LL.B. III Term

LB-3034 - Law of Crimes-III
(Socio-Economic Offences)

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(Socio-Economic Offences)

Topic 1: Introduction to the Socio-Economic Offences

(A) Concept and Evolution of ‘Socio-Economic Offences.’
(B) Nature and Extent of Socio-Economic Offences.
(C) Mens Rea, Nature of Liability, Burden of Proof and Sentencing Policy.
(D) Concept of White Collar Crimes - Sutherland’s theory of ‘Differential Association.’
(E) Distinction among Socio-Economic Offences, White Collar Crimes and Traditional Crimes.

Topic 2: The Immoral Traffic (Prevention) Act, 1956

History, Development and Magnitude of Human Trafficking
Constitutional Provisions and Sections 370-373 of the Indian Penal Code, 1860
The 64th report of the Law Commission of India, 1975
The Immoral Traffic (Prevention) Act, 1956

2. Gaurav Jain v. Union of India & Ors, 1997 (8) SCC 114
**Topic 3: The Narcotic Drugs and Psychotropic Substances Act, 1985**

Definition of Narcotic Drugs and Psychotropic Substances
Authorities and officers section 4,6
National Fund for Control of Drugs Abuse Section 7A
Prohibition Control and Regulation, Section 8, 9, 9A
Procedure Section, 41, 42, 43, 50, 52A, 54, 58, 60, 64.

6. *Indian Harm Reduction Network vs. Union of India*
   2012 Bom C R (Cri) 121 42
8. *Vijaysinh Chandubha Jadeja vs. State of Gujarat*
   (2011) 1 SCC 609 84

**Topic 4: The Food Safety and Standards Act, 2006**

The Food Safety and Standards Act, 2006:
Food Safety and Standards Authorities of India & State Food Safety and Standards Authorities: Establishment and functions
Food Safety Officer- Power, Function and liabilities
Food Analyst
General Principles to be followed for food safety under the Act (Section 18)
Licensing and Registration of food business (Section 31)
Purchaser may have food analyzed (Section 40)
Provisions related to offence and penalties (Sections 48 to 67)
Adjudication and Appeal procedures (Sections 68 & 76)

10. M. Mohammed v. Union of India, W.A.No.1491 of 2014
11. M/S Nestle India Limited v. The Food Safety and Standards Authority of India, W. P (L) No. 1688 of 2015

**Topic 5: The Prevention of Corruption Act, 1988**

Need of the Act (read with Santhanam Committee Report)
The Prevention of Corruption Act, 1988
Definitions of ‘public servant,’ Section 2 (c) and ‘gratification,’ Section 7.
Offence committed by public servant and bribe giver and their Penalties (Section 7 to 14)
Punishment for attempts (Section 15)
Sanction for prosecution (Section 19 r/w Section 197 of the Code of Criminal Procedure, 1973)
Presumption where public servant accepts gratification (Section 20)


**Topic 6: The Prevention of Money-Laundering Act, 2002**

Need for combating Money-Laundering
Magnitude of Money-Laundering, its steps and various methods
The Prevention of Money-Laundering Act, 2002:
Definition of ‘Money Laundering’, Section 3 & 2(1)(p)
Punishment for Money Laundering (Section 4)
**Enforcement:**
Attachment (Section 5)
Survey, Search, & Seizure (Sections 16, 17 & 18)
Power to arrest (Section 19)

Adjudication under the Act:
Adjudication by Adjudicating Authorities (Section 8)
Special courts (Sections 43 to 47)
Vestiging of Property in Central Government (Section 9)

Preventive Mechanisms under the Act:
Obligation of banking companies, financial institutions and Intermediaries (Sections 12 & 12A)

Reciprocal Arrangements with other countries (Overview of Chapter IX i.e. Sections 55 to 61)

17. B. Ramaraju v. Union of India, W.P. No. 10765 of High Court of A.P. 2011 (164)
Company Case 149 176

Prescribed Books & Articles:

Mahesh Chandra, Socio-Economic Offences (1979)
M. C. Mehanathan, Law on Prevention of Money Laundering in India (2014)

Suggested Readings:
Relevant Provisions of Universal Declaration on Human Rights, 1948
International Convention for Suppression of Immoral Traffic in Persons and of the Exploitation of the prostitution of others, 1951
Convention on Elimination of All Forms of Discrimination Against Women, 1979
Relevant Provisions of UN Convention against Illicit Traffic in Narcotic Drugs & P. Substances, 1988
Declaration on Elimination of Violence Against Women, 1993
UN Political Declaration & Action Plan against money laundering 1998
SAARC Convention on Preventing and Combating Trafficking in Women & Children for Prostitution, 2002
UN Convention against Corruption, 2003
Santhanam Committee Report on Prevention of Corruption in Central Government (1964)
TOPIC 2: THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956

Vishal Jeet v. Union of India
AIR 1990 SC 1412

S. RATNAVEL PANDIAN, J. This writ petition under Article 32 of the Constitution of India at the instance of an Advocate is filed by way of a Public Interest Litigation seeking issuance of certain directions, directing the Central Bureau of Investigation (1) to institute an enquiry against those police officers under whose jurisdiction Red Light areas as well Devadasi and Jogin traditions are flourishing and to take necessary action against such erring police officers and law breakers; (2) to bring all the inmates of the red light areas and also those who are engaged in 'flesh trade' to protective homes of the respective States and to provide them with proper medical aid, shelter, education and training in various disciplines of life so as to enable them to choose a more dignified way of life and (3) to bring the children of those prostitutes and other children found begging in streets and also the girls pushed into 'flesh trade' to protective homes and then to rehabilitate them. The averments made in the writ petition on the basis of which these directions are prayed for can be summarized thus:

Many unfortunate teenaged female children (hereinafter referred to as 'the children') and girls in full bloom are being sold in various parts of the country, for paltry sum even by their parents finding themselves unable to maintain their children on account of acute poverty and unbearable miseries and hoping that their children would be engaged only in household duties or manual labor. But those who are acting as pimps or brokers in the 'flesh trade' and brothel keepers who hunt for these teenaged children and young girls to make money either purchase or kidnap them by deceitful means and unjustly and forcibly inveigle them into 'flesh trade'. Once these unfortunate victims are taken to the dens of prostitutes and sold to brothel keepers, they are shockingly and brutally treated and confined in complete seclusion in a tiny claustrophobic room for several days without food until they succumb to the vicious desires of the brothel keepers and enter into the unethical and squalid business of prostitution. These victims though unwilling to lead this obnoxious way of life have no other way except to surrender themselves retreating into silence and submitting their bodies to all the dirty customers including even sexagenarians with plastic smile.

The petitioner has cited certain lurid tales of sex with sickening details alleged to have been confessed by some children and girls either escaped or rescued from such abodes of ill-fame. After giving a brief note on Devadasi system and Jogin tradition, the petitioner states that this system and tradition which are still prevailing in some parts of the country should be put to an end. The ultimate plea of the petitioner is that the young children and girls forcibly pushed into 'flesh trade' should be rescued and rehabilitated. With this petition, the petitioner has filed 9 affidavits said to have been sworn by 9 girls who claim to be living in the brothel houses, pleading for rescue and a list of names of 9 girls who are mortally afraid to swear the affidavits. Be it noted that no counter has been filed by any one of the respondents. The matter is one of great importance warranting a comprehensive and searching analysis and requiring a humanistic rather than a purely legalistic approach from different angles.
The questions involved cause considerable anxiety to the Court in reaching a satisfactory solution in eradicating such sexual exploitation of children. We shall now examine this problem and address ourselves to the merits of the prayers. No denying the fact that prostitution always remains as a running sore in the body of civilization and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large. It is highly deplorable and heart-rending to note that many poverty stricken children and girls in the prime of youth are taken to 'flesh market' and forcibly pushed into the 'flesh trade' which is being carried on in utter violation of all cannons of morality, decency and dignity of humankind.

There cannot be two opinions--indeed there is none--that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps. Article 23 which relate to Fundamental Rights in Part of the Constitution and which has been put under the caption 'Right against exploitation' prohibits 'traffic in human beings and begar and other similar forms of labour' and provides that any contravention of Article 23(1) shall be an offence punishable in accordance with law. The expression 'traffic in human beings' is evidently a very wide expression including the prohibition of traffic in women for immoral or other purposes. Article 35(a)(ii) of the Constitution reads that notwithstanding anything in this Constitution, Parliament shall have, and the legislature of a State shall not have, power to make laws for prescribing punishment for those acts which are declared to be offences under this part. The power of legislation, under this article, is given to the Parliament exclusively, for, otherwise the laws relating to fundamental rights would not have been uniform throughout the country. The power is specifically denied to the state legislatures.

In implementation of the principles underlying Article 23(1) the Suppression of Immoral Traffic in Women & Girls Act, 1956 (SITA for short) has been enacted under Article 35 with the object of inhibiting or abolishing the immoral traffic in women and girls. In this connection, it is significant to refer Article 39 which relates to 'Directive Principles of State Policy' under Part IV of the Constitution. Article 39 particularizes certain objectives. Clause (f) of Article 39 was substituted by Forty-Second Amendment Act, 1976. Among the objectives mentioned under Clauses (e) and (f) of Article 39, we will confine ourselves only to certain relevant objectives under those two clauses which are sufficient for the purpose of this case. One of the objectives under clause (e) of Article 39 is that the State should, in particular, direct its policy towards securing that the tender age of children are not abused. One of the objectives under clause (f) is that the State should, in particular, direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment.

These objectives reflect the great anxiety of the Constitution makers to protect and safeguard the interests and welfare of the children of our country. The Government of India
has also, in pursuance of these constitutional provisions of clauses (e) and (f) of Article 39, evolved a national policy for the welfare of the children. It will be apposite to make reference to one of the principles, namely, principle No. (9) formulated by the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1959. The said principle reads thus: "The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form." Before the adoption of SITA, there were enactments in some of the states for suppression of immoral traffic, but they were not uniform nor were they found to be adequately effective. Some states did not have any law on the subject. With the growing danger in society to healthy and decent living with morality, the world public opinion congregated at New York in a convention for suppression of traffic in persons for exploitation for immoral purposes. Pursuant to the signing of that convention on May 9, 1950, our Parliament has passed an Act called "Suppression of Immoral Traffic in Women and Girls Act, 1956" which is now changed as "The Immoral Traffic (Prevention) Act, 1956" to which certain drastic amendments are introduced by the Amendment Acts of 46 of 1978 and 44 of 1986. This Act aims at suppressing the evils of prostitution in women and girls and achieving a public purpose viz. to rescue the fallen women and girls and to stamp out the evils of prostitution and also to provide an opportunity to these fallen victims so that they could become decent members of the society.

Besides the above Act, here are various provisions in the Indian Penal Code such as Sections 366-A (dealing with procuration of minor girl), 366-B (dealing with offence of importation of girl from foreign country), 372 (dealing with selling of minor for purposes of prostitution etc.) and 373 (dealing with the offence of buying minor for purposes of prostitution etc.). The Juvenile Justice Act, 1986 which provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles contains a specific provision namely Section 13 which empowers a police officer or any other person or organization authorized by the State Government in this behalf to take charge of any neglected juveniles and bring them before the Board constituted under this Act which Board under section 15 has to hold an enquiry and make such orders in relation to the neglected juveniles as it may deem fit.

In spite of the above stringent and rehabilitative provisions of law under various Acts, it cannot be said that the desired result has been achieved. It cannot be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that the day has arrived imperiously demanding an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measures to weed out the vices of illicit trafficking. This malady is not only a social but also a socioeconomic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive. In our view, it is neither practicable and possible nor desirable to make a roving enquiry through the CBI through- out the length and breadth of this country and no useful purpose will be served by issuing any such direction, as requested by the petitioner.

Further, this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are
unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape, are weeping or wailing throughout. This devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers. The Courts in such cases have to always take a serious view of this matter and inflict consign punishment on proof of such offences. Apart from legal action, both the Central and the State Government who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction.

Bhagwati, J. (as he then was) in *Lakshmi Kant Pandey v. Union of India* [(1984) 2 SCC 244] while emphasizing the importance of children has expressed his view thus: "It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a 'supremely important national asset' and the future well-being of the nation depends on how its children grow and develop." We, after bestowing our deep and anxious consideration on this matter feel that it would be appropriate if certain directions are given in this regard. Accordingly, we make the following directions:

1. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.

2. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologists, members of the women's organizations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organizations and associations etc., the main objects of the Advisory Committee being to make suggestions of: (a) the measures to be taken in eradicating the child prostitution, and (b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.

3. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.

4. The Union Government should set up a committee of its own in the line, we have suggested under direction No.(2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation etc. etc. of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.
5. The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

6. The Advisory Committee can also go deep into Devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.

7. The copies of the affidavits and the list containing the names of 9 girls are directed to be forwarded to the Commissioner of Police, Delhi for necessary action.

We may add that we are not giving an exhaustive list of the members for the constitution of the committee. Therefore, it is open to the concerned Government to include any member or members in the committee as it deems necessary. We hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, Devadasi system and Jogin tradition and will also at the same time protect and safeguard the interests of the children by preventing the sexual abuse and exploitation. So far as the remaining prayer regarding rehabilitation of the children of prostitutes is concerned, we understand that a similar issue is raised in a separate writ petition bearing W.P. No. 824/88 pending before this Court and this Court is seized of the matter and also has given an interim direction on 15.11.1989 for setting up a committee to go into the question from various angles of the problems taking into consideration the different laws relevant to the matter and to submit its report. (Vide Gaurav Jain v. Union of India [AIR 1990 SC 292]. Therefore, we are not expressing any opinion on this prayer regarding the rehabilitation of the children of prostitutes. With the above directions, the Writ Petition is disposed of.

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"Frailty, thy name is woman", was the ignominy heaped upon women of Victorian Era by William Shakespeare in his great work 'Hamlet'. The history or sociology has, however, established the contrary, i.e., 'fortitude', thy name is woman; 'caress', thy name is woman; 'self-sacrifice', thy name is woman; tenacity and successful pursuit, their apathetically is women. Indira Gandhi, Margaret Thatcher, Srimovo Bhandarnaike and Golda Meir are few illustrious women having proved successful in democratic governance of the respective democratic States. Amidst them, still, a class of women is trapped as victims of circumstances, unfounded social sanctions, handicaps and coercive forms in the flesh trade, optimised as 'prostitutes', (for short, 'fallen women'). Seeking their redemptions, a few enlightened segments are tapping and doors of this Court under Article 32 of the Constitution, through a public spirited advocate, Gaurav Jain who filed, on their behalf, the main writ petitions claiming that right to be free citizens; right not to be trapped again; readjusted by economic empowerment, social justice and self-sustenance thereby with equality of status, dignity of person in truth and reality and social integration in the mainstream are their magna carta. An article "A Red light trap: Society gives no chance to prostitutes' offspring" in 'India Today' dated July 11, 1988 is founded as source material and has done yeoman's service to ignite the sensitivity of Gaurav to seek improvement of the plight of the unfortunate fallen women and their progeny. Though Gaurav had asked for establishing separate educational institutions for the children of the fallen women, this Court after hearing all the State Governments and Union Territories which were then represented through their respective standing counsel, observed on November 15, 1989 in Gaurav Jain v. Union of India & Ors. [1990 Supp. SCC 709] that "segregating children of prostitutes by locating separate schools and providing separate hostels" would not be in the interest of the children and the society at large. This Court directed that they "should be segregated from their mothers and be allowed to mingle with others and become a part of the society". Accepting the suggestion from the Bar and rejecting the limited prayer of the petitioner, this Court had ordered that "Children of prostitutes should, however, not be permitted to leave in inferno and the undesirable surroundings of prostitute homes". This was felt particularly so in the case of young girls whose body and mind are likely to be abused with growing age for being admitted into the profession of their mothers. While this Court did not accept the plea for separate hostels for children of prostitutes, it felt that "accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their mothers living in prostitute homes as soon as they are identified". In that view, instead of disposing of the writ petition with a set of directions, this Court constituted a Committee comprising Shri V.C. Mahajan, R.K. Jain, Senior Advocates and others including M.N. Shroff, Advocate, as its Convener, and other individuals named in the Order; the Court directed the Committee to submit its report giving suggestions for appropriate action. Accordingly, the report was submitted. Arguments we heard and judgment was reserved but could not be delivered. Resultantly, it was released from judgment. We have re-heard the counsel on both sides. The primary question in this case is: what are the rights of the children of fallen women, the modules to segregate them from their mothers and others so as to give them protection, care
and rehabilitation in the mainstream of the national life? And as facet of it, what should be the
scheme to be evolved to eradicate prostitution, i.e., the source itself; and what succour and
sustenance can be provided to the fallen victims of flesh trade? These are primary questions
we angulate for consideration in this public interest litigation.

The Preamble, an integral part of the Constitution, pledges to secure `socio-economic justice'
to all its citizens with stated liberties, `equality of status and of opportunity', assuring
`fraternity' and `dignity' of the individual in a united and integrated Bharat. The fallen women
too are part of citizenry. Prostitution in society has not been an unknown phenomenon; it is of
ancient origin and has its manifestation in various forms with varied degrees unfounded on
so-called social sanctions etc. It is of grave social concern, increasingly realised by
enlightened public spirited sections of the society to prevent gender exploitation of girl
children. The prostitute has always been an object and was never seen as complete human
being with dignity of person; as if she has had no needs and aspirations of her own,
individually or collectively. Their problems are compounded by coercion laid around them
and torturous treatment meted out to them. When they make attempts either to resist the
prostitution or to relieve themselves from the trap, they succumb to the violent treatment and
resultantly many a one settle for prostitution. Prostitute is equally a human being. Despite that
trap, she is confronted with the problems to bear and rear the children. Their children are
equally subjected to inhuman treatment by managers of brothels and are subjected to
discrimination, social isolation; they are deprived of their right to live normal life for no fault
of their own. In recent times, however, there has been a growing body of opinion, by certain
enlightened sections of the society advocating the need to no longer treat the fallen women as
a criminals or as an object of shocking sexual abuse; they are victims of circumstances and
hence should be treated as human beings like others, so as to bring them into the mainstream
of the social order without any attached stigma. Equally, they realise the need to keep their
children away from the red light area, particularly girl children and have them inducted into
respectable and meaningful avocations and/or self-employment schemes. In no circumstances,
they should continue to be in the trap of flesh trade for commercial exploitation. They need to
be treated with humanity and compassion so as to integrate them into the social mainstream.
These constitutional and human rights to the victims of fallen track of flesh trade need care
and consideration of the society. This case calls upon to resolve than human problem with
caress and purposeful guidelines, lend help to ameliorate their socio-economic conditions,
eradicate social stigma and to make available to them equal opportunities for the social order.

Equally, the right of the child is the concern of the society so that fallen women surpass
trafficking of her person from exploitation; contribute to bring up her children; live a life with
dignity; and not to continue in the foul social environment. Equally, the children have the
right to equality of opportunity, dignity and care, protection and rehabilitation by the society
with both hands open to bring them into the mainstream of social life without pre-stigma
affixed on them for no fault of her/his. The Convention on the Right of the Child, the
fundamental Rights in Part III of the Constitution, Universal Declaration of Human Rights,
the Directive Principles of the State Policy are equally made available and made meaningful
instruments and means to ameliorate their conditions - social, educational, economical and
cultural, and to bring them into the social stream by giving the same opportunities as had by
other children. Thus, this case calls for a careful and meaningful consideration with diverse perspectives, to decide the problems in the light of constitutional and human rights and directions given to the executive to effectuate them on administrative side effectively so that those rights become real and meaningful to them.

Let us, therefore, first consider the rights of the fallen women and their children given by the Constitution and the Directive Principles, the Human Rights and the Convention on the Right of Child, before considering the social ignominy attached to them and before looking for remedy to relieve them from the agony and make them equal participants in normal social order. Article 14 provides for equality in general. Article 21 guarantees right to life and liberty. Article 15 prohibits discrimination on the grounds of religious race, caste, sex or place of birth, or of any of them. Article 15(3) provides for special protective discrimination in favour of woman and child relieving them from the moribund of formal equality. It states that "nothing in this article shall prevent the State from making any special provision for women and children". Article 16(1) covers equality of opportunity in matters of public employment. Article 23 prohibits traffic in human beings and forced labour and makes it punishable under Suppression of Immoral Traffic in Women and Girls Act, 1956 which is renamed in 1990 as the Immoral Traffic (Prohibition) Act (for short, the 'ITP Act'). Article 24 prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age.

Article 38 enjoins the State to secure and protect, as effectively as it may, a social order in which justice - social, economic and political, shall inform all the institutions of national life. It enjoins, by appropriate statutory or administrative actions, that the state should minimize the inequalities in status and provide facilities and opportunities to make equal results. Article 39(f) provides that the children should be given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 46 directs the State to promote the educational and economic interests of the women and weaker sections of the people and that it shall protect them from social injustice and all forms of exploitation. Article 45 makes provision for free of exploitation. Article 45 makes provision for free and compulsory education for children, which is now well settled as a fundamental right to the children up to the age of 14 years; it also mandates that facilities and opportunities for higher educational avenues be provided to them. The social justice and economic empowerment are firmly held as fundamental rights of every citizen.

Article 1 of the Universal Declaration of Human Rights provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2 provides that everyone, which includes fallen women and their children, is entitled to all the rights and freedoms set forth in the Declaration without any distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 provides that everyone has the right to life, liberty and security of person. Article 4 enjoins that no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. The fallen victims in the flesh trade are no less than a
slave trade. Article 5 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The fallen/trapped victims of flesh trade are subjected to cruel, inhuman and degrading treatment which are obnoxious, abominable and an affront to Article 5 of the Universal Declaration and Article 21 of the Indian Constitution.

Equally, Article 6 declares that everyone has the right to recognition everywhere as a person before the law. The victims of flesh trade are equally entitled before the law to the recognition as equal citizens with equal status and dignity in the society. Article 7 postulates that all are equal before the law and are entitled, without discrimination, to equal protection of the law. So, denial of equality of the rights and opportunities and of dignity and of the right to equal protection against any discrimination of fallen women is violation of the Universal Declaration under Article 7 and Article 14 of the Indian Constitution.

Article 8 of the Universal Declaration provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or the law. The Supreme Court of India, which is the sentinel in the qui vive, is enjoined to protect equally the rights of the poor, the deprived, the degraded women and children trapped in the flesh trade, kept in inhumane and degrading conditions, and to grant them the constitutional right to freedoms, protection, rehabilitation and treatment by the social engineering, in law, constitution and appropriate administrate measures so as to enable them to work hand-in-hand to live with dignity and without any stigma due to their past conduct tagged to them by social conditions, unfounded customs and circumstances which have become blot on the victims and their children. They too are entitled to full equality, fair and adequate facilities and opportunities to develop their personality with fully grown potentiality to improve their excellence in every walk of life. Article 51-A(j) of the Constitution enjoins duty on every citizen to develop the scientific temper, humanism and the spirit of inquiry and reform and to strive toward excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.

Preamble to the Declaration of the Right of the Child adopted by the UNO on November 20, 1959, provides that the child by reason of his or her physical or mental immaturity, needs special safeguards and care including her appropriate legal protection before as well as after birth. Recalling the provisions of Declaration of Social and Legal Principles relating to Protection and Welfare of the Children with Special Reference to Foster or Placement and Adoption Nationally and Internationally; the General Assembly Resolution 41/85 of December 3, 1986; the United Nations adopted Standard Minimum Rules for the administration of Juvenile Justice (The Beijing Rules) dated November 29, 1985. India is a signatory to the Declaration and has the same and effectively participated in bringing the Declaration in force. Article 3 (1) postulates that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration. Article 3 (2) enjoins to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally and all the appropriate measures in that behalf shall be
taken by the State. Article 3 (3) postulates that the state shall ensure the availability of institutional services and facilities responsible for the care or protection of children, shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their self as well as competent supervision. Article 4 obligates by appropriate legislative, administrative or other measures, implementation of the right recognised in the Convention. The State has undertaken to implement economic, social and cultural rights, such measures to the maximum extent of the available resources and where needed within the framework of international co-operation.

Article 6 postulates that State Parties recognise that every child has the inherent right to life which is already granted by Article 21 of the Constitution of India which has been interpreted expansively by this Court to make the right to life meaningful, socially, culturally, economically, even to the deprived segments of the society with dignity of person and in pursuit of happiness. Article 6(2) enjoins to ensure development of the child and Article 7(2) postulates that the state shall ensure implementation of these rights in accordance with law and their obligations. Article 9 (3) envisages that the state shall respect the right of the child who is separated from her parents to maintain personal relations and contact with her parents on regular basis. Article 14(2) provides that the state shall respect the rights and duties of the parents, and when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Article 17(2)(e) enjoins the state to encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-bearing in mind the provisions of Articles 13 and 18. Article 18(1) provides that the state shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents and State have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. Sub-para (2) postulates that for promoting the rights set forth in this Convention, parents, legal guardian or the State in the performance of their child-rearing responsibilities, shall ensure the development of institutions, facilities and services for the care of children.

Article 19(1) provides that the State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, mal-treatment or exploitation including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child. Equally, sub-para (2) of Article 19 postulates protective measures, as may be appropriate, should include effective procedure for the establishment of social programme to provide necessary support for the child and for those who have the care of the child as well as for other forms of prevention etc. Article 20 which is material for the purpose postulates as under:

"1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, Kafala or Islamic Law, adoption, or if necessary placement in suitable institutions for the case of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethic, religious cultural and linguistic background."

Article 28 recognises the right of the child to education and with a view of achieving this right progressively and on the basis of equal opportunity, the state shall in particular: (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) make higher education accessible to all on the basis of capacity by every appropriate means; (d) make educational and vocational information and guidance available and accessible to all children; and (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates. Article 29 envisages that the State Parties agree that the education of the child shall be directed to: (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) the development of respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the United Nations; (c) the development of respect for the child's parents, his or her own cultural identity, languages and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and (e) the development of respect for the natural environment.

Article 32 recognises the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development. Articles 34, 36 and 37(a) are equally relevant and read as under:

34. State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take 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;
(c) the exploitative use of children in pornographic performances and materials.

36. State Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.
37. State Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment or life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;"

Article 8 of the Declaration on the Right to Development provides that the State shall undertake at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injuries.

The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 enjoins by Article 1, prohibition of discrimination of women. Article 5 enjoins to modify social and patterns of conduct of men and women with a view to achieving elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women. Article 12 prescribes discrimination against women in the field of health care in order to ensure on the basis of equality of men and women, access to health care services, including those related to family planning. Article 13 prescribes discrimination and directs that the State Parties shall eliminate discrimination against women in other areas of economic and social life in order to ensure on the basis of equality of men and women, the same rights, in particular, the right to family benefits, the right to participate in recreational activities, sports and all aspects of cultural life. Article 16(d) enjoins the State to ensure on the basis of equality of men and women, the same rights and responsibility as parties, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.

In Madhu Kishwar & Ors. v. State of Bihar & Ors. [(1996) 5 SCC 125], this Court considered the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and held the same to be integral scheme of the Constitution, international Conventions and the Protection of Human Rights Act, to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights. Article 2(f) read with Articles 3, 14, and 15 of the CEDAW embodies concomitant right to development as an integral scheme of the Indian constitution and the Human Rights Act charges the National Commission with duty to ensure proper implementation as well as prevention of violation of human rights and fundamental freedoms. Human Rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social,
economic and cultural life are concomitants for national development, social and family stability and growth - cultural, social and economical. All forms of discrimination on ground of gender is violative of fundamental freedoms and human rights. It would, therefore, be imperative to take all steps to prohibit prostitution. Eradication of prostitution in any form is integral to social weal and glory of womanhood. Right of the child to development hinges upon elimination of prostitution. Success lies upon effective measures to eradicate root and branch of prostitution.

Section 2 (a) of the Immoral Traffic (Prevention) Act, 1956 (for short, the `ITP Act') defines `brothel' to mean any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for purpose of sexual exploitation or abuse, for the gain of another person or for the mutual gain of two or more prostitutes. The essential ingredient, therefore, is a place being used for the purpose of sexual exploitation or abuse. The phrase `for the purpose of' indicates that the place being used for the purpose of the prostitution may be a brothel provided a person uses the place and ask for girls, where the person is shown girls to select from and where one does engage or offer her body for promiscuous sexual intercourse for hire. In order to establish prostitution, evidence of more than one customer is not always necessary. All that is essential to prove is that a girl/lad should be a person offering her body for promiscuous sexual intercourse for hire. Sexual intercourse is not an essential ingredient. The inference of prostitution would be drawn from diverse circumstances established in a case. Sexuality has got to be established but that does not require the evidence of more than one customer and no evidence of actual intercourse should be adduced or proved. It is not necessary that there should be repeated visits by persons to the place for the purpose of prostitution. A single instance coupled with the surrounding circumstances may be sufficient to establish that the place is being used as a brothel and the person alleged was so keeping it. The prosecution has to prove only that in a premise a female indulges in the act of offering her body for promiscuous sexual intercourse for hire. On proof thereof, it becomes a brothel.

The Juvenile Justices Act, 1986 (for short, the `JJ Act') was enacted to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of such matters relating to disposition of delinquent juveniles and for the adjudication of such matters relating to disposition of delinquent juveniles. The Act sought to achieve a uniform legal framework for juvenile justice in the country as a whole so as to ensure that no child, in any circumstance, is lodged in jail and police lock-up. The JJ Act is consistent with the right of the child to development; the established norms and standards for the administration of juvenile justice and special mode of investigation, prosecution, adjudication and disposition of the juvenile. The question, therefore, is: what procedure is efficacious to prevent prostitution, bring the fallen women and their children into the social mainstream by giving care, protection and rehabilitation?

Three Cs, viz., counselling, cajoling and coercion are necessary to effectively enforce the provisions of ITP Act and JJ Act. By Order dated May 2, 1990, this Court, after hearing the counsel, passed an order to set up an Advisory Committee to make suggestions for eradicating child prostitution and to point out social aspects for the care, protection, treatment, development and rehabilitation of the young victims, children and girls prostitutes from red
light area and get them free from the abuses of prostitution; to amend the existing law or enact a new law, if so warranted; to prevent sexual exploitation of children and to take various measures for effective enforcement thereof. It is seen that the Committee constituted by this Court under the chairmanship of Shri V.C. Mahajan travelled far and wide to have a look into the field of operation of the governmental agencies and has suggested nodal programme for the eradication of the twin facets of prostitution, viz., protection, care and rehabilitation of the fallen women and neglected juveniles. The Committee has opined that the problem of child prostitution does not stand by itself and is a component of overall phenomenon in the country. It highly concentrates on identified red light areas as well as on areas which are not so clearly identified. Though the problem of prostitution is mainly found in large cities, but in the urban areas and some rural areas, the problem gives frequent recurrence. Among the fallen women, the child prostitutes constitute major bulk of the component. Child prostitutes constitute 12 to 15% of prostitutes in any area. On account of the social sanctions, women are exploited by the monstrous customs of Devdasis, Jogins and Venkatans is known by other names in different parts of the country. The unfounded social and religion based sanctions are only camouflage; their real motive is to exploit the unfortunate women. Most of them belong either to Scheduled Castes or Backward Classes coming from socio-economically lower groups. They are prevalent highly in Karnataka, Maharashtra and Andhra Pradesh. The specific areas in major cities are identified as red light areas as well as some semi-urban but rural areas. The number of red light areas having increased in recent times, brothel based prostitution is on the vane but there is an increasing trend towards decentralised mode of prostitution. 86% of the fallen women hail from Andhra Pradesh, Karnataka, Tamil Nadu, West Bengal, Bihar, Maharashtra, Uttar Pradesh, Assam, Gujarat, Goa, Madhya Pradesh, Kerala, Meghalaya, Orissa, Punjab, Rajasthan and Delhi, Delhi receives prostitutes from about 70 districts in the country; Bombay from 40 districts; Bangalore from 70 districts; Calcutta from 11 districts, Hyderabad from 3 districts etc. There is growing evidence that the minimum numbers of prostitutes get into flesh trade either voluntarily or by organised gangster force women and girls by offering rosy future to innocent fallen women and trap them often with the connivance of the police.

The Committee has also identified ten types of prostitutes like Street walkers, religious prostitutes, prostitutes in brothel, singing and dancing girls, bar nude, massage parlor and some are call girls. Comprehensive study conducted by another Committee in six metropolitan cities, viz., Delhi, Bombay, Calcutta, Madras, Hyderabad and Bangalore, reveals the age group of the prostitutes below 20 years of age are 75%, 21 to 30 years are 40%, 30 to 35 years are 18% and above 35 years 12%. At the time of induction into the prostitution, 9% are below 15 years; 29.4% between 16 to 19 years, 27.7% between 19 to 21 years; and 32.9% are above 22 years. At the time of entry, therefore, 15% of the fallen girls are in the category of neglected juveniles, about 25% are minors between the age group of 16 to 18 years. The major reasons for induction of prostitution are poverty and unemployment or lack of appropriate rehabilitation etc. All abhor social stigma; 16% due to family tradition and 9% due to illiteracy. 94.6% prostitutes are Indians while 2.6% are Nepalis and 2.7% are Bangladesh is. 84.36% are Hindus; are Muslims and 3.5% are Christians. In terms of caste classification, Dalits and Tribes constitute 36%, Other Backward Classes 24% and others
In terms of marital status, only 10.6% of the prostitutes are married; 34.4% are unmarried and 54.2% are divorcee or widows. In terms of education level, 70% of them are illiterates while 4% only are literates. Only 24% of the prostitutes are educated at primary and secondary level while 1.4% has higher qualifications. Therefore, prostitution is primarily due to ignorance illiteracy, coercive trapping or scare of social stigma. In India, they enter into the prostitution between the age of 16 to 19 years and lose market by the time they become 35 years of age. Thereafter such persons either manage brothels or develop contact with high leads. Recent trend is that ladies from higher levels of income are initiated into the prostitution to sustain sufficient day-to-day luxurious style of life so as to ensure continuous economic support for their well-being.

The Mahajan Committee report indicates that in two villages in Bihar and some village in West Bengal, parents send their girl children to earn in prostitution and the girls in turn send their earnings for maintenance of their families. It further indicates that certain social organisations have identified the poverty as the cause for sending the children for prostitution in expectation of regular remittance of income from prostitution by the girls who have already gone into the brothels. It is also an inevitable consequence that over years the fallen women are accustomed to certain lifestyle and in terms of expenditure they need certain amount of money for their upkeep and maintenance. When they bear children, it becomes additional burden for them. They are led or caught in the debt traps. The managers of the brothel are generally ladies. They do not allow the girls to bear children. In case of birth against their wishes, the unfortunate are subjected to cruelty in diverse forms. In the process of maintaining the children, again they land themselves in perpetually growing burden of debt without any scope to get out from the bondage. Thereby, this process lends perpetually to slavery to the wile of prostitution. To support their children for education etc. 44% of them desires to leave the red light traps and 43% of them express their despondence languishing between hope and despair. Most of those who want to leave, have given the reasons to save their children from prostitution and protection of the future of their children, fear of contacting the venereal diseases, the fear of their children following the path; some of them expressed dislike the profession, social stigma and their yearning is to start new life. Those who want to remain in prostitution have given absence of alternatives source of income, their social non-acceptability, family customs, poverty, ill-health and their despondence as the reasons and, thus, they want to continue in the prostitution as the last resort for their livelihood. They do not like to remain in red light area and the profession but lack of alternative source of livelihood is the prime cause of their continuation in the profession. Provision of opportunities and facilities is input of the constitutional guarantee to the disadvantaged, deprived and denied people. The directive principles of the Constitution, in particular Articles 38, 39, and all relevant related Articles enjoin the State to provide them as impregnable in built right to life guaranteed by Article 21 and equality of opportunities with protective discrimination guaranteed in Article 14 the genus and its species, Articles 15 and 16 and the Preamble, the arch of the Constitution by legislative and administrative measures. Therefore, it is the duty of the State and all voluntary non-government organisations and public spirited persons to come in to their air to retrieve them from prostitution, rehabilitate them with a helping hand to lead a life with dignity of person, self-employment through
provisions of education, financial support, and developed marketing facilities as some of major avenues in this behalf. The courts are part of the State steering by way of judicial review. Interpretation is effective armory in its bow to steer clear the social malady, economic reorganisation as effective instruments remove disunity, and prevent frustration of the disadvantaged, deprived and denied social segments in the efficacy of law, and pragmatic direction pave way for social stability peace and order. This process sustains faith of the people in rule of law and the democracy becomes useful means to the common man to realise his meaningful right to life guaranteed by Article 21.

V.C. Mahajan Report States that an organisation by name Prerana selected Kamathipura red light area, Bombay where 14 lanes are in the occupation of the Managers of the brothels, and has located a centre for counseling. Therein, they organise regular counseling and service center for the fallen woman and do work for the children. The national plan of action for the girl child in the SAARC Decade of the Girl Child (1991-2000) was launched as a project for the welfare and development of the girl children including adolescent girls and street children in particular. An inter-departmental monitoring committee was also set up under this plan in some of the red light areas. The provisions of Integrated Child Development Services Scheme were extended. A number of voluntary agencies have also been involved in the care, rehabilitation and advocacy to retrieve prostitutes including child prostitutes. The rehabilitation and welfare organisation is to be initiated.

Women found in the flesh trade, should be viewed more as victims of adverse socio-economic circumstances rather than as offenders in our society. We are concerned in this case more with the rehabilitation aspect than with prevention of the crime. Therefore, we emphasise on the review of the relevant law in this behalf, effective implementation of the scheme to provide self-employment, training in weaving, knitting, painting and other meaningful programmes to provide the fallen women the regular source of income by self-employment or, after vocational education, the appropriate employment generating schemes in governmental, semi-governmental or private organisations.

The customary initiation of women in the practice of Devadasi, Jogins and Venkatansins is prevalent in Andhra Pradesh, Karnataka and Maharashtra areas: in particular the practice of prostitution is notorious. It is an affront to the human dignity and self-respect but the pursuit of customary beliefs traps the fair sex into this glorified self-sacrifice and ultimately leads to prostitution service in the temples and charitable institutions etc. which is a crime against humanity, violation of human rights and obnoxious to constitution and Human Rights Act. They are void under Article 13 of the Constitution of India and punishable under the law. Fundamentalists and proponents of these practices are constitutional criminals. The unfounded customs cannot have legal sanction. On the other hand, penal enactments provide for abolition thereof. Instead of progressive outlook, regressive unfortunate tendency, of late, is raising its ugly head to glorify these ignominious practices which is leading not only to abetment of commission of the crime, but also misleading the unfortunate illiterate and weaker sections of the society, to be taken in seriously by the later by their false promises or false theories such as God's ordain which finds easy acceptance by the poor and illiterate and is acted upon. The common feature of such women is that predominantly they are from
Scheduled Castes, Scheduled Tribes and other backward Classes. The eldest girl in every family is being offered as Devadasi, Jogin or Venkatasin. Sometimes, they do redeem the pledge made to the Gods or Goddesses, etc. Original families of these Devadasis, Jogins or Venkatasins were by and large poor. They are primarily agricultural having no access to credit facilities or literacy. The system has been in existence for years as a result of lack of awareness about the exploited segments of the Devadasis etc. Many families which dedicate their girls, do so due to the pursuit of customary practices. Economic rehabilitation is one of the factors that prevent the practice of dedication of the young girls to the prostitution as Devadasis, Jogins or Venkatasins. Their economic empowerment and education gives resistance to such exploitation; however, economic programmes are necessary to rehabilitate such victims of customs or practices. They are being rehabilitated with the help of vocational training centres set up in Maharashtra giving preferential admission into educational training institutes; they are admitted into informal adult education.

Children of the world are innocent, vulnerable and dependent. They are all curious, active and full of hope. Their life should be full of joy and peace, playing, learning and growing. Their future should be shaped in harmony and co-operation. Their childhood should mature, as they broaden their perspectives and gain new experience. Abandoning the children, excluding good foundation of life for them, is a crime against humanity. The children cannot wait till tomorrow; they grow everyday; along with them grows their sense of awareness about the surroundings. Tomorrow is no answer; the goal of their present care, protection and rehabilitation is the need of the hour. We have already dealt with the rights assured to them by the constitution, the Directive Principles and the Convention on the Right of the Child. The United Nations Declaration on the Rights of the Child made on November 20, 1959, has formulated and given 10 principles in that behalf. Principle No.1 provides that he child shall enjoy all the rights set forth in the Declaration. All children, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether himself or of his family. Principle No.2 postulates that the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. Principle No.3 postulates that the child shall be entitled from his birth to name and a nationality. Principle No.4 postulates among other things that the child shall enjoy the benefits of the social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided to him. Principle No.5 provides that the child who is physically, mentally or socially handicapped shall be given special treatment, education and care required by that particular condition. This is more relevant for the purpose of this case. Principle 6 postulates that the child for the full and harmonious development of his personality needs love and understanding. A child of tender years shall not, save in exceptional circumstance be separated from his/her mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.
Principle No.7 provides that the child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He/she shall be given an education which will promote his/her general culture, and enable him/her on a basis of equal opportunity to develop his/her abilities, his/her individual judgment, and his/her sense of moral and social responsibility and to become a useful member of the society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance, that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purpose as education, society, and the public authorities shall endeavor to promote the enjoyment of this right. Principle No.8 postulates that the child shall in all circumstances be among the first to receive protection and relief. Principle 9 is most important in his behalf which provides that the child important in this behalf which provides that the child shall be protected against all forms of neglect, rudely and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or health or education, or interfere with his physical, mental development. Principle No.10 postulates that the child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, and friendship among peoples, peace and universal brotherhood and in full consciousness that his energy should be devoted to the service of his fellow men. The Government of India has adopted the National Policy for Children by Resolution No. 1-14/74- CDD dated August 22. 1974. The main purpose of the policy is that the nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endorsed with the skills and motivations needed by the society. They participate in equal measure in democratic governance of the State as useful citizens. Equal opportunities for development to all children during the period of growth should be our aim; for this would serve our larger purpose of reducing inequality and ensuring Social justice. To care for, plan out needs of the children and successful implementation is, therefore, our duty, as citizen, be an administrator, a Magistrate or a Judge.

India has a tradition of voluntary action which shall be the endeavour of the State to encourage and strengthen voluntary actions so that State and NGOs complement each other. Paragraph 7 postulates legislative and administrative action in that behalf and paragraph 8 emphasizes people's participation in implementation of this programme. It would, thus, be seen that the constitutional imperatives of the national policy for the children and the international principles for the development of children are of the paramount need and consideration for the child development. The handicapped children and those from weaker sections are given special attention by the State and voluntary agencies. The question, therefore, is: what action is to be taken to rescue, rehabilitate and bring the children of fallen women into the mainstream of the society? As stated earlier, three Cs (CCC) are necessary for successful implementation, rescue and rehabilitate the children of the fallen woman living in the red light area. Counselling, Cajoling by persuasion and Coercion, as the last resort, are the
three Cs for successful implementation of them. 65.5% of the fallen women have children and usually they are in the age group of one to ten years. Generally, they prefer to keep their children away from them while they are in the act of intercourse except those children who are very young. Out of 71% children of illiterate fallen woman 39% are literate while 58% of the total has had primary or secondary or higher education. They show keen interest to educate their children. The children tend to spend their time at study or leisure; though girl children tend to be engaged in house hold jobs as is usual among poorer classes. The children face the problems mainly due to (i) lack of father figure to provide security, care and guidance; (ii) increased responsibilities of mother; (iii) economic hardships; (iv) lack of facilities to meet basic needs; (v) unhealthy social environment; (vi) mal-nutrition; (vii) coercive attempts by managers of brothels; (viii) taunting, due to dislike, by surrounds; and (ix) lack of proper counseling and guidance; motivation and opportunity gaps.

Many a prostitute themselves are child prostitutes (for short, the `CP'; they and the children of the prostitutes (for short, the COP') need to be removed from the red light area. Generally, the police resort to IPC and ITP Act in this behalf but the forceful rescue of CP of COP in reality is not successful in their rehabilitation. In this behalf, it is necessary to take aid of the definition of "neglected child" defined in JJ Act. It is already seen and is reiterated for continuity that 'neglected juvenile' means one found in begging ; or found without having any home or settled place of abode and without any ostensible means of subsistence and is destitute ; or has a parent who is unfit or incapacitated to exercise control over the juvenile ; or lives in a brothel or with a prostitute or frequently goes to any placed used for the purpose of prostitution or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life ; or who is being or is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain. It is of necessity to remember that the arms of law are long enough to mould the law to operate on the even keel. The coercive power with the law enforcement agency to rescue the child prostitute or the neglected juvenile, may not necessarily end up as a successful means.

The question than is: what is the proper method required to rehabilitate the neglected juvenile or child prostitute taken into custody under the JJ Act for enduring results ? It is rather unfortunate that the juvenile homes established and being run by Government are not effectively been managed and yielding expected results. They become ornament for the statistical purpose defeating the constitutional objectives and international Conventions which are part of the municipal law. This Court on May 2, 1990 had directed the enforcement agencies to bring the prostitute, neglected juveniles for the rehabilitation in the juvenile homes manned by well qualified and trained social workers. The child prostitutes rescued from the red light areas should be shifted into the juvenile homes. They should ensure their protection in the homes. The officers in charge of the juvenile homes, the welfare officers and the probation officers should coordinate the operation and enforce it successfully. They should be made responsible for the protection of the child prostitutes or the neglected juveniles kept in the juvenile homes for psychological treatment in the first instance relieving them from the trauma under which they were subjected to while in the brothels and red light areas. The special police authorities should be established to coordinate with the social welfare officers of the State Government and public spirited persons, NGOs locally available,
and see that the juvenile homes are entrusted to efficient and effective management, the child prostitutes or neglected juveniles are properly protected and psychologically treated, education imparted and rehabilitation succeeded. They should also be provided with proper accommodation maintenance facilities for education and other rehabilitation facilities.

V.C. Mahajan Committee's report specifies at page 31 that since its inception till November 1989, 102 boys and 34 girls were admitted by a responsible institute, a non-statutory body in Pune run on voluntary basis to impart education to the destitute children in general and neglected juveniles and child prostitutes in particular, with all facilities; it is run by Bal Sangopan Centre run by Shreemant Dagauseth Halwai Ganpat Trust which gets funds from the Ministry of Welfare, Government of India under the scheme for children in need of care and protection. Similar homes are also being run for 75 children at Kolhapur and Bombay. As policy, the Trust does not keep girls above 12 years in the institute. On the other hand, it has tied up with Hinge Stree Sikshan Sangthan at Pune for placement of the girls above 12 years into their custody but the Trust continues to be the parent institution, paying their fees and holding the overall responsibility to bring up the girls above 12 years. The report also states that the mothers are allowed to visit the children once in a month and they are allowed to take them home for brief spells during festivals and other special occasions. There is another institution, viz., `Nihar' run by `Vanchit Vikas' institute at Pune. It is founded on the basis of the felt needs of the neglected juvenile. Social workers of Pune Corporation cooperate with them. There are special health reforms available to prostitutes, the workers come into frequent contact with the prostitute mothers and their children. Gradually, they are getting acquainted with the situation and awareness is generated of the disadvantages to keep the children with them while remaining in red light area. The motivation yielded positive results in helping the children rescued from the mothers and their placement in the home. The institute is run through donation. It is being run for the past 15 years. Much progress has been made in the struggle to rehabilitate the neglected juveniles. There in, they have established a school for 25 children being used in that `Nihar'. Most of the children are in the age group of 5 to 10 years. They take only female children with the female staff to attend to the needs of the children. Their basic requirements of food, clothing and shelter are taken care of by `Nihar'. Health, education and overall development are also taken care of. The children are enrolled in Zila Parishad Schools. Residential staff helps them to take them to the schools and bring them home. On Saturdays, teachers spend their time in `Nihar' teaching music and playing games with the children. On Sundays, teachers come from Pune and spend time with the children and keep them in their studies. The mothers of the children visit once in a month. The management does not allow the mothers to take the children except for short duration. The prostitute mothers themselves have realised the advantage to keep their children away from vile environment and are happy with educational progress of their children. Similarly, "Devadasi Niradhar Mukti Kendra, Ganghiganj" is running a centre by name "Devadasi Chhatra Vasti Graha" at Pune from October 1986. It is a residential institution for the children of the Devadasis. 80% of them are the Devadasi children while 20% are children from socio-economic backward classes. Funds for this institution are granted by the Department of Social Welfare, Government of Maharashtra. It has on its roll, 75 boys and girls. As on the date of the visit by the Committee on July 7, 1990, 57 boys and 8 girls (total 65) were found in the
institute. Similar institutions are being run elsewhere; the details of which are not material. They have been elaborated in the Report of V.C. Mahajan Committee.

The above facts do indicate that the NGOs are actively involved in the field of rehabilitating and educating the children of the fallen women as neglected juveniles not brought within the net of JJ Act. The mothers have their legitimate aspirations to bring their children into the mainstream of the nation. What needs to be done is proper, efficient and effective coordination and management in particular entrustment to the NGOs which would yield better results than the management solely by the Governmental agencies. The motivation by the NGOs makes a deeper dent into the mind of the prostitute mothers or child prostitutes to retrieve them from the flesh trade and rehabilitate the children as useful citizens in the mainstream of the society. V.C. Mahajan Committee has given details of the Child Development and Care Centres (for short, the `CDCC') in Annexure IV to the Report. It states how the management needs to be done, as under:

CHILD DEVELOPMENT AND CARE CENTRES (for brevity CDCC) (A scheme for Children of Prostitutes & Children Associating with Prostitutes and Prostitution) Various factors have led to the perpetuation of prostitution which in turn has given rise to a large nature of work, status, income, etc. often leave the children wanting in attention and care for their overall development. However, it is not enough to perceive them as more victims of neglect. Their cause has to be taken up to prevent them from taking to prostitution or its promotion and curbing their proneness to delinquency. It is believed that children's energies Development and Care Centres are envisaged to provide Localised services through which the larger interests of these children can be attended to. Such Centres are to be situated in i) the vicinity of red-light areas; ii) the vicinity of other areas identified as having a concentration of prostitutes; iii) those areas where there is a concentration of communities among whom prostitution is the traditional occupation of the women and girls. These Centres will be run by voluntary organisation with government fund and have Advisory and Monitoring Committees at Central, State and Local levels.

OBJECTIVES: The scheme would i) provide welfare and developmental services for children of prostitutes and other children associating with prostitutes and prostitution by making them socially productive beings ; ii) try to wean them away from their surroundings by referring them to suitable residential institutions as and when necessary ; iii) try to reach out to the mothers (through their children) and counsel them on different issues related to their personal lives, their occupational lives and their children ; and iv) operate as an information dissemination and conscientious point, particularly for the higher age group (12 - 18 years).

Services/Facilities Keeping in view the total care and development of the child, the following services/facilities would be provided. i) crèche (day and night); ii) pre-school education - The objective of pre- school education, besides the physical emotional and social development of the children, is to prepare them mentally to attend formal schools in future. This, it is hoped will increase the enrolment in schools; iii) non-formal education/functional literacy; iv) counselling (personal and career); v) nutritional inputs; vi) health care; vii) library; viii) toy-bank; ix) recreation; x) skill development; xi) ‘save for the child' Mothers are anticipated
scheme to be spending Rs.100/- (at least) per child per month when the child stays with her. When the child is placed in the custody of a residential institution, she no longer has to spend on the child. She should, therefore, start an account in the name of the child in any nationalised bank and deposit Rs.100/- every month. If at the end of one year it is found that she has been regular in depositing the amount, the CDCC will start contributing an equal share. By the time the child is out of the institution he/she will have some immediate financial support. (Note: Suggestion by the Court: The Government of India should extend the Thrift Scheme of Women for these fallen women as well); xii) after school education help the children complete their homework and prepare lessons for schools. Teachers would also help them with any difficulties faced in school. By this measure, the rate of school dropout can be checked. (Suggestion and Directions of the Court: Special coaching should be arranged for these children); xiii) de-institutionalised help: Some of the mothers may help be agreeable to part with their children or have different priorities for the children. Money may not be their problem. In such cases the CDCC may enlist their children as recipients of de-institutionalised care services. It would ensure that the minimum needs of the child are met by the mother and his/her development is in no way impeded. It would be binding on the mother to provide the child with the basic minimum facilities for the child's overall growth and development. This would be means of getting the mother to provide for the child instead of institutionalizing him/her. Here, in the process, the CDCC would operate as a catalytic and monitoring agency. The CDCC will also follow up the cases of those children whose mothers are placed in Protective Homes. In case they are endangered in any way by separation form mother, the CDCC will adopt necessary steps to help them. The CDCC would be paid a nominal sum for its services and also for spending on some of the items required by the child for its growth, in case the mother is unable to meet such expenditure. The mother will be liable to make regular reports to the CDCC to facilitate its monitoring function. (Suggestion and Directions of the Court: All necessary funds should be provided by the appropriate Government, i.e., either the Central Government or the State Government, as the case may be.) (Note: This arrangement will work for the traditional communities, with either a CDCC or any other voluntary organisation functioning as a catalytic and monitoring agent.)

The CDCC would function as a nodal agency in the field and would co-ordinate with government departments to bring as many programmes to its group of beneficiaries as possible. Further, they would arrange referral services in the following areas as and when the need is felt for the benefit of a child: i) Institutionalised care - arrange sponsorship foster care; ii) skill development; iii) health; iv) on the job training; v) training for entrepreneurship

Eligibility of Beneficiaries Children of any age between 0-18 years who are either - i) children of prostitutes, or ii) children associated with prostitution or prostitute, may be benefitted from this scheme.

In all deserving cases the scheme should extend services to those children above 18 years, only if it is clearly seen that they are not yet able to feed for themselves and would be benefited by further support. Those older than 18 years would be assisted as special cases.

Coverage: There would be no limit to the number of children being covered by the Centre. Being a service oriented centre it is likely that only groups of children will come to the Centre
during the day asking for any of the services. Only in the case of creches and balwadis there would be regular attendance where not more than 25-30 children should be enrolled at any given time and when the member increases separate groups be formed and benefit of service extended.

Organisation: The following are some of the general conditions for eligibility for applying for the scheme: (i) The applicant should be a voluntary, non-governmental organisation, registered under an appropriate Act or a regularly constituted branch of a registered welfare organization; (ii) The organisation seeking assistance should be a non-profit and secular organisation in a way that its services would be open to all without any discrimination of religion, caste, creed, language or sex; (iii) The organisation should have a regularly constituted managing committee with its functions and their responsibilities clearly laid down in its Bye-laws; (iv) the organisation should preferably have had some experience in managing child development programmes or experience of working on the issues related to prostitution.

Programme: Though it is viewed as a localised service centre, its community outreach aspect must be active. By reaching the prospective target group and acquainting them with the services available, the utilisation of the CDCC can be availed.

The staff at the Centre would organise health camps and awareness generation camps from time to time. While providing the services of the children, efforts of the staff at the Centre would be to counsel the mothers and children and encourage the latter to join educational institutions. It should assist them in getting admitted into the educational institutions. Teachers attached to the CDCC would help the school going children in completing their homework and coping with other difficulties. During school hours the teacher would hold functional literacy classes for the elder children who are uneducated. By way of extending further support to this group of uneducated and unskilled children, the Centre's staff will have to counsel them regularly.

As it is advisable to remove the children from the vicinity of the red-light areas by about 6 years of age, the staff will have to convince the mothers and arrange for their placement in residential institutions. Regular meetings are to be held with the mothers to discuss about the health and nutritional needs of their children and to make them conscious about the environment. Efforts should be directed towards making them interested in the activities of the CDCC. They must be kept informed about the progress of their children and of their current activities, problem and future plans. They must be allowed to participate in planning and execution of programmes.

The Centre must follow up cases of women who are placed in Protective Homes. Their children must be immediately enlisted in the list of beneficiaries at the Centre. Depending upon their situation care and protection must be extended to them such that the separation from mother does not (i) hamper their education; (ii) make them emotionally and physically insure; (iii) render them neglected and uncared for; (iv) expose them to greater risks of delinquency. In case a child is affected in any of these ways, the Centre must step in and to give him/her in a residential institution. The mother must be involved in the process and the
Centre must be in touch with her at the Protective Home. The CDCC will involve the local level youth club or any other organisations and with support from the (i) mobilise the local community, (ii) organise activities for the beneficiary group.

**Advisory and Monitoring Committees**

To ensure effective implementation of the scheme Advisory and Monitoring Committees will be set up at various levels. There would be a Central Committee with State and Local Committees under it. While there will be a State Committee in every state, there may be as many Local Committees as the number of CDCCs operative in the respective state. A single Committee may be adequate in case there are more than one CDCC in the same city/town. Members of the Committees Central Committee (Seven Members) are i) Chairperson, Central Social Welfare Board; ii) Representative of the Department of Women and Child Development; iii) Representative of the Department of Social Welfare; iv) Retired Police Officer; v) Three Social Workers.

**Local Committee** (Seven Members) has i) Programme Co-ordinator CDCC; ii) Representative of mothers; iii) Representative of community; iv) Representative of local club, if any; v) secretary or representative of the voluntary organisation implementing the scheme; vi) Two Social Worker.

These Committees will run the scheme with the assistance from the government. No separate office need be maintained. The necessary office work can be done at the offices of the Chairperson, CSWB (in the case of the Central Committee) and Chairperson SSWAB (in the case of State Committee). The CDCC would help in the office work of the Local Committee. For this, the respective organisations will receive a token Administrative Assistance grant.

Meeting of the committee can be organised by the respective organisations. There must be quarterly meeting of the Central and State Committees. The Local Committees must, however, meet once in every month. The Local committee is to send its minutes of meeting held and reports of activities to the State and Central committees.

The Central Committee will function as the central Co-ordinating body, with regular feedback from the State and Local Committees. Besides regular meetings, the Committee may call emergent meetings to discuss any urgent matter. These Committees will co-ordinate the functioning of any ICDS Centres being run in lieu of CDCC (in case a voluntary organisation is not available to run and manage a CDCC) and execute the same functions as it does in the case of CDCC."

We are of the view that the suggestions require earnest examination to give force and content to them. The rescue and rehabilitation of the child prostitutes and children should be kept under the nodal Department, namely, Department of Women and Child Development under the Ministry of Welfare and Human Resource, Government of India. It would devise suitable schemes for proper and effective implementation. The institutional care, thus, would function as an effective rehabilitation of fallen women even if they have crossed the age prescribed under the JJ Act. They should not be left to themselves, but should be rehabilitated through
self-employment schemes or such measures as are indicated hereinbefore. The juvenile homes
should be used only for a short stay to relieve the child prostitutes and neglected juveniles
from the trauma they would have suffered; they need to be rehabilitated in the appropriate
manner. The details are required to be worked out by meaningful procedure and programmes.
In the light of the directions already given by this Court from time to the Central Government,
State Governments and Union Territory Administrators, adequate steps should be taken to
rescue the prostitutes, child prostitutes and the neglected juveniles as indicated hereinabove;
they should take measures to provide them adequate safety, protection and rehabilitation in
the juvenile homes manned by qualified trained social workers or homes run by NGOs with
the aid and financial assistance given by Government of India or State Government
concerned. A nodal Committee with the public spirited NGOs, in particular women
organisations/woman members should be involved in the management. Adequate
encouragement may be given to them; the needed funds should be provided and timely
payments disbursed so that the scheme would be implemented effectively and fruitfully.

The Minister of Welfare, Government of India will constitute a Committee consisting of the
Secretary in charge of Department of Women the Child Development as the chairperson and
three or four Secretaries from the concerned State Governments, to be nominated by the
Minister of Welfare. They would make an in-depth study into these problems and evolve such
suitable schemes as are appropriate and consistent with the directions given above. The
Committee should be constituted within one month from the date of the receipt of this
judgment. The Committee should finalise the report within three months thereafter. As soon
as the report is submitted the same may be communicated to all the State Governments and
the concerned Ministries for their examination. Within two month from date of the
communication, the Minister of Welfare, Government of India, in coordination with the Prime
Minister Office should convene a meeting presided over by the Prime Minister, with Minister
of Welfare, Home Minister, Human Resource Minister, the concerned Minister, Human
Resource Minister, the concerned Ministers of the State Governments and their Secretaries as
well to discuss the problem and take decision. The Committee should finalise the report with
further suggestions or amendments, if suggested in the conference. Thereafter, the report
should be finalised and then direction would be given to the State Governments for effective
implementation of the schemes. The nodal Department would enforce and regularly be
supervised by the Ministry of Welfare, Government of India. A permanent Committee of
Secretaries should be constituted to review the progress of the implementation on annual
basis, and to take such other steps as may be expedient in the effective implementation of the
schemes. Periodical progress as to funding and enforcement of the scheme should be
submitted to the Registry of this Court. If further directions would be needed, liberty is given
to the parties to approach this Court. In that view of the matter, it is believed and hoped that
the above law and directions would relieve the human problem by rehabilitation of the
unfortunate fallen women caught in the trap of prostitution; their children would be brought
into the mainstream of the social order; these directions would enable them to avail the
equality of opportunity and of status, with dignity of person which are the arch of the
Constitution.
My learned brother D.P. Wadhwa, J. has disagreed to the directions given to the Union of India etc. in the first part of the Order on the ground, as seems to me, that in view of the relief sought for in the writ petitions and the directions given by this Court on the earlier occasions there is no scope for the relief being granted now and directions given in the concluding part of the Order. Brother Wadhwa, J. thus agrees with the directions given at pages 78 to 81 relating to the prostitute children and the children of the fallen women. Directions at pages 38-39 and 43 to 45 of this Order pertain to the prevention of induction of women, in various forms, into prostitution; their rescue formal flesh trade; and rehabilitation through various welfare measures so as to rehabilitation through various welfare measures so as to provide them with dignity of person, means of livelihood and socio-economic empowerment. In that behalf, my learned brother has not concurred for the reasons given in the separate Order proposed to be delivered by him. That has necessitated me to have a re-look into the precedents on Public Interest Litigation vis-a-vis the scope, ambit and power of the Court to grant relief in matters arising from real and true and Court to grant reliefs in matters arising from real and true public interest litigation in which the condition of locus stand has been relaxed and public-spirited persons, not motivated by pressure tactics for ultimate ends, are encouraged to work for the poor, under-privileged or weaker segments of the society who are otherwise unable to avail of judicial process for grant of general reliefs to such a group of persons.

In Dr. Upendra Baxi & Ors. v. State of U.P. & Ors. [(1986) 4 SCC 106], Dr. Upendra Baxi, a noted humanist and champion of Human Rights, had addressed a letter to this Court that a writ petition may be entertained in public interest to protect the girls living in the Government protective Homes at Agra who were being denied right to live with basic human dignity by the State of Uttar Pradesh which was running the Home. In that case, it was held that the public interest litigation is not a litigation of an adversary undertaken for the purpose of holding the State Government or its officers responsible for making reparation. Public interest litigation involves collaborative and cooperative efforts by the State Government and its officer, the lawyers appearing in the case and the Bench for the purpose of making Human Rights meaningful for the weaker sections for the community in ensuring the socio-economic justice to the deprived and vulnerable sections of the humanity in the country. Directions, therefore, were accordingly issued; details thereof are, however, not material for the purpose of this case. What is material is that the power of this Court is wide to grapple with new situations; it can get the evidence collected with cooperation of the counsel for the parties and the State and mete out justice to protect the constitutional rights guaranteed to all the citizens in particular, the vulnerable weaker segments of the society.

In Bandhua Mukti Morcha v. Union of India & Ors. [(1984) 3 SCC 161] the writ petition under Article 32 was filed to release bonded labourers in the country by way of letter addressed to this Court. In that behalf, this Court had taken assistance of the parties, got the evidence collected and then issued appropriate directions for release of the bonded labour. In this behalf, it was held at page 189 that when the poor come before the Court, particularly for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure which will make it possible for the poor and the week to bring the necessary material before the Court for the purpose of securing enforcement
of their fundamental rights. It must be remembered that the problems of the poor which are
now coming before the Court are qualitatively different from those which have hitherto
occupied the attention of the Court and they need a different kind of layering skill and a
different kind of judicial approach. If we blindly follow the adversarial procedure in their
case, they would never be able to enforce their fundamental rights and the result would be
nothing but a mockery of the Constitution. We have, therefore, to abandon the laissez faire
approach in the judicial process particularly where it involves a question of enforcement of
fundamental rights; we should forge new tools, devise new methods and adopt new strategies
for the purpose of making fundamental rights meaningful for the large masses of the people.
And this is clearly permissible by the language of clause (2) of Article 32 because the
Constitution-makers while enacting that clause have deliberately and advisedly not used any
words restricting the power of the Court to adopt any procedure which it considers
appropriate in the circumstances of a given case for enforcing the fundamental right.

It would, thus, be the established procedure of this Court under Article 32 that the public
interest litigation is not adversarial. It is one of collaboration and cooperation between the
State and the Court. This Court as the sentinel on the qui vive, is constitutionally obligated to
enforce the fundamental rights of all the citizens of the country and to protect them from
exploitation and to provide guidance and direction for facilities and opportunities to them for
securing socio-economic justice, empowerment and to free the handicapped persons from the
disabilities with which they suffer from and to make them realise and enjoy the fundamental
rights ensured to them under the Constitution. In that behalf, this Court is entitled and
empowered under Article 32 to adopt such procedure as is expedient in a given fact situation
and deal with the matter appropriately. Therefore, the rigour of the pleadings or the reliefs
sought for in adversarial litigation, has been softened; new methods, tools and procedures wee
evolved to mete out justice and to enforce the fundamental rights. Obviously, therefore, when
a limited relief to establish separate schools for the children of the fallen women was sought
for by the petitioner-Gaurav Jain, this Court did not confine to the same. It, instead, enlarged
the scope and directed the authorities as an interim measure to have those children admitted in
the general schools to make the children overcome the disabilities had from foul atmosphere
and to generate the feeling of oneness and desegregation. In addition, this Court appointed
V.C. Mahajjan Committee to enquire into and submit a report. The report was accordingly
submitted after extensive travelling to far and wide parts of the country; it studied not only the
problem of the children of the fallen women but also the root cause of the menace of child
prostitution and the prostitution as such and the need for its eradication. The prevailing
conditions have been pointed out in the Report and beneficial actions already taken by some
of the Social Action Groups have been pointed and also noted as illustrated hereinafore.
They have also dealt with the problems of the children. The State Governments and the
Central Government were supplied with the copies of the Report and they have not even
objeected to the recommendations; in fact, they cannot be objected to since it is a fact
prevailing, unfortunately, in the country. Therefore, the relief cannot be restricted to the
pleadings or to the scope of the directions earlier issued; the Court can take cognizance from
indisputable or the undisputed facts from the Report of V.C. Mahajjan Committee and other
reports and articles published in recognised Journals and act upon it. Placing reliance thereon,
the directions given in the Order, aim not only at giving benefits to the children but also to root out the very source of the problem as has been pointed out in the first part of the Order, it is for the Government to evolve suitable programme of action. My learned brother has very graciously agreed to the second part of the order relating to the setting up of juvenile homes for the prostitute children and children of fallen women.

By operation of Article 145(6), to the extent both of us have agreed, the Order constitutes as binding precedent. It is to remember that this Court being composed of large number of Judges has evolved its own procedure to transact court management of its judicial work and to decide cases/causes sitting in appropriate Division Benches constituted by the Chief Justice of India as per the Supreme Court Rules. Any observation made by one of the Judges has persuasive obiter. When there is a dissent, the majority of opinion forms a binding precedent. Any difference of opinion between a Bench composed of two Judges, in an adversarial litigation requires resolution by a larger Bench of three Judges and/or if further reference is made to a Constitution Bench, it is to deal with the controversy and majority opinion forms precedent. As stated earlier, public interest litigation is not adversarial in nature but is one of cooperation and coordination between the three wings of the State and the coordination and it is the constitutional duty of this Court to ensure enjoyment of the fundamental rights by all citizens and in particular the poor and deprived social segments and in case of violation thereof, to prevent the same by giving appropriate directions in that behalf. In aid thereof, this court has been armed by Article 142 to pass such orders as may be necessary for doing complete justice in a cause or pending matter before it. An order so made shall be enforceable throughout the Territory of India.

I put a caveat upon myself and I am aware that Article 142 would be used to enforce final judgment or order which, in given special or exceptional circumstances, would include directions of this type to mitigate injustice and to elongate enforcement of fundamental and human rights. Article 142 speaks of doing complete justice in a cause. The arm of the Court is long enough to reach injustice wherever it is found and to mete out justice. Denial of the constitutional rights to the unfortunate fallen women outrages the quest for justice and pragmatism of constitutional ethos which constrain me to avail Article 142 of the Constitution of India to direct the Union of the India as well as all State Governments to evolve, after in depth discussion at Ministerial level conference, such procedures and principles or programmes, as indicated in this Order, as guidance would help rescue and rehabilitate the fallen women. Otherwise, the fundamental and human rights remain pious platitudes to these miserable souls crushed in the cruel flesh trade with grinding poverty in the evening of their lives. Generally, Article 142 may not be invoked before the difference of opinion is resolved in an adversarial litigation and in a keenly contested matters of even public interest litigation, in particular, of recent type cases. However, in the cases of the type in hand, where there would be no controversy on human problems of most unfortunate women which require their careful planning, rescue and rehabilitation, the exercise of the power under Article 142, even by a single member of the Bench, may be appropriate and efficacious to enforce fundamental and human rights of large number of neglected and exploited segments of the society. Before parting with the case, we place on record the valuable assistance and yeoman's service rendered by V.C. Mahajan Committee. The directions are accordingly given. The writ
petitions are directed to be posted after the compliance report as regards the action taken in that behalf, is furnished by the Union of India for appropriate orders.

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Krishnamurthy @ Tailor Krishnan v. Public Prosecutor, Madras
1967 AIR 567; 1967 SCR (1) 586

RAGHUBAR DAYAL,J. Krishnamurthy Krishnan was convicted by the III Presidency Magistrate, Saidapet, Madras, of the offence under s. 4(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act 104 of 1956), hereinafter called the Act, and was sentenced to nine months' rigorous imprisonment, though he was charged with an offence under s. 3(1) of that Act. He appealed against his conviction to the High Court. The State Government appealed to the High Court against the acquittal of the appellant of the offence under s. 3(1) of the Act. The High Court dismissed the appellants' appeal but allowed the State appeal and altered the appellant's conviction to one under s. 3(1) of the Act and sentenced him to two years' rigorous imprisonment and a fine of Rs. 50/- as he was a second offender. It is against this order of the High Court that the appellant appeals, by special leave.

The prosecution case, briefly, is that the Assistant Commissioner of Police (Vigilance), P.W.4, having information that the house occupied by the appellant was being used as a brothel with three girls, Saroja, Ambika and Lakshmi, deputed Shanmugham, P.W.2, as a decoy; on August 22, 1962. Shanmugham was given three marked 10-rupee currency notes by P.W.4. He went to the appellant's place and was shown the three girls. He selected Ambika and paid Rs. 30/- in those marked currency notes to the appellant. He and Ambika then went inside a room. Thereafter, the police party raided the house and found the decoy Shanmugham and Ambika in a dishevelled condition in that room. P.W. 4 recovered the marked currency notes from the possession of the appellant.

The main question in this appeal is whether the facts found make out the offence under s. 3(1) of the Act. Section 3(1) reads: “Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with a fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees.”

'Brothel' is defined in cl. (a) of s. 2. It includes any house, room or place or any portion of any house, room or place which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes. One will be guilty of the offence under s. 3(1) of the Act if he does any of the acts mentioned in that sub-section in relation to a brothel. The appellant's house, on the facts found, was being used as a brothel. The girls were offered for the purpose of prostitution. The house was used for such purposes, undoubtedly for the gain of the appellant who
pocketed the money which was given by P.W.2 for committing prostitution on Ambika of course, it can be presumed that the girls who were being offered for the purpose of prostitution, would also obtain monetary gain out of the amount paid by P.W.2. The appellant can therefore justifiably be said to be 'keeping a brothel'.

It has been urged, however, that a solitary instance of the house of the appellant being used for the purpose of prostitution will not suffice for establishing that the house was being 'kept as a brothel'. It may be true that a place used once for the purpose of prostitution may not be a brothel, but it is a question of fact as to what conclusion should be drawn about the use of a place about which information had been received that it was being used as a brothel, to which a person goes and freely asks for girls, where the person is shown girls to select from and where he does engage a girl for the purpose of prostitution. The conclusion to be derived from these circumstances about the place and the person 'keeping it' can be nothing else than that the place was being used as a brothel and the person in charge was so keeping it. It is not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution. A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as a brothel and that the person alleged was so keeping it. We are of opinion that the facts found in the present case justify the conclusion that the appellant was keeping a brothel at his house. The appellant's conviction under s. 3(1) of the Act is therefore correct.

The appellant has been awarded enhanced punishment as his present conviction was a second conviction. His first conviction was under ss. 5(1) and 8(1) of the Madras Suppression of Immoral Traffic Act, 1930 (5 of 1930) hereinafter called the Madras Act, in Criminal Case No. 1028 of 1955 from the Court of the III Presidency Magistrate, Madras. The previous conviction is not disputed. What is urged for the appellant is that it was not a conviction under the Act and therefore his present conviction cannot be considered to be a second conviction under s. 3(1) of the Act.

Section 5(1) of the Madras Act provided that any person who kept or managed or acted or assisted in the management of a brothel would be punished with imprisonment which might extend to two years or with fine which might extend to one thousand rupees or with both. The appellant's conviction under s. 5(1), therefore, was for an offence which would have been an offence under s. 3(1) of the Act also.

Thus, when the Act came into force in 1956, the corresponding provisions of the Madras Act stood repealed, by virtue of subs. (1) of s. 25. By virtue of sub-s. (2), the conviction of the appellant under S. 5(1) of the Madras Act would be deemed to be conviction under s. 3(1) of the Act, an Act deemed to be in force at the time the conviction took place. It follows that the present conviction of the appellant will have to be taken as a second conviction, within the meaning of the expression in sub-s. (1)
of s. 3 of the Act, and the appellant would be liable to suffer enhanced punishment under that sub-section. The result is that there is no force in this appeal. It is accordingly dismissed.

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Not for dramatic effect but to sting social conscience, we set out the tragic story of this case which is typical of the spreading disease of immoral traffic, to remedy which the Suppression of Immoral Traffic in Women And Girls Act, 1956 (for short, the Act) was enacted by Parliament in a mood of high morality but with such drafting inefficiency that it has pathetically failed to produce any decline in the malady.

The scene is the Isias Bar, 15, Free School Street, Calcutta. A hall of enchantment extends nocturnal invitation to have a nice time with svelte sylphs. The entrance fee is but a paltry Rs. 15/- per man and inside is served animating liquor. Females there solicit carnal custom, and the willing male victims pay Rs. 30/-, choose whom they fancy, drink together and, taking leave of decencies, indulge in promiscuous sex exercise legally described as operation prostitution. The stage is busy with many men and girls moving into rooms, lavatories and chambers. The curtain rises and a raiding party of police and excise officers surprise this erotic company drowned in drink and damsels.

This lecherous drama need not detain us further. The Act went into action, a prosecution was launched against many under S. 7 resulting in conviction and sentence of two persons, the proprietor and the manager of the Isias Bar. Often times, a bar or restaurant is a euphemism for a brothel and the socialites, unsuspected and without smirch, satisfy their sex in these respectably labelled houses patronised by even prestigious dignitaries and opulent businessmen.

An appeal to the High Court substantially failed and the appeal by the State on some counts, partly succeeded. In this Court, leave was refused regarding the challenge against the guilt and so the findings sustaining the conviction stand; but it is necessary to clarify that ultimately the High Court modified the conviction to an extent and we have to proceed on the footing that the accused, have been found guilty of offenses under s. 7(2)(a), s. 3(1) but acquitted under s. 7(2)(b). What is most pertinent to the present appeal is that an order was made under s. 18(1) read with sec. 18(2) directing "the occupiers of portion of premises Nos. 15 and 15/A, Free School Street commonly known as 'Isias Bar' to be evicted therefrom within a period of seven days from the date of this order and restore possession thereof to the owner landlord or his agent and we further direct that this premises or any portion thereof shall not be leased out, or otherwise given possession of, to or for the benefit of the person or persons, who were connected with the improper user thereof." We had granted special leave limited to the attack on this order for eviction under s. 18(2) read with s. 18(1). The area of discussion in these arguments is thus confined to the power to throw out the occupier of the guilty premises on conviction for offences under ss. 3(1) and 7(2)(a) on top of the sentence imposed.
An appreciation of the legal tangle can be facilitated by a brief but necessary sketch of the indubitable foundational facts and the basic legal provisions bearing on the orders under s. 18. The court, as earlier mentioned, passed an order, following on the sentence, that since a conviction under ss. 3 and 7 had been rendered, there would be a direction evicting the appellants-occupiers from the theatre of prostitutional operation, viz., the Isiah Bar. The Bar is beyond the offending distance of 200 yards of any 'public place' referred to in sub-s. (1) of s. 7. The said sub-section itemises premises such as places of public religious worship, educational institutions, hostels, hospitals, nursing homes and such other public places as may be notified by the authority designated. At the same time it is a proven fact that the appellants have been keeping or managing a brothel within the meaning of s. 3(1), and are keepers of a public place knowingly permitting prostitutes for the purposes of their trade to resort to or remain in such public place viz., the Isiah Bar.

The project of the statute, to the extent we are concerned, may now be set out. When a magistrate receives information that any brothel is being run within a distance of 200 yards of any public place such as has been mentioned earlier [in sub-s. (1) of s. 7] he may issue notice to the owner, tenant, occupier or other person in charge of or connected with the brothel to show cause why it should not be attached for improper user. After a hearing being conducted, the magistrate, if satisfied, may order eviction of the occupier and further direct that the owner or landlord shall not let out the premises for a period of one year after the passing of the order, without his previous approval.

In short, the house of ill-fame where Mrs. Warren's Profession is carried on is virtually sealed off by attachment by the magistrate. However, if the owner satisfies the magistrate of his innocence, it may be restored to him with a direction that it shall not be leased out to the person who had been improperly using it for immoral purposes.

Section 18(1) proprio vigore applies only to brothels within the vicious distance of 200 yards of specified types of public institutions. No criminal prosecution or conviction is necessary for taking action under s. 18(1). Strictly speaking, this is not a punitive provision but a preventive one. This power vested in the magistrate is calculated to ensure moral hygiene in the locality which is particularly sensitive. If one may say so, it is a moral scavenging operation, or a fumigation process whereby the dangerous visitations may be totally inhibited by a legally enforced closure. So far as we are concerned, the Isiah Bar is not shown to be within the offending distance and s. 18(1) cannot therefore apply. Indeed the Magistrate and the High Court have proceeded to exercise powers under s. 18(2) and the entire controversy before us is as to the real import of that provision. By way of aside, we may say that plausible submissions were urged by Shri D. Mukherjee, supported by the language of s. 18(2).
Once a court convicts a person under s. 3 or s. 7 as in this case, it may pass orders under sub-s. (1) of s. 18 without further notice to such person to show cause as required in that sub-section. Shri Mukherjee's submission is that this power of eviction is conditioned by the limitations of s. 18(1). Orders under sub-s. (1) of s. 18 can, admittedly, be passed only if the brothel is within 200 yards' distance. Since, in this case, the place is beyond that distance, Shri Mukherjee argues that sub-s. (2) cannot apply. The words 'pass orders under sub-s.' creates ambiguity which we have sought to dispel by trying to advance the remedy and suppress the evil through the interpretative methodology.

Shri A. K. Sen has explained-and we think rightly-that s. 3 punishes persons who keep brothels. Sub-s. (3) of s. 3 lays down that notwithstanding any other law 'any lease ... under which such premises ... are held or occupied at the time of the commission of the offence, shall become void and inoperative with effect from the date of the said conviction'. It is plain therefore that the consequence of a conviction under s. 3 is the invalidation of the lease of the premises where the brothel is run. The logical consequence must be that the occupier must be thrown out of the prostitutional premises. This is achieved by exercise of the power under s. 18(2).

Section 7(1) punishes prostitution in premises within a distance of 200 yards of specified sensitive places set out therein. Section 7(2) works out a dichotomy: sub-s. (2)(a) punishes the keeper of any public place who knowingly permits prostitutes to resort to such place (that is, any public place). No question of distance arises here but sub-s. 2(b) specifically mentions, as an ingredient of the offence, that the premises must be such as are referred to in sub-s. (1) (that is, within 200 yards distance). A person convicted either under sub-s. (1) or under sub-s. (2) (a) or (b) s. 7 will be covered by s. 18(2) because the latter provision empowers the court to pass orders under s. 18(1) if there is a conviction under s. 7, regardless of whether it falls under sub-s. (2) (a) or (b) of that section. Moreover, if we have regard to the wholesome purpose of cleansing houses of ill-fame, it can be achieved only by a broader construction of s. 18(2).

This Court in Sub-Div. Magistrate v. Ram Kali [AIR 1968 SC 1] held that s. 18(1) deals with one class and s. 18(2) relates to another class. Section 18(1) is a summary procedure for closing down obnoxious places of prostitution, without going through the detailed process of a criminal prosecution. It is a quick-acting defensive mechanism, calculated to extinguish the brothel and promote immediate moral sanitation, having regard to the social susceptibility of places like shrines, schools, hostels, hospitals and the like, Section 18(2) on the other hand, operates only where persons have been convicted of offences under s. 3 or s. 7. Thus the place is found to be put to prostitutional use, in a criminal trial. It stands to reason that if the purpose of extirpating the commercial vice from that venue were to be successful, the occupier must be expelled therefrom. This is precisely what has been done in the present case.
Section 18(2) operates not merely on places within the offending distance of 200 yards but in all places where the activity of prostitution has been conducted.

A close reading of s. 18(2) indicates that the orders under sub-s. (1), referred to therein, do not, wholesale, import the substantive paragraph of s. 18(1), but only the evicting orders contained in s. 18(2), clauses (a) and (b). What is, by a process of abbreviation, imported into s. 18(2) is the decretal part of s. 18(1) to the extent it is written into s. 18(1), (a) and (b). There is some clumsiness about the drafting, as we have already stated. Even so, if the purpose is carried to the meaning that we assign, the section fulfils the social cause.

We are in the International Women's Year—a circumstance meaningful socially, but not relevant legally. Even so, it is time to tighten up this statute and we may permit ourselves a few concluding observations, hopefully. Maybe, there are other provisions of the Act which have contributed to its dismal failure in the field and the legislature must, in the International Year of Women, protect the virtue of the weaker sex from the purchasing power of the takers of virginity who sip every flower and change every hour.

No nation, with all its boasts, and all its hopes, can ever morally be clean till all its women are really free—free to live without sale of their young flesh to lascivious wealth or commercialising their luscious figures. India, to redeem this 'gender justice' and to prescribe prostitution whereby rich men buy poor women through houses of vice, has salved its social conscience by enacting the Act. But the law is so ill-drafted and lacunose that few who follow "the most ancient Profession in the World" have been frightened into virtue and the customers of wine-cum-women are catered to respectably in bars, hotels and night-clubs in sophisticated and subtle ways, especially in our cities.

We dismiss the appeal, upholding the power of the magistrate to order eviction when there is a conviction under s. 3 or s. 7 confident that public power vested in a public functionary for public benefit shall be used whenever conditions necessary for the exercise are present, so that a comprehensive social purpose of moral clean-up of public places is accomplished. Appeal dismissed.

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Dr. B.S. CHAUHAN, J.

1. Leave granted.

2. This criminal appeal has been preferred against the judgment and order dated 19.5.2010 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 1711-SB/2005, by which the High Court has affirmed the judgment and order dated 2.9.2005 passed by learned Special Judge, Fatehgarh Sahib, in Sessions Case No. 72T/5.9.03/7.10.04, by which the appellant stood convicted for the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as NDPS Act) and was sentenced to undergo RI for 10 years and to pay a fine of Rs.1,00,000/- in default whereof, to undergo further RI for 6 months.

3. Facts and circumstances giving rise to this appeal are that on 4.7.2003, a police party was proceeding from Focal Point, Mandi Gobindgarh to G.T. Road on patrol duty in a government vehicle. When the police party reached near the culvert of minor in the area of village Ambe Majra, the police party spotted the appellant who was coming on foot, from the side of Ambe Majra carrying a plastic bag in his right hand. On seeing the police, the appellant turned to the left side of the road. The police party apprehended the appellant, being suspicious of him. In the meantime, Ashok Kumar, an independent witness also came to the spot and joined the police party. The appellant was apprised of his right of being searched in the presence of a Gazetted Officer and in that respect his statement was recorded. Shri Dinesh Partap Singh, Assistant Superintendent of Police, was summoned to the spot by the Investigating Officer and in his presence, Amarjit Singh, Inspector (P.W.3) searched the plastic bag of the appellant and the substance contained therein was found to be opium. Two samples of 10 gms. each of the opium were taken. The remaining opium was found to be 7.10 Kgs. The samples and the remaining opium were sealed and taken into possession by the police party.

4. A formal FIR was registered against the appellant; on personal search, an amount of Rs. 510/- was found with the appellant; the arrest memo of the accused was prepared and he was formally arrested. After completion of investigation and on receipt of the report from the Forensic Science Laboratory, confirming the contents of the sample to be of opium, a chargesheet was filed against him for the offence punishable under Section 18 of the NDPS Act. He did not plead guilty to the charges and claimed trial.

5. The prosecution examined Manjinder Singh, Constable (P.W.1), Jagdish Singh, Head Constable (P.W.2), Amarjit Singh, Inspector (P.W.3), Dinesh Partap Singh, Assistant Superintendent of Police (P.W.4) and Dalip Singh, Sub Inspector (P.W.5). Ashok Kumar, an independent witness was not examined by the prosecution, as he had been won over by the appellant.

6. In his statement under Section 313 of the Code of Criminal Procedure, 1973, the appellant stated that the prosecution case was false; he had been taken by the police from his house and Rs.6,000/- had been snatched from him; he was not physically fit even to walk as he had met with an accident in 1999. The appellant also examined 6 witnesses in his defence.
7. The Trial Court after scrutinising the evidence held that the appellant was guilty of the offences charged with and was awarded the sentences as mentioned hereinabove. Being aggrieved, he preferred an appeal before the High Court which has been dismissed by the impugned judgment and order dated 19.5.2010. Hence, this appeal.

8. Shri R.S. Suri, learned senior counsel appearing for the appellant at an initial stage raised a large number of factual and legal issues. However, ultimately considering that there had been concurrent findings of fact against the appellant by the two courts, he primarily submitted that as the opium recovered from the appellant weighing 7.10 kgs. contained 0.8% morphine, i.e. 56.96 gms., the quantity was below the commercial quantity, however, more than the minimum quantity prescribed under the Notification issued in this respect, the maximum sentence awarded by the court was unwarranted.

9. Shri Suri has placed reliance upon the judgment of this Court in E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau, (2008) 5 SCC 161, wherein the Court dealt with the case of recovery of heroin from a carrier, and held that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. Therefore, it will depend upon the morphine content and if this is less than the commercial quantity of morphine, the maximum sentence cannot be awarded.

10. On the contrary, Shri Jayant K. Sud, learned Addl. Advocate General, appearing for the State of Haryana has submitted that as the entire substance recovered from the appellant was opium and not any kind of mixture, the question of determining the quantity or percentage of morphine in the substance could not arise. The opium itself is an offending material under the NDPS Act. Therefore, the court has to proceed in view of Entry No.92 in the Notification in this regard which deals with opium and any preparation containing opium and specifies that a small quantity is only 25 gms., whilst a commercial quantity is 2.5 kgs. In the instant case as it was 7.10 kgs, i.e. the appellant was carrying about three times the minimum amount required for a commercial quantity. The judgment of this Court in E. Micheal Raj (supra) has no application in this case as that was a case of heroin and not of opium. More so, the accused was merely a carrier and not a dealer.

11. It is further contended by Shri Sud that the Notification applicable in this case provides separate Entry No. 77 for morphine, wherein the minimum quantity is 0.5 gms. and commercial quantity is 250 gms. Entry No. 92 separately deals with opium. Entry No. 93 for opium derivatives provides that a minimum quantity is 5 gms. and a commercial quantity is 250 gms. The present case is to be dealt with under Entry No.92 and not Entry No.77 or any other Entry. More so, in view of the Notification dated 18.11.2009 under the provisions of Section 2 of NDPS Act, no consideration is required in respect of the material recovered from the appellant. Thus, the question of interference with the impugned judgment and order does not arise. The appeal is liable to be dismissed.

13. Notification dated 18.11.2009 has replaced the part of the Notification dated 19.10.2001 and reads as under:-

"In the Table at the end after Note 3, the following Note shall be inserted, namely:-
(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

Thus, it is evident that under the aforesaid Notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18.11.2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned.

14. Opium is essentially derived from the opium poppy plant. The opium poppy gives out a juice which is opium. The secreted juice contains several alkaloid substances like morphine, codeine, thebaine etc. Morphine is the primary alkaloid in opium.

15. Opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. Thus, it can be identified without subjecting it to any chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary. In case opium is not mixed up with any other material, its chemical analysis is not required at all. "Of course, an analysis will always be necessary if there is a mixture and the quantity of morphine contained in mixture has to be established for the purpose of definition (of opium under the Opium Act)."

16. However, the aforesaid cases have been decided under the Opium Act and cannot be the authority so far as deciding the cases under the NDPS Act. Thus, chemical analysis of the contraband material is essential to prove a case against the accused under the NDPS Act.

17. The NDPS Act defines `opium' under Section 2(xv) as under:

   (a) the coagulated juice of the opium poppy; and

   (b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 per cent of morphine.

18. Coagulated means solidified, clotted, curdled - something which has commenced in curdled/solid form. In case the offending material falls in clause (a) then the proviso to Section 2(xv) would not apply. The proviso would apply only in case the contraband recovered is in the form of a mixture which falls in clause (b) thereof.

19. Relevant part of the chemical analysis made by the Forensic Science Laboratory, Punjab, Chandigarh in the instant case, reads as: "xx xx xx xx On analysis of the substance kept in the bundle under reference, it is established that the substance is opium and percentage of morphine is 0.8%." (Emphasis added)
20. The amendment in 2001 was made in order to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in huge quantities of drugs are punished with deterrent sentences; on the other hand, the addicts and those who commit less serious offences are sentenced to lesser punishment.

21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No.92 becomes totally redundant.

Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

22. The judgment in *E. Micheal Raj* (supra) has dealt with heroin i.e., Diacetylmorphine which is an "Opium Derivative" within the meaning of the term as defined in Section 2(xvi) of the NDPS Act and therefore, a `manufactured drug' within the meaning of Section 2(xi)(a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case.

23. In *Amarsingh Ramjibhai Barot v. State of Gujarat*, (2005) 7 SCC 550, this Court dealt with a case where the black-coloured liquid substance was taken as an opium derivative. The FSL report had been to the effect that it contained 2.8% anhydride morphine, apart from pieces of poppy (Posedoda) flowers. This was considered only for the purpose of bringing the substance within the sweep of Section 2(xvi)(e) as `opium derivative' which requires a minimum 0.2% morphine.

24. The Notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with Heroin, Entry 77 deals with Morphine, Entry 92 deals with Opium, Entry 93 deals with Opium Derivatives and so on and so forth. Therefore, the Notification also makes a distinction not only between Opium and Morphine but also between Opium and Opium Derivatives. Undoubtedly, Morphine is one of the derivatives of the Opium. Thus, the requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with. If it is Opium as defined in clause (a) of Section 2(xv) then the percentage of Morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of NDPS Act, that the quantity of morphine contents become relevant.
25. Thus, the aforesaid judgment in *E. Micheal Raj (supra)* has no application in the instant case as it does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances. The material so recovered from the appellant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact-situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL Report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine which should be not less than the prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine.

26. In view of the above, we do not find any substance in the appeal. It is devoid of any merit and, accordingly, dismissed.

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Indian Harm Reduction Network vs. Union of India
2012 Bom C R (Cri) 121

A.M. Khanwilkar, J.

1. By these petitions under Article 226 of the Constitution of India, the constitutional validity of Section 31-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") is challenged on the ground that the mandatory death sentence prescribed therein is violative of Articles 14 and 21 of the Constitution of India.

2. The first petition is filed by a Society registered under the Societies Registration Act, 1860, which claims to be working in the field of drug related programmes and policies since 2007. It is stated that its constituent members are non-government organisations from different parts of the country that have been supporting efforts to reduce drug-related harms for the last thirty years. The said petitioner seeks to secure a just, rational and humane response to drug use and dependence. It has challenged the validity of Section 31-A of the NDPS Act, as it is vitally concerned with the issue of meting out of mandatory death penalty for drug offences, which is excessive, unscientific and inhumane.

3. The second petition is filed by the original accused No. 1 in NDPS Special Case No. 60 of 2002, which was tried and ended in finding of guilt recorded by the Special Judge under the NDPS Act. The said petitioner was also prosecuted and convicted in connection with offences under Sections 8(c), 20 (B) read with Section 29 of the NDPS Act by the Sessions Judge at Himmatnagar, Ahmedabad, in NDPS Special Case No. 1 of 2002 vide judgment dated 9th March, 2004, regarding the seizure of commercial quantity of charas from the premises occupied by the said petitioner. Accordingly, the Special Judge under the NDPS Act at Mumbai by his decision dated 6th February, 2008 convicted the said petitioner in respect of "repeat offence" covered by Section 31-A of the NDPS Act; and, therefore, imposed death penalty in terms of Section 31-A of the NDPS Act. Besides challenging the said decision of the Special Judge under the NDPS Act at Mumbai by way of appeal before this Court, being Criminal Appeal No. 528 of 2008, the petitioner / original accused No. 1 in NDPS Special Case No. 60 of 2002 has also filed the present writ petition, challenging the validity of Section 31-A of the NDPS Act on the ground that it is violative of Articles 14 and 21 of the Constitution of India.

4. Section 31-A of the NDPS Act was incorporated in the NDPS Act of 1985 in 1989. The said provision was amended in 2001, which, in turn, narrowed down the offences punishable with death. The Statement of Objects and Reasons for introducing Section 31-A in 1989, vide Amendment Act 2 of 1989, reads thus:-

"In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill-over from such traffic has caused problems of abuse and addiction. The Narcotic
Drugs and Psychotropic Substances Act, 1985 provides deterrent punishments for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drugs offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.

2. A Cabinet Sub-Committee which was constituted for combating drug traffic and preventing drug abuse, also made a number of recommendations for strengthening the existing law. In the light of the recommendations of the Cabinet Sub-Committee and the working of the Narcotic Drugs and Psychotropic Substances Act, in the last three years, it is proposed to amend the said Act. These amendments, inter alia, provide for the following:-

(i) to constitute a National Fund for Control of Drugs Abuse to meet the expenditure incurred in connection with the measures for combating illicit traffic and preventing drug abuse;

(ii) to bring certain controlled substances which are used for manufacture of Narcotic Drugs and Psychotropic Substances under the ambit of Narcotic Drugs and Psychotropic Substances Act and to provide deterrent punishment for violation thereof;

(iii) to provide that no sentence awarded under the Act shall be suspended, remitted or commuted;

(iv) to provide for pre-trial disposal of seized drugs;

(v) to provide death penalty on second conviction in respect of specified offences involving specified quantities of certain drugs;

(vi) to provide for forfeiture of property and a detailed procedure relating to the same; and

(vii) to provide that the offences shall be cognizable and non-bailable."

6. As aforesaid, the original Section 31-A has been amended in 2001 by Amendment Act 9 of 2001. The Statement of Objects and Reasons for the said amendment reads thus:-

"The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail
provisions under the Act add to their misery. Therefore, it is proposed to rationalise
the sentence structure so as to ensure that while drug traffickers who traffic in
significant quantities of drugs are punished with deterrent sentences, the addicts and
those who commit less serious offences are sentenced to less severe punishment. This
requires rationalisation of the sentence structure provided under the Act. It is also
proposed to restrict the application of strict bail provisions to those offenders who
indulge in serious offences.

2. The Act was amended in 1989, *inter alia*, to provide for tracing, seizing and
forfeiture of illegally acquired property. The experience gained over the years reveals
that the provisions have certain inadequacies due to which the implementation of the
provisions has been tardy. Certain other inadequacies in the various provisions of the
Act have been noticed. In order to remove those inadequacies it is necessary to amend
the relevant provisions.

3. The provisions relating to certain procedural aspects like search and seizure have
certain deficiencies due to which the law enforcement efforts against illicit drug
trafficking have not proved very effective. A need has also been felt to confer powers
of entry, search, seizure, etc., in respect of offences relating to Controlled Substances
and for tracing, freezing, seizing and forfeiture of illegally acquired property upon the
empowered officers.

4. Certain obligations, especially in respect of the concept of 'Controlled Delivery'
arising from the United Nations Convention Against Illicit Traffic in Narcotic Drugs
and Psychotropic Substances, 1988 to which India acceded, also require to be
addressed by incorporating suitable provisions in the Act."

7. Section 31-A, as amended in 2001, as is applicable to the case of the petitioner in
the second petition, reads thus:-

"Death penalty for certain offences after previous conviction.--

(1) Notwithstanding anything contained in section 31, if any person who has been
convicted of the commission of, or attempt to commit, or abetment of, or criminal
conspiracy to commit, any of the offences punishable under section 19, section 24,
section 27-A and for offences involving commercial quantity of any narcotic drug or
psychotropic substance, is subsequently convicted of the commission of or attempt to
commit, or abetment of, or criminal conspiracy to commit, an offence relating to,-

(a) engaging in the production, manufacture, possession, transportation, import into
India, export from India or transshipment, of the narcotic drugs or psychotropic.

(b) financing, directly or indirectly, any of the activities specified in clause (a), shall
be punishable with death.

(2) Where any person is convicted by competent Court of criminal jurisdiction outside
India under any law corresponding to the provisions of section 19, section 24 or
section 27-A and for offences involving commercial quantity of any narcotic drug or psychotropic substance such person, in respect of such conviction, shall be dealt with for the purposes of sub-section (1) as if he had been convicted by a Court in India."

8. From the plain reading of Section 31-A of the Act, it is attracted only in cases where a person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable involving embezzlement of opium by a licensed cultivator (Section 19), unauthorised trade and external dealing in narcotic drugs and psychotropic substances (Section 24), financing illicit trafficking and harbouring offenders (Section 27-A) and for offences involving commercial quantity of any narcotic drug or psychotropic substance. If that person is subsequently convicted of the commission of or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to engaging in production, manufacture, possession, transportation, import into India, export from India or transshipment, of narcotic drugs and psychotropic substances specified in column (1) of the table in quantity equal to or more than the specified quantity in column (2) of the table or is subsequently convicted for offence of financing, directly or indirectly, with regard to activities specified in clause (a), such person is liable to be sentenced with death.

9. According to the petitioners, neither the first nor the second offence involves intentionally taking of life of any person. Besides, the said offences do not, directly or indirectly, result in killing or lethal consequences, whereas the offending acts in respect of the first and the second offences are those which are carried out without or in contravention of a licence. Further, the first offence under Sections 19, 24 or 27-A is independent of any quantity of drugs. They are distinct and not akin or similar to the second offence. Notwithstanding this, the accused is sentenced to death, as capital punishment is the only penalty specified by Section 31-A, and there is no alternative sentence. It is in this backdrop the petitioners assert that the mandatory death penalty provided in Section 31-A renders the said provision unconstitutional and violative of Articles 14 and 21 of the Constitution of India.

10. The petitioners would also rely on the International Covenants which, according to them, are also enforceable by virtue of the protection of the Human Rights Act, 1993. According to the petitioners, Articles 6 and 7 of the International Covenants on Civil and Political Rights (hereinafter referred to as "ICCPR") can be read in and/or give effect for interpreting and enforcing fundamental rights, in particular Article 21. On this premise, the petitioners assert that Section 31-A is violative of Article 21 of the Constitution, more particularly on account of denial of procedural safeguards, amongst others, right of pre-sentence hearing on the question of sentence. Further, the imposition of standardised or mandatory death penalty betrays the well-established principle that sentencing must be individualised, and ought to depend on the
circumstances of the offence as well as the offender. Similarly, the requirement of recording special reasons by the Court for imposing death penalty is completely done away with and the exercise of judicial discretion on well-recognised principles, which is the highest safeguard for the accused, and is at the core of administration of criminal justice, is impaired. That capital sentence can be prescribed only when the alternative of life sentence is unquestionably foreclosed. In any case, considering the tenor of Section 31-A, the remedy of the accused to ask for judicial review of the death penalty before the superior Court is completely denied. According to the petitioners, breach of such safeguards guaranteed to the accused renders the procedure for capital sentencing under Section 31-A unfair, unjust and arbitrary.

11. According to the petitioners, taking away the judicial discretion in the matter of sentencing inevitably impinges upon the doctrine of separation of powers and the rule of law; for, sentencing is judicial function, centered on administration of justice. Section 31-A completely eliminates judicial discretion in sentencing. That violates the constitutional norms of separation of powers and rule of law, for which reason, the provision is violative of Article 21 of the Constitution.

12. According to the petitioners, the mandatory death sentence, without alternative punishment, is substantively unfair, unjust and unreasonable. Further, the mandatory death penalty constitutes cruel, inhumane and degrading punishment. As Section 32-A of the NDPS Act forbids suspension, remission or commutation of sentence awarded under the NDPS Act, including the death sentence awarded under Section 31-A, the inevitable effect is that the person sentenced to death by virtue of Section 31-A has no remedy, even if his sentence is not administered within a reasonable time. That would, inevitably, expose such person to Death Row Syndrome on account of prolonged delay in carrying out execution, which is considered worse than execution itself. The Death Row Syndrome, being dehumanising, violates Article 21 of the Constitution. The respondents have failed to discharge the burden to establish that Section 31-A does not infringe Article 21 of the Constitution. It has merely proceeded on denial and on the premise that specifying sentence is essentially a legislative policy.

13. The petitioners have also attacked the validity of Section 31-A on the touchstone of Article 14 of the Constitution of India, which postulates that classification for the purpose of legislation must be reasonable. According to the petitioners, the distinction between persons covered by law and those left out of it should be based on an intelligible differentia; and that differentia must have a rational nexus to the object sought to be achieved by law. Whereas, the repeat offenders can be sentenced under Section 31 or Section 31-A, as the case may be. Section 31 already provides for enhanced punishment for offences after previous conviction. The offence, which is not covered by Section 31-A, may be the second or successive offences committed, but, still, the person would not face the mandatory death penalty, as is provided in
Section 31-A. Moreover, Section 31-A opens with non-obstante clause, which presupposes exclusion of application of Section 31 to person convicted for any of the offences under Sections 19, 24, or 27-A and offences involving commercial quantity, who is subsequently convicted for offences involving quantities specified in the table and for activities referred to in Section 31-A of the Act. The exclusion of such accused has no nexus with the object sought to be achieved by the Act. Accordingly, the classification so made is illogical, unfair, unjust and unreasonable.

14. The petitioners have also taken exception to the drug quantities specified in the table in Section 31-A of the Act. According to the petitioners, from the error which has crept in in the drug quantities specified in the table given in Section 31-A of the Act, it demonstrates the negligent and casual drafting by the Legislature, much less in respect of provision prescribing mandatory death penalty. Inasmuch as, the drug specified at item No. (iv) in the table, viz., Codeine, the commercial quantity thereof is specified as "1 kg" in the Act, and even under Section 31-A, the drug quantity is retained as "1 kg" for the repeat offences, unlike multiple drug quantity for other specified drugs under the same table. Moreover, the drugs listed in the table to Section 31-A, by definition, include mixture or preparation; and keeping in mind the Notification dated 18th November, 2009, which has amended the earlier Notification dated 19th October, 2001, the amount of narcotic drug or psychotropic substance involved in the offence will have to be calculated on the basis of the weight of the entire mixture or solution, and not just its pure drug content. Resultantly, it would contradict the legislative intent of imposing penalties according to the quantity of narcotic or psychotropic drug involved; and a person would be liable to death sentence under Section 31-A, even when the actual quantity of drugs, such as opium, which can be a mixture, is less than the specified quantity of 10 kg. As a result, the application of Section 31-A would be arbitrary and violative of Article 14 of the Constitution.

15. According to the petitioners, the death penalty for drug crimes is disproportionate, for which reason, it is opposed to the tenets of Articles 14 and 21 of the Constitution. Mandatory death penalty is opposed to the constitutional obligation to protect the right to life of persons accused of drug crimes. According to the petitioners, the narcotic drugs and psychotropic substances are not abhorrent, per se. They serve genuine medical and scientific needs of the community, and, as such, are beneficial to society. Engaging in the production, manufacture, possession, transportation, import and export or transshipment of narcotic drugs and psychotropic substances, even in the quantities specified in the table to Section 31-A, is not, per se, illegal. Those activities are penalised, when they are carried out without a licence, or in contravention of the terms and conditions prescribed in the licence. According to the petitioners, the mere absence of, or derogation from a licence, cannot warrant the extreme penalty of capital sentence.
16. Further, trafficking of drugs, even in the quantities specified under Section 31-A, does not, directly or indirectly, cause loss of life. In that sense, it is not the most serious offence, which alone can be considered for providing death penalty. In addition, the consumption of drugs itself does not cause death. Even in the case of drug dependent, addiction itself does not cause death. The drug dependent person can recover from addiction after treatment, education, after care, rehabilitation and social re-integration, and the NDPS Act itself provides for such measures. Even for most serious crimes, such as under the provisions of the Unlawful Activities (Prevention) Act, 1967 and the Maharashtra Control of Organised Crime Act, 1999, which deal with terrorist activities and other serious crimes, the mandatory punishment of death sentence is not provided for. At any rate, the repeat drug crimes do not constitute rarest of rare case for justifying imposition of death penalty.

17. According to the petitioners, recidivism, *per se*, cannot be the basis for sending a person to gallows, and more so, in the context of the dictum of the Apex Court that even a second conviction for murder does not automatically qualify it as a rarest of rare crime deserving capital punishment. It is the case of the petitioners that a repeat conviction for drug trafficking covered by Section 31-A of the Act resulting in a mandatory death sentence is unduly harsh and excessive, for which reason, it falls foul of the principle of proportionality under Article 14, read with Article 6 (2) of the ICCPR. According to the petitioners, the State has not discharged the burden to justify that Section 31-A is not unfair and arbitrary under Article 14 of the Constitution.

19. In the second Writ Petition, attempt has been made by the petitioner to additionally persuade us to interpret Section 31-A of the Act so as to define the sweep and application of the said provision. Relying on the facts applicable to that case, it was argued that the petitioner has been convicted and sentenced under Section 31-A of the NDPS Act in respect of offence unravelled by the NCB officers on 13th February, 2002, when commercial quantity of charas was seized from the premises belonging to the petitioner. On that day, however, the petitioner/original accused No. 1 was not convicted of offence specified under Section 19, 24 or 27-A of the NDPS Act, with the result that Section 31-A was clearly inapplicable. In the present judgment, however, we would confine the discussion only on the question of validity of Section 31-A of the NDPS Act and not its application.

20. As constitutional validity of the Central Legislation was put in issue, notice was issued to the Attorney General of India, who is now represented by the learned Additional Solicitor General. These petitions are opposed by the respondents. Although it was argued that the Court should not decide the question pertaining to the constitutionality of Section 31-A of the NDPS Act in a petition filed by the first petitioner- Society, which is in the nature of Public Interest Litigation, however, it is fairly accepted that the said challenge, in any case, will have to be answered in the
second petition filed by the original accused No.1 in NDPS Case No. 60 of 2002, who has been convicted and sentenced to death penalty under Section 31-A of the Act.

21. The substance of the argument canvassed on behalf of the respondents is that the death penalty, per se, is not unconstitutional. Relying on the decisions of the Apex Court, it was argued that the death penalty cannot be considered as "cruel and unusual punishment". Further, the due process clause for free application is not relevant in the Indian context. The death penalty is justified as a social defence and for economic offences for private profit, such as that in the case of narcotics. Further, the collective conscience of the community is so shocked that it expects the holders of judicial power to inflict the death penalty. In matters covered by Section 31-A, death penalty does not violate Article 21 of the Constitution. There are sufficient procedural safeguards which are observed before pronouncing the mandatory death penalty. The sentencing is, essentially, a legislative policy. Whether to grant the Courts any discretion in sentencing is also Legislature's prerogative. The mandatory death penalty provided in Section 31-A is in the nature of minimum sentence in respect of repeat offences by the same offenders of specified activities and for offences involving drugs quantity specified in column 2 of the table. It is not open to the Court to reduce the minimum sentence, when provided for by the Legislature.

22. According to the respondents, the 1989 amendment contained a package of amendments designed to strengthen the NDPS Act, including insertion of Section 31-A. The legislative competence to enact Section 31-A of the Act has not been challenged by the petitioners. At the same time, the offences falling under the NDPS Act have been held to have deleterious effect and deadly impact on society as a whole. The Apex Court has, time and again, held that narcotic crimes are more heinous than murder. It is then contended that the quantity of drugs specified in Section 31-A is in multiples of the commercial quantity specified in clauses (viia) and (xiiiia) of Section 2 of the NDPS Act. Insofar as mixture at serial No. (iv) in the table in Section 31-A, i.e., Codeine, it is fairly accepted that the quantity specified is 1 kg., which is the same as commercial quantity provided for.

24. It is then contended that the death sentence in Section 31-A provided for a second conviction is far less stringent than the mandatory death sentence for narcotics in several countries such as Bangladesh, Indonesia, Malaysia, Pakistan, Singapore and Thailand, where death sentence is provided for quantity of narcotics far less than the quantity of drugs specified in Section 31-A of the Act. It was argued that mandatory death penalty provided in Section 31-A is not violative of Articles 21 or 14 of the Constitution, as the same specifies the requirements of procedural due process. The classification made by Section 31-A is between first-time offender and repeat offender engaged in dealing with huge quantity of drugs. It is reasonable and is based on intelligible differentia. It has nexus with the objects of the Act, viz., stricter control
and deterrence in relation to narcotic crimes - more heinous than murder and anti-social in nature. The classification between Section 31 and 31-A is also rational, given the nature of repeat offences set out in Section 31-A. It is contended that the proportionality of punishment in cases of mandatory or minimum sentence is a matter for Legislature to decide as policy. The Court cannot sit in substantive judgment over Parliament's legislative determination of what punishment is appropriate. It is contended that there is no encroachment on the domain of the judiciary. It is the Parliament which gives the Judiciary a discretion that sentencing moves into the judicial domain.

25. Insofar as the International Conventions pressed into service by the petitioners, it is argued that all the Conventions have an article which expressly states that a party-State to the Convention may adopt more stricter or severe measures of control than those provided by the Convention, if such measures are desirable or necessary for the protection of public health and welfare. Similarly, the International Reports relied upon by the petitioners also contain the qualification that death should be provided only for the most serious crimes, apart from providing that no one shall be subject to cruel, inhumane or degrading punishment. According to the respondents, the jurisprudence in India differs from the foreign jurisdictions. In India, the death penalty is provided even for economic, social or political crime. Moreover, death penalty has been held not to constitute "cruel and unusual punishment". It is contended that, for International Conventions and Treaties to be recognized as law, overriding any conflicting domestic law, Parliament has to legislate under Article 253 of the Constitution. The municipal law of India will always prevail over International Conventions in the case of any conflict, if there is no overriding law enacted by Parliament under Article 253. In other words, the enacted laws by Parliament can, in no way, be circumscribed by the International Conventions or Treaties.

It is then submitted that there is a presumption in favour of the constitutionality of a statute; and the burden is always upon the person who attacks it to show that there has been a clear transgression of a constitutional provision. Further, the Court should, ordinarily, defer to the wisdom of the Legislature, unless it enacts a law about which there can be no manner of doubt about its unconstitutionality. The Legislature is the best judge of what is good for the community, by whose suffrage, it comes into existence. If two views are possible, one making the provision in the statute constitutional and the other making it unconstitutional, the former should be preferred. It was submitted that the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving the statutory provision a strained meaning or narrower or wider meaning than what appears on the face of it. The Court should declare a statute to be unconstitutional only when all efforts to uphold the constitutional validity fails. At the end, alternative argument is addressed that, in the event the Court were to hold that Section 31-A of the Act is
unconstitutional, in that case, the expression 'shall' in Section 31-A, which is indicative of death penalty as mandatory, be read as 'may'. In that case, the legislation will be saved, and the Court will retain its sentencing discretion not to award death sentence in appropriate cases, and, instead, award sentence of imprisonment, as provided in Section 31 of the NDPS Act. Discretionary death sentence will preserve the judicial discretion in sentencing. The punishment provided in Section 31 can be read as alternative to death sentence under Section 31-A. It was submitted that, following the analogy, where a Court frames a charge on a major count, the law does not provide that it should also frame a charge under the minor count. Thus, even if the charge framed to be one under Section 31-A (major count) of the Act, there is no reason why the conviction and sentencing cannot be proceeded also under Section 31 (minor count) of the Act. Accordingly, the respondents contend that the petitions are devoid of merits, and be dismissed.

27. Indubitably, the petitioner has not challenged the validity of Section 31-A of the NDPS Act on the ground of lack of legislative competence as such. Whereas, the challenge is limited to the said provision, being violative of Articles 14 and 21 of the Constitution of India. The Constitution Bench of the Apex Court in Bachan Singh v. State of Punjab, reported in (1980) 2 SCC 684 dealt with the challenge to Section 302, prescribing death penalty, being violative of the Constitution. The said decision has considered the earlier two Constitution Bench decisions in Jagmohan Singh v. State of Uttar Pradesh (1973) 1 SCC 20 and Rajendra Prasad v. State of Uttar Pradesh (1979) 3 SCC 646.

28. One of the argument in Bachan Singh's case (supra) was that the provision of death penalty in Section 302 of the Indian Penal Code offended Article 19 of the Constitution. In that, death penalty serves no social purpose and its value as a deterrent remains unproven and defiles the dignity of individual so solemnly vouchsafed in the Preamble of the Constitution, its imposition must be regarded as "unreasonable restriction" amounting to total prohibition on the freedom guaranteed in Article 19(1).

30. The Apex Court proceeded to apply the test to consider the validity of Section 302 of the Penal Code which prescribes death or imprisonment for life for murder.

"61. Now, let us apply this test to the provisions of the Penal Code, in question. Section 299 defines 'culpable homicide' and Section 300 defines culpable homicide amounting to murder. Section 302 prescribes death or imprisonment for life as penalty for murder. It cannot, reasonably or rationally, be contended that any of the rights mentioned in Article 19(1) of the Constitution confers the freedom to commit murder or, for the matter of that, the freedom to commit any offence whatsoever. therefore, penal laws, that is to say, laws which define offences and prescribe punishment for the commission of offences do not attract the application of Article 19(1). We cannot, of
course, say that the object of penal laws is generally such as not to involve any violation of the rights conferred by Article 19(1) because after the decision of this Court in the Bank Nationalisation case the theory, that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental, right of the individual is irrelevant, stands discredited. But the point of the matter is that, in pith and substance, penal laws do not deal with the subject matter of rights enshrined in Article 19(1). That again is not enough for the purpose of deciding upon the applicability of Article 19 because as the test formulated by us above shows, even if a law does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), if the direct and inevitable effect of the law is such as to abridge or abrogate any of those rights, Article 19(1) shall have been attracted. It would then become necessary to test the validity of even a penal law on the touchstone of that Article. On this latter aspect of the matter, we are of the opinion that the deprivation of freedom consequent upon an order of conviction and sentence is not a direct and inevitable consequence of the penal law but is merely incidental to the order of conviction and sentence which may or may not come into play, that is to say, which may or may not be passed. Considering therefore the test formulated by us in its dual aspect, we are of the opinion that Section 302 of the Penal Code does not have to stand the test of Article 19(1) of the Constitution."

33. The Court then proceeded to examine the age-old debate between Abolitionists and Retentionists. The Court noted that, while dealing with the procedural aspects of the problem, in India, ample safeguards have been provided by law and the Constitution which almost eliminate the chances of an innocent person being convicted and executed for a capital offence. In paragraph 101, the Court opined that, whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved, either way, because statistics as to how many potential murderers were deterred from committing murder, but for the existence of capital punishment for murder, are difficult, if not altogether impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel as they may remain hidden in the innermost recesses of their mind. The Court then noticed that it is a common phenomenon in all the civilized countries that some murders are so shockingly offensive that there is a general outcry from the public for infliction of the ultimate penalty on the criminal.

34. On detailed analysis of the debate on the two opposite views in paragraph 132 of the reported judgment, the Court concluded thus:-

"132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to
death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the CrPC, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter or the ethos of Article 19.

35. In the case of Bachan Singh (supra), while analysing the dictum in the case of Jagmohan, the Constitution Bench, in paragraph 197, had noted thus:-

"197. In Jagmohan, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since Jagmohan - as we have discussed already - do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability: (2) In
making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also."

36. Indeed, in Bachan Singh's case (supra), the dictum in the case of Rajendra Prasad has been explained on two aspects. Firstly, the Court noted in paragraph 201 that, on conjoint reading of Section 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear that, for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. Secondly, in paragraph 204 in Bachan Singh's case, the Court noted that it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and Society, public order and the interests of the general public, may provide 'special reasons' to justify the imposition of the extreme penalty on the person convicted of such a heinous murder. But it was not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible.

37. In paragraph 209, the majority view in Bachan Singh's case (supra) summed up thus:

"209. .......... "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society."

…A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

39. In paragraph 83 of Rajendra Prasad's case, the Court summarised the guidelines to facilitate easier application and to inject scientific formulation. What is relevant for our consideration is that the Court has noticed that in the post-constitution, the penal provisions have to be read in the humane light of parts III and IV, further illumined by the preamble to the Constitution. That deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea. The personal and social, the motivational and physical circumstances, "of the criminals" are relevant factors in adjudging the penalty. So also the intense suffering already endured by prison torture or agonising death penalty hanging overhead consequent on the legal process. It is also held that offences such as train dacoity and bank robbery bandits, reaching menacing proportions, "economic offenders profit - killing in an intentional and organised way", are some exceptional ones validating death penalty. The Court may take into account the factum of planned motivation that goaded the accused to commit the crime. The Court noted that with the development of the complex industrial Society, there has come into existence a class of murderers who indulge in a nefarious activity solely for personal monetary or property gain. These white-collar criminals in appropriate cases do deserve capital punishment as the
law now stands, both as deterrent and as putting an end to an active mind indulging in incurably nefarious activities. It is held that in certain class of cases, social justice to defend the Society would validate death penalty. To wit, the crime may be less shocking than other murders and yet the callous criminal, e.g. a lethal economic offender, may be jeopardizing societal existence by his act.

40. Thus, there is hardly any doubt that death penalty, per se, in the Indian context, is not at all impermissible and the Legislature is competent to provide for such penalty within the framework of our Constitution. The petitioners have, therefore, advisedly restricted their challenge to Section 31-A of the NDPS Act, being violative of Articles 14 and 21 of the Constitution of India.

41. Reverting to the challenge that the standardised, mandatory death penalty stipulated by Section 31-A of the NDPS Act being violative of Article 21 of the Constitution, the argument is that the said provision is unfair, unjust and unreasonable. Article 21 of the Constitution guarantees that no person shall be deprived of his right to life and personal liberty, except according to procedure established by law. The expression "procedure established by law" pre-supposes that the law must itself be substantively fair, just and reasonable.

42. Reliance has been placed on Article 6 of the ICCPR which, according to the petitioners, grants protection against the arbitrary extinction of the right to life. It provides that every human being has the inherent right to life. That right shall be protected by law. Further, no one shall be arbitrarily deprived of his right. According to the petitioners, the Indian Constitution is ingrained by humanistic values that respect the sanctity and dignity inherent in life, whereas capital punishment puts an end to life, which is final and irreversible. For that reason, the death penalty must be only an exceptional measure, as it is cruel, inhuman and degrading punishment and affronts human dignity.

43. It is further argued that the Constitution permits deprivation of life, subject to observance of procedure such as pre-sentence hearing - giving right to the accused person to be heard on the question of sentence, which is a salutory condition for a fair trial. Further, the sentencing of accused must be individualised and ought to depend on facts of each case. The Courts are obliged to consider the aggravating and mitigating factors associated with the offence as well as the offender. The offenders are of what circumstances, whether young or old, sick or mentally infirm, socially or economically disadvantaged or acting under duress or pressure, are relevant factors for determining the punishment to be imposed. On account of standardised, mandatory death penalty provided by Section 31-A of the NDPS Act, these factors would be rendered irrelevant. In a given case, the person may be a drug carrier, in another, an intermediary or the organiser of the crime. They cannot be pulled together so as to apply the standardised, mandatory death penalty sentence merely because he
happens to be a repeat offender of the specified activities and dealing in stated quantity of the drugs. As a result of mandatory death penalty under Section 31-A, the Court is not required to assign any reason, much less special reasons, for awarding capital punishment which ought to apply only in rarest of rare cases. The provision such as Section 31-A renders the mandate under Section 235 (2) and Section 354 (3) of the Criminal Procedure Code, which apply to all other cases under the ordinary law, as well as other crimes under the NDPS Act as otiose. As a matter of fact, the possibility of enhanced punishment for repeat offenders is already provided for in the form of Section 31 of the NDPS Act. It is not as if the sentence provided in Section 31 of the NDPS Act for repeat offenders may not be sufficient, or subserve the object sought to be achieved by the said Act.

44. It is further argued that the remedy of review of death sentence by the superior Court is completely snapped by virtue of Section 31-A of the Act, as the enquiry to be made by the superior Court would be limited to the finding of guilt recorded by the subordinate Court. If the superior Court were to affirm that finding, then, it would have no option but to confirm the mandatory death penalty awarded by the subordinate Court. Thus, neither the trial Court nor the superior Court has any judicial discretion to consider whether awarding death penalty in the facts and circumstances of the case after giving due weightage to aggravating and mitigating factors associated with the offence as well as the offender would be warranted at all or otherwise.

46. The respondents, however, would contend that there are sufficient procedural safeguards in the Criminal Procedure Code, and the death penalty, per se, does not violate Article 21 of the Constitution at all. Instead, the said Section 31-A of the NDPS Act specifies the requirement of procedure due process. According to the respondents, the argument of the petitioners regarding non-compliance of certain procedure is essentially in respect of substantive due process, which is not part of our Constitution. Moreover, it has been repeatedly held by the Apex Court that death penalty, per se, under Section 31-A does not inflict a cruel and unusual punishment, nor does it degrade or lower the dignity of the individual.

47. Having given thoughtful consideration, it appears that the abovesaid contention regarding Section 31A of the NDPS Act being violative of Article 21 of the Constitution pressed into service on behalf of the petitioners deserves acceptance. In the case of *Mithu*, the provision of Penal Code containing similar standardised, mandatory death penalty was put in issue. The validity of Section 303 of the Indian Penal Code was challenged, inter alia, being violative of Article 21 of the Constitution. Even in that case, the argument was that Section 303 creates an absolute liability in ignorance of several important aspects of cases which attracts the application of that section and all questions which are bound to arise under it. The sum and substance of the argument was that the provision contained in Section 303
was wholly unreasonable and arbitrary, and thereby, it violated Article 21 of the Constitution, which affords the guarantee that no person shall be deprived of his right to life and personal liberty, except in accordance with the procedure established by law. The Court noted that, since the procedure by which Section 303 authorised the deprivation of life was unfair and unjust, the section was unconstitutional. For recording this opinion, the Court adverted to the development of law as expounded in Maneka Gandhi's case (supra). The larger Bench (7 Judges) of the Apex Court has held that a statute, which merely prescribes "some kind of procedure" for depriving a person of his life and liberty, cannot ever meet the requirements of Article 21. Instead, the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The Court also adverted to the dictum in Sunil Batra v. Delhi Administration, reported in (1978) 4 SCC 494, which had considered the question as to whether a person awaiting death sentence can be kept in solitary confinement. In that decision, it was noted that, though our Constitution did not have a "due process" clause as in the American Constitution, the same consequence ensued after the decisions in the Banks' Nationalisation Case (supra) and Maneka Gandhi (supra). The Court also referred to the dictum in Bachan Singh (supra), which upheld the constitutional validity of the death penalty. It proceeded to hold that these decisions have expanded the scope of Article 21 in a significant way, and it is now too late in the day to contend that it is for the Legislature to prescribe the procedure and for the Courts to follow it; that it is for the Legislature to provide the punishment and for the Courts to impose it.

48. In the context of the stand taken by the respondents in that case that the ratio of Bachan Singh would apply; and the question as regards validity of Section 303 must be treated as concluded by that decision, the Court noted that the same suffered from two defects: firstly, because it is founded on misunderstanding of the decision in Bachan Singh, and secondly, there was an essential distinction between the provisions of Sections 302 and 303. The Court went on to observe that the majority decision in Bachan Singh did not lay down any abstract proposition that "death sentence is constitutional", that is to say, that "it is permissible under the Constitution to provide for the (mandatory) sentence of death". Instead, the question which arose for consideration in Bachan Singh was: whether Section 302 of the Indian Penal Code, which provides for the sentence of death as one of the two alternative sentences is valid?

While answering the said issue, the Court opined that the majority in Bachan Singh's case concluded that Section 302 of I.P.C. is valid for three main reasons: firstly, that the death sentence provided for by Section 302 "is an alternative" to the sentence of life imprisonment; secondly, that special reasons have to be stated if the normal rule is departed from and the death sentence has to be imposed; and, thirdly, because the accused is entitled, under Section 235 (2) of the Code of Criminal Procedure, to be
heard on the question of sentence. The Court then noticed that the last of these three reasons becomes relevant, only because of the first of these reasons. The Court re-stated that it is because the Court has an option to impose either of the two alternative sentences, subject to the rule that the normal punishment for murder is life imprisonment, that it is important to hear the accused on the question of sentence; and, if the law provides a mandatory sentence of death, neither Section 235 (2) nor Section 354 (3) of the Code of Criminal Procedure can possibly come into play. For, the Court can have no option, except to impose the sentence of death. In such a situation, it would be meaningless to hear the accused on the question of sentence, and it becomes superfluous to state the reasons for imposing the sentence of death. In paragraph 7 of the reported decision, the Court opined as follows:-

"The ratio of Bachan Singh, therefore, is that, death sentence is Constitutional if it is prescribed as an alternative sentence for the offence of murder and if the normal sentence prescribed by law for murder is imprisonment for life." (emphasis supplied)

51. Accordingly, the Court, in the first place, proceeded to analyse as to whether there is any rational justification for making a distinction in the matter of punishment between persons who commit murders while they are under the sentence of life imprisonment as distinguished from those who commit murders while they are not under the sentence of life imprisonment. The Court opined that the test of reasonableness of classification was not fulfilled. As a result, it held that it is difficult to hold that the prescription of the mandatory sentence of death answers the test of reasonableness.

52. One of the crucial facet which is relevant for our purpose that weighed with the Court, while answering the controversy before it is that, it held that the provision, which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed, and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. This is not a casual observation made by the Court or in the nature of obiter dicta. The statement of law that can be culled out from this exposition is that a provision of law, which takes away the judicial discretion for sentencing the convict after reckoning aggravating and mitigating circumstances in which the offence was committed and of the offender as well, particularly in a matter of life and death, would necessarily be harsh, unjust and unfair. In other words, it would violate the guarantee provided in Article 21 of the Constitution that the procedure established by law must be a just and fair procedure. In the same paragraph, the Court noted that the measure of punishment for an offence is not afforded by the label which that offence bears. But the gravity of the offence furnishes the guidelines for punishment, and one cannot determine how grave the offence, without having regard to the circumstances in which it was committed, its motivation and its
repercussions. The Court opined that the Legislature cannot make relevant circumstances irrelevant, deprive the Courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. It also held that equity and good conscience are the hallmarks of justice. This statement of law is still holding the field.

53. The Court went on to observe that the convict must get an opportunity to show cause why he should not be sentenced to death. And on accepting that plea, the Court would be relieved from its obligation to record special reasons for awarding death sentence. Further, deprivation of these rights and safeguards will inevitably result in injustice and harsh, arbitrary and unjust.

55. While delivering separate but concurring opinion, Justice Chinnappa Reddy pithily observed as follows:-

"23. Section 303, Indian Penal Code, is an anachronism. It is out of tune with the march of the times. It is out of tune, with the rising tide of human consciousness. It is out of tune with the philosophy of an enlightened Constitution like ours. It particularly offends Article 21 and the new jurisprudence which has sprung around it ever since the Banks Nationalisation case freed it from the confines of Gopalan. After the Banks Nationalisation case, no article of the Constitution guaranteeing a Fundamental Right was to lead an isolated existence. ...” “Maneka Gandhi carried Article 21 to nobler rights and made it the focal point round which must now revolve to advantage all claims to rights touching life and liberty. If Article 21 declared, "No person shall be deprived of his life or liberty except according to procedure established by law," the Court declared, without frill or flourish, in simple and absolute terms: The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary", (Chandrachud, J, as he then was).

25. Judged in the light shed by Maneka Gandhi and Bachan Singh, it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional."

56. In the recent decision of the Apex Court in the case of Rameshbhai Rathod (supra), the Apex Court (bench of two Judges) in paragraph 106, re-stated the legal position as follows:-
"106. Therefore fairness, justice and reasonableness which constitute the essence of guarantee of life and liberty epitomised in Article 21 of the Constitution also pervades the sentencing policy in Sections 235(2) and 354(3) of the Code. Those two provisions virtually assimilate the concept of "procedure established by law" within the meaning of Article 21 of the Constitution. Thus, a strict compliance with those provisions in the way it was interpreted in Bachan Singh having regard to the development of constitutional law by this Court, is a must before death sentence can be imposed."

57. Relying on the dictum in paragraph 174 in *Bachan Singh’s* case, it was argued on behalf the respondents that the quantum of punishment, including the question as to whether discretionary jurisdiction should be provided for considering the issue of sentence is a policy matter, which belongs to the sphere of legislation. It was argued that the death penalty prescribed in Section 31-A was in the nature of minimum sentence for the offences referred to in the said provision. If so, it was not open to the Court to disregard the said legislative intent.

The argument, though attractive, is founded on misunderstanding of the ratio of *Bachan Singh's* case. The ratio of *Bachan Singh's* case has been restated in *Mithu's* case. Besides, the dictum in paragraphs 174 and 175 in *Bachan Singh’s* case is in the context of the question considered as to whether it was possible to standardise the punishment, instead of leaving it to the judicial discretion. That question arose on the argument that the provisions containing alternative death penalty did not provide for any guidelines for the Court to be observed before awarding extreme penalty. In *Jagmohan's case*, the Constitution Bench addressed the said issue, and was of the opinion that standardisation of sentencing is well nigh impossible. That opinion has been quoted with approval in *Bachan Singh’s* case. In paragraph 172 in *Bachan Singh's* case, the Court further observed that criminal cases do not fall into set behaviouristic patterns. Even within a single-category offence, there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. The Court went on to observe that a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. The Court further observed that there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty. Having said this, the Court, even in paragraph 174 of the same judgment on which emphasis was placed by the respondents, went on to observe that it was "sound legislative policy" of the Parliament of not providing for standardised mandatory punishment. This means that judicial discretion in sentencing in the matter of life and death is the hallmark of a just
and fair procedure within the meaning of Article 21 of the Constitution. It is, therefore, difficult to agree with the submission of the respondents that the observation in this decision validates the provision providing for mandatory death penalty, such as Section 31-A of the NDPS Act.

Suffice it to observe that the opinion in Bachan Singh's case, as understood in Mithu's case, is that equity and good conscience are the hallmarks of justice, and no discretion left to the Court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In other words, the use of wise and beneficent discretion by the Court in a matter of life and death after reckoning the circumstances in which the offence was committed and that of the offender is indispensable; and divesting the Court of the use of such discretion and scrutiny before pronouncing the preordained death sentence cannot but be regarded as harsh, unjust and unfair, thereby violative of the tenets of Article 21 of the Constitution. Bachan Singh's case has quoted the opinion in Jagmohan's case with approval that impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. The discretion in the matter of sentence is to be exercised by the judge judicially, after balancing all the aggravating and mitigating circumstances of the crime. The discretion is liable to be corrected by the superior Court. These are the safest possible safeguards for the accused guaranteed by Article 21 of the Constitution of India.

59. As aforesaid, the opinion of Bachan Singh, as understood in the subsequent decision of the Apex Court in Mithu's case, is the governing exposition to answer the argument of the respondents. A priori, neither the argument of standardisation nor sentencing being a legislative policy matter, which exclusively belongs to the sphere of legislation or that the punishment specified in Section 31-A is in the nature of minimum sentence, can be countenanced to sustain the mandatory death penalty provision. As observed in Mithu's case, it is too late in the day to contend that it is for the Legislature to prescribe the procedure and for the Courts to follow it; that it is for the Legislature to provide the punishment and for the Courts to impose it. Whereas, the mandate of Article 21 of the Constitution predicates that the last word on the question of justness and fairness of the procedure prescribed by law does not rest with the Legislature, but it is for the Courts to decide whether the prescription of mandatory death penalty by law depriving the person of his life and liberty is fair, just and reasonable.

60. As aforesaid, the legal position expounded in the case of Bachan Singh and Mithu is still holding the field. The deficiency regarding the fairness and reasonableness noticed by the Apex Court in the case of Mithu squarely apply to Section 31-A of the NDPS Act. Even in Section 31-A of the NDPS Act, there is no
option to the Court, but to award preordained death penalty. The death penalty provided for is not an alternative sentence for the repeat offence of specified type. The sentencing under Section 31-A is standardised, mandatory death penalty, and not individualised sentencing, after giving due weightage to the aggravating and mitigating factors associated with the offence and the offender. Further, even though the sentence provided under Section 31-A is of death penalty, the Court is not required to record special reasons, unlike the other crimes under the ordinary law or, for that matter, other offences under the provisions of the NDPS Act, as is required under Section 354(3) of the Code. Similarly, the pre-sentence hearing as required by Section 235(2) of the Criminal Procedure Code has been rendered irrelevant and an empty formality only in so far as the offence covered by Section 31 A of the NDPS Act. Notably, there is no express provision in the NDPS Act to override the mandate of Sections 235(2) and 354(3) of the Code. Indeed, Section 31-A is a non-obstante clause, but it is limited to Section 31 of the NDPS Act. It does not impact the procedure prescribed by the Code, much less the mandatory provision prescribing the procedure to be followed before pronouncing the sentence such as death penalty, epitomised in Article 21 of the Constitution, which implicitly guarantees judicial discretion in the matter of sentencing, keeping in mind the facts of each case concerning the circumstances in which the offence took place and also of the offender.

61. Suffice it to observe that the purport of Section 31-A of the NDPS Act, which provides for mandatory death penalty fails to fulfill the cardinal procedure and safeguards of legitimate exercise of judicial discretion for sentencing the convict after reckoning the aggravating and mitigating circumstances in which the offence was committed and of the offender. Considering the mandate of Section 31-A of the Act, it would necessarily follow that there would be no review of death sentence. In that event, the jurisdiction of the superior Court will be circumscribed only to examine the finding of guilt recorded against the convict, and nothing more. This has the inevitable effect of infracting the guarantee under Article 21 of the Constitution of India. It is common ground that, except the decision in the case of Mithu, there is no other judgment of the Indian Court on the point of validity of a provision containing mandatory death penalty. We, therefore, do not think it necessary to dilate on the dictum of other authorities on the point under consideration.

62. The respondents would, however, argue that the enactment of the NDPS Act, and more particularly, Section 31-A, will have to be considered, keeping in mind the oft-repeated observations of the Supreme Court that narcotic offences cause a deleterious effect and deadly impact on the society as a whole; and that narcotic crimes were more heinous than murder [see Union of India v. Kul dip Singh 2004 (2) SCC 590, Union of India v. Ramsingh (1999) 9 SCC 429, Intelligence Officer, NCB v. Sambhu Sonkar (2001) 2 SCC 562, Jasbir Singh v. Vipin Kumar Jaggi AIR 2001
SC 2734. It was argued that death sentence under Section 31-A is provided for a second conviction, which is far less stringent than mandatory death sentence for narcotics in several countries such as Bangladesh, Indonesia, Malaysia, Pakistan, Singapore and Thailand. In those countries, mandatory death sentence is provided where the quantity of narcotics is far less than the quantity of narcotics provided for in Section 31-A of the Act.

63. There is no reason to doubt that the offences relating to narcotic drug or psychotropic substances are more heinous than culpable homicide. For, the latter affects only an individual, while the former affects and leaves its deleterious effect on the society, besides crippling the economy of the nation as well. At the same time, we cannot be oblivious of the scheme of the NDPS Act. It was enacted to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from or used in illicit traffic in narcotics drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances, to which India was a party. Thus, it is an enactment to regulate and control the cultivation, production, manufacture, possession, transportation, import into India, export outside India and transshipment, of narcotic drugs and psychotropic substances, except for medical and scientific reasons. The Act, however, permits/authorises the specified activities through licence. It makes the activities of dealing in excessive quantity of drugs unlawful. The offences so committed may pertain to small quantity or greater than small quantity, but less than commercial quantity or commercial quantity, as the case may be. The quantity of drugs has been specified in the Act covered within the three sets of categories. The Act provides for structured punishment, depending on the quantity of drugs. The Act makes the attempt to commit offence as well as accessory to crime and aiding and abetting and criminal conspiracy punishable in the same manner as in the case of principal offence. Even preparation to commit certain offences is made punishable. Notably, Section 31 of the Act provides for enhanced penalty in respect of repeat crimes. For offences where the minimum penalties are prescribed, a Court can take into consideration factors that it may deem important as well as additional factors enlisted in the statute. Suffice it to observe that the standardised mandatory death penalty specified in respect of cases covered under Section 31-A of the Act completely takes away the judicial discretion, nay, abridges the entire procedure for administration of criminal justice of weighing the aggravating and mitigating circumstances in which the offence was committed as well as that of the offender. Moreover, considering the cases covered by Section 31-A of engaging in production, manufacture, possession, transportation, import into India, export from India or transshipment, of narcotic drugs and psychotropic substances referred to in column (1) of the table contained therein and involving the quantity which is equal to or more than the quantity indicated
against each such drug or substance as specified in column (2) of the said table or of
financing, directly or indirectly, any of the activities specified in clause (a) is made
punishable with death. It is incomprehensible as to why the offences covered by
Section 31-A of the NDPS Act cannot be suitably dealt with under the alternative
enhanced punishment under Section 31 of the Act, which also applies to repeat
offenders. The fact that Section 31-A deals with specific cases for offences involving
quantity which is equal to or more than the quantity indicated against the specified
drugs or substances does not make the requirement of weighing the aggravating and
mitigating circumstances of the offence and also of the offender, less relevant.
65. An attempt was made by the learned Additional Solicitor General to persuade us
to hold that Mithu's case, essentially, dealt with the efficacy of Section 303 of Penal
Code in contradistinction to the provision in Section 302 of the Penal Code. We do
not think that the opinion in Mithu's case is of such limited import. The judgment
deals with the development of law, in view of the expansive requirements of Article
21, and opines that the decisions on the point have expanded the horizon of Article 21
in a significant way. The exposition in Mithu's case is, thus, not limited to the
consequences arising from or flowing from Section 303 of the Penal Code alone, but
also govern the requirements of Article 21 of the Constitution. Indeed, we may not
agree with the argument of the petitioners that death penalty, per se, constitutes cruel,
inhuman and degrading punishment. That argument is no more res integra, as the
Apex Court has, time and again, negatived that argument.
66. Reliance was placed on Article 7 of the ICCPR, which provides that no one shall
be subjected to cruel, inhuman or degrading punishment. That argument need not
detain us, in view of the well-established position expounded by the Supreme Court
that, as per the municipal law and the constitutional scheme as applicable in India,
providing for death penalty is within the domain of the Legislature. Further, the
International Covenants and judicial decisions cannot be the basis to overlook the
express provision in the municipal law. Even the argument of the petitioners that the
provisions of the International Covenants are enforceable, per se, in India, will have to
be negatived for the same reason. Further, the definition of expression "human rights"
occurring in Section 2(d) of the Protection of Human Rights Act, 1993 would not take
the matter any further. In that, it plainly provides that the rights embodied in the
International Covenants and enforceable by Courts in India alone encompass the
expression "human rights" within the meaning of Section 2(d) of that Act. As
aforesaid, in matters of express provision in the Municipal law, the same shall prevail.
67. It is then contended that even if the Court were to convict and award death
penalty, invariably, in India, the execution thereof does not take place within a
reasonable time. That results in the accused suffering the agony of Death Row
Syndrome. Moreover, in the NDPS Act, the suspension, remission or commutation of
sentences awarded under the NDPS Act, including the death sentence awarded under Section 31-A of the Act, is forbidden. Relying on the exposition in *Ediga Anamma v. State of Andhra Pradesh* (1974) 4 SCC 443; *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68; and *Triveniben v. State of Gujarat*, (1988) 4 SCC 574, it was contended that penalty provided in Section 31-A would subject the convicts to cruel and inhuman treatment and encroach upon protection accorded under Article 21 of the Constitution. In the first place, delay in execution of death penalty is essentially on account of the successive attempts made by the accused and his relatives by way of representation for commutation of the death penalty to life sentence. As commutation of sentence even in respect of death penalty awarded in respect of offence under the NDPS Act has been forbidden, there would be no occasion for delay in execution thereof. At any rate, this argument cannot be the basis to test the validity of the procedure prescribed by Section 31-A of the Act. In a given case, due to unreasonable and inexplicable delay in execution of death penalty awarded under Section 31-A of the NDPS Act whether it impinges upon any of the constitutional rights of the concerned convict is a matter to be addressed independently. We do not intend to traverse the said argument as it is not relevant to the point in issue. For, we are presently called upon to consider the question only of constitutional validity of Section 31-A of the Act being violative of Article 21 of the Constitution.

69. That takes us to the challenge to Section 31-A of the NDPS Act, being violative of Article 14 of the Constitution. The argument is that the classification for the purpose of legislation has to be reasonable, in that (i) the distinction between persons covered by law and those left out of it be based on intelligible differentia and (ii) that differentia have a rational nexus to the object sought to be achieved by law. To buttress this submission, reliance is placed on the exposition of the Apex Court in the cases of *D.S. Nakara v. State* (1983) 1 SCC 305, and *E.P. Royappa v. State of Tamil Nadu* (1974) 4 SCC 3. According to the petitioners, the classification of repeat offenders covered by Section 31-A is arbitrary. Inasmuch as, Section 31-A of the NDPS Act deals with recidivism strictly. In cases where the offender has engaged himself in successive crimes, under other provisions of the NDPS Act, is already dealt with under Section 31 of the Act. The penalty upon subsequent conviction extends to one half of the maximum term of imprisonment and one half of the maximum amount of fine for that offence. Whereas, the penalty under Section 31-A is death. According to the respondents, however, the classification made by Section 31-A between first-time offenders and repeat offenders is reasonable, based on intelligible differentia, and has a nexus with the object of the NDPS Act, viz., stricter control and deterrence in relation to narcotic crime - more heinous than murder and anti-social in nature. Further, the classification is also rational, given the nature of repeat offences covered by Section 31-A of the Act. Besides, the proportionality of punishment is a matter for Parliament to decide as policy, and the Courts cannot sit in substantive judgment over
the Parliament's legislative determination of what punishment is appropriate. In that sense, there is no encroachment on the domain of the Judiciary, as is sought to be contended.

70. These arguments will have to be tested in the context of the sweep of Sections 31 and 31-A, respectively. Insofar as Section 31, it deals with persons who have been convicted of the commission of, or abetment to commit or abetment of, or criminal conspiracy to commit, any of the offences punishable under the NDPS Act is subsequently convicted of the commission of, or attempt to commit or abetment or, criminal conspiracy to commit, an offence punishable under the same Act that the same amount of punishment shall be given for the second and every subsequent offence with rigorous imprisonment for a term which may extend to one half of the maximum term of imprisonment and also be liable to fine, which shall extend to one half of the maximum amount of fine. Whereas, Section 31-A deals with the person who has been convicted of specified activities for offence punishable under Sections 19, 24 and 27-A and for offences involving commercial quantity of narcotic drugs or psychotropic substances is subsequently convicted of the commission for attempt to commit or abetment of, or criminal conspiracy to commit an offence referred to in clause (a) in respect of narcotic drugs or psychotropic substances specified in Column (1) of the table in the said section and involving quantity which is equal to or more than the quantity indicated against each such drug or substance as specified in column (2) of the table or for financing, directly or indirectly, with regard to activities specified in clause (a) is punishable with death penalty. The classification is therefore, based on intelligible differentia.

For, in the latter provision, a person, besides being found to be involved in specified activities, must in the past also be convicted in respect of commercial quantity of the narcotic drugs or psychotropic substances. It is not simpliciter a repeat offender, as is the case under Section 31 of the Act. The legislative intent is not only to structure the penalty in the context of the different offences under the Act, but also to introduce stringent provision for controlling and regulating the operations relating to narcotic drugs and psychotropic substances. The fact that Section 31-A is limited to offences for embezzlement of opium by cultivator (Section 19) or for external dealings in narcotic drugs or psychotropic substances in contravention of Section 12 (Section 24) or for financing illicit traffic and harbouring offenders (Section 27A) and not other offences, does not take the matter any further. The Legislature has thought it appropriate to introduce stringent provisions to control the activities referred to in Sections 19, 24 and 27-A of the Act, as the case may be, which are the root cause for the unabated trade in narcotic drugs and psychotropic substances. Suffice it to observe that there is not only intelligible differentia but the differentia has a rational nexus to the object sought to be achieved by the law. It cannot be overlooked that the quantity of drugs specified in column (2) of the table under Section 31-A for the repeat offence
is in multiples of the commercial quantity specified by the Act. That pre-supposes that the offender is incorrigible and is unabatedly indulging in the prohibited activities, which would have deleterious effect on the society as a whole. The fact remains that the sweep of Section 31-A of the Act has been limited to the crimes referred to in clauses (a) and (b) of sub-section (1) thereof.

71. It was further argued that the death penalty provided in Section 31-A for crimes in relation to the drugs quantity specified in column (2) of the table in the said section is disproportionate. On the doctrine of proportionality which is implicit in Articles 14 and 21 of the Constitution, it will necessarily follow that Section 31-A is ultra vires. While answering the challenge of the petitioners in the context of Article 14 of the Constitution, we have already opined that the distinction between persons covered by law (Section 31A) and those left out of it is based on an intelligible differentia; and that differentia has a rational nexus to the object sought to be achieved by law. For the same reasons, we will have to negative the argument that the death penalty provided in Section 31-A of the Act is disproportionate as such.

72. No doubt, the petitioners have pressed into service the decisions in the cases of Om Kumar and Others v. Union of India [2000 (7) SCALE 524, Union of India and Another v. G. Ganayutham (Dead) by L.Rs. [(1997) 7 SCC 463], R v. Oakes, [(1986) 1 S.C.R. 103], para 70, at pg 43, R v. Smith [(1987) S.C.R. 104, (Constitutional Court of South Africa)]. However, as aforesaid, the persons engaged in the offence covered by Section 31-A ought to be proceeded sternly. In that, they have been already convicted for the specified offences under Sections 19, 24 and 27-A and for offences involving commercial quantity of narcotic drugs or psychotropic substances, and have been subsequently convicted for activities referred to in clauses (a) and (b) of sub-section (1) of Section 31-A. The offending activities are in respect of quantity of drugs which are in multiples of the commercial quantity specified in the Act (except in respect of drug at item No.(iv) in table given in Section 31-A).

75. Considering the gravity of the said offence and the repeated involvement of the person in relation to specified offence under the NDPS Act, the argument that the punishment of death penalty is disproportionate cannot be countenanced, having regard to the oft- repeated observations of the Apex Court that offence relating to narcotic drug or psychotropic substance is even more heinous than culpable homicide, because the latter affects only an individual, while the former affects and leaves its deleterious effect on the society, besides crippling the economy of the nation as well.

76. The only argument that needs some attention is of quantity of drugs specified in column (2) of the table, in particular with regard to drug at serial No. (iv), i.e., Codeine. It is common ground that the commercial quantity of the said drug, Codeine, is specified as 1 kg. Even in Section 31-A of the Act, the quantity specified against the said drug is also 1 kg. To re-assure ourselves that, unlike in other cases, the drug
quantity specified in column (2) to the table is in multiples of the commercial quantity, we perused the Government publication of the Act. Even there, the quantity against drug at serial No. (iv) is mentioned as "1 kg." In this context, it was argued by the counsel for the petitioners that it reflects the casual and negligent approach of the Legislature in drafting and enacting Section 31-A of the Act. Besides, it was argued that, as per the Notification issued by the Ministry of Finance, Department of Revenue, dated 18th November, 2009, it may result in a piquant situation in that, admittedly, the drug Codeine is a mixture. By definition 2(xx), the drugs listed in the table to Section 31-A would include mixture or preparation. As a result of the Notification dated 18th November, 2009, the entire mixture or solution will have to be reckoned, and not just its pure drug content.

77. We may place on record the fair stand taken by the learned Additional Solicitor General that, insofar as drug at serial No.(iv), i.e., Codeine, as the quantity, 1 kg., specified in column (2) in the table given under Section 31-A, the content of the narcotic drug or psychotropic substance be taken into consideration, and not the weight of the mixture as such. This, however, would be in conflict with the Notification dated 18th November, 2009. Even if we were to accept this argument of the petitioners, it would result in striking down only entry (iv) in the table pertaining to drug Codeine. However, what is relevant to note is that, when Section 31-A of the Act was introduced by amendment of 1989, subsequent thereto, Notification S.O. 101E dated 19th October, 2001 came to be issued. On the basis of the said Notification, the challenge was considered by the Apex Court in *E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau*, reported in (2008) 5 SCC 161. The position has now been altered by Notification dated 18th November, 2009. At any rate, this argument cannot be the basis to strike down the provision of Section 31-A, much less as a whole. Suffice it to observe that the challenge of the petitioners regarding the validity of Section 31-A, being violative of Article 14 of the Constitution of India on the stated grounds, is devoid of merits.

78. The argument of the petitioners that the legislative policy of reducing illicit drugs must be balanced with constitutional obligation to protect the right to life of persons accused of drug crimes ought to be answered, keeping in mind the principle underlying the dictum of the Apex Court in *Rajendra Prasad’s* case that the offences which affect the social security, the fundamental rights of the defendant become a deadly instrument, whereby many are wiped out and terror strikes community life. Then he reasonably forfeits his fundamental rights and takes leave of life under the law (see paragraph 60 of the reported decision). The Court further observed, if such accused is prosecuted and convicted, he may earn the extreme penalty for taking the lives of innocents deliberately for astronomical scales of gain. The fact that if a person engages in repeated activities involving drug quantity of less than specified in column (2) of the table given in Section 31-A of the Act is left out, it does not come in the
way of proceeding against a person, who has indulged in activities concerning quantity of drugs or substances, which is equal to or more than the quantity indicated against the concerned drugs or substances as specified in column (2) of the table in Section 31-A of the Act. It is also possible that the person has acted against the licence or without the licence. The argument that such activity is not abhorrent, per se, or that the drugs and psychotropic substances serve genuine medical and scientific needs of the community is also totally misplaced. That does not mean that "in a given case" keeping in mind the circumstances in which the offence has been committed and that of the offender, the stated activity should be visited with lighter punishment or only enhanced sentence, particularly when it is a case of repeat offence under the NDPS Act in relation to quantity of drugs equal to or more than the quantity specified in column (2) of the table.

79. The argument that the drugs do not involve taking of life also does not commend to us. We are more than bound by the dictum of the Apex Court that offence relating to narcotic drugs or psychotropic substances is more heinous than a culpable homicide. According to the petitioners, the offence falling under Section 31-A of the NDPS Act, by no stretch of imagination, meets the threshold of most serious crime or the parameter specified by the Apex Court of rarest of rare cases. Reliance was placed on Article 6, paragraph 2, of the ICCPR, which stipulates that the State-Parties may retain the death penalty to the most serious crime. As per the International Human Rights' norms, the phrase "most serious crime" refers to crime involving intentional taking of life. For that, reliance was placed on materials, including pertaining to the International Conventions. However, it is well-established position that the International Conventions cannot be the governing law. It is the Municipal law which ought to prevail. Further, the Legislature is competent to provide for the extreme death penalty within the framework of our Constitution. As has been observed by the Apex Court that, even in respect of white collar criminals, who indulge in various activities solely for personal monetary and property gain, in appropriate cases, they deserve capital punishment as the law now stand both as policy and putting an end to an active mind indulging in nefarious activities. Such death penalty would stand the test of social justice for the protection and survival of the society. The activities falling under the NDPS Act cannot but jeopardise the societal fabric. This crime may be less shocking than the crime of murder, but it is more heinous than the latter. The offence under Section 31-A, therefore, legitimately fits into the legislative scheme of structuring the punishments for different offences, including for the rarest of rare cases. The Parliament is competent to provide for extreme death penalty for specified offences. Suffice it to observe that the challenge regarding the validity of Section 31-A of the NDPS Act, being violative of Article 14 of the Constitution on the above-mentioned arguments, cannot be countenanced. Whereas, Section 31-A is a provision which makes distinction between persons covered by the law and those left out of it
on an intelligible differentia and that differentia has a rational nexus to the object sought to be achieved by law.

81. That takes us to the last aspect as to the nature of relief to be granted. We have rejected the challenge to Section 31-A of the NDPS Act, being violative of Article 14 of the Constitution. However, as we find merits in the challenge to the said provision, being violative of Article 21 of the Constitution, as it provides for mandatory death penalty, the appropriate relief would be to declare Section 31-A as unconstitutional and void ab initio. Upon such declaration, the said provision would cease to be on the statute book. As a necessary consequence thereof, the decision of the trial Court of convicting the petitioner in the second petition for offence under Section 31-A of the NDPS Act and awarding death penalty therefor would become non est in the eyes of law, in spite of the finding of guilt recorded by the trial Court against the petitioner for having indulged in activities covered by Section 31-A of the Act. Concededly, the activities of the petitioner-convict would also constitute offence under other provisions of the Act and could be proceeded as per law, including for imposing enhanced punishment for offences after previous conviction. We are conscious of the fact that we should not be concerned about the consequences of the declaration.

82. However, we may have to consider the alternative argument canvassed on behalf of the respondents that the provision contained in Section 31-A be read down to be a discretionary death sentence. That is possible by reading the words "shall be punishable with death" at the end of Section 31-A as "may be punishable with death". In other words, by way of alternative argument, the respondents submit that the expression 'shall' occurring in Section 31-A be read as 'may', so that the provision is saved from being unconstitutional and in which case, the Court can retain its sentencing discretion not to award the death sentence in appropriate cases, and instead, award sentence of enhanced punishment for offences after previous conviction under Section 31 of the NDPS Act. In other words, upon such construction, there would be alternative punishment for the repeat offences covered by Section 31-A of the NDPS Act. To buttress this contention, it is further argued that it may be open to the Court, which has framed charge under Section 31-A (a major punishment), to proceed to impose punishment under Section 31 (lesser punishment than death penalty). Reliance is placed on the decision of the Apex Court in State of Maharashtra v. Vinayak Tukaram Utekar 1997 Cri.L.J. 3988.

83. The petitioners, however, would contend that the Court having held that Section 31-A is unconstitutional, ought to strike it down, more so because the argument of reading down Section 31-A to save it from being declared unconstitutional is unavailable because of the language of Section 31-A itself. For, the said provision uses expression 'shall' which pre-supposes that it is a mandatory provision, and the Legislature's intention to make it mandatory cannot be lightly brushed aside by the
Court. Further, the impugned section does not provide for a substitute to the death penalty. Thus, if the Court were to consider the expression 'shall' as 'may', it will have to add the penalty of life imprisonment or its equivalent into the impugned section. That is plainly impermissible. The petitioners further contend that, as Section 31-A opens with the non-obstante clause, upon accepting the alternative plea of the respondents of reading down the said provision, it would result in a clumsy and distorted interpretation of the said provision. According to the petitioners, instead of reading down Section 31-A as suggested by the respondents, the appropriate course would be to remand the cases against the concerned accused convicted and sentenced under Section 31-A to the trial Court for re-hearing only on the question of sentence under Section 31 of the NDPS Act.

84. Having considered the alternative argument, we find merits in the submission of the respondents that the provision contained in Section 31A can be treated as discretionary provision, instead of mandatory death penalty. In that, the expression 'shall' be read as 'may'. That would save the provision from being unconstitutional and such a course would be legitimate. On such interpretation, the Court can exercise its judicial discretion to impose punishment of death penalty depending on the facts and circumstances of each case. Inasmuch as, in spite of finding of guilt with regard to the activities indulged by the concerned accused covered by Section 31-A of the Act, if the Court were to be convinced that the enhanced punishment specified in Section 31 for offences after previous conviction would subserve the ends of justice, can proceed to award sentence against the concerned accused under that provision. On the other hand, if the Court were to be of the opinion that the death penalty would be the appropriate penalty to be imposed in the facts and circumstances of a given case, may proceed to impose such punishment, as is provided under Section 31-A of the Act. Indeed, that judicial discretion will have to be exercised, keeping in mind the settled parameters for imposing death penalty.

85. The moot question is: whether it is possible for us to consider the expression 'shall' appearing in Section 31-A as 'may', even though the legislative intent was to make the said provision mandatory and provide for standardised death penalty for the offence covered by Section 31-A? We have already held that considering the tenets of Article 21 of the Constitution, such a provision cannot be sustained. Therefore, the provision will have to be read in conformity with the requirements of Article 21 of the Constitution. Only if it were to be a directory provision, the exercise of judicial discretion for awarding death penalty would be available, and not otherwise. Thus, the provision would be constitutional if alternative sentence to death penalty is also in place. As aforesaid, Section 31 already covers the field to punish the accused, who has been subsequently convicted of the stated offences. Section 31-A, however, deals with such accused, who are otherwise covered by Section 31 of the NDPS Act, but have indulged in specified activities in relation to huge quantity of narcotic drugs /
psychotropic substances, which is in multiples of the commercial quantity specified by the Act for the same narcotic drugs / psychotropic substances. Notably, it is common ground that the accused, who engage themselves in commission of offences otherwise covered by Section 31-A of the NDPS Act, if are in a position to persuade the Court that the death penalty provided for by Section 31-A is avoidable or not appropriate in their case, considering the circumstances in which the offence was committed, as also of the offender, they can be still proceeded with under Section 31 of the Act.

But, if the Court is not convinced with the said stand of the accused, it must be open to the Court to impose death penalty provided for in Section 31-A by recording special reasons therefor. We have, therefore, no hesitation in accepting the alternative argument of the respondents that the provisions contained in Section 31-A of the NDPS Act providing for mandatory death penalty be, instead, read as directory to save the same from being unconstitutional.

86. The argument of the petitioners is, however, that the language of Section 31-A would not permit such interpretation. There is no merit in this submission. Indeed, the section opens with the phrase "Notwithstanding anything contained in Section 31", which pre-supposes that, if the offence is covered by Section 31-A of the Act, the regime provided in Section 31 will be inapplicable. However, the effect of this non-obstante clause is to empower the Court to impose death penalty in respect of offences specified in Section 31-A, even though the same may be in the nature of repeat offences, and could ordinarily be dealt with under Section 31 of the Act. Thus understood, reading down the expression 'shall' in Section 31-A as aforesaid, it would not and cannot be an impediment to proceed against the accused guilty of offence specified by Section 31-A of the Act by imposing punishment specified in Section 31 of the Act, instead of death penalty. Whereas, if the Court is disinclined to accept the explanation or the defence of the accused regarding the circumstances in which the offence was committed or of the offender, it would be competent to impose death penalty as provided in Section 31-A of the Act. That could be done, notwithstanding the punishment provided for the stated offence also under Section 31 of the Act.

87. Indeed, Section 31 of the Act does not provide for punishment of life sentence, which is ordinarily treated as alternative to death penalty. However, as is noticed from Section 31, for the successive conviction for the specified offence, the same is made punishable with rigorous imprisonment, which may extend to one half of the maximum term of imprisonment and also liable to fine, which shall extend to one half of the maximum amount of fine. In a given case, the punishment can be up to 30 years. As has been noticed, in view of Section 32-A of the NDPS Act, such punishment is forbidden from being suspended, remitted or commuted. If so, even the enhanced punishment, if awarded under Section 31 of the Act, would act as a
deterrent, and can deal sternly with the offender. *Stricto senso*, there is no law which stipulates that only life sentence can be an alternative to death sentence. Moreover, even Section 354(3) of the Code refers to the alternative punishment not only with imprisonment for life but also "imprisonment for a term of years". Further, imposition of punishment of actual imprisonment, which is above fourteen years or up to 30 years, and which cannot be suspended, remitted or commuted, is no less than life sentence. In that, under ordinary law, the life sentence is amenable to remission or commutation. In which case, the convict can be considered for being released on completion of fourteen years' sentence, including remission period. Thus understood, the decision of the Apex Court in the case of *Delhi Transport Corporation (supra)*, pressed into service by the petitioners, will be of no avail.

88. Suffice it to observe that there is no impediment in accepting the alternative argument of the respondents that Section 31-A of the NDPS Act may be construed as directory; and death penalty specified in Section 31-A of the NDPS Act may be considered as alternative punishment with regard to offences covered by Section 31-A of the Act, if the normal sentence prescribed by Section 31 of the Act for the stated offences is found to be inadequate or would not meet the ends of justice.

89. To conclude, we hold that Section 31-A of the NDPS Act is violative of Article 21 of the Constitution of India, as it provides for mandatory death penalty. We, however, reject the challenge to the said provision on the stated grounds, being violative of Article 14 of the Constitution of India. Further, instead of declaring Section 31-A as unconstitutional, and void ab initio, we accede to the alternative argument of the respondents that the said provision be construed as directory by reading down the expression "shall be punishable with death" as "may be punishable with death" in relation to the offences covered under Section 31-A of the Act. Thus, the Court will have discretion to impose punishment specified in Section 31 of the Act for offences covered by Section 31-A of the Act. But, in appropriate cases, the Court can award death penalty for the offences covered by Section 31-A, upon recording reasons therefor.

* * * * *
Karnail Singh vs. State of Haryana  
(2009) 8 SCC 539

P. Sathasivam, J.

1) In the case of Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513, a three-Judge Bench of this Court held that compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of Sajan Abraham v. State of Kerala, (2001) 6 SCC 692, which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient. In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorization, these appeals were placed before the Constitution Bench to resolve the issue.

2) The statement of objects and reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organized gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded, consolidating and amending the then existing laws relating to narcotic drugs, strengthening the existing control over drug abuse, considerably enhancing the penalties particularly for trafficking offences, making provisions for exercising effective control over psychotropic substances and making provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

3) Let us consider the Scheme of the NDPS Act and its relevant provisions. The 1985 Act came into force on 14.11.1985. Certain provisions were subsequently amended in 1989 and in 2001. Chapter IV deals with offences and penalties whereas Chapter V deals with procedure. Section 41 relates to power to issue warrant and authorization. Section 42 with which we are concerned relates to power of entry, search, seizure and arrest without warrant or authorization. Section 43 relates to power of seizure and arrest in public place. Section 50 refers to conditions under which search of persons shall be conducted. The NDPS Act prescribes stringent punishment. Hence a balance must be struck between the need of the law and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other. This would mean that a balance must be struck in. The provisions contained in Chapter V, intended for providing certain checks on exercise of powers of the authority concerned, are capable of being misused through arbitrary or indiscriminate exercise unless strict compliance is required. The statute mandates that the prosecution must prove compliance with the said provisions.
4) The facts in *Abdul Rashid Ibrahim Mansuri* (*supra*) were as follows: PW 2, Inspector of Police at Dariapur Police Station, got information on 12-1-1988 that one Iqbal Syed Husen was trying to transport charas up to Shahpur in an autorickshaw. At about 4.00 p.m. they sighted the autorickshaw which was then driven by the appellant. They stopped and checked it and found four gunny bags placed inside the vehicle. The police took the vehicle to the police station and when the gunny bags were opened ten packets of charas were found concealed therein. The value of the said contraband was estimated to be Rs. 5.29 lakhs. When appellant/accused was questioned by the trial court under Section 313 of the Code of Criminal Procedure he did not dispute the fact that he rode the autorickshaw and that the same was intercepted by the police party and the gunny bags kept in the vehicle were taken out and examined by them at the police station. His defence was that those four gunny bags were brought in a truck at Chokha Bazar by two persons who unloaded them into his vehicle and directed him to transport the same to the destination mentioned by them. He carried out the assignment without knowing what were the contents of the load in the gunny bags. The Trial Court acquitted the accused. But, State of Gujarat preferred an appeal before the High Court. The Division Bench of the High Court set aside the order of acquittal and convicted the accused of the offences charged. The convicted accused filed SLP before this Court and contended that there was non-compliance of Section 42 of the Act which was enough to vitiate the search as a whole. After referring Section 42 of the Act and the evidence of police officer as PW 2, the Court held that (1) he should have taken down the information in writing; and (2) he should have sent forthwith a copy thereof to his immediate official superior. After finding that PW 2 - police officer admitted that he proceeded to the spot only on getting the information that somebody was trying to transport a narcotic substance and noting that PW 2 admitted that he proceeded on getting prior information from a Constable and the information was precisely one falling within the purview of Section 42(1) of the Act which was enough to vitiate the search as a whole. After referring Section 42 of the Act and the evidence of police officer as PW 2, the Court held that (1) he should have taken down the information in writing; and (2) he should have sent forthwith a copy thereof to his immediate official superior. After finding that PW 2 - police officer admitted that he proceeded to the spot only on getting the information that somebody was trying to transport a narcotic substance and noting that PW 2 admitted that he proceeded on getting prior information from a Constable and the information was precisely one falling within the purview of Section 42(1) of the Act, the Court decided that PW 2 cannot wriggle out of the conditions stipulated in the said sub-section and unhesitatingly found that there was non-compliance of Section 42 of the Act. The State contended before the Bench that such non-compliance with Section 42 of the Act cannot be visited with greater consequences than what has been held by the Constitution Bench regarding non-compliance with the conditions prescribed in Section 50 of the Act. After referring to the dictum laid down in *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, this Court held that the views expressed with reference to Section 50 of the Act would apply with reference to Section 42 also and consequently held as follows:

"If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused"

It was also contended by the learned counsel for the State of Gujarat that as the accused did not dispute the factum of recovery of the "charas" from the vehicle it does not matter that the
information was not recorded at the first instance by the police officer. The Court did not approve such contention because it held that non-recording of information has in fact deprived the accused as well as the Court of the material to ascertain what was the precise information which PW 2 got before proceeding to stop the vehicle. It further held that value of such an information, which was the earliest in point of time, for ascertaining the extent of the involvement of the accused in the offence, was of a high degree. It further held that it is not enough that PW 2 was able to recollect from memory, when he was examined in court after the lapse of a long time, as to what information he got before he proceeded to the scene. Even otherwise, it held that the information which PW 2 recollected itself tends to exculpate the appellant rather than inculpate him. Finally, the court held that non-recording of the vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused. On analyzing this as well as the other materials, this court ultimately allowed the appeal filed by the accused/appellant and set aside the conviction and sentence passed on him by the High Court and restored the order of acquittal passed in his favour by the trial court. The ratio in Abdul Rashid (supra) is that the non-recording of vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused-appellant. The police officer examined as a crucial witness, PW2, in that case admitted that he proceeded to the spot only on getting information that somebody was trying to transport a narcotic substance, but failed to take down the information in writing. Nor did he apprise his superior officer of any such information either then or later, much less send a copy of the information to the superior officer. Thus, it was a case of absolute non-compliance with the requirements of Section 42(1) and (2).

(5) The facts in Sajan Abraham v. State of Kerala (supra), were completely different. The appellant/accused - Sajan Abraham was put on trial for an offence punishable under Section 21 of the Act. As per the prosecution case, on 10.10.1993 at about 7.45 p.m. the appellant was in possession of a manufactured drug by the name of "Tidigesic" and three syringes for injecting the same near Blue Tronics Junction at Palluruthy. The Head Constable, PW 3 and two other Constables of the Special Squad got information at about 7.00 p.m. on the said date that a person was selling injectable narcotic drugs near Blue Tronics Junction at Palluruthy. They informed this to PW 5 - Sub-Inspector of Police, Palluruthy Cusba Police Station, who was coming in a jeep along with his police party. Thereafter PW 5 along with his police party including PW 3 and other members of the Special Squad went to the scene of occurrence found the accused standing on the road with a packet in his hand. He was identified by PW 3 and apprehended by PW 5. On search, the packet possessed by the appellant revealed that it contained 5 strips of 5 ampoules each of Tidigesic and three injection syringes and a purse containing currency note of Rs. 10. At the spot, one ampoule was taken as a sample for chemical analysis and the said contraband articles were seized as per Ext. P-1 and seizure mahazar was prepared at the spot. The appellant was also arrested. The charge-sheet was submitted, the appellant pleaded not guilty.

The trial court found discrepancies in the evidence of the prosecution witnesses and thus disbelieved the prosecution story, hence acquitted the appellant. The High Court, on reappraisal of the evidence, came to the conclusion that the Trial Court was not justified in acquitting the appellant. It held that the prosecution has established with positive evidence
beyond reasonable doubt that the appellant has committed an offence punishable under Section 21 of the Act, hence convicted and sentenced the appellant before this court. Learned counsel for the appellant submitted before this Court with vehemence that the prosecution has violated the mandatory provisions under Section 42, Section 50 and Section 57 of Act and hence conviction and sentence is liable to be set aside. The conclusion of this Court with regard to Section 42 is as under:

"With regard to Section 42, the submission is that PW 5 has not recorded the information given by PW 3 with respect to the appellant's involvement before proceeding to arrest him in his case. This constitutes violation of Section 42 of the Act. It is true under Section 42(1), the officer concerned, when he has reason to believe from his personal knowledge or information received from any person, is obliged to take it down in writing if such information constitutes an offence punishable under Chapter IV of the Act and send it forthwith to his immediate superior. Such an officer is empowered to search any building, conveyance and in case of any resistance, break up any door or remove any obstacle for such entry, seizure of such drug or substance and to arrest such person whom he has reason to believe to have committed any offence punishable under the said Chapter. Thereafter such officer has to send a copy of this information forthwith to his immediate superior. Submission is that PW 5 after receiving the said information had not communicated it to his immediate superior which constitutes violation of Section 42. In construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out."

"In the present case, PW 3 - Head Constable, got information with reference to the appellant only at about 7 p.m. that the person is selling injectable narcotic drugs near Blue Tronics Junction, Palluruthy. When he proceeded for Palluruthy Police Station to give this information to his immediate superior, SI of Police, PW 5, he found PW 5 along with his police party, who were on patrol duty coming, hence the said information was communicated there by PW 3 to PW 5. Thereafter, PW 5 along with his police party and PW 3 immediately proceeded towards the place where the appellant was standing. Had they not done so immediately, the opportunity of seizure and arrest of the appellant would have been lost. How PW 5 could have recorded the information given by PW 3 and communicated to his superior while he was on motion, on patrol duty, in the jeep before proceeding to apprehend him is not understandable. Had they not acted immediately, the appellant would have escaped. On these
facts, this Court found that no inference could be drawn that there has been violation of Section 42 of Act."

It is clear from *Sajan Abraham* (*supra*) that to enforce the law under the NDPS Act stringently against the persons involved in illicit drug trafficking and drug abuse, the legislature has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted to be mandatory. It is further clear that this is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The court however while construing such provisions strictly should not interpret them literally so as to render their compliance impossible. It concluded that if in a case, the strict following of a mandate results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. It is also clear that when substantial compliance has been made it would not vitiate the prosecution case.

(6) In the light of the above decisions and the principles enunciated therein, it would be appropriate to refer to Section 42 of the NDPS Act which is relevant for the present purpose as it stood before its amendment by Act 9 of 2001. It reads as under:

"42. Power of entry, search, seizure and arrest without warrant or authorisation.-- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,--

a) enter into and search any such building, conveyance or place;

b) in case of resistance, break open any door and remove any obstacle to such entry;

c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.
(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

Sub-section (2) as replaced by Act 9 of 2001 is extracted below:

"(2) Where an officer takes down any information in writing under sub-Section (1) or records grounds for his belief under the proviso thereto, he shall within seventy two hours send a copy thereof to his immediate official superior."  

7) It is well established that search and seizure are essential steps in the armoury of an investigator in the investigation of a criminal case. The Code of Criminal Procedure in various provisions, particularly, Sections 96 to 103 and Section 165 recognizes the necessity and usefulness of search and seizure during the investigation. Sub-section (1) of Section 41 of the Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub-Section (2) of Section 41 refers to issue of authorization for similar purposes by officers of departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc.

8) Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. The proviso to sub-section (1) of Section 42 lays down that if the empowered officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief.

9) Sub-section (2) of Section 42 as it originally stood mandated that the empowered officer who have taken down information in writing or records the grounds of his belief under the proviso to sub-section (1), should send a copy of the same to his immediate official superior forthwith. But after the amendment in the year 2001, the period within which such report has to be sent was specified to be 72 hours. Section 43 deals with the power of seizure and arrest of the suspect in a public place.

10. We may note that Abdul Rashid followed State of Punjab v. Balbir Singh - 1994 (3) SCC 299. We extract below the passage that was followed:

(2-C) Under Section 42(1), the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso
to Section 42(1), if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(1), such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

Abdul Rashid was followed in Koluttumottil Razak v. State of Kerala - 2004 (4) SCC 465, which was also a case of total non-compliance with section 42, as the Sub-Inspector of Police neither reduced the information received into writing nor informed the official superior about it.

11. A careful examination of the facts in Abdul Rashid and Sajan Abraham shows that the decisions revolved on the facts and do not really lay down different prepositions of law. In Abdul Rashid, there was total non-compliance with the provision of section 42. The police officer neither took down the information as required under section 42(1) nor informed his immediate official superior, as required by Section 42(2). It is in that context this Court expressed the view that it was imperative that the police officer should take down the information and forthwith send a copy thereof to his immediate superior officer and the action of the police officer on the basis of the unrecorded information would become suspect though the trial may not be vitiated on that score alone. On the other hand, in Sajan Abraham, the facts were different. In that case, it was very difficult, if not impossible for the Sub-Inspector of police to record in writing the information given by PW-3 and send a copy thereof forthwith to his official superior, as the information was given to him when he was on patrol duty while he was moving in a jeep and unless he acted on the information immediately, the accused would have escaped. The Sub-Inspector of Police therefore acted, without recording the information into writing, but however, sent a copy of the FIR along with other records regarding arrest of the accused immediately to his superior officer. It is in these circumstances that this Court held that the omission to record in writing the information received was not a violation of Section 42.

12) The material difference between the provisions of Sections 42 and 43 is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.

13) Section 50 prescribes the conditions under which search of a person shall be conducted. Sub-section (1) provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest gazetted officer or the Magistrate for the purpose. Under sub-section (2) it is laid down that if such
request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such gazetted officer or the Magistrate. Sub-section (3) lays down that when the person to be searched is brought before such a gazetted officer or the Magistrate and such gazetted officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise, he shall direct that the search be made.

14) The Constitution Bench in Baldev Singh (supra) considered the compliance of Section 50 of the Act. While doing so, the Bench also considered the provisions of Sections 41 and 42 of the Act. It observed as follows:

"8. Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide sub-section (2) the power has also been vested in gazetted officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place.

9. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without a warrant between sunrise and sunset, and he may do so without recording his reasons of belief.

10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub- section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."
It is to be noted that *Baldev Singh's* case (*supra*) has dealt with Section 50 of the Act and the effect of non-compliance of the same. It was held that the same provisions of Section 50 containing certain protection and safeguards implicitly make it imperative and obligatory and cast a duty on the investigating officer to ensure that search and seizure of the person concerned is conducted in a manner prescribed by Section 50. The unamended Section 50 as existed during that period is as follows:

"Section 50 - Conditions under which search of persons shall be conducted (1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate. (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in subsection (1). (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made. (4) No female shall be searched by anyone excepting a female."

The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. But this strict procedural requirement has been diluted by the insertion of subsection (5) and (6) to the Section by Act 9 of 2001, by which the following subsections were inserted accordingly:

"(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974). (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

Through this amendment the strict procedural requirement as mandated by *Baldev Singh's* case was avoided as relaxation and fixing of the reasonable time to send the record to superior official as well as exercise of Section 100 of CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance of Section 50 by *Baldev Singh's* case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence, the mandate given in *Baldev Singh's* case is diluted.
15) Under Section 42(2) as it stood prior to amendment such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same would adversely affect the prosecution case and to that extent, it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. Abdul Rashid (supra) has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

16) The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now for the last two decades police investigation has gone through a sea-change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under Section 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other
means, and the information calls for immediate action and any delay would have resulted in
the goods or evidence being removed or destroyed, it would not be feasible or practical to
take down in writing the information given to him, in such a situation, he could take action as
per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the
information in writing and forthwith inform the same to the official superior.
(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in
regard to writing down the information received and sending a copy thereof to the superior
officer, should normally precede the entry, search and seizure by the officer. But in special
circumstances involving emergent situations, the recording of the information in writing and
sending a copy thereof to the official superior may get postponed by a reasonable period, that
is after the search, entry and seizure. The question is one of urgency and expediency.
(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is
impermissible, delayed compliance with satisfactory explanation about the delay will be
acceptable compliance of section 42. To illustrate, if any delay may result in the accused
escaping or the goods or evidence being destroyed or removed, not recording in writing the
information received, before initiating action, or non-sending a copy of such information to
the official superior forthwith, may not be treated as violation of section 42. But if the
information was received when the police officer was in the police station with sufficient time
to take action, and if the police officer fails to record in writing the information received, or
fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance
being a clear violation of section 42 of the Act. Similarly, where the police officer does not
record the information at all, and does not inform the official superior at all, then also it will
be a clear violation of section 42 of the Act. Whether there is adequate or substantial
compliance with section 42 or not is a question of fact to be decided in each case. The above
position got strengthened with the amendment to section 42 by Act 9 of 2001.
18) We answer the reference in the manner aforesaid. Let the appeals be now placed for
disposal before the appropriate Bench.
* * * * *
Vijaysinh Chandubha Jadeja vs. State of Gujarat
(2011) 1 SCC 609

D.K. Jain, J. - 1. The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") casts a duty on the empowered officer to 'inform' the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a Gazetted Officer can be said to be due compliance with the mandate of the said Section?

2. When these appeals came up for consideration before a bench of three Judges, it was noticed that there was a divergence of opinion between the decisions of this Court in the case of Joseph Fernandez v. State of Goa (2000) 1 SCC 707, Prabha Shankar Dubey v. State of M.P. (2004) 2 SCC 56 on the one hand and Krishna Kanwar (Smt) alias Thakuraeen v. State of Rajasthan (2004) 2 SCC 608 on the other, with regard to the dictum laid down by the Constitution Bench of this Court in State of Punjab v. Baldev Singh (1999) 6 SCC 172, in particular regarding the question whether before conducting search, the concerned police officer is merely required to ask the suspect whether he would like to be produced before the Magistrate or a Gazetted Officer for the purpose of search or is the suspect required to be made aware of the existence of his right in that behalf under the law. It would be expedient to extract the relevant portion of the order:

“When the matter came up before this Court, it was found that in some of the decisions rendered by this Court, a slightly different view was taken than what was expressed by the Constitution Bench with regard to interpretation of Section 50 of the NDPS Act. In the case Joseph Fernandez v. State of Goa 2001 (1) SCC 707, a Bench of three Hon'ble Judges held that even when the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate"; it was held that it was in substantial compliance with the requirement of Section 50 of the NDPS Act, and the Court observed that it did not agree with the contention that there was non-compliance of the mandatory provisions contained in Section 50 of the NDPS Act. In another decision of this Court in Prabha Shankar Dubey v. State of M.P., the following information was conveyed to the accused: "By way of this notice, you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by a gazetted officer or by a Magistrate". This was held to be substantial compliance of Section 50 of the NDPS Act. In Krishna Kanwar (Smt.) Alias Thakuraeen v. State of Rajasthan 2004(2) SCC 608, the same question was
considered and it was held that there is no specific form prescribed or initiated for conveying the information required to be given under Section 50 of the NDPS Act and it was held that "what is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Whether the requirement of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or a straitjacket formula.

Thus, in a way, it all depends on the oral evidence of the officer who conducts search, in case nothing is mentioned in the search mahazar or any other contemporaneous document prepared at the time of search. In view of the large number of cases coming up under the provisions of the NDPS Act the interpretation of Section 50 of the Act requires a little more clarification as its applicability is quite frequent in many cases. In appreciating the law laid down by the Constitution Bench in Baldev Singh's case (supra), we have noticed that conflicting decisions have been rendered by this Court. We feel that the matter requires some clarification by a larger Bench. The matter be placed before the Hon'ble Chief Justice of India for taking further action in this regard."

That is how these appeals came to be placed before this Constitution Bench.

3. Since the cases have come up before us for a limited purpose of clarification as to the interpretation of Section 50 of the NDPS Act by the Constitution Bench in Baldev Singh's case (supra), we deem it unnecessary to state the background facts, giving rise to these appeals.

4. We have heard learned Counsel for the appellant, State of Gujarat, State of West Bengal, Government of National Capital Territory of Delhi and learned Additional Solicitor General on behalf of Union of India.

5. Mr. P.H. Parekh, learned senior counsel appearing on behalf of appellant (Criminal Appeal No. 943 of 2005), strenuously urged that a conjoint reading of Section 50(1) and 50(3) of the NDPS Act, in its common grammatical connotation, makes it abundantly clear that the procedural safeguards envisaged under Section 50 are to be employed effectively and honestly while informing, apprising and advising the suspect of his vested right to be searched only by a Gazetted Officer or a Magistrate. It was contended that the ambit of statutory protection granted by the Parliament under Section 50(1) of the NDPS Act having been explained unambiguously and clearly by the Constitution Bench in the case of Baldev Singh (supra), there is no scope for any other interpretation or clarification of Section 50 of the NDPS Act.
6. Learned Counsel vehemently contended that in the light of the dictum laid down in *Baldev Singh* *(supra)*, the decisions of this Court in *Joseph Fernandez* *(supra)* and *Prabha Shankar Dubey* *(supra)* wherein the concept of 'substantial compliance' has been erroneously read into Section 50 of the NDPS Act, do not lay down the correct proposition of law. It was argued that Section 50 being the only safeguard provided to the suspect under the NDPS Act, the legislature, while enacting it, gave it the character of a "due process" clause, thereby placing some minimum procedural limitations on the exercise of such extensive statutory power, by insisting on the strict observance of the procedure established under the said Section. According to the learned Counsel, this safeguard is meant to ensure that the powers under the NDPS Act are not abused and a person is not falsely implicated and subjected to grave consequences which are likely to follow under the said Act. Relying on the decision of this Court in *Beckodiyan Abdul Rahim v. State of Kerala* (2002) 4 SCC 229, learned Counsel submitted that the harsh provisions of the NDPS Act cast a heavier duty upon the prosecution to strictly follow and comply with the safeguards.

7. Learned Counsel thus, argued that the theory of 'substantial compliance' cannot be applied to defeat, negate or neutralise important safeguards provided by the legislature. It was asserted that merely asking the suspect whether he would like to be produced before a Magistrate or a Gazetted Officer for the purpose of the search can never amount to due compliance with Section 50 of the NDPS Act.

8. Mr. Siddharth Luthra, learned senior counsel appearing on behalf of State of Gujarat, on the other hand, submitted that the rigours of Section 50 of the NDPS Act are neither applicable to the officers who have been empowered by a warrant under Section 41(1); nor to the gazetted/empowered officers who order search or arrest under Section 41(2). It was argued that Section 41(1) of the NDPS Act grants the Magistrate the power to issue warrants for arrest or search, whether by day or night, inter alia, in relation to a person whom the Magistrate has reason to believe has committed an offence under the NDPS Act. It was urged that a reading of Sections 41(1), 41(3), 42, 43 and 50 of the NDPS Act shows that an officer acting under a warrant by a Magistrate under Section 41(1) would not fall within the ambit of Section 50(1) of the NDPS Act. It was submitted that from the language of Section 41(2) of the NDPS Act, it is clear that the Central Government or the State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorise his subordinate on the terms stated in the Section. On the contrary, however, under Section 42(1) of the NDPS Act, there is no restriction on the Central Government or the State Government to empower only a gazetted officer and, therefore, additional checks and balances over officers acting under Section 42 have been provided in the proviso to Section 42(1) and in Section 42(2) of the NDPS Act. It was, thus, contended that the language of Section 42 of the NDPS Act makes it clear that the provision applies only to an officer empowered
under Section 42(1) and not an empowered Gazetted Officer under Section 41(2) of the NDPS Act. In support of the submission that a distinction between a Gazetted Officer and an officer acting under Section 42 of the NDPS Act has to be maintained, learned Counsel commended us to the decisions of this Court in *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence* (2003) 8 SCC 449 and *Union of India v. Satrohan* (2008) 8 SCC 313. It was pleaded that the divergent view on the point expressed by this Court in *Ahmed v. State of Gujarat* (2000) 7 SCC 477, does not lay down the correct proposition of law.

9. It was then contended by Mr. Luthra that a reading of Sub-sections (1) and (3) of Section 50 of the NDPS Act makes it clear that the right granted to a suspect is not the right to be searched before the nearest Gazetted Officer or nearest Magistrate, but the right to be taken before the nearest Gazetted Officer or nearest Magistrate, whereupon such officer or Magistrate is duly empowered under Section 50(3), to either discharge the suspect from detention or direct that a search be made. In support of the proposition, reliance is placed on a decision of this Court in *State of Rajasthan v. Ram Chandra* (2005) 5 SCC 151.

10. Learned Counsel also submitted that the decisions of this Court in *State of Punjab v. Balbir Singh* (1994) 3 SCC 299, *Saiyad Mohd. Saiyad Umar Saiyad and Ors. v. State of Gujarat* (1995) 3 SCC 610, *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala* (1994) 6 SCC 569 and affirmed in *Baldev Singh* (supra) have all read the phrase 'for making the search' into Section 50(1) of the NDPS Act, which has led to safeguards and protections to an accused person, as envisaged under Section 50 of the NDPS Act to be read down, making the said provision virtually ineffective and, therefore, the decision of this Court in *Baldev Singh* (supra) needs reconsideration.

11. Adopting the same line of arguments, Mr. P.P. Malhotra, the learned Additional Solicitor General, appearing on behalf of the Government of NCT of Delhi maintained that it is clear from language of Sections 41(2), 42 and 43 of the NDPS Act that the legislature has dealt with gazetted officers differently, reposing higher degree of trust in them and, therefore, if a search of a person is conducted by a gazetted officer, he would not be required to comply with the rigours of Section 50 (1) of the Act. It was argued that the view expressed by this Court in *Ahmed* (supra), is incorrect and, therefore, deserves to be reversed.

12. The NDPS Act was enacted in the year 1985, with a view to consolidate and amend the law relating to narcotic drugs, incorporating stringent provisions for control and regulation of operations relating to narcotic drugs and psychotropic substances. The object of the said legislation has been explained time and again by this Court in a plethora of cases and, therefore, we feel that it is not necessary to delve upon this aspect all over again, except to re-emphasise that in order to prevent abuse of the provisions of the NDPS Act, which confer wide powers on the empowered
officers, the safeguards provided by the Legislature have to be observed strictly. Moreover, having regard to the terms of reference to the larger Bench, extracted above, it is equally unnecessary to extract extensively all the provisions of the NDPS Act to which reference was made by learned Counsel appearing for the States, and a brief reference to these provisions would suffice.

13. Under Section 41 of the NDPS Act, certain classes of Magistrates are competent to issue warrants for the arrest of any person whom such Magistrates have reason to believe to have committed any offence punishable under the NDPS Act, or for the search of any building, conveyance or place in which such Magistrate has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the said Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA is kept or concealed. Under Section 42 of the NDPS Act, the empowered officer can enter, search, seize and arrest even without warrant or authorisation, if he has reason to believe from his personal knowledge or information taken down in writing, that an offence under Chapter IV of the said Act has been committed. Under proviso to Sub-section (1), if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief and send the same to his immediate official superior in terms of Sub-section (2) of the Section.

14. Section 50 of the NDPS Act prescribes the conditions under which personal search of a person is required to be conducted. Being the pivotal provision, the Section, (as amended by Act 9 of 2001 -inserting Sub-sections (5) and (6) with effect from 2nd October 2001) is extracted in full. It reads as under:

50. Conditions under which search of persons shall be conducted.-- (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in Sub-section (1).
(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under Sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

15. Sub-section (1) of the said Section provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest gazetted officer or the Magistrate for the purpose. Under Sub-section (2), it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such gazetted officer or the Magistrate. It is manifest that if the suspect expresses the desire to be taken to the gazetted officer or the Magistrate, the empowered officer is restrained from effecting the search of the person concerned. He can only detain the suspect for being produced before the gazetted officer or the Magistrate, as the case may be. Sub-section (3) lays down that when the person to be searched is brought before such gazetted officer or the Magistrate and such gazetted officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct the search to be made. The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.

16. At this juncture, we must state that the issue before us in terms of the referral order is not about the applicability of Section 50 of the NDPS Act per se but is confined to the scope and width of the expression "if the person to be searched so requires" as figuring in Sub-section (1) of the said Section. Therefore, we deem it unnecessary to evaluate the submissions made by the learned Counsel regarding the applicability of the rigours of Section 50 of the NDPS Act when a search of the suspect is conducted by an officer empowered under Section 41 of the said Act. We
may, however, add that while considering the question of compliance with Section 50 of the NDPS Act, the Constitution Bench in *Baldev Singh* (*supra*) considered the provisions of Section 41 as well. It observed as under:

8. Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide Sub-section (2) the power has also been vested in gazetted officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place.

17. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh's case (*supra*). We are concerned with the following conclusions:

57. (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under Sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.
(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

18. Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of Sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.
19. As noted above, Sub-sections (5) and (6) were inserted in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two Sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the Sub-sections, viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under Sub-section (6). Under the said Sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In our opinion, the insertion of these two Sub-sections does not obliterates the mandate of Sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate. The object and the effect of insertion of Sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in *Karnail Singh v. State of Haryana* (2009) 8 SCC 539. Although in the said decision the Court did observe that by virtue of insertion of Sub-sections (5) and (6), the mandate given in *Baldev Singh’s* case (*supra*) is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or safeguards given to the suspect have been taken away completely. The Court observed:

Through this amendment the strict procedural requirement as mandated by Baldev Singh case was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by Baldev Singh case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh case is diluted.

20. It can, thus, be seen that apart from the fact that in *Karnail Singh* (*supra*), the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in *Baldev Singh’s* case (*supra*) in so far as the obligation of the empowered officer to inform the suspect of his right enshrined in Sub-section (1) of Section 50 of the NDPS Act is concerned. It
is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted Sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, Sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of Sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

21. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In Prabha Shankar Dubey (supra), a two Judge bench of this Court culled out the ratio of Baldev Singh's case (supra), on the issue before us, as follows:

What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word "right" at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the "suspect" at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and Joseph Fernandez (supra), the Court chose to follow the views echoed in the latter case, wherein it was held that searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words:

The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations. It is manifest from the afore-extracted paragraph that Joseph Fernandez (supra) does not notice the ratio of Baldev Singh (supra) and in Prabha Shankar Dubey (supra),
Joseph Fernandez (supra) is followed ignoring the dictum laid down in Baldev Singh's case (supra).

22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed In Re: Presidential Poll MANU/SC/0047/1974: (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

23. Accordingly, we answer the reference in the manner aforesaid. The appeals shall, now, be placed before the appropriate Bench for disposal.

* * * * *
1. When this appeal came up for hearing before us on 11th April, 2012, it was contended by learned counsel for the appellant-Union of India that Standing Order No.1 of 1989 dated 13th June, 1989 which prescribes the procedure to be followed for seizure, sampling, safe keeping and disposal of the seized Drugs, Narcotics and Psychotropic substances is being followed throughout the country. It was also contended that Ministry of Finance, Department of Revenue, Government of India, has in terms of a Circular dated 23rd February, 2011 impressed upon the Chief Secretaries and the concerned police heads of the State Governments to ensure that instructions given and the procedure prescribed in the Standing Order aforementioned was strictly adhered to. These submissions notwithstanding, doubts about the procedure being actually followed persisted. Pilferage of the contraband goods and their return to the market place for circulation being a major hazard, this Court appointed Mr. Ajit Kumar Sinha, Senior Advocate, as Amicus Curiae, with a view to making a realistic review of the procedure for search, disposal or destruction of the narcotics and the remedial steps that need to be taken to plug the loopholes, if any.

2. On 3rd July, 2012 this Court after hearing the Amicus Curiae prima facie came to the conclusion that the procedure prescribed for the destruction of the contraband seized in different States was not being followed resulting in a very piquant situation in which accumulation of huge quantities of the seized drugs and narcotics has increased manifold the chances of their pilferage for re-circulation in the market. This Court also noted a report published in the timesofindia.indiatimes.com under the heading “Bathinda’s police stores bursting at seams with seized narcotics” from which it appeared that large quantities of seized drugs had accumulated over the years including opium, poppy husk, charas etc. apart from modern narcotic substances. The report suggested that 39 lakhs sedatives and narcotic tablets, 1.10 lakhs capsules, over 21,000 drug syrups and 1828 sedative injections apart from 8 kgs. of smack and 84 kgs. of ganja were awaiting disposal in Bathinda Police stores alone. The position was, according to Mr. Sinha, no better in other States especially those situate along the international borders. It was argued by the Amicus Curiae that without proper data from the authorities concerned, it was not possible to take stock of the magnitude of the problem no matter challenges posed by rampant drug abuse had acquired alarming proportions affecting the youth, some of whom are driven to commission of crimes on account of deleterious effects of drug abuse.

3. It was in the above backdrop that by an order dated 3rd July, 2012 passed in Criminal Appeal No.652 of 2012 this Court directed collection of information from the police heads of each one of the States through the Chief Secretaries concerned in regard to seizure, storage, disposal and destruction of the seized contraband and judicial supervision over the same. Specific queries were formulated in the order passed by us with a direction to the Chief Secretaries of the States concerned to serve the same upon the Directors General of Police for a report to be forwarded through the Registrars General of the High Courts of the States concerned who were appointed Nodal Officers for that purpose. Registrars General were also asked to independently secure from the District and Sessions Judges concerned in their respective States, answers to the queries specified under the head “Judicial Supervision”. Chiefs of Central Government Agencies viz. Narcotics Control Bureau, Central Bureau of Narcotics, Directorate General of Revenue Intelligence and Commissionerates of Customs & Central Excise including the Indian Coast Guard were directed to issue similar queries to the officers concerned and to submit their respective reports detailing the information required in terms of the orders passed by this Court. The queries raised by this Court were in the following words:

“12.1. Seizure
(i) What narcotic drugs and psychotropic substances (natural and synthetic) have been seized in the last 10 years and in what quantity? Provide year-wise and district-wise details of the seizure made by the relevant authority.

(ii) What are the steps, if any, taken by the seizing authorities to prevent damage, loss and pilferage of the narcotic drugs and psychotropic substances (natural and synthetic) during seizure/transit?

(iii) What are the circulars/notifications/directions/guidelines, if any, issued to competent officers to follow any specific procedure in regard to seizure of contrabands, their storage and destruction? Copies of the same be attached to the report.

12.2. Storage

(i) Is there any specified/notified store for storage of the seized contraband in a State, if so, is the storage space available in each district or taluka?

(ii) If a store/storage space is not available in each district or taluka, where is the contraband sent for storage purposes? Under what conditions is withdrawal of the contraband permissible and whether a court order is obtained for such withdrawal?

(iii) What are the steps taken at the time of storage to determine the nature and quantity of the substance being stored and what are the measures taken to prevent substitution and pilferage from the stores?

(iv) Is there any check stock register maintained at the site of storage and if so, by whom? Is there any periodical check of such register? If so, by whom? Is any record regarding such periodic inspection maintained and in what form?

(v) What is the condition of the storage facilities at present? Is there any shortage of space or any other infrastructure lacking? What steps have been taken or are being taken to remove the deficiencies, if any?

(vi) Have any circulars/notifications/directions/guidelines been issued to competent officers for care and caution to be exercised during storage? If so, a copy of the same be produced.

12.3. Disposal/Destruction

(i) What narcotic drugs and psychotropic substances (natural and synthetic) have been destroyed in the last 10 years and in what quantity? Provide year-wise and district-wise details of the destruction made by the relevant authority. If no destruction has taken place, the reason therefor.

(ii) Who is authorised to apply for permission of the court to destroy the seized contraband? Has there been any failure or dereliction in making such applications? Whether any person having technical knowledge of narcotic drugs and psychotropic substances (natural and synthetic) is associated with the actual process of destruction of the contraband?

(iii) Was any action taken against the person who should have applied for permission to destroy the drugs or should have destroyed and did not do so?
(iv) What are the steps taken at the time of destruction to determine the nature and quantity of the substance being destroyed?

(v) What are the steps taken by competent authorities to prevent damage, loss, pilferage and tampering/substitution of the narcotic drugs and psychotropic substances (natural and synthetic) during transit from point of storage to point of destruction?

(vi) Is there any specified facility for destruction of contraband in the State? If so, a list of such facilities along with location and details of maintenance, conditions and supervisory bodies be provided.

(vii) If a facility is not available, where is the contraband sent for destruction purposes? Under whose supervision and what is the entire procedure thereof?

(viii) Is any record, electronic or otherwise prepared at the site of destruction of the contraband and by whom? Is there any periodical check of such record? What are the ranks/designation of the supervising officers charged with keeping a check on the same?

12.4. Judicial supervision

(i) Is any inspection done by the District and Sessions Judge of the store where the seized drugs are kept? If drugs are lying in the store, has the Sessions Judge taken steps to have them destroyed?

(ii) Is any report of the inspection conducted, submitted to the Administrative Judge of the High Court or the Registry of the High Court? If so, has any action on the subject being taken for timely inspection and destruction of the drugs?

(iii) Are there any pending applications for destruction of drugs in the district concerned, if so, what is the reason for the delay in the disposal of such application?

(iv) What level officers including the judicial officers are associated with the process of destruction?

(v) At what stages are the Magistrates/judicial officers/any other officer of the court associated with seizure/storage/destruction of drugs?

(vi) Are there any rules framed by the Court regarding its supervisory role in enforcement of the NDPA Act as regards seizure/storage/destruction of drugs?

(vii) What is the average time for completion of trial of NDPS matters?”

4. In compliance with the above directions, reports have been submitted by all the States except the States of Arunachal Pradesh, Jammu and Kashmir, Dadar & Nagar Haveli, Lakshadweep, Nagaland and Pondicherry.

6. Similarly, in answer to the query as to the steps taken at the time of storage to determine the nature and the quantity of the substance being stored and measures to prevent substitution and/or pilferage from the stores, the State Governments have sent their replies.

The reports submitted by the State Governments and the Central Agencies further claim that stock registers maintained at the storage sites are periodically checked by the staff mentioned in the reports.
Another question that was asked from the State Governments and the Central Agency relates to the condition of the storage facilities, shortage of storage facilities, if any, and whether any steps have been taken or are being taken to remove the deficiencies. Answers to those queries suggest that no proper storage facilities are available in most of the States. For instance, in Gujarat no special storage facility is available for keeping the contraband, which is, therefore, stored in general muddamal room. In Assam the NBC Guwahati Zonal Unit is said to be running from a rented house and one secured room is earmarked for storage with triple locking system under the supervision of the Superintendent. In Imphal, the store room is overflowing with contraband. Since there is shortage of space, pre-trial disposal process has been initiated to decrease congestion in godowns. Although Mizoram Government claims that there is no lack of storage facility, no information as to any specific storage facility being earmarked for the purpose has been provided. In Tripura the enforcement branch is said to be maintaining the malkhana used for storage of contrabands. In Himachal Pradesh there is no storage facility except an old building used for the purpose, while in Chhattisgarh the storage facility is satisfactory but not sufficient for bulk storage. Similarly, Rajasthan has scarcity of storage facility. Jharkhand has no separate storage facility at all whereas Kerala has satisfactory storage facilities only in some of the districts. In Orissa and Bihar the storage facilities are totally insufficient and unsatisfactory. States of Haryana, Madhya Pradesh, Goa, Daman, and Nagar Haveli and Andhra Pradesh claim to have no problems with storage facility while Tamil Nadu does not have any separate storage.

8. Directorate of Revenue Intelligence has not provided any information while NCB Zonal Office, Jodhpur has no shortage of space. NCB Zonal Office, Chandigarh has reported insufficiency of space and has started the process for construction of a specified storage facility. Customs and Central Excise Authority has reported that their godown is full and no more space is available.

9. In answer to the question as to who is authorised to apply to the Court to destroy the seized contraband and whether there has been any failure or dereliction in making such applications and whether any person having technical knowledge of narcotic drugs and psychotropic substance (natural and synthetic) is associated with the process of destruction of the contraband, the reply submitted by the State Governments suggest that different persons in different States have been authorised to make such applications to the Courts concerned except in Tripura where no particular person is authorised. In some cases Officer-in-charge of the Police Station has been authorised while in others the I.O. is also empowered to apply for permission to destroy the contraband. In answer to the question whether any action has been taken against anyone who should have applied for permission to destroy the narcotics but had not done so, State Governments have all answered in the negative implying thereby that either no dereliction of duty has occurred on the part of any officer competent to apply for destruction or no action has been taken for any such dereliction.

10. Similarly, regarding the steps taken at the time of destruction to determine the nature and quantity of the substance being destroyed, the reports submitted by the State Governments give varying answers. There is no uniformity in the procedure adopted by those associated or in charge of the process of destruction. The reports suggest as if adequate steps are taken to prevent damage, loss, pilferage and tampering/substitution of the narcotic drugs and psychotropic substances from the point of search to the point of destruction but there is no uniformity or standard procedure prescribed or followed in that regard. Having said that we must mention that we are in these proceedings concerned with the following three issues only for the present: Seizure and sampling of the Narcotic drugs and Psychotropic substances their storage and their destruction Seizure and sampling:
11. Section 52-A (1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.” Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

12. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“Section 52A: Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or
(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

13. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. The re is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general
and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.

STORAGE:

15. The Narcotic Drugs and Psychotropic Substances Act, 1985 does not make any special provision regulating storage of the contraband substances. All that Section 55 of the Act envisages is that the officer in charge of a Police Station shall take charge of and keep in safe custody the seized article pending orders of the Magistrate concerned. There is no provision nor was any such provision pointed out to us by learned counsel for the parties prescribing the nature of the storage facility to be used for storage of the contraband substances. Even so the importance of adequate storage facilities for safe deposit and storage of the contraband material has been recognised by the Government inasmuch as Standing Order No.1/89 has made specific provisions in regard to the same. Section III of the said Order deals with “Receipt of Drugs in Godowns and Procedure” which inter alia provides that all drugs shall invariably be stored in “safes and vaults” provided with double locking system and that the agencies of the Central and the State Governments may specifically designate their godowns for storage purposes and such godowns should be selected keeping in view their security angle, juxtaposition to courts etc. We may usefully extract paras 3.2 to 3.9 comprising Section III supra at this stage for ready reference:

“3.2. All drugs invariably be stored in safes and vaults provided with double-locking system. Agencies of the Central and State Governments, may specifically, designate their godowns for storage purposes. The godowns should be selected keeping in view their security angle, juxtaposition to courts etc.

3.3 Such godowns, as a matter of rule, shall be placed under the over-all supervision and charge of a Gazetted Officer of the respective enforcement agency, who shall exercise utmost care, circumspection and personal supervision as far as possible. Each seizing officer shall deposit the drugs fully packed and sealed in the godown within 48 hours of such seizure, with a forwarding memo indicating NDPS Crime No. as per Crime and Prosecution (C & P Register) under the new law, name of the accused, reference of test memo, description of the drugs, total no. of packages/containers etc.

3.4 The seizing officer, after obtaining an acknowledgement for such deposit in the format (Annexure-I), shall hand acknowledged over such to the Investigation Officer of the case along with the case dossiers for further proceedings.

3.5 The officer-in-charge of the godown, before accepting the deposit of drugs, shall ensure that the same are properly packed and sealed. He shall also arrange the packages/containers (case-wise and lot-wise) for quick retrieval etc.
3.6 The godown-in-charge is required to maintain a register wherein entries of receipt should be made as per format at Annexure-II.

3.7 It shall be incumbent upon the Inspecting Officers of the various Departments mentioned at Annexure II to make frequent visits to the godowns for ensuring adequate security and safety and for taking measures for timely disposal of drugs. The Inspecting Officers should record their remarks/observations against Col. 15 of the Format at Annexure-II.

3.8 The Heads of the respective enforcement agencies (both Central and State Governments) may prescribe such periodical reports and returns, as they may deem fit, to monitor the safe receipt, deposit, storage, accounting and disposal of seized drugs.

3.9 Since the early disposal of drugs assumes utmost consideration and importance, the enforcement agencies may obtain orders for pre-trial disposal of drugs and other articles (including conveyance, if any) by having recourse to the provisions of sub-section (2) of Section 52A of the Act.”

It is evident from a plain reading of para 3.2 (supra) that storage of all drugs in safes and vaults has been made mandatory and that agencies of the Central and the State Governments have been permitted to designate their godowns for storage purposes. It is also clear that keeping in view the importance of protecting the seized drugs against theft, substitution or pilferage the Central Government has prescribed that such godowns shall be placed under the overall supervision and charge of a gazetted officer of the respective enforcement agencies who shall exercise utmost care, circumspection and personal supervision over the storage facilities. The provision contained in paras 3.5, 3.6, 3.7 and 3.8 also are aimed at ensuring that the godown or storage facility is satisfactory and those in-charge of the same are made accountable for its upkeep and effective management. Subsequent Notification including Notification dated 16th January, 2015 have in no way diluted the above requirement. The result is that there is a statutory framework which governs the storage of drugs and matters relating and incidental thereto. The question is whether the said statutory mechanism has been effectively implemented by the Central Government agencies and by the State Governments. Our answer regretfully is in the negative. It is evident from the responses received from the State and the Central Government agencies that no notified storage facility- godown has been established for storage of the seized drugs. Even the Narcotics Control Bureau has admitted to using mallkhana of the Courts for storage of the seized drugs in certain cases and in certain circumstances. The Customs and Central Excise Department and DRI have also stated that they have no designated storage facility for storage of contraband. The position in the States is no different. Due to non-availability of any designated godown-facility with adequate vaults and double lock system, the seized contraband is stored in police maalakhana which is a common storage facility for all kinds of goods and weapons seized in connection with all kinds of offences including those specified by the IPC. This is a totally unhappy and unacceptable situation to say the least. It is indeed unfortunate that even after a lapse of 26 years since Standing Order No. 1/89 was issued, the Central Government or its agencies and the State Governments have paid little or no attention to the need for providing adequate storage facilities of the kind stipulated in Standing Order No. 1/89 with the necessary supervisory and other controls prescribed in Section III of the said order. The result is that while Standing Order No. 1/89 very early in point of time recognized the need for providing adequate and effective storage facilities by the States and the Central Government agencies, the failure on the part of the Central Government and the State Governments to provide for such storage has defeated, if not completely negated the very purpose underlying the said notification and the provisions made therein. There is as on date hardly any credible protection against theft, replacement, pilferage and destruction of the seized drugs on account of the wholly unsatisfactory and unscientific method of storage of drugs and psychotropic substances which


at times hit the headlines in newspapers on account of what is often described by the agencies as “big catch” worth crores of rupees in the international market. What has defied our understanding is the neglect on the part of the Central Government and its agencies and the State Governments in realizing the importance of the storage facilities and in providing for the same to prevent hazardous and at times lethal substances with great potential to do harm to those who use the same from being replaced, pilfered, stolen or siphoned out on account of very poor supervision, control or invigilation over such storage facilities. The learned amicus has in that view very rightly argued that there is a complete failure on the part of the Central Government and its agencies as also the State Governments in taking adequate steps for providing proper storage facilities with proper system of supervision and control over the drugs that are stored in the same. It was contended by Mr. Sinha, and in our opinion rightly so, that the cumulative effect of the reports submitted by the States and the Central agencies is that only 16% of the contrabands seized between 2002 to 2012 have been actually disposed of. What happened to the remaining 84% of such seizures is anybody’s guess and if it is still lying in the police maalkhana, why has nobody ever bothered to apply for their disposal according to the procedure established by law is hard to fathom. The fact that the States and the Central Government agencies have accepted that no specific register is maintained by the State Police and that general maalkhana register alone is being maintained for the seized drugs shows the neglect of all concerned towards this important aspect and the cavalier manner in which the issue regarding storage of ceased drugs is approached by them. Absence of periodical inspection of the storage facility and the absence of any record suggesting that any inspection has been carried out by any of the officers shows a complete failure bordering criminal negligence by officers who are supposed to be taking action in this regard but have failed to do so.

16. The menace of drugs in this country, as observed earlier has alarming dimensions and proportions. Studies based on conferences and seminars have very often shown that the menace is deep rooted not only because drug lords have the money power and transnational links but also because the enforcement agencies like the Police and at times politicians in power help them in carrying on what is known to be a money spinning and flourishing trade. We only hope that the failure of the Central Government agencies and the State Governments in providing what is the bare minimum in terms of infrastructure required to arrest the growing menace and prevent pilferage and re-circulation of drugs back into the market is not on account of any unholy connect between the drug traffickers and the enforcement agencies. We would comfort ourselves by presuming them to be relatable only to apathy and indifference and hope that the system does not get corrupted by continued neglect lest all hopes are lost in the fight against drug menace which are eating into the vitals of our society. It is in that spirit that we deem it necessary to issue appropriate directions to the Central Government agencies and to the States to set up adequate storage facilities with effective supervisory and regulatory controls as prescribed in Notification No. 1/89.

Disposal of Drugs:

17. Section 52A as amended provides for disposal of the seized contraband in the manner stipulated by the Government under Clause 1 of that Section. Notification dated 16th January, 2015 has, in supersession of the earlier notification dated 10th May, 2007 not only stipulates that all drugs and psychotropic substances have to be disposed off but also identifies the officers who shall initiate action for disposal and the procedure to be followed for such disposal. Para 4 of the Notification inter alia, provides that officer-in-charge of the Police Station shall within 30 days from the date of receipt of chemical analysis report of drugs, psychotropic substances or controlled substances apply to any Magistrate under Section 52A(2) in terms of Annexure 2 to the said Notification.
18. Sub-para (2) of Para (4) provides that after the Magistrate allows the application under sub-section (3) of Section 52A, the officer mentioned in sub para (1) of Para (4) shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of seized items to the Chairman of the Drugs Disposal committee for a decision by the Committee on the question of disposal. The officer shall also send a copy of the details along with the items seized to the officer in-charge of the godown. Para (5) of the notification provides for constitution of the Drugs Disposal Committee while para (6) specifies the functions which the Committee shall perform. In para (7) the notification provides for procedure to be followed with regard to disposal of the seized items, while para (8) stipulates the quantity or the value upto which the Drugs Disposal Committee can order disposal of the seized items. In terms of proviso to para (8) if the consignments are larger in quantity or of higher value than those indicated in the table, the Drugs Disposal Committee is required to send its recommendations to the head of the department who shall then order their disposal by a high level Drugs Disposal Committee specially constituted for that purpose. Para (9) prescribes the mode of disposal of the drugs, while para (10) requires the Committee to intimate to the head of the Department the programme of destruction and vest the head of the Department with the power to conduct a surprise check or depute an officer to conduct such checks on destruction operation. Para (11) deals with certificate of destruction while paras (12) and (13) deal with details of sale to be entered into the godown register and communication to be sent to Narcotic Control Bureau.

19. There are two other aspects that need to be noted at this stage. The first is that notification dated 16th January, 2015 does not in terms supersede Standing Order No. 1/89 insofar as the said Standing Order also prescribes the procedure to be followed for disposal of Narcotic Drugs and Psychotropic and controlled Substances and Conveyances. Specific overriding of the earlier Standing Order would have avoided a certain amount of confusion which is evident on account of simultaneous presence of Standing Order No. 1/89 and notification dated 16th January, 2015. For instance in para (1) of Standing Order No. 1/89 only certain narcotic drugs and psychotropic substances enumerated therein could be disposed of while notification dated 16th January, 2015 provides for disposal of all Narcotic Drugs and Psychotropic and controlled Substances and Conveyances. Again in terms of Standing Order No. 1/89 the procedure for making of application was marginally different from the one stipulated in Notification dated 16th January, 2015 not only insofar as the procedure related to the officers who could make the application is concerned but also in relation to the procedure that the DDC would follow while directing disposal. In both the notifications are prescribed the limits upto which the disposal could be directed. In case of excess quantity the disposal under the Standing Order No. 1/89 had to be done in the presence of the head of the Department whereas according to notification of 2015 in the event of excess quantity or value the disposal has to be by a high level Drug Disposal Committee to be constituted by the head of the Department. Again while Standing Order No. 1/89 specifically required the approval of the Court for disposal, notification dated 16th January, 2015 does not stipulate such approval as a specific condition. Be that as it may, to the extent the subsequent notification prescribes a different procedure, we treat the earlier notification/Standing Order No. 1/89 to have been superseded. In order to avoid any confusion arising out of the continued presence of two notifications on the same subject we make it clear that disposal of Narcotic Drugs and Psychotropic and controlled Substances and Conveyances shall be carried out in the following manner till such time the Government prescribes a different procedure for the same:

(1) Cases where the trial is concluded and proceedings in appeal/revision have all concluded finally:

In cases that stood finally concluded at the trial, appeal, revision and further appeals, if any, before 29th May, 1989 the continued storage of drugs and Narcotic Drugs and Psychotropic and controlled
Substances and Conveyances is of no consequence not only because of the considerable lapse of time since the conclusion of the proceedings but also because the process of certification and disposal after verification and testing may be an idle formality. We say so because even if upon verification and further testing of the seized contraband in such already concluded cases it is found that the same is either replaced, stolen or pilferaged, it will be difficult if not impossible to fix the responsibility for such theft, replacement or pilferage at this distant point in time. That apart, the storage facility available with the States, in whatever satisfactory or unsatisfactory conditions the same exist, are reported to be over-flowing with seized contraband goods. It would, therefore, be just and proper to direct that the Drugs Disposal Committees of the States and the Central agencies shall take stock of all such seized contrabands and take steps for their disposal without any further verification, testing or sampling whatsoever. The concerned heads of the Department shall personally supervise the process of destruction of drugs so identified for disposal. To the extent the seized Drugs and Narcotic Substances continue to choke the storage facilities and tempt the unscrupulous to indulge in pilferage and theft for sale or circulation in the market, the disposal of the stocks will reduce the hazards that go with their continued storage and availability in the market.

(2) Drugs that are seized after May, 1989 and where the trial and appeal and revision have also been finally disposed of:

In this category of cases while the seizure may have taken place after the introduction of Section 52A in the Statute book the non-disposal of the drugs over a long period of time would also make it difficult to identify individuals who are responsible for pilferage, theft, replacement or such other mischief in connection with such seized contraband. The requirement of para 5.5 of standing order No. 1/89 for such drugs to be disposed of after getting the same tested will also be an exercise in futility and impractical at this distant point in time. Since the trials stand concluded and so also the proceedings in appeal, Revision etc. insistence upon sending the sample from such drugs for testing before the same are disposed of will be a fruitless exercise which can be dispensed with having regard to the totality of the circumstances and the conditions prevalent in the maalkhanas and the so called godowns and storage facilities. The DDCs shall accordingly take stock of all such Narcotic Drugs and Psychotropic and controlled Substances and Conveyances in relation to which the trial of the accused persons has finally concluded and the proceedings have attained finality at all levels in the judicial hierarchy. The DDCs shall then take steps to have such stock also destroyed under the direct supervision of the head of the Department concerned.

(3) cases in which the proceedings are still pending before the Courts at the level of trial court, appellate court or before the Supreme Court:

In such cases the heads of the Department concerned shall ensure that appropriate applications are moved by the officers competent to do so under Notification dated 16th January, 2015 before the Drugs Disposal Committees concerned and steps for disposal of such Narcotic Drugs and Psychotropic and controlled Substances and Conveyances taken without any further loss of time.

20. To sum up we direct as under:

No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub- Section 3 of Section 52A, as discussed by us
in the body of this judgment under the heading ‘seizure and sampling’. The sampling shall be done
under the supervision of the magistrate as discussed in paras 13 and 14 of this order.

The Central Government and its agencies and so also the State Governments shall within six months
from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic
Drugs and Psychotropic and controlled Substances and Conveyances duly equipped with vaults and
double locking system to prevent theft, pilferage or replacement of the seized drugs. The Central
Government and the State Governments shall also designate an officer each for their respective storage
facility and provide for other steps, measures as stipulated in Standing Order No. 1/89 to ensure proper
security against theft, pilferage or replacement of the seized drugs.

The Central Government and the State Governments shall be free to set up a storage facility for each
district in the States and depending upon the extent of seizure and store required, one storage facility
for more than one districts.

Disposal of the seized drugs currently lying in the police maalkhans and other places used for storage
shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this
judgment under the heading ‘disposal of drugs’.

21. Keeping in view the importance of the subject we request the Chief Justices of the High Courts
concerned to appoint a Committee of Judges on the administrative side to supervise and monitor
progress made by the respective States in regard to the compliance with the above directions and
wherever necessary, to issue appropriate directions for a speedy action on the administrative and even
on the judicial side in public interest wherever considered necessary.

* * * * *
The Appellant/Petitioner has projected the instant intra Court Writ Appeal before this Court as against the order dated 10.10.2014 passed by the Learned Single Judge in W.P.No.24999 of 2014.

2. The Learned Single Judge while passing the impugned order on 10.10.2014 in W.P.No.24999 of 2014 (filed by the Appellant/Writ Petitioner) in para 18 among other things it is observed that admittedly, the Areca Nut (Betel-Nuts) is an agriculture product included to fall within the definition of primary food and such primary food is covered in the definition of food as contained in Section 3(2) of the Food Safety and Standards Act. The definition of 'food' as contained in the provisions of the Prevention of Food Adulteration Act, 1954 is quite different from that of the definition under the Food Safety and Standards Act, 2006 referred supra and for better appreciation, the relevant definitions under the Prevention of Food Adulteration Act are quoted herein below:-

2(v) food' means any article used as food or drink for human consumption other than drugs and water and includes:- (a) any article which ordinarily enters into, or is used in the composition or preparation of, human food; (b) any flavouring matter or condiments and (c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act.

2(xii a) 'primary food' means any article of food, being a produce of agriculture or horticulture in its natural form and further, in para 21 held that the definition of 'Food' as contained under Section 3(i) of the Food Safety and Standards Act is an inclusive provision including any substance whether processed, partially processed or unprocessed, which is intended for human consumption and also includes primary food to the extent defined under clause (zk) of Section 2 and also includes any substance used in the food during its manufacture, preparation on treatment to be an article of food as defined under the Food Safety and Standards Act and consequently came to the conclusion that the Appellant/Petitioner failed to make out any case for granting the relief sought for in the Writ Petition and dismissed the same without costs.

3. The Learned counsel for the Appellant/Petitioner contends that the Appellant is engaged in the business of import, processing and wholesale of raw areca nut commonly called as Betel Nuts in ungarbled form and that the Firm had imported 688 bags of Srilankan Betel Nuts weighing 50,942 kgs from M/s. Commodities Importers, Sri Lanka, as per 'Bill of Entry' No.5853707 dated 19.06.2014. Also, the Appellant/Firm filed its 'Bill of Entry' in Cochin Port on 19.06.2014 and subsequently, the Third Respondent/Commissioner of Customs, Chennai on 19.06.2014 passed an 'Examination Order' on 19.06.2014, in and by which, a direction was issued to the Appellant/Firm that in order to obtain customs clearance for the consignment, it must obtain a test report and a No Objection Certificate from the Second Respondent/Authorised Officer, Food Safety & Standards Authority of India, Ministry of Health and Family Welfare, Chennai.

4. The Learned counsel for the Appellant/Petitioner strenuously submits that the Appellant's consignment comprises of 'Ungarbled Betel Nuts' which are neither intended for, nor
commonly used for human consumption and in order to transform it into marketable commodity, 'Ungarbled Betel Nuts' required to undergo a series of multi-stage processes over a period of time that include, inter-alia, cleaning, drying and boiling and in fact, the consignment of import of 'Ungarbled Betel Nuts' would be subjected to the Plant Quarantine Test (PQ Test) in terms of the provision of Clause 3 (16) of the Plant Quarantine (Regulation of Import into India) Order, 2003 which is issued under Sub Section (1) of the Destructive Insects and Pests Act, 1914 and it is needless to state that if the consignment passes the test, it is cleared by the Customs Authorities.

5. The Learned counsel for the Appellant/Petitioner brings it to the notice of this Court that after clearance of the customs authorities, when the 'Ungarbled Betel Nuts' reach the appropriate maturity, the importer washes, cleans, dries and sorts the betel nuts after which they are soaked in water for ten days and subsequently, betel nuts are boiled, cleaned and dried again. Later, the outer shells are to be removed and only after completion of this process, the 'betel nuts' become consumable and marketable as a Food item.

6. The Learned counsel for the Appellant/Petitioner takes a categorical stand that in the 'Ungarbled Form' in which the betel nuts are imported, they did not qualify as a food item as they are not mentioned for human consumption in that way. As a matter of fact, the consumable betel nuts are sold to betel nuts vendors by the importer.

7. The Appellant with a view to secure clearance of the assignment at the earliest possible time, applied for approval through FICS system based on the reasonable expectation that No Objection Certificate would be granted by the Second Respondent on the footing that the relevant food standards are inapplicable to 'Ungarbled Betel Nuts' since it is not an article of food and therefore, it does not fall within the ambit of Food Safety and Standards Act.

8. The Learned counsel for the Appellant/Petitioner contends that the Second Respondent, acting outside the ambit of the Food Safety and Standards Act, 2006. Furthermore, it is represented on behalf of the Appellant that Second Respondent under FSS Act applied the food standard for 'dry nuts' and the same would be applicable only after the betel nut i.e., dried and cleaned and after it has reached proper maturity and it is not meant for raw betel nuts in ungarbled form, the current form, in which it has been imported.

9. The Learned counsel for the Appellant emphatically submits that the decision of the Division Bench of the Kerala High Court in Al Marwa Traders v. Assistant Commissioner of Imports [2007 (1) K.L.T. 381] squarely applies to the facts of the present case and the same is pending before the Respondents. Added further, as the test is the same under both the Acts, the change in law does not change the settled principle that 'Ungarbled Betel Nuts' cannot be tested in its current form.

10. The Learned counsel for the Appellant forcefully contends that the Referral Laboratory in the present case reported that the samples that from the Appellant's consignment did not conform to the standards set in the FSS Regulations and the report identified two defects in the Appellant's sample-the presence of mold on the split of the betel nuts and a higher percentage of damaged pieces can be allowed under regulations. Apart from that stand of the Appellant that since 'Ungarbled Betel Nuts' are not meant nor commonly used for human consumption in any market in our country, there is no question of a food safety concern arising on account of clearance being granted for the Appellant's shipment.
11. The core contention advanced by the Learned counsel for the Appellant is that even assuming but not conceding 'Ungarbled Betel Nuts' do fall within the ambit of food for the purposes of the Food Safety And Standards Act, they are certainly within the purview of primary food, being agricultural produce.

12. In this regard, the Learned counsel for the Appellant/Petitioner adverts to the ingredients of Section 48(2)(b) of the Food Safety and Standards Act, where the quality or purity of the article, being primary food, has fallen below the specified standard or its constituents are present in quantities not within the specified limits of variability, in either case, solely due to natural causes and beyond the control of human agency, then such article shall not be deemed to be unsafe or sub-standard or food containing extraneous matter.

13. The Learned counsel for the Appellant submits that the Learned Single Judge had committed a grievous error in interpreting Section 3(1)(j) of the Food Safety and Standards Act, 2006. At this stage, the Learned counsel for the Appellant submits that a purposeful and meaningful reading of the definition of Section 3(1)(j) of the Food Safety and Standards Act, 2006 makes it crystal clear that an essential element for an article to be 'Food' for the purposes of this Act is that the Article must be 'intended for human consumption' in that very form and further, article may be processed, unprocessed or partially processed and selling it to human consumption included within the ambit of 'Food' for the purpose of Food Safety and Standards Act. Apart from that, the Learned Single Judge failed to properly appreciate the reasoning in the Division Bench of the Kerala High Court in case of Al Marwa Traders v. Assistant Commissioner of Imports [2007 (1) KLT 381].

14. The Learned counsel for the Appellant refers to the Regulation 2.3.47 of the Food Safety and Standards (Food Product Standards & Food Additives) Regulation 2011 in the caption 'Nuts and Raisins' and the relevant portion is as follows:

1. Groundnut kernel (de-shelled) for direct human consumption commonly known as moongphali are obtained from the plant arachis hypogols. The kernels shall be free from non-edible seeds such as mahua, caster, neem or argemone etc. It shall be free from colouring matter and preservatives. It shall be practically free from extraneous matter, such as stones, dirt, clay etc. The kernels shall conform to the following standards, namely:-

   Moisture Not more than 7.0 per cent
   Damaged kernel including slightly Not more than 5.0 per cent by damaged kernel weight
   Aflatoxin content - Not more than 30 parts per billion

Also refers to ITC (HS), 2012 Schedule I of Import Policy, Section II, Chapter 8 and the relevant portion is extracted as under:

   Areca nuts: Whole Free Import permitted freely provided if value is Rs.35/- per kilogram and above
   Spilt Free Import permitted freely provided if value is Rs.35/- per Kilogram and above.
   Ground Free Import permitted freely provided if value is Rs.35/- per Kilogram and above.

15. The Learned counsel for the Appellant cites the order of W.P.(c) No.20920 of 2014(L) dated 15.10.2014 of High Court of Kerala between wherein in paragraphs 11 to 14 it is observed and held as follows:

11. Thus, in the light of the above, betel nuts are of heterogeneous class from dry fruits and nuts. This Court is of the view that the standards prescribed in Sub Clause (5) of Regulation
2.3.47 of the FSS Regulations for fruits and nuts have no application for betel nuts which by very nature form a different class.

12. Learned counsel for the petitioners also relied on the decision of this Court in *Al Marwa Traders*. Therein, this Court, while considering betel nuts under the *Prevention of Food Adulteration Act*, 1954 (for short, the PFA Act) held that betel nut cannot be a dry fruit coming under the standards prescribed under PFA Act and further held that betel nuts imported cannot be subjected to the tests for the standards prescribed for dry fruits and nuts. I am also of the view that though *Al Marwa's case* (supra) was under the *Prevention of Food Adulteration Act* (for short, the PFA Act) there is no difference in prescription of standards in respect of dry fruits and nuts under the PFA Act or FSS Act. Therefore, for non conformity of the standards prescribed for dry fruits and nuts, betel nuts imported by the petitioners cannot be detained.

13. However, question that arises is whether goods imported for which no prescription of standards are prescribed under the FSS Act can be directed to be released if it is found that goods are contaminated or unfit for human consumption or injurious to human life. In the *Centre for Public Interest Litigation case* (supra), the Hon'ble Supreme Court reminded authorities of the constitutional principles to safe guard the interest of citizen and protect human life. Therefore, the authorities have a duty to protect interest of citizen from the potential danger of contaminated or adulterated food articles or substances. In *Nilabati Behera Alias Lalit Behera v. State of Orissa and others* [1993 AIR 1960], the Hon'ble Supreme Court after referring to the International Covenant on Civil and Political Rights, 1966 held that while considering fundamental right expressly granted in the Constitution, international covenants and norms can be relied on. In *Vishaka and others v. State of Rajasthan and others* [1997 (6) SCC 241], the Hon'ble Supreme Court held that 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 workplaces, 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 and in Articles 14, 15, 19(1) (g) and 21 of the Constitution of India and further, held that any international convention, not inconsistent in 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.

The World Trade Organisation (WTO) agreement on the application of sanitary and phytosanitary measures (SPS Agreement) provides that in cases where relevant scientific evidence is insufficient, a Member State may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information. The above agreement is for providing measures to protect human/animal/plant life or health. SPS Agreement provides different types of precautionary measures and clearly permits the Government to take a final decision when sufficient scientific evidence does not exist on the safety of a product. Therefore, absence of standard does not prevent Government or Food Authority from exercising their power for bona fide reasons in terms of SPS Agreement, which in the light of the judgments in *Nilabati* and *Vishaka's* cases has to be considered as a part of domestic law.

The Codex Alimentarius Commission is established by the Food and Agriculture Organisation (FAO) of the United Nations and WHO, wherein India is a Member State. The Codex Alimentarius provides international food standards, guidelines and codes of practice.
Contribute to the safety, quality and fairness of this international food trade. The Codex Alimentarius provides standards for various food products. India, being a Member State, these standards are to be followed if there are no specific standards in FSS Act of India. Therefore, in the absence of any specific standards in FSS Act, the Food Safety and Standards Authority of India are bound to follow the standards of the Codex Alimentarius, if any, for determining the standards. In the absence of those standards as noted above, it is open for the Government and the authority to take precautionary measures, if any of the food articles that are being imported are dangerous to human or animal or plant life or health in India in terms of the SPS Agreement.

14. The learned Standing counsel for the Customs Shri John Varghese pointed out to para 17 of *Al Marwa Trader*'s case wherein it is held by this Court as follows:

17. However, in public interest, we make it clear that although betel nuts imported by the appellants cannot be subjected to test for the standards prescribed under Item A.29.04, certainly, the respondents can ensure that the same is not adulterated in the sense mentioned in Section 2(b), (e) and (f) so as to see that the appellants are not importing betel nuts which are not injurious to the health of the ultimate consumer, who may consume the product made of betel nuts imported by the appellants. We are told by the counsel for the appellants that the inspection under the provisions of the Plant, Fruits and Seeds (Regulation of Import into India) Order-1989 and the Plant Quarantine (Regulation of Import into India) Order, 2003, would ensure the same. However, we leave it to the Customs Authorities to ensure, but without causing any delay in clearance of the goods on account of that, taking into account the perishable nature of the goods.

16. In response, the Learned counsel for the Second Respondent contends that the Food Safety and Standards (Food Product Standards and Food Additives) Regulation 2011 under 2.3.47(5) provides for authorized laboratory analysis of the sample of imported betel nut (supari) and in reality, Section 3(j) of the Food Safety and Standards Act, 2006 defines 'Food' as: 3(j) Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), ...., and any substance including water used into the food during its manufacture, preparation or treatment .... narcotic or psychotropic substances.

17. The Learned counsel for the Second Respondent adverts to Section 3(zk) of the Food Safety and Standards Act, 2006 of 'primary food' and the same enjoins as: "primary food means an article of food, being a produce of agriculture or horticulture and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman."

18. The Learned counsel for the Second Respondent points out to Section 2(V) of the Prevention of Food Adulteration Act, 1954 deals with definition 'Food' which means any article used as food or drink for human consumption other than drugs and water and includes:- a) Any article which ordinarily enters into, or is used in the composition or preparation of, human food, b) Any flavouring matter or condiments and [c] .... and further, the definition under Section 2 (xii a) 'primary food' means any article of food, being a produce of agriculture or horticulture in its natural form.
19. The Learned counsel for the Second Respondent takes a stand that the Learned Single Judge had correctly held that the consignment imported by the Appellant would fall within the definition of 'Food' and 'Primary Food' which would also include any substance used in the food during its manufacture, preparation or on treatment to be an article of food under Food Safety and Standards Act, 2006.

20. The Learned counsel for the Second Respondent contends that the Learned Single Judge had primarily appreciated that there is vast difference between the definition of 'food' and 'primary food' in the Prevention of Food Adulteration Act, 1954 and the Food Safety and Standards Act, 2006.

21. The Learned counsel for the Second Respondent submits that in the counter to the Writ Petition, the Second Respondent had in para 6 referred to the decision of the Hon'ble Supreme Court in *Pyarali K. Tejani v. Mahadeo Ramchandra Dange and others* [1974 AIR 228; 1974 SCC (1) 167] wherein it was held as: “It is commonplace knowledge that the word food is a very general term and applies to all that is eaten by man for nourishment and takes in subsidiaries. Is supari eaten with relish by man for taste and nourishment? It is.” And so it is food. Without carrying further on this unusual argument we hold that supari is food within the meaning of Sec.2 (v) of the Act.

Also in the decision of *Al Marwa Traders*, the Division Bench of Kerala High Court has taken a similar view and further, it is represented on behalf of the Second Respondent that after inspection of the Consignment, the Second Respondent, as per practice took the sample of Betel Nuts from the consignment and transmitted the same to authorized laboratory for analysis and the sample of imported supari was tested/analysed as per Regulation 2.3.47(5) of the Food Safety and Standards (Food Product Standards & Food Additives) Regulation 2011 and it came to be known soon after receipt of analysis report that the sample of betel nuts was found to be damaged/discoloured units beyond the prescribed limit and mould growth was observed on the split of areca nut. Therefore, the authorized officer of the Food Authority of India declined to issue No Objection Certificate for clearance of the betel nuts consignment, inasmuch as the consignment failed to confirm to the standards laid down by the notified laboratory and the referral laboratory.

22. At this stage, this Court worth recalls and recollects the decision of the Hon'ble Supreme Court in *Dineshchandra Jamnadas Gandhi v. State of Gujarat and another*, [1989 (1) SCC 420 at p. 421] whereby and where under it is observed and held as follows: “The object and the purpose of the Act are to eliminate the danger to human life from the sale of unwholesome articles of food. It is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. It is intended to suppress a social and economic mischief. The construction appropriate to a social defence legislation is one which would suppress the mischief aimed at by the legislation and advance the remedy.”

23. Also, in the aforesaid decision at page 426 in para 16, it is laid down as follows: “The object and the purpose of the Act (Prevention of Food Adulteration Act, 1954) are to eliminate the danger to human life from the sale of unwholesome articles of food. The legislation is on the topic 'Adulteration of Food Stuffs and other Goods' [entry 18 List III Seventh Schedule]. It is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. It is intended to suppress a social and economic mischief-an evil which attempts to poison, for monetary gains, the very sources of sustenance
of life and the well-being of the community. The evil of adulteration of food and its effects on the health of the community are assuming alarming proportions. The offence of adulteration is a socio-economic offence. In Municipal Corporation of Delhi v. Kacheroo Mal [1976 (1) SCC 412] in para 5 Sarkaria, J. said: The Act has been enacted to curb and remedy the widespread evil of food adulteration, and to ensure the sale of wholesome food to the people. It is well-settled that wherever possible, without unreasonable stretching or straining, the language of such a statute should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circumvention.”

24. Further, this Court aptly cites the decision of the Hon'ble Supreme Court in Pyarali K. Tejani v. Mahadeo Ramchandra Dange and others observed and held as follows: “The Act (Prevention of Food Adulteration Act, 1954) defines 'food' very widely as covering any article used as food and every component which enters into it, and even flavouring matter and condiments…”

25. Besides the above, this Court refers to the following decisions to prevent aberration of justice and to promote substantial cause of justice:

(i) In the decision of the Hon'ble Supreme Court in State of Tamil Nadu v. R. Krishnamurthy [AIR 1980 Supreme Court 538] it is observed and held as under:

In order to be 'food' for the purposes of the Act, (Prevention of Food Adulteration Act, 1954) an article need not be 'fit' for human consumption; it need not be described or exhibited as intended for human consumption; it may even be otherwise described or exhibited; it need not even be necessarily intended for human consumption, it is enough if it is generally or commonly used for human consumption or in the preparation of human food. Gingelly oil, mixed or not with groundnut oil or some other oil, whether described or exhibited as an article of food for human consumption or as an article for external use only is 'food' within the meaning of the definition contained in S.2 (v) of the Act. 1971 Cri LJ 1556 (SC) and 1975 Cri LJ 1868 (SC), Explained.”

(ii) In the decision of the Delhi High Court in Bishan Das Mehta and others v. Union of India and others [AIR 1970 Del 267] wherein it is held as follows:

“In order that an article should be food within the meaning of the Act (Prevention of Food Adulteration Act, 1954) it is not essential that it must be an article which is consumed by human being as such. Katha is admittedly used in composition of Pan and therefore, would be governed by the definition of food given in Section 2 (v) of the Act. To constitute food what has to be seen is whether the article in question is usable and enters into the composition or preparation of food which is taken by human beings. The definition is worded in a very wide language and would govern any article which enters into the composition or preparation of human food and would cover any flavouring matter and condiments. AIR 1955 NUC (All) 169 & (1918) 88 LJKB 441, Rel. on.”

(iii) In the decision of the Hon'ble Supreme Court in Ramlal v. State of Rajasthan [AIR 2001 SC 47] and at special page 48 and 49 in para 5 it is observed as follows:

“Part III of the Prevention of Food Adulteration Rules (for short 'the Rules') contains Definitions and Standards of Quality of various articles of food. Rule 5 which falls within the said part says that the standards of quality of various articles of food specified in Appendix B to these Rules are as defined in that appendix. Milk is defined in Item A.11.01.01 of
Appendix B as the normal mammary secretion derived from complete milking of healthy milk animal without either addition thereto or extraction there from. But it shall be free from colostrum. The above definition does not differentiate between milk of different animals. Hence, it is clear that camel's milk also would fall within the amplitude of the said definition. The question whether the camel milk can be consumed by human beings as a food article need not vex us much, for the Food Inspector in this case took the sample on the assumption that it was a food article. If it was not a food article the Food Inspector had no power to take sample there from. Section 10 of the Act confers power on the Food Inspector to take sample of any article of food. Food is defined in S. 2(v) as any article used as food or drink for human consumption, other than drugs and water and includes ......(As the items included thereby are not very relevant for the purpose of this case the remaining part of the definition is omitted). We may observe that an article which is food does not lose its character as food by the fact that it was also used or sold for other purposes.”

26. In so far as the present case is concerned, it is to be borne in mind that in the decision of the Division Bench of Kerala High Court in *Al Marwa Traders* 'Ungarbled Betel Nuts' was the subject matter in issue, but in case on hand, the Appellant in the 'Bill of Entry' had not mentioned the product as 'Ungarbled Betel Nuts'. However, in the affidavit filed in support of the Writ Petition, the Appellant/Petitioner had endeavour to mention that the product is as 'Ungarbelled Betel Nuts'. It is not in dispute that the Appellant/Petitioner, in the 'Bill of Entry' for home consumption dated 19.06.2014 in B.E.No.5853707 and it described the item as areca nuts (betel nuts). Admittedly, the product was imported from Srilanka. When the Appellant/Petitioner had applied to FICS which specifies inspection of the goods by drawing samples to find out/examination as to whether meets the required standards prescribed under Food Safety and Standards (Food Product Standards & Food Additives) Regulation 2011. In this connection, this Court very significantly points out that by Section 97(1) of the Food Safety and Standards Act (Prevention of Food Adulteration Act, 1954, was repealed) and only the ingredients of Food Safety and Standards Act, 2006 is applicable to all kinds of exports (including import made by the Appellant).

27. It is to be noted that the Division Bench judgment of Kerala High Court in *Al Marwa Traders* case pertains to definition under the earlier Prevention of Food Adulteration Act, 1954 but in the instant case, only the Food Safety and Standards Act applies. To put it succinctly, in the Division Bench Judgment of the Kerala High Court in *Al Marwa Trader's* case, the decision came to be rendered in interpretation of the Prevention of Food Adulteration Act, 1954 and the Rules made thereto.

28. Moreover, the term 'Food' defined under the Prevention of Food Adulteration Act, 1954 is certainly different from that of the definition of 'Food' mentioned under Food Safety and Standards Act. Viewed from that angle, this Court is of the considered view that the decision of Al Marwa Trader's case relied on by the Appellant/Petitioner is to no avail to the Petitioner. At the risk of repetition, this Court pertinent points out that the term 'Food' under the Prevention of Food Adulteration Act, 1954 is to include any article which is used as food or drink for human consumption other than drugs and water whereas word 'Food' as defined under Section 3(j) of the Food Safety and Standards Act, 2006 is all inclusive and pervasive one dealing with any substance whether processed, partially processed or unprocessed which
is intended for human consumption and include primary food to the extent defined in clause 3 (zk), genetically modified or engineered food etc.

29. In the light of qualitative and quantitative discussions and also, this Court on an entire conspectus of the attendant facts and circumstances of the present case in a cumulative fashion, comes to an irresistible conclusion that the view taken by the Learned Single Judge in the impugned order dated 10.10.2014 in W.P.No.24999 of 2014 to the effect that the Appellant/Petitioner had miserably failed to make it any case for granting the relief claimed by the Appellant in the writ petition in W.P.No.24999 of 2014 suffers from no material irregularity or patent illegality in the eye of law. Consequently, the Writ Appeal fails.

30. In the result, the Writ Appeal is dismissed leaving the parties to bear their own costs and resultantly, the order dated 10.10.2014 in W.P.No.24999 of 2014 passed by the Learned Single Judge is confirmed by this Court for the reasons as assigned in the present Writ Appeal. Consequently, connected Miscellaneous Petitions are also closed.
M/s Nestle India Limited v. The Food Safety and Standards Authority of India
W. P (L) No. 1688 of 2015

V.M. KANADE, J. 1. Heard.

2. Rule. Rule is made returnable forthwith. Respondents waive service. By consent of parties, Petition is taken up for final hearing.

CHALLENGE:

3. Petitioner - Company is seeking an appropriate writ, order and direction for quashing and setting aside the order passed by the Chief Executive Officer - Respondent No.2 herein dated 05/06/2015 whereby Petitioner was directed to stop manufacture, sale and distribution etc of nine types of variants of noodles manufactured by them and also gave other directions by the impugned order which is at Exhibit-A to the Petition. Petitioner is also challenging the impugned order passed by the Commissioner of Food Safety, State of Maharashtra - Respondent No. 4 which is at Exhibit-B.

4. Petitioner has challenged these two impugned orders principally on the following five grounds:-

(i) Firstly, it was contended that the said two impugned orders have been passed in complete violation of principles of natural justice since Respondent Nos. 2 and 3 had not issued any show cause notice to the Petitioner and had not given any particulars on the basis of which they proposed to pass the impugned orders. It was contended that Petitioner's representatives were called by Respondent No.2 at his Office on 05/06/2015 and they were informed about the result of analysis made by the Food Laboratories and, thereafter, the impugned order (Exhibit-A) was passed. It was contended that the said order was completely arbitrary, capricious and it was passed in undue haste.

(ii) Secondly, it was contended that the reports of the Food Laboratories on the basis of which the impugned order (Exhibit-A) was passed were either not accredited by NBAL or notified under section 43 of the Food Safety and Standards Act, 2006 ("the Act") and even if some Food Laboratories were accredited, they did not have accreditation for the purpose of testing lead in the product.

(iii) Thirdly, it was contended that the product had to be tested according to the intended use and this was not done and, therefore, no reliance could be placed on the said reports.

(iv) Fourthly, the Petitioner contended that it had tested the samples of batches in its own accredited laboratory and the results showed that the lead contained in the product was well within the permissible limits.

(v) Lastly, it was contended that there was no question of challenging the analysis made by the Food Analyst in the Food Laboratory by filing an appeal under section 46(4) of the Act since by the final impugned orders Respondent Nos. 1 and 2 had already pre-determined the issue and, therefore, Petitioner had no other option but to challenge the orders at Exhibit-A and Exhibit-B.

5. On the other hand, Respondent Nos. 1, 2 and 3 have made the following submissions:-
(i) Firstly, the Petitioner had an alternative remedy of filing an appeal under section 46(4) of the Act and, therefore, Petition should not be entertained.

(ii) Secondly, it was submitted that the show cause notice had been issued to the Petitioner asking the Petitioner to show cause why product approval which was granted to it should not be cancelled and the Petitioner, instead of giving reply to the show cause notice and satisfying the Food Authority that there was nothing wrong in its product, had directly approached this Court by filing a Petition under Article 226 of the Constitution of India. Petition challenging the show-cause notice therefore, it was urged, was liable to be dismissed.

(iii) Thirdly it was submitted objection to the analysis by non-accredited that the /non-notified Food Laboratories was raised for the first time in rejoinder and was an afterthought. It was urged by the learned that there was suppression of material facts by the Petitioner and the results of the Laboratory from Pune were suppressed in the Petition filed by the Petitioner and therefore on that ground the Petition was liable to be dismissed.

(iv) Fourthly, it was submitted by the learned Counsel for Respondent No. 1 and 2 and adopted by Senior Counsel for Respondent Nos. 3 and 4 that the Petitioner was destroying the evidence by burning manufactured goods in order to avoid further prosecution. It was also urged on behalf of Respondent Nos. 1 and 2 that the Food Authority had discretion in prescribing the standards for proprietary food and that they were not bound even by the Regulations which were framed in respect of additives and contaminants which were found in proprietary foods.

(v) Fifthly, it was also urged that the Petitioner had violated the terms which were imposed upon it. It was submitted that in the application for product approval a representation was made by the Petitioner that the content of lead would be less than 1 ppm (parts-per-million). It was contended that therefore even if Regulations prescribe 2.5 ppm as the maximum amount of lead which was permissible, if the lead contained in the product of the Petitioner was above 1 ppm, the Food Authority could still ban the product since the lead contained in the Petitioner's product was contrary to the representation made by the Petitioner about the lead content in its product. This was notwithstanding that the Regulations permitted lead upto 2.5 ppm

(vi) Sixthly it was urged on behalf of Respondent Nos. 1 to 3 that the Food Authority had to act in public interest and even if lead was found in one sample, exceeding the permissible limit, the order of prohibition could be passed in public interest and 2, the said order (Exhibit-A) had been passed under sections 10(5), 16(1), 16(5), 22, 26 and 28 of the Act. According to Respondent No.3, the order passed by it (at Exhibit-B) is under section 30 of the said Act.

These are the broad submissions which have been urged by either side, apart from other detailed arguments which were made by both, the Petitioner and the Respondents.

FACTS:
6. Brief facts which are germane for the purpose of WPL/1688/2015 deciding this Petition are as under:
7. Nestle S.A of Switzerland is a Company which is registered and incorporated under the Laws of Switzerland and is carrying on business of manufacture, sale and distribution of food
products. Petitioner - Company is its subsidiary in India and is registered under the provisions of Companies Act, 1956. Petitioner is carrying on its business in India for more than 30 years.

8. One of the products which has been manufactured by the Petitioner is known as "MAGGI Noodles". Petitioner had been manufacturing and selling this product for more than 30 years and at no time they had come to the adverse notice of the Food Authorities in the past and also at no point of time criminal prosecution was launched against the Petitioner either for violation of the old Act or the new Act after it came into force in 2006 till the impugned order of ban was passed on 05/06/2015. Petitioner manufactured 9 variants of these noodles which are known as under:-

<table>
<thead>
<tr>
<th>Serial</th>
<th>MAGGI Noodles Variants</th>
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<tbody>
<tr>
<td>No.</td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>● MAGGI Xtra Delicious Chicken Noodles</td>
</tr>
<tr>
<td>2.</td>
<td>● MAGGI Thrillin Curry Noodles</td>
</tr>
<tr>
<td>3.</td>
<td>● MAGGI Cuppa Mania Chilly Chow Masala YO</td>
</tr>
<tr>
<td>4.</td>
<td>● MAGGI Cuppa Mania Masala YO WPL/1688/2015</td>
</tr>
<tr>
<td>5.</td>
<td>● MAGGI 2 Minutes Masala Noodles / MAGGI Hungroo Noodles</td>
</tr>
<tr>
<td>6.</td>
<td>● MAGGI Vegetable Multigrainz Noodles</td>
</tr>
<tr>
<td>7.</td>
<td>● MAGGI Vegetable Atta Noodles</td>
</tr>
<tr>
<td>8.</td>
<td>● MAGGI Xtra Delicious Magical Masala Noodles</td>
</tr>
<tr>
<td>9.</td>
<td>● MAGGI 2 Minute Masala Dumdaar Noodles</td>
</tr>
</tbody>
</table>

These noodles are pre-cooked products. The purchaser is instructed to cook the noodles along with the taste maker which is separately packed inside the packed product and it has to be mixed in water and boiled for two minutes and, if necessary, the purchaser can add other vegetables to the noodles and consume them as a food supplement. Petitioner was granted license to manufacture these products even prior to the New Act coming into force in 2006. License was granted to the Petitioner under the old Act viz. Prevention of Food Adulteration Act in the year 1983. After 2006, Petitioner continued to manufacture noodles and in the year 2012 certain advisories were issued by the Food Authority - Respondent Nos. 1 and 2 introducing a regime which was called a product approval regime. Petitioner, accordingly, applied for product approval and the product approval was granted to 8 out of the 9 variants of noodles.

9. So far as one of the Variants is concerned viz. "MAGGI Oats Masala Noodles", at the relevant time, when the said product was to be introduced in the market, the advisory viz. of obtaining product approval was stayed by the High Court in Writ Petition No.2746 of 2013 in the case of Vital Nutraceuticals & Ors v. Union of India & Ors. According to the Petitioner, since the stay order was in operation, they did not apply for product approval. However, the judgment and order of this Court was stayed by the Apex Court by its order dated 13/08/2014 passed in SLP (Civil) No.8372-8374 of 2014 (Food Safety Standards Authority of India v. Vital Nutraceuticals Private Limited & Ors).
10. The Petitioner, after the Apex Court granted stay to the order passed by this Court, applied for product approval. However, certain clarifications were sought by Respondent Nos. 1 and 2, which clarifications were given by the Petitioner within the prescribed period of 30 days. However, thereafter, Petitioner's application was not processed and it was closed without giving reasons.

CHRONOLOGY OF EVENTS IN RESPECT OF PRESENT DISPUTE:

11. Sometime in the month of January, 2015, Food Inspector Barabanki, UP, became suspicious, after he saw packet of Maggi Noodles on which it was claimed that there was "No added MSG". Since the Food Inspector became suspicious about the said claim, he sent the packet to Food Laboratory viz. State Food Laboratory, Gorakhpur in UP. The result of the analysis showed that there was MSG in the said product which was found in the said packet. He therefore informed Respondent Nos. 1 and 2 and the Petitioner. At the instance of the Petitioner, the said sample was sent to Referral Laboratory at Kolkata which is a Laboratory which again tests the product if there is a dispute about authenticity of the Food Laboratory analysis.

12. This product which was seized was a packet containing Maggi Noodles manufactured on 15/01/2014. The shelf life of the product was nine months and there was a declaration made on the packet that the food can be best used for 9 months after the date of manufacture. The best use therefore was over on 15/09/2014. After the product was seized, on 22/01/2015 it was sent for analysis to the Referral Laboratory at Kolkata where it remained till 29/03/2015 and almost after 3 months the report was submitted.

13. The Referral Laboratory at Calcutta which was supposed to test the result regarding MSG found in the product also gave a report that the lead contained was 17 ppm which was much higher than the permitted lead content of 2.5 pm as per the Regulations.

14. Food Authorities were alarmed by the said results and therefore they tested the samples from other batches in Delhi and 9 other States. We must mention here that out of the 9 Variants of MAGGI Noodles only 3 Variants were tested.

15. The Food Analyst gave a report and Respondent No.2 found that out of 72 samples which were tested, in 30 samples there was lead in excess of 2.5 pm, though 42 samples showed that the lead content was within the permissible limits. Similarly in 7 States viz., (1) Delhi, (2) UP, (3) Tamil Nadu, (4) Gujarat (5) Maharashtra,(6) Punjab (7) Meghalaya the lead content in the product of the Petitioner was found above 2.5 pm, whereas in Goa and Kerala the lead content was found to be within the permissible limits. The said results were made known to Respondent No.2 on telephone on 04/06/2015.

16. According to the Petitioner, after reading the news items which were published in media regarding the excess lead in its product, Petitioner-Company immediately made an announcement on 4th June, 2015 and press release was given in which the Petitioner stated that though according to it its product was safe, the Petitioner was withdrawing its product from the market till its name was cleared. The following press release was given by the Petitioner - Company.
"PRESS RELEASE NESTLE HOUSE, Gurgaon, 5th June, 2015, MAGGI Noodles are completely safe and have been trusted in India for over 30 years.

The trust of our consumers and the safety of our products is our first priority. Unfortunately, recent developments and unfounded concerns about the product have led to an environment of confusion for the consumer, to such an extent that we have decided to withdraw the product off the shelves, despite the product being safe.

We promise that the trusted MAGGI Noodles will be back in the market as soon as the current situation is clarified."

ISSUES

17. (I) Whether the Writ Petition filed by the Petitioner - Company under Article 226 of the Constitution of India is maintainable, particularly when the impugned orders, according to the Respondents, are show cause notices and that the Petitioner has an alternative remedy of filing an appeal under section 46(4) of the Act?

(II) Whether there was suppression of fact on the part of the Petitioner and whether the Petitioner had made an attempt to destroy the evidence disentitling the Petitioner from claiming any relief from this Court?

(III) Whether Respondent No.2 could impose a ban on the ground that the lead found in the product of the Petitioner was beyond what the Petitioner had represented in its application for product approval, though it was below the maximum WPL/1688/2015 permissible limit laid down under the Regulations?

(IV) Whether the Food Authority had an unfettered discretion to decide what are the standards which have to be maintained by the manufacturers of proprietary food and whether in respect of the proprietary food, the Food Authority was not bound by the permissible limits of additives and contaminants mentioned in the Regulations and the Schedules appended thereto?

(V) Whether in view of the provisions of Section 22, there was a complete ban on the manufacture of sale and products mentioned in the said section?

(VI) Whether there is violation of principles of natural justice on the part of Respondent Nos. 1 to 4 on account of the impugned orders being passed without issuance of show cause notice and without giving the Petitioner an opportunity to explain the discrepancy pointed out by the Food Authority in respect of the product of the Petitioner?

(VII) What is the source of power under which the impugned orders were passed and whether such orders could have been passed sections 10(5), 16(1), 16(5), 18, 22, under 26, 28 and 29 of the Act?

(VIII) Whether the analysis of the product manufactured by the Petitioner could have been made in the Laboratories in which the said product was tested by the Food Authority and whether these Laboratories are accredited Laboratories by the NABL and whether the reports submitted by these Laboratories can be relied upon?

(IX) Whether reliance can be placed on the reports obtained by the Petitioner from its Laboratory and other accredited Laboratories?
(X) Whether the Food Analyst was entitled to test the samples in any Laboratory, even if it was not accredited and recognized by the Food Authority?

(XI) Whether it was established by the Food Authority that the lead beyond the permissible limit was found in the product of the Petitioner and the product of the Petitioner was misbranded on account of a declaration made by the Petitioner that the product contained "No added MSG"? were not justified in imposing the ban on all the 9 Variants of the Petitioner, though tests were conducted only in respect of 3 Variants and whether such ban orders are arbitrary, unreasonable and violative of Article 14 and 19 of the Constitution of India?

REASONS AND FINDINGS:

FINDING ON ISSUE NO. (I)

18. From the above observation, it is clear that contention of Respondent Nos. 1 and 2 that there was no ban order is totally incorrect since the order, in terms, imposes a ban on the Petitioner's production, sale etc of its product. Secondly, the penultimate para of the said order states that the Petitioner should show-cause why its product approval should not be cancelled and the Petitioner should show cause within 15 days from the date of the said order. The said show cause notice also had been issued after the order banning the product was already passed in the preceding paragraph of the impugned order. Having passed the ban order, further show cause notice for cancellation of the product approval which was already granted, was only a consequential order. Lastly, as rightly pointed out by Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner, that the Petitioner had approached this Court under Article 226 of the Constitution of India inter alia on the ground of violation of principles of natural justice and the Petitioner was therefore entitled to approach this Court directly even assuming that an alternative remedy was available.

19. It is quite well settled that the alternative remedy by way of appeal is not always a bar in approaching the High Court under Article 226, particularly when the Petitioner challenges the order on the ground of violation of principles of natural justice. The Apex Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others [AIR 1999 SC 22 WPL/1688/2015] has observed in para 15 as under:-

"15. Under Article 226 of the Constitution, the High Court having regard to the facts of the case, has discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case- law on this point put to cut down this circle of forensic Whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

It is, therefore, quite well settled that whenever allegation is made that there is violation of principles of natural justice the Petitioner is entitled to challenge the said order and, secondly, in the present case, the impugned order (Exhibit- A) cannot be strictly said to be a show cause
notice since the order imposes a ban on manufacture, sale, distribution of 9 variants of Maggi Noodles. It, therefore, imposes a complete ban on the product.

20. In our view, ratio of the judgment in *Aamir Khan Production Pvt. Ltd. v. Union of India* [W.P. No. 358 of 2010, Bombay High Court] will not apply to the facts of the present case since in that case the Petitioner had challenged the show cause notices and not the final order. Hence the ratio of the said judgment can be distinguished on facts.

21. In our view, therefore, Petition filed by the Petitioner under Article 226 of the Constitution of India is maintainable. Issue No. (I) is, therefore, answered in the affirmative.

FINDING ON ISSUE NO. (II)

22. So far as the submission regarding destruction of evidence is concerned, in our view, the said submission is also without any substance. It is obvious that Respondent Nos. 1 to 4 have not given proper instructions to their respective Counsel who was appearing on their behalf. The minutes of various meetings which were produced by the Petitioner clearly indicate that the Petitioner had taken every step as per the directions given by the Food Authority. The minutes of the meetings which had been tendered across the bar and which were not disputed and which were admitted by the Counsel appearing for Respondent Nos. 1 and 2 indicate that the Petitioner was directed to destroy the food packets which were manufactured by the Petitioner.

23. There is, therefore, absolutely no substance in the submissions made by the learned Senior Counsels appearing on behalf of Respondent Nos. 1 and 4 that there was suppression of fact and an attempt to destroy the evidence by the Petitioner.

FINDING ON ISSUE NO. (III)

24. Whether Respondent No. 2 could impose a ban on the ground that the lead found in the product of the Petitioner was beyond what the Petitioner had represented in its application for product approval, though it was below the maximum permissible limit laid down under the Regulations?

25. Mr. Mehmood Pracha, the learned Counsel for Respondent No. 2, vehemently urged that the obligation was cast on the Petitioner or the food manufacturer to manufacture the food which was safe and wholesome and an element of trust therefore was created on the basis of assurances given by the manufacturer. He submitted that if the trust was broken, the Food Authority could then act and imposes the ban on the product of the manufacturer. He submitted that the Petitioner had made representation in its application for product approval that the lead contained in its product, both, in the noodles and taste maker, was less than 0.1 ppm. He submitted that the Food Authority could impose a ban on the Petitioner's product if it was found that the lead contained was more than 0.1 ppm though the permissible limit was 2.5 ppm. He submitted that the Food Authority could so order the ban because the representation which was made by the Petitioner in its application for product approval was incorrect and though the permissible limit may be 2.5 ppm and the lead contained was less than 2.5 ppm, yet, such a ban order could be imposed and justified. He invited our attention to the averments made in the reply of Respondent No. 1 to that effect in para 13. It would be fruitful to reproduce the said paragraph wherein it is mentioned as under:-
13. The said product with its 9 approved variants are admittedly covered under Section 22 of the FSS Act and which, being non-standardised, have to undergo risk and safety assessment from the Food Authority through the process of product approval. The petitioner's company had submitted the composition of the 'Noodle Cake' along with the composition of 'Tastemaker' for each variant as part of the Product Approval applications. The package contains the 'Noodle Cake' and the 'Tastemaker' is placed inside the main package as a sealed Sachet, which is removable as an independent pack once the main package is opened. As such, both are liable to be tested separately. The Certificate of Analysis (CoA) furnished with the application for Maggi 2-Minute Noodles Masala variant showed 0.0153 ppm lead as against the maximum permissible limit of 2.5 ppm. The petitioner is trying to create confusion by making reference to different standards prescribed for 'Lead' under the FSS regulations, fully knowing that the Standards prescribed in the FSS Regulations cannot be applied to a Section 22 Product on a selective basis. Once it is Section 22 Product, the Safety assessment is undertaken on the basis of averments made in the application. The petitioner Company cannot go back on its own commitments in the application wherein it annexed the Codex Standards for Instant Noodles (wherein the maximum permissible limits for lead is far less than the limit prescribed under the FSS Act, 2006 Rules and Regulations). Even, if assumed, but not admitted, that the certificate of analysis was for the entire product, then the final product should have lead content of 0.0153 ppm or as promised in PA Applications. The contention of the petitioner that the product should be tested in the form as it is finally ready for consumption is not tenable because the final consumption ready product would include water therein which is not being supplied by the petitioner company as part of the product.”

26. We are surprised and astonished at the stand taken by Mr. Pracha, the learned Counsel appearing on behalf of Respondent No.2 which is also reflected from the averments made in the affidavit in reply filed by Respondent No.1. The said submission is preposterous to say the least. The Scheme of the Act and provisions of the Rules and Regulations framed thereunder clearly indicate that the Regulations have been framed by the Food Authority giving manufacturers various standards which are to be maintained by the food. Most of these Regulations were placed before both the Houses of Parliament and they were approved. It is difficult to understand as to how such a submission therefore could be made which does not find any support from the provisions of the Act and the Rules and Regulations framed thereunder. If this is the interpretation which is sought to be made by Respondent No.2 then there is something inherently wrong in the manner in which the Rules and Regulations are being interpreted by the Food Authority. Such interpretation cannot be given by any standard or cannons of interpretation or rules of interpretation which have been formulated by the Apex Court over the last six decades. If the arguments of Mr. Pracha are to be accepted, it would effectively mean that for proprietary foods, the FSS Regulations would not apply and the food authority granting the product approval would decide what would be the limits WPL/1688/2015 prescribed for additives, contaminants and other substances that may be contained in a proprietary food. To our mind, this argument is wholly fallacious and would run contrary to the provisions of Section 22 of the Act itself. Section 22 inter alia deals with proprietary foods and explanation (4) to the said section defines "proprietary and novel food". The proviso appearing after explanation (4) clearly stipulates that such food should not contain any of the foods and ingredients prohibited under the Act and the regulations framed
thereunder. If we are to accept the argument of Mr. Pracha, this proviso would be rendered
otiose. The said submission is therefore wholly without merit and stands rejected. Issue No.
(III) is therefore answered in the negative.

FINDING ON ISSUE NO. (IV)

27. Whether the Food Authority had an unfettered discretion to decide what are the standards
which have to be maintained by the manufacturers of proprietary food and whether in respect
of the proprietary food, the Food Authority was not bound by the permissible limits of
additives and contaminants mentioned in the Regulations and the Schedules appended
thereto?

28. Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2,
taking his argument further from the point which he has argued on the earlier question, then
seriously contended that in respect of proprietary food, the Food Authority had an unfettered
discretion to decide what standards have to be maintained by the manufacturers of proprietary
food and the Food Authority was not bound by permissible limits of additives/contaminants
mentioned in the Schedule given in the Act. We are again amazed and astonished by the
submission made by the learned Counsel for Respondent No.2. The FSS Act no doubt gives
power to the Food Authority to regulate and monitor the manufacture, storage, distribution,
sale and import of food and for that purpose can frame Regulations under section 16(2) of the
Act. After the Regulations so framed under section 92 of the Act, they are to be placed before
both the Houses of Parliament under section 93 of the Act for approval and once the
Regulations so framed are approved by both the Houses of Parliament then it cannot be said
that the Food Authority has an unfettered discretion to decide what are the standards which
are to be maintained by the manufacturers of proprietary food.

29. It is not in dispute that the product which is manufactured by the Petitioner viz. Maggi
Noodles is proprietary food. The limits of quantities and contaminants, heavy metals etc. also
are prescribed under the Regulations which are framed under section 92 of the Act and this is
applicable even in the case of proprietary food. Limit of various additives including
contaminants is mentioned in the said Regulations. Limit of lead is also mentioned in the said
Regulations. If the submission made by the learned Counsel for Respondent No.2 is accepted
then these Regulations which are framed as per the procedure prescribed under section 93
namely of placing the same before both the Houses of Parliament would be rendered otiose. If
this submission is to be accepted, it would mean that the Food Authority is not bound by the
Regulations which are framed and approved after they are placed before both the Houses of
Parliament and become lawful Regulations, having the force of law and it would also mean
that the Food Authority is a law unto itself and which can take any decision according to its
discretion. In fact, in exercise of powers conferred by Section 92(2)(i) read with Sections 20
and 21 of the Food Safety and Standards Act, 2006, Regulations have been framed regarding
contaminants, toxins and residues known as the Food Safety and Standards (Contaminants,
Toxins and Residues) Regulations, 2011. Regulation 2.1.1.(2) inter alia stipulates that no
article of food specified in column (2) of the Table appended thereto can contain any metal
specified in excess of quantities specified in the corresponding entry in column (3) thereof. At
Sr. No.1 of the said table is lead and under the column Article of Food at (iii), there is an
entry which states "Foods not specified". As far as this entry is concerned, under the
Regulations, the lead level permissible is up to 2.5 ppm. If the argument of Mr. Pracha is to be accepted that in respect of proprietary food (i.e. in respect of foods where no standards have been set out) the food authority had unfettered discretion to decide what standards have to be maintained by the manufacturers of proprietary food for lead, Entry (iii) in the table appended to Regulation 2.1.1.(2) would be rendered otiose. These Regulations specifically contemplate different tolerance level of lead in different products. As a residuary item "foods not specified" finds place at item (iii) of Sr. No.1 of the table appended to regulation 2.1.1.(2) and specifies the permissible limit of lead in "foods not specified" would be 2.5 ppm. Such a proposition is therefore absolutely unacceptable. Issue No. (IV) is therefore answered in the negative.

FINDING ON ISSUE NO. (V)

30. On proper and plain reading and interpretation of section 22 of the Act and after hearing the learned Senior Counsel Mr. Chagla for the Petitioner and the learned Counsel Mr. Pracha for Respondent No.2 at some length, we find, at least prima facie, that there is considerable force in the arguments advanced by Mr. Chagla the learned Senior Counsel appearing on behalf of the Petitioner. In the facts of the present case, however, we find that product approval has, in fact, been granted to 8 out of 9 Variants of MAGGI Noodles manufactured by the Petitioner. In this view of the matter, the issue as to what would be the interpretation of section 22 does not really arise for consideration before us in the facts of the present case and, therefore, we leave it open to be argued in an appropriate case. The Issue No.(V), therefore, does not arise.

31. However, in the Court reliance is placed on section 22 and this is the argument which is sought to be advanced in support of the action of the Food Authority. In our view, there is something fundamentally wrong in the approach of the Food Authority and in the interpretation which is sought to be given by it to several provisions of the Act, including section 22 of the Act.

FINDING ON ISSUE NOS. (VI) & (VII) WHICH CAN BE DECIDED TOGETHER:

32. The Act envisages that the authorities can pass orders which have adverse civil consequences and they can also prosecute those who violate the provisions of the Act and Rules and Regulations framed thereunder which may then result in imposition of fine and sentence on the accused. In cases of emergency, order banning the product can also be passed and, obviously, in such cases, question of giving hearing does not arise. The principal object in passing these orders is to protect public interest at large and to see the public welfare and to ensure that the food which is sold is not unsafe for human consumption.

33. According to Respondent Nos. 1 and 2 the impugned order at Exhibit-A has been passed while exercising powers vested in them under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act, whereas, according to Respondent Nos. 3 and 4, the impugned order at Exhibit-B has been passed under section 30 of the Act. It will be necessary therefore to examine the contention of the Respondents that the impugned orders are passed under the aforesaid provisions before it can be accepted.

34. In our view, from the perusal of the aforesaid provisions it is difficult to accept that the Food Authority can pass the impugned orders under these provisions. It is difficult to trace the
origin of the power to ban the product on emergency basis to sections 10(5), 16(1), 16(5), 18, 22, 26, 28, 29 of the Act.

35. Section 10(5) enumerates that the Chief Executive Officer shall exercise the powers of the Commissioner of Food Safety while dealing with matters relating to food safety of such articles. This section therefore empowers the Chief Executive Officer to exercise the powers which are exercised by the Commissioner of Food Safety and, to that extent, Respondent No. 2 was authorized to pass the said order. However, the section does not specify as to whether the principles of natural justice have to be followed or not and, for that purpose, the powers vested in Commissioner of Food Safety will have to be examined. Section 10(5) of the Act reads as under:-

"10(5) The Chief Executive Officer shall exercise the powers of the Commissioner of Food Safety while dealing with matters relating to food safety of such articles."

36. Section 16(1) only imposes duty on the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of the food so as to ensure safe and wholesome food. Sub-section (1) of section 16 is an omnibus provision which casts a duty and obligation on the part of the Food Authority to regulate the food business to ensure food safety. To our mind, Section 16(1) does not empower the Food Authority to ban any product or article of food. That power would be found elsewhere. Section 16(1) of the Act reads as under:-

"16(1) It shall be the duty of the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food."

37. Section 16(5) also speaks about the directions which can be given by the Food Authority to the Commissioner of Food Safety. Section 16(5) of the Act reads as under:-

"16(5) The Food Authority may, from time to time give such directions, on matters relating to food safety and standards, to the Commissioner of Food Safety, who shall be bound by such directions while exercising his powers under this Act."

38. It is difficult to accept the contention of Respondent Nos. 1 and 2 that the impugned order at Exhibit-A has been passed under section 16(1) or under section 16(5) since section 16(1) only speaks about the duty cast on the Food Authority and section 16(5) authorizes Food Authority to give directions to the Commissioner of Food Safety who is bound by such directions. Therefore, in our view, the impugned order at Exhibit-A could not have been passed under these provisions.

39. The next section on which the reliance is placed by Respondent Nos. 1 and 2 is section 18 which is found in Chapter-III of the Act which deals with general principles of food safety and sub-section (1) of section 18 enumerates the guiding principles which are to be followed while implementing the provisions of the Act. Sub-section (2) of section 18 lays down guiding principles which are to be kept in mind by the Food Authority while framing regulations and specifying standards under the Act. We fail to understand as to how these guiding principles can be said to give power to the Food Authority or Commissioner of Food Safety in passing the impugned order at Exhibit-A. This section also cannot be said to be a source of power since it only lays down the guidelines. Section 18 of the Act reads as under:-
40. Section 22 quoted above on which reliance is placed by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2, is a provision which is found in Chapter-IV of the Act which deals with general provisions as to articles of food and it clarifies that the categories of food mentioned in the said section viz. novel food, genetically modified articles of food, irradiated food, organic food, foods for special dietary uses, functional foods, neutraceuticals, health supplements, proprietary food etc cannot be manufactured by any person save and otherwise provided under the Act and Rules and Regulations framed thereunder.

41. The impugned order at Exhibit-A also does not in terms state that the order is passed under section 22 of the Act. This argument is advanced for the first time by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of the Respondent No.2. The learned Additional Solicitor General appearing on behalf of Respondent No.1 or Mr. Darius Khambatta appearing on behalf of Respondent Nos. 3 and 4 have not argued that the order has been passed under section 22. Even otherwise, from the aforesaid provisions, it can be seen that this order (Exhibit-A) could not have been passed under section 22 as canvassed by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2.

42. In our view, therefore, the Food Authority cannot trace its power to pass the impugned order at Exhibit-A under section 26, 28 and 29 of the said Act.

43. The learned Senior Counsel Mr. Darius Khambatta appearing on behalf of Respondent Nos. 3 and 4 has submitted that the order at Exhibit-B has been passed under section 30. The learned Counsels appearing on behalf of Respondent Nos. 1 and 2 have not relied on section 30 as a source of power for passing the impugned order at Exhibit-A. Whereas, according to Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner, both the orders viz. Order at Exhibit-A and the Order at Exhibit-B had been passed under section 34 of the Act which reads as under:-

The learned Senior Counsel for the Petitioner then submitted that even if it is held that the both these orders had been passed under section 30, though it does not mention that principles of natural justice have to be followed, it is implied that before passing such order doctrine of audi alteram partem has to be complied with and hearing has to be given to the affected party.

44. In our view, after having seen all these provisions, it is difficult to accept the contention of Respondent Nos. 1 and 2 that the order at Exhibit-A has been passed under section 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act. In our view, it appears that Respondent Nos. 3 and 4 have passed the impugned order at Exhibit-B under section 30 of the Act and Respondent Nos. 1 and 2 have passed the impugned order at Exhibit-A either under section 30 or under section 34 of the Act. It appears that Respondent Nos. 1 and 2 have taken the aforesaid stand to justify their action of not giving show cause notice and hearing before passing the impugned order at Exhibit-A. Sub-section (1) of section 34 mentions that before passing any order under section 34, the Designated Officer has to serve a notice on the food business operator and then pass the order. Section 34, therefore, speaks about issuance of show cause notice and following the principles of natural justice. Section 30 even though it does not in terms mentions that principles of natural justice have to be followed, it is implied that such a course has to be normally followed. The Apex Court in *C.B. Gautam v. Union of...*
India and Others while deciding the issue as to whether in the absence of specific requirement of following the principles of natural justice in any section, whether it can be implied that such a hearing has to be given has observed in paras 28 and 30 as under:-

"28. It must, however, be borne in mind that courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties affected. This would be particularly so in a case where the validity of the section would be open to a serious challenge for want of such an opportunity."

45. In the said case, under section 269-UD of the Income-tax Act no reference was made to principles of natural justice being followed and the Apex Court has held that it was implied that such a hearing should be given.

"76. In our view, even if the impugned notification falls into the last of the above category of cases, whatever material the Food (Health) Authority had, before taking a decision on the articles in question, ought to have been presented to the appellants who are likely to be affected by the ban order. The principle of natural justice requires that they should have been given an opportunity of meeting such facts. This has not been done in the present case. For this reason also, the notification is bad in law."

46. In the present case, the Food Authority and the Commissioner of Food Safety, banning State of Maharashtra have not issued any Notification all Noodles. The Food Authority has banned the product of the Petitioner relying on the results given by the Food Laboratories. It was, therefore, incumbent upon the Food Authority and the Commissioner of Food Safety to have given all the material to the Petitioner on the basis of which the impugned orders (Exhibit -A and Exhibit-B) were passed so that the Petitioner - Company could have got an opportunity of giving its reply to the material on the basis of the which the said impugned orders were passed.

47. From the facts of this case it can be seen that:-

(i) The Petitioner was carrying on business for more than 30 years and no such contamination was found in the past.

(ii) There was no risk analysis made by the authorities to determine the extent of damage which would be caused on the consumption of food as was done in Dhariwal Industries Ltd and another v. State of Maharashtra and others [2013(1) Mh.L.J. 461].

(iii) The reports received from other States were informed to the Food Authority on telephone and, in any case, so far as the Commissioner of Pune is concerned, he had conducted the test on 06/06/2015 that is one day after the impugned order at Exhibit-A was passed.

(iv) Petitioner - Company itself had already issued a press release stating therein that the Petitioner was recalling the product and was going to stop manufacture, sale distribution of the product etc.

(v) Out of 70 samples examined by Food Authority - Respondent Nos. 1 and 2, more than 50% i.e. about 42 samples were found to be within permissible limit and in 30 samples the lead was found to be in excess.
(vi) Delhi and Kolkata reports were available.

48. Under these circumstances therefore, in our view, the Food Authority should have given a proper opportunity to the Petitioner - Company to prove that its product was safe for human consumption and it was not necessary to impose a nationwide ban on the product, particularly when the Petitioner had already, one day before the impugned order at Exhibit-A was passed, had given a press release, stating therein that Petitioner was recalling its product from the market. Therefore, in our view, in this particular case, there is a clear violation of principles of natural justice and on that ground alone the impugned orders at Exhibit-A and respectively are liable to be set aside. Issue No.(VI) is therefore answered in the affirmative. The answer to Issue No(VII) is that the source of power under which the impugned orders were passed is traceable to either section 30 or section 34 of the Act and, in any case, the impugned orders could not have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act. Issue No. (VII) therefore is answered accordingly.

FINDINGS ON ISSUE NOS. (VIII) to (XI) WHICH CAN BE DECIDED TOGETHER:

49. It will be relevant to take into consideration the provisions of section 3(p) which defines the "food laboratory" and section 43 which gives power to the Food Authority to give recognition to laboratory and notify it. Upon conjoint reading of both these sections, it is clear that under section 3(p), "food laboratory" is a laboratory which is either State or Central laboratory or any other allied laboratory which is accredited and recognized by NABL and by the Food Authority under section 43 of the Act. The laboratory, therefore, has to pass twin test before it can be said to be a recognized laboratory viz. (i) it has to be accredited by NABL and over and above that (ii) it has also to be recognized by the Food Authority under section 43 of the Act. Sub-section (1) of section 43 makes it abundantly clear that only in that laboratory which is recognized by the Food Authority by Notification, food can be sent for analysis by the Food Analyst. Upon conjoint reading of the said two provisions, it is clear that the submission made by Mr. Khambata, the learned Senior Counsel for Respondent Nos. 3 and 4 is without any substance. Subsection (1) mandates that the Food Analyst has to analyse the food in a laboratory accredited by NABL and also recognized by the Food Authority and notified by it. It is apparent that therefore if there is non-compliance of the said provisions and if the food is tested in a laboratory which does not fall within the definition of section 3(p) and not recognized by the Food Authority, the analysis made in such laboratory cannot be relied upon. Though the said observation is made in respect of provisions of the Prevention of Food Adulteration Act, 1954 (which has now been repealed by FSS Act, 2006), even under the new Act, the provisions of section 43(1) will have to be held mandatory and not directory. This is more so when Section 43(1) is read with the definition of the words "food laboratory" in Section 3(p) of the FSS Act, 2006.

50. It is not in dispute that the Laboratories in which these food samples were tested were either not accredited by NABL or not recognized by the Food Authority under section 43(1) of the Act or even if they were accredited or notified, they were not accredited to make analysis in respect of lead in the samples. There is no material on record to show whether the procedure of testing samples mentioned under the Act and Rules and Regulations framed which is thereunder has been followed. There is a grave doubt about the samples being tested at Avon Food Lab (Pvt.) Ltd. and even if they are so tested, prima facie, it does appear that
procedure of testing the samples has not been followed. The contention of Mr. Pracha, the learned Counsel for Respondent No.2 that in view of the Notification issued on 5/7/2011 even the State and Central Laboratories, though not notified, were entitled to test the samples, is incorrect.

51. On the same ground, it will not be possible to accept the reports of the samples which have been tendered on behalf of the Petitioner since there is no manner of knowing whether procedure has been properly followed or not. Issue No. (VIII) to (XI) are therefore answered in the negative.

FINDING ON ISSUE NO. (XII)

52. Keeping all the observations of the Apex Court and other judgments in view, we will have to examine whether action of Respondent Nos. 1 to 4 is arbitrary capricious and violative of Article 14 and 19 of the Constitution of India.

53. Again, it will be necessary to briefly examine the facts of this case in order to see whether the impugned order is arbitrary in the facts of this case. We have already held that the mandatory provision for analysing sample as laid down under section 47 and the Regulations framed there under has not been followed by Respondent Nos. 1 to 4. We have considered those questions at length and we do not propose therefore to again repeat the said reasons. Secondly, it is an admitted position that on 04/06/2015, the Petitioner had given press release, stating therein that though its product was safe, in view of what had happened the Petitioner - Company was stopping the production, distribution and sale etc. of all 9 variants of Maggi before the Petitioner - Company clears the misunderstanding. On 05/06/2015, the impugned order at Exhibit-A was passed by Respondent No.2 - Food Authority imposing a complete ban on production, sale, distribution etc of Petitioner's product Maggi Noodles throughout India. In the said impugned order, three reasons were given viz. (i) that lead in excess of the prescribed standard was found in the product of the Petitioner - Company, (ii) the product was misbranded because though it was stated on the packet there was "No added MSG", MSG was found in the product of the Petitioner and (iii) one of the 9 variants viz. MAGGI Vegetable Atta Noodles was manufactured and sold without seeking product approval.

54. In our view the impugned order (Exhibit-A) is liable to be set aside because-

(i) It has been passed in an arbitrary manner. There is lack of transparency. It is unreasonable.

(ii) It has been passed in utter violation of principles of natural justice since no material on the basis of which the said order was passed was given to the Petitioner as is discussed hereinabove by us while deciding Issue No. (VI).

(iii) The samples of the product of the Petitioner have not been analysed as per the mandatory provision viz. Section 47(1) and Regulations framed there under, which has been elaborately discussed by us while dealing with Issue Nos. (VIII) to (XI).

(iv) The procedure which was followed by Respondent Nos. 1 to 4 was not fair and transparent. As observed by the Apex Court in Natural Resources Allocation (supra), the State action in order to escape the wrath of Article 14 has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in
pursuit of promotion of healthy competition and equitable treatment and State action must conform to norms which are rational, informed with reasons and guided by public interest.

55. Apart from that, the most important aspect is that the Respondents were aware that the Petitioner had recalled its product on 04/06/2015 and the press release to that effect was given by the Petitioner and under these circumstances it was not necessary to impose ban all over India and proper opportunity ought to have been given to the Petitioner to clear the misunderstanding or find out the correct position regarding safety of its product. Action of the State of not supplying the material on the basis of which the action was taken and not giving a personal hearing to the Petitioner and issuing an order of ban when Petitioner itself had withdrawn the product clearly falls within the four corners of arbitrariness and is therefore violative of Article 14 and 19 of the Constitution of India. In fact, the entire sequence culminating in imposition of ban on 05/06/2015 by Respondent No.2 shows that there is something more that what meets the eye which has resulted in passing the impugned orders by Respondent Nos. 2 and 4.

56. The Apex Court has held that procedure of sampling is mandatory in the case of *Pepsi Co* (supra). Though the said judgment was passed under the Prevention of Food Adulteration Act, 1954, the provisions under the repealed Prevention of Food Adulteration Act, 1954 and FSS Act, 2006 are almost identical and, therefore, observations of the Apex Court in the said case are squarely applicable even to the provisions under the FSS Act, 2006.

57. It has also to be seen that so far as second ground for imposing ban is concerned, it is stated in the impugned order (Exhibit-A) that the product was misbranded since it was mentioned on the packet of the product of the Petitioner that there was "No added MSG" and the "MSG" was found.

58. There is no material on record to substantiate the same. It is not the case of the Respondents that the Petitioner had added "MSG" though the Petitioner had declared that there was no added MSG. Secondly, it is an admitted position that the Glucomate is even otherwise found in its natural form in certain types of foods. Thirdly, the Petitioner had agreed that it would remove the declaration from the packet that there was "No added MSG". Fourthly, the maximum penalty for misbranding of product even in criminal prosecution as laid down under section 52 of the Act is to the extent of Rs 3 lakhs. Misbranding of the product, therefore, could not be a ground for banning the product indefinitely.

59. Lastly, the third ground which has been mentioned is that one of the Maggi Variants viz. MAGGI Vegetable Atta Noodles were not approved by the Food Authority and the product approval was not obtained. The Petitioner in its Petition has stated that it had applied for product approval after the order WPL/1688/2015 of stay granted by the High Court in *Vital Nutraceuticals & Ors v. Union of India & Ors* was stayed by the Apex Court. Respondents have merely stated in view of non-compliance of objections, the file was closed. The Respondents, firstly, could have asked the Petitioners not to produce, or sell the said variant. There was no reason to ban all other Nine Maggi Variants and, secondly, it was the duty of the Respondents to inform the Petitioner as to how the requirements were not complied with so that they could have complied with the requirements.
60. Additionally, it is an admitted position that the product approval in respect of 8 products was granted by the Respondents. Viewed from any angle therefore we have no hesitation in coming to the conclusion that the action of Respondents in passing the impugned orders at Exhibit-A and Exhibit-B is violative of Articles 14 and 19 of the Constitution of India and the said orders at Exhibit-A and Exhibit-B will have to be set aside. Issue No.(XII) is therefore answered in the affirmative.

FINAL ORDER:

61. During the course of arguments, we asked Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner whether irrespective of the final outcome of the Petition, whether Petitioner would continue to abide by the statement made by the Petitioner on 04/06/2015 for such time till the samples which were preserved by them could be tested in Food Laboratories mutually accepted by the Petitioner and the Respondents and he had answered in the affirmative. On the other hand, Mr. Darius Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 submitted that the food samples which were in their possession should be tested in an accredited Food the Petitioner.

62. Laboratory and not the samples which were in possession of The learned Senior Counsel Mr. Chagla appearing for the Petitioner, however, submitted that the authenticity of the samples which were with the Food Authority was in doubt and similar statement was made by the learned Counsels appearing for the Respondents regarding authenticity of the samples which were in possession of the Petitioner. While making the said suggestion, we had pointed out that this Court was concerned about public health and manufacture and sale of safe and wholesome food to the people of India. Mr. Chagla, learned Senior Counsel for the Petitioner accepted the suggestion made by this Court. However, the Respondents did not accept the suggestion made by this Court and, therefore, we are constrained to give directions for testing of food samples which have been preserved by the Petitioner pursuant to the directions given by Respondent No.2 which can be seen from the minutes of the meeting held between the representatives of the Petitioner and Respondent No.2.

63. Though, we have allowed the Petition and set aside the impugned orders, for the reasons mentioned hereinabove, we are still concerned about public health and public interest and therefore we are of the view that before allowing the Petitioner to manufacture and sell its product, Petitioner should send the 5 samples of each batch which are in their possession to three Food Laboratories accredited and recognized by NABL as per the provisions of section 3(p) and section 43 of the Act and which are as under:-

(1) Vimta Lab, Plot No.5, Alexandria Knowledge Park, Genome Valley, Shameerpet, Hyderabad-500078, Andhra Pradesh.

(2) Punjab Biotechnology Incubator, Agri & Food Testing Laboratory, SCO:7-8, Top Floor, Phase-5, SAS Nagar, Mohali-60 059.

(3) CEG Test House and Research Centre Private Limited, B-11(G), Malviya Industrial Area, Jaipur-17.

64. These samples shall be tested and analysed by these three Laboratories. The sampling process should be undertaken as per the provisions of section 47(1) and other relevant
provisions of the Act and Regulations framed thereunder. If the results show that lead in these samples is within the permissible limit then the Petitioner would be permitted to start its manufacturing process. However, even newly manufactured products of all the other Variants be tested in these three laboratories and if level of lead in these newly manufactured products is also within the permissible limit then the Petitioner - Company may be permitted to sell its products.

65. The contention of the Respondents that the 4th sample which is in their possession should also be tested cannot be accepted. We have already discussed the reason why we feel that procedure of sampling was not under taken as per the provisions of section 47(1) of the Act and the Regulations framed thereunder and therefore we feel that it would be an exercise in futility if the 4th sample is now permitted to be analysed.

SUMMARY:

66. Nestle (India) challenged the nationwide ban imposed by the Food Authority on its popular product Maggi Instant Noodles.

67. The Food Authority and Commissioner of Pune claimed that in public interest and to ensure food safety, the impugned orders were passed after the Food Laboratory Reports indicated the presence of lead in excess of the permissible limits and MSG being found in the product against the declaration of the Petitioner that there was "No added MSG" in the product.

68. After examining the rival contentions in great detail, we have come to the conclusion that -

(a) Principles of natural justice have not been followed before passing the impugned orders and on that ground alone the impugned orders are liable to be set aside, particularly when the Petitioner - Company, one day prior to the impugned orders, had given a Press Release that it had recalled the product till the authorities were satisfied about safety of its product.

(b) Secondly, we have held that the Food Laboratories where the samples were tested were not accredited and recognized Laboratories as provided under the Act and Regulations for testing presence of lead and therefore no reliance could be placed on the said results.

(c) We have further held that the mandatory procedure which has to be followed as per Section 47(1) of the Act and Regulations framed thereunder, was not followed.

(d) The impugned orders are held to be violative of Articles 14, 19(1)(g) of the Constitution of India.

69. Although we are setting aside the impugned orders, in public interest and in order to give an opportunity to the Petitioner to satisfy the Food Authority, we have directed that five samples from each batch cases out of 750 may be tested in three laboratories mentioned hereinabove and if the lead is found within permissible limits then the Petitioner would be permitted to manufacture all the Variants of the Noodles for which product approval has been granted by the Food Authority. These in turn would be tested again in the said three Laboratories and if the lead is found within permissible limits then the Petitioner would be permitted to sell its product. The three laboratories shall follow the procedure laid down under section 47 of the Act and Rules and Regulations framed thereunder.
70. Since the Petitioner - Company has already made a statement that it will delete the declaration made by it viz. "No added MSG" on its product, no prejudice would be caused to the public at large and the allegation that product is misbranded also will not survive.

71. Petition is accordingly disposed of in the aforesaid terms. Rule is made absolute in terms of prayer clause (a) and (b) along with what we have mentioned hereinabove.

72. We clarify that though in the judgment we have mentioned that the samples of 9 Variants of Maggi Noodles should be tested, we make it clear that the Variants which are available with the Petitioner may be tested. Those Variants which are not available with the Petitioner, they may be manufactured after positive report is given in respect of the Variants which are available. So far as "Maggi Oats Masala Noodles with Tastemaker" is concerned, the Petitioner will have to undergo the procedure of obtaining product approval and the Respondents may consider the application of the Petitioner again, after such an application is made within a period of 8 weeks from the date of making of such application.

73. At this stage, Mr. Anil Singh, the learned Additional Solicitor General for Respondent No.1 and the learned Counsels for Respondent Nos. 2, 3 and 4 have submitted that the Judgment and Order passed by this Court may be stayed for a period of eight weeks.

74. In our view, since the Petitioner - Company has made a statement that it would not manufacture or sell the product, the question of granting stay to this Judgment and Order does not arise.
THOMAS, J. Appellant was an IPS Officer who reached upto the level of Superintendent of Police in the State Police Service, Orissa. Based on some sleuth information raid was conducted in the residence of the appellant on 12-5-1990 and a good amount of cash and jewellery were recovered. A case was registered against him under section 13(2) of the Prevention of Corruption Act, 1988 (for short "the Act"). On 31-12-1990 appellant retired from service but the investigation into the case continued. On 30-9-1992 the Vigilance Department submitted a charge-sheet against the appellant for the offence under Section 13(2) read with Section 13(1)(e) of the act.

The main contention of the appellant was that the legislature did not include a retired public servant within the purview of the Act and that there is no mention in the Act about a person who ceased to be a public servant. He invited our attention to Section 197 of the Code which envisages sanction for prosecution of public servants and pointed out that the section is now applicable to former public servants also by virtue of the specific words in the Section "any person who is or was......a public servant". According to the counsel since such words have not been employed in any of the provisions of the Act it could be launched or continued against a person who, though a public servant at the time of commission of the offence, ceased to be so subsequently.

"Public servant" is defined in Section 2(c) of the Act. It does not include a person who ceased to be a public servant. Chapter III of the Act which contains provisions for offences and penalties does not point to any person who became a non-public servant, according to the counsel.

Among the provisions subsumed in the Chapter, Sections 8,9,12 and 15 deal with offences committed by persons who need not be public servants, though all such offences are intertwined with acts of public servants. The remaining provisions in the Chapter deal with offences committed by public servants. Section 7 of the Act contemplates offence committed by a person who expects to be public servant.

There is no indication anywhere in the above provisions that an offence committed by a public servant under the Act would vanish off from penal liability at the moment he demits his office as public servant. His being a public servant is necessary when he commits the offence in order to make him liable under the Act. He cannot commit any such offence after he demits his office. If the interpretation now sought to be placed by the appellant is accepted it would lead to the absurd position that any public servant could commit the offences under the Act soon before retiring or demiting his office and thus avert any prosecution for it or that when a public servant is prosecuted for an offence under the Act he can secure an escape by protracting the trial till the date of superannuation.

Learned counsel for the appellant invited our attention to Section 19(1) of the Act which reads thus: "19. Previous sanction necessary for prosecution.- (1) No Court shall take cognizance of an offence punishable under sections 7,10,11,13 and 15 alleged to have been committed by a
public servant, except with the previous sanction, (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the central government, of that Government; (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government; (c) in the case of any other person, of the authority competent to remove him from his office.”

It was contended that if the case does not fall under sub-clause (a) or sub-clause (b) it should necessarily fall under sub-clause (c) and otherwise no prosecution can lie for any offence under this Act. A person who ceased to be public servant cannot be removed from any office, and hence it is contended that he cannot be prosecuted for any offence under the Act.

Section 19(1) of the Act is in para materia with Section 6(1) of the preceding enactment i.e. Prevention of corruption Act, 1947 (the old Act). When a similar contention was raised before a three Judge Bench of this court regarding Section 6 of the Old Act in S.A. Venkataraman v. The State [1958 SCR 1040], that contention was repelled. It was held thus:

"The words in s. 6(1) of the Act are clear enough and they must be given effect to. There is nothing in the words used in s.6(1) to even remotely suggest that previous sanction necessary before a court could take cognizance of the offences mentioned therein in the case of a person who had ceased to be a public servant at the time the court was asked to take cognizance, although he had been such a person at the time the offence was committed. It was suggested that cl.(c) in s.6(1) refers to persons other than those mentioned in cl.s. (a) and (b).

The words 'is employed' are absent in this clause which would, therefore, apply to a person who had ceased to be a public servant though he was so at the time of the commission of the offence. Clause (c) cannot be construed in this way. The expressions 'in the case of a person' and 'in the case of any other person' must refer to a public servant having regard to the first paragraph of the sub-section. Clauses (a) and (b), therefore, servant who is employed in connection with the affairs of the Union or a State and is not removable from his office save by or with the sanction of the central Government or the State Government and cl.(c) would cover the case of any other public servant whom a competent authority could remove from his office. The more important words in cl.(c) are 'of the authority competent to remove him from his office'."

The same view was adopted by another three Judge Bench in C.R. Bansi v. State of Maharashtra [1971(3) SCR 236]. This was followed in State of West Bengal v. Mannmal Bhutoria [1977 (3) SCR 758]. The Constitution Bench in K. Veeraswami v. Union of India [1991(3) SCC 655] upheld the view that no sanction is required to prosecute a public servant after retirement.

Learned counsel, however, contended that the legal position must be treated as changed under the Prevention of Corruption Act of 1988 since parliament has in the meanwhile changed the wording in section 197 of the Code. The provision provided a check against launching prosecution proceedings against a public servant on the accusation of having committed an offence while acting or purporting to act in the discharge of his official duty. For such
prosecution sanction of the Government is made a condition precedent under Section 197 of the Code of criminal procedure 1898 (the old code). But such a sanction was not then necessary when a retired public servant was prosecuted. However, in the corresponding provision of the present code (Section 197) the necessity for previous sanction is made applicable to former public servants also by using the words "when any person who is or was a public servant". The contention here is that the earlier decisions of the court were rendered at a time when sanction for prosecution was not contemplated in Section 197 of the code as for a public servant who has retired from service. Hence, according to him those decisions are of no help to sustain the same view now.

In R. Balakrishna Pillai v. State of Kerala [1996 (1) SCC 478] learned Chief Justice Ahmadi has referred to the law commission's report which suggested an amendment to Section 197 of the Code. The observation of the law commission in paragraph 15.123 of its Report reads thus:

"It appears to us that protection under the section is needed as much after retirement of the public servant as before retirement. The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The ultimate justification for the protection conferred by Section 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecutions. It should be left to the Government to determine from that point of view the question of the expediency of prosecuting any public servant."

Their Lordships after referring to the above report have observed: "It was in pursuance of this observation that the expression 'is' to make the sanction applicable even in cases where a retired public servant is sought to be prosecuted."

It must be remembered that in spite of bringing such a significant change to section 197 of the Code in 1973, the Parliament was circumspect enough not to change the wording in Section 19 of the Act which deals with sanction. The reason is obvious. The sanction contemplated in Section 197 of the Code concerns a public servant who "is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", whereas the offences contemplated in the P.C. Act are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties. Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former P.C. Act was materially imported in the new P.C. Act, 1988 without any change in spite of the change made in section 197 of the Code.

The result of the above discussion is thus: A public servant who committed an offence mentioned in the Act, while he was a public servant when the court takes cognizance of the offence. But if he ceases to be a public servant by that time the court can take cognizance of offence without any such sanction. In other words, the public servant who committed the offence while he was public servant is liable to be prosecuted whether he continues in office or not at the time of trial or during the pendency of the prosecution. The Special court and the High Court have, therefore, rightly repelled the preliminary objections of the appellant. Accordingly we dismiss this appeal.
These appeals by special leave had been filed against the order dated 2.4.2009 passed by the High Court of Punjab and Haryana at Chandigarh in two Criminal Miscellaneous Petitions Nos. M-15695/2007 and 23037-M of 2007 for quashing FIR No.13 dated 9.4.2003 which was registered for offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and under Section 168 of the Indian Penal Code, at Police Station, Vigilance Bureau, Ludhiana but were dismissed as the learned single Judge declined to quash the proceedings against the appellants.

3. Relevant facts of the case under which the two cases were registered against the appellants disclose that the appellants are Medical Officers working with the State Government of Punjab against whom first information report was registered on the statement of informant/Raman Kumar alleging that he knew the appellants Dr. Rajinder Singh Chawla who was posted as Government Doctor at Dhanasu and Dr. Kanwarjit Singh Kakkar who also was serving as Government Doctor in Koom Kalan in District Ludhiana. It was alleged that both the doctors were doing private practice in the evening at Metro Road, Jamalpur and charged Rs.100/- in cash per patient as prescription fee. While Dr. Rajinder Singh Chawla checked the blood pressure of the patients Dr. Kanwarjit Singh Kakkar issued prescription slips and medicines to the patients after checking them properly and charged Rs.100/- from each patient. The complainant Raman Kumar got medicines from the two doctors regarding his ailment and the doctor had charged Rs.100/- as professional fee from him. The informant further stated in his FIR that as per the government instructions, the government doctors are not supposed to charge any fee from the patients for checking them as the same was contrary to the government instructions. In view of this allegation, a raid was conducted at the premises of both these doctors and it was alleged that they could be nabbed doing private practice as they were trapped receiving Rs.100/- as consultation charges from the complainant. On the basis of this, the FIR was registered against the appellants under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and under Section 168, IPC which has registered at Police Station Vigilance Bureau, Ludhiana.

4. As already stated, the appellants felt aggrieved with the case registered against them and hence filed two Criminal Miscellaneous Petitions for quashing FIR No.13 dated April 9, 2003 before the High Court of Punjab and Haryana at Chandigarh wherein counsel for the appellants contended that no offence is made out from the allegations in the FIR even as it stands. Substantiating the arguments, it was submitted that neither any medical instrument was recovered nor any apparatus or blood pressure checking machine or even thermometer was recovered from the residence of the appellants. It was explained that the complainant had come to the house of Dr. Kanwarjit Singh Kakkar which was under renovation and requested for treatment. It was added that on humanitarian grounds, the appellant just scribbled down the prescription on a plain paper which does not even bear the signature of the appellant.

5. It was also contended by learned counsel for the appellants that there is no law prohibiting government doctor from doing any act on humanitarian ground and the appellants could be...
alleged to have indulged in private practice only if they have deviated from the rules laid down by the State Government in this regard. In the alternative, it was contended that even if there is a deviation from these rules prohibiting private practice by government doctors contrary to the government instructions, it could warrant initiation of departmental proceeding and the punishment under the Punjab Civil Services (Punishment and Appeal) Rules and not under IPC much less under the Prevention of Corruption Act.

6. The learned single Judge, however, was pleased to dismiss the Criminal Miscellaneous Applications refusing to quash the FIR relying on Rule 15 of the Punjab Civil Medical (State Service Class I) Rules, 1972. As per Rule 15 of the said Rules, the Government may by general or special order permit any member of the Service to engage in private service on such terms and conditions and subject to such restrictions and limitations as may be specified in the order provided that such practice does not in any way interfere with the discharge of his or their official duties.

Rule 15 of the aforesaid Rules states as follows: "15. Private Practice: (1) The Government may, by general or special order, permit any member of the Service to engage in private practice on such terms and conditions and subject to such restrictions and limitations as may be specified in the order, provided that such practice does not in any way interfere with the discharge of his or their official duties. (2) Nothing contained herein shall be construed to limit or abridge the power of the Government at any time to withdraw such permission or to modify the terms on which it is granted without assigning any cause and without payment of compensation."

7. The relevant question which requires determination in these appeals is whether a government doctor alleged to be doing practice can be booked within the ambit and purview of the Prevention of Corruption Act or under Indian Penal Code, or the same would amount to misconduct under the Punjab Civil Medical (State Service Class I) Rules, 1972 under Rule 15 which has been extracted above.

8. Learned counsel for the appellants submitted that the FIR was fit to be quashed as the case against the appellants who admittedly are government doctors could not have been registered under IPC or the Prevention of Corruption Act as Section 7 of the Prevention of Corruption Act explains `corruption' as acceptance or `demand' illegal gratification for doing any official act. It was submitted that the demand/receipt of `fee' while doing private practice is not an illegal gratification for official duties. It was further submitted that even Section 13(1)(d) of the Prevention of Corruption Act does not apply since the main ingredients of this Section are: (a) the accused must be a public servant at the time of the offence; (b) he must have used corrupt or illegal means and obtain for himself or for any other person any valuable or pecuniary advantage; or (c) he must have abused his position as a public servant and have obtained for himself and for any other person any valuable thing or pecuniary advantage; or (d) while holding such office he must have obtained for any other person any valuable thing or pecuniary advantage without any motive.

9. Learned counsel for the respondents however repelled the arguments advanced in support of the plea of the appellants and it was contended that the provisions of Prevention of Corruption Act clearly apply as the government doctors in the State of Punjab have been
specifically prohibited to carry private practice under the departmental rules and as such the act of the appellants were illegal.

10. By way of a rejoinder, it was again submitted by the counsel for the appellants that it is the `departmental rules' which bar private practice by a government doctor, hence action if any, is liable to be initiated/taken under the departmental rules which in the present case are the Punjab Civil Services (Punishment and Appeal) Rules. Rule 15 of the Punjab Civil Medical (State Service Class I) Rules, 1972 states that a government doctor may engage in practice with prior permission from the government.

11. On a critical analysis of the arguments advanced in the light of the definition of `corruption' defined under the Prevention of Corruption Act in its Preamble and under Section 7 of the Act, it clearly emerges that `corruption' is acceptance or demand of illegal gratification for doing an official act. We find no difficulty in accepting the submission and endorsing the view that the demand/receipt of fee while doing private practice by itself cannot be held to be an illegal gratification as the same obviously is the amount charged towards professional remuneration. It would be preposterous in our view to hold that if a doctor charges fee for extending medical help and is doing that by way of his professional duty, the same would amount to illegal gratification as that would be even against the plain common sense. If however, for the sake of assumption, it were alleged that the doctor while doing private practice as Government doctor indulged in malpractice in any manner as for instance took money by way of illegal gratification for admitting the patients in the government hospital or any other offence of criminal nature like prescribing unnecessary surgery for the purpose of extracting money by way of professional fee and a host of other circumstances, the same obviously would be a clear case to be registered under the IPC as also under the Prevention of Corruption Act which is not the case in the instant matter. The FIR sought to be quashed, merely alleges that the appellants were indulging in private practice while holding the post of government doctor which restrained private practice, and charged professional fee after examining the patients.

12. We however, came across a case of Raj Rajendra Singh Seth alias R.R.S. Seth v. State of Jharkhand And Anr. [(2008) 11 SCC 681], wherein a doctor who had demanded Rs.500/- for giving proper medical treatment to the complainant's father resulted in conviction of the doctor as it was held in the circumstances of the said case that all the requisites for proving demand and acceptance of bribe were clearly established and the appellant therein was held to have been rightly convicted. However, the prosecution version in the said case disclosed that a written complaint was made to SP., CBI, Dhanbad that on 1.9.1985 one Raju Hadi, a Safai Mazdoor of the Pathological Laboratory Area -9, BCCL, Dhanbad, alleged therein that he had visited Chamodih Dispensary in connection with the treatment of his father who was examined by Dr. L.B. Sah who referred him to Central Hospital, Dhanbad. The complainant's father was admitted in the Central Hospital and the complainant visited his ailing father who complained of lack of proper treatment and he requested him to meet the doctor concerned. The complainant met Dr. R.R.S. Seth who was treating the complainant's father. It was alleged by the complainant therein that Dr. R.R.S. Seth demanded a sum of Rs. 500/- from the complainant for giving proper medical treatment to his father and also insisted that the amount be paid to the doctor on 1.9.1985. The doctor also told the complainant Raju Hadi that
in case he was not available in the hospital, he should pay the amount to his ward boy Nag Narain who would pass the amount to him. Since the complainant Raju Hadi was not willing to make the payment of bribe amount to the doctor and ward boy, he lodged a complaint to the SP, CBI, Dhanbad for taking necessary action.

13. On the basis of this complaint, which was finally tried and resulted into conviction, came up to this Court (Supreme Court) challenging the conviction. This conviction was upheld by this Court as it was held therein that there is no case of the accused that the said amount was received by him as the amount which he was legally entitled to receive or collect from the complainant. It was, therefore, held that when the amount is found to have been passed to the public servant, the burden is on public servant to establish that it was not by way of illegal gratification. This Court held that the said burden was not discharged by the accused and hence it was held that all the requisites for proving the demand and acceptance of bribe had been established and hence interference with the conviction and sentence was refused. The learned Judges in this matter had placed reliance on the case of B. Noha v. State of Kerala [(2006) 12 SCC 277], wherein this Court took notice of the observations made in the said case at paras 10 and 11 wherein it was observed as follows: "............When it is proved that there was voluntary and conscious acceptance of the money, there is no further burden cast on the prosecution to prove by direct evidence, the demand or motive. It has only to be deduced from the facts and circumstances obtained in the particular case." The learned Judges also took notice of the observations made by this Court in Madhukar Bhaskar Rao Joshi v. State of Maharashtra [(2000) 8 SCC 571 at 577, para 12] wherein it was observed that "The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established, the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. ...............If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

15. But the most important and vital check before a public servant can be booked under the Prevention of Corruption Act, the ingredients of the offence will have to be deduced from the facts and circumstances obtained in (2001) 1 SCC 691 the particular case. Judging the case of the appellants on this anvil, it is not difficult to notice that in the case at hand, the amount that is alleged to have been accepted even as per the allegation of the complainant/informant was not by way of gratification for doing any favour to the accused, but admitted by way of professional fee for examining and treating the patients. However, no presumption can be drawn that it was accepted as motive or reward for doing or forbearing any official act so as to treat the receipt of professional fee as gratification much less illegal gratification. The professional fee even as per the case of the complainant/informant was that this act on the part of the accused appellants was, contrary to the government circular and the circular itself had a rider in it which stated that the government doctor could do private practice also, provided he sought permission from the government in this regard. Thus the conduct of the appellants who
are alleged to have indulged in private practice while holding the office of government doctor and hence public servant at the most, could be proceeded with for departmental proceeding under the Service Rules but in so far as making out of an offence either under the Prevention of Corruption Act or under the IPC, would be difficult to sustain as we have already observed that examination of patients by doctor and thereby charging professional fee, by itself, would not be an offence but as per the complaint, since the same was contrary to the government circular which instructed that private practice may be conducted by the government doctors in the State of Punjab provided permission was sought from the Government in this regard, the appellants were fit to be prosecuted. Thus, the appellants even as per the FIR as it stands, can be held to have violated only the government instructions which itself has not termed private practice as 'corruption' under the Prevention of Corruption Act merely on account of charging fee as the same in any event was a professional fee which could not have been charged since the same was contrary to the government instructions.

Thus, if a particular professional discharges the duty of a doctor, that by itself is not an offence but becomes an offence by virtue of the fact that it contravenes a bar imposed by a circular or instruction of the government. In that event, the said act clearly would fall within the ambit of misconduct to be dealt with under the Service Rules but would not constitute criminal offence under the Prevention of Corruption Act.

16. In our considered view, the allegation even as per the FIR as it stands in the instant case, do not constitute an offence either under the Prevention of Corruption Act or under Section 168 of the IPC.

17. For the reasons discussed herebefore, we are pleased to set aside the impugned orders passed by the High Court and quash the FIR No.13 dated 9.4.2003 registered against the appellants as we hold that no prima facie case either under Section 168 of the IPC or Section 13 (1)(d) read with 13(2) of the Prevention of Corruption Act is made out under the prevailing facts and circumstances of the case and hence proceeding in the FIR registered against the appellants would ultimately result into abuse of the process of the Court as also huge wastage of time and energy of the Court. Hence, the respondent - State, although may be justified if it proceeds under the Punjab Civil Services (Punishment and Appeal) Rules against the appellants initiating action for misconduct, FIR registered against them under IPC or Prevention of Corruption Act is not fit to be sustained. Consequently, both the appeals are allowed.

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Abhay Singh Chautala v. C.B.I

(2011) 7 SCC 141

V.S. SIRPURKAR, J. This judgment will dispose of two Special Leave Petitions, they being SLP (Crl.) No. 7384 of 2010 and SLP (Crl.) No. 7428 of 2010. While Abhay Singh Chautala is the petitioner in the first Special Leave Petition, the second one has been filed by Shri Ajay Singh Chautala. The question involved is identical in both the SLPs and hence they are being disposed of by a common judgment.

3. Whether the sanction under Section 19 of The Prevention of Corruption Act (hereinafter called "the Act" for short) was necessary against both the appellants and, therefore, whether the trial which is in progress against both of them, a valid trial, is common question. This question was raised before the Special Judge, CBI before whom the appellants are being tried for the offences under Sections 13(1) (e) and 13(2) of the Prevention of Corruption Act read with Section 109 of Indian Penal Code in separate trials.

4. Separate charge sheets were filed against both the appellants for the aforementioned offences by the CBI. It was alleged that both the accused while working as the Members of Legislative Assembly had accumulated wealth disproportionate to their known sources of income. The charges were filed on the basis of the investigations conducted by the CBI. This was necessitated on account of this Court's order in Writ Petition (Crl.) No.93 of 2003 directing the CBI to investigate the JBT Teachers Recruitment Scam. The offences were registered on 24.5.2004. The CBI conducted searches and seized incriminating documents which revealed that Shri Om Prakash Chautala and his family had acquired movable and immovable properties valued at Rs.1,467 crores. On this basis a Notification came to be issued on 22.2.2006 under Sections 5 and 6 of the DSPE Act with the consent of the Government of Haryana extending powers and jurisdiction under the DSPE Act to the State of Haryana for investigation of allegations regarding accumulation of disproportionate assets by Shri Om Prakash Chautala and his family members under the Prevention of Corruption Act. A regular First Information Report then came to be registered against Shri Om Prakash Chautala who is the father of both the appellants. It is found that in the check period of 7.6.2000 to 8.3.2005, appellant Abhay Singh Chautala had amassed wealth worth Rs.1,19,69,82,619/- which was 522.79 % of appellant Abhay Singh Chautala's known sources of income. During the check period, Shri Abhay Singh Chautala was the Member of the Legislative Assembly Haryana, Rori Constituency. Similarly, in case of Ajay Singh Chautala, his check period was taken as 24.5.1993 to 31.5.2006 during which he held the following offices:

1. 2.3.90 to 15.12.92 MLA Vidhan Sabha, Rajasthan
2. 28.12.93 to 31.11.98 MLA Vidhan Sabha, Rajasthan
3. 10.10.99 to 6.2.2004 Member of Parliament, Lok Sabha from Bhiwani Constituency
4. 2.8.2004 to 03.11.09 Member of Parliament, Rajya Sabha
He was later on elected as MLA from Dabwali constituency, Haryana in November, 2009. It was found that he had accumulated wealth worth Rs.27,74,74,260/- which was 339.26% of his known sources of income. It was on this basis that the charge sheet came to be filed.

5. Admittedly, there is no sanction to prosecute under Section 19 of the Act against both the appellants.

6. An objection regarding the absence of sanction was raised before the Special Judge, who in the common order dated 2.2.2010, held that the allegations in the charge sheet did not contain the allegation that the appellants had abused their current office as member of Legislative Assembly and, therefore, no sanction was necessary.

7. This order was challenged by way of a petition under Section 482 Cr.P.C. before the High Court. The High Court dismissed the said petition by the order dated 8.7.2010.

8. The learned Senior Counsel Shri Mukul Rohhtagi as well as Shri U.U. Lalit arguing for the appellants, urged that on the day when the charges were framed or on any date when the cognizance was taken, both the appellants were admittedly public servants and, therefore, under the plain language of Section 19 (1) of the Act, the Court could not have taken cognizance unless there was a sanction. The learned senior counsel analyzed the whole Section closely and urged that in the absence of a sanction, the cognizance of the offences under the Prevention of Corruption Act could not have been taken. In this behalf, learned senior counsel further urged that the judgment of this Court in Prakash Singh Badal v. State of Punjab [2007 (1) SCC 1] as also the relied on judgment in RS Nayak v. A R. Antulay [1984 (2) SCC 183] were not correct and required reconsideration and urged for a reference to a Larger Bench.

9. Against these two judgments as also the judgments in Balakrishnan Ravi Menon v. Union of India [2007 (1) SCC 45], K. Karunakaran v. State of Kerala [2007 (1) SCC 59] and Habibullah Khan v. State of Orissa [1995 (2) SCC 437], this Court had clearly laid down the law and had held that where the public servant had abused the office which he held in the check period but had ceased to hold "that office" or was holding a different office then a sanction would not be necessary. The learned Solicitor General appearing for the respondent urged that the law on the question of sanction was clear and the whole controversy was set at rest in AR Antulay's case (cited supra) which was followed throughout till date. The Solicitor General urged that the said position in law should not be disturbed in view of the principle of stare decisis. Extensive arguments were presented by both the parties requiring us now to consider the question.

Section 19 runs as under: "19. Previous sanction necessary for prosecution. (1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, - (a) In the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government; (b) In the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government; (c) In the case of any other person, of the authority competent to remove him from his office.
(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973- (a) No finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission, irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has, in fact, been occasioned thereby; (b) No court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice; (c) No court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation: For the purposes of this Section, - (a) Error includes competency of the authority to grant sanction; (b) A sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

10. Shri Mukul Rohtagi and Shri U.U. Lalit, learned senior counsel appearing on behalf of the appellants, firstly pointed out that the plain meaning of Section 19(1) of the Act is that when any public servant is tried for the offences under the Act, a sanction is a must. The learned senior counsel were at pains to point out that in the absence of a sanction, no cognizance can be taken against the public servant under Sections 7, 10, 11, 13 and 15 of the Act and thus, a sanction is a must. The plain language of Section 19(1) cannot be disputed. The learned senior counsel argued that Section 19(1) of the Act creates a complete embargo against taking cognizance of the offences mentioned in that Section against the accused who is a public servant. The learned senior counsel also argued that it is only when the question arises as to which authority should grant a sanction that the sub-Section (2) will have to be taken recourse to. However, where there is no duty of any such nature, the Court will be duty bound to ask for the sanction before it takes cognizance of the offences mentioned under this Section.


12. Shri Mukul Rohtagi and Shri U.U. Lalit, learned senior counsel appearing on behalf of the appellants, have no quarrel with the proposition that in all the above cases, it is specifically
held that where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction.

13. To get over this obvious difficulty, the learned senior counsel appearing on behalf of the appellants contended that the basic decision in *RS Nayak v. A R. Antulay* (cited supra) was not correctly decided, inasmuch as the decision did not consider the plain language of the Section which is clear and without any ambiguity. The learned senior counsel contended that where the language is clear and admits of no ambiguity, the Court cannot reject the plain meaning emanating out of the provision. Further, the learned senior counsel pointed out that even in the judgments following the judgment in *RS Nayak v. A R. Antulay* (cited supra) up to the judgment in the case of *Prakash Singh Badal v. State of Punjab* (cited supra) and even thereafter, the learned Judges have not considered the plain meaning and on that count, those judgments also do not present correct law and require reconsideration. Another substantial challenge to the judgment in *RS Nayak v. A R. Antulay* (cited supra) is on account of the fact that the law declared to the above effect in *RS Nayak v. A R. Antulay* (cited supra) was obiter dictum, inasmuch as it was not necessary for the Court to decide the question, more particularly, decided by the Courts in paragraphs 23 to 26. The learned senior counsel pointed out that, firstly, the Court in *RS Nayak v. A R. Antulay* (cited supra), came to the conclusion that Shri Antulay who was a Member of the Legislative Assembly, was not a public servant. It is contended that once that finding was arrived at, there was no question of further deciding as to whether, the accused being a public servant in a different capacity, the law required that there had to be a sanction before the Court could take the cognizance. Learned senior counsel further argued that where the Court makes an observation which is either not necessary for the decision of the court or does not relate to the material facts in issue, such observation must be held as obiter dictum. The learned senior counsel also argued that the whole class of public servant would be deprived of the protection if the decision in *RS Nayak v. A R. Antulay* (cited supra) is followed. For this purpose, learned senior counsel argued that in such case, public servants would be exposed to frivolous prosecutions which would have disastrous effects on their service careers, though they are required to be insulated against such false, frivolous and motivated complaints of wrong doing. It is then argued that the decision in *K. Veeraswami v. Union of India* [1991 (3) SCC 655] has in fact removed the very foundation of the decision in *RS Nayak v. A R. Antulay* (cited supra) in respect of the sanction. It is also argued that, in effect, the decision in *RS Nayak v. A R. Antulay* (cited supra) has added further proviso to the effect "provided that nothing in this sub-Section shall apply to a case where at the time of cognizance, the public servant is holding a different post with a different removing authority from the one in which the offence is alleged to have been committed". It is argued that such an addition would be clearly impermissible as it would negate the very foundation of criminal law which requires a strict interpretation in favour of the accused and not an interpretation which results into deprivation of the accused of his statutory rights.

23. We do not think the finding given in *Antulay's* case (cited supra) was in any manner obiter and requires reconsideration. We, therefore, reject the argument on that count.

24. There is one more reason, though not a major one, for not disturbing the law settled in *Antulay's* case (cited supra). That decision has stood the test of time for last over 25 years and
it is trite that going as per the maxim *stare decisis et non quieta movere*, it would be better to stand by that decision and not to disturb what is settled. This rule of interpretation was approved of by Lord Coke who suggested - "those things which have been so often adjudged ought to rest in peace".

25. This leaves us with the other contention raised by learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants. The learned senior counsel contended that the decision in *Antulay’s* case (cited supra) is hit by the doctrine of *per incuriam*. We feel that the resultant argument on the part of the learned senior counsel is not correct. In support of their argument, the learned senior counsel contended that in *Antulay’s* case (cited supra), Section 6(2) of the 1947 Act, as it therein existed, was ignored. In short, the argument was that Section 6(2) which is *pari materia* with Section 19(2) of the Act provides that in case of doubt as to which authority should give the sanction, the time when the offence is alleged to have been committed is relevant. The argument further goes on to suggest that if that is so, then the Act expressly contemplates that a public servant may be holding office in a different capacity from the one that he was holding when the offence is alleged to have been committed at the time when cognizance is taken so as to cause doubt about the sanctioning authority. Thus, there would be necessity of a sanction on the date of cognizance and, therefore, in ignoring this aspect, the decision in *Antulay’s* case (cited supra) has suffered an illegality. Same is the argument in the present case.

26. This argument is basically incorrect. In *Antulay’s* case (cited supra), it is not as if Section 6(2) of the 1947 Act as it then existed, was ignored or was not referred to, but the Constitution Bench had very specifically made a reference to and had interpreted Section 6 as a whole. Therefore, it cannot be said that the Constitution Bench had totally ignored the provisions of Section 6 and more particularly, Section 6(2). Once the Court had held that if the public servant had abused a particular office and was not holding that office on the date of taking cognizance, there would be no necessity to obtain sanction. It was obvious that it was not necessary for the Court to go up to Section 6(2) as in that case, there would be no question of doubt about the sanctioning authority. In our opinion also, Section 6(2) of the 1947 Act, which is *pari materia* to Section 19(2), does not contemplate a situation as is tried to be argued by the learned senior counsel. We do not agree with the proposition that the Act expressly contemplates that a public servant may be holding office in a different capacity from the one that he was holding when the offence is alleged to have been committed at the time when cognizance is taken. That is not, in our opinion, the eventuality contemplated in Section 6(2) or Section 19(2), as the case may be. In *Antulay’s* case (cited supra), the Court went on to hold that where a public servant holds a different capacity altogether from the one which he is alleged to have abused, there would be no necessity of sanction at all. This view was taken on the specific interpretation of Section 6 generally and more particularly, Section 6(1)(c), which is *pari materia* to Section 19(1)(c) of the Act. Once it was held that there was no necessity of sanction at all, there would be no question of there being any doubt arising about the sanctioning authority. The doubt expressed in Section 19(2), in our opinion, is not a pointer to suggest that a public servant may have abused any particular office, but when he occupies any other office subsequently, then the sanction is a must. That will be the incorrect reading of the Section. The Section simply contemplates a situation where there is a genuine
doubt as to whether sanctioning authority should be the Central Government or the State Government or any authority competent to remove him. The words in Section 19(2) are to be read in conjunction with Sections 19(1)(a), 19(1)(b) and 19(1)(c). These clauses only fix the sanctioning authority to be the authority which is capable of "removing a public servant". Therefore, in our opinion, the argument based on the language of Section 6(2) or as the case may be, Section 19(2), is not correct.

27. It is in the light of this that the Court did not have to specify as to under what circumstances would a duty arise for locating the authority to give sanction. The doubt could arise in more manners than one and in more situations than one, but to base the interpretation of Section 19(1) of the Act on the basis of Section 19(2) would be putting the cart before the horse. The two Sections would have to be interpreted in a rational manner. Once the interpretation is that the prosecution of a public servant holding a different capacity than the one which he is alleged to have abused, there is no question of going to Section 6(2) / 19(2) at all in which case there will be no question of any doubt. It will be seen that this interpretation of Section 6(1) or, as the case may be, Section 19(1), is on the basis of the expression "office" in three sub-clauses of Section 6(1), or the case may be, Section 19(1). For all these reasons, therefore, we are not persuaded to accept the contention that Antulay's case (cited supra) was decided per incuriam of Section 6(2). In our opinion, the decision in K. Veeraswami v. Union of India (cited supra) is not apposite nor does it support the contention raised by the learned senior counsel as regards Antulay's case (cited supra) being per incuriam of Section 6(2).

28. The learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, in support of their argument that Antulay's case (cited supra) require reconsideration, urged that that interpretation deprives the entire class of public servants covered by the clear words of Section 6(1)/19(1) of a valuable protection. It was further urged that such interpretation would have a disastrous effect on the careers of the public servants and the object of law to insulate a public servant from false, frivolous, malicious and motivated complaints of wrongdoing would be defeated. It was also urged that such interpretation would amount to re-writing of Section 19(1) and as if a proviso would be added to Section 19(1) to the following effect:- “Provided that nothing in this sub-section shall apply to a case where at the time of cognizance, the public servant is holding a different post with a different removing authority from the one in which the offence is alleged to have been committed.”

Lastly, it was urged that such an interpretation would negate the very foundation of criminal law, which requires a strict interpretation in favour of the accused. Most of these questions are already answered, firstly, in Antulay's case (cited supra) and secondly, in Prakash Singh Badal v. State of Punjab (cited supra). Therefore, we need not dilate on them. We specifically reject these arguments on the basis of Antulay's case (cited supra) itself which has been relied upon in Prakash Singh Badal v. State of Punjab (cited supra). The argument regarding the addition of the proviso must also fall as the language of the suggested proviso contemplates a different "post" and not the "office", which are entirely different concepts. That is apart from the fact that the interpretation regarding the abuse of a particular office and there being a direct relationship between a public servant and the office that he has abused, has already been approved of in Antulay's case (cited supra) and the other cases following
Antulay's case (cited supra) including Prakash Singh Badal v. State of Punjab (cited supra). We, therefore, reject all these arguments.

29. It was also urged that a literal interpretation is a must, particularly, to sub-Section (1) of Section 19. That argument also must fall as sub-Section (1) of Section 19 has to be read with in tune with and in light of sub-Sections (a), (b) and (c) thereof. We, therefore, reject the theory of litera regis while interpreting Section 19(1). On the same lines, we reject the argument based on the word "is" in sub-Sections (a), (b) and (c). It is true that the Section operates in praesenti; however, the Section contemplates a person who continues to be a public servant on the date of taking cognizance. However, as per the interpretation, it excludes a person who has abused some other office than the one which he is holding on the date of taking cognizance, by necessary implication. Once that is clear, the necessity of the literal interpretation would not be there in the present case. We specifically hold that giving the literal interpretation to the Section would lead to absurdity and some unwanted results, as had already been pointed out in Antulay's case (cited supra).

30. Another novel argument was advanced basing on the language of Sections 19(1) and (2). It was pointed out that two different terms were used in the whole Section, one term being "public servant" and the other being "a person". It was, therefore, urged that since the two different terms were used by the Legislature, they could not connote the same meaning and they had to be read differently. The precise argument was that the term "public servant" in relation to the commission of an offence connotes the time period of the past whereas the term "a person" in relation to the sanction connotes the time period of the present. Therefore, it was urged that since the two terms are not synonymous and convey different meanings in respect of time/status of the office, the term "public servant" should mean the "past office" while "person" should mean the "present status/present office". While we do agree that the different terms used in one provision would have to be given different meaning, we do not accept the argument that by accepting the interpretation of Section 19(1) in Antulay's case, the two terms referred to above get the same meaning. We also do not see how this argument helps the present accused. The term "public servant" is used in Section 19(1) as Sections 7, 10, 1 and 13 which are essentially the offences to be committed by public servants only. Section 15 is the attempt by a public servant to commit offence referred to in Section 13(1)(c) or 13(1)(d). Section 19(1) speaks about the cognizance of an offence committed by a public servant. It is not a cognizance of the public servant. The Court takes cognizance of the offence, and not the accused, meaning, the Court decides to consider the fact of somebody having committed that offence. In case of this Act, such accused is only a public servant. Then comes the next stage that such cognizance cannot be taken unless there is a previous sanction given. The sanction is in respect of the accused who essentially is a public servant. The use of the term "a person" in sub-Sections (a), (b) and (c) only denotes an "accused". An "accused" means who is employed either with the State Government or with the Central Government or in case of any other person, who is a public servant but not employed with either the State Government or the Central Government. It is only "a person" who is employed or it is only "a person" who is prosecuted. His capacity as a "public servant" may be different but he is essentially "a person" - an accused person, because the Section operates essentially qua an accused person. It is not a "public servant" who is employed; it is
essentially "a person" and after being employed, he becomes a "public servant" because of his position. It is, therefore, that the term "a person" is used in clauses (a), (b) and (c). The key words in these three clauses are "not removable from his office save by or with the sanction of ....". It will be again seen that the offences under Sections 7, 10, 11 and 13 are essentially committed by those persons who are "public servants". Again, when it comes to the removal, it is not a removal of his role as a "public servant", it is removal of "a person" himself who is acting as a "public servant". Once the Section is read in this manner, then there is no question of assigning the same meaning to two different terms in the Section. We reject this argument.

31. Another novel argument was raised on the basis of the definition of "public servant" as given in Section 2(c) of the Act. The argument is based more particularly on clause 2(c)(vi) which provides that an arbitrator, on account of his position as such, is public servant. The argument is that some persons, as contemplated in Sections 2(c)(vii), (viii), (ix) and (x), may adorn the character of a public servant only for a limited time and if after renouncing that character of a public servant on account of lapse of time or non-continuation of their office they are to be tried for the abuse on their part of the offices that they held, then it would be a very hazardous situation. We do not think so. If the person concerned at the time when he is to be tried is not a public servant, then there will be no necessity of a sanction at all. Section 19(1) is very clear on that issue. We do not see how it will cause any hazardous situation.

32. Same argument was tried to be raised on the question of plurality of the offices held by the public servant and the doubt arising as to who would be the sanctioning authority in such case. In the earlier part of the judgment, we have already explained the concept of doubt which is contemplated in the Act, more particularly in Section 19(2). The law is very clear in that respect. The concept of `doubt' or `plurality of office' cannot be used to arrive at a conclusion that on that basis, the interpretation of Section 19(1) would be different from that given in Antulay's case (cited supra) or Prakash Singh Badal v. State of Punjab (cited supra). We have already explained the situation that merely because a concept of doubt is contemplated in Section 19(2), it cannot mean that the public servant who has abused some other office than the one he is holding could not be tried without a sanction. The learned senior counsel tried to support their argument on the basis of the theory of "legal fiction". We do not see as to how the theory of "legal fiction" can work in this case. It may be that the appellants in this case held more than one offices during the check period which they are alleged to have abused; however, there will be no question of any doubt if on the date when the cognizance is taken, they are not continuing to hold that very office. The relevant time, is the date on which the cognizance is taken. If on that date, the appellant is not a public servant, there will be no question of any sanction. If he continues to be a public servant but in a different capacity or holding a different office than the one which is alleged to have been abused, still there will be no question of sanction and in that case, there will also be no question of any doubt arising because the doubt can arise only when the sanction is necessary. In case of the present appellants, there was no question of there being any doubt because basically there was no question of the appellants' getting any protection by a sanction.

33. We do not, therefore, agree with learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, that the decision in Antulay's case (cited supra) and the subsequent decisions require any reconsideration for the reasons argued before us. Even
on merits, there is no necessity of reconsidering the relevant ratio laid down in Antulay's case (cited supra).

34. Thus, we are of the clear view that the High Court was absolutely right to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19 of the Act. The appeals are without any merit and are dismissed.

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TOPIC 6: THE PREVENTION OF MONEY-LAUNDERING ACT, 2002

Ram Jethmalani & Ors. v. Union of India

2011 (10) SCALE 691

B. SUDERSHAN REDDY, J. 1. ‘Follow the money’ was the short and simple advice given by the secret informant, within the American Government, to Bob Woodward, the journalist from Washington Post, in aid of his investigations of the Watergate break in. Money has often been claimed, by economists, to only be a veil that covers the real value and the economy. As a medium of exchange, money is vital for the smooth functioning of exchange in the market place. However, increasing monetization of most social transactions has been viewed as potentially problematic for the social order, in as much as it signifies a move to evaluating value, and ethical desirability, of most areas of social interaction only in terms of price obtained in the market place.

2. Price based notions of value and values, as propounded by some extreme neo-liberal doctrines, implies that the values that ought to be promoted, in societies, are the ones for which people are willing to pay a price for. Values, and social actions, for which an effective demand is not expressed in the market, are neglected, even if lip service is paid to their essentiality. However, it cannot be denied that not everything that can be, and is transacted, in the market for a price is necessarily good, and enhances social welfare. Moreover, some activities, even if costly and without being directly measurable in terms of exchange value, are to be rightly viewed as essential. It is a well established proposition, of political economy, and of statecraft, that the State has a necessary interest in determining, and influencing, the kinds of transactions, and social actions that occur within a legal order. From prevention of certain kinds of harmful activities, that may range from outright crimes, to regulating or controlling, and consequently mitigating, socially harmful modes of social and economic production to promotion of activities that are deemed to be of higher priority, than other activities which may have a lower priority, however evaluated in terms of social utility, are all the responsibilities of the State. Whether such activities by the State result in directly measurable benefits or not is often not the most important factor in determining their desirability; their absence, or their substantial evisceration, are to be viewed as socially destructive.

3. The scrutiny, and control, of activities, whether in the economic, social or political contexts, by the State, in the public interest as posited by modern constitutionalism, is substantially effectuated by the State ‘following the money’. In modern societies very little gets accomplished without transfer of money. The incidence of crime, petty and grand, like any other social phenomena is often linked to transfers of monies, small or large. Money, in that sense, can both power, and also reward, crime. As noted by many scholars, with increasing globalization, an ideological and social construct, in which transactions across borders are accomplished with little or no control over the quantum, and mode of transfers of money in exchange for various services and value rendered, both legal and illegal, nation-states also have begun to confront complex problems of cross-border crimes of all kinds. Whether this complex web of flows of funds, instantaneously, and in large sums is good or
bad, from the perspective of lawful and desired transactions is not at issue in the context of the matters before this Court.

4. The worries of this Court that arise, in the context of the matters placed before us, are with respect to transfers of monies, and accumulation of monies, which are unaccounted for by many individuals and other legal entities in the country, in foreign banks. The worries of this Court relate not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country, and with the nature of activities that may have engendered the accumulation of such monies. The worries of this Court are also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation, including actions against the State. The worries of this Court also relate to whether the activities of engendering such unaccounted monies, transferring them abroad, and the routing them back to India may not actually be creating a culture that extols the virtue of such cycles, and the activities that engender such cycles are viewed as desirable modes of individual and group action. The worries of this court also relate to the manner, and the extent to which such cycles are damaging to both national and international attempts to combat the extent, nature and intensity of cross-border criminal activity. Finally, the worries of this Court are also with respect to the extent of incapacities, system wide, in terms of institutional resources, skills, and knowledge, as well as about incapacities of ethical nature, in keeping an account of the monies generated by various facets of social action in the country, and thereby developing effective mechanisms of control. These incapacities go to the very heart of constitutional imperatives of governance. Whether such incapacities are on account of not having devoted enough resources towards building such capacities, or on account of a broader culture of venality in the wider spheres of social and political action, they run afoul of constitutional imperatives.

5. Large amounts of unaccounted monies, stashed away in banks located in jurisdictions that thrive on strong privacy laws protecting bearers of those accounts to avoid scrutiny, raise each and every worry delineated above. First and foremost, such large monies stashed abroad, and unaccounted for by individuals and entities of a country, would suggest the necessity of suspecting that they have been generated in activities that have been deemed to be unlawful. In addition, such large amounts of unaccounted monies would also lead to a natural suspicion that they have been transferred out of the country in order to evade payment of taxes, thereby depleting the capacity of the nation to undertake many tasks that are in public interest.

6. Many schools of thought exist with regard to the primary functions of the State, and the normative expectations of what the role of the State ought to be. The questions regarding which of those schools provide the absolutely correct view cannot be the criteria to choose or reject any specific school of thought as an aid in constitutional adjudication. Charged with the responsibility of having to make decisions in the present, within the constraints of epistemic frailties of human knowledge, constitutional adjudicators willy-nilly are compelled to choose those that seem to provide a reasoned basis for framing of questions relevant, both with respect to law, and to facts. Institutional economics gives one such perspective which may be a useful guide for us here. Viewed from a functional perspective, the State, and governments, may be seen as coming into existence in order to solve, what institutional economists have
come to refer to as, the coordination problems in providing public goods, and prevent the
disutility that emerges from the moral hazard of a short run utility maximizer, who may desire
the benefits of goods and services that are to be provided in common to the public, and yet
have the interest of not paying for their production.

7. Security of the nation, infrastructure of governance, including those that relate to law
making and law keeping functions, crime prevention, detection and punishment, coordination
of the economy, and ensuring minimal levels of material, and cultural goods for those who
may not be in a position to fend for themselves or who have been left by the wayside by the
operation of the economy and society, may all be cited as some examples of the kinds of
public goods that the State is expected to provide for, or enable the provision of. In as much
as the market is primarily expected to cater to purely self centered activities of individuals and
groups, markets and the domain of purely private social action significantly fail to provide
such goods. Consequently, the State, and government, emerges to rectify the coordination
problem, and provide the public goods.

8. Unaccounted monies, especially large sums held by nationals and entities with a legal
presence in the nation, in banks abroad, especially in tax havens or in jurisdictions with a
known history of silence about sources of monies, clearly indicate a compromise of the ability
of the State to manage its affairs in consonance with what is required from a constitutional
perspective. This is so in two respects. The quantum of such monies by itself, along with the
numbers of individuals or other legal entities who hold such monies, may indicate in the first
instance that a large volume of activities, in the social and the economic spheres within the
country are unlawful and causing great social damage, both at the individual and the
collective levels. Secondly, large quanta of monies stashed abroad, would also indicate a
substantial weakness in the capacity of the State in collection of taxes on incomes generated
by individuals and other legal entities within the country. The generation of such revenues is
essential for the State to undertake the various public goods and services that it is
constitutionally mandated, and normatively expected by its citizenry, to provide. A substantial
degree of incapacity, in the above respect, would be an indicia of the degree of failure of the
State; and beyond a particular point, the State may spin into a vicious cycle of declining moral
authority, thereby causing the incidence of unlawful activities in which wealth is sought to be
generated, as well as instances of tax evasion, to increase in volume and in intensity.

9. Consequently, the issue of unaccounted monies held by nationals, and other legal entities,
in foreign banks, is of primordial importance to the welfare of the citizens. The quantum of
such monies may be rough indicators of the weakness of the State, in terms of both crime
prevention, and also of tax collection. Depending on the volume of such monies, and the
number of incidents through which such monies are generated and secreted away, it may very
well reveal the degree of ‘softness of the State’.

10. The concept of a ‘soft state’ was famously articulated by the Nobel Laureate, Gunnar
Myrdal. It is a broad based assessment of the degree to which the State, and its machinery, is
equipped to deal with its responsibilities of governance. The more soft the State is, greater the
likelihood that there is an unholy nexus between the law maker, the law keeper, and the law
breaker.

11. When a catchall word like ‘crimes’ is used, it is common for people, and the popular
culture to assume that it is ‘petty crime’, or crimes of passion committed by individuals. That
would be a gross mischaracterization of the seriousness of the issues involved. Far more dangerous are the crimes that threaten national security, and national interest. For instance, with globalization, nation states are also confronted by the dark worlds of international arms dealers, drug peddlers, and various kinds of criminal networks, including networks of terror. International criminal networks that extend support to home-grown terror or extremist groups, or those that have been nurtured and sustained in hostile countries, depend on networks of formal and informal, lawful and unlawful mechanisms of transfer of monies across boundaries of nation-states. They work in the interstices of the micro-structures of financial transfers across the globe, and thrive in the lacunae, the gaps in law and of effort. The loosening of control over those mechanisms of transfers, guided by an extreme neo-liberal thirst to create a global market that is free of the friction of law and its enforcement, by nation-states, may have also contributed to an increase in the volume, extent and intensity of activities by criminal and terror networks across the globe.

12. Increasingly, on account of ‘greed is good’ culture that has been promoted by neo-liberal ideologues, many countries face the situation where the model of capitalism that the State is compelled to institute, and the markets it spawns, is predatory in nature. From mining mafias to political operators who, all too willingly, bend policies of the State to suit particular individuals or groups in the social and economic sphere, the raison d'etre for weakening the capacities and intent to enforce the laws is the lure of the lucre. Even as the State provides violent support to those who benefit from such predatory capitalism, often violating the human rights of its citizens, particularly it's poor, the market begins to function like a bureaucratic machine dominated by big business; and the State begins to function like the market, where everything is available for sale at a price.

13. The paradigm of governance that has emerged, over the past three decades, prioritizes the market, and its natural course, over any degree of control of it by the State. The role for the State is visualized by votaries of the neo- liberal paradigm as that of a night watchman; and moreover it is also expected to take its hands out of the till of the wealth generating machinery. Based on the theories of Arthur Laffer, and pushed by the Washington Consensus, the prevailing wisdom of the elite, and of the policy makers, is that reduction of tax rates, thereby making tax regimes regressive, would incentivise the supposed genius of entrepreneurial souls of individuals, actuated by pursuit of self-interest and desire to accumulate great economic power. It was expected that this would enable the generation of more wealth, at a more rapid pace, thereby enabling the State to generate appropriate tax revenues even with lowered tax rates. Further, benefits were also expected in moral terms—that the lowering of tax rates would reduce the incentives of wealth generators to hide their monies, thereby saving them from the guilt of tax evasion. Whether that is an appropriate model of social organization or not, and from the perspective of constitutional adjudication, whether it meets the requirements of constitutionalism as embedded in the texts of various constitutions, is not a question that we want to enter in this matter.

14. Nevertheless, it would be necessary to note that there is a fly in the ointment of the above story of friction free markets that would always clear, and always work to the benefit of the society. The strength of tax collection machinery can, and ought to be, expected to have a direct bearing on the revenues collected by the State. If the machinery is weak, understaffed, ideologically motivated to look the other way, or the agents motivated by not so salubrious
mottoes, the amount of revenue collected by the State would decline, stagnate, or may not generate the revenue for the State that is consonant with its responsibilities. From within the neo-liberal paradigm, also emerged the under-girding current of thought that revenues for the State implies a big government, and hence a strong tax collecting machinery itself would be undesirable. Where the elite lose out in democratic politics of achieving ever decreasing tax rates, it would appear that state machineries in the hands of the executive, all too willing to promote the extreme versions of the neo- liberal paradigm and co-opt itself in the enterprises of the elite, may also become all too willing to not develop substantial capacities to monitor and follow the money, collect the lawfully mandated taxes, and even look the other way. The results, as may be expected, have been disastrous across many nations.

15. In addition, it would also appear that in this miasmic cultural environment in which greed is extolled, conspicuous consumption viewed as both necessary and socially valuable, and the wealthy viewed as demi-gods, the agents of the State may have also succumbed to the notions of the neo-liberal paradigm that the role of the State ought to only be an enabling one, and not exercise significant control. This attitude would have a significant impact on exercise of discretion, especially in the context of regulating economic activities, including keeping an account of the monies generated in various activities, both legal and illegal. Carried away by the ideology of neo-liberalism, it is entirely possible that the agents of the State entrusted with the task of supervising the economic and social activities may err more on the side of extreme caution, whereby signals of wrong doing may be ignored even when they are strong. Instances of the powers that be ignoring publicly visible stock market scams, or turning a blind eye to large scale illegal mining have become all too familiar, and may be readily cited. That such activities are allowed to continue to occur, with weak, or non-existent, responses from the State may, at best, be charitably ascribed to this broader culture of permissibility of all manner of private activities in search of ever more lucre. Ethical compromises, by the elite - those who wield the powers of the state, and those who fatten themselves in an ever more exploitative economic sphere- can be expected to thrive in an environment marked by such a permissive attitude, of weakened laws, and of weakened law enforcement machineries and attitudes.

16. To the above, we must also add the fragmentation of administration. Even as the range of economic, and social activities have expanded, and their sophistication increased by leaps and bounds, the response in terms of administration by the State has been to create ever more specialized agencies, and departments. To some degree this has been unavoidable. Nevertheless, it would also appear that there is a need to build internal capacities to share information across such departments, lessen the informational asymmetries between, and friction to flow of information across the boundaries of departments and agencies, and reduce the levels of consequent problems in achieving coordination. Life, and social action within which human life becomes possible, do not proceed on the basis of specialized fiefdoms of expertise. They cut across the boundaries erected as a consequence of an inherent tendency of experts to specialize. The result, often, is a system wide blindness, while yet being lured by the dazzle of ever greater specialization. Many dots of information, now collected in ever increasing volume by development of sophisticated information technologies, get ignored on account of lack of coordination across agencies, and departments, and tendency within bureaucracy to jealously guard their own turfs. In some instances, the failure to properly
investigate, or to prevent, unlawful activities could be the result of such over-specialization, frictions in sharing of information, and coordination across departmental and specialized agency boundaries.

17. If the State is soft to a large extent, especially in terms of the unholy nexus between the law makers, the law keepers, and the law breakers, the moral authority, and also the moral incentives, to exercise suitable control over the economy and the society would vanish. Large unaccounted monies are generally an indication of that. In a recent book, Prof. Rotberg states, after evaluating many failed and collapsed states over the past few decades:

“Failed states offer unparalleled economic opportunity but only for a privileged few. Those around the ruler or ruling oligarchy grow richer while their less fortunate brethren starve. Immense profits are available from an awareness of regulatory advantages and currency speculation and arbitrage. But the privilege of making real money when everything else is deteriorating is confined to clients of the ruling elite... The nation-state’s responsibility to maximize the well-being and prosperity of all its citizens is conspicuously absent, if it ever existed.... Corruption flourishes in many states, but in failed states it often does so on an unusually destructive scale. There is widespread petty or lubricating corruption as a matter of course, but escalating levels of venal corruption mark failed states.”

18. India finds itself in a peculiar situation. Often celebrated, in popular culture, as an emerging economy that is rapidly growing, and expected to be a future economic and political giant on the global stage, it is also popularly perceived, and apparently even in some responsible and scholarly circles, and official quarters, that some of its nationals and other legal entities have stashed the largest quantum of unaccounted monies in foreign banks, especially in tax havens, and in other jurisdictions with strong laws of secrecy. There are also apparently reports, and analyses, generated by Government of India itself, which place the amounts of such unaccounted monies at astronomical levels.

19. We do not wish to engage in any speculation as to what such analyses, reports, and factuality imply with respect to the state of the nation. The citizens of our country can make, and ought to be making, rational assessments of the situation. We fervently hope that it leads to responsible, reasoned and reasonable debate, thereby exerting the appropriate democratic pressure on the State, and its agents, within the constitutional framework, to bring about the necessary changes without sacrificing cherished, and inherently invaluable social goals and values enshrined in the Constitution. The failures are discernible when viewed against the vision of the constitutional project, and as forewarned by Dr. Ambedkar, have been on account of the fact that man has been vile, and not the defects of a Constitution forged in the fires of wisdom gathered over eons of human experience. If the politico-bureaucratic, power wielding, and business classes bear a large part of the blame, at least some part of blame ought to be apportioned to those portions of the citizenry that is well informed, or is expected to be informed. Much of that citizenry has disengaged itself with the political process, and with the masses. Informed by contempt for the poor and the downtrodden, the elite classes

that have benefited the most, or expects to benefit substantially from the neo-liberal policies that would wish away the hordes, has also chosen to forget that constitutional mandate is as much the responsibility of the citizenry, and through their constant vigilance, of all the organs of the state, and national institutions including political parties. To not be engaged in the process, is to ensure the evisceration of constitutional content.

20. These matters before us relate to issues of large sums of unaccounted monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted monies, as alleged by the Government of India itself is massive. The show cause notices were issued a substantial length of time ago. The named individuals were very much present in the country. Yet, for unknown, and possibly unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.

21. It is in light of the above, that we heard some significant elements of the instant writ petitions filed in this Court, and at this stage it is necessary that appropriate orders be issued. There are two issues we deal with below: (i) the appointment of a Special Investigation Team; and (ii) disclosure, to the Petitioners, of certain documents relied upon by the Union of India in its response.

II

22. The instant writ petition was filed, in 2009, by Shri. Ram Jethmalani, Shri. Gopal Sharman, Smt. Jalbala Vaidya, Shri. K.P.S. Gill, Prof. B.B. Dutta, and Shri. Subhash Kashyap, all well known professionals, social activists, former bureaucrats or those who have held responsible positions in the society. They have also formed an organization called Citizen India, the stated objective of which is said to be to bring about changes and betterment in the quality of governance, and functioning of all public institutions.

23. The Petitioners state that there have been a slew of reports, in the media, and also in scholarly publications that various individuals, mostly citizens, but may also include non-citizens, and other entities with presence in India, have generated, and secreted away large sums of monies, through their activities in India or relating to India, in various foreign banks, especially in tax havens, and jurisdictions that have strong secrecy laws with respect to the contents of bank accounts and the identities of individuals holding such accounts. The Petitioners allege that most of such monies are unaccounted, and in all probability have been generated through unlawful activities, whether in India or outside India, but relating to India. Further, the Petitioners also allege that a large part of such monies may have been generated within India, and have been taken away from India, breaking various laws, including but not limited to evasion of taxes.

24. The Petitioners contend: (i) that the sheer volume of such monies points to grave weaknesses in the governance of the nation, because they indicate a significant lack of control over unlawful activities through which such monies are generated, evasion of taxes, and use of unlawful means of transfer of funds; (ii) that these funds are then laundered and brought back into India, to be used in both legal and illegal activities; (iii) that the use of various unlawful modes of transfer of funds across borders, gives support to such unlawful networks
of international finance; and (iv) that in as much as such unlawful networks are widely acknowledged to also effectuate transfer of funds across borders in aid of various crimes committed against persons and the State, including but not limited to activities that may be classifiable as terrorist, extremist, or unlawful narcotic trade, the prevailing situation also has very serious connotations for the security and integrity of India.

25. The Petitioners also further contend that a significant part of such large unaccounted monies include the monies of powerful persons in India, including leaders of many political parties. It was also contended that the Government of India, and its agencies, have been very lax in terms of keeping an eye on the various unlawful activities generating unaccounted monies, the consequent tax evasion; and that such laxity extends to efforts to curtail the flow of such funds out, and into, India. Further, the Petitioners also contend that the efforts to prosecute the individuals, and other entities, who have secreted such monies in foreign banks, have been weak or non-existent. It was strongly argued that the efforts at identification of such monies in various bank accounts in many jurisdictions across the globe, attempts to bring back such monies, and efforts to strengthen the governance framework to prevent further outflows of such funds, have been sorely lacking.

26. The Petitioners also made allegations about certain specific incidents and patterns of dereliction of duty, wherein the Government of India, and its various agencies, even though in possession of specific knowledge about the monies in certain bank accounts, and having estimated that such monies run into many scores of thousands of crores, and upon issuance of show cause notices to the said individual, surprisingly have not proceeded to initiate, and carry out suitable investigations, and prosecute the individuals. The individual specifically named is one Hassan Ali Khan. The Petitioners also contended that Kashinath Tapuria, and his wife Chandrika Tapuria, are also party to the illegal activities of Hassan Ali Khan.

27. Specifically, it was alleged that Hassan Ali Khan was served with an income tax demand for Rs. 40,000.00 Crores (Rupees Forty Thousand Crores), and that the Tapurias were served an income tax demand notice of Rs. 20,580.00 Crores (Rupees Twenty Thousand and Five Hundred and Eighty Crores). The Enforcement Directorate, in 2007, disclosed that Hassan Ali Khan had “dealings amounting to 1.6 billion US dollars” in the period 2001-2005. In January 2007, upon raiding Hassan Ali’s residence in Pune, certain documents and evidence had been discovered regarding deposits of 8.04 billion dollars with UBS bank in Zurich. It is the contention of the Petitioners that, even though such evidence was secured nearly four and half years ago, (i) a proper investigation had not been launched to obtain the right facts from abroad; (ii) the individuals concerned, though present in India, and subject to its jurisdiction, and easily available for its exercise, had not even been interrogated appropriately; (iii) that the Union of India, and its various departments, had even been refusing to divulge the details and information that would reveal the actual status of the investigation, whether in fact it was being conducted at all, or with any degree of seriousness; (iv) given the magnitude of amounts in question, especially of the demand notice of income tax, the laxity of investigation indicates multiple problems of serious non-governance, and weaknesses in the system, including pressure from political quarters to hinder, or scuttle, the investigation, prosecution, and ultimately securing the return of such monies; and (v) given the broadly accepted fact that within the political class corruption is rampant, ill-begotten wealth has begun to be amassed in massive quantities by many members in that class, it may be reasonable to suspect, or even
conclude, that investigation was being deliberately hindered because Hassan Ali Khan, and the Tapurias, had or were continuing to handle the monies of such a class. The fact that both Income Tax department, and the Enforcement Directorate routinely, and with alacrity, seek the powers for long stretches of custodial interrogation of even those suspected of having engaged in money laundering, or evaded taxes, with respect to very small amounts, ought to raise the reasonable suspicion that inaction in the matters concerning Hassan Ali Khan, and Tapurias, was deliberately engineered, for nefarious reasons.

28. In addition, the Petitioners also state that in as much as the bank in which the monies had been stashed by Hassan Ali Khan was UBS Zurich, the needle of suspicion has to inexorably turn to high level political interference and hindrance to the investigations. The said bank, it was submitted, is the biggest or one of the biggest wealth management companies in the world. The Petitioners also narrated the mode, and the manner, in which the United States had dealt with UBS, with respect to monies of American citizens secreted away with the said bank. It was also alleged that UBS had not cooperated with the U.S. authorities. Contrasting the relative alacrity, and vigour, with which the United States government had pursued the matters, the Petitioners contend the inaction of Union of India is shocking.

29. The Petitioners further allege that in 2007, the Reserve Bank of India had obtained some ‘knowledge of the dubious character’ of UBS Security India Private Limited, a branch of UBS, and consequently stopped this bank from extending its business in India by refusing to approve its takeover of Standard Chartered Mutual Funds business in India. It was also claimed by the Petitioners that the SEBI had alleged that UBS played a role in the stock market crash of 2004. The said UBS Bank has apparently applied for a retail banking license in India, which was approved in principle by RBI initially. In 2008, this license was withheld on the ground that ‘investigation of its unsavoury role in the Hassan Ali Khan case was pending investigation in the Enforcement Directorate’. However, it seems that the RBI reversed its decision in 2009, and no good reasons seem to be forthcoming for the reversal of the decision of 2008.

30. The Petitioners contend that such a reversal of decision could only have been accomplished through high level intervention, and that it is further evidence of linkages between members of the political class, and possibly even members of the bureaucracy, and such banking operations, and the illegal activities of Hassan Ali Khan and the Tapurias. Hence, the Petitioners argued, in the circumstances it would have to be necessarily concluded that the investigations into the affairs of Hassan Ali Khan, and the Tapurias, would be severely compromised if the Court does not intervene, and monitor the investigative processes by appointing a special investigation team reporting directly to the Court.

31. The learned senior counsel for the Petitioners sought that this Court intervene, order proper investigations, and monitor continuously, the actions of the Union of India, and any and all governmental departments and agencies, in these matters. It was submitted that their filing of this Writ Petition under Article 32 is proper, as the inaction of the Union of India, as described above, violates the fundamental rights - to proper governance, in as much as Article 14 provides for equality before the law and equal protection of the law, and Article 21 promises dignity of life to all citizens.

32. We have heard the learned senior counsel for the Petitioners, Shri. Anil B. Divan, the learned senior counsel for interveners, Shri. K.K. Venugopal, and the learned senior counsel
for the petitioners in the connected Writ Petition, Shri. Shanti Bhushan. We have also heard the learned Solicitor General, Shri. Gopal Subramaniam, on behalf of the respondents.

33. Shri Divan, specifically argued that, having regard to the nature of the investigation, its slow pace so far, and the non-seriousness on the part of the respondents, there is a need to constitute a Special Investigation Team (‘SIT’) headed by a former judge or two of this court. However, this particular plea has been vociferously resisted by the Solicitor General. Relying on the status reports submitted from time to time, the learned Solicitor General stated that all possible steps were being taken to bring back the monies stashed in foreign banks, and that the investigations in cases registered were proceeding in an appropriate manner. He expressed his willingness for a Court monitored investigation. He also further submitted that the Respondents, in principle, have no objections whatsoever against the main submissions of the Petitioners.

35. We must express our serious reservations about the responses of the Union of India. In the first instance, during the earlier phases of hearing before us, the attempts were clearly evasive, confused, or originating in the denial mode. It was only upon being repeatedly pressed by us did the Union of India begin to admit that indeed the investigation was proceeding very slowly. It also became clear to us that in fact the investigation had completely stalled, in as much as custodial interrogation of Hassan Ali Khan had not even been sought for, even though he was very much resident in India. Further, it also now appears that even though his passport had been impounded, he was able to secure another passport from the RPO in Patna, possibly with the help or aid of a politician.

36. During the course of the hearings the Union of India repeatedly insisted that the matter involves many jurisdictions, across the globe, and a proper investigation could be accomplished only through the concerted efforts by different law enforcement agencies, both within the Central Government, and also various State governments. However, the absence of any satisfactory explanation of the slowness of the pace of investigation, and lack of any credible answers as to why the respondents did not act with respect to those actions that were feasible, and within the ambit of powers of the Enforcement Directorate itself, such as custodial investigation, leads us to conclude that the lack of seriousness in the efforts of the respondents are contrary to the requirements of laws and constitutional obligations of the Union of India. It was only upon the insistence and intervention of this Court has the Enforcement Directorate initiated and secured custodial interrogation over Hassan Ali Khan. The Union of India has explicitly acknowledged that there was much to be desired with the manner in which the investigation had proceeded prior to the intervention of this court. From the more recent reports, it would appear that the Union of India, on account of its more recent efforts to conduct the investigation with seriousness, on account of the gravitas brought by this Court, has led to the securing of additional information, and leads, which could aid in further investigation. For instance, during the continuing interrogation of Hassan Ali Khan and the Tapurias, undertaken for the first time at the behest of this Court, many names of important persons, including leaders of some corporate giants, politically powerful people, and international arms dealers have cropped up. So far, no significant attempt has been made to investigate and verify the same. This is a further cause for the grave concerns of this Court, and points to the need for continued, effective and day to day monitoring by a SIT constituted by this Court, and acting on behalf, behest and direction of this Court.
37. In light of the fact that the issues are complex, requiring expertise and knowledge of different departments, and the necessity of coordination of efforts across various agencies and departments, it was submitted to us that the Union of India has recently formed a High Level Committee, under the aegis of the Department of Revenue in the Ministry of Finance, which is the nodal agency responsible for all economic offences. The composition of the High Level Committee (HLC) is said to be as follows: (i) Secretary, Department of Revenue, as the Chairman; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (vii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR- I), CBDT. It was also submitted that the HLC may co-opt, as necessary, representation not below the rank of Joint Secretary from the Home Secretary, Foreign Secretary, Defense Secretary and the Secretary, Cabinet Secretariat. The Union of India claims that such a multi-disciplinary group and committee would now enable the conducting of an efficient and a systematic investigation into the matters concerning allegations against Hassan Ali Khan and the Tapurias; and further that such a committee would also enable the taking of appropriate steps to bring back the monies stashed in foreign banks, for which purposes a need may arise to register further cases. The Union of India also claims that the formation of such a committee indicates the seriousness with which it is viewing the entire matter.

38. While it would appear, from the Status Reports submitted to this Court, that the Enforcement Directorate has moved in some small measure, the actual facts are not comforting to an appropriate extent. In fact we are not convinced that the situation has changed to the extent that it ought to so as to accept that the investigation would now be conducted with the degree of seriousness that is warranted. According to the Union of India the HLC was formed in order to take charge of and direct the entire investigation, and subsequently, the prosecution. In the meanwhile a charge sheet has been filed against Hassan Ali Khan. Upon inquiry by us as to whether the charge-sheet had been vetted by the HLC, and its inputs secured, the counsel for Union of India were flummoxed. The fact was that the charge-sheet had not been given even for the perusal of the HLC, let alone securing its inputs, guidance and direction. We are not satisfied by the explanation offered by the Directorate of Enforcement by way of affidavit after the orders were reserved. Be it noted that a nodal agency was set up, pursuant to directions of this Court in Vineet Narain case given many years ago. Yet the same was not involved and these matters were never placed before it. Why?

39. From the status reports, it is clear that the problem is extremely complex, and many agencies and departments spread across the country have not responded with the alacrity, and urgency, that one would desire. Moreover, the Union of India has been unable to answer any of the questions regarding its past actions, and their implications, such as the slowness of the investigation, or about grant of license to conduct retail banking by UBS, by reversing the decision taken earlier to withhold such a license on the grounds that the said bank's credentials were suspect. To this latter query, the stance of the Union of India has been that entry of UBS would facilitate flow of foreign investments into India. The question that arises is whether the task of bringing foreign funds into India override all other constitutional concerns and obligations?
40. The predominant theme in the responses of Union of India before this court has been that it is doing all that it can to bring back the unaccounted monies stashed in various banks abroad. To this is added the qualifier that it is an extremely complex problem, requiring the cooperation of many different jurisdictions, and an internationally coordinated effort. Indeed they are complex. We do not wish to go into the details of arguments about whether the Union of India is, or is not, doing necessary things to achieve such goals. That is not necessary for the matters at hand.

41. What is important is that the Union of India had obtained knowledge, documents and information that indicated possible connections between Hassan Ali Khan, and his alleged co-conspirators and known international arms dealers. Further, the Union of India was also in possession of information that suggested that because the international arms dealing network, and a very prominent dealer in it, could not open a bank account even in a jurisdiction that is generally acknowledged to lay great emphasis on not asking sources of money being deposited into its banks, Hassan Ali Khan may have played a crucial role in opening an account with the branch of the same bank in another jurisdiction. The volume of alleged income taxes owed to the country, as demanded by the Union of India itself, and the volume of monies, by some accounts US $8.04 billion, and some other accounts in excess of Rs. 70,000 crores, that are said to have been routed through various bank accounts of Hassan Ali Khan, and Tapurias. Further, from all accounts it has been acknowledged that none of the named individuals have any known and lawful sources for such huge quantities of monies. All of these factors, either individually or combined, ought to have immediately raised questions regarding the sources being unlawful activities, national security, and transfer of funds into India for other illegal activities, including acts against the State. It was only at the repeated insistence by us that such matters have equal, if not even greater importance than issues of tax collection, has the Union of India belatedly concluded that such aspects also ought to be investigated with thoroughness. However, there is still no evidence of a really serious investigation into these other matters from the national security perspective.

42. The fact remains that the Union of India has struggled in conducting a proper investigation into the affairs of Hassan Ali Khan and the Tapurias. While some individuals, whose names have come to the adverse knowledge of the Union of India, through the more recent investigations, have been interrogated, many more are yet to be investigated. This highly complex investigation has in fact just begun. It is still too early to conclude that the Union of India has indeed placed all the necessary machinery to conduct a proper investigation. The formation of the HLC was a necessary step, and may even be characterized as a welcome step. Nevertheless, it is an insufficient step.

43. In light of the above, we had proposed to the Union of India that the same HLC constituted by it be converted into a Special Investigation Team, headed by two retired judges of the Supreme Court of India. The Union of India opposes the same, but provides no principle as to why that would be undesirable, especially in light of the many lapses and lacunae in its actions in these matters spread over the past four years.

44. We are of the firm opinion that in these matters fragmentation of government, and expertise and knowledge, across many departments, agencies and across various jurisdictions, both within the country, and across the globe, is a serious impediment to the conduct of a proper investigation. We hold that it is in fact necessary to create a body that coordinates,
directs, and where necessary orders timely and urgent action by various institutions of the State. We also hold that the continued involvement of this Court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values. However, it would be impossible for this Court to be involved in day to day investigations, or to constantly monitor each and every aspect of the investigation.

45. The resources of this Court are scarce, and it is overburdened with the task of rendering justice in well over a lakh of cases every year. Nevertheless, this Court is bound to uphold the Constitution, and its own burdens, excessive as they already are, cannot become an excuse for it to not perform that task. In a country where most of its people are uneducated and illiterate, suffering from hunger and squalor, the retraction of the monitoring of these matters by this Court would be unconscionable.

46. The issue is not merely whether the Union of India is making the necessary effort to bring back all or some significant part of the alleged monies. The fact that there is some information and knowledge that such vast amounts may have been stashed away in foreign banks, implies that the State has the primordial responsibility, under the Constitution, to make every effort to trace the sources of such monies, punish the guilty where such monies have been generated and/or taken abroad through unlawful activities, and bring back the monies owed to the Country. We do recognize that the degree of success, measured in terms of the amounts of monies brought back, is dependent on a number of factors, including aspects that relate to international political economy and relations, which may or may not be under our control. The fact remains that with respect to those factors that were within the powers of the Union of India, such as investigation of possible criminal nexus, threats to national security etc., were not even attempted. Fealty to the Constitution is not a matter of mere material success; but, and probably more importantly from the perspective of the moral authority of the State, a matter of integrity of effort on all the dimensions that inform a problem that threatens the constitutional projects. Further, the degree of seriousness with which efforts are made with respect to those various dimensions can also be expected to bear fruit in terms of building capacities, and the development of necessary attitudes to take the law enforcement part of accounting or following the money seriously in the future.

47. The merits of vigour of investigations, and attempts at law enforcement, cannot be measured merely on the scale of what we accomplish with respect to what has happened in the past. It would necessarily also have to be appreciated from the benefits that are likely to accrue to the country in preventing such activities in the future. Our people may be poor, and may be suffering from all manner of deprivation. However, the same poor and suffering masses are rich, morally and from a humanistic point of view. Their forbearance of the many foibles and failures of those who wield power, no less in their name and behalf than of the rich and the empowered, is itself indicative of their great qualities, of humanity, trust and tolerance. That greatness can only be matched by exercise of every sinew, and every resource, in the broad goal of our constitutional project of bringing to their lives dignity. The efforts that this Court makes in this regard, and will make in this respect and these matters, can only be conceived as a small and minor, though nevertheless necessary, part. Ultimately the protection of the Constitution and striving to promote its vision and values is an elemental mode of service to our people.

49. In light of the above we herewith order:
(i) That the High Level Committee constituted by the Union of India, comprising of (i) Secretary, Department of Revenue; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (vii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT be forthwith appointed with immediate effect as a Special Investigation Team;

(ii) That the Special Investigation Team, so constituted, also include Director, Research and Analysis Wing;

(iii) That the above Special Investigation Team, so constituted, be headed by and include the following former eminent judges of this Court:
(a) Hon’ble Mr. Justice B.P. Jeevan Reddy as Chairman; and (b) Hon’ble Mr. Justice M.B. Shah as Vice-Chairman; and that the Special Investigation Team function under their guidance and direction;

(iv) That the Special Investigation Team, so constituted, shall be charged with the responsibilities and duties of investigation, initiation of proceedings, and prosecution, whether in the context of appropriate criminal or civil proceedings of: (a) all issues relating to the matters concerning and arising from unaccounted monies of Hassan Ali Khan and the Tapurias; (b) all other investigations already commenced and are pending, or awaiting to be initiated, with respect to any other known instances of the stashing of unaccounted monies in foreign bank accounts by Indians or other entities operating in India; and (c) all other matters with respect to unaccounted monies being stashed in foreign banks by Indians or other entities operating in India that may arise in the course of such investigations and proceedings. It is clarified here that within the ambit of responsibilities described above, also lie the responsibilities to ensure that the matters are also investigated, proceedings initiated and prosecutions conducted with regard to criminality and/or unlawfulness of activities that may have been the source for such monies, as well as the criminal and/or unlawful means that are used to take such unaccounted monies out of and/or bring such monies back into the country, and use of such monies in India or abroad. The Special Investigation Team shall also be charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the country's battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically.

(v) That the Special Investigation Team so constituted report and be responsible to this Court, and that it shall be charged with the duty to keep this Court informed of all major developments by the filing of periodic status reports, and following of any special orders that this Court may issue from time to time;

(vi) That all organs, agencies, departments and agents of the State, whether at the level of the Union of India, or the State Government, including but not limited to all statutorily formed individual bodies, and other constitutional bodies, extend all the cooperation necessary for the Special Investigation Team so constituted and functioning;

(vii) That the Union of India, and where needed even the State Governments, are directed to facilitate the conduct of the investigations, in their fullest measure, by the Special Investigation Team so constituted and functioning, by extending all the necessary financial,
material, legal, diplomatic and intelligence resources, whether such investigations or portions
of such investigations occur inside the country or abroad.
(viii) That the Special Investigation Team also be empowered to further investigate even
where charge-sheets have been previously filed; and that the Special Investigation Team may
register further cases, and conduct appropriate investigations and initiate proceedings, for the
purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad.
50. We accordingly direct the Union of India to issue appropriate notification and publish the
same forthwith. It is needless to clarify that the former judges of this Court so appointed to
supervise the Special Investigation Team are entitled to their remuneration, allowances, perks,
facilities as that of the judges of the Supreme Court. The Ministry of Finance, Union of India,
shall be responsible for creating the appropriate infrastructure and other facilities for proper
and effective functioning of the Special Investigation Team at once.

III
77. The revelation of details of bank accounts of individuals, without establishment of prima
facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy.
Details of bank accounts can be used by those who want to harass, or otherwise cause
damage, to individuals. We cannot remain blind to such possibilities, and indeed experience
reveals that public dissemination of banking details, or availability to unauthorized persons,
has led to abuse. The mere fact that a citizen has a bank account in a bank located in a
particular jurisdiction cannot be a ground for revelation of details of his or her account that
the State has acquired. Innocent citizens, including those actively working towards the
betterment of the society and the nation, could fall prey to the machinations of those who
might wish to damage the prospects of smooth functioning of society. Whether the State itself
can access details of citizen’s bank accounts is a separate matter. However, the State cannot
compel citizens to reveal, or itself reveal details of their bank accounts to the public at large,
either to receive benefits from the State or to facilitate investigations, and prosecutions of
such individuals, unless the State itself has, through properly conducted investigations, within
the four corners of constitutional permissibility, been able to establish prima facie grounds to
accuse the individuals of wrong doing. It is only after the State has been able to arrive at a
prima facie conclusion of wrong doing, based on material evidence, would the rights of others
in the nation to be informed, enter the picture. In the event citizens, other persons and entities
have credible information that a wrong doing could be associated with a bank account, it is
needless to state that they have the right, and in fact the moral duty, to inform the State, and
consequently the State would have the obligation to investigate the same, within the
boundaries of constitutional permissibility. If the State fails to do so, the appropriate courts
can always intervene.
78. The major problem, in the matters before us, has been the inaction of the State. This is so,
both with regard to the specific instances of Hassan Ali Khan and the Tapurias, and also with
respect to the issues regarding parallel economy, generation of black money etc. The failure is
not of the Constitutional values or of the powers available to the State; the failure has been of
human agency. The response cannot be the promotion of vigilantism, and thereby violate
other constitutional values. The response has to necessarily be a more emphatic assertion of
those values, both in terms of protection of an individual's right to privacy and also the
protection of individual's right to petition this Court, under Clause (1) of Article 32, to protect
fundamental rights from evisceration of content because of failures of the State. The balancing leads only to one conclusion: strengthening of the machinery of investigations, and vigil by broader citizenry in ensuring that the agents of State do not weaken such machinery.

79. In light of the above we order that:
(i) The Union of India shall forthwith disclose to the Petitioners all those documents and information which they have secured from Germany, in connection with the matters discussed above, subject to the conditions specified in (ii) below;
(ii) That the Union of India is exempted from revealing the names of those individuals who have accounts in banks of Liechtenstein, and revealed to it by Germany, with respect of who investigations/enquiries are still in progress and no information or evidence of wrongdoing is yet available;
(iii) That the names of those individuals with bank accounts in Liechtenstein, as revealed by Germany, with respect of whom investigations have been concluded, either partially or wholly, and show cause notices issued and proceedings initiated may be disclosed; and
(iv) That the Special Investigation Team, constituted pursuant to the orders of today by this Court, shall take over the matter of investigation of the individuals whose names have been disclosed by Germany as having accounts in banks in Liechtenstein, and expeditiously conduct the same. The Special Investigation Team shall review the concluded matters also in this regard to assess whether investigations have been thoroughly and properly conducted or not, and on coming to the conclusion that there is a need for further investigation shall proceed further in the matter. After conclusion of such investigations by the Special Investigation Team, the Respondents may disclose the names with regard to whom show cause notices have been issued and proceedings initiated.

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3. In the impugned judgment, it is mentioned that the basic allegation is amassing of illicit wealth by various former Ministers, including a former Chief Minister of the State. The money alleged to have been so earned is of unprecedented amounts. However, there is no clear allegation so far about its laundering in the sense mentioned above, but there is an allegation of its investment in property, shares etc. not only in India but also abroad.

4. The basic investigation requires determining whether money has been acquired by an abuse of the official position amounting to an offence under the Prevention of Corruption Act and under the Indian Penal Code, the persons by whom this has been done, the amount which has been so earned and places where it has been invested.

5. The amount is alleged to run into several hundred crores. The investigations done so far allege that the amount unearthed so far in one case is about one and a half crore and in another case is about six and a half crores, which would appear to be merely the tip of the iceberg. The investments having been made not only in various States of the country outside the State of Jharkhand, but also in other countries means that the investigation called for is not only multi-state but also multi-national.

6. The matter on the face of it requires a systematic, scientific and analysed investigation by an expert investigating agency, like the Central Bureau of Investigation. It is incorporated in the affidavit that 32 companies have to be investigated and the money acquired by illegal means being invested in Bangkok (Thailand), Dubai (UAE), Jakarta (Indonesia), Sweden and Libya. It is also mentioned that there are several companies in other countries in which there are huge investments by the accused or with the help of their accomplices in foreign countries. The list of countries and companies indicate prima facie that the amount involved could not be a mere few crores, but would be nearer a few hundred crores.

7. The High Court in the impugned judgment has also mentioned that it is neither possible nor desirable at this stage to give a positive finding about how much of the crime proceeds have been ‘projected as untainted’. Therefore, there is an area of overlap and the same cannot be allowed to form a tool in the hands of the accused to scuttle the investigation. Looking to the gravity and magnitude of the matter, after hearing learned counsel for the parties, the Division Bench of the High Court referred the matter to the Central Bureau of Investigation. The High Court also observed that the Central Government should exercise the powers under Section 45(1A) of the Prevention of Money Laundering Act, 2002 (for short ‘the PML Act’) for transferring investigation from the Enforcement Directorate to the CBI. If such an order is not passed by the Central Government, any material found by the CBI during investigation, which leads to an inference of money laundering within the PML Act will be shared by the CBI with the Enforcement Directorate from time to time, to enable the Enforcement Directorate to take such action, as may be necessary.

8. The appellant, aggrieved by the said judgment preferred this appeal before this court. Shri K.K. Venugopal, the learned senior counsel appearing on behalf of the appellant formulated following substantial questions of law concerning the impugned judgment and the interpretation of the PML Act:
“1. Whether the PML Act is a self-occupied Code while the Act constituting the CBI is limited?
2. Whether, in light of Section 45(1A) read with Sections 43 and 44 of the PML Act, the CBI has any authority to investigate offences which are the sole domain of the Enforcement Directorate?
3. Whether the High Court was right in brushing aside all the allegations against the PIL and directing investigation by the CBI?”

9. According to the learned counsel for the appellant, the offence of money laundering, under section 4 of the PML Act may be investigated only by the Enforcement Directorate and tried only by the Special Court under the Act.

10. Mr. Venugopal submitted that the PML Act is a self-contained Code while the Act constituting the CBI is limited.

11. Mr. Venugopal further submitted that the PML Act was enacted pursuant to the Political Declaration adopted by the Special Session of the United Nations General Assembly on 8th to 10th June, 1998, which called upon member States to adopt national money-laundering legislation and programmes. (Preamble to the PML Act).

12. Learned counsel for the appellant submitted that the Delhi Special Police Establishment Act, 1946, 1946 (‘DPSE Act’) is limited to investigating offences in Delhi and the Union Territories.

13. Mr. Venugopal submitted that the PML Act was enacted pursuant to Article 253 of the Constitution and would prevail over any inconsistent State enactment. Reliance has been placed on Maganbhai Ishwarbhai Patel Etc. v. Union of India and Another [(1970) 3 SCC 400 at para 81] and S. Jagannath v. Union of India and Others [(1997) 2 SCC 87 at para 48]. This is however not the case with the DPSE Act.

14. Learned counsel for the appellant also submitted that the PML Act is a special legislation enacted by Parliament and not only sets out the ‘Offences’ (Chapter II) but also the ‘manner of investigation’, attachment and adjudication (Chapter III), the power to summon, search, seizure and arrest (Chapter V), establishment of Tribunals (Chapter VI), Special Courts (Chapter VII), Authorities and their powers (Chapter VIII) and International arrangements (Chapter IX).

15. Mr. Venugopal contended that the Act establishes a specialized agency which consists of Police Officials, Revenue Officials, Income Tax Officials and various specialized officials drawn from various departments. It also empowers the Enforcement Directorate under Section 54 to call on assistance of officials from: (a) Customs and Excise Department; (b) Under the NDPS Act; (c) Income Tax; (d) Stock Exchange; (e) RBI; (f) Police; (g) Under FEMA; (h) SEBI; or (i) Any Body Corporate established under an Act or by the Central Government.

16. Learned counsel for the appellant also contended that the CBI is comprised only of the police officers and does not have the expertise or wherewithal to deal with the offences under the PML Act. In addition, as specifically defined in Section 55 (c) of the PML Act, the ED is empowered internationally to trace the proceeds of crime, with great freedom accorded to the ED when the nexus is established with a contracting state. The CBI does not possess such an advantage.
17. Mr. Venugopal placed reliance on the judgment of this Court in *Central Bureau of Investigation v. State of Rajasthan & Others* [(1996) 9 SCC 735] where the identical issue arose of the CBI seeking to investigate offences under the FERA, which was the sole domain of the ED, the Court held as follows:

(i) The officers of the ED are empowered to exercise the powers under the FERA as per Sections 3 & 4, and no other authority has been empowered except as the Central Government may empower from time to time.

(ii) FERA is a special and a central legislation enacted later in time than the DSPE Act, and Section 4(2) of the Cr.P.C. makes it clear that only in the absence of any provision in any other law relating to investigation will a member of the police force be authorized to investigate the offence.

(iii) The FERA Act is a complete code in itself.

(iv) As the allegations in the case related to FERA offences outside India, and the DSPE Act under Sections 1 and 2 are authorized only to investigate offences inside India, the DSPE member is “not clothed with the authority to investigate offences committed outside India”.

18. Learned counsel further submitted that in addition to the above, this court in *Enforcement Directorate & Another v. M. Samba Siva Rao & Others* [(2000) 5 SCC 431 at para 5] reiterated that the provisions of the FERA constitute a complete code. The provisions of the PML Act are identical, and in some ways more wide-ranging.

19. Learned counsel for the appellant further submitted that as the allegations in the complaint against the appellant relate to so-called national and trans-national offences, the only authority which is legally and factually equipped to investigate the offences is the Enforcement Directorate.

20. Mr. Venugopal further submitted that in the light of Section 45 (1A) read with sections 43 and 44 of the PML Act, the CBI has no authority to investigate the offences which are the sole domain of the Enforcement Directorate.

21. Mr. Venugopal referred various sections of the PML Act to demonstrate that only the Enforcement Directorate can investigate the matter. He also submitted that the conduct of investigation by the CBI is therefore contrary to both the intent of the Legislature as well as the Executive and further if the plea of CBI is put to test it leads to absurdity. It is submitted that in order to convict a person of an offence punishable under section 4 of the PML Act, the Enforcement Directorate has to first rule that the scheduled offence is committed which can be an offence under the Indian Penal Code or the Prevention of Corruption Act or the Narcotic Drugs and Psychotropic Substances Act or any other offence given in any other Act in the schedule in the PML Act. Once this first part is proved then the Enforcement Directorate has to prove how much money or what property was derived from committing the scheduled offence and lastly how was it being projected as untainted. The appellant prayed that the investigation by the CBI of Vigilance FIR No.09/09 registered at Ranchi be set aside and the appellant be released from illegal detention forthwith.

22. The written submissions have also been filed on behalf of the CBI and the Directorate of Enforcement. It is mentioned in the written submissions that the Vigilance P.S. Case No.09/2009 dated 02.07.2009 is instituted inter alia alleging commission of offence under Sections 409, 420, 423, 424, 465, 120-B of IPC and Sections 7, 10, 11, 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988. The said complaint was
registered on directions of the Special Judge, Vigilance, Ranchi, who exercised powers under Section 156(3) of the Cr.P.C. It named Shri Madhu Koda, former Chief Minister, Shri Kamlesh Singh, former Minister, Shri Bhanu Prasad Shah, former Minister and Bandhu Tirky, former Minister of Jharkhand.

23. During the course of investigation into the said complaint by the Vigilance, P.S., State of Jharkhand, involvement of the appellant Binod Kumar Sinha had surfaced. The FIR also contains clear allegations against the appellant. The Central Bureau of Investigation is investigating into the commission of these offences alone and is not investigating any offence under the PML Act, 2002 since the investigation under the said Act is solely and exclusively within the jurisdiction and domain of the Enforcement Directorate, which is of course subject to the exercise of powers by the Central Government under Section 45 (1-A) of the said Act.

24. In the written submissions, comprehensive information about investigation has been submitted. It is also incorporated that the appellant, who was an absconder and evaded arrest, is not entitled to any relief in exercise of discretionary jurisdiction of this court under Article 136 of the Constitution of India. It is also prayed that this appeal which challenges the order transferring investigation of Vigilance P.S. No. 09/2009 to the CBI deserves to be dismissed.

25. It is also incorporated that the appellant is involved in a multi crore scam - corruption in the matter of grant of iron ore mine leases and other acts as more particularly set out. It is incorporated in the affidavit that a perusal of various provisions of the Act would show that the said Act does not empower the Enforcement Directorate to investigate offences under IPC or the Prevention of Corruption Act, 1988 or any of the scheduled offences. It is the PML Act which authorizes the Enforcement Directorate only to investigate offences of money laundering as defined under Section 3 and punishable under Section 4 thereof. It also provides attachment, adjudication and confiscation of the property involved in money laundering and setting up of Special Courts.

26. Section 2(p) defines Money Laundering as: ‘money-laundering’ has the meaning assigned to it in section 3.

27. Section 2(ra) defines offence of cross border implications: “offence of cross border implications”, means--
(i) any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person remits the proceeds of such conduct or part thereof to India; or
(ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India. Explanation.-- Nothing contained in this clause shall adversely affect any investigation, enquiry, trial or proceeding before any authority in respect of the offences specified in Part A or Part B of the Schedule to the Act before the commencement of the Prevention of Money-Laundering (Amendment) Act, 2009.

28. Section 2(u) defines proceeds of crime: (u) ‘proceeds of crime’ means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property;

29. Section 2(x) defines Schedule: "Schedule” means the Schedule to this Act".
30. Section 2(y) defines Scheduled Offences: (2y) "scheduled offence" means-- (i) the offences specified under Part A of the Schedule; or (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more; or (iii) the offences specified under Part C of the Schedule.

31. Section 3 and 4 are reproduced hereunder:

3. Offence of money-laundering.-- Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.

4. Punishment for money-laundering.-- Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees: Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words ‘which may extend to seven years’, the words ‘which may extend to ten years’ had been substituted.”

32. Mr. H.P. Raval, learned Additional Solicitor General appearing for the C.B.I. submitted that a bare perusal of the above provisions makes it clear that the offence of money-laundering is a standalone offence within the meaning of the said Act and its investigation alone is in the exclusive domain of the Enforcement Directorate.

33. He also submitted that the provisions of the said Act do not contemplate the investigation of any of the Indian Penal Code, Prevention of Corruption Act, or any of the scheduled offences by the Enforcement Directorate.

34. Mr. Raval contended that having regard to the terminology of Section 3, any process or activity connected with the proceeds of the crime and projecting it as untainted property is the offence of money laundering which is made punishable under Section 4.

35. Mr. Raval submitted that Section 5(1) of the said Act provides that the Director or Authorised Officer has reason to believe, to record in writing on the basis of material in his possession that any person is in possession of any proceeds of crime, that such person has been charged of having committed the scheduled offence and such proceeds of crime are likely to be conceded, transfer or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III of the said Act, then by an order in writing such property may be provisionally attached for a period not exceeding 150 days.

36. According to Mr. Raval, a bare reading of the said provision makes it clear that the jurisdiction to initiate action of attachment has to be founded on a reasonable belief of a person being in possession of any proceeds of the crime and not on a concluded investigation of the person being in possession of the proceeds of the crime. The distinction is clear and it follows from Section 5(1)(b) that the second condition for initiation of action of attachment of property involved in money laundering is that such person in respect of whom there is reason to believe that he is in possession of any proceeds of the crime, has been charged of having committed a scheduled offence.

37. Mr. Raval contended that if the contentions of the appellant were true, then the sections of the said Act would have been differently worded. He also submitted that the contention of the
appellant on the basis of provisions of Section 43 to 45 that any of the scheduled offences can only be investigated exclusively by the Enforcement Directorate is not justified and tenable at law.

38. Mr. Raval submitted that the embargo from taking cognizance by the Special Court of any offence as provided in the second proviso of sub section (1) of Section 45 is only with respect to an offence punishable under Section 4. It is only in respect of an offence punishable under Section 4 of the Prevention of Money Laundering Act that cognizance is barred to be taken by the Special Court except on a complaint in writing as provided in sub clause (1) and (2) thereof.

39. He also submitted that this provision cannot be construed to mean that the Enforcement Directorate has the exclusive jurisdiction to investigate any of the scheduled offences.

40. Mr. Raval contended that the contention of the appellant that merely because under section 44 of the PML Act, the Special Court constituted in the area in which the offence has been committed, has been authorized statutorily to try the scheduled offence and the offence punishable under Section 4 is equally unsustainable in law since nothing in the said provision of Section 44 of the said Act envisages the exclusive investigation of the scheduled offences by the Enforcement Directorate. Mr. Raval submitted that the trial of the scheduled offence is distinct and different from investigation under the PML Act.

41. The above contention of the respondent is buttressed having regard to provisions contained in Section 43(2) which provides that while trying an offence under the PML Act (which means the offence of Money Laundering alone) the Special Court shall also try an offence other than referred to sub section (1) of Section 43 with which the accused under the Code of Criminal Procedure be charged at the same trial.

42. He contended that the scheme of the Act would, therefore, not construe the submission of the appellant that in case of there being an allegation of offence of money laundering, the scheduled offence also has to be exclusively investigated by the Enforcement Directorate. Such a contention is not supported by the provisions of the Act since there is no provision restricting the investigation of offence other than that of money laundering by any appropriate investigating agency.

43. Mr. Raval submitted that the money alleged to have been so earned is of unprecedented amounts. It is further recorded that, however, there is no clear allegation so far about its laundering in the sense mentioned in the PML Act. It is further observed that there is an allegation of his investment in the property, shares etc. not only in India, but, also abroad. Having so observed it is recorded that therefore the basic investigation requires determining whether money has been acquired by abuse of official position amounting to an offence under the Prevention of Corruption Act and under the Indian Penal Code and persons by whom the same has been done the amount of money which has been so earned and the places where it has been invested.

44. According to the learned counsel for the respondents, the High Court in the impugned order has recorded cogent reasons for directing the investigation by the Central Bureau of Investigation. Even this court while issuing notice vide order dated 01.09.2010 has directed the CBI to continue to investigate as directed by the High Court. Under the circumstances, the appellant is not entitled to any relief as contended.
45. Mr. Raval informed the Court that the charge sheet in fact has been filed on 12.11.2010 before the Court of Competent Jurisdiction alleging inter alia commission of offence under Section 120-B IPC, Section 9, Section 13 (2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988 against various accused including the appellant Shri Binod Kumar Sinha. It is further submitted that the investigation is still on and subsequent charge sheets may be filed as and when during investigation sufficient material surfaces on other aspects.

46. In written submission it is categorically stated that the Central Bureau of Investigation is investigating into the commission of these offences alone and presently is not investigating any offence under the PML Act as the investigation under the PML Act is solely and exclusively within the jurisdiction and domain of the Enforcement Directorate, which is of course subject to the exercise of powers by the Central Government under Section 45 (1-A) of the said Act.

47. We have heard the learned counsel for the parties at length and perused the written submissions filed by them. On consideration of the totality of the facts and circumstances, we are clearly of the view that no interference is called for. The appeal being devoid of any merit is accordingly dismissed.

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In the High Court of Judicature, Andhra Pradesh at Hyderabad (BEFORE GODA RAGHURAM AND R. KANThA RAO, 33.)

B. Rama Raju v. Union of India

WP Nos. 10765, 10769 and 23166 of 2010 Decided on March 4, 2011

GODA RAGHURAM, J.:— These writ petitions substantially challenge the vices of certain provisions of the Prevention of Money Laundering Act, 2002 (Central Act 15 of 2003) [‘the Act’]; amended by the Prevention of Money Laundering (Amendment) Act, 2005 (Central Act 20 of 2005) [‘the Amendment Act’]; further amended by the Prevention of Money-Laundering (Amendment) Act, 2009 [Central Act 21 of 2009] (the 2nd Amendment Act) and orders passed by the primary and attaching authorities and the adjudicating authority. The particulars, the circumstances and the defence to the provisions of the Act and the impugned orders are set out hereinafter. WP No. 10765 of 2010:

2. B. Rama Raju 5/0 B. Ramalinga Raju seeks (i) invalidation of Sections 5(1), 8 (1), 8(2), 8(3), 8(4), 23 and 24 of the Act; (ii) a declaration that the provisional attachment Order No. 1/09 in ECIR No. 01.H20/2009, dated 18.8.2009 passed by the Deputy Director, Enforcement, Hyderabad (R3), is arbitrary and illegal; (iii) that the order dated 14.1.2010 passed by the Adjudicating Authority (R4) in OC No. 38/09 is arbitrary and illegal; (iv) a declaration that the 4th respondent’s direction to the petitioner to handover possession of the attached properties is without jurisdiction and contrary to law and the Directorate of Enforcement (R2) or any other officer is not entitled to take possession of the petitioner’s properties; (v) a declaration that the petitioner’s properties sought to be attached by the impugned provisional attachment order (dated 18.8.2009) as confirmed by the impugned order (dated 14.1.2010) of the 4th respondent are free from attachment or encumbrance; and (vi) for attendant reliefs.

5. (A) The Deputy Director, Enforcement, passed the provisional attachment order dated 18.8.2009, purportedly under Section 5 of the Act, in respect of movable properties comprising the shares of M/s SRSR Holdings Ltd., in M/s Satyam Computer Services Ltd., and 287 immovable properties of various companies and persons including the petitioner. The petitioner's immovable properties enumerated at SI. Nos. 246 to 251 in the table of immovable properties in the order were provisionally attached.

(B) The Deputy Director, Enforcement, filed Application No. 38/2009 on 15.9.2009 before the Adjudicating Authority against 132 defendants. The petitioner is the 8th defendant therein. The Adjudicating Authority issued notice to all the 132 defendants in respect of the movable and immovable properties enumerated in the complaint of the Deputy Director, Enforcement, on 15.9.2009, the day the complaints were filed.

(C) Several of the defendants including the petitioner filed applications before the Adjudicating Authority setting out objections to its jurisdiction; seeking dismissal of the complaint; and discharge of the notice. The Adjudicating Authority however orally pronounced disposal of the objection applications on 20.11.2009 (the date of the hearing). A copy of the order dated 20.11.2009 was furnished to the several defendants including the petitioner on 24.1.2009
(D) The petitioner and some other defendants filed WP No. 27058/09 challenging the Adjudicating Authority's notice dated 15.9.2009 and the order dated 20.11.2009. This Court by the order dated 1.12.2009 in WP No. 25846/09 (filed by another defendant) allowed the petitioner therein to appear before the Adjudicating Authority to seek information as to whether he was being proceeded against as one who committed an offence under Section 3 of the Act or for being in possession of the proceeds of a crime. Consequent on this order the petitioner also applied to the Adjudicating Authority for relevant information. On 7.12.2009 the Adjudicating Authority informed all the defendants seeking information that they were being proceeded against for committing an offence under Section 3 of the Act.

(E) This Court eventually disposed of the writ petition filed by the petitioner on 10.12.2009 on similar lines as other writ petitions directing that the proceedings before the Adjudicating Authority be postponed to 21.12.2009 and the writ petitioners submit their defense and proceed with the matter according to law.

(F) On 20.12.2009 the petitioner filed his response to the show-cause notice issued by the Adjudicating Authority. The Counsel for the petitioner was heard on 23.12.2009. Written submissions were also filed.

(G) On 14.1.2010 the Adjudicating Authority passed an order confirming attachment of the petitioners' properties; directed the attachment to continue during pendency of the proceedings pertaining to the scheduled offence before the trial Court and till its conclusion and until the order of the trial Court becomes final; and further directed that the defendants shall handover possession of properties to the Enforcement Directorate or any officer authorized, forthwith.

6. The challenge to the vires of provisions of the Act: 1. Section 2(u) of the Act defines "proceeds of crime" expansively to include property or the value thereof, derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence even if in the hands of a person who has no knowledge or nexus with such criminal activity allegedly committed by others. The expansive definition thus inflicts grossly unreasonable consequences on innocent persons and is, therefore, unconstitutional offending Articles 14, 20, 21 and Article 300 - A of the Constitution.

2. Under Section 5(1) of the Act the authorized officer may provisionally attach properties for a period not exceeding 150 days if he has reason to believe on the basis of material in his possession that any person is in possession of proceeds of crime; that such person has been charged of having committed a scheduled offence and such proceeds of crime are likely to be concealed etc., in any manner which could result in frustrating any proceedings relating to confiscation of such proceeds of crime, under Chapter III. The two provisos to Section 5(1) were incorporated by the 2nd Amendment Act. Under the first proviso no order of attachment shall be made unless the report is forwarded under Section 173 Cr.PC in relation to a includable offence, or a complaint is filed before a Magistrate or a Court for taking cognizance of the scheduled offence. The 2nd proviso enacts that notwithstanding anything in Clause (b), any property of a person may be attached under the Section if an authorized officer has reason to believe that such property involved in money-laundering, if not immediately attached is likely to frustrate any proceedings under the Act.
Section 5(1) is vague and confusing. While under the main provision [Section 5(1)], 'such property' is the property of a person charged of a scheduled offence; the 2nd proviso enables property of any person, and of involved in money-laundering, to be proceeded against. The term 'involved in money laundering' is vague and ambiguous. There is no indication as to the nature or degree of involvement required. It is not clear whether the liability runs with the property or is only in respect of property belonging to a person charged with committing a scheduled offence. The provision is also bereft of guidelines consistent and commensurate with the serious consequences that follow. The provision is therefore arbitrary and unconstitutional.

3. The proviso to Section 5(1) can be operated only from the date of coming into force of provisions of the 2nd Amendment Act. It cannot therefore apply against property acquired or possessed prior to enactment of this provision or in respect of any scheduled offence prior to its enactment. It is however being construed otherwise. Since the consequence of attachment and eventual confiscation are severe and have penal and punitive consequences there could be no retrospective incidence of liability. The operational reality of retrospective application of the provisos to Section 5(1) of the Act by the executing agencies - the respondents renders the provision unconstitutional as offending Articles 14, 20 and 300-A of the Constitution.

4 Section 8 of the Act provides for adjudication following a provisional attachment under Section 5(1) and a complaint under Section 5(5). Section 8 (1) sets out the conditions precedent to the exercise of jurisdiction and initiation of proceedings by a notice and as to the nature and scope of the notice. The Adjudicating Authority is required to apply its mind to the complaint and the material filed therewith and form a reason to believe that a person has committed an offence under Section 3 or is in possession of proceeds of crime. On settled principle and authority, the reason to believe is neither academic nor on subjective satisfaction but must follow upon an objective consideration, for good and sufficient reasons. The notice issued by the Adjudicating Authority should be directed only against such persons as it has reasons to believe have committed an offence under Section 3 or are in possession of the proceeds of crime.

The offence of money laundering as defined in Section 3 is in respect of acts of persons. There are no guidelines as to what properties can be said to be 'involved in money laundering' and thus subject to attachment and/or confiscation under the Act. The Act does not enable the Adjudicating Authority to go into the legality, validity, propriety or correctness of the provisional attachment order made under Section 5(1), even though the Adjudicating Authority is required to consider confirmation of such attachment. The criteria for provisional attachment are different from the course of enquiry and the consideration that the Adjudicating Authority must apply to confirm the order of attachment. The standard of evidence and the sequence of leading evidence is also uncertain. Thus, persons against whom proceedings are pursued are disabled from presenting their defence in the proceedings and are thus denied fair trial, violative of Article 14. The impugned order of the Adjudicating Authority illustrates absence of focus and clarity as to what is adjudicated and decided upon; on what criteria; and under what procedure and application of standards of appreciation of evidence. The scheme of adjudication set out in Section 8(1) to (3) being vague, unfair and diffused, is violative of Article 14.
5. Under the scheme of the Act even if a person is acquitted by the Special Court of the offence of money laundering, the Adjudicating Authority's finding as to such person being involved in money laundering and the involvement of such person in money laundering would nonetheless stand undisturbed and such person would not have any recourse against orders of attachment and confiscation. The same consequence follows if the person is not even accused of or charged with the offence of money laundering; and his guilt determined by improper standards of trial or proceedings and by an improper forum, is inflicted with punitive consequences. The provisions of the Act are thus arbitrary and offend Articles 14, 21 and 300-A of the Constitution.

6. Section 8(4) of the Act as construed by the respondent authorities enables deprivation of possession and enjoyment of an attached immovable property even/before conclusion of the trial of the scheduled offence. This provision is harsh and so disproportionate as to violate Articles 14, 21 and 300-A of the Constitution.

7. Section 23 provides that where money laundering involves two or more interconnected transactions, proving that one or more of such transactions is involved in money laundering raises a rebuttable presumption that the rest of the transactions form part of such interconnected transactions. Such legislatively enjoined presumption is grossly unreasonable and excessively disproportionate and places irrational burdens upon the defendant. Section 23 thus violates Article 14 and its consequences violate Article 300-A as well.

8. Section 24 enacts that the burden of proving that proceeds of crime are untainted property is on the person accused of having committed the offence under Section 3. This provision is contradictory and vague. It is being construed as if a bald and baseless allegation of there being proceeds of crime and/or that any property constitutes proceeds of crime is presumed to be true and the burden is upon the accused to prove to the contrary. These provisions offend Article 14. In any case Section 24 applies only to the trial of an offence under Section 3. In a proceedings under Section 8(1) the defendant is not an accused. However the Adjudicating Authority is construing the provisions of Section 24 as applicable to proceedings under Section 8(1) as well. On such construction Section 24 is illegal, unreasonable and offends Article 14.

9. The impugned provisional attachment order (dated: 18.8.2009) is illegal as properties of persons not even accused of any scheduled offence are attached; there is no assertion in the order as to the commission of any scheduled offence or of any fact disclosing commission of any scheduled offence; there is no statement of facts or material on the basis of which the officer has formed a belief that the properties are likely to transferred; no facts or reasons are recorded disclosing application of mind, a condition precedent to passing an order of provisional attachment. The provisional attachment order is thus invalid.

10. The order of the Adjudicating Authority (dated: 14.1.2010) passed under Section 8(3) of the Act is invalid since the Authority failed to apply its mind to whether there is substance in the complaint as to the commission of any scheduled offence, when and by whom the offence was allegedly committed. Since the Adjudicating Authority failed to deal with any of the submissions, contentions and arguments of the petitioner and other defendants; since the order proceeds on generalizations, surmises and conjectures; and the Adjudicating Authority
nered in assuming and holding that it was not necessary to draw a conclusion as to the commission of an offence to consider adjudication under Section 8 of the Act, the same is vitiated by an error in holding that the investigation by the CBI and the Directorate of Enforcement, are sufficient material to infer the commission of a scheduled offence as well as an offence under Section 3 of the Act. The confirmation order is unsustainable for failure to consider whether determination of guilt as to commission of a scheduled offence; whether for the purpose of punishment or for attachment and/or confiscation of property, must be predicated on the same standards of evidence - "beyond reasonable doubt".

There are other and detailed challenges pleaded to the validity of the order of the Adjudicating Authority (dated 14.1.2010).

We are not inclined to consider the several challenges to the merits of the orders of provisional attachment or of the Adjudicating Authority conforming the orders of provisional attachment, since any person aggrieved by the order passed by the Adjudicating Authority may appeal to the Appellate Tribunal constituted under Section 25, under Section 26 of the Act. There is a further appeal provided to the High Court against a decision or order of the Appellate Tribunal, under Section 42.

7. Pleadings in response:

On behalf of the respondents, in particular the Directorate of Enforcement, the Deputy Director of Enforcement, Hyderabad has filed a counter. It is generally contended that the writ petitions are misconceived; the challenge to provisions of the Act is asserted only to protract the proceedings and without any basis; and that the writ petitions are not maintainable and should not be countenanced since there is an effective and alternative remedy by way of an appeal under Section 26 of Act. The counter-affidavit sets out detailed responses to the several contentions of the petitioners regarding challenges to the provisions of the Act as well as to contentions assailing on merits provisional attachment and confirmation orders passed by the respondent authorities under the provisions of Sections 5 and 8 of the Act, respectively. As we are not inclined to consider the specific challenges to the orders of provisional attachment or of confirmation or the merits of the decision making process or the eventual conclusion of the Authorities under the Act, in view of the available alternative remedy of an appeal, and a further appeal, we summarise herein only those responses in the counter-affidavit of the Enforcement Directorate pertaining to challenge to the provisions of the Act. (12) The counter asserts and sets out:

(A) The enacting history of the Act including international commitment and convention, resolutions of the General Assembly of the United Nations, the Statement of Objects and Reasons accompanying the Bill which was eventually enacted by the Parliament; the preamble of the Act; and its several provisions disclosing a policy to address the scourge of Laundering of Money which destabilizes National and International economies, the sovereignty of several States and has adverse impact on law and order maintenance. The provisions of the Act must therefore be interpreted consistently with the evil the provisions are intended to address;

(B) Money-Laundering while facially appears to comprise one or more clear and simple financial transactions, involves and comprises a complex web of financial and other
transactions. A money laundering transaction usually involves three stages: (i) The placement stage: The malfeasant places the crime money into the normal financial system; (ii) The layering stage: The money induced into the financial system is layered—spread out into several transactions within the financial system with a view to concealing the origin or original identity of the money and to make this origin/identity virtually disappear; and (iii) The integration stage: The money is thereafter integrated into the financial system in such a way that its original association with crime is totally obliterated and the money could be used by the malfeasant and/or the accomplices to get it as untainted/clean money. (C) Money laundering often involves five different directional fund flows:

(i) Domestic money laundering flows: In which domestic funds are laundered within the country and reinvested or otherwise spent within the country;

(ii) Returning laundered funds: Funds originate in a country, are laundered abroad and returned back.

(iii) Inbound funds: illegal funds earned out of crime committed abroad are either laundered [placed] abroad or within the country and are ultimately integrated into the country;

(iv) Out bound funds: Typically constitute illicit capital flight from a country and do not return back to the country; and

(v) Flow-through: The funds enter a country as part of the laundering process and largely depart for integration elsewhere.

(D) The Act is a Special Law and a self contained code intended to address the increasing scourge of money laundering and provides for confiscation of property derived from or involved in money laundering. The Act provides a comprehensive scheme for investigation, recording of statements, search and seizure, provisional attachment and its confirmation, confiscation and prosecution. The provisions of the Act [vide Section 71] are enacted to have an overriding effect [entrenched by a non-obstante provision], notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

(E) The provisions of the Act are fair, reasonable and have sufficient safeguards, checks and balances to prevent arbitrary exercise of power and/or abuse by the authorities and provide several layers of scrutiny at various stages of the proceedings.

(F) A person accused of money laundering is subject to broadly two parallel actions:

(i) prosecution for punishment under Section 4, for the offence of money-laundering defined in Section 3;

(ii) attachment of the property involved in money-laundering, under Section 5 of the Act. Proceedings under each section is independent.

(iii) The punishment specified for the offence of money-laundering under Section 4 of the Act can be administered only after prosecution by way of filing a complaint/charge sheet before the Special Court and due trial and conviction; while on investigation if any property is suspected to have been derived out of the proceeds of crime, that property is placed under provisional attachment under Section 5(1) and a complaint is filed before the Adjudicating Authority within thirty (30) days of such attachment [Section 5(5) of the Act]. An order of
provisional attachment is operative for a period not exceeding one hundred and fifty days from the date of such order [Section 5(1) of the Act].

(iv) On receipt of a complaint, under Section 8(1) the Adjudicating Authority is required to issue a notice [to any person who has committed an offence under Section 3 or is in possession of proceeds of crime], to indicate the sources of income, earnings and assets out of which or by means of which he has acquired the property attached under Section 5(1) of the Act. If on considering the response and after granting an opportunity of hearing, the Adjudicating Authority is satisfied that any property is involved in money laundering, it shall under Section 8(3) issue an order confirming the provisional attachment. The confirmation of an order or provisional attachment by the Adjudicating Authority attains finality only after the Adjudicating Authority passes an order confiscating the property, after giving an opportunity to the persons concerned and when a person is found guilty of the scheduled offence by the competent Court, after trial.

(v) From the scheme of the Act and the evils its provisions are intended to address it is apparent that action by way of provisional attachment under Section 5(1) must be taken expeditiously during the course of investigation so that properties which comprise proceeds of crime are not concealed, transferred or dealt with in any manner that may frustrate proceedings for eventual confiscation of such proceeds of crime. For this purpose the Act provides a three tiered process and procedure before an order of confiscation;

(a) A provisional attachment by the Director or an officer authorized by the Director in this behalf, under Section 5(1);

(b) Confirmation of the provisional attachment by the Adjudicating Authority under Section 8(3); and

(c) A final order of confiscation by the Adjudicating Authority under Section 8(6).

The writ petitions are filed at the 2nd stage i.e, confirmation of the provisional attachment orders, under Section 8(3).

(G) At the present stage, when investigations are ongoing the Adjudicating Authority is required to take only a prima facie view, on whether the properties are involved in money-laundering. There is a presumption of culpability of the mental stage on the part of the defendant on whom shifts the burden to establish that the properties are not involved in money laundering, as the defendant is accused of money laundering under Section 3 of the Act. This shifting of burden is indicated in Section 24 of the Act. (H) A further and detailed opportunity is provided at the stage of confiscation. The Adjudicating Authority is required to consider the matter again while finally considering confiscation of properties under attachment, under Section 8(6). At this stage an opportunity of hearing is provided. Confiscation proceedings can be pursued only after the guilt of a person accused of a scheduled offence is established in the trial Court and when the order of such trial Court becomes final [Section 8(6) read with 8(3)(b) of the Act]. From the scheme of the Act an order of provisional attachment and confirmation thereof constitutes the first stage of the relevant proceedings involving a prima facie assessment. It is at the stage of confiscation (2nd stage) that the entire evidence is required to be appreciated and a definitive finding recorded by the Adjudicating Authority.
(I) Elaborate and fair procedures are incorporated in the Act. The order of provisional attachment shall be only by the Director or any other officer not below the rank of a Deputy Director, specifically authorized by the Director for the purposes of Section 5; the decision to provisionally attach the property must be supported by reasons to be recorded which must be based on material available in the possession of the attaching authority; no order of provisional attachment could be made unless, in relation to the scheduled offence a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by a person authorized to investigate the offence set out in the Schedule to the Act, before a Magistrate or Court for taking cognizance of the Scheduled Offence, as the case may be; the provisional attachment is limited for a period not exceeding one hundred and fifty days; under the 2nd proviso to Section 5 (1) attachment of property even of persons not charged with committing a scheduled offence is permitted but must be exercised only in exceptional cases for reasons to be recorded in writing and on the basis of the material in possession of the Authority concerned asserting that the property is involved in money laundering and non-attachment of such property would frustrate any proceedings under the Act; the order of provisional attachment and the material in possession of the Authority concerned must immediately after attachment be forwarded to the Adjudicating Authority for its consideration at appropriate stages; provisional attachment does not disable a person interested in the enjoyment of immovable property from such enjoyment; and only after the Adjudicating Authority confirms an order of provisional attachment under Section 8(3) is possession of the property taken over by the Director or any other officer authorized in this behalf—vide Section 8(4) of the Act.

(J) From the provisions of Section 6 it is clear that the Adjudicating Authority is comprised of expertise in the field of law, finance, accountancy or administration; is independent of the enforcement mechanism, ensuring a matrix of independent scrutiny of the actions and orders passed by Enforcement Authority. There are sufficient safeguards to prevent abuse of the powers conferred on the Adjudicating Authority as well. The Adjudicating Authority must consider any complaint or application received by it and issue a notice only when it has reasons to believe that a person has committed an offence under Section 3 or is in possession of proceeds of crime, calling upon such person to indicate the sources of income, earning or assets out of which or by means of which he has acquired the property provisionally attached under Section 5(1) or seized under Section 17 or 18, along with evidence on which the person relies and other relevant information and particulars and to show-cause why or all any of such property should not be declared to be properties involved in money laundering and confiscated by the Central Government.

(K) The provision mandating taking over possession of a provisionally attached property upon confirmation is in furtherance of the legislative intent of securing the property [pending completion of proceedings before a Court of competent jurisdiction and till the order of such trial Court becomes final], with a view to prevent frustration of the legislative intent by dissipation or spoilage of the immovable property during the interregnum proceedings.

(L) There are further salutary provisions to prevent abuses of authority and powers under the Act. An appeal is provided to the Appellate Tribunal, a body whose independence is legislatively entrenched qua the qualifications prescribed and tenure protection provided vide
Sections 28 and 29 of the Act. A further appeal is provided to the High Court, to any person aggrieved by a decision or order of the Appellate Tribunal, both on a question of law and fact, arising from such order.

(M) The provisions of Sections 23 and 24 of the Act are valid and unassailable. These provisions are incorporated to regulate an inherently complex and layered series of transactions involved in money laundering operations. Section 23 enacts a presumption [applicable to adjudication or confiscation under Section 8 of the Act], that where money laundering involves plural and interconnected transactions and one or more of such transactions is/are proved to be involved in money laundering, it shall, unless otherwise proved to the satisfaction of the Adjudicating Authority, be presumed that the remaining transaction forms part of such interconnected transactions. The presumption is a rebuttable presumption.

(N) Section 24 inheres on a person accused of having committed the offence under Section 3, the burden of proving that the proceeds of crime are untainted property. The shifting of the incidence of the burden of proof, which is rebuttable, is an essential component of the scheme of the Act which targets money laundering, which as already noticed comprises a complex and series of financial dealings involving deceit, layering and diversion of the proceeds of the crime through several transactions.

(O) After the confession by Sri. B. Ramalinga Raju on 7.1.2009, the share price of Satyam Computer Services Limited [for short the SCSL] fell drastically and a large number of investors suffered huge financial losses. Pursuant to a complaint by one such investor Smt. L. Mangat, the A.P.C.I.D registered FIR No. 2/2009 on 9.1.2009 under Section 120-B read with Sections 406, 420, 467, 471, 477-A of the IPC. The State Government transferred the case to the CBI for investigation and the Anti Corruption Branch of the CBI, Hyderabad registered RC.4[S]/2009 on 20.2.2009 After completion of investigation a charge sheet was filed by the CBI before the XIV Additional Chief Metropolitan Magistrate's Court under Sections 420, 419, 467, 468, 471, 477-A and 201 of the IPC. The designated Court after considering the charge-sheet has taken cognizance of the offence. After the State CID registered FIR. 2/2009, the Enforcement Directorate registered an Enforcement Case Information Report [ECIR], under the Act against Sri. B. Ramalinga Raju and others since the FIR reveals information as to the commission of a scheduled offence i.e, under Section 467 IPC. The investigation under the Act reveals commission of a scheduled offence and generation of proceeds of crime thereby. Hence initiation of proceedings both for prosecution and for attachment and for subsequent proceedings, against persons accused of committing scheduled offences and for attachment and confiscation of the proceeds of crime against the accused and others in possession of proceeds of crime, is valid.

9. The enacting history: On 14.12.1984 the General Assembly of the U.N by a resolution requested the Economic and Social Council of the U.N to request the Commission on Narcotic Drugs in its 31st Session, 1985, to initiate preparation of a draft convention about illicit traffic in Narcotic Drugs by considering the problem holistically on a priority basis. Eventually the U.N Conference for Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [NDPS] met in Vienna and with participation of delegates of 106 States including India; specialized agencies; and representatives of Inter-
Governmental Organizations; interested agencies and bodies drew up the U.N Convention Against Illicit Traffic in NDPS. The conference adopted a raft of resolutions pertaining to exchange of information; provisional application of the U.N Convention against Illicit Traffic in NDPS and provision of necessary resources to the Division of Narcotic Drugs and the Secretariat of the International Narcotic Board to enable discharge of the task entrusted to them under International Drug Control Treaties. The purpose of the Convention was to promote cooperation among the parties and to more effectively address various aspects of illicit traffic in NDPS, having an international dimension. The Convention exhorts the parties to take necessary measures including legislative and administrative, in conformity with the fundamental provisions of their respective domestic law. The Convention enumerated measures for incorporation as offences, conduct promoting NDPS and for confiscation of proceeds derived from offences established in relation to NDPS.

In 1990, the Financial Action Task Force [FATF— an inter governmental body, which sets standards, develops and promotes policies to combat money-laundering and terrorist financing with a membership of a number of countries and international organizations] drew up forty recommendations as initiatives to combat money-laundering and terrorist financing to provide an enhanced, comprehensive and consistent framework of measures for combating money-laundering and terrorist financing. The FATE recommendations have been revised from time to time.

11. From the above, it is clear that the law seeks to prevent money-laundering which in plain terms means the preventing legitimizing of the money earned through illegal and criminal activities by investments in movable and immovable properties. The need for a law on the subject has been the focus of the Government world over in recent times and that of the U.N also, because the scourge of money-laundering has threatened to wreck the foundations of the States and undermine their sovereignty even. The terrorist outfits and smuggling gangs have been depending upon money laundering to finance their operations and it is known that money for such operations are arranged through laundering. Many such illegal outfits have set up ostensibly legal front organization. The money generated through illegal activities is ultimately inducted and integrated with legitimate money and its species like movable and immovable property. Thus certain economic offences, commercial frauds, crimes like murder, extortion have contributed to money-laundering in a significant manner. The perpetrators of such heinous crimes should not be allowed to enjoy the fruits of the money that passed under the activity and therefore the present enactment is intended to deprive the property which is related to the proceeds of specific crimes listed in the Schedule to the Act.

12. At the oral hearing, learned Counsel Sri. Gopal Chowdary [WP No. 23166 of 2010] and Sri. S. Niranjan Reddy [WP No. 10765 of 2010] made detailed submissions. In support of the contention that the definition of "Proceeds of Crime" [2][1][u] is void for vagueness and over breadth and that in its broad connotation the expression traps innocent persons and their property; places disproportionately onerous burdens and requirements to make enquiries and investigation as to antecedent criminality adhering to a property; poses a pervasive and infinite threat to the title of a property and thus constitutes a confiscatory law, Sri. Gopal Chowdary has enumerated a few illustrations to assert that the expression "Proceeds of Crime" as defined/understood/interpreted by the Enforcement Authority is likely to target
bona fide purchasers/transferees of the property who have no knowledge/nexus/participation in any antecedent criminality associated with a property. A similar exercise is undertaken by Sri. Chowdary, the learned Counsel to impeach the expression "Property involved in Money-Laundering", employed in the 2nd proviso to Section 5(1), 8(2) and 8(3) of the Act. Sri. Niranjan Reddy contends that the Act is applicable only against a person guilty of committing a scheduled offence and had derived any benefit either directly or indirectly therefrom and only such benefit as derived from a criminal conduct may be classified as "Proceeds of Crime". While a property in the domain, custody or possession of any person who knowingly assists or participates in the criminal activity of a person accused of a scheduled offence would constitute proceeds of crime, property in the domain, custody or possession of a person who is a bona fide purchaser/transferee of such property without knowledge of or participation in the malfeasance cannot constitute proceeds of crime, elaborates Sri. Niranjan Reddy. He further contends that mens rea must be considered an integral component of every shade of conduct criminalized under Section 3 of the Act; otherwise the provision would be unconstitutional. It is also contended by Sri. Reddy that the provisions of Section 8 are arbitrary and unconstitutional.

13. We are not inclined to identify or exhaustively enumerate the various factual circumstances and component parts of transactions, to which the provisions of the Act, whether with regard to the offence and its prosecution; or proceedings of attachment, its confirmation and eventual confiscation might or might not apply. The Act is a recent piece of legislation and the fullness of its personality and nuances of its several provisions will manifest and must be identified in the fullness of time and as occasions arise. Our exercise is adjudicatory and not an academic exercise nor a treatise on the provisions of the Act. We will confine analysis of the provisions of the Act as applicable to the narrow set of facts and circumstances of the cases on hand. Even in this respect our analysis of the facts and circumstances the assertions and responses are predicated on a prima facie view of the relevant factual matrix, since the trial of the scheduled offence is under way. Though the petitioners assert to be not yet accused of having committed a scheduled offence, it is the contention on behalf of the Enforcement Directorate as expressed by Sri. Rajeev Awasthi, learned Counsel for the Enforcement Directorate that the petitioners will also be eventually charged of an offence under Section 3 of the Act. Our analysis of the provisions and their applicability to the facts of these cases is also tentative since the proceedings are now at the stage of confirmation of orders of provisional attachment which in our view involves only a prima fade assessment of the matter by the Adjudicating Authority; a comprehensive view to be taken at the stage of confiscation.

14. On the basis of rival pleadings, contentions and the material on record, the following issues are formulated for consideration. Issues:

(A) Whether property owned by or in possession of a person, other than a person charged of having committed a scheduled offence is liable to attachment and confiscation proceedings under Chapter-III and if so whether Section 2(1)(u) which defines "proceeds of crime" broadly, is invalid?;
(B) Whether provisions of the second proviso of Section 5(1) [incorporated by the 2nd amendment Act—w.e.f 6.3.2009] are applicable to property acquired prior to enforcement of this provision and if so, whether the provision is invalid for retrospective penalisation?;

(C) Whether the provisions of Section 8 are invalid for vagueness; incoherence as to the onus and standards of proof; ambiguity as regard criteria for determination of the nexus between a property targeted for attachment/confirmation and the offence of money-laundering; and for exclusion of mens rea/knowledge of criminality in the acquisition of such property?;

(D) Whether Section 8(4) is invalid for enjoining deprivation of possession of immovable property even before conclusion of guilt/conviction in the prosecution for an offence of money-laundering?;

(e) Whether the presumption enjoined by Section 23 is unreasonably restrictive, excessively disproportionate and thus invalid?; and

(f) Whether shifting/imposition of the burden of proof, by Section 24 is arbitrary and invalid; is applicable only to the trial of an offence under Section 3; not to proceedings for attachment and confiscation of property under Chapter-III; and in any case not in respect of a person not accused of having committed the offence under Section 3?

Issue - A:

15. The core contention on behalf of the petitioners is that property in ownership, control or possession of a person not charged of having committed a scheduled offence would not constitute proceeds of crime, liable to attachment and confiscation proceedings, under Chapter III of the Act.

16. Learned Counsel for the petitioners adverted to the Convention against Illicit Traffic in Narcotic Drugs and Substances, [to which India is a party and a signatory]. Article 3 in Part-XVII of this Convention sets out provisions pertaining to Offences and Sanctions. Certain provisions, of clauses (b) and (c) of sub-section (1), and sub-sections (2) and (3) of Article 3 are adverted to in this behalf. The provisions adverted to by the petitioners read:

Article 3

Offences and Sanctions

(1) Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally;

(b)(i) The convention or transfer of property, knowing that such property is derived from any offence or offences, established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location,
disposition, movement, rights with respect to, or ownership of property knowing that such property is derived from an offence or offences established in accordance with sub-paragraph (a) of this paragraph;

(c) Subject to its constitutional principles and the basic concepts of its legal system-

(i) The acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from an offence or offences, established in accordance with sub-paragraph (a) of this paragraph or from an act of participation in such offence or offences;

(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, finalizing and counseling the commission of any of the offences established in accordance with this Article

(2) Subject to its constitution, principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

(3) Knowledge, intent or purpose required as an element of an offence set forth in Paragraph I of this Article may be inferred from objective factual circumstances.

17. Learned Counsel Sri. Rajeev Awasthi, referred to the General Assembly resolution 55/25, dated 15.11.2000, the United Nations Convention against Transnational Organized Crime. The purport of the Convention is to promote cooperation to prevent and combat Transnational Organised Crime more effectively. The Convention is aimed to integrate international cooperation inter alia for seizure and confiscation of proceeds of crime derived from predicate offences covered by the Convention or property the value of which corresponds to that of such proceeds; and property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention. The scope of application of this Convention is to prevent, investigate and prosecute specified offences and other serious crime, where the offence is transnational in nature and involves an organised criminal group. Suffice it to notice for the purposes of this /is that while detailing measures to be adopted by State Parties for seizure and confiscation of proceeds of crime, it is indicated that State may consider the possibility of requiring that an offender demonstrate the lawful origin of the alleged proceeds of crime or other property liable to confiscation, to the extent the requirement is consistent with the principle of their Domestic law and with the nature of judicial and other proceedings. It also provided that provisions for seizure and confiscation should not be construed to prejudice the rights of a bona fide third parties [Article 12 Clauses 7, 8].

18. Sri. Gopal Chowdury has also contended, by reference to provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 that mens rea or some measure of an informed association with an offence is the sine qua non to constitute "illegally acquired property" under the NDPS Act.
19. We are required, in the context of the rival contentions in these writ petitions to interpret the Act in accordance with established and applicable principles of statutory interpretation. The unit of interpretation is the Act as a whole and such of those provisions which are considered for interpretation but in the context of the provisions of Act. While the preamble to the Act refers to the U.N General Assembly Resolution S-17/2, dated 23.2.1990; and the political declaration adopted by the Special Session of the U.N General Assembly held on 8th to 10th June, 1998; these are among the reasons for the legislation and the contents of those resolutions or declarations are not to be considered while interpreting provisions of a domestic law such as the Act unless there is an ambiguity in any provision necessitating reference to extra textual sources for guidance. The well established principle is that the words of a statute, passed after the date of a treaty and dealing with the same subject-matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it Garland v. British Rail Engineering Ltd., (1983) 2 AC. 751; A (FC) v.Secretary of State for the Home Department, (2005) UKHL 71. This principle is reiterated in our jurisdiction as well. In Visakha v. State of Rajasthan, 1997 (2) ALD (Crl.-) 604 (SC) : (1997) 6 SCC 241, the Supreme Court explained that 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. While International Treaties, Conventions, Protocols or other instruments may catalyze domestic Legislation, these are not to be construed as the authority for Legislation. The Power to Legislate in India is derived from the grant of Legislative Power qua the provisions of the Constitution and the limits upon the legislative powers enumerated in the provisions of the Constitution including the authorised and enumerated fields of legislation in Lists 1, 2 and 3 of the Seventh Schedule of the Constitution.

The learned Counsel for the petitioners are not heard to contend that the provisions of the Act are ultra vires international treaties, conventions; the FATF Standards etc. The contours of the powers of Parliament to make any law for the whole or any part of the territory of India for implementation of any treaty, agreement, convention or any decision made at any international conference, association or body is well established to justify the customary parade of familiar scholarship and a catena of precedent - see Maganbhai v. Union of India, (1970) 3 SCC 400; S. Jagannath v. Union of India, (1997) 2 SCC 67 : 1997 (3) ALD (SCSN) 28; Bilabeti Behera v. State of Orissa, (1993) 2 SCC 746; and Apparel Export Promotion Council v. A.K Chopra, (1999) 1 SCC 759 : 1999 (1) ALD (SCSN) 26. We therefore proceed to interpret the provisions of the Act within the framework of its provisions, tested on the anvil of the limits on legislative powers enjoined by the provisions of our Constitution; for we are not persuaded that there is any ambiguity that legitimizes a resort to trans-legislation sources for guidance.

20. We had benefit of perusing the judgment by a learned Division Bench of the Bombay High Court, dated 5.8.2010 in First Appeal Nos. 527 to 529 of 2010 [per A.M Khanwilkar, J] The very question as to whether the provisions in the Act are applicable for attachment and confiscation of property belonging to persons other than those charged and prosecuted of having committed a scheduled offence fell for consideration in this judgment. The appeals (to
the Bombay High Court) were preferred [under Section 42 of the Act] against the judgment and order of the Appellate Tribunal rejecting a challenge to orders of the Adjudicating Authority confirming orders of provisional attachment. It however requires to be noted that the decision was delivered in the context of the provisions of Section 5 of the Act prior to its amendment by the 2nd Amendment Act, 2009 i.e., prior to the introduction of the second proviso to Section 5(1) of the Act. On an interactive interpretation of the several provisions of the Act including definition of the expressions- "Person"; "Proceeds of Crime"; "Property"; and "Transfer"; and the provisions of Sections 5 and 8, the Bombay judgment concluded that attachment of proceeds of crime in possession of any person [other than the person charged of having committed a scheduled offence] will fall within the sweep of Section 5 of the Act.

22. While it may perhaps be contended that the provisions of Section 5(1) [prior to the second proviso exclude from the domain of the Act, attachment and confiscation of property in the possession of a person not charged of having committed a scheduled offence, this contention in our considered view is wholly misconceived after enactment of the second proviso. The second proviso enjoins that any property of any person may be attached if the specified authority therein has reason to believe . The non obstante clause in the second proviso clearly excludes clause (b) of Section 5(1). It is this clause [b] that incorporates the requirement that the proceeds of crime should be in possession of a person who is charged of having committed a scheduled offence, for initiating proceedings for attachment and confiscation. If the provisions of the Section 5(1)(b) are to be eschewed for ascertaining the meaning of the second proviso [qua the legislative injunct of the non obstante provision], on a true and fair construction of the provisions of Section 5(1) including the second proviso thereof but ignoring clause (b), the Legislative intent is clear, unambiguous and linear. Provided the other conditions set out in Section 5 of the Act are satisfied, any property of any person (the expression "person", is not restrictively defined in Section 2(s) limited to a person charged of having committed a scheduled offence), could be proceeded against for attachment, adjudication and confiscation. We are persuaded to the view that incorporation of the 2nd proviso Section 5(1) is intended to clarify the position or remove any ambiguity as to the application of Section 5(1) to property of a person not charged of having committed a scheduled offence.

24. Inter alia it was suggested that attachment and confiscation proceedings could be initiated for instance against a shareholder of a Company who receives higher dividend or higher value on the sale of shares of such company, where the company makes and declares substantial profits by evading customs duties or the like. Would the higher dividends received by the shareholder or the gains made by selling his shares in the company at higher price relatable to the illegal activity of the Company, of which illegality he was clearly not aware, be liable to attachment and confiscation, query the petitioners. In response, Sh. Rajeev Awasthi for the respondent has stated that as a policy the Enforcement Officials are not proceeding against properties, under the Act, unless satisfied that the property is proceeds of the crime; is in possession of a person who is either accused/charged of a scheduled offence or has knowledge of the property being the proceeds of crime.

25. In our considered view the petitioners' contention proceeds on a misconception of the relevant provisions of the Act. Against transactions constituting money laundering, the
provisions of the Act contemplate two sets of proceedings; (a) prosecution for the offence of money-laundering defined in Section 3 with the punishment provided in Section 4; and (b) attachment, adjudication and confiscation in the sequential steps and subject to the conditions and procedures enumerated in Chapter 111 of the Act. Section 2 (p) defines the expression "money-laundering" as ascribed in Section 3. Section 3 defines the offence of Money-Laundering in an expansive locus as comprehending direct or indirect attempt to indulge; assist, be a party to or actually involved knowingly in any process or activity connected with the proceeds of the crime and projecting it as untainted property. On proof of guilt and conviction of the offence of Money-Laundering, the punishment provided in Section 4 of the Act would follow after a due trial by the Special Court; which is conferred exclusive jurisdiction qua Section 44, Chapter VII of the Act. The prosecution, trial and conviction for the offence of money-laundering are the criminal sanction administered by the Legislation and effectuated by a deprivation of personal liberty as a disincentive to a malfeasant. The second matrix of proceedings targets the "proceeds of crime" defined in Section 2(u); as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property, for initial attachment and eventual confiscation.

26. Chapter III of the Act enables the specified authority, if he has reasons to believe [the reasons to be recorded in writing], on the basis of material in possession of the authority that any person charged of having committed a scheduled offence [Section 5(1)(b)] or even if not so charged [second proviso to Section 5(1)] is in possession of proceeds of crime and such proceeds are likely to be concealed, transferred etc., in a manner as may frustrate any proceeding relating to confiscation of such proceeds of crime under Chapter III, to provisionally attach [Section 5(1)]; confirm an order of provisional attachment after a process of adjudication [Section 8(3)]; and eventually pass an order confiscating such property [Section 8(6)].

27. On the afore-stated scheme the provisions of the Act, the prosecution under the Act; and attachment and eventual confiscation proceedings are distinct proceedings. These two sets of proceedings may be initiated against the same person if he is accused of the offence of money-laundering. Even when a person is not so accused, the property in his possession may be proceeded against for attachment and confiscation, on a satisfaction by the appropriate and competent authority that such property constitutes proceeds of crime.

28. In our considered view, the provisions of the Act which clearly and unambiguously enable initiation of proceedings for attachment and eventual confiscation of property in possession of a person not accused of having committed an offence under Section 3 as well, do not violate the provisions of the Constitution including Articles 14, 21 and 300-A and are operative proprio vigore.

29. While the offence of money-laundering comprises various degrees of association and activity with knowledge and information connected with the proceeds of crime and projection of the same as untainted property; for the purposes of attachment and confiscation (imposition of civil and economic and not penal sanctions) neither mens rea nor knowledge that a property has a lineage of criminality is either constitutionally necessary or statutorily enjoined. Proceeds of crime [as defined in Section 2(u)] is property derived or obtained
directly or indirectly as a result of criminal activity relating to a scheduled offence or the value of any such property. "Property" is defined in Section 2(v) to include property of every description corporeal, incorporeal, movable, immovable, tangible, and intangible and includes deeds and instruments evidencing title to or interest in such property or assets wherever located.

30. The matrix of the relevant provisions of the Act compel the inference that the legislation subsumes that property which satisfies the definition of "proceeds of crime", prime fade is considered as property whose transfer [defined in Section 2 (za)] is subject to verification to consider whether the transfer is a stratagem of a money laundering operation and is part of a layering transaction. As the provisions of the Act target malfeasant charged of an offence under Section 3 and the proceeds of crime in the possession of a person so charged and any other person as well, the legislative intent is manifest that attachment and confiscation constitute a critical and clearly intended and specifically enacted strategy to combat the evil of money-laundering. A person though not accused/charged of an offence under Section 3, when in possession of any proceeds of crime, from the provisions of the Act it is clear, has but a defeasible and not a clear title thereto. In the context of attachment and confiscation proceedings, knowledge that a property is proceeds of crime is not legislatively prescribed.

31. Proceeds of crime is defined to include not merely property derived or obtained as a result of criminal activity relating to a scheduled offence but the value of any such property as well. The bogey of apprehensions propounded on behalf of the petitioners is that where proceeds of crime are sequentially transferred through several transactions, in favour of a series of individuals having no knowledge or information as to the criminality antecedent to the property; the authorities may proceed against each and all of such sequential transactions, thus bringing within the vortex of Chapter-III of the Act, all the properties involved in several transactions.

32. Section 8(1) clearly postulates affording of an opportunity to a person in possession of proceeds of crime to indicate the sources of his income, earnings or assets; out of which or by means of which he has acquired the property attached, under Section 5(1) or seized under Sections 17 or 18 the vidence on which he relies and other relevant information and particulars. It is therefore clear that here a property is provisionally attached under Section 5, the person in possession of such property may avail the opportunity under Section 8 to indicate/establish that he has acquired the property attached (prime fade the proceeds of crime) out of his lawful earnings or assets, that he has the means to do so, and that his acquisition is therefore legitimate, bona fide and at fair market value of such property; and that the value paid for acquisition of the property and not the property in his possession that constitutes proceeds of crime, if at all. On such showing, to the satisfaction of the adjudicating authority, it would perhaps be not the property in possession of a person but the fair value for which he has acquired the property and paid to the transferor that constitutes proceeds of crime and the authorities may have to proceed against the property or value in the hands of the transferor. \

33. In the illustration proffered on behalf of the petitioners; since the dividend, the higher dividend or the value of the shares sold would be relatable to illegal conduct of a company or
its officers (if such illegality is a scheduled offence and the company or a person in management or control of the company is accused of an offence under Section 3 and would be proceeds of crime, so much of the quantum of the dividend received or the value of a share sold as constitutes proceeds of crime could be liable to attachment and confiscation. This in our considered view is the true and fair construction of the provisions of the Act. At this stage of the proceedings we cannot be oblivious of the fact that the petitioners and others, whose assets are being subjected to the processes under Chapter III of the Act, are alleged to be closely related to or employees of the individual(s) who orchestrated the massive scam and that these persons had traded in the shares of SCSL (with a presumptive insider information) when those shares had a peak value, achieved on account of the criminal conduct of Sri Ramalinga Raju, and others.

34. The contention by the petitioners that attachment and confiscation of proceeds of crime in possession of a person who is not charged of an offence under Section 3 or who has no knowledge or information as to the antecedent criminality are arbitrary and unfair legislative prescriptions is misconceived.

35. Section 24 inheres on a person accused/charged of having committed an offence under Section 3, the burden of proving that proceeds of crime are untainted property. Section 23 of the Act enjoins a presumption in interconnected transactions that where money-laundering involves two or more interconnected transactions and one or more of such transactions is or are proved to be involving in money-laundering, then for the purposes of adjudication or confiscation under Chapter III, the Act enjoins a rebuttable presumption that the remaining transactions form part of such interconnected transactions.

36. From the scheme of the provisions of the Act, it is apparent that, a person accused of an offence under Section 3 of the Act whose property is attached and proceeded against for confiscation must advisedly indicate the sources of his income, earnings or assets, out of which or means by which he has acquired the property attached, to discharge the burden (Section 24) that the property does not constitute proceeds of crime. Where a transaction of acquisition of property is part of interconnected transactions, the onus of establishing that the property acquired is not connected to the activity of money-laundering, is on the person in ownership, control or possession of the property, though not accused of a Section 3 offence, provided one or more of the interconnected transactions is or are proved to be involved in money-laundering (Section 23).

37. It further requires to be noticed that not only from the second proviso to Section 9 of the Act but on general, principles of law as well, a person deprived of the property in his ownership, control or possession on account of confiscation proceedings under the Act, has a right of action against the transferor of such property to recover the value of the property.

38. In the context of the fact that money-laundering is perceived as a serious threat to financial systems of countries across the globe and to their integrity and sovereignty as well; in view of the fact that targetting the proceeds of crime and providing for attachment and confiscation of the proceeds of crime is conceived to be the appropriate legislative strategy; and given the several safeguards procedural and substantive alluded to hereinbefore, we are not persuaded to the view that attachment and confiscation of property constituting proceeds
of crime in the possession of a person not accused/charged of an offence under Section 3 constitutes an arbitrary or unconstitutional legislative prescription.

39. The contention that the definition of "proceeds of crime" [Section 2(u)] is too broad and is therefore arbitrary and invalid since it subjects even property acquired, derived or in the possession of a person not accused, connected or associated in any manner with a crime and thus places innocent persons in jeopardy, is a contention that also does not merit acceptance. In Attorney General for India v. Amratlal Prajivandas, (1994) 5 SCC 54, a Constitution Bench of the Supreme Court considering the validity of provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) observed: The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu - whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu whether in his own name or in the name of his relatives and associates.

40. The Court further observed: By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate - it does not matter whether he intends such a person to be a mere name lender or whether he really intends that such person shall be the real owner and/or possessor thereof - or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates - in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(c). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property - even though purchased from a convict/detenu - is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict.

41. The Supreme Court concluded: The application of SAFEMA to the relatives and associates [in clauses (c) and (d) of Section 2(2)] is equally valid and effective inasmuch as the purpose and object of bringing such persons within the net of SAFEMA is to reach the
properties of the detenu or convict, as the case may be, wherever they are, howsoever they are held and by whomsoever they are held. They are not conceived with a view to forfeit the independent properties of such relatives and associates as explained in this judgment.

42. SAFEMA targets for forfeiture 'illegally acquired property' of a person (defined as a convict or detenue under specified enactments and relative or associate of such convict or detenue (the expression relative or associate also defined)). This is a 1976 enactment that provides for forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators. The Act, on the other hand, specifically targets the wider pathology of money-laundering in relation to a large number of scheduled offences enumerated from a variety of specified legislations. In the context of the objects sought to be achieved by the Act and the specificity of the definitions of the expressions "money-laundering" and "proceeds of crime"; the inherence of the burden of proof on a person accused of an offence under Section 3 (Section 24) and the presumptions in interconnected transactions (Section 23), it is clear that what is targeted for confiscation is proceeds of crime in the ownership, control or possession of any person and not all property or proceeds of all crime in the ownership, control or possession of any person.

43. Again, in Smt. Heena Kausar v. Competent Authority, 2008 (7) SCALE 331 the validity of the proviso to Section 68 - C. of the Narcotic Drugs and Psychotropic Substances Act, 1985, (NDPS Act, 1985), prior to its amendment by Central Act 9 of 2001 fell for the consideration of the Supreme Court. Dealing with the challenge the Supreme Court observed: "...The purported object for which such a statute has been enacted must be noticed in interpreting the provisions thereof. The nexus of huge amount of money generated by drug trafficking and the purpose for which they are spent is well known ... Necessity was felt for introduction of strict measures so that money earned from the drug trafficking by the persons concerned may not continue to be invested, inter alia, by purchasing movable or immovable properties not only in his own name but also in the names of his near relatives."

44. In Heena Kausar's case (supra), interpreting similar provisions in Chapter VA of the NDPS Act, 1985, the Apex Court pointed out that the property sought to be forfeited must be one which has a direct nexus with the income, etc., derived by way of contravention of any of the provisions of the Act or any property acquired therefrom. The Court explained that the meaning of "identification of such property" (a phrase employed in Section 68 - E of Chapter VA), is that the property was derived from or used in the illicit traffic.

45. The SAFEMA; The NDPS Act, 1985; The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988; and The Benami Transactions (Prohibition) Act, 1988 are illustrations of statutes that incorporate provisions for forfeiture, confiscation or acquisition without compensation, of property derived, acquired, possessed or dealt with in contravention of specified legislative prescriptions. The Act is a later statute to the aforementioned Acts and specifically targets the perceived evil of money-laundering. The category of offences enumerated in Parts A, B and C of the Schedule of the Act elucidate the legislative intent that the several offences and the unlawful gains/wealth derived therefrom by malfeasant(s) are targeted and confiscated, including from others when the property being the derivative of criminal activity is laundered through one or more layered transactions and finds its way to the ownership, control or possession of non-offenders as well; but in respect
of scheduled offences.

46. The object of the Act is to prevent money-laundering and connected activities and confiscation of "proceeds of crime" and preventing legitimising of the money earned through illegal and criminal activities by investments in movable and immovable properties often involving layering of the money generated through illegal activities, i.e., by inducting and integrating the money with legitimate money and its species like movable and immovable property. Therefore, it is that the Act defines the expression "proceeds of crime" expansively to sub-serve the broad objectives of the Act. We thus do not find any infirmity in the provisions of the Act.

47. Issue-A is answered accordingly. Issue-B:

48. The Bombay High Court in the judgment dated 5.8.2010 (in First Appeal Nos. 527 to 529 of 2010) has interpreted the provisions of Section 5(1) of the Act even prior to incorporation of the second proviso by the Second Amendment Act, 2009) as enabling initiation of proceedings for attachment and confiscation of property in possession of a person not accused/charged of an offence under Section 3 as well. The Second Amendment Act insofar as it has incorporated the second proviso to Section 5(1), it is contended on behalf of the respondents is by way of clarification and emphasis as to the true import and trajectory of Section 5(1). Be that as it may.

49. The process of adjudication under Section 8 of the Act is in respect of property attached under Section 5(1); proceeds of crime involved in money-laundering in possession of any person searched and seized under Section 17 and in respect of which the appropriate authority has filed an application to the adjudicating authority for retention of such property under Section 17(4); and proceeds of crime seized from the possession, ownership or control of any person under Section 18(1) and in respect of which an application is filed under subsection (10) of Section 18 to the adjudicating authority, requesting for retention of such property. The common objective of Sections 5, 8, 17 and 18 is provisional attachment, confirmation of attachment and confiscation of property constituting proceeds of crime. While there was perhaps an ambiguity on the issue whether the process of provisional attachment under Section 5 and confirmation of such provisional attachment under Section 8(3) could lie against property in possession of a person other than one accused/charged of having committed an offence under Section 3 [this ambiguity has since been resolved by the provisions of the Second Amendment Act incorporating appropriate amendments by way of the second proviso to Section 5(1) and addition of the clause "or is in possession of proceeds of crime" in Section 8(1)], there was no ambiguity that the process of adjudication under Section 8 is available against all proceeds of crime whether in possession of a person accused/charged of an offence under Section 3 or otherwise, in view of the adjudication process applying to property seized under Sections 17 and 18 of the Act. Neither the provisions of Sections 17 nor 18 require for search and seizure operations that the proceeds of crime involved in money-laundering should be in possession only of a person accused/charged of an offence under Section 3. The provisions of Clause (ii) of Section 17(1) clearly (by employing the disjunctive 'or') stipulate that search and seizure operations may proceed not only against a person who has committed an act which constitutes money-laundering but also against a person in possession of any proceeds of crime involved in
money-laundering or in possession of records relating to money-laundering. On search of any person or seizure of such record or property constituting proceeds of crime in the possession, ownership or control of any person, which may be useful or relevant to any proceedings under the Act, a property, which constitutes proceeds of crime seized under Section 17 or 18, is equally subject to the adjudicatory processes under Section 8.

50. On analysis of the provisions of Sections 5, 8, 17 and 18, it is clear that provisions of the Second Amendment Act have carefully ironed out the creases and the latent rucks in the texture of the provisions of the Act relating to attachment, adjudication and confiscation in Chapter-III. Attachment or confiscation of proceeds of crime in the possession of a person who is not accused or charged of an offence under Section 3 is thus not an incorporation for the first time by the provisions of the Second Amendment Act, 2009. The contention on behalf of the petitioners that the second proviso to Section 5(1) of the Act, applies only to property acquired/possessed prior to enforcement of this provision or if interpreted as being retrospective, the provision itself must be invalidated for arbitrary retrospective operation is therefore without substance or force.

51. The above contention does not merit acceptance even otherwise. Article 20 of the Constitution enacts an injunction only in respect of ex post facto laws resulting in conviction for offences or imposition of penalties greater than which might have been inflicted under the law enforceable at the time of commission of the offence. No provision of the Constitution has been brought to our notice which prohibits a legislative measure which targets for attachment and confiscation proceeds of crime.

53. The majority opinion in Khemka & Co. is only a reiteration and application of the well-accepted "void for vagueness" principle which applies to invalidate irredeemably ambiguous statutory provisions. The observations in the majority opinions are not to be considered as encompassing legislative sanctions which do not effect personal liberties within the constitutional prohibition of ex post-facto laws enjoined by Article 20(2) of the Constitution. The Khemka majority opinion, in our carefully considered view, only means that no regulation of conduct; imposition of person's civil, economic rights or of personal liberty or regulation of freedoms, natural or guaranteed by constitutionally entrenched rights, may be brought about by overly vague and unspecific legislative prescriptions; and nothing more.

54. In Amratlal Prajivandars case (supra) the validity of SAFEMA was challenged and upheld by the Constitution Bench. Section 3(c) of the legislation defined 'illegally acquired property' as any property acquired whether before or after the commencement of SAFEMA, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law which the Parliament has the power to make. The challenge to the definition of illegally acquired wealth on grounds of
over breadth and as an excessive and disproportionate legislative response to the perceived evil, was repelled. Jeevan Reddy, J., put it pithily when he observed: Bitter medicine is not bad medicine.

55. The huge quanta of illegally acquired wealth; acquired from crime and economic and corporate malefianse corrodes the vitals of rule of law; the fragile patina of integrity of some of our public officials and State actors; and consequently threatens the sovereignty and integrity of the Nation. The Parliament has the authority to legislate and provide for forfeiture of proceeds of crime which is a produce of specified criminality acquired prior to the enactment of the Act as well. It has also the authority to recognise the degrees of harm and identified pejorative conduct has on the fabric of our society and to determine the appropriate remedy for the pathology.

56. Issue-B is answered accordingly.

Issues - C & D:

57. Under Issue - C, the challenge to the provisions of Section 8 on the ground of vagueness is considered. The petitioners also contend that the definitions, "money-laundering" [Section - 2(1)(p)]; "proceeds of crime" [Section - 2(1)(u)] and the provisions of Section 5 (enabling provisional attachment) are void for being vague. We analyse the authorities cited on behalf of the petitioners to support the void for vagueness contention.


59. The United States Courts have evolved the Void for Vagueness doctrine to scrutinize laws that are intrinsically vague and thus enable arbitrary and discriminatory enforcement of criminal statutes and other statutes that deter citizens from engaging in certain political and religious discourse. This doctrine advances four seminal constitutional policies flowing out of the Due Process Clauses of the 5th and 14th Amendments to the United States Constitution: (a) It encourages the Government to clearly distinguish conduct that is lawful from that which is not so—enabling individuals to have adequate notice of their legal obligations so that they can govern their behaviour accordingly. Under this value where individuals are left uncertain by the wording of an imprecise statute, the law becomes an arbitrary and a standardless trap for the unwary; (b) the doctrine curbs arbitrary and discriminatory enforcement of criminal statutes. The standard assumes that penal laws must be understood by those persons who are required to obey them and those persons who charged with the duty of enforcing them. Therefore, statutes that do not carefully outline detailed procedures by which Enforcement officials may perform an investigation, conduct a search or make an arrest, confer a wide discretion upon each officer to act as he sees fit. Precisely worded statutes confine the officers' activities to the letter of the law; (c) the doctrine discourages Judges from attempting
to apply sloppily worded laws. In cases of vague provisions, the Courts may attempt to narrowly construe a vague statute so that it applies only to a finite set of circumstances. By a reading of specific enactment requirements into a vaguely structured or worded law, Courts attempt to insulate innocent behaviour from criminal sanction. Such interpretive techniques are not always possible. Eventually, a confusing law that cannot be cured by a narrow judicial interpretation will be struck down as unconstitutional violation of the Due Process Clause and; (d) the doctrine avoids encroachment on the First Amendment freedoms, such as speech and religion. Since vague laws produce uncertainty in the minds of average citizens, some citizens will inevitably decline to undertake risky behaviour that might deprive them of liberty. Where vague provisions of legislation deter citizens from engaging in certain political and religious discourse, Courts will apply heightened scrutiny to ensure that protected expressions are not suppressed. It must however be noted that though Courts will scrutinize a vague law that strikes a fundamental freedom, in other cases the void for vagueness doctrine does not however require mathematical precision on the part of the Legislators. Also, laws that regulate the economy are scrutinized less closely than those that regulate individual behaviour; and laws that impose civil or administrative penalties may be drafted with less clarity than those imposing criminal sanctions.

66. The decisions of our Supreme Court in Romesh Thapar, Khemka & Company, AX Roy and Kartar Singh's cases (supra), reiterate and reinforce the void for vagueness doctrine evolved and refined in other constitutional jurisdictions, in the United States and Canada. A prohibitory order issued by the Governor of Madras in exercise of powers under Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 — prohibiting the entry into or circulation, sale or distribution in the State of Madras of a newspaper "Cross Roads"; validity of certain provisions of the National Security Act, 1980; and challenge to the provisions of the Terrorist Effected Areas (Special Courts) Act, 1984, the Terrorist and Disruptive Activities (Prevention) Act, 1985; the Terrorist and Disruptive Activities (Prevention) Act, 1987 and Section 9 of the Code of Criminal Procedure (UP Amendment), 1976 respectively fell for consideration of our Supreme Court, in the above cases. In these decisions, the Apex Court reiterated the principle that a law would be void for vagueness particularly if it involves criminal sanctions. In A.K Roy, Chief Justice Chandrachud, reiterated the well established principle that crimes must be defined with appropriate definiteness and it is regarded as a fundamental concept in criminal law and must now be regarded as a pervasive theme of our Constitution. The Court held: Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the prescribed area, when measured by common understanding.

67. Bhagwati, 3 pointed out in Naraianand Indurkhya v. State of M.P, (1974) 4 SCC 764, where the power conferred by a statute on any authority of the State is vagrant and unconfined and no standards or principles are laid down by the statute to guide and control the exercise of such power, the statute would be violative of the equality clause, because it would permit arbitrary and capricious exercise of power, which is an anti-thesis of equality before the law.

68. The plea for invalidation of the provisions of the Act on the ground of vagueness is
in our considered view misconceived. The vagueness doctrine prohibits only laws that fail either to give proper notice to regulate parties or to meaningfully limit the discretion of their enforcers. The judicial branch cannot determine a law's constitutionality simply by examining how it is enforced. The reason is readily apparent. If a Court makes only the determination that an enforcer is behaving arbitrarily and with unrestrained discretion, it cannot know whether the enforcer's actions are authorised by an unconstitutionally vague law or whether the enforcer is acting outside the authority granted by a sufficiently tailored and, therefore, intra wires law. It is therefore appropriate that a Court scrutinising a vagueness challenge must come to the law at issue rather than simply examine the actions or potential actions of its enforcer.

70. In the light of the authority of the precedents, we proceed to consider the provisions of the Act in the context of the challenges classified in issues 'C and 'D'. The scheme of Section 8:

71. The challenge to the validity of Section 8 is considered under these issues. 'Proceeds of crime' is defined as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [Section 2(u)]. Under Section 8, if on receipt of a complaint under Section 5(5) (after an order of provisional attachment) or applications under Section 17(4) or 18(10) (pursuant to a search and seizure operation), where the adjudicating authority has reason to believe that any person has committed an offence under Section 3 or is in possession of proceeds of crime, he may initiate the process delineated in Section 8.

72. While Section 5 does not enjoin a notice or opportunity to any person in possession of proceeds of crime, whether charged of having committed a scheduled offence or otherwise, Section 8(1) mandates service of a notice (for the stipulated period) requiring the noticee to indicate the sources of his income, earning or assets, out of which or by means of which, he has acquired the property attached under Section 5(1) or seized under Section 17 or 18; the evidence on which such person relies and other relevant information and particulars. The noticee must show-cause why all or any of the properties provisionally attached or seized as the case may be, be not declared to be properties involved in money laundering and confiscated by the Central Government.

73. We consider Sections 5; 8(1), (2) and (3); 17 and 18 to comprise an intermeshing raft of provisions. The process of provisional attachment under Section 5; seizure under Section 17(1)(c) or 18(1) are, in the legislative scheme of the Act, intended to empower the appropriate authority to provisionally attach but without the consequence of dispossession from immovable property (under Section 5) or to seize a property (under Section 17 or 18), on the basis of a unilateral satisfaction of the appropriate authority (if there is reason to believe; such belief to be recorded in writing), that such property constitutes proceeds of crime, in the possession, ownership or control of any person, whether or not accused of an offence under Section 3.

74. At the provisional attachment stage under Section 5(1) or a seizure under Section 17 or 18, the prima facie satisfaction that the property in question constitutes proceeds of crime as defined in the Act, is a satisfaction that the appropriate authority arrives on his own; on the
basis of the report as to the scheduled offence forwarded to a Magistrate under Section 173 of
the Code of Criminal Procedure, 1973 or a complaint filed by a person authorized to
investigate an offence enumerated in the Schedule before a Magistrate or a Court for taking
cognizance of the scheduled offence [first proviso to Section 5(1) and proviso to Section
18(1)]; or on the basis of information in the possession of the authorized officer [under
Section 17(1)]. No notice or providing of an opportunity to the person in possession,
ownership or control of the property, believed by the authorised officer to constitute proceeds
of crime; hearing the version or considering the material produced by any such person (in
support of a claim that the property does not constitute proceeds of crime in view of the
sources of his income, earning or assets out of or by means of which the property was
acquired), is envisaged or obligated, at this stage of the process.

75. Since the reason to believe or the satisfaction requisite for provisional attachment or
seizure of a property under these provisions is unilateral, it is mandated that the period of
provisional attachment shall not exceed 150 days from the date of the order and that within
30 (thirty) days therefrom a complaint should be filed before the adjudicating authority
stating the facts of such attachment —[vide Section 5(5)]. Similarly, clause (4) of Section 17
and clause (10) of Section 18 enjoin that the authority seizing any record or property under
the substantive provisions, shall within thirty (30) days from such seizure, file an application
before the adjudicating authority requesting for retention of such record or property.

76. Section 20 enjoins that where a property has been seized under Section 17 or 18 and
the authorized officer, on the basis of material in his possession, has a reason to believe (the
reason to be recorded in writing) that such property is required to be retained for the purposes
of adjudication under Section 8, such property may be retained for a period not exceeding
three months, from the end of the month in which the property was seized. This provision
also enjoins that the authorized officer, after passing an order for retention of the property for
the purposes of adjudication under Section 8, shall forward a copy of the order along with the
material in his possession to the adjudicating authority whereupon the adjudicating authority
is required to keep such order and material for the prescribed period; further on expiry of the
period specified in sub-section (1), the property shall be returned to the person from whom it
was seized, unless the adjudicating authority permits retention of such property beyond the
said period. To a similar effect are the provisions of Section 21 with regard to retention of
records seized under Section 17 or 18.

77. Proceeds of crime is defined as any property, derived or obtained by any person as a
result of criminal activity relating to a scheduled offence or the value of such property. For
confirmation of provisional attachment [under Section 8(2)], the adjudicating authority must
record a finding that all or any of the properties provisionally attached or seized are involved
in money laundering and only thereafter may he pass an order under Section 8(3), confirming
the provisional attachment made under Section 5(1) or retention of a property seized under
Section 17 or 18. The vagueness challenge:

78. Within the scheme of the provisions of the Act, on receipt of a complaint under
Section 5(5) (from the authority which passed the provisional attachment order) or pursuant
to applications made under Section 17(4) or 18(10) (pursuant to a search and seizure), the
adjudicating authority is required, on the basis of the material in his possession to have a
reason to believe that any person has committed an offence under Section 3 or a person even if not so accused is in possession of proceeds of crime involved in money laundering. On such prima facie satisfaction, the adjudicating authority is required to serve a notice (for the stipulated period) on such person; on any other person holding the property on behalf of another person; or where the property is jointly held by more than one person on all persons holding the property [1st and 2nd Provisos to Section 8(1)] calling upon him/them to indicate the sources of his/their income etc. The noticee is thus provided an opportunity to rebut the prima facie assumptions of the adjudicating authority and to establish that the property in question does not constitute/comprise proceeds of crime involved in money-laundering. This is a salutary safeguard to the noticee, also in view of the presumption regarding interconnected transactions enjoined by Section 23 of the Act. Where the noticee is a person accused of having committed the offence under Section 3 of the Act, in the light of the enjoined burden of proof on such person (Section 24), this opportunity provides an avenue to discharge the burden.

79. Sub-section (2) of Section 8 obligates the adjudicating authority to consider the reply if any submitted by a noticee; hear the aggrieved person (as well as the Director or any other officer authorised by him in this behalf); take into account all relevant materials available on record before him; and to record a finding by passing an order whether all or any of the properties referred to in the notice issued [under Section 8(1)], are involved in money-laundering. The proviso to Section 8(2) enables a person who claims the property but is not issued or served a notice under Section 8(1) to avail the opportunity of being heard to establish that the property claimed by him is not involved in money-laundering.

80. Only on a finding recorded under Section 8(2) that a property referred to in a notice [issued under Section 8(1)] is involved - in money-laundering, is the adjudicating authority authorised to pass an order (in writing) confirming attachment of the property or retention of the property or record seized. Section 8 (3) stipulates, vide Clauses (a) and (b) that where the adjudicating authority passes an order confirming attachment of a property [seized under Section 5(1)] or retention of property or the record seized (under Section 17 or 18), the attachment or retention of the seized property or record as the case may be shall continue during the pendency of any proceedings relating to any scheduled offence before a Court and would become final after the guilt of the person is proved in the trial Court and the order of such trial Court becomes final.

81. Under Section 8(4), on confirmation of an order of provisional attachment [under sub-section (3)], the specified authority is enjoined to take possession of the attached property.

82. Section 8(6) provides that only when the attachment of any property or retention of the seized property or record becomes final under Section 8(3)(b) i.e (proof of guilt of the accused in the trial Court and such order attaining finality), the adjudicating authority may initiate the process and shall again afford an opportunity of being heard to the person concerned with the property, before passing an order confiscating the property.

83. Clause (5) of Section 20 and of Section 21 provide that after an order of confiscation under Section 8(6) is passed, the adjudicating authority shall direct release of all properties
other than properties involved in money laundering to the person from whom such properties were seized; and direct release of records to the person from whom such records were seized, respectively.

84. In view of the clear and unambiguous provisions of Section 8 (analysed above), considered in the context of the other provisions of the Act, we discern no vagueness in the trajectory of the provisions of Section 8. It is clear that the stage of confirmation of an order of provisional attachment or retention of the property or record seized is an intermediary stage, anterior to confiscation. Where the property is provisionally attached or a record seized from the ownership, control or possession, of a person accused of an offence under Section 3 or not so accused, the attachment, retention and the eventual authority to order confiscation of the property is dependant and contingent upon proof of guilt and finality of an order of conviction of a person, of the offence of money-laundering, under Section 3 of the Act. The several degrees of assumptions and reasons to believe on the part of the adjudicating authority, anterior to the stage of confiscation are thus in the scheme of the Act prima facie and tentative assumptions or reasons to believe, since determination of the guilt of the person accused, of the offence of money-laundering is within the exclusive domain of the Special Court constituted for trial of the offence and outside the domain of the adjudicating authority under Section 8. Challenge: Incoherence as to the onus and standards of proof:

85. The processes under Chapter-III of the Act (provisional attachment, confirmation; seizure under Chapter-V and confiscation of property attached/seized under Section (8) as noticed supra are available against proceeds of crime involved in money-laundering, whether in the ownership, control or possession of a person accused of an offence under Section 3 or of a person not so accused.

86. The burden of proving, that proceeds of crime are untainted property inheres on a person accused of having committed an offence under Section 3 qua Section 24. The first proviso to Section 5 mandates that no order of provisional attachment shall be made unless a final report under Section 173 of the Code of Criminal Procedure has been forwarded to a Magistrate or a complaint filed for taking cognizance of a scheduled offence by a person authorized to investigate the scheduled offence. Further, confiscation proceedings in respect of an attached/retained property may be initiated only on proof of guilt of a person charged of an offence under Section 3 and the order of the trial Court becomes final. Section 23 enjoins a presumption in inter-connected transactions; that where money -laundering involves two or more inter-connection transactions and one or more of these are proved to be involved in money-laundering, then for the purposes of adjudication or confiscation under Section 8, it shall, unless otherwise proved to the satisfaction of the adjudicating authority, be presumed that the remaining transactions form part of such inter-connected transactions (i.e, involved in money-laundering).

87. As we have observed earlier in this judgment in another context, the provisions of Sections 3, 5, 8, 23 and 24 are also inter-related provisions and must be considered as components of a statutory symphony that elucidate the true scope of the onus probandi and the burden of proof. The argument as to incoherence as to the onus and standards of proof in Section 8, proceeds on a misconception of the holistic trajectory of the several provisions of the Act. If the several provisions are considered together as they must, there is no
incoherence discernible. On a person accused of having committed offence under Section 3, inheres the burden of proving that the proceeds of crime are untainted property. Proceeds of crime is defined [Section 2(u)] as any property derived or obtained, directly or indirectly by any person as a result of a criminal activity relating to a scheduled offence or the value of any such property. ‘Value’ is defined [Section 2(zb)] as the fair market value of any property on the date of its acquisition by any person or if such date cannot be determined, the date on which such property is possessed by such person. Where proceeds of crime continue in the ownership, control or possession of a person accused of an offence under Section 3, the burden of proof is clearly expressed (Section 24). Where however proceeds of crime are layered through a money-laundering operation and pass(es) through one or more transactions which are inter-connected transactions and one or more of such inter-connected transactions is/are proved to be involved in money-laundering, Section 23 enjoins a presumption that the other transactions form part of such inter-connected transactions (involved in money-laundering), unless proved (to rebut the enjoined presumption) otherwise (by the person in ownership, control or possession of property involved in the remaining transactions), for the purposes of adjudication and confiscation under Section 8.

88. At the stage of confirmation of an order of provisional attachment under Section 8, even where the provisional attachment and confirmation pertain to property in the ownership, control or possession of a person not accused of an offence under Section 3, there must be an anterior forwarding of a final report under Section 173 of the Cr.PC or a complaint made by an authorized person, in relation to a scheduled offence. It is only thus that a prima facie satisfaction (reason to believe), could be recorded by an adjudicating authority that a person has committed an offence under Section 3 or in possession of proceeds of crime, since proceeds of crime is referable to property derived or obtained as a result of criminal activity relating to a scheduled offence or the value of any such property.

The clear implication, though prima facie at this stage, is that the property in the ownership, control or possession of any person not accused of an offence under Section 3 is proceeds of crime having a nexus with or inter-connected with the offence of money-laundering under Section 3. Therefore at the stage of confirmation of provisional attachment under Section 8, the person in possession of the property believed by the adjudicating authority to constitute proceeds of crime involved in money-laundering must satisfy the adjudicating authority by indicating the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under Section 5(1) or seized under Section 17 or 18, the evidence on which he relies to establish the claim of his income, earning or assets and other relevant information and particulars, that the property is acquired by him bona fide; without knowledge or information of the association with criminality; and out of his own income, earnings or assets and for fair market value, to dispel the presumption that the property is proceeds of crime involved in money-laundering.

89. The same is the burden even at the confiscation stage under Section 8(6). By then, there is proof of guilt of a person accused of a scheduled offence established before a Court and the conviction recorded by the trial Court would have become final. Where the property is in the ownership, control or possession of a person not accused of a scheduled offence but constitutes part of inter-connected transactions i.e, connected to one or more transactions
proved to have been involved in money-laundering, the presumption under Section 23 comes into play and must be discharged by the person (though not an accused, but) in the ownership, control or possession of the property attached or seized and retained (under Sections 5; 17 or 18 and 8).

92. This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the Tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background.

94. In Raghavanna v. Chenchamma, AIR 1964 SC 136, Subba Rao, 3 (as his Lordship then was) again explained the distinction between burden of proof and onus ...There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case, undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.

96. Section 22 of the Act also enjoins a presumption that where any records or property are or is found in the possession or control of any person in the course of a survey or a search, it shall be presumed that — (i) such records or property belong or belongs to such person; (ii) the contents of such records are true; and (iii) the signature and every other part of such records which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a record, stamped, executed or attested, that it was executed or attested by the person by whom it purports to have been so stamped, executed or attested. Sub-section (2) of this section enjoins a substantially similar presumption in respect of records received from outside India.

98. From the scheme of the Act and its several provisions, in particular the provisions of Sections 8 and 22 to 24, it is clear that the Legislature considered it appropriate to inhere different shades of presumptions and thus corollary burdens, on persons in the ownership, control or possession of property believed to be proceeds of crime, depending on whether the person is accused of a scheduled offence or not, necessitating such person to dislodge the presumption by probative evidence or material. The inheritance of such presumptions is a matter of legal policy and no case is made put to hold, nor is it contended that the inheritance of the burden by the enactment of presumptions is ultra vires the legislative power for being in transgression of any limitations on such legislative power in the Constitution of India. Challenge: As to ambiguity as regards criteria for determination of nexus between the
property attached and the offence of money-laundering: 99. In view of the analysis on the sub-issue relating to the challenge of incoherence on onus and standards of proof; the definition of the expressions ‘proceeds of crime’; ‘money-laundering’; and the fact that money-laundering includes acquisition of title to or possession of property derived or obtained as a result of criminal activity relating to a scheduled offence and passing it of as an untainted property including by layering such property through several transactions, the contention as to ambiguity in criteria for determining the nexus between the property proceeded against for attachment and confiscation and the offence of money-laundering, does not commend acceptance by this Court.

100. Where the acquisition of property that is alleged to constitute proceeds of crime involved in money-laundering, is by a person not accused of a scheduled offence and such person in the ownership, control or possession of such property is able to establish, to the satisfaction of the adjudicating authority that he has acquired the property bona fide without information or knowledge as to the antecedent criminality or for fair market value (vide definition of value in Section 2 (zb), he may successfully campaign for extrication of the property from attachment or confiscation proceedings under Chapter-III of the Act. There are clearly discernable and statutorily explicated criteria for identification of the nexus between property; the commission of scheduled offence and money-laundering operations. The challenge as to ambiguity in identifying criteria or incoherence in ascertaining nexus, is thus without substance. Challenge to the exclusion of men, rea:

101. The contention is that provisional attachment, its confirmation and confiscation; of property in the ownership, control or possession of a person not accused of an offence under Section 3 and having no involvement or knowledge as regards a scheduled offence or the offence of money-laundering i.e without mens rea or knowledge of antecedent criminality in the acquisition of such property, is an arbitrary prescription.

102. In our concluding analysis on issue-A, we have noticed that the legislative intent is clear and specifically expressed by the several provisions of the Act, that proceeds of crime involved in money-laundering is targetted for eventual confiscation as a multi-national co-operative effort to control the incidence and spread of conduct which cripples financial systems of countries across the globe, corrodes the rule of law and governance systems and pejoratively impacts the integrity and sovereignty of Nations. We have also in the analysis on issue-A noted that a person in possession, ownership or control of a property (provisionally attached or seized) is provided ample opportunity to produce relevant material and evidence to satisfy the adjudicating authority, at the stage of confirmation of provisional attachment or retention of the seized property [Sections 8(1) to (3)], that the property was acquired out of lawful earnings or assets, that there were means to do so and thus the acquisition of the property is legitimate, bona fide and at the fair market value of such property. A person aggrieved by or concerned with the property provisionally attached may perhaps gainfully contend that in the circumstances it is the value paid for the acquisition of the property and not the property currently in his possession that constitutes proceeds of crime involved in money-laundering.

103. Since proceeds of crime is defined to include the value of any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence,
where a person satisfies the adjudicating authority by relevant material and evidence having a
probative value that his acquisition is bona fide, legitimate and for fair market value paid
therefore, the adjudicating authority must carefully consider the material and evidence on
record (including the reply furnished by a notice in response to a notice issued under Section
8(1) and the material or evidence furnished along therewith to establish his earnings, assets or
means to justify the bona fides in the acquisition of the property); and if satisfied as to the
bona fide acquisition of the property, relieve such property from provisional attachment by
declining to pass an order of confirmation of the provisional attachment; either in respect of
the whole or such part of the property provisionally attached in respect whereof bona fide
acquisition by a person is established, at the stage of the Section 8(2) process. A further
opportunity of establishing bona fide acquisition of property or that the property in question
is not proceeds of crime involved in money-laundering is available and mandated, prior to the
adjudicating authority passing an order of confiscation, under Section 8(6).

104. Proceedings for attachment and confiscation of proceeds of crime are a process
distinct and dissimilar to the process for prosecution of the offence of money -laundering.
Deprivation of property involved in money-laundering is the sanction in the first process
while deprivation of personal liberty is the sanction enjoined in conviction for the offence.
Mens rea is not a jurisprudential non-derogable adjunct for visitation of civil consequences
and therefore the legislative policy in this area is eminently within the domain of legislative
choice. This challenge must therefore fail. Challenge to dispossession before conviction of
the accused:

105. Section 8(4) of the Act enjoins the taking over of possession of an attached property
on the passing of an order of confirmation of provisional attachment. This provision
is arbitrary since dispossession precedes the recording of guilt/conviction by the Special Court
in the prosecution of the offence of money-laundering under Section 3. Section 8(4) is
therefore invalid, contend the petitioners. This conclusion in our considered view is without
merit and misconceived.

106. At the stage of provisional attachment under Section 5(1) a person interested in the
enjoyment of the suspect immovable property is not deprived of enjoyment, in view of the
provisions of sub-section (4) thereof. However Section 8 (4) enjoins taking over possession
of the attached property whose provisional attachment is confirmed under Section 8(3). On an
holistic analysis of the several provisions of the Act, in particular of Sections 5 and 8, we are
of the considered view that the legislative intent underlying the preservation of the right to
the enjoyment of immovable property provisionally attached under Section 5(1) while
enjoining taking over of possession on confirmation under Section 8(3), is part of a
consciously calibrated legislative schemata to achieve the object which the several provisions
of the Act are designed to fulfil. The wholesome legislative intent underpinning the
sequential provisions for provisional attachment, confirmation of such attachment and
eventual confiscation; or for retention of a seized property, permitting continuance of such
retention pending a determination as to confiscation under Section 8, while preserving the
right to possession at the stage of provisional attachment while mandating dispossession after
confirmation of the attachment; are conceived to balance the governmental interest expressed
by the provisions of the Act on the one hand and the several degrees of rights of persons in
possession of property that is believed to be proceeds of crime involved in money-laundering, on the other. In our analysis of the provisions of Sections 5 and 8, we have observed that the reason to believe that a property in possession of a person constitutes proceeds of crime involved in money-laundering, is a satisfaction that may legitimately be arrived at unilaterally and without a participatory process involving hearing or consideration of material that may be produced by, the person in the ownership, control or possession of the property, to disprove the assumption as to involvement of the property in money-laundering. The process of provisional attachment is also in the nature of an emergency prophylactic. An order of provisional attachment is passed where the authorized authority has reason to believe that if the property is not attached immediately, any proceedings under the Act may be frustrated. Having regard to the exigency of the public interest involved in attaching a property believed to be proceeds of crime involved in money-laundering, to prevent frustration of other proceedings under the Act, the maximal due process of hearing an affected party before passing an order of provisional attachment is consciously excluded under the presence of Section 5. It is for this reason that while passing an order of provisional attachment as a prophylactic measure to preserve the property, possession is not disturbed. This appears to be a finely calibrated legislative measure structured to meet the governmental interest at that stage, while not inflicting a disproportionate burden, of deprivation of possession, at this nascent stage of forming of a belief, unilaterally.

107. At the stage of confirmation of provisional attachment however, the person in ownership, control or possession of property is provided an opportunity to show-cause why all or part of such property be not declared to be involved in money-laundering and confiscated by the Central Government. The person interested in the property is required by notice to indicate the source of his income, earning or assets, out of which or by means of which he has acquired the property provisionally attached or seized. An order confirming the provisional attachment, as already noticed, may be passed only on the adjudicating authority being satisfied, on considering the material on record including material or evidence furnished in response to the notice issued under Section 8(1); the reply furnished in response thereto; and taking all and other relevant material into consideration, to record a finding that the property or so much of it, is involved in money-laundering.

108. Only at the confirmation stage is taking possession of the attached property legislatively enjoined [Section 8(4)]. The reason for the prescription as to dispossession is apparent. The apparent purpose is also vouchsafed in the counter of the respondents and the contentions of the learned Counsel Sri Rajeev Awasthi. The satisfaction as to the provisional attached property constituting proceeds of crime involved in money-laundering is arrived at by the adjudicating authority after considering a fuller basket of information, material and evidence which includes a showing by a person concerned with the property. From the legislative scheme, in particular of Section 8, we infer that dispossession from immovable property is prescribed under Section 8(4) to prevent wastage or spoilage of the property and thus dissipation of its value so as to preserve the integrity and value of the property till the stage of confiscation. Thus construed the provisions of Section 8(4) are neither arbitrary nor disproportionate to the object sought to be achieved by the provisions of the Act. The provisions of Section 8(4) are reasonable and unimpeachable. The challenge to Section 8 of
the Act must therefore fail.

109. Issues C & D are answered as above. Issue-E:

110. The challenge to Section 23 is projected on the ground that the presumption enjoined by this provision in respect of interconnected transactions is unduly restrictive of the right to property; is a disproportionate burden, not commensurate with legitimate Governmental interests in targetting proceeds of crime involved in money-laundering, for eventual confiscation.

111. Money-laundering, it is pleaded in the counter-affidavit by the Enforcement Directorate, while apparently comprising one or more apparently clear and simple financial transactions or dealings with property, in reality involve a complex web of transactions that are processed through three stages—the placement, layering and integration stage. When laundering operations are pursued across State boundaries, flows of funds would involve several routes. Since the object of the Act is to seize or attach proceeds of crime involved in money-laundering for eventual confiscation to the State, the enforcement strategy must be commensurate with, correspond to and complement the degree of camouflage, deceit, layering and integration normally associated with a money-laundering operation, to be effective and successful, is the contention on behalf of the respondents.

112. Section 23 enjoins a presumption in respect of inter-connected transactions. Money-laundering is defined in Section 2(p) (with reference to Section 3). Though Section 3 defines the offence of money-laundering, the ingredients of the offence enumerated in this provision define money-laundering in its generic sense as applied by the Act to attachment and confiscation processes as well. Such duality is achieved by the drafting technique of defining money-laundering in Section 2(p) by ascription of the definition of the offence of money-laundering in Section 3.

113. This technique, though specific, is not unique. As observed in LIC of India v. Crown Life Insurance Co., AIR 1965 SC 1985, the object of a definition clause in a statute is to avoid the necessity of frequent repetitions in describing all the subject matter to which the word or expression so defined is intended to apply. A definition section may borrow definitions from an earlier or an existing statute; not necessarily in the definition section but in some other provision, of that Act; and may equally borrow the definition from some other section of the same Act where a word or an expression is defined for a distinct purpose, occasion, or in a specific context. Section 2(1)(p), thus, defines the expression "money-laundering" by borrowing the definition expressed in Section 3, where this expression is defined for the purpose of delineating the offence. In Section 2(1)(p), however, the expression "money-laundering" is defined for the generic purpose of describing the contours of the conduct; wherever the expression is employed in the several provisions of the Act, including in Chapter III - for attachment and confiscation. It is also well settled that the Legislature has the power to define a word or an expression artificially - Kishanlal v. State of Rajasthan, 1990 Supp SCC 742 : AIR 1990 SC 2269. The definition of a word or an expression in the definition section may thus be restrictive or extensive of its ordinary meaning. When a word is defined to "mean" so and so, the definition is prima facie exhaustive and restrictive - Inland Revenue Commissioner v. Joiner, (1975) 3 ALL. E.R 1050; Vanguard
Fire and General Insurance Co. Ltd. v. Frazer & Ross, AIR 1960 SC 971; and Feroze N. Dotiwala v. P.M Wadhwani, (2003) 1 SCC 433. 114. Conduct of directly or indirectly attempting to indulge, knowingly assist or being a party to or actual involvement in any process or activity connected with proceeds of crime and projecting such proceeds of crime as untainted property, constitutes money-laundering. The expression 'proceeds of crime' means property derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [Section 2 (u)]. Thus, a property acquires a taint on account of being a derivative of criminal activity relating to a scheduled offence and includes the value of such property. Since placement, layering and integration are among the essential features of money-laundering, the proceeds of crime may not necessarily continue in the hands of the original malfeasant(s).

115. Where proceeds of crime are layered through plural transactions, the intent to camouflage the source of the property as a derivative of criminality renders it difficult to identify the succeeding transactions as relatable to the initial proceeds of crime. It is for this reason and to effectuate the purposes of the Act that Section 23 incorporates the presumption that where money-laundering involves two or more connected transactions and one or more such transactions is/are proved to be involved in money-laundering, then for the purposes of adjudication or confiscation under Section 8, it shall, unless otherwise proved to the satisfaction of the adjudicating authority, be presumed that the remaining transactions form part of such interconnected transactions i.e, involved in money-laundering as well.

116. The presumption enjoined by Section 23 is clearly a rebuttable presumption i.e, presumptio pro tantum. 117. In Izhar Ahmad v. Union of India, AIR 1962 SC 1052, Gajendragadkar, 3 (as his Lordship then was) observed (in the majority opinion of the Constitution Bench) that: The term "Presumption" in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted. Quoting with approval the statement of principle set out in the Principles of the Law of Evidence by Best, his Lordship observed that when the rules of evidence provide for the raising of a rebuttable or irrebuttable presumption, they are merely attempting to assist the judicial mind in the matter of weighing the probative or persuasive force of certain facts proved in relation to other facts presumed or inferred.

120. Having regard to the fact that money-laundering is indulgence, informed assistance or being a party to or actual involvement in any process or activity connected with proceeds of crime and projecting it as untainted property, inherently assuming a degree of deceit and camouflage in the process of layering the proceeds of crime through a series of transactions, in the considered legislative wisdom a presumption in inter-connected transactions is enjoined by Section 23 of the Act, contingent upon one or more of inter-connected transactions having to be proved to be involved in money-laundering. The legislatively enjoined presumption shifts the burden of proof to the person in the ownership, control or possession of a property comprising the inter-connected transactions to rebut the statutory presumption that this property is not involved in money-laundering. 121. Section 23 enacts a rule prescribing a rebuttable presumption and is a rule of evidence. The rule purports to regulate and structure the judicial process of appreciating evidence relating to adjudication of
money-laundering for the purposes of confirmation of attachment/seizure and confiscation and provides that the said appreciation will draw an inference from the fact of one or more transactions forming part of inter-connected transactions having been proved to be involved in money-laundering, that the other transactions are also to be presumed so, unless the contrary is established.

122. As observed in Izhar Ahmad's case (supra), the rule of presumption enjoined by Section 23 takes away judicial discretion either to attach or not due probative value to the fact that one or more of the inter-connected transactions have been proved to be involved money-laundering; and requires prima facie due probative value to be attached and mandates an inference that the other transactions form part of the raft of inter-connected transactions involved in money-laundering, subject of course to the said presumption being rebutted by proof to the contrary. 123. On the aforesaid analysis, since Section 23 enjoins a rule of evidence and a rebuttable presumption considered essential and integral to effectuation of the purposes of the Act in the legislative wisdom; a rebuttable and not an irrebuttable presumption, we are not persuaded to conclude that the provision is unduly harsh, oppressive or arbitrary. After all a legislative remedy must correspond to the social pathology it professes to regulate. 124. Issue-E is answered accordingly. Issue-F: 125. Section 24 shifts the burden of proving that proceeds of crime are untainted property onto person(s) accused of having committed the offence under Section 3. This provision is challenged as arbitrary; is contended to be applicable only to the trial of an offence under Section 3 and not the proceedings for attachment and confiscation of property under Chapter-III; and alternatively as not applicable to proceedings for attachment and confiscation of property of a person not accused of an offence under Section 3. 126. On its textual and grammatical construction, the provision shifts the burden of proving that proceeds of crime are untainted property on person(s) accused of having committed the offence under Section 3. 127. We have noticed while on the analysis of Issues C to E that the provisions of Sections 3, 5, 8, 17, 18, 20, 21 and 23; the definitions of 'money-laundering' [Section 2(p); 'proceeds of crime' (Section 2(u); 'property' (Section 2(v) and 'value' (Section 2(b)] are inter twined, delineate the provisions of each other and in tandem operate to effectuate one of the two substantial purposes of the Act viz., attachment for the purposes of eventual confiscation, of proceeds of crime involved in money-laundering, whether in the ownership, control or possession of a person accused of the offence under Section 3 or not. The offence of money-laundering as defined in Section 3 comprises direct or indirect attempt to indulge, knowingly assist, and knowingly be a party to or actual involvement in any process or activity connected with the proceeds of crime and projecting it as untainted property. Proceeds of crime is 'any property' derived or obtained directly or indirectly by any person as a result of a criminal activity relating to a scheduled offence or the value of any such property (Section 2(u). Qua the provisions in Chapter-III of the Act, the process of provisional attachment, confirmation of such attachment by the adjudicating authority and confiscation of the property attached is operative against Property constituting the proceeds of crime involved in money-laundering whether in the ownership, control or possession of a person who has committed an offence under Section 3 or otherwise. Section 8(1) while enjoining the adjudicating authority to issue a notice to a person in possession of proceeds of a crime, whether in his own right or on behalf of any other person, calling upon the noticee to indicate the sources of his income, earning or assets
for the purposes of establishing that the acquisition of ownership, control or possession of the property by the noticee is bona fide and out of legitimate sources; of his income, earning or assets, does not enact a presumption that where the noticee is a person accused of the offence under Section 3, the provisionally attached property is proceeds of crime. Since camouflage and deceit are strategies inherent and integral to money-laundering operations and may involve successive transactions relating to proceeds of crime and intent to project the layered proceeds as untainted property, effectuation of the legislative purposes is achieved only where the burden is imposed on the accused to establish that proceeds of crime are untainted property. This is the legislative purpose and the justification for Section 24 of the Act.

128. In response to a notice issued under Section 8(1) and qua the legislative prescription in Section 24 of the Act the person accused of having committed the offence under Section 3 must show with supporting evidence and material that he has the requisite means by way of income, earning or assets, out of which or by means of which he has acquired the property alleged to be proceeds of crime. Only on such showing would the accused be able to rebut the statutorily enjoined presumption that the alleged proceeds of crime are untainted property. This being the purpose, we are not satisfied that the provisions of Section 24 are arbitrary or unconstitutional. Section 24 is not confined to the trial of an offence under Section 3 but operates to attachment and confiscation proceedings under Chapter-III, as well. The legislative prescription that the burden of proof inheres on a person accused of having committed the offence under Section 3 is only to confine the inherence of the expressed burden to an accused. Where the property is in the ownership, control or possession of a person not accused of having committed an offence under Section 3 and where such property/proceeds of crime is part of inter-connected transactions involved in money-laundering, then and in such an event the presumption enjoined in Section 23 comes into operation and not the inherence of burden of proof under Section 24. This is in our considered view the true and fair construction of the provisions of Section 24.

129. Clearly, therefore a person other than one accused of having committed the offence under Section 3 is not imposed the burden of proof enjoined by Section 24. On a person accused of an offence under Section 3 however, the burden applies, also for attachment and confiscation proceedings.

129. Issue F is answered accordingly.


134. Having considered the several challenges to the provisions of the Act and on the various grounds addressed and in the context of the appropriate and applicable principles of judicial scrutiny we have recorded our conclusions on each of the issues formulated for decision. We now record a summary of our conclusions. Summary of Conclusions:

136. On the several issues framed herein-before we hold:

(i) On Issue - A: that property owned or in possession of a person, other than a person charged of having committed a scheduled offence is equally liable to attachment and confiscation proceedings under Chapter-III; and Section 2(1) (u) which defines the expression "Proceeds of Crime", is not invalid;
(ii) On Issue - B: that the provisions of the second proviso to Section 5 are applicable to property acquired even prior to the coming into force of this provision (vide the second amendment Act with effect from 6.3.2009); and even so is not invalid for retrospective penalisation.

(iii) On Issues - C & D: that the provisions of Section 8 are not invalid for vagueness; incoherence as to the onus and standard of proof; ambiguity as regards criteria for determination of the nexus between a property targeted for attachment/confirmation and the offence of money-laundering; or for exclusion of mens rea knowledge of criminality in the acquisition of such property; Section 8(4), which enjoins deprivation of possession of immovable property pursuant to an order confirming the provisional attachment and before conviction of the accused for an offence of money-laundering, is valid;

(iv) On Issue - E: that the presumption enjoined in cases of interconnected transactions enjoined by Section 23 is valid; and

(v) On Issue - F: that the burden of proving that proceeds of crime are untainted property is applicable not only to prosecution and trial of a person charged of committing an offence under Section 3 but to proceedings for attachment and confiscation - in Chapter III of the Act as well; but only to a person accused of having committed an offence under Section 3. The burden enjoined by Section 24 does not inhere on a person not accused of an offence under Section 3. The presumption under Section 23 however applies in interconnected transactions, both to a person accused of an offence under Section 3 and a person not so accused.

135. We record our appreciation for the methodical, clinical and meticulous assistance provided by Sri Copal Choudhary, Sri S. Niranjan Reddy and Sri Rajeev Awasthi. learned Counsel for the respective Parties in this case.

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