(1988) 04 SC CK 0049

Supreme Court of India

Case No: Criminal Appeal No. 468 of 1986

A.R. Antulay	APPELLANT
Vs	
R.S. Nayak and Another	RESPONDENT

Date of Decision: April 29, 1988

Acts Referred:

- Constitution of India, 1950 - Article 139, 14, 21
- Criminal Law (Amendment) Act, 1952 - Section 6, 7, 7(1)
- Criminal Procedure Code, 1973 (CrPC) - Section 137, 190, 197, 197(1), 25
- Penal Code, 1860 (IPC) -

Citation: AIR 1988 SC 1531 : (1989) 1 BLJR 25 : (1988) 90 BOMLR 312 : (1988) CriLJ 1661 : (1988) 2 Crimes 753 : (1988) 2 JT 325 : (1988) 2 SCC 602 : (1988) 1 SCR 1 Supp

Hon'ble Judges: Sabyasachi Mukherjee, J; S. Ranganathan, J; S. Natarajan, J; Ranganath Misra, J; M. N. Venkatachaliah, J; G. L. Oza, J; B. C. Ray, J

Bench: Full Bench

Advocate: P.P. Rao, R.D. Ovlekar, M.N. Dwevedi, Sulman Khurshid and N.V. Pradhan, for the Appellant; Ram Jethmalani, Rani Jethmalani, Ashok Sharma, A.M. Khanwilkar and A.S. Bhasme, for the Respondent

Final Decision: Dismissed

Judgement

1. The main question involved in this appeal, is whether the directions given by this Court on 16th February, 1984. as reported in 278507 were legally proper. The next question is, whether the action and the trial proceedings pursuant to those directions, are legal and valid. Lastly, the third consequential question is, can those directions be recalled or set aside or annulled in those proceedings in the manner sought for by the appellant. In order to answer these questions certain facts have to be borne in mind.

2. The appellant became the Chief Minister of Maharashtra on or about 9th of June, 1980. On 1st of September, 1981, respondent No. 1 who is a member of the

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

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

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

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

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

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

8. On 16th of February, 1984, in an appeal filed by respondent No. 1 directly under Article 136, a Constitution Bench of this Court held that a member of the Legislative

Assembly is not a public servant and set aside the order of Special Judge Sule. Instead of remanding the case to the Special Judge for disposal in accordance with law, this Court suo motu withdrew the Special Cases No. 24/82 and 3/83 (arising out of a complaint filed by one P.B. Samant) pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule and transferred the same to the Bombay High Court with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court for holding the trial from day to day. These directions were given, according to the appellant, without any pleadings, without any arguments, without any such prayer from either side and without giving any opportunity to the appellant to make his submissions before issuing the same. It was submitted that the appellant''s right to be tried by a competent court according to the procedure established by law enacted by Parliament and his rights of appeal and revision to the High Court u/s 9 of the 1952 Act had been taken away.

9. The directions of this Court mentioned hereinbefore are contained in the decision of this Court in 278507 . There the Court was mainly concerned with whether sanction to prosecute was necessary. It was held that no such sanction was necessary in the facts and circumstances of the case. this Court further gave the following directions:

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

10. The appellant as mentioned hereinbefore had appeared before the Special Judge and objected to the jurisdiction of the learned Judge on the ground that the case had not been properly allocated to him by the State Government. The Special Judge Bhutta after hearing the parties had decided the case was validly filed before him and he had properly taken cognizance. He based his order on the construction of the notification of allocation which was in force at that time. Against the order of the learned Special Judge rejecting the appellant''s contention, the appellant filed a revision application in the High Court of Bombay. During the pendency of the said revision application, the Government of Maharashtra issued a notification appointing Special Judge R.B. Sule, as the Judge of the special case. It is the contention of the respondents before us that the appellant thereafter did not raise any further objection in the High Court against cognizance being taken by Shri

Bhutta. It is important to take note of this contention because one of the points urged by Shri Rao on behalf of the appellant was that not only we should set aside the trial before the High Court as being without jurisdiction but we should direct that no further trial should take place before the Special Judge because the appellant has suffered a lot of which we shall mention later but also because cognizance of the offences had not been taken properly. In order to meet the submission that cognizance of the offences had not been taken properly, it was urged by Shri Jethmalani that after the Government Notification appointing Judge Sule as the Special Judge, the objection that cognizance of the offences could not be taken by Shri Bhutta was not agitated any further. The other objections that the appellant raised against the order passed by Judge Bhutta were dismissed by the High Court of Bombay. Against the order of the Bombay High Court the appellant filed a petition under Article 136 of the constitution. The appeal after grant of leave was dismissed by a judgment delivered on 16th February, 1984 by this Court in 279465 . There at page 954 of the report, this Court categorically observed that a private complaint filed by the complainant was clearly maintainable and that the cognizance was properly taken. This was the point at issue in that appeal. This was decided against the appellant. On this aspect therefore, the other point is open to the appellant. We are of the opinion that this observation of this Court cannot by any stretch of imagination be considered to be without jurisdiction. Therefore, this decision of this Court precludes any scope for argument about the validity of the cognizance taken by Special Judge Bhutta. Furthermore, the case had proceeded further before the Special Judge, Shri Sule and the learned Judge passed an order of discharge on 25th July, 1983. This order was set aside by the Constitution Bench of this Court on 16th February, 1984, in the connected judgment (vide 278507 . The order of taking cognizance had therefore become final and cannot be reagitated. Moreover Section 460(e) of the Code expressly provides that if any Magistrate not empowered by law to take cognizance of an offence on a complaint u/s 190 of the Code erroneously in good faith does so his proceedings shall not be set aside merely on the ground that he was not so empowered.

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

12. Being aggrieved the appellant came up before this Court by filing special leave petitions as well as writ petition. this Court on 17th April, 1984, in Abdul Rehman Antulay v. Union of India and Ors. etc. [1984] 3 S.C.R. 482 held that the learned Judge

was perfectly justified and indeed it was the duty of the learned Judge to follow the decision of this Court which was binding on him. this Court in dismissing the writ petition observed, inter alia, as follows:

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

13. D.N. Mehta, J. to whom the cases were transferred from Khatri, J. framed charges under 21 heads and declined to frame charges under 22 other heads proposed by respondent No. 1. this Court allowed the appeal by special leave preferred by respondent No. 1 except in regard to three draft charges u/s 384, I.P.C. (extortion) and directed the Court below to frame charges with regard to all other offences alleged. this Court requested the Chief Justice of the Bombay High Court to nominate another Judge in place of D.N. Mehta, J. to take up the trial and proceed expeditiously to dispose of the case finally. See in this connection 287190 .

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

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

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

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

18. So far as SLP (Crl.) No. 2518/86 against the judgment and order dated 21st August, 1986 of P.S. Shah, J. of the Bombay High Court about the absence of sanction u/s 197 of the Code is concerned, we have by an order dated 3rd February, 1988 delinked that SLP inasmuch as the same involved consideration of an independent question and directed that the SLP should be heard by any appropriate Bench after disposal of this appeal, Similarly, Writ Petition (Crl.) No. 542 of 1986 challenging a portion of Section 197(1) of the Criminal Procedure Code as ultra vires Articles 14 and 21 of the Constitution had also to be delinked by our order dated 3rd February, 1988 to be heard along with SLP no 2518 of 1986. This judgment therefore, does not cover these two matters.

19. In this appeal two questions arise, namely, (1) whether the directions given by this Court on 16th of February, 1984 in 278507 withdrawing the Special Case No. 24/82 and Special Case No. 3/83 arising out of the complaint filed by one shri P.B. Samant pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule, and transferring the same to the High Court of Bombay with a request to the Chief Justice to assign these two cases to a sitting Judge of the High Court, in breach of Section 7(1) of the Act of 1952 which mandates that offences as in this case shall be tried by a Special Judge only thereby denying at least one right of appeal to the appellant was violative of Articles 14 and 21 of the Constitution and whether such directions were at all valid or legal and (2) if such directions were not at all valid or legal in view of the order dated 17th of April, 1984 referred to hereinbefore, is this appeal sustainable or the grounds therein justiciable in these proceedings. In other words, are the said directions in a proceedings inter-parties binding even if bad in law or violative of Articles 14 and 21 of the Constitution and as such are immune from correction by this Court even though they cause prejudice and do injury? These are the basic questions which this Court must answer in this appeal.

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

21. The only question with which we are concerned in this appeal is, whether the case which is triable under the 1952 Act only by a Special Judge appointed u/s 6 of the said Act could be transferred to the High Court for trial by itself or by this Court

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

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

23. Section 7(1) of the 1952 Act creates a condition which is sine qua non for the trial of offences u/s 6(1) of the said Act. The condition is that notwithstanding anything contained in the CrPC or any other law, the said offences shall be triable by Special

Judges only. (Emphasis supplied). Indeed conferment of the exclusive jurisdiction of the Special Judge is recognised by the judgment delivered by this Court in 279465 where this Court had adverted to Section 7(1) of the 1952 Act and at page 931 observed that Section 7 of the 1952 Act conferred exclusive jurisdiction on the Special Judge appointed u/s 6 to try cases set out in Section 6(1)(a) and 6(1)(b) of the said Act. The Court emphasised that the Special Judge had exclusive jurisdiction to try offences enumerated in Section 6(1)(a) and (b). In spite of this while giving directions in the other matter, that is, 278507 , this Court directed transfer to the High Court of Bombay the cases pending before the Special Judge. It is true that Section 7(1) and Section 6 of the 1952 Act were referred to while dealing with the other matters but while dealing with the matter of directions and giving the impugned directions, it does not appear that the Court kept in mind the exclusiveness of the jurisdiction of the Special Court to try the offences enumerated in Section 6.

24. Shri Rao made a point that the directions of the Court were given per incuriam, that is to say without awareness of or advertence to the exclusive nature of the jurisdiction of the Special Court and without reference to the possibility of the violation of the fundamental rights in a case of this nature as observed by a seven Judges Bench decision in 281215 .

25. Shri Ram Jethmalani on behalf of the respondents submitted that the judgment of the Constitution Bench of this Court was delivered on 16th of February, 1984 and counsel for both sides were present and it was neither objected to nor stated by the appellant that he wanted to be heard in regard to the transfer of the trial forum. He submitted that the order of discharge was not only challenged by a SLP before this Court but also that a revision application before the High Court being Criminal Revision Application No. 354/83 was filed but the Criminal Revision Application by an order of this Court was withdrawn and heard along with the special leave petition. That application contained a prayer to the effect that the order of discharge be set aside and the case be transferred to the High Court for trial. Therefore, it was submitted that the order of transfer was manifestly just. There was no review against this order. It was submitted that the order of transfer to a superior court cannot in law or in fact ever cause any harm or prejudice to any accused. It is an order made for the benefit of the accused and in the interests of justice. Reliance was placed on 282543 . It was further submitted by Shri Jethmalani that a decision which has become final cannot be challenged. Therefore, the present proceedings are an abuse of the process of the Court, according to him. It was further submitted that all the attributes of a trial court were present in a Court of Appeal, an appeal being a continuation of trial before competent Court of Appeal and, therefore, all the qualifications of the trial court were there. The High Court is authorised to hear an appeal from the judgment of the Special Judge under the Act of 1952. It was submitted that a Special Judge except in so far as a specific provision to the contrary is made is governed by all the provisions of the Code and he is a Court subordinate

to the High Court. See 279465 .

26. It was submitted that power u/s 526 of the old Code corresponding to Section 407 of the new Code can be exercised qua a Special Judge. This power, according to Shri Jethmalani, is exercise-able by the High Court in respect of any case u/s 407(1)(iv) irrespective of the Court in which it is pending. This part of the section is not repealed wholly or pro tanto, according to the learned Counsel, by anything in the 1952 Act. The Constitution Bench, it was submitted, consciously exercised this power. It decided that the High Court had the power to transfer a case to itself even from a Special Judge. That decision is binding at least in this case and cannot be reopened, it was urged. In this case what was actually decided cannot be undone, we were told repeatedly. It will produce an intolerable state of affars. this Court sought to recognise the distinction between finality of judicial orders qua the parties and the reviewability for application to other cases. Between the parties even a wrong decision can operate as res judicata. The doctrine of res judicata is applicable even to criminal trials, it was urged. Reliance was placed on 276166 . A judgment of a High Court is binding in all subsequent proceedings in the same case; more so, a judgment which was unsuccessfully challenged before this Court.

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

28 It appears to us that in Gurcharan Das Chadha v. State of Rajasthan [1966] 2 S.C.R. 678 an identical question arose. The petitioner in that case was a member of an All India Service serving in the State of Rajasthan. The State Government ordered his trial before the Special Judge of Bharatpur for offences u/s 120B/161 of the Indian Penal Code and under Sections 5(1)(a) and (d) and 5(2) of the Act. He moved this Court u/s 527 of the old Code praying for transfer of his case to another State on various grounds. Section 7(1) of the Act required the offences involved in that case to be tried by a Special Judge only, and Section 7(2) of the Act required the offences to be tried by a Special Judge for the area within which these were committed which condition could never be satisfied if there was a transfer. this Court held that the condition in Sub-section (1) of Section 7 of the Act that the case must be tried by a Special Judge, is a sine qua non for the trial of offences u/s 6. This condition can be satisfied by transferring the case from one Special Judge to another Special Judge. Sub-section (2) of Section 7 merely distributes, it was noted, work between Special Judges appointed in a State with reference to territory. This provision is at par with the section of the Code which confers territorial jurisdiction on Sessions Judges and magistrates. An order of transfer by the very nature of

things must sometimes result in taking the case out of the territory. The third sub-section of Section 8 of the Act preserves the application of any provision of the Code if it is not inconsistent with the Act save as provided by the first two sub-sections of that Section. It was held by this Court that Section 527 of the old Code, hence, remains applicable if it is not inconsistent with Section 7(2) of the Act. It was held that there was no inconsistency between Section 527 of the Code and Section 7(2) of the Act as the territorial jurisdiction created by the latter operates in a different sphere and under different circumstances. Inconsistency can only be found if two provisions of law apply in identical circumstances, and create contradictions. Such a situation does not arise when either this Court or the High Court exercises the power of transfer. Therefore, this Court in exercise of its jurisdiction and power u/s 527 of the Code can transfer a case from a Special Judge subordinate to one High Court to another Special Judge subordinate to another High Court. It has to be emphasised that that decision was confined to the power u/s 527 of the previous Code and to transfer from one Special Judge to another Special Judge though of another State. It was urged by Shri Jethmalani that Chadha''s case (supra) being one of transfer from one Special Judge to another the judgment is not an authority for the proposition that it cannot be transferred to a court other than that of a Special Judge or to the High Court. But whatever be the position, this is no longer open at this juncture.

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

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

31. It was further submitted that any case transferred for trial to the High Court in which it exercises jurisdiction only by reason of the order of transfer is a case tried not in ordinary original criminal jurisdiction but in extraordinary original criminal jurisdiction. Some High Courts had both ordinary criminal jurisdiction as well as extraordinary criminal original jurisdiction. The former was possessed by the High Courts of Bombay, Madras and Calcutta. The first two High Courts abolished it in the

40''s and the Calcutta High Court continued it for quite some time and after the 50''s in a truncated form until it was finally done away with by the Code. After the Code the only original criminal jurisdiction possessed by all the High Courts is extraordinary. It can arise by transfer under the Code or the Constitution or under Clause 29 of the Letters Patent. It was submitted that it was not right that extraordinary original criminal jurisdiction is contained only in Clause 24 of the Letters Patent of the Bombay High Court. This is contrary to Section 374 of the Code itself. That refers to all High Courts and not merely all or any one of the three Chartered High Courts. In 819978 , the Delhi High Court recognised its extraordinary original criminal jurisdiction as the only one that it possessed. The nature of this jurisdiction is clearly explained in Madura, Tirupparankundram etc. v. Alikhan Sahib and Ors. 35 C W N 1088 and 34755 . Reference may also be made to the Law Commissioner''s 41st Report, paragraphs 3.1 to 3.6 at page 29 and paragraph 31.10 at page 259.

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

33. Section 7 of the 1952 Act provides that notwithstanding anything contained in the CrPC, or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by Special Judges only. So the law provides for a trial by Special Judge only and this is notwithstanding anything contained in Sections 406 and 407 of the CrPC, 1973. Could it, therefore, be accepted that this Court exercised a power not given to it by Parliament or the Constitution and acted under a power not exercisable by it? The question that has to be asked and answered is if a case is tried by a Special Judge or a court subordinate to the High Court against whose order an appeal or a revision would lie to the High Court, is transferred by this Court to the High Court and such right of appeal or revision is taken away would not an accused be in a worse position than others? this Court in 278507 did not refer either to Section 406 or Section 407 of the Code. It is only made clear that if the application had been made to the High Court u/s 407 of the Code, the High Court might have transferred the case to itself.

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

35. In 278244 Venkatarama Ayyar, J. observed that the fundamental principle is well established that a decree passed by a Court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon-even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

36. This question has been well put, if we may say so, in the decision of this Court in 288648 where Mathew, J. observed that the jurisdiction was a verbal coat of many colours and referred to the decision in Anisminic Ltd. v.Foreign Compensation Commission [1969] 2 A.C. 147 where the majority of the House of Lords dealt with the assimilation of the concepts of ''lack'' and ''excess'' of jurisdiction or, in other words, the extent to which we have moved away from the traditional concept of jurisdiction. The effect of the dicta was to reduce the difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point. What is a wrong decision on a question of limitation, he posed referring to an article of Professor H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismanic case" and concluded; "it is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or decree embodying the decision a nullity liable to collateral attack.... And there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

(Emphasis supplied)

37. While applying the ratio to the facts of the present controversy, it has to be borne in mind that Section 7(1) of the 1952 Act creates a condition which is sine qua non for the trial of offenders u/s 6(1) of-that Act. In this connection, the offences specified u/s 6(1) of the 1952 Act are those punishable under Sections 161, 162, 163, 164 and 165A of the Indian Penal Code and Section 5 of the 1947 Act. Therefore, the order of this Court transferring the cases to the High Court on 16th February, 1984, was not authorised by law. this Court, by its directions could not confer jurisdiction on the High Court of Bombay to try any case which it did not possess such jurisdiction under the scheme of the 1952 Act. It is true that in the first judgment in 279465 when this Court was analysing the scheme of the 1952 Act, it referred to Sections 6 and 7 at page 931 of the Reports. The arguments, however, were not advanced and it does not appear that this aspect with its remifications was present in the mind of the Court while giving the impugned directions.

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

or both combined can enlarge the jurisdiction of a Court or divest a person of his rights of revision and appeal. See in this connection the observations in M.L. Sethi v. R.P. Kapur (supra) in which Justice Mathew considered Anisminic [1969] 2 AC 147 and also see Halsbury''s Laws of England, 4th Edn. Vol. 10 page 327 at para 720 onwards and also Amnon Rubinstein ''Jurisdiction and Illegality'' 1965 Edn. 16. Reference may also be made to 288435 .

39. The question of validity, however, is important in that the want of jurisdiction can be established solely by a superior Court and that, in practice, no decision can be impeached collaterally by any inferior Court. But the superior Court can always correct its own error brought to its notice either by way of petition or ex debito justitiae. See Rubinstein''s Jurisdiction and Illegality'' (supra).

40. In the aforesaid view of the matter and the principle reiterated, it is manifest that the appellant has not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of Article 21 of the Constitution. That is violative of Articles 14 and 19 of the Constitution also, as is evident from the observations of the 7 Judges Bench judgment in Anwar Ali Sarkar''s case (supra) where this Court found that even for a criminal who was alleged to have committed an offence, a special trial would be per se illegal because it will deprive the accused of his substantial and valuable privileges of defences which, others similarly charged, were able to claim. As Justice Vivian Bose observed in the said decision at page 366 of the report, it matters not whether it was done in good faith, whether it was done for the convenience of Government, whether the process could be scientifically classified and labelled, or whether it was an experiment for speedier trial made for the good of society at large. Justice Bose emphasised that it matters not how lofty and laudable the motives were. The question which must be examined is, can fair minded, reasonable, unbiased and resolute men regard that with equanimity and call it reasonable, just and fair, regard it as equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which are obtained in India today. Judged by that view the singling out of the appellant in this case for a speedier trial by the High Court for an offence of which the High Court had no jurisdiction to try under the Act of 1952 was, in our opinion, unwarranted, unprecedented and the directions given by this Court for the said purpose, were not warranted. If that is the position, when that fact is brought to our notice we must remedy the situation. In rectifying the error, no procedural inhibitions should debar this Court because no person should suffer by reason of any mistake of the Court. The Court, as is manifest, gave its directions on 16th February, 1984. Here no rule of res judicata would apply to prevent this Court from entertaining the grievance and giving appropriate directions. In this connection, reference may be made to the decision of the Gujarat High Court in 705105 . Where D.A. Desai, J. speaking for the Gujarat High Court observed that no act of the court or irregularity can come in the way of justice being done and one of the highest and the first duty of all Courts is to take care that the act of the Court

does no injury to the suitOrs.

41. It appears that when this Court gave the aforesaid directions on 16th February, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar Ali Sarkar''s case (supra). See Halsbury''s Laws of England, 4th End, Vol. 26, page 297, para 578 and page 300, the relevant notes 8, 11 and 15; Dias on Jurisprudence, 5th Edn., pages 128 and 130; Young v. Bristol Aeroplane Co. Ltd. [1944] 2 AER 293. Also see the observations of Lord Goddard in Moore v. Hewitt [1947] 2 A.E.R. 270-A and Penny v. Nicholas [1950] 2 A.E.R. 89. "per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Morelle v. Wakeling [1955] 1 All E.R. 708. Also see 290375 . We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong.

42. The principle that the size of the Bench-whether it is comprised of two or three or more Judges-does not matter, was enunciated in Young v. Bristol Aeroplane Co. Ltd. (supra) and followed by Justice Chinnappa Reddy in 284282 where it has been held that a Division Bench of three Judges should not overrule a Division Bench of two Judges, has not been followed by our Courts. According to well-settled law and various decisions of this Court, it is also well-settled that a Full Bench or a Constitution Bench decision as in Anwar Ali Sarkar''s case (supra) was binding on the Constitution Bench because it was a Bench of 7 Judges.

43. The principle in England that the size of the Bench does not matter, is clearly brought out in the decision of Evershed M.R. in the case of Morelle v. Wakeling (supra). The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here, where larger Benches overrule smaller Benches. See the observations of this Court in 282022 , 258796 at page 92 and 270884 . This is the practice followed by this Court and now it is a crystallised rule of law. See in this connection, as mentioned hereinbefore, the observations of the State of Orissa v. Titagarh Paper Mills (supra) and also Union of India and Ors. v. Godfrey Philips India Ltd. [1985] Su. 3 SCR 123.

44. In support of the contention that a direction to delete wholly the impugned direction of this Court be given, reliance was placed on 274463 . The ratio of the decision as it appears from pages 601 to 603 is that the judgment which does not terminate the proceedings, can be challenged in an appeal from final proceedings. It may be otherwise if subsequent proceedings were independent ones.

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

46. In our opinion, we are not debarred from re-opening this question and giving proper directions and correcting the error in the present appeal, when the said directions on 16th February, 1984, were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant, guaranteed by Articles 14 and 21 of the Constitution. The appellant has been treated differently from other offenders, accused of a similar offence in view of the provisions of the Act of 1952 and the High Court was not a Court competent to try the offence. It was directed to try the appellant under the directions of this Court, which was in derogation of Article 21 of the Constitution. The directions have been issued without observing the principle of audi alterant partem. It is true that Shri Jethmalani has shown us the prayers made before the High Court which are at page 121 of the paper-book. He argued that since the transfers have been made u/s 407, the procedure would be that given in Section 407(8) of the Code. These directions, Shri Jethmalani sought to urge before us, have been given in the presence of the parties and the clarificatory order of April 5, 1985 which was made in the presence of the appellant and his Counsel as well as the Counsel of the State Government of Maharashtra, expressly recorded that no such submission was made in connection with the prayer for grant of clarification. We are of the opinion that Shri Jethmalani is not right when he said that the decision was not made per incuriam as submitted by the appellant. It is a settled rule that if a decision has been given per incuriam the Court can ignore it. It is also true that the decision of this Court in the case of 279450 was not regarding an order which had become conclusive inter-parties. The Court was examining in that case only the doctrine of precedents and determining the extent to which it could take a different view from one previously taken in a different case between different parties.

47. According to Shri Jethmalani, the doctrine of per incuriam has no application in the same proceedings. We are unable to accept this contention. We are of the opinion that this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the Court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner. See the observations in Prem Chand Garg v. Excise Commissioner, U.P. Allahabad [1963] Su.1 S.C.R. 885.

48. In support of the contention that an order of this Court be it administrative or judicial which is violative of fundamental right can always be corrected by this Court when attention of the Court is drawn to this infirmity, it is instructive to refer to the decision of this Court in Prem Chand Garg v. Excise Commissioner, U.P., Allahabad (supra). This is a decision by a Bench of five learned Judges. Gajendragadkar, J. spoke for four learned Judges including himself and Shah, J. expressed a dissenting

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

49. this Court by majority held that Rule 12 of Order XXXV of the Supreme Court Rules was invalid in so far as it related to the furnishing of security. The right to move the Supreme Court, it was emphasised, under Article 32 was an absolute right and the content of this right could not be circumscribed or impaired on any ground and an order for furnishing security for the respondent''s costs retarded the assertion or vindication of the fundamental right under Article 32 and contravened the said right. The fact that the rule was discretionary did not alter the position. Though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the Court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question

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

50. The power of the Court to correct an error subsequently has been reiterated by a decision of a bench of nine Judges of this Court in 282776 . The facts were different and not quite relevant for our present purposes but in order to appreciate the contentions urged, it will be appropriate to refer to certain portions of the same.

There was a suit for defamation against the editor of a weekly newspaper, which was filed in the original side of the High Court. One of the witnesses prayed that the Court may order that publicity should not be given to his evidence in the press as his business would be affected. After hearing arguments, the trial Judge passed an oral order prohibiting the publication of the evidence of the witness. A reporter of the weekly along with other journalists moved this Court under Article 32 of the Constitution challenging the validity of the order. It was contended that : (1) the High Court did not have inherent power to pass the order; (2) the impugned order violated the fundamental rights of the petitioners under Article 19(1)(a); and (3) the order was amenable to the writ jurisdiction of this Court under Article 32 of the Constitution.

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

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

opinion that the appropriate order would be to recall the directions contained in the order dated 16th February, 1984.

53. In considering the question whether in a subsequent proceeding we can go to the validity or otherwise of a previous decision on a question of law inter-parties, it may be instructive to refer to the decision of this Court in 284460 . There, the petitioner was a partner in a firm which carried on the business of manufacture and sale of hand-made bidis. On December 14, 1957, the State Government issued a notification u/s 4(1)(b) of the U.P. Sales Tax Act, 1948. By a subsequent notification dated 25th November, 1958, hand-made and machine-made bidis were unconditionally exempted from payment of sales tax. The Sales Tax Officer had sent a notice to the firm for the assessment of tax on sale of bidis during the assessment period 1st of April, 1958 to June 30, 1958. The firm claimed that the notification dated 14th December, 1957 had exempted bidis from payment of sales tax and that, therefore, it was not liable to pay sales tax on the sale of bidis. This position was not accepted by the Sales Tax Officer who passed certain orders. The firm appealed u/s 9 of the Act to the Judge (Appeals) Sales Tax, but that was dismissed. The firm moved the High Court under Article 226 of the Constitution. The High Court took the view that the firm had another remedy under the Act and the Sales Tax Officer had not committed any apparent error in interpreting the notification of December 14, 1957. The appeal against the order of the High Court on a certificate under Article 133(1)(a) of the Constitution was dismissed by this Court for non-prosecution and the firm filed an application for a restoration of the appeal and condonation of delay. During the pendency of that appeal another petition was filed under Article 32 of the Constitution for the enforcement of the fundamental right under Articles 19(1)(g) and 31 of the Constitution. Before the Constitution Bench which heard the matter a preliminary objection was raised against the maintainability of the petition and the correctness of the decision of this Court in 277763 relied upon by the petitioner was challenged. The learned Judges referred the case to a larger Bench. It was held by this Court by a majority of five learned Judges that the answer to the questions must be in the negative. The case of Kailash Nath was not correctly decided and the decision was not sustainable on the authorities on which it was based. Das, J. speaking for himself observed that the right to move this Court by appropriate proceedings for the enforcement of fundamental rights conferred by Part III of the Constitution was itself a guaranteed fundamental right and this Court was not trammelled by procedural technicalities in making an order or issuing a writ for the enforcement of such rights. The question, however, was whether, a quasi-judicial authority which made an order in the undoubted exercise of its jurisdiction in pursuance of a provision of law which was intra vires, an error of law or fact committed by that authority could not be impeached otherwise than on appeal, unless the erroneous determination related to a matter on which the jurisdiction of that body depended. It was held that a tribunal might lack jurisdiction if it was improperly constituted. In such a case, the characteristic attribute of a

judicial act or decision was that it binds, whether right or wrong, and no question of the enforcement of a fundamental right could arise on an application under Article 32. Subba Rao, J. was, however, unable to agree.

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

(ii) The right of revision to the High Court u/s 9 of the Criminal Law Amendment Act.

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

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

55. In this connection Shri Rao rightly submitted that it is no necessary to consider whether Section 374 of the Criminal Procedure Code confers the right of appeal to this Court from the judgment of a learned Judge of the High Court to whom the case had been assigned inasmuch as the transfer itself was illegal. One has to consider that Section 407 of the Criminal Procedure Code was subject to the overriding mandate of Section 7(1) of the 1952 Act, and hence, it does not permit the High Court to withdraw a case for trial to itself from the; Court of Special Judge. It was submitted by Shri Rao that even in cases where a case is withdrawn by the High Court to itself from a criminal court other than the Court of Special Judge, the High

Court exercised transferred jurisdiction which is different from original jurisdiction arising out of initiation of the proceedings in the High Court. In any event Section 374 of Criminal Procedure Code limits the right to appeals arising out of Clause 24 of the Letters Patent.

56. In aid of the submission that procedure for trial evolved in derogation of the right guaranteed under Article 21 of the Constitution would be bad, reliance was placed on Attorney General of India v. Lachma Devi and Ors. [1985] 2 Scale 144. In aid of the submission on the question of validity our attention was drawn to ''Jurisdiction and Illegality'' by Amnon Rubinstein (1965 Edn.). The Parliament did not grant to the Court the jurisdiction to transfer a case to the High Court of Bombay. However, as the superior Court is deemed to have a general jurisdiction, the law presumes that the Court acted within jurisdiction. In the instant case that presumption cannot be taken,firstly because the question of jurisdiction was not agitated before the Court, secondly these directions were given per incuriem as mentioned hereinbefore and thirdly the superior Court alone can set aside an error in its directions when attention is drawn to that error. This view is warranted only because of peculiar facts and circumstances of the present case. Here the trial of a citizen in a Special Court under special jurisdiction is involved, hence, the liberty of the subject is involved. In this connection, it is instructive to refer to page 126 of Rubinstein''s aforesaid book. It has to be borne in mind that as in Kuchenmeister v. Home Office [1958] 1 Q.B. 496 here form becomes substance. No doubt, that being so it must be by decisions and authorities, it appears to us patently clear that the directions given by this Court on 16th February, 1984 were clearly unwarranted by constitutional provisions and in derogation of the law enacted by the Parliament. See the observations of Attorney General v. Herman James Sillem [1864] 10 H.L.C. 703, where it was reiterated that the creation of a right to an appeal is an act which requires legislative authority, neither an inferior Court nor the superior Court or both combined can create such a right, it being one of limitation and extension of jurisdiction. See also the observations of Isaacs v. Roberston [1984] 3 A.E.R. 140 where it was reiterated by Privy Council that if an order is regular it can be set aside by an appellate Court; if the order is irregular it can be set aside by the Court that made it on the application being made to that Court either under the rules of that Court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warranted, namely, violation of the rules of natural justice or fundamental rights. In Ledgard v. Bull, 13 I.A. 134, it was held that under the old CPC u/s 25 the superior Court could not make an order of transfer of a case unless the Court from which the transfer was sought to be made, had jurisdiction to try. In the facts of the instant case, the criminal revision application which was pending before the High Court even if it was deemed to be transferred to this Court under Article 139A of the Constitution it would not have vested this Court with power larger than what is contained in Section 407 of Criminal Procedure Code. u/s 407 of the Criminal Procedure Code read with the Criminal law Amendment Act, the

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

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

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

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

60. In so far as Mirajkar''s case (supra) which is a decision of a Bench of 9 Judges and to the extent it affirms Prem Chand Garg''s case (supra), the Court has power to review either u/s 137 or suo motu the directions given by this Court. See in this connection 279438 and 285467 . See also the observations in 279309 , 274463 , 289783 and 283943 .

61. We are further of the view that in the earlier judgment the points for setting aside the decision, did not include the question of withdrawal of the case from the Court of Special Judge to Supreme Court and transfer it to the High Court. Unless a plea in question is taken it cannot operate as res judicata. See 282279 , 900586 . See also 281153 on the question of violation of the principles of natural justice. Also see 277828 at pages 674-681. Though what is mentioned hereinbefore in the Bengal Immunity Co. Ltd. v. The State of Bihar and Ors. (supra), the Court was not concerned with the earlier decision between the same parties. At page 623 it was reiterated that the Court was not bound to follow a decision of its own if it was satisfied that the decision was given per incuriam or the attention of the Court was

not drawn. It is also well-settled that an elementary rule of justice is that no party should suffer by mistake of the Court. See 282660 , 281902 , 280472 and 284431 .

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

63. The right of appeal u/s 374 is limited to Clause 24 of Letters Patent. It was further submitted that the expression ''Extraordinary original criminal jurisdiction'' u/s 374 has to be understood having regard to the language used in the Code and other relevant statutory provisions and not with reference to decisions wherein Courts described jurisdiction acquired by transfer as extraordinary original jurisdiction. In that view the decisions referred to by Shri Jethmalani being Kavasji Pestonji Dalai v. Rustomji Sorabji jamadar and Anr, AIR 1949 Bom. 42, 34755 , Sasadhar Acharjya and Anr. v. Sir Charles Tegart and Ors. [1935] CWN 1088, Peoples'' Insurance Co. Ltd. v. Sardul Singh Caveeshgar and Ors. AIR 1961 Punj. 87 and 819978 are not relevant.

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

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

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

67. Shri Ram Jethmalani made elaborate submissions before us regarding the purpose of the Criminal Law Amendment Act and the Constitution of the Special Court. In our opinion, these submissions have no relevance and do not authorise this Court to confer a special jurisdiction on a High Court not warranted by the statute. The observations of this Court 281067 are not relevant for this purpose. Similarly, the observations on right of appeal in V.C. Shukla v. Delhi Administration

[1980] 3 SCR 500, Shri Jethmalani brought to our notice certain facts to say that the powers given in the Criminal Law Amendment Act were sought to be misused by the State Government under the influence of the appellant. In our opinion, these submissions are not relevant for the present purpose. Mr. Jethmalani submitted that the argument that in so far as Section 407 purports to authorise such a transfer it stands repealed by Section 7(1) of the Criminal Law Amendment Act is wrong. He said it can be done in its extraordinary criminal jurisdiction. We are unable to accept this submission. We are also unable to accept the submission that the order of transfer was made with full knowledge of Section 7(1) of the Criminal Law Amendment Act and the so-called exclusive jurisdiction was taken away from Special Judges and the directions were not given per incuriam. That is not right. He drew our attention to the principles of interpretation of statutes and drew our attention to the purpose of Section 7(1) of the Act. He submitted that when the Amending Act changes the law, the change must be confined to the mischief present and intended to be dealt with. He drew us to the Tek Chand Committee Report and submitted that he did not wish that an occasional case withdrawn and tried in a High Court was because of delay in disposal of corruption cases. He further submitted that interference with existing jurisdiction and powers of superior Courts can only be by express and clear language. It cannot be brought about by aside wind.

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

69. Shri Jethmalani highlighted before us that it was for the first time a Chief Minister had been found guilty of receiving quid pro quo for orders of allotment of cement to various builders by a Single Judge of the High Court confirmed by a Division Bench of the High Court. He also urged before us that it was for the first time such a Chief Minister did not have the courage to prosecute his SLP before this Court against the findings of three Judges of the High Court. Shri Jethmalani also urged that it was for the first time this Court found that a case instituted in 1982 made no progress till 1984. Shri Jethmalani also sought to contend that Section 7(1) of the 1952 Act states "shall be triable by Special Judges only", but does not say that under no circumstances the case will be transferred to be tried by the High Court even in its Extraordinary Original Criminal Jurisdiction. He submitted that Section 407(1)(iv) is very much in the statute and and it is not repealed in respect of the cases pending before the Special Judge. There is no question of repealing Section 407(1)(iv). Section 407 deals with the power of the High Court to transfer cases and appeals. Section 7 is entirely different and one has to understand the scheme of the Act of 1952, he urged. It was an Act which provided for a more speedy trial of certain offences. For this it gave power to appoint Special Judges and stipulated for appointment of Special Judges under the Act. Section 7 states that notwithstanding anything contained in the Code, the offences mentioned in Sub-section (1) of Section

6 shall be triable by Special Judges only. By express terms therefore, it takes away the right to transfer cases contained in the Code to any other Court which is not a Special Court. Shri Jethmalani sought to urge that the Constitution Bench had considered this position. That is not so. He submitted that the directions of this Court on 16th February, 1984 were not given per incuriam or void for any reason. He referred us to Dias on jurisprudence, 5th Edition, page 128 and relied on the decision of Milianges v. George Frank (Textiles) Ltd. [1975] 3 All E.R. 801. He submitted that the per incuriam rule does not apply where the previous authority is alluded to. It is true that previous statute is referred to in the other judgment delivered on the same date in connection with different contentions. Section 7(1) was not referred to in respect of the directions given on 16th February, 1984 in the case of R.S. Nayak v. A.R. Antulay (supra). Therefore, as mentioned hereinbefore the observations indubitably were per incuriam. In this case in view of the specific language used in Section 7, it is not necessary to consider the other submissions of Shri Jethmalani, whether the procedure for trial by Special Judges under the Code has stood repealed or not. The concept of repeal may have no application in this case. It is clear that words should normally be given their ordinary meaning bearing in mind the context. It is only where the literal meaning is not clear that one resorts to the golden rule of interpretation or the mischief rule of interpretation. This is well illustrated from the observations of Tindal, C.J. in Sussex Peerage Claim [1844] 11 C & F 85. He observed:

The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Pyer, Stewell v. Lord Zouch [1569] 1 Plowd 353 is a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress.

70. This passage states the commonly accepted view concerning the relationship between the literal and mischief rules of interpretation of statutes. Here there is no question as to what was the previous law and what was intended to be placed or replaced as observed by Lord Wilberforce in 274 House of Lords Debate, Col. 1294 on 16th November, 1966, see Cross; Statutory Interpretation, second edition, page 36. He observed that the interpretation of legislation is just a part of the process of being a good lawyer; a multi-faceted thing, calling for many varied talents; not a subject which can be confined in rules. When the words are clear nothing remains to be seen. If words are as such ambiguous or doubtful other aids come in. In this context, the submission of controversy was whether the Code repealed the Act of

1952 or whether it was repugnant or not is futile exercise to undertake. Shri Jethmalani distinguished the decision in Chadha''s case, which has already been discussed. It is not necessary to discuss the controversy whether the Chartered High Courts contained the Extraordinary Original Criminal Jurisdiction by the Letters Patent.

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

72. Dealing with the submission that the order of the Constitution Bench was void or non-est and it violated the principles of natural justice, it was submitted by Shri Jethmalani that it was factually incoirect. Inspite of the submissions the appellant did not make any submission as to directions for transfer as asked for by Shri Tarkunde. It was submitted that the case should be transferred to the High Court. The Court merely observed there that they had given ample direction. No question of submission arose after the judgment was delivered. In any case, if this was bad the fact that no objection had been raised would not make it good. No question of technical rules or res judicata apply, Shri Jethmalani submitted that it would amount to an abuse of the process of the Court. He referred us to Re Tarling [1979] 1 All E.R. 981; Ali v. Secretary of State for the Home Department [1984] 1 All E.R. 1009 and Seervai''s Constitutional Law, Vol. 1, pages 260 to 265. We are of the opinion that these submissions are not relevant. There is no abuse of the process of the Court. Shri Jethmalani submitted that there was no prejudice to the accused. There was prejudice to the accused in being singled out as a special class of accused for a special dispensation without room for any appeal as of right and without power of the revision to the High Court. There is prejudice in that. Reliance placed on the decision of this Court in 282543 was not proper in the facts of this case.

73. If a discrimination is brought about by judicial perception and not by executive whim, if it is unauthorised by law, it will be in derogation of the right of the appellant as the special procedure in Anwar Ali Sarkar''s case (supra) curtailed the rights and privileges of the accused. Similarly, in this case by judicial direction the rights and privileges of the accused have been curtailed without any justification in law. Reliance was placed on the observations of the seven Judges Bench in Re : Special Courts Bill, 1978 (supra). Shri Jethmalani relied on the said observations therein and emphasised that purity in public life is a desired goal at all times and in all situations

and ordinary Criminal Courts due to congestion of work cannot reasonably be expected to bring the prosecutions to speedy termination. He further submitted that it is imperative that persons holding high public or political office must be speedily tried in the interests of justice. Longer these trials last, justice will tarry, assuming the charges to be justified, greater will be the impediments in fostering democracy, which is not a plant of easy growth. All this is true but the trial even of person holding public office though to be made speedily must be done in accordance with the procedure established by law. The provisions of Section 6 read with Section 7 of the Act of 1952 in the facts and circumstances of this case is the procedure established by law; any deviation even by a judicial direction will be negation of the rule of law.

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

75. The Privy Council in Isaacs v. Robertson [1984] 3 A.E.R. 140 held that orders made by a Court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. If an order is regular it can only be set aside by an appellate Court; if it is irregular it can be set aside by the Court that made it on application being made to that Court either under rules of Court dealing expressly with setting aside orders for irregularity or ex debite justitiae if the circumstances warranted, namely, where there was a breach of the rules of natural justice etc. Shri Jethmalani urged before us that Lord Diplock had in express terms rejected the argument that any orders of a superior Court of unlimited jurisdiction can over be void in the sense that they can be ignored with impunity. We are not concerned with that. Lord Diplock delivered the judgment. Another Judge who sat in the Privy Council with him was Lord Keith of Kinkel. Both these Law Lords were parties to the House of Lords judgment in Re Racal Communications Ltd. case [1980] 2 A.E.R. 634 and their Lordships did not extend this principle any further. Shri Jethmalani submitted that there was no question of reviewing an order passed on the construction of law. Lord Scarman refused to extend the Anisminic principle to superior Courts by the felicitous statement that this amounted to comparison of incomparables. We are not concerned with this controversy. We are not comparing incomparables. We are correcting an irregularity committed by Court not on construction or misconstruction of a statute but on non-perception of certain provisions and certain authorities which would amount to derogation of the constitutional rights of the citizen.

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

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

78. We do not labour ourselves on the question of discretion to disobey a judicial order on the ground of invalid judicial order. See discretion to Disobey by Mertimer R. Kadish and Sanford H. Kadish pages 111 and 112. These directions were void because the power was not there for this Court to transfer a proceeding under the Act of 1952 from one Special Judge to the High Court. This is not a case of collateral attack on judicial proceeding; it is a case where the Court having no Court superior to it rectifies its own order. We recognise that the distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction is very fine. So fine indeed that it is rapidly being eroded as observed by Lord Wilberforce in Anisminic Ltd. v. Foreign Compensation Commissioner [1969] 1 All E.R. 208. Having regard to the enormity of the consequences of the error to the appellant and by reason of the fact that the directions were given suo motu, we do not find there is anything in the observations of 261190 which detract the power of the Court to review its judgment ex debite justitiae in case injustice has been caused. No court, however, high has jurisdiction to give an order unwarranted by the Constitution and, therefore, the principles of Bhatia Co-operative Housing Society Ltd. Vs. D.C. Patel would not apply.

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

80. This case has caused us considerable anxiety. The appellant-accused has held an important position in this country, being the Chief Minister of a premier State of the country. He has been charged with serious criminal offences. His trial in accordance with law and the procedure established by law would have to be in accordance with the 1952 Act. That could not possibly be done because of the directions of this Court dated 16th February, 1984, as indicated above. It has not yet been found whether the appellant is guilty or innocent. It is unfortunate, unfortunate for the people of the State, unfortunate for the country as a whole, unfortunate for the future working of democracy in this country which, though is not a plant of an easy growth yet is with deep root in the Indian polity that delay has occurred due to procedural wrangles. The appellant may be guilty of grave offences alleged against him or he

may be completely or if not completely to a large extent, innocent. Values in public life and perspective of these values in public life, have undergone serious changes and erosion during the last few decades. What was unheard of before is common place today. A new value orientation is being undergone in our life and in our culture. We are at the threshold of the cross-roads of values. It is, for the sovereign people of the country to settle those conflicts yet the Courts have vital roles to play in such matters. With the avowed object of speedier trial the case of the appellant had been transferred to the High Court but on grounds of expediency of trial he cannot be subjected to a procedure unwarranted by law, and contrary to the constitutional provisions. The appellant may or may not be an ideal politician. It is a fact, however, that the allegations have been brought against him by a person belonging to a political party opposed to his but that is not the decisive factor. If the appellant Shri Abdul Rehman Antulay has infringed law, he must be dealt with in accordance with the law. We proclaim and pronounce that no man is above the law; but at the same time reiterate and declare that no man can be denied his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law and not in derogation of it. this Court, in its anxiety to facilitate the parties to have a speedy trial gave directions on 16th February, 1984 as mentioned hereinbefore without conscious awareness of the exclusive jurisdiction of the Special Courts under the 1952 Act and that being the only procedure established by law, there can be no deviation from the terms of Article 21 of the Constitution of India. That is the only procedure under which it should have been guided. By reason of giving the directions on 16th February, 1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court, even if there are any technicalities this Court should not feel shackled and decline to rectify that injustice or otherwise the injustice noticed will remain forever a blot on justice. It has been said long time ago that "Actus Curiae Neminem Gravabit"- an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law.

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

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

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

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

84. Shri Rao has canvassed before us on the authority of 284764 ; Kadra Pahadiya v. State of Bihar, AIR 1981 SC 939 ; Kadra Pahadiya (II) v. State of Bihar, AIR 1982 S.C. 1167 and 258806 . He has, however, very strongly relied upon the observations of this Court in Suk Das v. Union Territory of Arunachal Pradesh (supra). In that case the appellant a government servant was tried and convicted to suffer imprisonment for two years for offences u/s 506 read with Section 34, I.P.C. He was not represented at the trial by any lawyer by reason of his inability to afford legal representation. On appeal the High Court held that the trial was not vitiated since no application for legal aid was made by him. On appeal this Court quashed the conviction and considered the question whether the appellant would have to be tried in accordance with law after providing legal assistance to him. this Court felt that in the interests of justice the appellant should be reinstated in service without back wages and accordingly directed that no trial should take place. Shri Rao submitted that we should in the facts of this case in the interests of justice direct that the appellant should not be tried again. Shri Rao submitted to let the appellant go only on this long delay and personal inconveniences suffered by the appellant, no more injury be caused to him. We have considered the submission. Yet we must remind ourselves that purity of public life is one of the cardinal principal which must be upheld as a matter of public policy. Allegations of legal infractions and criminal infractions must be investigated in accordance with law and procedure established under the Constitution. Even if he has been wronged, if he is allowed to be left in doubt that would cause more serious damage to the appellant. Public confidence in

public administration should not be eroded any further. One wrong cannot be remedied by another wrong.

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

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

S. Ranganath Misra, J.

87. I have had the advantage of perusing the judgment proposed by my learned Brother Mukharji, J. While I agree with the conclusion proposed by my esteemed Brother, keeping the importance of the matter, particularly the consequences the decision may generate as also the fact that I was a party to the two-Judge Bench decision of this Court reported in 287190 in view, I propose to express my opinion separately.

88. Abdul Rehman Antulay, the appellant, was the Chief Minister of the State of Maharashtra from 1980 till January 20, 1982, when he resigned his office but continued to be a member of the Maharashtra Legislative Assembly. Ramdas Shrinivas Nayak, Respondent No. 1 herein, lodged a complaint in the Court of Chief Metropolitan Magistrate, 28th Esplanade, Bombay, on September 11, 1981, against Antulay alleging commission of several offences under the Indian Penal Code as also Section 5(2) of the Prevention of Corruption Act, 1947 (''1947 Act'' for short). The learned Magistrate was of the view that prosecution under Sections 161 and 165 of the Penal Code and Section 5 of the 1947 Act required sanction as a condition precedent and in its absence the complaint was not maintainable. The Governor of Bombay later accorded sanction and the Respondent No. 1 filed a fresh complaint, this time in the Court of the Special Judge of Bombay, alleging the commission of those offences which had formed the subject-matter of the complaint before the Magistrate. On receiving summons from the Court of the particular Special Judge, Antulay took the stand that the said Special Judge had no jurisdiction to entertain the complaint in view of the provisions of Section 7 of the Criminal Law Amendment Act, 1952 (hereinafter referred to as the 1952 Act) to take cognizance and such cognizance could not be taken on a private complaint. These objections were overruled by the Special Judge by order dated October 20, 1982, and the case was set down for recording evidence of the prosecution. The Criminal Revision Petition of the accused against the order of the Special Judge was rejected by the Bombay High Court and it held that a private complaint was maintainable and in view of the

notification specifying a particular Special Judge for the offences in question there was no basis for the objections. this Court granted special leave to the accused against the decision of the High Court that a private complaint was maintainable. Criminal Appeal No. 347 of 1983 thus came to be instituted. In the meantime, objection raised before the Special Judge that without sanction the accused who still continued to be a member of Legislative Assembly, could not be prosecuted came to be accepted by the Special Judge. The complainant filed a criminal revision application before the High Court questioning that order. this Court granted special leave against the decision that sanction was necessary, whereupon Criminal Appeal No. 356 of 1983 was registered and the pending criminal revision application before the High Court was transferred to this Court. Both the criminal appeals and the transferred criminal revision were heard together by a five-Judge Bench of this Court but the two appeals were disposed of by two separate judgments delivered on February 16, 1984. The judgment in Criminal Appeal No. 347 of 1983 is reported in 279465 . In the present appeal we are not very much concerned with that judgment. The judgment of Criminal Appeal No. 356 of 1983 is reported in 278507 . As already noticed the main theme of the criminal appeal was as to whether a member of the Legislative Assembly was a public servant for whose prosecution for the offences involved in the complaint sanction was necessary as a condition precedent. this Court at page 557 of the Reports came to hold:

To sum up, the learned Special Judge was clearly in error in holding that M.L.A. is a public servant within the meaning of the expression in Section 12(a) and further erred in holding that a sanction of the Legislative Assembly of Maharashtra or majority of the members was a condition precedent to taking cognizance of offences committed by the accused. For the reasons herein stated both the conclusions are wholly unsustainable and must be quashed and set aside.

Consequently this Court directed:

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

this Court gave a further direction to the following effect:

The accused was the Chief Minister of a premier State-the State of Maharashtra. By a prosecution launched as early as on September 11, 1981, his character and integrity came under a cloud. Nearly 2&#65533; years have rolled by and the case has not moved an inch further. An expeditious trial is primarily in the interest of the accused and a mandate of Article 21. Expeditious disposal of a criminal case is in the interest of both, the prosecution and the accused. Therefore, Special Case No. 24 of 1982 and Special Case No. 3/83 pending in the Court of Special Judge, Greater Bombay Shri R.B. Sule are withdrawn and transferred to the High Court of Bombay with a

request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. On being so assigned, the learned Judge may proceed to expeditiously dispose of the cases preferably by holding the trial from day to day.

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

A.N. Sen, J.:

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

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

Desai, J.:

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

16 witnesses were examined by Khatri J. by July 27, 1984. Khatri J. was relieved of trying the case on his request, whereupon the learned Chief Justice nominated Mehta J. to continue the trial. 41 more witnesses were examined before him and at the stage when 57 witnesses in all had been examined for the prosecution, the Trial Judge invited the parties to consider the framing of charges. 43 draft charges were placed for his consideration on behalf of the prosecution and the learned Trial Judge framed 21 charges and recorded an order of discharge in respect of the remaining 22. At the instance of the complainant, Respondent No. 1, the matter came before this Court in appeal on special leave and a two-Judge Bench of which I happened to be one, by judgment dated April 17, 1986, in Criminal Appeal No. 658 of 1985 (1962) 2 SCC 716 set aside the order of discharge in regard to the several offences excepting extortion and directed the learned Trial Judge to frame charges for the same. this Court requested the learned Chief Justice of the Bombay High Court to nominate another Judge to take up the matter from the stage at which Mehta J. had

made the order of discharge. Shah J. came to be nominated by the learned Chief Justice to continue the trial. By order dated July 24, 1986, Shah J. rejected the application of the accused for proceeding against the alleged co-conspirators by holding that there had been a long delay, most of the prosecution witnesses had already been examined and that if the co-conspirators were then brought on record, a de novo trial would be necessitated. The appellant challenged the order of Shah J. by filing a SLP before this Court wherein he further alleged that the High Court had no jurisdiction to try the case. A two-Judge Bench, of which Mukherji J., my learned brother, was a member, granted special leave, whereupon this Criminal Appeal (No. 468 of 1986) came to be registered. The Respondent No. 1 asked for revocation of special leave in Criminal Miscellaneous Petition No. 4248 of 1986. While rejecting the said revocation application, by order dated October 29, 1986, the two-Judge Bench formulated several questions that arose for consideration and referred the matter for hearing by a Bench of seven Judges of the Court. That is how this seven-Judge Bench has come to be constituted to hear the appeal.

90. It is the settled position in law that jurisdiction of courts comes solely from the law of the land and cannot be exercised otherwise. So far as the position in this country is concerned conferment of jurisdiction is possible either by the provisions of the Constitution or by specific laws enacted by the Legislature. For instance, Article 129 confers all the powers of a court of record on the Supreme Court including the power to punish for contempt of itself. Articles 131, 132, 133, 134, 135, 137, 138 and 139 confer different jurisdictions on the Supreme Court while Articles 225, 226, 227, 228 and 230 deal with conferment of jurisdiction on the High Courts. Instances of conferment of jurisdiction by specific law are very common. The laws of procedure both criminal and civil confer jurisdiction on different courts. Special jurisdiction is conferred by special statute. It is thus clear that jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the Legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. In support of judicial opinion for this view reference may be made to the permanent edition of ''Words and Phrases Vol. 23A'' at page 164. It would be appropriate to refer to two small passages occurring at pages 174 and 175 of the Volume at page 174, referring to the decision in Carlile v. National Oil and Development Co. it has been stated:

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

seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the question being submitted to it by the parties for decision.

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

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

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

(3)....

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

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

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

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

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

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

Section 6 shall be triable by Special Judges only;

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

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

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

(2) A special Judge, may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof; and any pardon so tendered shall, for the purposes of Sections 339 and 339-A of the CrPC, 1898 (5 of 1898), be deemed to have been tendered u/s 338 of that Code.

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

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

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

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

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

On the ratio of the seven-Judge Bench decision of this Court in the 281215 the vires of this Act are not open to challenge. The majority of the learned Judges in Anwar Ali Sarkar''s case expressed the view that it was open to the Legislature to set up a special forum for expedient trial of particular class of cases. Section 7(1) has clearly provided that offences specified in Sub-section (1) of Section 6 shall be triable by the Special Judge only and has taken away the power of the courts established under the CrPC to try those offences. Section 10 of the Act required all pending cases on the date of commencement of the Act to stand transferred to the respective Special Judge. Unless there be challenge to the provision creating exclusive jurisdiction of the Special Judge, the procedural law in the Amending Act is binding on courts as also the parties and no court is entitled to make orders contrary to the law which are binding. As long as Section 7 of the Amending Act of 1952 hold the field it was not open to any court including the apex Court to act contrary to Section 7(1) of the Amending Act.

92. The power to transfer a case conferred by the Constitution or by Section 406 of the CrPC does not specifically relate to the special Court. Section 406 of the Code could perhaps be applied on the principle that the Special Judge was a subordinate court for transferring a case from one special Judge to another special Judge. That would be so because such a transfer would not contravene the mandate of Section 7(1) of the Amending Act of 1952. While that may be so, the provisions for transfer, already referred to, do not authorize transfer of a case pending in the court of a special Judge first to the Supreme Court and then to the High Court for trial. A four Judge Bench in 288435 was considering the jurisdiction of the High Court to deal with a matter Shah J., as he then was, spoke for the court thus:

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

93. Brother Mukharji in his elaborate judgment has come to the conclusion that the question of transferring the case from the court of the special Judge to the High Court was not in issue before the five-Judge Bench. Mr. Jethmalani in course of the argument has almost accepted the position that this was not asked for on behalf of the complainant at the hearing of the matter before the Constitution Bench. From a reading of the judgment of the Constitution Bench it appears that the transfer was a

suo motu direction of the court. Since this particular aspect of the matter had not been argued and counsel did not have an opportunity of pointing out the legal bar against transfer, the learned Judges of this Court obviously did not take note of the special provisions in Section 7(1) of the 1952 Act. I am inclined to agree with Mr. Rao for Antulay that if this position had been appropriately placed, the direction for transfer from the court or exclusive jurisdiction to the High Court would not have been made by the Constitution Bench. It is appropriate to presume that this Court never'' intends to act contrary to law.

94. There is no doubt that after the Division Bench of Desai and Sen, JJ. dismissed the writ petition and the special leave petitions on 17th April, 1984, by indicating that the petitioner could file an appropriate review petition or any other application which he may be entitled in law to file, no further action was taken until charges were framed on the basis of evidence of 57 witnesses and a mass of documents. After a gap of more than three years, want of jurisdiction of the High Court was sought to be reagitated before the two-Judge Bench in the present proceedings. During this intervening period of three years or so a lot of evidence was collected by examining the prosecution witnesses and exhibiting documents. A learned Judge of the High Court devoted his full time to the case. Mr. Jethmalani pointed out to us in course of his argument that the evidence that has already been collected is actually almost three-fourths of what the prosecution had to put in. Court''s time has been consumed, evidence has been collected and parties have been put to huge expenses. To entertain the claim of the appellant that the transfer of the case from the Special Judge to the High Court was without authority of law at this point of time would necessarily wipe out the evidence and set the clock back by about four years. It may be that some of the witnesses may no longer be available when the de novo trial takes place. Apart from these features, according to Mr. Jethmalani to say at this stage that the direction given by a five-Judge Bench is not binding and, therefore, not operative will shake the confidence of the litigant public in the judicial process and in the interest of the system it should not be done. Long arguments were advanced on either side in support of their respective stands-the appellant pleading that the direction for transfer of the proceedings from the Special Judge to the High Court was a nullity and Mr. Jethmalani contending that the apex Court had exercised its powers for expediting the trial and the action was not contrary to law. Brother Mukharji has dealt with these submissions at length and I do not find any necessity to dwell upon this aspect in full measure. In the ultimate analysis I am satisfied that this Court did not possess the power to transfer the proceedings from the Special Judge to the High Court. Antulay has raised objection at this stage before the matter has been concluded. In case after a full dressed trial, he is convicted, there can be no doubt that the wise men in law will raise on his behalf, inter alia, the same contention as has been advanced now by way of challenge to the conviction. If the accused is really guilty of the offences as alleged by the prosecution there can be no two opinions that he should be suitably punished and the social mechanism

of punishing the guilty must come heavily upon him. No known loopholes should be permitted to creep in and subsist so as to give a handle to the accused to get out of the net by pleading legal infirmity when on facts the offences are made out. The importance of this consideration should not be overlooked in assessing the situation as to whether the direction of this Court as contained in the five-Judge Bench decision should be permitted to be questioned at this stage or not.

95. Mr. Rao for Antulay argued at length and Brother Mukharji has noticed all those contentions that by the change of the forum of the trial the accused has been prejudiced. Undoubtedly, by this process he misses a forum of appeal because if the trial was handled by a Special Judge, the first appeal would lie to the High Court and a further appeal by special leave could come before this Court. If the matter is tried by the High Court there would be only one forum of appeal being this Court, whether as of right or by way of special leave. The appellant has also contended that the direction violates Article 14 of the Constitution because he alone has been singled out and picked up for being treated differently from similarly placed accused persons. Some of these aspects cannot be overlooked with ease. I must, however, indicate here that the argument based upon the extended meaning given to the contents of Article 21 of the Constitution, though attractive have not appealed to me.

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

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

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

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

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

99. What remains to be decided is the procedure by which the direction of the 16th of February, 1984, could be recalled or altered. There can be no doubt that certiorari shall not lie to quash a judicial order of this Court. That is so on account of the fact that the Benches of this Court are not subordinate to larger Benches thereof and certiorari is, therefore, not admissible for quashing of the orders made on the judicial side of the court. Mr. Rao had relied upon the ratio in the case of Prem Chand Garg v. Excise Commissioner, U.P., Allahabad [1963] 1 SCR 885. Brother Mukharji has dealt with this case at considerable length. this Court was then dealing with an Article 32 petition which had been filed to challenge the vires of Rule 12 of Order 35 of this Court''s Rules. Gajendragadkar, J., as the learned Judge then was, spoke for himself and three of his learned brethren including the learned Chief Justice. The facts of the case as appearing from the judgment show that there was a judicial order directing furnishing of security of Rs. 2,500 towards the respondent''s costs and the majority judgment directed:

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

Shah, J. who wrote a separate judgment upheld the vires of the rule and directed dismissal of the petition. The fact that a judicial order was being made the subject matter of a petition under Article 32 of the Constitution was not noticed and whether such a proceeding was tenable was not considered. A nine-Judge Bench of this Court in 282776 referred to the judgment in Prem Chand Garg''s case (supra). Gajendragadkar, CJ., who delivered the leading and majority judgment stated at page 765 of the Reports:

In support of his argument that a judicial decision can be corrected by this Court in exercise of its writ jurisdiction under Article 32(2), Mr. Setalvad has relied upon another decision of this Court in Prem Chand Garg v. Excise Commissioner, U.P. Allahabad (supra). In that case, the petitioner had been required to furnish security for the costs of the respondent under Rule 12 of order 35 of the Supreme Court Rules. By his petition filed under Article 32, he contended that the rule was invalid as it placed'' obstructions on the fundamental right guaranteed under Article 32 to move the Supreme Court for the enforcement of fundamental rights. This plea was upheld by the majority decision with the result that the order requiring him to furnish security was vacated. In appreciating the effect of this decision, it is necessary to bear in mind the nature of the contentions raised before the Court in that case. The rule itself, in terms, conferred discretion on the court, while dealing

with applications made under Article 32, to impose such terms as to costs as to the giving of security as it thinks fit. The learned Solicitor General who supported the validity of the rule, urged that though the order requiring security to be deposited may be said to retard or obstruct the fundamental right of the citizen guaranteed by Article 32(1), the rule itself could not be effectively challenged as invalid, because it was merely discretionary; it did not impose an obligation on the court to demand any security; and he supplemented his argument by contending that under Article 142 of the Constitution, the powers of this Court were wide enough to impose any term or condition subject to which proceedings before this Court could be permitted to be conducted. He suggested that the powers of this Court under Article 142 were not subject to any of the provisions contained in Part III including Article 32(1). On the other hand, Mr. Pathak who challenged the validity of the rule, urged that though the rule was in form and in substance discretionary, he disputed the validity of the power which the rule conferred on this Court to demand security.... It would thus be seen that the main controversy in the case of Prem Chand Garg centered round the question as to whether Article 145 conferred powers on this Court to make rules, though they may be inconsistent with the constitutional provisions prescribed by Part III. Once it was held that the powers under Article 142 had to be read subject not only to the fundamental rights, but to other binding statutory provisions, it became clear that the rule which authorised the making of the impugned order was invalid. It was in that context that the validity of the order had to be incidentally examined. The petition was made not to challenge the order as such, but to challenge the validity of the rule under which the order was made. Once a rule was struck down as being invalid, the order passed under the said rule had to be vacated. It is difficult to see how this decision can be pressed into service by Mr. Setalvad in support of the argument that a judicial order passed by this Court was held to be subject to the writ jurisdiction of this Court itself....
In view of this decision in Mirajkar''s case (supra) it must be taken as concluded that judicial proceedings in this Court are not subject to the writ jurisdiction thereof.

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

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

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

this Court in 286083 reiterated the position by saying:

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

Once judicial satisfaction is reached that the direction was not open to be made and it is accepted as a mistake of the court, it is not only appropriate but also the duty of the Court to rectify the mistake by exercising inherent powers. Judicial opinion heavily leans in favour of this view that a mistake of the Court can be corrected by the Court itself without any fetters. This is on the principle as indicated in Alexander Rodger''s case (supra). I am of the view that in the present situation, the Court''s inherent powers can be exercised to remedy the mistake. Mahajan, J. speaking for a four-Judge Bench in 281762 stated:

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

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

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

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

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

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

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

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

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

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

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

G.L. Oza, J.

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

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

B.C. Ray, J.

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

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

M.N. Venkatachaliah, J.

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

If the appeal is accepted, it will have effect of blowing-off, by a side-wind as it were, a number of earlier decisions of different benches of this Court, binding inter-parties, rendered at various stages of the said criminal prosecution including three judgments of 5 judge benches of this Court. What imparts an added and grim poignance to the case is that the appeal, if allowed, would set to naught all the proceedings taken over the years before three successive Judges of the High Court of Bombay and in which already 57 witnesses have been examined for the prosecution-all these done pursuant to the direction dated 16.12.1984 issued by a five judge Bench of this Court. This by itself should be no deterrent for this Court to afford relief if there has been a gross miscarriage of justice and if appropriate proceedings recognised by law are taken. Lord Atkin said "Finality is a good thing, but justice is a better". [See 60 Indian Appeals 354 PC]. Considerations of finality are subject to the paramount considerations of justice; but the remedial action must be appropriate and known to law. The question is whether there is any such gross miscarriage of justice in this case, if so whether relief can be granted in the manner now sought.

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

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

(emphasis supplied).

2. I have had the opportunity, and the benefit, of reading in draft the learned and instructive opinions of my learned Brothers Sabyasachi Mukharji J., and Ranganath Misra J. They have, though for slightly differing reasons, proposed to accept the appeal. This will have the effect of setting-aside five successive earlier orders of different benches of the Court made at different stages of the criminal prosecution, including the three judgments of Benches of five Judges of this Court in 278507 and 279465 and 278507 .

I have bestowed a respectful and anxious consideration to the weighty opinion of my brothers with utmost respect, I regret to have to deny myself the honour of agreeing with them in the view they take both of the problem and the solution that has commended itself to them. Apart from other things, how can the effect and finality of this Court''s Order dated 17.4.1984 in Writ Petition No. 708 of 1984 be unsettled in these proceedings? Admittedly, this order was made after hearing and does not share the alleged vitiating factors attributed to the order dated 16.2.1984. That order concludes everything necessarily inconsistent with it. In all humility, I venture to say that the proposed remedy and the procedure for its grant are fraught

with far greater dangers than the supposed injustice they seek to relieve : and would throw open an unprecedented procedural flood-gate which might, quite ironically, enable a repetitive challenge to the present decision itself on the very grounds on which the relief is held permissible in the appeal. To seek to be wiser than the law, it is said, is the very thing by good laws forbidden. Well trodden path is the best path.

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

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

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

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

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

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

Appellant questioned the jurisdiction of Special Judge to take cognisance of those offences on a private complaint. On 20.10.1982, the Special Judge over-ruled the objection. On 7.3.1983, the High Court dismissed appellant''s revision petition in which the order of the Special Judge was assailed. The criminal case thereafter stood transferred to another Special Judge, Shri R.B. Sule. Appellant did not accept the order of the High Court dated 7.3.1983 against which he came up in appeal to this Court, by Special-leave, in Criminal appeal No. 347 of 1983. During the pendency of

this appeal, however, another important event occurred. The Special Judge, Shri R.B. Sule, by his order dated 25.7.1983, discharged the appellant, holding that the prosecution was not maintainable without the sanction of the Maharashtra Legislative Assembly, of which the appellant continued to be a member, notwithstanding his ceasing to be Chief Minister. Respondent No. 1 challenged this order of discharge in a Criminal Revision Petition No. 354 of 1982 before the High Court of Bombay. Respondent No. 1 also sought, and was granted, special-leave to appeal against Judge Sule''s order directly to this Court in Criminal appeal No. 356 of 1983. this Court also withdrew to itself the said criminal revision application No. 354 of 1982 pending before the High Court. All the three matters-the two appeals (Crl. A. 347 of 1983 and 356 of 1983) and Criminal Revision Petition so withdrawn to this Court-were heard by a five Judge bench and disposed of by two separate Judgments dated 16.2.1984.

By Judgment in Crl. appeal No. 356 of 1983 278507 this Court, while setting aside the view of the Special Judge that sanction of the Legislative Assembly was necessary, further directed the trial of the case by a Judge of the Bombay High Court. this Court observed that despite lapse of several years after commencement of the prosecution the case had "not moved an inch further", that "expeditious trial is primarily necessary in the interest of the accused and mandate of Article 21", and that "therefore Special case No. 24 of 1982 and Special Case No. 3 of 1983 pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule" be withdrawn and transferred to the High Court of Bombay, with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. The Judge so designated was also directed to dispose of the case expeditiously, preferably "by holding the trial from day-to-day.

Appellant, in these proceedings, does not assail the correctness of the view taken by the 5 Judge Bench on the question of the sanction. Appellant has confined his challenge to what he calls the constitutional infirmity-and the consequent nullity-of the directions given as to the transfer of the case to a Judge of the High Court.

In effectuation of the directions dated 16.2.1984 of this Court the trial went on before three successive learned Judges of the High Court. It is not necessary here to advert to the reasons for the change of Judges. It is, however, relevant to mention that when the matter was before Khatri J. who was the first learned Judge to be designated by the Chief Justice on the High Court, the appellant challenged his jurisdiction, on grounds which amounted to a challenge to the validity of directions of this Court for the transfer of the case. Khatri J. quite obviously, felt bound to repel the challenge to his jurisdiction. Learned Judge said appellant''s remedy, if any was to seek a review of the directions dated 16.2.1984 at the hands of this Court.

Learned Judge also pointed out in his order dated 14.3.1984 what, according to him, was the true legal position permitting the transfer of the case from the Special-Judge to be tried by the High Court in exercise of its extra-ordinary original

criminal jurisdiction. In his order dated 16.3.1984, Khatri J. observed:

...Normally it is the exclusive jurisdiction of a Special Judge alone to try corruption charges. This position flows from Section 7 of the 1952 Act. However, this does not mean that under no circumstances whatever, can trial of such offences be not tried by a Court of superior jurisdiction than the Special Judge. I have no hesitation in contemplating at three situations in which a Court of Superior jurisdiction could try such offence....

8. The third situation can be contemplated under the CrPC itself where a Court of superior jurisdiction may have to try the special cases. Admittedly, there are no special provisions in the 1952 Act or 1947 Act relating to the transfer of special cases from one Court to the other. So by virtue of the combined operation of Section 8(3) of the 1952 Act and Section 4(2) of the CrPC, the High Court will have jurisdiction u/s 407 of the Code in relation to the special cases also. An examination of the provisions of Section 407 leaves no doubt that where the requisite conditions are fulfilled, the High Court will be within its legitimate powers to direct that a special case be transferred to and tried before itself.

Appellant did not seek any review of the directions at the hands of the Bench which had issued them, but moved in this Court a Writ Petition No. 708 of 1984 under Article 32 of the Constitution assailing the view taken by Khatri J. as to jurisdiction which in substance meant a challenge to the original order dated 16.2.1984 made by this Court. A division Bench consisting of D.A. Desai and A.N. Sen, JJ. dismissed the writ petition on 17.4.1984. Sen, J. speaking for the bench said:

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

(emphasis supplied)

[A.R. Antulay v. Union [1984] 3 SCR 482

This order has become final. Even then no review was sought.

It is also relevant to refer here to another pronouncement of a five Judge bench of this Court dated 5.4.1984 in 278507 in Criminal misc. petition No. 1740 of 1984 disposing of a prayer for issue of certain directions as to the procedure to be followed before the designated Judge of the High Court. The bench referred to the provisions of law, which according to it, enabled the transfer of the trial of the criminal case to the High Court. The view taken by my two learned Brothers, it is needless to emphasise, has the effect of setting at naught this pronouncement of the five Judge Bench as well. The five Judge bench considered the legal foundations of the power to transfer and said:

...To be precise, the learned Judge has to try the case according to the procedure prescribed for cases instituted otherwise than on police report by Magistrate. This position is clearly an unambiguous in view of the fact that this Court while allowing the appeal was hearing amongst others Transferred case No. 347 of 1983 being the Criminal Revision Application No. 354 of 1983 on the file of the High Court of the Judicature at Bombay against the order of the learned Special Judge, Shri R.B. Sule discharging the accused. if the criminal revision application was not withdrawn to this Court, the High Court while hearing criminal revision application could have u/s 407(8), CrPC, 1973, would have to follow the same procedure which the Court of Special Judge would have followed if the case would not have been so transferred....

(emphasis supplied)

According to the Bench, the High Court''s power u/s 407, Criminal Procedure Code for withdrawing to itself the case from a Special Judge, who was, for this purpose, a Sessions Judge, was preserved notwithstanding the exclusivity of the jurisdiction of the Special Judge and that the Supreme Court was entitled to and did exercise that power as the Criminal Review application pending in the High Court had been withdrawn to the Supreme Court. The main basis of appellant''s case is that all this is per-incurriam, without jurisdiction and a nullity.

In the meanwhile Mehta J. was nominated by the Chief Justice of the High Court in place of Khatri. J. In addition to the 17 witnesses already examined by Khatri J. 41 more witnesses were examined for the prosecution before Mehta J. of the 43 charges which the prosecution required to be framed in the case, Mehta J. declined to frame charges in respect of 22 and discharged the appellant of those alleged offences. Again respondent No. 1 came up to this Court which by its order dated 17.4.1986 in Criminal Appeal No. 658 of 1985 [reported in (1985) 2 SCC 716] set aside the order of discharge in regard to 22 offences and directed that charges be drawn in respect of them. this Court also suggested that another Judge be nominated to take up the case. It is, thus, that Shah J came to conduct the further trial.

4. I may now turn to the occasion for the present appeal. In the further proceedings before Shah J. the appellant contended that some of the alleged co-conspiratOrs. some of whom had already been examined as prosecution witnesses, and some others proposed to be so examined should also be included in the array of accused persons. This prayer, Shah J had no hesitation to reject. It is against this order dated 24.7.1986 that the present appeal has come up. With this appeal as an opening, appellant has raised directions of the five Judges Bench, on 16.2.1984; of the serious violations of his constitutional-rights; of a hostile discrimination of having to face a trial before a Judge of the High Court instead of the Special-Judge, etc. A Division Bench consisting of E.S. Venkataramiah and Sabyasachi Mukharji JJ. in view of the seriousness of the grievances aired in the appeal, referred it to be heard by a bench of seven Judges.

5. The actual decision of Shah J in the appeal declining to proceed against the alleged co-conspirators is in a short compass. But the appeal itself, has assumed a dimension far beyond the scope of the order it seeks to be an appeal against. The appeal has become significant not for its pale determined by the order under appeal; but more for the collateral questions for which it has served as a spring board in this Court.

6. Before going into these challenges, it is necessary to say something on the merits of the order under appeal itself. An accused person cannot assert any right to a joint trial with his co-accused. Normally it is the right of the prosecution to decide whom it prosecutes. It can decline to array a person as a co-accused and, instead, examine him as a witness for the prosecution. What weight is to be attached to that evidence, as it may smack of the testimony of a guilty partner, in crime, is a different matter. Prosecution can enter Nolle proseque against any accused-person. It can seek to withdraw a charge against an accused person. These propositions are too well settled to require any further elaboration. Suffice it to say that the matter is concluded by the pronouncement of this Court in Laxmipat Choraria and Others Vs. State of Maharashtra where Hidayathullah J referred to the argument that the accomplice, a certain Ethyl Wong in that case, had also to be arrayed as an accused and repelled it, observing:

...Mr. Jethmalani''s argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso).

...The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers'' ring. Ethyl Wong was prosecuted by Section 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence....

On this point, really, appellant cannot be heard to complain. Of the so called co-conspirators some have been examined already as prosecution witnesses; some others proposed to be so examined; and two others, it would appear, had died in {he interregnum. The appeal on the point has no substance and would require to be dismissed. We must now turn to the larger issue raised in the appeal.

7. While Shri P.P. Rao, learned Senior Counsel for the appellant, handling an otherwise delicate and sensitive issue, deployed all the legal tools that a first rate legal-smithy could design, Shri Ram Jethmalani, learned Senior Counsel, however, pointed out the impermissibility both as a matter of law and propriety of a different bench embarking upon the present exercise which, in effect, meant the exertion of an appellate and superior jurisdiction over the earlier five Judge Bench and the precedential problems and anomalies such a course would create for the future.

8. The contentions raised and urged by Shri P.P. Rao admit of being summarised and formulated thus:

(a) That Supreme Court has, and can, exercise only such jurisdiction as is invested in it by the Constitution and the laws; that even the power under Article 142(1) is not unfettered, but is confined within the ambit of the jurisdiction otherwise available to it; that the Supreme Court, like any other court, cannot make any order that violates the law; that Section 7(1) of the Criminal Law (Amendment) Act, 1952, (1952 Act) envisages and sets-up a special and exclusive forum for trial of certain offences; that the direction for trial of those offences by a Judge of the High Court is wholly without jurisdiction and void; and that ''Nullity'' of the order could be set up and raised whenever and wherever the order is sought to be enforced or effectuated;

(b) That in directing a Judge of the High Court to try the case the Supreme Court virtually sought to create a new jurisdiction and a new forum not existent in and recognised by law and has, accordingly, usurped Legislative powers, violating the basic tenets of the doctrine of separation of powers;

(c) That by being singled out for trial by the High Court, appellant is exposed to a hostile discrimination, violative of his fundamental rights under Articles 14 and 21 and if the principles in 281215 . The law applicable to Anwar Ali Sarkar should equally apply to Abdul Rahman Antulay.

(d) That the directions for transfer were issued without affording an opportunity to the appellant of being hear and therefore void as violative of Rules of Natural Justice.

(e) That the transfer of the case to the High Court deprived appellant of an appeal, as of right, to the High Court. At least one appeal, as of right is the minimal constitutional safeguard.

(f) That any order including a judicial order, even if it be of the highest Court, which violates the fundamental rights of a person is a nullity and can be assailed by a petition under Article 32 of the Constitution on the principles laid down in Prem Chand Garg v. Excise Commissioner, UP. [1963] 1 SCR 885.

(g) That, at all events, the order dated 16.2.1984 in so far as the impugned direction is concerned, is per incuriam passed ignoring the express statutory provisions of Section 7(1) of Criminal Law (Amendment) Act, 1952, and the earlier decision of this Court in Gurucharan Das Chadhaw. State of Rajasthan [1966] 2 SCR 678.

(h) That the direction for transfer of the case is a clear and manifest case of mistake committed by the Court and that when a person is prejudiced by a mistake of Court it is the duty of the Court to correct its own mistake : Actus Curiae Nominem Gravabit.

9. Courts are as much human institutions as any other and share all human susceptibilities to error. Justice Jackson said:

...Whenever decisions of one Court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court a substantial proportion of our reversals of state Courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

(See Brown v. Allen [1944] US 443.

In Broom v. Cassel [1972] AC 1027 Lord Diplock said:

...It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in Court of Appeal I sometimes thought the House of Lords was wrong in over ruling me. Even since that time there have been occasions, of which the instant appeal itself is one, when, alone or in company, I have dissented from a decision of the majority of this House. But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted.

Judge Learned Hand, referred to as one of the most profound legal minds in the jurisprudence of the English speaking world, commended the Cromwellian intellectual humility and desired that these words of Cromwell be written over the portals of every church, over court louse and at every cross road in the nation : "I beseech ye...think that ye may be mistaken.

As a learned author said, while infallibility is an unrealisable ideal, "correctness", is often a matter of opinion. An erroneous decision must be as binding as a correct one. It would be an unattainable ideal to require the binding effect of a judgment to defend on its being correct in the absolute, for the test of correctness would be resort to another Court the infallibility of which is, again subject to a similar further investigation. No self-respecting Judge would wish to act if he did so at the risk of being called a usurper whenever he failed to anticipate and predict what another Judge thought of his conclusions. Even infallibility would not protect him he would need the gift of prophecy-ability to anticipate the fallibilities of others as well. A proper perception of means and ends of the judicial process, that in the interest of finality it is inevitable to make some compromise between its ambitions of ideal justice in absolute terms and its limitations.

10. Re : Contentions (a) and (b) : In the course of arguments we were treated to a wide ranging, and no less interesting, submissions on the concept of "jurisdiction" and "nullity" in relation to judicial orders. Appellant contends that the earlier bench had no jurisdiction to issue the impugned directions which were without any visible legal support, that they are ''void'' as violative of the constitutional-rights of the appellant, and, also as violating the Rules of natural justice. Notwithstanding these

appeal to high-sounding and emotive appellate ous; I have serious reservations about both the permissibility-in these proceedings-of an examination of the merits of these challenges. Shri Rao''s appeal to the principle of "nullity" and reliance on a collateral challenge in aid thereof suffers from a basic fallacy as to the very concept of the jurisdiction of superior courts. In relation to the powers of superior courts, the familiar distinction between jurisdictional issues and adjudicatory issues-appropriate to Tribunals of limited jurisdiction,-has no place. Before a superior court there is no distinction in the quality of the decision-making-process respecting jurisdictional questions on the one hand and adjudicatory issues or issues pertaining to the merits, on the other.

11. The expression "jurisdiction" or the power to determine is, it is said, a verbal cast of many colours. In the case of a Tribunal, an error of law might become not merely an error in jurisdiction but might partake of the character of an error of jurisdiction. But, otherwise, jurisdiction is a ''legal shelter''-a power to bind despite a possible error in the decision. The existence of jurisdiction does not depend on the correctness of its exercise. The authority to decide embodies a privilege to bind despite error, a privilege which is inherent in and indispensable to every judicial function. The characteristic attribute of a judicial act is that it binds whether it be right or it be wrong. In Malkarjun v. Narahari [1900] 27 I.A. 216 the executing Court had quite wrongly, held that a particular person represented the estate of the deceased Judgment-debtor and put the property for sale in execution. The judicial committee said:

In doing so, the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right and if that course is not taken the decision, however wrong, cannot be disturbed.

In the course of the arguments there were references to the Anisminic case. In my view, reliance on the Anisminic principle is wholly misplaced in this case. That case related to the powers of Tribunals of limited jurisdiction. It would be a mistake of first magnitude to import these inhibitions as to jurisdiction into the concept of the jurisdiction of superior courts. A finding of a superior court even on a question of its own jurisdiction, however grossly erroneous it may, otherwise be, is not a nullity; nor one which could at all be said to have been reached without jurisdiction, susceptible to be ignored or to admit of any collateral-attack. Otherwise, the adjudications of superior courts would be held-up to ridicule and the remedies generally arising from and considered concomitants of such classification of judicial-errors would be so seriously abused and expanded as to make a mockery of those foundational principles essential to the stability of administration of justice.

The superior court has jurisdiction to determine its own jurisdiction and an error in that determination does not make it an error of jurisdiction. Holdsworth (History of English Law vol. 6 page 239) refers to the theoretical possibility of a judgment of a

superior court being a nullity if it had acted coram-non-judice. But who will decide that question if the infirmity stems from an act of the Highest Court in the land? It was observed:

...It follows that a superior court has jurisdiction to determine its own jurisdiction; and that therefore an erroneous conclusion as to the ambit of its jurisdiction is merely an abuse of its jurisdiction, and not an act outside its jurisdiction....

...In the second place, it is grounded upon the fact that, while the judges of the superior courts are answerable only to God and the king, the judges of the inferior courts are answerable to the superior courts for any excess of jurisdiction....

Theoritically the judge of a superior court might be liable if he acted coram non judice; but there is no legal tribunal to enforce that liability. Thus both lines of reasoning led to the same conclusion-the total immunity of the judges of the superior courts.

Rubinstein in his "Jurisdiction and Illegality" says:

...In practice, every act made by a superior court is always deemed valid (though, possibly, voidable) wherever it is relied upon. This exclusion from the rules of validity is indispensable. Superior courts knew the final arbiters of the validity of acts done by other bodies; their own decisions must be immune from collateral attack unless confusion is to reign. The superior courts decisions lay down the rules of validity but are not governed by these rules.

(See P. 12)

A clear reference to inappositeness and limitations of the Anisminic Rule in relation to Superior Court so to be found in the opinion of Lord Diplock in Re Racal Communications Ltd. [1980 2 All E.R. 634], thus:

There is in my view, however, also an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court acting in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his jurisdiction, or as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their judicial capacity as such can be corrected only by means of appeal to an appellate court and if, as in the instant case, the statute provides that the judge''s decision shall not be appealable,

they cannot be corrected at all.

[See page 639 & 640].

In the same case, Lord Salmon, said:

The Court of Appeal, however, relied strongly on the decision of your Lordship''s House in Anisminic Ltd. v. Foreign Compensation Commission [1969] 1 All ER 209. That decision however was not, in my respectful view in any way relevant to the present appeal. It has no application to any decision or order made at first instance in the High Court of Justice. It is confined to decisions made by commissioners, tribunals or inferior courts which can now be reviewed by the High Court of Justice, just as the decision of inferior courts used to be reviewed by the old Court of King''s Bench under the prerogative writs. If and when any such review is made by the High Court, it can be appealed to the Court of Appeal and hence, by leave, to your Lordship''s House. [See page 641].

Again in Issac v. Robertson [1984] 3 All E.R. 140 the Privy Council reiterated the fallacy of speaking in the language of Nullity, void, etc, in relation to Judgments of superior courts. It was pointed out that it could only be called ''irregular''. Lord Diplock observed:

Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are ''void'' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are ''voidable'' and may be enforced unless and until they are set aside. Dicta that refers to the possibility of these being such a distinction between orders to which the description ''void'' and void able'' respectively have been applied can be found in the opinion given by the judicial committee of the Privy Council in Marsh v. Marsh, [1945] AC 271 and Maxfoy United Africa Co. Ltd. [1961] All EWR 1169 AC 152, but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall in a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceeding to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind....

The contrasting legal concepts of voidness and void ability form part of the English Law of contract. They art inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies. [See page 143]

Superior courts apart, even the ordinary civil courts of the land have jurisdiction to decide questions of their own jurisdiction. this Court, in the context of the question whether the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, was not attracted to the premises in question and whether, consequently, the exclusion u/s 28 of that Act, of the jurisdiction of all courts other than the Court of Small Causes in Greater Bombay did not operate, observed:

...The crucial point, therefore, in order to determine the question of the jurisdiction of the City Civil Court to entertain the suit, is to ascertain whether, in view of Section 4 of the Act, the Act applies to the premises at all. If it does, the City Civil Court has no jurisdiction but if it does not then it has such jurisdiction, The question at once arises as to who is to decide this point in controversy. It is well settled that a Civil Court has inherent power to decide the question of its own jurisdiction, although, as a result of its enquiry, it may turn out that it has no jurisdiction over the suit. Accordingly, we think, in agreement with High Court that this preliminary objection is not well founded in principle or on authority and should be rejected. Bhatia Co-operative Housing Society Ltd. Vs. D.C. Patel. Bhatia Co-operative Housing Society Ltd. v. D.C. Patel]

It would, in my opinion, be wholly erroneous to characterise the directions issued by the five Judge bench as a nullity, amenable to be ignored or so declared in a collateral attack.

12. A judgment, inter-parties, is final and concludes the parties. In Re Hastings (No. 3) [1959] 1 All ER 698, the question arose whether despite the refusal of a writ of Habeas Corpus by a Divisional Court of the Queen''s bench, the petitioner had, yet, a right to apply for the writ in the Chancery Division. Harman J. called the supposed right an illusion:

Counsel for the applicant, for whose argument I for one am much indebted, said that the clou of his case as this, that there still was this right to go from Judge to Judge, and that if that were not so the whole structure would come to the ground....

I think that the Judgment of the Queen''s bench Divisional Court did make it clear that this supposed right was an illusion. If that be right, the rest follows. No body doubts that there was a right to go from court to court, as my Lord has already explained. There are no different courts now to go to. The courts that used to sit in bane have been swept away and their places taken by Divisional Courts, which are entirely the creatures of statute and rule. Applications for a writ of habeas corpus are assigned by the rule to Divisional Courts of the Queen''s Bench Division, and that is the only place to which a applicant may go.... [See page 701]

In 282073 it was held:

It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public

interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res-judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32. [See page 583].

In 284970 Bachawat J. recognised the same limitations even in matter pertaining to the conferment of fundamental rights.

...The right to move this Court for enforcement of fundamental rights is guaranteed by Article 32. The writ under Article 32 issues as a matter of course if a breach of a fundamental right is established. But this does not mean that in giving relief under Article 32 the Court must ignore and trample under foot all laws of procedure, evidence, limitation, res-judicata and the like....

...the object of the statutes of limitation was to give effect to the maxim ''interest reipublicae ut sit finis litium'' (Cop Litt 303)-the interest of the State requires that there should be a limit to litigation. The rule of res-judicata is founded upon the same rule of public policy.... [See page 842 and 843]

It is to be recalled that an earlier petition, W.P. No. 708 of 1984 under Article 32 moved before this Court had been dismissed, reserving leave to the appellant to seek review.

The words of Venkataramiah J in 276375 are apt and are attracted to the present case:

The reversal of the earlier judgment of this Court by this process strikes at the finality of judgments of this Court and would amount to the abuse of the power of review vested in this Court, particularly in a criminal case. It may be noted that no other court in the country has been given the power of review in criminal cases. I am of the view that the majority judgment of Baharul Islam and R.B. Misra, JJ. should remain undisturbed. This case cannot be converted into an appeal against the earlier decision of this Court.

(Emphasis supplied)

13. The exclusiveness of jurisdiction of the special judge u/s 7(1) of 1952 Act, in turn, depends on the construction to be placed on the relevant statutory-provision. If on such a construction, however erroneous it may be, the court holds that the operation of Section 407, Cr.P.C. is not excluded, that interpretation will denude the plenitude of the exclusivity claimed for the forum. To say that the court usurped legislative powers and created a new jurisdiction and a new forum ignores the basic concept of functioning of courts. The power to interpret laws is the domain and function of courts. Even in regard to the country''s fundamental-law as a Chief Justice of the Supreme Court of the United States said : "but the Constitution is what the judges say it is". In Thomas v. Collins,(1945) US 516 it was said:

at page 943-4

The case confronts us again with the duty our system places on this Court to say where the individual''s freedom ends and the State''s power begins. Choice on that border, now as always is, delicate....

I am afraid appellant does himself no service by resting his case on these high conceptual fundamentals.

14. The pronouncements of every Division-Bench of this Court are pronouncements of the Court itself. A larger bench, merely on the strength of its numbers, cannot un-do the finality of the decisions of other division benches. If the decision suffers from an error the only way to correct it, is to go in Review under Article 137 read with Order 40 Rule I framed under Article 145 before "as far as is practicable" the same judges. This is not a matter merely of some dispensable procedural ''form'' but the requirement of substance. The reported decisions on the review power under the CPC when it had a similar provision for the same judges hearing the matter demonstrate the high purpose sought to be served thereby.

15. In regard to the concept of Collateral Attack on Judicial Proceedings it is instructive to recall some observations of Van Fleet on the limitations-and their desirability-on such actions.

One who does not understand the theory of a science, who has no clear conception of its principles, cannot apply it with certainty to the problems; it is adapted to solve. In order to understand the principles which govern in determining the validity of RIGHTS AND TITLES depending upon the proceedings of judicial tribunals, generally called the doctrine of COLLATERAL ATTACK ON JUDGMENTS, it is necessary to have a clear conception of the THEORY OF JUDICIAL PROCEEDINGS....

...And as no one would think of holding a judgment of the court of last resort void if its jurisdiction were debatable or even colorable, the same rule must be applied to the judgments of all judicial tribunals. This is the true theory of judicial action when viewed collaterally. If any jurisdictional question is debatable or colorable, the tribunal must decide it; and an erroneous conclusion can ony be corrected by some proceeding provided by law for so doing, commonly called a Direct Attack. It is only where it can be shown lawfully, that some matter or thing essential to jurisdiction is wanting, that the proceeding is void, collaterally.

It is the duty of the courts to set their faces against all collateral assaults on judicial proceedings for two reasons, namely : First. Not one case in a hundred has any merits in it....

...Second. The second reason why the courts should reduce the chances for a successful collateral attack to the lowest minimum is, that they bring the courts themselves into disrepute. Many people look upon the courts as placed where jugglery and smartness are substituted for justice....

...Such things tend to weaken law and order and to cause men to settle their rights by violence. For these reasons, when the judgment rendered did not exceed the possible power of the court, and the notice was sufficient to put the defendant upon inquiry, a court should hesitate long before holding the proceedings void collaterally....

(emphasis supplied)

16. But in certain cases, motions to set aside Judgments are permitted where, for instance a judgment was rendered in ignorance of the fact that a necessary party had not been served at all, and was wrongly shown as served or in ignorance of the fact that a necessary-party had died and the estate was not represented. Again, a judgment obtained by fraud could be subject to an action for setting it aside. Where such a judgment obtained by fraud tended to prejudice a non-party, as in the case of judgments in-rem such as for divorce, or justification or probate etc. even a person, not eo-nomine a party to the proceedings, could seek a setting-aside of the judgment.

Where a party has had no notice and a decree is made against him, he can approach the court for setting-aside the decision. In such a case the party is said to become entitled to relief ex-debito justitiae, on proof of the fact that there was no service. This is a class of cases where there is no trial at all and the judgment is for default. D.N. Gordan, in his "Actions to set aside judgments." 1961 77 L Q R 356 says:

The more familiar applications to set aside judgments are those made on motion and otherwise summarily. But these are judgments obtained by default, which do not represent a judicial determination. In general, Judgments rendered after a trial are conclusive between the parties unless and until reversed on appeal. Certainly in general judgments of superior Courts cannot be overturned or questioned between the parties in collateral actions. Yet there is a type of collateral action known as an action of review, by which even a superior court''s judgment can be questioned, even between the parties, and set aside....

Cases of such frank failure of natural justice are obvious cases where Relief is granted as of right. Where a person is not actually served but is held erroneously, to have been served, he can agitate that grievance only in that forum or in any further proceeding therefrom. In Issac''s case [1984] 3 All ER 140 privy council referred to:

...a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex-debito justitiae in exercise of the inherent jurisdiction of the court without needing to have recourse to the Rules that deal expressly with proceedings to set-aside orders for irregularity and give to the judge a discretion as to the order he will make.

In the present case by the order dated 5.4.1984 a five judge bench set-out, what according to it, was, the legal basis and source of jurisdiction to order transfer. On

17.4.1984 appellant''s writ petition challenging that transfer as a nullity was dismissed. These orders are not which appellant is entitled to have set-aside ex-debito justitiae by another bench. Reliance on the observations in Issac''s case is wholly misplaced.

The decision of the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh 2 NI Act 181 illustrates the point. Referring to the law on the matter, Lord Brougham said:

It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an Order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever, therefore, has been really determined in these Courts must stand, there being no power of re-hearing for purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. The Courts of Equity may correct the Decrees made while they are in minutes; when they are complete they can only vary them by re-hearing; and when they are signed and enrolled they can no longer be reheard, but they must be altered, if at all, by Appeal. The Courts of Law, after the term in which the judgments are given can only alter them so as to correct misprisions, a power given by the Statutes of Amendment. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects, in order to enable the Decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1669, of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an Appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a rehearing upon the whole cause, and an entire alteration of the judgment once pronounced....

17. The second class of cases where a judgment is assailed for fraud, is illustrated by the Duchess of Kingston''s case (1776 2 Sm. L.C. 644 13th Ed.). In that case, the Duchess was prosecuted for bigamy on the allegation that she entered into marriage while her marriage to another person, a certain Hervey, was still subsisting. In her defence, the Duchess relied upon a decree of jactitation from an ecclesiastical court which purported to show that she had never been married to Hervey. The prosecution sought to get over this on the allegation the decree was

obtained in a sham and collusive proceeding. The House of Lords held the facts established before Court rendered the decree nugatory and was incapable of supplying that particular defence. De Grey CJ said that the collusive decree was not be impeached from within; yet like all other acts of the highest authority, it is impeachable from without, although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud which affected the judgment was described by the learned Chief Justice as an "extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice."

18. The argument of nullity is too tall and has no place in this case. The earlier direction proceeded on a construction of Section 7(1) of the Act and Section 407 Cr.P.C. We do not sit here in appeal over what the five Judge bench said and proclaim how wrong they were. We are, simply, not entitled to embark, at a later stage, upon an investigation of the correctness of the very same decision. The same bench can, of course, reconsider the matter under Article 137.

However, even to the extent the argument goes that the High Court u/s 407 Cr.P.C. could not withdraw to itself a trial from Special-Judge under the 1952 Act, the view of the earlier bench is a possible view. The submissions of Shri Ram Jethmalani that the exclusivity of the jurisdiction claimed for the special forum under the 1952 Act is in relation to Courts which would, otherwise, be Courts of competing or co-ordinate jurisdictions and that such exclusivity does not effect the superior jurisdiction of the High Court to withdraw, in appropriate situations, the case to itself in exercise of its extraordinary original criminal jurisdiction; that canons of Statutory-construction, appropriate to the situation, require that the exclusion of jurisdiction implied in the 1952 amending Act should not be pushed beyond the purpose sought to be served by the amending law; and that the law while creating the special jurisdiction did not seek to exclude the extra-ordinary jurisdiction of the High Court are not without force; The argument, relying upon Kavasji Pestonji Dalal v. Rustomji Sorabji Jamadar and Anr, AIR 1949 Bombay 42 that while the ordinary competing jurisdictions of other Courts were excluded, the extraordinary jurisdiction of the High Court was neither intended to be, nor, in fact, affected, is a matter which would also bear serious examination. In Sir Francis Bennion''s Statutory Interpretation, there are passages at page 433 which referring to presumption against implied repeal, suggest that in view of the difficulties in determining whether an implication of repeal was intended in a particular situation it would be a reasonable presumption that where the legislature desired a repeal, it would have made it plain by express words. In Sutherland Statutory construction the following passages occur:

Prior statutes relating to the same subject matter are to be compared with the new provisions; and if possible by reasonable construction, both are to be so construed that effect is given to every provision of each. Statutes in pari materia although in apparent conflict, are so far as reasonably possible constructed to be in harmony with each other.

(Emphasis supplied)

When the legislature enacts a provision, it has before it a 11 the other provisions relating to the same subject matter which it enacts at that time, whether in the same statute or in a separate Act. It is evident that it has in mind the provisions of a prior Act to which it refers, whether it phrases the later Act as amendment or an independent Act. Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is rec ogzant of them both, without expressly recognizing the inconsistency.

(emphasis supplied)

Reliance by Shri Ram Jethmalani on these principles to support his submission that the power u/s 407 was unaffected and that the decision in State of Rajasthan v. Gurucharan Das Chadda (supra), can not also be taken to have concluded the matter, is not un-arguable. I would, therefore, hold contentions (a) and (b) against appellant.

19. Re: contention (c):

The fundamental right under Article 14, by all reckoning, has a very high place in constitutional scale of values. Before a person is deprived of his personal liberty, not only that the Procedure established by law must strictly be complied with and not departed from to the disadvantage or detriment of the person but also that the procedure for such deprivation of personal liberty must be reasonable, fair and just. Article 21 imposes limitations upon the procedure and requires it to conform to such standards of reasonableness, fairness and justness as the Court acting as sentinel of fundamental rights would in the context, consider necessary and requisite. The court will be the arbiter of the question whether the procedure is reasonable, fair and just.

If the operation of Section 407, Cr.P.C. is not impliedly excluded and therefore, enables the withdrawal of a case by the High Court to itself for trial as, indeed, has been held by the earlier bench, the argument based on Article 14 would really amount to a challenge to the very vires of Section 407. All accused persons cannot claim to be tried by the same Judge. The discriminations-inherent in the choice of one of the concurrent jurisdictions-are not brought about by an inanimate statutory-rule or by executive fiat. The withdrawal of a case u/s 407 is made by a conscious judicial act and is the result of judicial discernment. If the law permits the withdrawal of the trial to the High Court from a Special Judge, such a law enabling withdrawal would not, prima facie, be bad as violation of Article 14. The five Judge bench in the earlier case has held that such a transfer is permissible under law. The appeal to the principle in Anwar Ali Sarkar''s case (supra), in such a context would be somewhat out of place.

If the law did not permit such a transfer then the trial before a forum which is not according to law violates the rights of the accused person. In the earlier decision the transfer has been held to be permissible. That decision has assumed finality.

If appellant says that he is singled out for a hostile treatment on the ground alone that he is exposed to a trial before a Judge of the High Court then the submission has a touch of irony. Indeed that a trial by a Judge of the High Court makes for added re-assurance of justice, has been recognised in a number of judicial pronouncement. The argument that a Judge of the High Court may not necessarily possess the statutory-qualifications requisite for being appointed as a Special Judge appears to be specious. A judge of the High Court hears appeals arising from the decisions of the Special Judge, and exercises a jurisdiction which includes powers co-extensive with that of the trial court. There is, thus, no substance in contention (c).

21. Re : Contention (d):

This grievance is not substantiated on facts; nor, having regard to the subsequent course of events permissible to be raised at this stage. These directions, it is not disputed, were issued on 16.2.1984 in the open Court in the presence of appellant''s learned Counsel at the time of pronouncement of the judgment. Learned Counsel had the right and the opportunity of making an appropriate submission to the court as to the permissibility or otherwise of the transfer. Even if the submissions of Shri Ram Jethmalani that in a revision application Section 403 of the Criminal Procedure Code does not envisage a right of being heard and that transfer of a case to be tried by the Judge of the High Court cannot, in the estimate of any right thinking person, be said to be detrimental to the accused person is not accepted, however, applicant, by his own conduct, has disentitled himself to make grievance of it in these proceedings. It cannot be said that after the directions were pronounced and before the order was signed there was no opportunity for the appellant''s learned Counsel to make any submissions in regard to the alleged illegality or impropriety of the directions. Appellant did not utilise the opportunity. That apart, even after being told by two judicial orders that appellant, if aggrieved, may seek a review, he did not do so. Even the grounds urged in the many subsequent proceedings appellant took to get rid of the effect of the direction do not appear to include the grievance that he had no opportunity of being heard. Where, as here, a party having had an opportunity to raise a grievance in the earlier proceedings does not do so and makes it a technicality later he cannot be heard to complain. Even in respect of so important jurisdiction as Habeas Corpus, the observation of Gibson J in Re. Tarling [1979] 1 All E.R. 981 at 987 are significant:

Firstly, it is clear to the Court that an applicant for habeas corpus is required to put forward on his initial application then whole of the case which is then fairly available to him he is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the

Court.

The true doctrine of estoppel known as res judicata does not apply to the decision of this Court on an application for habeas corpus we refer to the words of Lord Parket CJ delivering the Judgment of the Court in Re. Hastings (No. 2). There is, however, a wider sense in which the doctrine of res judicata may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore, should have been litigated in earlier proceedings....

This statement of the law by Gibson J was approved by Sir John Donaldson MR in the Court of appeal in Ali v. Secretary of State for the Home Department [1984] 1 All E.R. 1009 at 1019.

Rules of natural justice embodies fairness in-action. By all standards, they are great assurances of Justice and fairness. But they should not be pushed to a breaking point. It is not inappropriate to recall what Lord Denning said in R. v. Secretary of State for the Home Department ex-parte Mughal [1973] 3 All ER 796:

...The rules of natural justice must not be stretched too far. Only too often the people who have done wrong seek to invoke the rules of natural justice so as to avoid the consequences.

Contention (d) is insubstantial.

22. Re. Contention (e):

The contention that the transfer of the case to the High Court involves the elimination of the appellant''s right of appeal to the High Court which he would otherwise have and that the appeal under Article 136 of the Constitution is not as of right may not be substantial in view of Section 374, Cr.P.C. which provides such an appeal as of right, when the trial is held by the High Court. There is no substance in contention (e) either.

23. Re. Contention (f):

The argument is that the earlier order of the five Judge bench in so far as it violates the fundamental rights of the appellant under Article 14 and 21 must be held to be void and amenable to challenge under Article 32 in this very Court and that the decision of this Court in Premchand Garg''s case (supra) supports such a position. As rightly pointed out by Ranganath Misra, J. Premchand Garg''s case needs to be understood in the light of the observations made in Naresh Sridhar Mirajkar and Ors. v. State of Maharashtra and Anr. [1966] 3 SCC 744. In Mirajkar''s case, Gajendragadkar, CJ., who had himself delivered the opinion in Garg''s case, noticed the contention based on Garg''s case thus:

In support of his argument that a judicial decision can be corrected by this Court in exercise of its writ jurisdiction under Article 32(2), Mr. Setalvad has relied upon another decision of this Court in Prem Chand Garg v. Excise Commissioner, UP,

Allahabad (supra)....

Learned Chief Justice referring to the scope of the matter that fell for consideration in Garg''s case stated:

...It would thus be seen that the main controversy in the case of Prem Chand Garg centered round the question as to whether Article 145 conferred powers on this Court to make rules, though they may be inconsistent with the constitutional provisions prescribed by part III. Once it as held that the powers under Article 142 had to be read subject not only to the fundamental rights, but to other binding statutory provisions, it became clear that the ruler which authorised the making of the impugned order was invalid. It was in that context that the validity of the order had to be incidentally examined. The petition was made not to challenge the order as such, but to challenge the validity of the rule under which the order was made....

Repelling the contention, learned Chief Justice said:

...It is difficult to see now this decision can be pressed into service by Mr. Setalvad in support of the argument that a judicial order passed by this Court was held to be subject to the writ jurisdiction of this Court itself....

A passage from Kadish & Kadish "Discretion to Disobey", 1973 Edn. may usefully by recalled:

On one view, it would appear that the right of a citizen to defy illegitimate judicial authority should be the same as his right to defy illegitimate legislative authority. After all, if a rule that transgresses the Constitution or is otherwise invalid is no law at all and never was one, it should hardly matter whether a court or a legislature made the rule. Yet the prevailing approach of the courts has been to treat invalid court orders quite differently from invalid statutes. The long established principle of the old equity courts was that an erroneously issued injunction must be obeyed until the error was judicially determined. Only where the issuing court could be said to have lacked jurisdiction in the sense of authority to adjudicate the cause and to reach the parties through its mandate were disobedient contemnors permitted to raise the invalidity of the order as a full defence. By and large, American courts have declined to treat the unconstitutionality of a court order as a jurisdictional defect within this traditional equity principle, and in notable instances they have qualified that principle even where the defect was jurisdiction in the accepted sense. (See 111).

Indeed Ranganath Misra, J. in his opinion rejected the contention of the appellant in these terms:

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

There is no substance in contention (f) either.

24. Contention (g):

It is asserted that the impugned directions issued by the five Judge Bench was per-incuriam as it ignored the Statute and the earlier Chaada''s case.

But the point is that the circumstance that a decision is reached per-incuriam, merely serves to denude the decision of its precedent-value. Such a decision would not be binding as a judicial precedent. A co-ordinate bench can disagree with it and decline to follow it. A larger bench can over rule such decision. When a previous decision is so overruled it does not happen-nor has the overruling bench any jurisdiction so to do-that the finality of the operative order, inter-parties, in the previous decision is overturned. In this context the word ''decision'' means only the reason for the previous order and not the operative-order in the previous decision, binding inter-parties. Even if a previous decision is overruled by a larger-bench, the efficacy and binding nature, of the adjudication expressed in the operative order remains undisturbed inter-parties. Even if the earlier decision of the five Judge bench is per-incuriam the operative part of the order cannot be interfered within the manner now sought to be done. That apart the five Judge bench gave its reason. The reason, in our opinion, may or may not be sufficient. There is advertence to Section 7(1) of the 1952 Act and to the exclusive jurisdiction created thereunder. There is also reference to Section 407 of the Criminal Procedure Code. Can such a decision be characterised as one reached per-incurium? Indeed, Ranganath Misra, J. says this on the point:
Overruling when made by a larger bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without affecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger bench....

I respectfully agree. Point (g) is bereft of substance and merits.

25. Re : Contention (h):

The argument is that the appellant has been prejudiced by a mistake of the Court and it is not only within power but a duty as well, of the Court to correct its own mistake, so that no party is prejudiced by the Court''s mistake : Actus Curiae Neminem Gravabid.

I am afraid this maxim has no application to conscious conclusions reached in a judicial decision. The maxim is not a source of a general power to reopen and rehear adjudication which have otherwise assumed finality. The maxim operates in a different and narrow area. The best illustration of the operation of the maxim is provided by the application of the rule of nunc-pro-tunc. For instance, if owing to the delay in what the court should, otherwise, have done earlier but did later, a party suffers owing to events occurring in the interrugnum, the Court has the power to remedy it. The area of operation of the maxim is, generally, procedural. Errors in

judicial findings, either of facts or law or operative decisions consciously arrived at as a part of the judicial-exercise cannot be interfered with by resort to his maxim. There is no substance in contention (h).

26. It is true that the highest court in the land should not, by technicalities of procedure forge fetters on its own feet and disable itself in cases of serious miscarriages of justice. It is said that "Life of law is not logic; it has been experience." But it is equally true as Cordozo said : But Holmes did not tell us that logic is to be ignored when experience is silent. Those who do not put the teachings of experience and the lessons of logic out of consideration would tell what inspires confidence in the judiciary and what does not. Judicial vacillations fall in the latter category and undermine respect of the judiciary and judicial institutions, denuding thereby respect for law and the confidence in the even-handedness in the administration of justice by Courts. It would be gross injustice, says an author, (Miller-''data of jurisprudence'') to decide alternate cases on opposite principles. The power to alter a decision by review must be expressly conferred or necessarily inferred. The power of review-and the limitations on the power-under Article 137 are implicit recognitions of what would, otherwise, be final and irrevocable. No appeal could be made to the doctrine of inherent powers of the Court either. Inherent powers do not confer, or constitute a source of, jurisdiction. They are to be exercised in aid of a jurisdiction that is already invested. The remedy of the appellant, if any, is recourse to Article 137; no where else. This appears to me both good sense and good law.
The appeal is dismissed.

S. Ranganathan, J.
I have had the benefit of perusing the drafts of the judgments proposed by my learned brothers Sabyasachi Mukharji, Ranganath Misra and Venkatachaliah, JJ. On the question whether the direction given by this Court in its judgment dated 16.2.1984 should be recalled, I find myself in agreement with the conclusion of Venkatachaliah, J. (though for slightly different reasons) in preference to the conclusion reached by Sabyasachi Mukharji, J. and Ranganath Misra, J. I would, therefore, like to set out my views separately on this issue.

THE ISSUES

1. This is an appeal by special leave from a judgment of Shah J., of the Bombay High Court. The appellant is being tried for offences under Sections 120B, 420, 161 and 165 of the Indian Penal Code (I.P.C.) read with Section 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947. The proceedings against the appellant were started in the Court of Sri Bhutta, a Special Judge, appointed u/s 6(1) of the Criminal Law (Amendment) Act, 1952 (hereinafter referred to as ''the 1952 Act''). The proceedings have had a chequered career as narrated in the judgment of my learned brother Sabyasachi Mukharji, J. Various issues have come up for

consideration of this Court at the earlier stages of the proceedings and the judgments of this Court have been reported in 278207 and 287190 . At present the appellant is being tried by a learned Judge of the Bombay High Court nominated by the Chief Justice of the Bombay High Court in pursuance of the direction given by this Court in its order dated 16.2.1984 (reported in 278507 . By the order presently under appeal, the learned Judge (s) framed as many as 79 charges against the appellant and (b) rejected the prayer of the appellant that certain persons, named as co-conspirators of the appellant in the complaint on the basis of which the prosecution has been launched should be arrayed as co-accused along with him. But the principal contention urged on behalf of the appellant before us centers not round the merits of the order under appeal on the above two issues but round what the counsel for the appellant has described as a fundamental and far-reaching objection to the very validity of his trial before the learned Judge. As already stated, the trial is being conducted by the learned Judge pursuant to the direction of this Court dated 16.2.1984. The contention of the learned Counsel is that the said direction is per incuriam, illegal, invalid, contrary to the principles of natural justice and violative of the fundamental rights of the petitioner. This naturally raises two important issues for our consideration:

A. Whether the said direction is inoperative, invalid or illegal, as alleged; and

B. Whether, if it is, this Court can and should recall, withdraw, revoke or set aside the same in the present proceedings.

Since the issues involve a review or reconsideration of a direction given by a Bench of five judges of this Court, this seven-judge Bench has been constituted to hear the appeal.

2. It is not easy to say which of the two issues raised should be touched upon first as, whichever one is taken up first, the second will not arise for consideration unless the first is answered in the affirmative. However, as the correctness of the direction issued is impugned by the petitioner, as there is no detailed discussion in the earlier order on the points raised by the petitioner, and as Sabyasachi Mukharji, J. has expressed an opinion on these contentions with parts of which I am unable to agree, it will be perhaps more convenient to have a look at the first issue as if it were coming up for consideration for the first time before us and then, depending upon the answer to it, consider the second issue as to whether this Court has any jurisdiction to recall or revoke the earlier order. The issues will, therefore, be discussed in this order.

A. ARE THE DIRECTIONS ON 16.2.1984 PROPER, VALID AND LEGAL?

3. For the appellant, it is contended that the direction given in the last para of the order of the Bench of five Judges dated 16.2.1984 (extracted in the judgment of Sabyasachi Mukharji, J.) is vitiated by illegality, irregularity and lack of jurisdiction on the following grounds:

(i) Conferment of jurisdiction on courts is the function of the legislature. It was not competent for this Court to confer jurisdiction on a learned Judge of the High Court to try the appellant, as, under the 1952 Act, an offence of the type in question can be tried only by a special Judge appointed thereunder. This has been overlooked while issuing the direction which is, therefore, per Incuriam.

(ii) The direction above-mentioned (a) relates to an issue which was not before the Court (b) on which no arguments were addressed and (c) in regard to which the appellant had no opportunity to make his submissions. It was nobody''s case before the above Bench that the trial of the accused should no longer be conducted by a Special Judge but should be before a High Court Judge.

(iii) In issuing the impugned direction, the Bench violated the principles of natural justice, as mentioned above. It also overlooked that, as a result thereof, the petitioner (a) was discriminated against by being put to trial before a different forum as compared to other public servants accused of similar offences and (b) lost valuable rights of revision and first appeal to the High Court which he would have had, if tried in the normal course.

The direction was thus also violative of natural justice as well as the fundamental rights of the petitioner under Article 14 and 21 of the Constitution.

Primary Jurisdiction

4. There can be-and, indeed, counsel for the respondent had-no quarrel with the initial premise of the learned Counsel for the appellant that the conferment of jurisdiction on courts is a matter for the legislature. Entry 77 of List I, entry 3 of List II and entries 1, 2, 11A and 46 of List III of the Seventh Schedule of the Constitution set out the respective powers of parliament and the State Legislatures in that regard. It is common ground that the jurisdiction to try offences of the type with which are concerned here is vested by the 1952 Act in Special Judges appointed by the respective State Governments. The first question that has been agitated before us is whether this Court was right in transferring the case for trial from the Court of a Special Judge, to a Judge nominated by the Chief Justice of Bombay.

High Court''s Power of Transfer

5. The power of the Supreme Court to transfer cases can be traced, in criminal matters, either to Article 139A of the Constitution or Section 406 of the CrPC ("Cr. P.C.), 1973. Here, again, it is common ground that neither of these provisions cover the present case. Sri Jethmalani, learned Counsel for the respondent, seeks to support the order of transfer by reference to Section 407 (not Section 406) of the Code and Clause 29 of the Letters Patent of the Bombay High Court. Section 407 reads thus:

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

it may order-

(i) that any offence be inquired into or tried by any Court not qualified u/s 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offences;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2)the High Court may act either on the report of the lower court or on the application of a party interested or on its own initiative:

XXX XXX XXX XXX XXX XXX XXX XXX XXX

(9) Nothing in this section shall be deemed to affect any order of Government u/s 197.

And Clause 29 of the Letters Patent of the Bombay High Court runs thus:

And we do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of appeal or superior jurisdiction, and also to direct the preliminary investigation of trial of any criminal case by any officer of Court otherwise competent to investigate or try it though such case belongs, in ordinary course, to the jurisdiction of some other officer, of Court.

The argument is that this power of transfer vested in the High Court can well be exercised by the Supreme Court while dealing with an appeal from the High Court in the case.

6. For the appellant, it is contended that the power of transfer u/s 407 cannot be invoked to transfer a case from a Special Judge appointed under the 1952 Act to the High Court. Learned Counsel for the appellant contends that the language of Section 7(1) of the Act is mandatory; it directs that offences specified in the Act can be tried only by persons appointed, u/s 6(2) of the Act, by the State Government, to be special judges, No other Judge, it is said, has jurisdiction to try such a case, even

if he is a Judge of the High Court. In this context, it is pointed out that a person, to be appointed as a special Judge, u/s 6(2) of the 1952 Act, should be one who is, or has been, a Sessions Judge (which expression in this context includes an Additional Sessions Judge and/or an Assistant Sessions Judge) All High Court Judges may not have been Sessions Judges earlier and, it is common ground, Shah, J. who has been nominated by the Chef Justice for trying this case does not fulfill the qualifications prescribed for appointment as a Special Judge. But, that consideration apart, the argument is that, while a High Court can transfer a case from one special judge to another, and the Supreme Court, from a special judge in one State to a special judge in another State, a High Court cannot withdraw a case from a Special Judge to itself and the Supreme Court cannot transfer a case from a Special Judge to the High Court.

7. On the other hand, it is contended for the respondent that the only purpose of the 1952 Act is to ensure that cases of corruption and bribery do not get bogged up in the ordinary criminal courts which are over-burdened with all sorts of cases. Its object is not to create special courts n the sense of courts manned by specially qualified personnel or courts following any special type of procedure. All that is done is to earmark some of the existing sessions judges for trying these offences exclusively. The idea is just to segregate corruption and bribery cases to a few of the sessions judges so that they could deal with them effectively and expeditiously. It is a classification in which the emphasis is on the types of offences and nature of offenders rather than on the qualifications of judges. That being so, the requirement in Section 7(1) that these cases should be tried by special judges only is intended just to exclude their trial by the other normal criminal courts of coordinate jurisdiction and not to exclude the High Court.

8. Before dealing with these contentions, it may be useful to touch upon the question whether a judge of a High Court can be appointed by the State Government as a special judge to try offences of the type specified in Section 6 of the 1952 Act. It will be seen at once that not all the judges of the High Court (but only those elevated from the State subordinate judiciary) would fulfill the qualifications prescribed u/s 6(2) of the 1952 Act. Though there is nothing in Sections 6 and 7 read together to preclude altogether the appointment of a judge of the High Court fulfilling the above qualifications as a special judge, it would appear that such is not the (atleast not the normal) contemplation of the Act. Perhaps it is possible to argue that, under the Act, it is permissible for the State Government to appoint one of the High Court Judges (who has been a Sessions Judge) to be a Special Judge under the Act. If that had been done, that Judge would have been a Special Judge and would have been exercising his original jurisdiction in conducting the trial. But that is not the case here. In response to a specific question put by us as to whether a High Court Judge can be appointed as a Special Judge under the 1952 Act, Shri Jethmalani submitted that a High Court Judge cannot be so appointed. I am inclined to agree. The scheme of the Act, in particular the provisions contained in

Sections 8(3A) and 9, militate against this concept. Hence, apart from the fact that in this case no appointment of a High Court Judge, as a Special Judge, has in fact been made, it is not possible to take the view that the statutory provisions permit the conferment of a jurisdiction to try this case on a High Court Judge as a Special Judge.

9. Turning now to the powers of transfer u/s 407, one may first deal with the decision of this Court in Gurucharan Das Chadha v. State of Rajasthan [1966] 2 S.C.R. 678 on which both counsel strongly relied. That was a decision by three judges of this Court on a petition u/s 527 of the 1898 Cr.P.C. (corresponding to Section 406 of the 1973 Cr.P.C.). The petitioner had prayed for the transfer of a case pending in the court of a Special Judge in Bharatpur, Rajasthan to another criminal court of equal or superior jurisdiction subordinate to a High Court other than the High Court of Rajasthan. The petition was eventually dismissed on merits. But the Supreme Court dealt with the provisions of Section 527 of the 1898 Cr.P.C. in the context of an objection taken by the respondent State that the Supreme Court did not have the jurisdiction to transfer a case pending before the Special Judge, Bharatpur. The contention was that a case assigned by the State Government under the 1952 Act to a Special Judge cannot be transferred at all because, under the terms of that Act, which is a self-contained special law, such a case must be tried only by the designated Special Judge. The Court observed that the argument was extremely plausible but not capable of bearing close scrutiny. After referring to the provisions of Section 6, 7 and 8 of the 1952 Act, the Court set out the arguments for the State thus:

The Advocate-General, Rajasthan, in opposing the petition relies principally on the provisions of Section 7(1) and 7(2) and contends that the two sub-sections create two restrictions which must be read together. The first is that offences specified in Section 6(1) can be tried by Special Judges only. The second is that every such offence shall be tried by the Special Judge for the area within which it is committed and if there are more special judges in that area by the Special Judge chosen by the Government. These two conditions, being statutory, it is submitted that no order can be made u/s 527 because, on transfer, even if a special judge is entrusted with the case, the second condition is bound to be broken.

Dealing with this contention the Court observed:

This condition, if literally understood, would lead to the conclusion that a case once made over to a special Judge in an area where there is no other special Judge, cannot be transferred at all. This could hardly have been intended. If this were so, the power to transfer a case intra-state u/s 526 of the CrPC, on a parity of reasoning, must also be lacking. But this Court in 284785 unheld the transfer of a case by the High Court which took it to a special judge who had no jurisdiction in the area where the offence was committed. In holding that the transfer was valid this Court relied upon the third sub-section of Section 8 of the Act. That sub-section preserves the application of any provision of the CrPC if it is not inconsistent with the Act, save as

provided in the first two sub-sections of that section. The question, therefore, resolves itself to this : Is there an inconsistency between Section 527 of the Code and the second sub-section of Section 7? The answer is that there is none. Apparently this Court in the earlier case found no inconsistency and the reasons appear to be there: The condition that an offence specified in Section 6(2) shall be tried by a special Judge for the area within which it is committed merely specifies which of several special Judges appointed in the State by the State Government shall try it. The provision is analogous to others under which the jurisdiction of Magistrates and Sessions Judges is determined on a territorial basis. Enactments in the CrPC intended to confer territorial jurisdiction upon courts and Presiding Officers have never been held to stand in the way of transfer of criminal cases outside those areas of territorial jurisdiction. The order of transfer when it is made under the powers given by the Code invests another officer with jurisdiction although ordinarily he would lack territorial jurisdiction to try the case. The order of this Court, therefore, which transfer(s) a case from one special Judge subordinate to one High Court to another special Judge subordinate to another High Court creates jurisdiction in the latter in much the same way as the transfer by the High Court from one Sessions Judge in a Session Division to another Sessions Judge in another Sessions Division.

There is no comparison between the first sub-section and the second sub-section of Section 7. The condition in the second sub-section of Section 7 is not of the same character as the condition in the first sub-section. The first sub-section creates a condition which is a sine qua non for the trial of certain offences. That condition is that the trial must be before a special Judge. The second sub-section distributes the work between special Judges and lays emphasis on the fact that trial must be before a special Judge appointed for the area in which the offence is committed. This second condition is on a par with the distribution of work territorially between different Sessions Judges and Magistrates. An order of transfer, by the very nature of things must, some times, result in taking the case out of the territory and the provisions of the Code which are preserved by the third sub-section of Section 8 must supervene to enable this to be done and the second sub-section of Section 7 must yield. We do not consider that this creates any inconsistency because the territorial jurisdiction created by the second sub-section of Section 7 operates in a different sphere and under different circumstances. Inconsistency can only be found if two provisions of law apply in identical circumstances and create contradictions. Such a situation does not arise when either this Court or the High Court exercises its powers of transfer. We are accordingly of the opinion that the Supreme Court in exercise of its jurisdiction and power u/s 527 of the CrPC can transfer a case from a Special Judge subordinate to the High Court to another special Judge subordinate to another High Court.

(emphasis added)

10. The attempt of Sri Jethmalani is to bring the present case within he scope of the observations contained in the latter part of the extract set out above. He submits that a special judge, except insofar as a specific provision to the contrary is made, is a court subordinate to the High Court, as explained in 279465 and proceedings before him are subject to the provisions of the 1973 Cr.P.C.; the field of operation of the first sub-section of Section 7 is merely to earmark certain Sessions Judges for purposes of trying cases of corruption by public servants and this provision is, in principle, not different from the earmarking of cases on the basis of territorial jurisdiction dealt with by Sub-Section 2 of Section 7. The argument is no doubt a plausible one. It does look somewhat odd to say that a Sessions Judge can, but a High Court Judge cannot, try an offence under the Act. The object of the Act, as rightly pointed out by counsel, is only to segregate certain cases to special courts which will concentrate on such cases so as to expedite their disposal and not to oust the superior jurisdiction of the High Court or its powers of superintendence over subordinate courts under Article 227 of the Constitution, an aspect only of which is reflected in Section 407 of the Cr.P.C. However, were the matter to be considered as res integra, I would be inclined to accept the contention urged on behalf of the appellant, for the following reasons. In the first place, the argument of the counsel for the respondent runs counter to the observations made by the Supreme Court in the earlier part of the extract set out above that the first sub-section of Section 7 and the second sub-section are totally different in character. The first sub-section deals with a sine qua non for the trial of certain offences, whereas the second sub-section is only of a procedural nature earmarking territorial jurisdiction among persons competent to try the offence. They are, therefore, vitally different in nature. The Supreme Court has clearly held in the passage extracted above that the case can be transferred only from one special judge to another. In other words, while the requirement of territorial jurisdiction is subordinate to Section 406 or 407, the requirement that the trial should be by a special judge is not. It is true that those observations are not binding on this larger Bench and moreover the Supreme Court there was dealing only with an objection based on Sub-section (2) of Section 7. It is, however, clear that the Bench, even if it had accepted the transfer petition of Gurcharan Das Chadha, would have rejected a prayer to transfer the case to a court other than that of a Special Judge appointed by the transferee State. I am in respectful agreement with the view taken in that case that there is a vital qualitative difference between the two sub-sections and that while a case can be transferred to a special judge who may not have the ordinary territorial jurisdiction over it, a transfer cannot be made to an ordinary magistrate or a court of session even if it has territorial jurisdiction. If the contention of the learned Counsel for the respondent that Section 7(1) and Section 407 operate in different fields and are not inconsistent with each other were right, it should be logically possible to say that the High Court can, u/s 407, transfer a case from a special judge to any other Court of Session. But such a conclusion would be clearly repugnant to the scheme of the 1952 Act and plainly incorrect. It is, therefore, difficult to accept the argument of Sri

Jethmalani that we should place the restriction contained in the first sub-section of Section 7 also as being on the same footing as that in the second sub-section and hold that the power of transfer contained in the Criminal Procedure Code can be availed of to transfer a case from a Special Judge to any other criminal court or even the High Court. The case can be transferred only from one special judge to another special judge; it cannot be transferred even to a High Court Judge except where a High Court Judge is appointed as a Special Judge. A power of transfer postulates that the court to which transfer or withdrawal is sought is competent to exercise jurisdiction over the case, (vide, 288435).

11. This view also derives support from two provisions of Section 407 itself. The first is this. Even when a case is transferred from one criminal court to another, the restriction as to territorial jurisdiction may be infringed. To obviate a contention based on lack of territorial jurisdiction in the transferee court in such a case, Clause (ii) of Section 407 provides that the order of transfer will prevail, lack of jurisdiction under Sections 177 to 185 of the Code notwithstanding. The second difficulty arises, even under the Cr.P.C. itself, by virtue of Section 197 which not only places restriction on the institution of certain prosecutions against public servants without Government sanction but also empowers the Government, inter alia, to determine the court before which such trial is to be conducted. When the forum of such a trial is transferred u/s 407 an objection may be taken to the continuance of the trial by the transferee court based on the order passed u/s 197. This eventuality is provided against by Section 407(9) of the Act which provides that nothing in Section 407 shall be deemed to affect an order passed u/s 407. Although specifically providing for these contingencies, the section is silent in so far as a transfer from the court of a Special Judge under the 1952 Act is concerned though it is a much later enactment.

12. On the contrary, the language of Section 7(1) of the 1952 Act places a definite hurdle in the way of construing Section 407 of the Cr.P.C. as overriding its provisions. For, it opens with the words:

Notwithstanding anything contained in the CrPC, 1898 or in any other law.

In view of this non-obstante clause also, it becomes difficult to hold that the provisions of Section 407 of the 1973 Cr.P.C. will override, or even operate consistently with, the provisions of the 1952 Act. For the same reason it is not possible to hold that the power of transfer contained in Clause 29 of the Letters Patent of the Bombay High Court can be exercised in a manner not contemplated by Section 7(1) of the 1952 Act.

13. Thirdly, whatever may be the position where a case is transferred from one special judge to another or from one ordinary subordinate criminal Court to another of equal or superior jurisdiction, the withdrawal of a case by the High Court from such a Court to itself for trial places certain handicaps on the accused. It is true that the court to which the case has been transferred is a superior court and in fact, the

High Court. Unfortunately, however, the high Court judge is not a person to whom the trial of the case can be assigned u/s 7(1) of the 1952 Act. As pointed out by the Supreme Court in 281357 at pp. 464 in a slightly different context, the circumstance that a much superior forum is assigned to try a case than the one normally available cannot by itself be treated as a "sufficient safeguard and a good substitute" for the normal forum and the rights available under the normal procedure. The accused here loses his right of coming up in revision or appeal to the High Court from the interlocutory and final orders of the trial court. He loses the right of having two courts-a subordinate court and the High Court-adjudicate upon his contentions before bringing the matter up in the Supreme Court. Though, as is pointed out later, these are not such handicaps as violate the fundamental rights of such an accused, they are circumstances which create prejudice to the accused and may not be overlooked in adopting one construction of the statute in preference to the other.

14. Sri Jethmalani vehemently contended that the construction of Section 407 sought for by the appellant is totally opposed to well settled canons of statutory construction. He urged that the provisions of the 1952 Act should be interpreted in the light of the objects it sought to achieve and its amplitude should not be extended beyond its limited objective. He said that a construction of the Act which leads to repugnancy with, or entails pro tanto repeal of, the basic criminal procedural law and seeks to divest jurisdiction vested in a superior court should be avoided. These aspects have been considered earlier. The 1952 Act sought to expedite the trial of cases involving public servants by the creation of courts presided over by experienced special judges to be appointed by the State Government. There is however nothing implausible in saying that the Act having already earmarked these cases for trial by experienced Sessions Judges made this provision immune against the applicability of the provisions of other laws in general and the Cr.P.C. in particular. Effect is only being given to these express and specific words used in Section 7(1) and no question arises of any construction being encouraged that is repugnant to the Cr.P.C. or involves an implied repeal, pro tanto, of its provisions. As has already been pointed out, if the requirement in Section 7(1) were held to be subordinate to the provisions contained in Section 406 or 407, then in principle, even a case falling under the 1952 Act can be transferred to any other Sessions Judge and that would defeat the whole purpose of the Act and is clearly not envisaged by it.

Supreme Court''s power of transfer

15. It will have been noticed that the power of transfer u/s 407 or Clause 29 of the Letters Patent which has been discussed above is a power vested in the High Court. So the question will arise whether, even assuming that the High Court could have exercised such power, the Supreme Court could have done so. On behalf of the respondent, it was contended that, as the power of the High Court u/s 407 can be exercised on application of a party or even suo motu and can be exercised by it at

any stage irrespective of whether any application or matter in connection with the case is pending before it or not, the Supreme Court, as an appellate Court, has a co-equal jurisdiction to exercise the power of transfer in the same manner as the High Court could. In any event, the Supreme Court could exercise the power as one incidental or ancillary to the power of disposing of a revision or appeal before it. The appellants, however, contend that, as the power of the Supreme Court to order transfer of cases has been specifically provided for in Section 406 and would normally exclude cases of intra-state transfer covered by Section 407 of the Code, the statute should not be so construed as to imply a power of the Supreme Court, in appeal or revision, to transfer a case from a subordinate court to the High Court. The argument also is that what the Supreme Court, as an appellate or revisional Court, could have done was either (a) to direct the High Court to consider whether this was a fit case for it to exercise its power u/s 407(1)(iv) to withdraw the case to itself and try the same with a view to expeditiously dispose it of or (b) to have withdrawn the case to itself for trial. But, it is contended, no power which the Supreme Court could exercise as an appellate or revisional Court could have enabled the Supreme Court to transfer the case from the Special Judge to the High Court.

16. Here also, the contentions of both parties are nicely balanced but I am inclined to think that had the matter been res integra and directions for transfer were being sought before us for the first time, this Court would have hesitated to issue such a direction and may at best have left it to the High Court to consider the matter and exercise its own discretion. As already pointed out, the powers of the Supreme Court to transfer cases from one court to another are to be found in Article 139-A of the Constitution and Section 406 of the Cr.P.C The provisions envisaged either inter-state transfers of cases i.e. from a court in one State to a court in another State or the withdrawal of a case by the Supreme Court to itself. Intra-State transfer among courts subordinate to a High Court inter-se or from a court subordinate to a High Court to the High Court is within the jurisdiction of the appropriate High Court. The attempt of counsel for the respondent is to justify the transfer by attributing the powers of the High Court u/s 407 to the Supreme Court in its capacity as an appellate or revisional Court. This argument overlooks that the powers of the Supreme Court, in disposing of an appeal or revision, are circumscribed by the scope of the proceedings before it. In this case, it is common ground that the question of transfer was not put in issue before the Supreme Court.

17. The reliance placed in this context on the provisions contained in Articles 140 and 142 of the Constitution and Section 401 read with Section 386 of the Cr.P.C. does not also help. Article 140 is only a provisions enabling Parliament to confer supplementary powers on the Supreme Court to enable it to deal more effectively to exercise the jurisdiction conferred on it by or under the Constitution. Article 142 is also not of much assistance. In the first place, the operative words in that article, again are "in the exercise of its jurisdiction." The Supreme Court was hearing an

appeal from the order of discharge and connected matters. There was no issue or controversy or discussion before it as to the comparative merits of a trial before a special judge vis-a-vis one before the High Court. There was only an oral request said to have been made, admittedly, after the judgment was announced. Wide as the powers under Article 141 are, they do not in my view, envisage an order of the type presently in question. The Nanavati case (1961 SCR 497, to which reference was made by Sri Jethmalani, involved a totally different type of situation. Secondly, it is one of the contentions of the appellant that an order of this type, far from being necessary for doing complete justice in the cause or matter pending before the Court, has actually resulted in injustice, an aspect discussed a little later. Thirdly, however wide and plenary the language of the article, the directions given by the Court should not be inconsistent with, repugnant to or in violation of the specific provisions of any statute. If the provisions of the 1952 Act read with Article 139-A and Sections 406-407 of the Cr.P.C. do not permit the transfer of the case from a special judge to the High Court, that effect cannot be achieved indirectly, it is, therefore, difficult to say, in the circumstances of the case, that the Supreme Court can issue the impugned direction in exercise of the powers under Article 142 or u/s 407 available to it as an appellate court.

18. Learned Counsel for the complainant also sought to support the order of transfer by reference to Section 386 and 401 of the 1973 Cr.P.C. He suggested that the Court, having set aside the order of discharge, had necessarily to think about consequential orders and that such directions as were issued are fully justified by the above provisions. He relied in this context on the decision of the Privy Council in AIR 1935 122 (Privy Council) It is difficult to accept this argument. Section 401 provides that, in the revision pending before it, the High Court can exercise any of the powers conferred on a court of appeal u/s 386. Section 386, dealing with the powers of the appellate court enables the court, in a case such as this : (i) under Clause (a), to alter or reverse the order under appeal/revision; or (ii) under Clause (e), to make any amendment or any consequential or incidental order that may be just or proper. The decision relied on by counsel, AIR 1935 122 (Privy Council) , is of no assistance to him. In that case, the Additional Judicial Commissioner, who heard an appeal on a difference of opinion between two other judicial commissioner had come to the conclusion that the conviction had to be set aside. Then he had the duty to determine what should be done aid Section 426 of the 1898 Cr.P.C. (corresponding to Section 386 of the 1973 Cr.P.C.) exactly provided for the situation and empowered him:

to reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction subordinate to such appellate Court.

In the present case, the Special Judge, Sri Sule, had discharged the accused because of his conclusion that the prosecution lacked the necessary sanction. The conclusion

of the Supreme Court that this conclusion was wrong meant, automatically, that the prosecution had been properly initiated and that the proceedings before the Special Judge should go on. The direction that the trial should be shifted to the High Court can hardly be described as a consequential or incidental order. Such a direction did not flow, as a necessary consequence of the conclusion of the court on the issues and points debated before it. I am, therefore, inclined to agree with counsel for the appellant that this Court was in error when it directed that the trial of the case should be before a High Court Judge.

19. It follows from the above discussion that the appellant, in consequence of the impugned direction, is being tried by a Court which has no jurisdiction-and which cannot be empowered by the Supreme Court-to try him. The continued trial before the High Court, therefore, infringes Article 21 of the Constitution.

Denial of equality and violation of Article 21.

20. It was vehemently contended for the appellant that, by giving the impugned direction, this Court has deprived the appellant of his fundamental rights. He has been denied a right to equality, inasmuch as his case has been singled out for trial by a different, though higher, forum as compared to other public servants. His fundamental right under Article 21, it is said, has been violated, inasmuch as the direction has deprived him of a right of revision and first appeal to the High Court which he would have had from an order or sentence had he been tried by a Special Judge and it is doubtful whether he would have a right to appeal to this Court at all. It is pointed out that a right of first appeal against a conviction in a criminal case has been held, by this Court, to be a part of the fundamental right guaranteed under Article 21 of the Constitution. It is not necessary for me to consider these arguments in view of my conclusion that the High Court could not have been directed to try the petitioner''s case. I would, however, like to say that, in my opinion, the arguments based on Articles 14 and 21 cannot be accepted, in case it is to be held for any reason that the transfer of the apellant''s case to the High Court was valid and within the competence of this Court. I say this for the following reason : If the argument is to be accepted, it will be appreciated, it cannot be confined to cases of transfer to the High Court of cases under the 1952 Act but would also be equally valid to impugn the withdrawal of a criminal case tried in the normal course under the Cr.P.C. from a subordinate court trying it to the High Court by invoking the powers u/s 407. To put it in other words, the argument, in substance, assails the validity of Section 407 of the 1973 Cr.P.C. In my opinion, this attack has to be repelled. The section cannot be challenged under Article 14 as it is based on a reasonable classification having relation to the objects sought to be achieved. Though, in general, the trial of cases will be by courts having the normal jurisdiction over them, the exigencies of the situation may require that they be dealt with by some other court for various reasons. Likewise, the nature of a case, the nature of issues involved and other circumstances may render it more expedient, effective,

expeditious or desirable that the case should be tried by a superior court or the High Court itself. The power of transfer and withdrawal contained in Section 407 of the Cr.P.C. is one dictated by the requirements of justice and is, indeed, but an aspect of the supervisory powers of a superior court over courts subordinate to it : (see also Sections 408 to 411 of the Cr.P.C.). A judicial discretion to transfer or withdraw is vested in the highest court of the State and is made exercisable only in the circumstances set out in the section. Such a power is not only necessary and desirable but indispensable in the cause of the administration of justice. The accused will continue to be tried by a court of equal or superior jurisdiction. Section 407(8) read with Section 474 of the Cr.P.C. and Section 8(3) of the 1952 Act makes it clear that he will be tried in accordance with the procedure followed by the original Court or ordinarily by a Court of Session. The accused will, therefore, suffer no prejudice by reason of the application of Section 407. Even if there is a differential treatment which causes prejudice, it is based on logical and acceptable considerations with a view to promote the interest of justice. The transfer or withdrawal of a case to another court or the High Court, in such circumstances, can hardly be said to result in hostile discrimination against the accused in such a case.

21. Considerable reliance was placed on behalf of the appellant on 281215 . This decision seems to have influenced the learned judges before whom this appeal first came up for hearing in referring the matter to this larger Bench and has also been applied to the facts and situation here by my learned brother, Sabyasachi Mukharji, J. But it seems to me that the said decision has no relevance here. There, the category of cases which were to be allocated to a Special Judge were not well defined; the selection of cases was to be made by the executive; and the procedure to be fallowed by the special courts was different from the normal criminal procedure. As already pointed out, the position here is entirety different. The 1952 legislation has been enacted to give effect to the Tek Chand Committee and to remedy a state of affairs prevalent in respect of a well defined class of offences and its provisions constituting special judges to try offences of corruption is not under challenge. Only a power of transfer is being exercised by the Supreme Court which is sought to be traced back to the power of the High Court u/s 407. The vires of that provision also is not being challenged. What is perhaps being said is that the Supreme Court ought not to have considered this case a fit one for withdrawal for trial to the High Court. That plea should be and is being considered here on merits but the plea that Article 14 has been violated by the exercise of a power u/s 407 on the strength of Anwar Ali Sarkar''s case wholly appears to be untenable. Reference may be made in this context to Kathi Raning Rawat v. The State of Saurashtra [1952] 3 S.C.R. 435 and 281067 and Shukla v. Delhi Administration [1980] 3 S.C.R. 500, which have upheld the creation of special judges to try certain classes of offences.

22. It may be convenient at this place to refer to certain observations by the Bench of this Court, while referring this matter to the larger Bench, in a note appended to their order on this aspect. The learned Judges have posed the following questions in

paragraphs 4 and 6 of their note :

4. The Criminal Law Amendment Act, 1952 as its preamble says is passed to provide for speedier trial? Does not further speeding up of the case by transferring the case to the High Court for speedy disposal violate the principle laid down by seven learned Judges of this Court in Anwar Ali Sarkar''s case (1952) S.C.R. 284 and result in violation of Article 14 of the Constitution? The following observations of Vivian Bose, J. in Anwar Ali Sarkar''s case at pages 366-387 of the Report are relevant:

Tested in the light of these considerations, I am of opinion that the whole of the West Bengal Special Courts Act of 1950 offends the provisions of Article 14 and is therefore bad. When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, nor indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled, or whether it is an experiment in speedier trials made for the good of society at large. It matters now how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable, unbiassed and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad.''
(Underlining by us)

Do not the above observations apply to judicial orders also?

6. Does the degree of heinousness of the crime with which an accused is charged or his status or the influence that he commands in society have any bearing on the applicability or the constriction of Article 14 or Article 21.?

23. In my opinion, the answers to the questions posed will, again, depend on whether the impugned direction can be brought within the scope of Section 407 of the 1973 Cr.P.C. or not. If I am right in my conclusion that it cannot, the direction will clearly be contrary to the provisions of the Cr.P.C. and hence violative of Article 21. It could also perhaps be said to be discriminatory on the ground that, in the absence of not only a statutory provision but even any well defined policy or criteria, the only two reasons given in the order-namely, the status of the petitioner and delay in the progress of the trial-are inadequate to justify the special treatment meted out to the

appellant. On the other hand, if the provisions of Section 407 Cr.P.C. are applicable, the direction will be in consonance with a procedure prescribed by law and hence safe from attack as violative of Article 21. The reasons given, in the context of the developments in the case, can also be sought to be justified in terms of Clauses (a), (b) or (c) of Section 407(1). In such an event, the direction will not amount to an arbitrary discrimination but can be justified as the exercise of a choice of courses permitted under a valid statutory classification intended to serve a public purpose.

24. The argument of infringement of Article 21 is based essentially on the premise that the accused will be deprived, in cases where the trial is withdrawn to the High Court of a right of first appeal. This fear is entirely unfounded. I think Sri Jethmalani is right in contending that where a case is thus withdrawn and tried by the Court, the High Court will be conducting the trial in the exercise of its extraordinary original criminal jurisdiction. As pointed out by Sabyasachi Mukharji, J., the old Presidency-town High Courts once exercised original jurisdiction in criminal matters but this has since been abolished. One possible view is that now all original criminal jurisdiction exercised by High Court is only extraordinary original criminal jurisdiction. Another possible view is that still High Courts do exercise ordinary original criminal jurisdiction in habeas corpus and contempt of court matters and also under some specific enactments (e.g. Companies'' Act Sections 454 and 633). They can be properly described as exercising extraordinary original criminal jurisdiction, where though the ordinary original criminal jurisdiction is vested in a subordinate criminal Court or special Judge, a case is withdrawn by the High Court to itself for trial. The decision in Madura Tirupparankundram etc. v. Nikhan Sahib, 35 C.W.N. 1088, 467629 , 34755 , 370792 and 819978 cited by him amply support this contention. If this be so, then Sri Jethmalani is also right in saying that a right of first appeal to the Supreme Court against the order passed by the High Court will be available to the accused u/s 374 of the 1973 Cr.P.C. In other words, in the ordinary run of criminal cases tried by a Court of Sessions, the accused will be tried in the first instance by a court subordinate to the High Court; he will then have a right of first appeal to the High Court and then can seek leave of the Supreme Court to appeal to it under Article 136. In the case of a withdrawn case, the accused has the privilege of being tried in the first instance by the High Court itself with a right to approach the apex Court by way of appeal. The apprehension that the judgment in the trial by the High Court, in the latter case, will be final, with only a chance of obtaining special leave under Article 136 is totally unfounded. There is also some force in the submission of Sri Jethmalani that, if that really be the position and the appellant had no right of appeal against the High Court''s judgment, the Supreme Court will consider any petition presented under Article 136 in the light of the inbuilt requirements of Article 21 and dispose of it as if it were itself a petition of appeal from the judgment, (see, in this context, the observations of this Court in Sadananthan v. Arunachalam [1980] 2 S.C.R. 673. That, apart it may be pointed out, this is also an argument that would be valid in respect even of ordinary criminal

trials withdrawn to the High Court u/s 407 of the Cr.P.C. and thus, like the previous argument regarding Article 14, indirectly challenges the validity of Section 407 itself as infringing Article 21. For the reasons discussed, I have come to the conclusion that an accused, tried directly by the High Court by withdrawal of his case from a subordinate court, has a right of appeal to the Supreme Court u/s 374 of the Cr.P.C. The allegation of an infringement of Article 21 in such cases is, therefore, unfounded. Natural Justice

25. The appellant''s contention that the impugned direction issued by this Court on 16.2.1984 was in violation of the principles of natural justice appears to be well founded. It is really not in dispute before us that there was no whisper or suggestion in the proceedings before this Court that the venue of the trial should be shifted to the High Court. This direction was issued suo motu by the learned Judges without putting it to the counsel for the parties that this was what they proposed to do. The difficulties created by observations or directions on issue''s not debated before the Court have been highlighted by Lord Diplock) in Hadmor Productions Ltd. v. Hamilton [1983] A.C. 191. In that case, Lord Denning, in the Court of Appeal, had in his judgment, relied on a certain passage from the speech of Lord Wedderburn in Parliament as reported in Hansard (Parliamentary Reports) in support of the view taken by him. The counsel for the parties had had no inkling or information that recourse was likely to be had by the Judge to this source, as it had been authoritatively held by the House of Lords in Davis v. Johns [1979] A.C. 264 that these reports should not be referred to by counsel or relied upon by the court for any purpose. Commenting on this aspect, Lord Diplock observed:

Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice : the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is. In the instant case, counsel for Hamilton and Bould complained that Lord Denning M.R. had selected one speech alone to rely upon out of many that had been made...and that, if he has counsel had known that (Lord Denning) was going to do that, not only would he have wished to criticise what Lord Wedderburn had said in his speech...but he would also have wished to rely on other speeches disagreeing with Lord Wedderburn if he, as counsel, had been entitled to refer to Hansard....

The position is somewhat worse in the present case. Unlike the Hamilton case (supra) where the Judge had only used Hansard to deal with an issue that arose in the appeal, the direction in the present case was something totally alien to the scope of the appeal, on an issue that was neither raised nor debated in the course of the hearing and completely unexpected.

26. Shri Jethmalani submitted that, when the judgment was announced, counsel for the complainant (present respondent) had made an oral request that the trial be

transferred to the High Court and that the Judges replied that they had already done that. He submitted that, at that time and subsequently, the appellant could have protested and put forward his objections but did not and had thus acquiesced in a direction which was, in truth, beneficial to him as this Court had only directed that he should be tried by a High Court Judge, a direction against which no one can reasonably complain. This aspect of the respondent''s arguments will be dealt with later but, for the present, all that is necessary is to say that the direction must have come as a surprise to the appellant and had been issued without hearing him on the course proposed to be adopted.

Conclusion

27. To sum up, my conclusion on issue A is that the direction issued by the Court was not warranted in law, being contrary to the special provisions of the 1952 Act, was also not in conformity with the principles of natural justice and that, unless the direction can be justified with reference to Section 407 of the Cr.P.C., the petitioner''s fundamental rights under Articles 14 and 21 can be said to have been infringed by reason of this direction. This takes me on to the question whether it follows as a consequence that the direction issued can be, or should be, recalled, annulled, revoked or set aside by us now.

B. CAN AND SHOULD THE DIRECTION OF 16.2.84 BE RECALLED?

28. It will be appreciated that, whatever may be the ultimate conclusion on the correctness, propriety or otherwise of the Court''s direction dated 16.2.1984, that was a direction given by this Court in a proceeding between the same parties and the important and far-reaching question that falls for consideration is whether it is at all open to the appellant to seek to challenge the correctness of that direction at a later stage of the same trial.

Is a review possible?

29. The first thought that would occur to any one who seeks a modification of an order of this Court, particularly on the ground that it contained a direction regarding which he had not been heard, would be to seek a review of that order under Article 137 of the Constitution read with the relevant rules. Realising that this would be a direct and straight forward remedy, it was contended for the appellant that the present appeal may be treated as an application for such review.

30. The power of review is conferred on this Court by Article 137 of the Constitution which reads thus:

Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

It is subject not only to the provisions of any law made by Parliament (and there is no such law so far framed) but also to any rules made by this Court under Article 145. this Court has made rules in pursuance of Article 145 which are contained in Order XL in Part VIII of the Supreme Court Rules. Three of these rules are relevant for our present purposes. They read as follows:

(1) The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

(2) An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly its grounds for review.

(3) Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

31. It is contended on behalf of the respondent that the present pleas of the appellant cannot be treated as an application for review, firstly, because they do not seek to rectify any error apparent on the face of the record; secondly, because the prayer is being made after the expiry of the period of thirty days mentioned in Rule 2 and there is no sufficient cause for condoning the delay in the making of the application and thirdly, for the reason that a review petition has to be listed as far as practicable before the same Judge or Bench of Judges that delivered the order sought to be reviewed and in this case at least two of the learned Judges, who passed the order on 16.2.1984, are still available to consider the application for review. These grounds may now be considered.

32. For reasons which I shall later discuss, I am of opinion that the order dated 16.2.1984 does not suffer from any error apparent on the face of the record which can be rectified on a review application. So far as the second point is concerned, it is common ground that the prayer for review has been made beyond the period mentioned in Rule 2 of Order XL of the Supreme Court Rules. No doubt this Court has power to extend the time within which a review petition may be filed but learned Counsel for the respondent vehemently contended that this is not a fit case for exercising the power of condo nation of delay. It is urged that, far from this being a fit case for the entertainment of the application for review beyond the time prescribed, the history of the case will show that the petitioner has deliberately avoided filing a review petition within the time prescribed for reasons best known to himself.

33. In support of his contention, learned Counsel for the respondent invited our attention to the following sequence of events and made the following points:

(a) The order of this Court was passed on 16.2.1984. At the time of the pronouncement of the said order, counsel for the present respondent had made a request that the trial of the case may be shifted to the High Court and the Court had observed that a direction to this effect had been included in the judgment. Even assuming that there had been no issues raised and no arguments advanced on the question of transfer at the time of the hearing of the appeals, there was nothing to preclude the counsel for the appellant, when the counsel for the complainant made the above request, from contending that it should not be done, or, at least, that it should not be done without further hearing him and pointing out this was not a matter which had been debated at the hearing of the appeal. But no, the counsel for the accused chose to remain quiet and did not raise any objection at that point of time. He could have filed a review application soon thereafter but he did not do so. Perhaps he considered, at that stage, that the order which after all enabled him to be tried by a High Court Judge in preference to a Special Judge was favourable to him and, therefore, he did not choose to object.

(b) The matter came up before the trial judge on 13th March, 1984. The accused, who appeared in person, stated that he did not want to engage any counsel "at least for the present''. He would not put down his arguments in writing and when he argued the gravemen of his attack was that this Court''s order transferring the trial from the Special Judge to the High Court was wrong on merits. Naturally, the learned Judge found it difficult to accept the contention that he should go behind the order of the Supreme Court. He rightly pointed out that if the accused had any grievance to make, his proper remedy was to move the Supreme Court for review of its judgment or for such further directions or clarifications as may be expedient. Thus, as early as 13th March, 1984, Khatri, J., had given a specific opportunity to the accused to come to this Court and seek a review of the direction. It can perhaps be said that on 16.2.1984, when this Court passed the impugned direction, the appellant was not fully conscious of the impact of the said direction and that, therefore, he did not object to it immediately. But, by the 13th March, 1984, he had ample time to think about the matter and to consult his counsel. The appellant himself was a barrister. He chose not to engage counsel but to argue himself and, even after the trial court specifically pointed out to him that it was bound by the direction of this Court under Articles 141 and 144 of the Constitution and that, if at all, his remedy was to go to the Supreme Court by way of review or by way of an application for clarification, he chose to take no action thereon.

(c) On 16th March, 1984, Khatri, J. disposed of the preliminary objections raised by the accused challenging the jurisdiction and competence of this Court to try the accused. Counsel for the respondent points out that, at the time of the hearing, the appellant had urged before Khatri, J. all the objections to the trial, which he is now

putting forth. These objections have been summarised in paragraph 3 of the order passed by the learned Judge and each one of them has been dealt with elaborately by the learned Judge. It has been pointed out by him that the Supreme Court was considering not only the appeals preferred by the accused and the complainant, namely, Crl. Appeal Nos. 246, 247 and 356 of 1983 but also two revision petitions being C.R. Nos. 354 "and 359 of 1983 which had been withdrawn by the Supreme Court to itself for disposal along with Crl. Appeal No. 356 of 1983. A little later in the order the learned Judge pointed out that, even assuming that in the first instance the trial can be conducted only by a Special Judge, the proceedings could be withdrawn by the high Court to itself under powers vested in it under Article 228(a) of the Constitution as well as Section 407 of the Cr.P.C. When the criminal revisions stood transferred to the Supreme Court (this was obviously done under Article 139-A though that article is not specifically mentioned in the judgment of the Supreme Court), the Supreme Court could pass the order under Article 139-A read with Article 142. The learned Judge also disposed of the objections based on Article 21. He pointed out that as against an ordinary accused person tried by a special judge, who gets a right of appeal to the High Court, a court of superior jurisdiction, with a further right of appeal to the Supreme Court u/s 374 of the Cr.P.C. and that an order of transfer passed in the interest of expeditious disposal of a trial was primarily in the interests of the accused and could hardly be said to be prejudicial to the accused. Despite the very careful and fully detailed reasons passed by the High Court, the appellant did not choose to seek a review of the earlier direction.

(d) Against the order of the learned Judge dated 16.3.1984 the complainant came to the Court because he was dissatisfied with certain observations made by the trial Judge in regard to the procedure to be followed by the High Court in proceeding with the trial. This matter was heard in open court by same five learned Judges who had disposed of the matter earlier on 16.2.1984. The accused was represented by a senior counsel and the Government of Maharashtra had also engaged a senior counsel to represent its case. Even at this hearing the counsel for the appellant did not choose to raise any objection against the direction given in the order dated 16.2.1984. The appeal before the Supreme Court was for getting a clarification of the very order dated 16.2.1984. This was a golden opportunity for the appellant also to seek a review or clarification of the impugned direction, if really he had a grievance that he had not been heard by the Court before it issued the direction and that it was also contrary to the provisions of the 1952 Act as well as violative of the rights of the accused under Article 21 of the Constitution.

(e) The petitioner instead filed two special leave petitions and a writ petition against the orders of Khatri, J. dated 13.3.1984 and 16.3.1984. In the writ petition, the petitioner had mentioned that the impugned direction had been issued without hearing him. In these matters counsel for the accused made both oral and written submissions and all contentions and arguments, which have now been put forward, had been raised in the written arguments. The appeals and writ petition were

disposed of by this Court. this Court naturally dismissed the special leave petitions pointing out that the High Court was quite correct in considering itself bound by the directions of the Court. The Court also dismissed the writ petition as without merit. But once again it observed that the proper remedy of the petitioner was elsewhere and not by way of a writ petition. These two orders, according to the learned Counsel for the respondent, conclude the matter against the appellant. The dismissal of the writ petition reminded the petitioner of his right to move the Court by other means and, though this advice was tendered as early as 17.4.1984, the petitioner did nothing. So far as the SLP was concerned, its dismissal meant the affirmation in full of the decision given by Justice Khatri dismissing and disposing of all the objections raised by the petitioner before him. Whatever may have been the position on 16.2.1984 or 16.3.1984, there was absolutely no explanation or justification for the conduct of the petitioner in failing to file an application for review between 17.4.1984 and October, 1986.

34. Recounting the above history, which according to him fully explained the attitude of the accused, learned Counsel for the respondent submitted that in his view the appellant was obviously trying to avoid a review petition perhaps because it was likely to go before the same learned Judges and he did not think that he would get any relief and perhaps also because he might have felt that a review was not an adequate remedy for him as, under the rules, it would be disposed of in chamber without hearing him once again. But, whatever may be the reason, it is submitted, the delay between April 1984 and October, 1986 stood totally unexplained and even now there was no proper review petition before this Court. In the circumstances, it is urged that this present belated prayer for review.

35. There is substance in these contentions. The prayer for review is being made very belatedly, and having regard to the circumstances outlined above there is hardly any reason to condone the delay in the prayer for review. The appellant was alive to all his present contentions as is seen from the papers in the writ petition. At least when the writ petition was dismissed as an inappropriate remedy, he should have at once moved this Court for review. The delay from April 1984 to October 1986 is totally inexplicable. That apart, there is also validity in the respondent''s contention that, even if we are inclined to condone the delay, the application will have to be heard as far as possible by the same learned Judges who disposed of the earlier matter. In other words, that application will have to be heard by a Bench which includes the two learned Judges who disposed of the appeal on 16.2.1984 and who are still available in this Court to deal with any proper review application, that may be filed. However, since in my view, the delay has not been satisfactorily explained, I am of opinion that the prayer of the appellant that the present pleas may be treated as one in the nature of a review application and the appellant given relief on that basis has to be rejected.

Is a writ maintainable?

36. This takes one to a consideration of the second line of attack by the appellant''s counsel. His proposition was that a judicial order of a court-even the High Court or this Court may breach the principles of natural justice or the fundamental rights and that, if it does so, it can be quashed by this Court in the exercise of its jurisdiction under Article 32. In other words, the plea would seem to be that the present proceedings may be treated as in the nature of a writ petition to quash the impugned order on the above ground. The earliest of the cases relied upon to support this contention is the decision in Prem Chand Garg v. Excise Commissioner [1963] Su. 1 S.C.R. 885, which may perhaps be described as the sheet-anchor of the appellant''s contentions on this point. The facts of that case have been set out in the judgment of Sabyasachi Mukharji, J. and need not be repeated. The case was heard by a Bench of five judges. Four of them, speaking through Gajendragadkar, J. held that Rule 12 of Order XXXV of the Supreme Court Rules violated Article 32 and declared it invalid. This also set aside an earlier order dated 12.12.1961 passed by the Court in pursuance of the rule calling upon the petitioner to deposit cash security. Sri Rao contended that this case involved two separate issues for consideration by the Court : (a) the validity of the rule and (b) the validity of the order dated 12.12.1961; and that the decision is authority not only for the proposition that a writ petition under Article 32 could be filed to impugn the constitutional validity of a rule but also for the proposition that the Court could entertain a writ petition to set aside a judicial order passed by the Court earlier on discovering that it is inconsistent with the fundamental rights of the petitioner. Counsel submitted that an impression in the minds of some persons that the decision in Prem Chand Garg is not good law after the decision of the nine-Judge Bench in 282776 is incorrect. He submitted that, far from Garg''s case being overruled, it has been confirmed in the later case.

37. Mirajkar was a case in which the validity of an interlocutory order passed by a judge of the Bombay High Court pertaining to the publication of reports of the proceedings in a suit pending before him was challenged by a journalist as violating his fundamental rights under Article 19 of the Constitution. The matter came to the Supreme Court by way of a writ petition under Article 32. The validity of the order was upheld by the majority of the Judges while Hidayatullah J. dissented. In this connection it is necessary to refer to a passage at p. 767 in the judgment of Gajendragadkar, C.J.

Mr. Setalvad has conceded that if a court of competent jurisdiction makes an order in a proceeding before it, and the order is inter-partes, its validity cannot be challenged by invoking the jurisdiction of this Court under Article 32, though the said order may affect the aggrieved party''s fundamental rights. His whole argument before us has been that the impugned order affects the fundamental rights of a stranger to the proceeding before the Court; and that, he contends, justifies the petitioners in moving this Court under Article 32. It is necessary to examine the validity of this argument.

The question before the Supreme Court was thus as to whether, even at the instance of a stranger to the earlier proceedings, the earlier order could be challenged by means of a writ petition under Article 32. One of the questions that had to be considered by the Court was whether the judicial order passed by the learned judge of the High Court was amenable to be writ jurisdiction of the Court under Article 32. On this question, the judges reacted differently:

(i) Gajendragadkar, CJ and Wanchoo, Mudholkar, Sikri and Ramaswamy, JJ. had this to say:

The High Court is a superior Court of Record and it is for it to consider whether any matter falls within its jurisdiction or not. The order is a judicial order and if it is erroneous, a person aggrieved by it, though a stranger, could move this Court under Article 136 and the order can be corrected in appeal but the question about the existence of the said jurisdiction as well as the validity or the propriety of the order cannot be raised in writ proceedings under Article 32.

(ii) Sarkar J. also concurred in the view that this Court had no power to issue a certiorari to the High Court. He observed:

I confess the question is of some haziness. That haziness arises because the courts in our country which have been given the power to issue the writ are not fully analogous to the English courts having that power. We have to seek a way out for ourselves. Having given the matter my best consideration, I venture to think that it was not contemplated that a High Court is an inferior court even though it is a court of limited jurisdiction. The Constitution gave power to the High Court to issue the writ. In England, an inferior court could never issue the writ. I think it would be abhorrent to the principle of certiorari if a Court which can itself issue the writ is to be made subject to be corrected by a writ issued by another court. When a court has the power to issue the writ, it is not according to the fundamental principles of certiorari, an inferior court or a court of limited jurisdiction. It does not cease to be so because another Court to which appeals from it lie has also the power to issue the writ. That should furnish strong justification for saying that the Constitution did not contemplate the High Courts to be inferior courts so that their decisions would be liable to be quashed by writs issued by the Supreme Court which also had been given power to issue the writs. Nor do I think that the cause of justice will in any manner be affected if a High Court is not made amenable to correct by this Court by the issue of the writ. In my opinion, therefore, this Court has not power to issue a certiorari to a High Court.

(iii) Bachawat J. held:

The High Court has jurisdiction to decide if it could restrain the publication of a. document or information relating to the trial of a pending suit or concerning which the suit is brought, if it erroneously assume a jurisdiction not vested in it, its decision may be set aside in appropriate proceedings but the decision is not open to attack

under Article 32 on the ground that it infringes the fundamental right under Article 19(1)(a). If a stranger is prejudiced by an order forbidding the publication of the report of any proceeding, his proper course is only to apply to the Court to lift the ban.

(iv) Justice Shah thought that, in principle, a writ petition could perhaps be filed to challenge an order of a High Court on the ground that it violated the fundamental rights of the petitioner under Articles 20, 21 and 22 but he left the question open. He, however, concluded that an order of the nature in issue before the Court could not be said to infringe Article 19.

38. Hidayatullah J., as His Lordship then was, however, dissented. He observed:

Even assuming the impugned order means a temporary suppression of the evidence of the witness, the trial Judge had no jurisdiction to pass the order. As he passed no recorded order, the appropriate remedy (in fact the only effective remedy) is to seek to quash the order by a writ under Article 32.

There may be action by a Judge which may offend the fundamental rights under Articles 14, 15, 19, 20, 21 and 22 and an appeal to this Court will not only be practicable but will also be an ineffective remedy and this Court can issue a writ to the High Court to quash its order under Article 32 of the Constitution. Since there is no exception in Article 32 in respect of the High Courts there is a presumption that the High Courts are not excluded. Even with the enactment of Article 226, the power which is conferred on the High Court is not in every sense a coordinate power and the implication of reading Articles 32, 136 and 226 together is that there is no sharing of the powers to issue the prerogative writs possessed by this Court. Under the total scheme of the Constitution, the subordination of the High Courts to the Supreme Court is not only evident but is logical.

His Lordship proceeded to meet an objection that such a course might cast a slur on the High Courts or open the floodgates of litigation. He observed:

Article 32 is concerned with Fundamental Rights and Fundamental Rights only. It is not concerned with breaches of law which do not involve fundamental rights directly. The ordinary writs of certiorari, mandamus and prohibition can only issue by enforcement of Fundamental Rights. A clear cut case of breach of Fundamental Right alone can be the basis for the exercise of this power. I have already given examples of actions of courts and judges which are not instances of wrong judicial orders capable of being brought before this Court only by appeal but breaches of Fundamental Rights clear and simple. Denial of equality as for example by excluding members of a particular party or of a particular community from the public Court room in a public hearing without any fault, when others are allowed to stay on would be a case of breach of fundamental right of equal protection given by this Constitution. Must an affected person in such a case ask the Judge to write down his order, so that he may appeal against it? Or is he expected to ask for special leave

from this Court? If a High Court judge in England acted improperly, there may be no remedy because of the limitations on the rights of the subject against the Crown. But in such circumstances in England the hearing is considered vitiated and the decision voidable. This need not arise here. The High Court in our country in similar circumstances is not immune because there is a remedy to move this Court for a writ against discriminatory treatment and this Court should not in a suitable case shirk to issue a writ to a High Court Judge, who ignores the fundamental rights and his obligations under the Constitution. Other cases can easily be imagined under Article 14, 15, 19, 20, 21 and 22 of the Constitution, in which there may be action by a Judge which may offend the fundamental rights and in which an appeal to this Court will not only be not practicable but also quite an ineffective remedy.

We need not be dismayed that the view I take means a slur on the High Courts or that this Court will be flooded with petitions under Article 32 of the Constitution. Although the High Courts possess a power to interfere by way of high prerogative writs of certiorari, mandamus and prohibition, such powers have not been invoked against the normal and routine work of subordinate courts and tribunals. The reason is that people understand the difference between an approach to the High Court by way of appeals etc. and approach for the purpose of asking for writs under Article 226. Nor have the High Courts spread a Procrustean bed for high prerogative writs for all actions to lie. Decisions of the courts have been subjected to statutory appeals and revisions but the losing side has not charged the Judge with a breach of fundamental rights because he ordered attachment of property belonging to a stranger to the litigation or by his order affected rights of the parties or even strangers. This is because the people understand the difference between normal proceedings of a civil nature and proceedings in which there is a breach of fundamental rights. The courts acts, between parties and even between parties and strangers, done impersonally and objectively are challengeable under the ordinary law only. But acts which involve the court with a fundamental right are quite different.

One more passage from the judgment needs to be quoted. Observed the learned Judge:

I may dispose of a few results which it was suggested, might flow from my view that this Court can issue a high prerogative writ to the High Court for enforcement of fundamental rights. It was suggested that the High Courts might issue writs to this Court and to other High Courts and one Judge or Bench in the High Court and the Supreme Court might issue a writ to another judge or Bench in the same Court. This is an erroneous assumption. To begin with High Courts cannot issue a writ to the Supreme Court because the writ goes down and not up. Similarly, a High Court cannot issue a writ to another High Court. The writ does not go to a court placed on an equal footing in the matter of jurisdiction

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I must hold that this English practice of not issuing writs in the same court is in the very nature of things. One High Court will thus not be able to issue a writ to another High Court nor even to a court exercising the powers of the High Court. In so far as this Court is concerned, the argument that one Bench or one Judge might issue a writ to another Bench or Judge, need hardly be considered. My opinion gives no support to such a view and I hope I have said nothing to give countenance to it. These are imaginary fears which have no reality either in law or in fact.

39. I have set out at length portions from the judgment of Hidayatullah, J. as Shri Rao placed considerable reliance on it. From the above extracts, it will be seen that the majority of the Court was clearly of opinion that an order of a High Court cannot be challenged by way of a writ petition under Article 32 of the Constitution on the ground that it violates the fundamental rights, not even at the instance of a person who was not at all a party to the proceedings in which the earlier order was passed. Even Hidayatullah, J. has clearly expressed the view that, though a writ of certiorari might issue to quash the order of a High Court in appropriate case, it cannot lie from a Bench of one court to another Bench of the same High Court. Subba Rao, C.J. has also made an observation to like effect in regard to High Court Benches inter se in 261308 . The decision in Prem Chand Garg, seems to indicate to the contrary. But it is clearly distinguishable and has been distinguished by the nine judge Bench in Mirajkar. The observations of Gujendragadkar, C.J. (at p. 766), and Sarkar, J. (at p. 780), be seen in this context. In that case, it is true that the order passed by the Court directing the appellant to deposit security was also quashed but that was a purely consequential order which followed on the well-founded challenge to the validity of the rule. Hidayatullah, J. also agreed that this was so and explained that the judicial decision which was based on the rule was only revised. (p. 790).

40. Sri Rao also referred to 279438 . In that case, the petitioner was acquitted by the High Court, in appeal, of charges u/s 302 and 148 of the Indian Penal Code. The brother of the deceased, not the State or the informant, petitioned this Court under Article 136 of the Constitution for special leave to appeal against the acquittal. Leave was granted and his appeal was eventually allowed by the High Court. The judgment of the High Court was set aside and the conviction and sentence imposed by the trial court u/s 302 was upheld by the Supreme Court in his earlier decision reported in Arunachalam Vs. P.S.R. Sadhanantham and Another, . Thereupon, the petitioner filed a writ petition under Article 32 of the Constitution, challenging the validity of the earlier order of this Court. Eventually, the petition was dismissed on the merits of the case. However, learned Counsel for the appellant strongly relied on the fact that in this case a Bench pf five judges of this Court entertained a petition under Article 32 to reconsider a decision passed by it in an appeal before the Court. He submitted that it was inconceivable that it did not occur to the learned judges who decided the case that, after Mirajkar, a writ petition under Article 32 was not at all entertain able. He, therefore, relied upon this judgment as supporting his proposition that in an appropriate case this Court can entertain a petition under

Article 32 and review an earlier decision of this Court passed on an appeal or on a writ petition or otherwise. This decision, one is constrained to remark, is of no direct assistance to the appellant. It is no authority for the proposition that an earlier order of the court could be quashed on the ground that it offends the Fundamental Right. As the petition was eventually dismissed on the merits, it was not necessary for the court to consider whether, if they had come to the conclusion that the earlier order was incorrect or invalid, they would have interfered therewith on the writ petition filed by the petitioner.

41. Two more decisions referred to on behalf of the appellant may be touched upon here. The first was the decision of this Court in Attorney-General v. Lachma Devi, : 1986CriLJ364 . In that case the High Court had passed an order that certain persons found guilty of murder should be hanged in public. This order was challenged by a writ petition filed under Article 32 by the Attorney-General of India, on the ground that it violated Article 21 of the Constitution. This petition was allowed by this Court. The second decision on which reliance was placed is that in 285467 . In that case the petitioner, accused of a criminal offence had not been provided with legal assistance by the court. The Supreme Court pointed out that this was a constitutional lapse on the part of the court and that the conviction on the face of the record suffered from a fatal infirmity. These decisions do not carry the petitioner any further. Sukhdas was a decision on an appeal and Lachma Devi does not go beyond the views expressed by Hidayatullah, J. and Shah, J. in Mirajkar.

42. On a survey of these decisions, it appears to me that Prem Chand Garg cannot be treated as an authority for the proposition that an earlier order of this Court could be quashed by the issue of a writ on the ground that it violated the fundamental rights. Mirajkar clearly precludes such a course. It is, therefore, not possible to accept the appellant''s plea that the direction dated 16.2.1984 should be quashed on the grounds put forward by the petitioner.

Inherent power to declare orders to be null and void

43. The next line of argument of learned Counsel for the appellant is that the order dated 16.2.1984, in so far as it contained the impugned direction, was a complete nullity. Being an order without jurisdiction, it could be ignored by the person affected or challenged by him at any stage of the proceedings before any Court, particularly in a criminal case, vide 283187 . Counsel also relied on the following observations made in 278244 .

The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral

proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgments and decree would be nullities.

(emphasis added)

He also extensively quoted from the dicta of this Court in 288648 , where after setting out the speeches of Lord Reid and Lord Pearce in Anisminic Ltd. v. Foreign Compensation Commissioner [1969] 2 A.C. 147 this Court observed:

The dicta of the majority of the House of Lords in the above case would show the extent to which ''lack'' and ''excess'' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "impose an unwarranted condition" or "addressing themselves to a wrong question." The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess or jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allow. In the end it can only be a value judgment (see R.W.R. Wade, "Constitutional and Administrative Aspects of the Anisminic case", Law Quarterly Review, Vo. 85, 1969 p. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata could oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of this Court.

He also referred to Badri Prasad v. Nagarmal [1959] 1 Su. S.C.R. 769 which followed the clear law laid down in AIR 1925 83 (Privy Council) , 291166 which followed Ledgard v. Bull, L.R. 13 I.A.p 134; Meenakshi Naidu v. Subramaniya Sastri, L.R. 14 I.A 140 and 289783 . Sr Rao, citing a reference from Halsbury''s Laws of England (4th Edition) Vol. X, para 713, pages 321-2, contended that the High Court''s jurisdiction

clearly stood excluded by Section 7(1) of the 1952 Act and, hence, the direction of the Supreme Court was also one without jurisdiction.

44. In dealing with this contention, one important aspect of the concept of jurisdiction has to be borne in mind. As pointed out by Mathew J. in Kapur v. Sethi, (supra), the word "jurisdiction is a verbal coat of many colours." It is used in a wide and broad sense while dealing with administrative or quasi-judicial tribunals and subordinate courts over which the superior Courts exercise a power of judicial review and superintendence. Then it is only a question of "how much latitude the court is prepared to allow" and "there is no yardstick to determine the magnitude of the error other than the opinion of the court." But the position is different with superior Courts with unlimited jurisdiction. These are always presumed to act with jurisdiction and unless it is clearly shown that any particular order is patently one which could not, on any conceivable view of its jurisdiction, have been passed by such court, such an order can neither be ignored nor even recalled, annulled, revoked or set aside in subsequent proceedings by the same court. This distinction is well brought out in the speeches of Lord Diplock, Lord Edmund-Devier and Lord Scarman in Re. Racal Communications Ltd. [1980] 2 A.E.R. 634. In the interests of brevity, I resist the temptation to quote extracts from the speeches here.

45. In the present case, the order passed is not one of patent lack of jurisdiction, as I shall explain later. Though I have come to the conclusion, on considering the arguments addressed now before us, that the direction in the order dated 16.2.1984 cannot be justified by reference to Article 142 of the Constitution or Section 407 of the 1973 Cr.P.C., that is not an incontrovertible position. It was possible for another court to give a wider interpretation to these provisions and come to the conclusion that such an order could be made under those provisions. If this Court had discussed the relevant provisions and specifically expressed such a conclusion, it could not have been modified in subsequent proceedings by this Bench merely because we are inclined to hold differently. The mere fact that the direction was given, without an elaborate discussion, cannot render it vulnerable to such review.

46. Shri P.P. Rao then placed considerable reliance on the observations of the Privy Council in Isaacs v. Robertson [1984] 3 A.E.R. 140 an appeal from a decision of the Court of Appeal of St. Vincent and the Grenadines. Briefly the facts were that Robertson had obtained an interim injunction against Isaacs and two others on 31.5.1979 which the latter refused to obey. The respondents motion for committal of the appellant for contempt was dismissed by the High Court of Saint Vincent. The Court of Appeal allowed the respondents application; the appellants were found to be in contempt and also asked to pay respondents costs. However, no penalty, was inflicted because the appellant would have been entitled to succeed on an application for setting aside the injunction, has he filed one. The main attack by the appellant on the Court of Appeal''s judgment was based on the contention that, as a consequence of the operation of certain rules of the Supreme Court of St. Vincent,

the interlocutory injunction granted by the High Court was a nullity : so disobedience to it could not constitute a contempt of court. Lord Diplock observed:

Glosgow J. accepted this contention, the Court of Appeal rejected it, in their Lordships'' view correctly, on the short and well established ground that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent must be obeyed unless and until it has been set aside by the court. For this proposition Robotham AJA cited the passage in the judgment of Romer L.J. in Hadkinson v. Hadkinson [1952] 2 All. E.R. 567.

It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cotteniiam, Leven to cases where the person affected by an order believes it to be irregular or even void. Lord Cotteniiam, L.C. said in Chuck v. Cremer [1946] 1 CTC 338 : "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitOrs. or their solicitOrs. could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be obeyed." Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court...is in contempt and may be published by committal or attachment or otherwise.
It is in their Lordships view, says all that needs to be said oh this topic. It is not itself sufficient reason for dismissing this appeal.

Having said this, the learned Law Lord proceeded to say:

The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind, what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deals expressly with proceedings to set aside orders for irregularity and give to the Judge a discretion as to the order he will make. The judges in the case that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order in the category that attracts ex debito justitiae the right to have it set aside save that specifically it includes orders that have been obtained in breach of rules of natural justice. The

contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentions litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court, if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies.

Sri Rao strongly relied on this passage and, modifying his earlier, somewhat extreme, contention that the direction given on 16.2.1984 being a nullity and without jurisdiction could be ignored by all concerned-even by the trial judge-he contended, on the strength of these observations., that he was at least entitled ex debito justitiae to come to this Court and request the court, in the interests of justice, to set aside the earlier order "without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity", if only on the ground that the order had been made in breach of the principles of natural justice. Violation of the principles of natural justice, he contended, renders the direction a nullity without any further proof of prejudice (see 281153).

47. Learned Counsel contended, in this context, that the fact the direction had been given in the earlier proceedings in this very case need not stand in the way of our giving relief, if we are really satisfied that the direction had been issued per incuriam, without complying with the principles of natural justice and purported to confer a jurisdiction on the High Court which it did not possess. In this context he relied on certain decisions holding that an erroneous decision on a point of jurisdiction will not constitute res judicata. In 291905 , this Court observed:

A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute, the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly, by an erroneous decision, if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be re-opened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties.

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Where, however the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the court sanctioning something which is illegal, by resort

to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

Counsel also relied on the decision of this Court in Ghulam Sarwar v. Union of India [1965] 2 S.C.C. 271, where it was held that the principle of constructive res judicata was not applicable to habeas corpus proceedings. He also referred to the observations of D.A. Desai J. in 705105 that no act of the court or irregularity can come in the way of justice being done and one of the highest and the first duty of all courts is to take care that the act of the court does no injury to the suitOrs. He also made reference to the maxim that an get of, or mistake on the part, of a court shall cause prejudice to no one, vide : 281902 . Relying on these decisions and passages from various treatises which I do not consider it necessary to set out in in extenso here, Sri Rao contended that this Court should not consider itself bound by the earlier order of the Bench or any kind of technicality where the liberty of an individual and the rights guaranteed to him under Articles 14 and 21 of the Constitution are in issue. It is urged that, if this Court agrees with him that the direction dated 16.2.1984 was an illegal one, this Court should not hesitate nay, it should hasten-to set aside the said order and repair the injustice done to the appellant without further delay. On the other hand, Sri Jethmalani vehemently urged that the present attempt to have the entire matter reopened constitutes a gross abuse of the process of court, that it is well settled that the principle of res judicata is also available in criminal matters (vide 276166 and State v. Tara Chand [1973] S.C.C. Crl. 774 that in the United States the principle of res judicata governs even jurisdictional issues and that "the slightest hospitality to the accused''s pleas will lead to a grave miscarriage of justice and set up a precedent perilous to public interest."

48. I have given careful thought to these contentions. The appellant''s counsel has relied to a considerable extent on the maxim "actus curiae neminem gravabit" for contending that it is not only within the power, but a duty as well, of this Court to correct its own mistakes in order to see that no party is prejudiced by a mistake of the Court. I am not persuaded that the earlier decision could be reviewed on the application of the said maxim. I share the view of my learned brother Venkatachaliah, J. that this maxim has very limited application and that it cannot be availed of to correct or review specific conclusions arrived at in a judicial decision. My brother Venkatachaliah, J. has further taken the view that this Court cannot exercise any inherent powers for setting right any injustice that may have been caused as a result of an earlier order of the Court. While alive to the consideration that "the highest court in the land should not, by technicalities of procedure, forge fetters on its own feet and disable itself in cases of serious miscarriages of justice", he has, nevertheless, come to the conclusion that "the remedy of the appellant, if any, is by recourse to Article 137 and nowhere else." It is at this point that I would record a dissent from his opinion. In my view, the decisions cited do indicate that

situations can and do arise where this Court may be constrained to recall or modify an order which has been passed by it earlier and that when ex facie there is something radically wrong with the earlier order, this Court may have to exercise its plenary and inherent powers to recall the earlier order without considering itself bound by the nice technicalities of the procedure for getting this done. Where a mistake is committed by a subordinate court or a High Court, there are ample powers in this Court to remedy the situation. But where the mistake is in an earlier order of this Court, there is no way of having it corrected except by approaching this Court. Sometimes, the remedy sought can he brought within the four corners of the procedural law in which event there can be no hurdle in the way of achieving the desired result. But the mere fact that, for some reason, the conventional remedies are not available should not, in my view, render this Court powerless to give relief. As pointed out by Lord Diplock in Isaac v. Robertson [1984] 3 A.E.R. 140, it may not be possible or prudent to lay down a comprehensive list of defects that will attract the ex debito justitiae relief. Suffice it to say that the court can grant relief where there is some manifest illegality or want of jurisdiction in the earlier order or some palpable injustice is shown to have resulted. Such a power can be tract d either to Article 142 of the Constitution or to the powers inherent in this Court as the apex court and the guardian of the Constitution.

49. It is, however, indisputable that such power has to be exercised in the "rarest of rare" cases. As rightly pointed out by Sri Jethmalani, there is great need for judicial discipline of the highest order in exercising such a power, as any laxity in this regard may not only impair the eminence, dignity and integrity of this Court but may also lead to chaotic consequences. Nothing should be done to create an impression that this Court can be easily persuaded to alter its views on any matter and that a larger Bench of the Court will not only be able to reverse the precedential effect of an earlier ruling but may also be inclined to go back on it and render it ineffective in its application and binding nature even in regard to subsequent proceedings in the same case. In 279450 , this Court held that it had the power, in appropriate cases, to reconsider a previous decision given by it. While concurring in this conclusion, Venkatarama Ayyar, J. sounded a note of warning of consequences which is more germane in the present context:

The question then arises as to the principles on which and the limits within which this power should be exercised. It is of course not possible to enumerate them exhaustively, nor is it even desirable that they should not crystallised into rigid and inflexible rules. But one principle stands out prominently above the rest, and that is that in general, there should be finality in the decisions of the highest courts in the land, and that is for the benefit and protection of the public. In this connection, it is necessary to bear in mind that next to legislative enactments, it is decisions of Courts that form the most important source of law. It is on the faith of decisions that rights are acquired and obligations incurred, and States and subjects alike shape their course of action. It must greatly impair the value of the decisions of this Court,

if the notion came to be entertained that there was nothing certain or final about them, which must be the consequence if the points decided therein came to be re-considered on the merits every time they were raised. It should be noted that though the Privy Council has repeatedly declared that it has the power to reconsider its decisions, in fact, no instance has been quoted in which it did actually reverse its previous decision except in ecclesiastical cases. If that is the correct position, then the power to reconsider is one which should be exercised very sparingly and only in exceptional circumstances, such as when a material provision of law had been overlooked, or where a fundamental assumption on which the decision is based turns out to be mistaken. In the present case, it is not suggested that in deciding the question of law as they did in 279203 the learned Judges ignored any material provisions of law, or were under any misapprehension as to a matter fundamental to the decision. The arguments for the appellant before us were in fact only a repetition of the very contentions which were urged before the learned Judges and negatived by them. The question then resolves itself to this. Can we differ from a previous decision of this Court, because a view contrary to the one taken therein appears to be preferable? I would unhesitatingly answer it in the negative, not because the view previously taken must necessarily be infallible but because it is important in public interest that the law declared should be certain and final rather than that it should be declared in one sense or the other. That, I conceive, in the reason behind Article 141. There are questions of law on which it is not possible to avoid difference of opinion, and the present case is itself a signal example of it. The object of Article 141 is that the decisions of this Court on these questions should settle the controversy, and that they should be followed as law by all the Courts, and if they are allowed to be reopened because a different view appears to be the better one, then the very purpose with which Article 141 has been enacted will be defeated, and the prospect will have been opened of litigants subjecting our decisions to a continuous process of attack before successive Benches in the hope that with changes in the personnel of the Court which time must inevitably bring, a different view might find acceptance. I can imagine nothing more damaging to the prestige of this Court or to the value of its pronouncements. In James v. Commonwealth, 18 C.L.R. 54, it was observed that a question settled by a previous decision should not be allowed to be reopened "upon a mere suggestion that some or all of the Members of the later Court might arrive at a different conclusion if the matter was res integra. Otherwise, there would be grave danger of want of continuity in the interpretation of the law" (per Griffiths, C.J. at p. 58). It is for this reason that Article 141 invests decisions of this Court with special authority, but the weight of that authority can only be what we ourselves give to it.

Even in the context of a power of review, properly so called, Venkataramiah, J. had this to say in 276375 :

The review petition was admitted after the appeal had been dismissed only because Nandini Satpathy cases, : 1987CriLJ778 and : [1987]1SCR680 had been subsequently

referred to a larger bench to review the earlier decisions. When the earlier decisions are allowed to remain intact, there is no justification to reverse the decision of this Court by which the appeal had already been dismissed. There is no warrant for this extraordinary procedure to be adopted in this case. The reversal of the earlier judgment of this Court by this process strikes at the finally of judgments of this Court and would amount to the abuse of the power of review vested in this Court, particularly in a criminal case. It may be noted that no other court in the country has been given the power of review in criminal cases. I am of the view that the majority judgment of Baharul Islam and R.B. Misra, JJ. should remain undisturbed. This case cannot be converted into an appeal against the earlier decision of this Court.

The attempt of the appellant here is more far-reaching. He seeks not the mere upsetting of a precedent of this Court nor the upsetting of a decision of a High Court or this Court in accordance with the normal procedure. What he wants from us is a declaration that an order passed by a five judge Bench is wrong and that it should, in effect, be annulled by us. This should not be done, in my view, unless the earlier order is vitiated by a patent lack of jurisdiction or has resulted in grave injustice or has clearly abridged the fundamental rights of the appellant. The question that arises is whether the present case can be brought within the narrow range of exceptions which calls for such interference. I am inclined to think that it does not.

50. I have indicated earlier, while discussing the contentions urged by Shri P.P. Rao that some of them were plausible and, that, if I were asked to answer these questions posed by counsel for the first time, I might agree with his answers. But I have also indicated that, in my view, they do not constitute the only way of answering the questions posed by the learned counsel. Thus, to the question : did this Court have the jurisdiction to issue the impugned direction, a plausible answer could well be that it did, if one remembers that one of the transferred cases before this Court was the revision petition before the Bombay High Court in which a transfer of the case to the High Court has been asked for and if one gives a wide interpretation to the provisions of Article 142 of the Constitution. On the question whether this Court could transfer the case to a High Court Judge, who was not a Special Judge, a court could certainly accept the view urged by Sri Ram Jethmalani that Section 7(1) of the 1952 Act should not be so construed as to exclude the application of the procedural provisions of the Cr.P.C. in preference to the view that has found favour with me. Though the order dated 16.2.1984 contains no reference to, or discussion of, Section 407 Cr.P.C, this line of thinking of the judges who issued the direction does surface in their observations in their decision of even date rendered on the complainant''s SLP 279465 . I have already pointed out that, if the transfer is referable to Section 407 of the 1973 Cr.P.C, it cannot be impugned as offending Article 14 and 21 of the Constitution. The mere fact that the judges did not discuss at length the facts or the provisions of Section 407 Cr.P.C vis-a-vis the 1952 Act or give a reasoned order as to why they thought that the trial should be in the High Court itself cannot render their direction susceptible to a charge of

discrimination. A view can certainly be taken that the mere entrustment of this case to the High Court for trial does not perpetrate manifest or grave injustice. On the other hand, prima facie, it is something beneficial to the accused and equitable in the interest of justice. Such trial by the High Court, in the first instance, will be the rule in cases where a criminal trial is withdrawn to the High Court u/s 407 of the Cr.P.C. or where a High Court judge has been constituted as a Special Judge either under the 1952 Act or some other statute. The absence of an appeal to the High Court with a right of seeking for further leave to appeal to the Supreme Court may be considered outweighed by the consideration that the original trial will be in the High Court (as in Sessions cases of old, in the Presidency Towns) with a statutory right of appeal to the Supreme Court u/s 374 of the Cr.P.C. In this situation, it is difficult to say that the direction issued by this Court in the impugned order is based on a view which is manifestly incorrect, palpably absurd or patently without jurisdiction. Whether it will be considered right or wrong by a different Bench having a second-look at the issues is a totally different thing. It will be agreed on all hands that it will not behave the prestige and glory of this Court as envisaged under the Constitution if earlier decisions are revised or recalled solely because a later Bench takes a different view of the issues involved. Granting that the power of review is available, it is one to be sparingly exercised only in extraordinary or emergent situations when there can be no two opinion about the error or lack of jurisdiction in the earlier order and there are adequate reasons to invoke a resort to an unconventional method of recalling or revoking the same. In my opinion, such a situation is lot present here.

51. The only question that has been bothering me is that the appellant had been given no chance of being heard before the impugned direction was given and one cannot say whether the Bench would have acted in the same way even if he had been given such opportunity. However, in the circumstances of the case, I have come to the conclusion that this is not a fit case to interfere with the earlier order on that ground. It is true that the audi altarem partem rule is a basic requirement of the rule of law. But judicial decisions also show that the degree of compliance with this rule and the extent of consequences flowing from failure to do so will vary from case to case. Krishna Iyer, J. observed thus in Nawabkhan Abbaskhan Vs. The State of Gujarat thus:

an order which infringed a fundamental freedom passed in violation of the audi alteram partem rule was a nullity. A determination is no determination if it is contrary to the constitutional mandate of Article 19. On this footing the externment order was of no effect and its violation was not offence. Any order made without hearing the party affected is void and ineffectual to bind parties from the beginning if the injury is to a constitutionally guaranteed right. May be that in ordinary legislation or at common law a Tribunal having jurisdiction and failing to hear the parties may commit an illegality which may render the proceedings voidable when a direct attack was made thereon by way of appeal, revision or review but nullity is the

consequence of unconstitutionality and so the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void ab initio and of no legal efficacy. The duty to hear manacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid down in regard to hearing.

(emphasis added)

So far as this case is concerned, I have indicated earlier that the direction of 16.2.1984 cannot be said to have infringed the fundamental rights of the appellant or caused any miscarriage of justice. As pointed out by Sri Jethmalani, the appellant did know, on 16.2.84, that the judges were giving such a direction and yet he did not protest. Perhaps he did think that being tried by a High Court Judge would be more beneficial to him, as indeed was likely to be. That apart, as discussed earlier, several opportunities were available for the appellant to set this right. He did not move his little finger to obtain a variation of this direction from this Court. He is approaching the Court nearly after two years of his trial by the learned judge in the High Court. Volumes of testimony, we are told, have been recorded and numerous exhibits have been admitted as evidence. Though the trial is only at the stage of the framing charges, the trial being according to the warrant procedure, a lot of evidence has already gone in and the result of the conclusions of Sabyasachi Mukharji, J. would be to wipe the slate clean. To take the entire matter back at this stage to square No. 1 would be the very negation of the purpose of the 1952 Act to speed up all such trials and would result in more injustice than justice from an objective point of view A& pointed out by Lord Denning in R. v. Secretary of State for the Home Department ex parte Mughal [1973] 3 All E.R. 796, the rules of natural justice must not be stretched too far. They should not be allowed to be exploited as a purely technical weapon to undo a decision which does not in reality cause substantial injustice and which, had the party been really aggrieved thereby, could have been set right by immediate action. After giving my best anxious and deep thought to the pros and cons of the situation I have come to the conclusion that this is not one of those cases in which I would consider it appropriate to recall the earlier direction and order a retrial of the appellant de novo before a Special Judge. I would, therefore, dismiss the appeal.

ORDER

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