Union of India and another Vs W.N. Chadha

Court: Supreme Court of India

Date of Decision: Dec. 17, 1992

Acts Referred: Constitution of India, 1950 â€" Article 14, 19, 20, 21, 22
Penal Code, 1860 (IPC) â€" Section 120B, 161, 162, 163, 164

Citation: AIR 1993 SC 1082 : AIR 1992 SC 1082 : (1993) CriLJ 859 : (1992) 3 SCALE 396 : (1993) 4 SCC 260 Supp : (1992) 3 SCR 594 Supp

Hon'ble Judges: S. Ratnavel Pandian, J; K. Jayachandra Reddy, J

Bench: Division Bench

Advocate: Altaf Ahmed, Addl. Solicitor General, Ashok Bhan and C.V.S. Rao, for the Appellant; Rajendra Singh and Dinesh Mathur, Ashok Grover, Rahul P. Dave, Krishan Kumar and Ruby Anand, for the Respondent

Final Decision: Disposed Of

Judgement

@JUDGMENTTAG-ORDER

S. Ratnavel Pandian, J.
The above appeal is preferred before this Court challenging the judgment of the High Court of Delhi dated 2nd

September 1992 rendered in Criminal Writ No. 501/91 knocking down the very registration of the First Information Report and all the

proceedings arising thereon including the issue of letters rogatory in the second round of the bout of this litigation.

2. The first round of the litigation came before this Court on an appeal preferred by Sh. H.S. Chowdhary challenging the order of the learned

Single Judge, Justice M.K. Chawla of the High Court of Delhi dated 19th December, 1990 dismissing his petition on the ground that he has no

locus standi to file his petition and a few other appeals preferred by the Union of India and some political parties which had been seriously litigated

before this Court on the earlier occasion and resulted in the pronouncement of an order dated 27th August 1991, giving only the conclusions and

the final judgment on 28th August 1992 vide 286881 the decisions of which were rendered by this Bench.

3. The synoptical resumption of the case of the prosecution leading to the initiation of the proceedings inclusive of the organic synthesis of the

events and the circumstances veering the case have been encapsulated and presented in the order and judgment of this Court rendered in the first

round of the batch of appeals. Nonetheless, to assimilate the controversial issues both legal and factual involved, we would like to give a terse

sketch, shorn of the detailed facts of the case, as borne out from the records, which has given rise to this appeal.

4. The respondent, namely, W.N. Chadha who is now residing at Dubai in United Arab Emirates (UAE) had his first agreement in 1978 with M/s.

A.B. Bofors (hereinafter referred to as "Bofors") to provide representation services to it in India with regard to supply of arms and ammunition to

Indian Government. The terms of the said representation services agreement were extended from time to time until the end of 1985. However, in

January 1986, Bofors and Anatronic General Corporation Private Ltd. (for short "AGC") promoted by the respondent entered into a consultancy

agreement in 1986 with Bofors in respect of its business in India. According to the respondent, at no stage he or any of his concerns was made

agent of BofOrs. Similarly, he or his concern was not entitled to enter into negotiations with Government of India on behalf of Bofors or to commit

or to bind Bofors to any agreement or arrangement with the Government of India but as stated supra, he was to render administrative consultancy

services to BofOrs.

5. The Ministry of Defence, Government of India approved in August 1980 a proposal forwarded by Army Headquarters recommending, interalia,

the introduction of 155 mm calibre medium guns both towed and self-propelled to meet its defence operational requirements. The choice for

purchasing the said guns was short listed in December, 1982 to (1) M/s. Sofma of France, (2) M/s. A.B. Bofors of Sweden (Bofors), (3) M/s.

International Military Services (IMS) of U.K. and (4) M/s. Voest Alpine of Austria.

6. In April 1984, the Cabinet Committee on Political Affairs ("CCPA" for short) approved the proposal for procurement of 155 mm guns along

with certain related equipments and ammunition at a total estimated cost of Rs. 1600 crores. In May 1984, a Negotiating Committee comprising of

the Defence Secretary as the Chairman, Secretary (DP&S), Scientific Adviser to Raksha Mantri (i.e. Secretary, Research and Development),

Secretary (Expenditure), Additional Secretary, Department of Economic Affairs, Financial Adviser, Defence Services and the Deputy Chief of

Army Staff as Members was constituted for detailed negotiations with the various suppliers.

7. The Negotiating Committee started its deliberation in June 1984 and decided that fresh sealed technical and commercial offers should be invited

from the four shortlisted firms. After the offers were received from the aforesaid four firms, technical and commercial negotiations were held with

all the said firms and thereafter revised offers were invited and the same were received on 1st September. Offers were also invited from the

ammunition manufacturers. After seeking certain clarifications from the aforesaid firms with a view to evaluate the offers of all the competitions, all

the four firms submitted fresh commercial offers on 10th May 1985. Thereafter, members of the Negotiating Committee requested the Army

Headquarters to give their recommendations of the guns acceptable to them taking into account the technical aspects, delivery schedule etc. and

clearly indicate their preference from amongst the acceptable guns. The then Deputy Chief of the Army Staff told the committee that the French

gun was the best and the Swedish gun was the second best and that if the price difference was marginal, they should go for the former, The

recommendations of the Army Headquarters to shortlist only M/s. Sofma of France and M/s. A.B. Bofors of Sweden for further negotiations were

accepted by the Negotiating Committee which, however, felt that the choice between the two was open and it would depend on a combination of

technical and financial considerations. The above two shortlisted firms were called for negotiation in the middle of December 1985. Three

ammunition manufacturers were also called in the middle of January 1986. The commercial, contractual and technical aspects of purchase and

licence production were negotiated with the said two firms.

8. On 4th March 1986, the Negotiating Committee expressed the view that Bofors gun had a clear edge over Sofma gun of France with which

view the then Deputy Chief of the Army Staff also agreed. On 12th March 1986, the Negotiating Committee recommended that a letter of intent

might be issued to Bofors to the effect that the Government of India would be willing to award the contract to them subject to the condition of

being satisfied on all aspects of the purchase, licensed production, credit and other arrangements. Finally, the order was placed by the Government

of India to Bofors on 24th March, 1986 for the supply of 410 numbers (400 plus 10 free) of 155 mm Field Howitzer 77-B gun system/spare guns

vide contract No. 6 (9)/84/D (GS-IV) for a total amount of SEK 8410.66 million (Swedish Kroners) equivalent to amount Rs. 1437.72 crores.

The related contract for supply of the gun package (towed) and other related agreements/contracts were concluded, approved and signed on 24th

March 1986 with BofOrs.

9. On 17th April 1987, some newspapers in India gave prominent coverage to a Swedish Radio broadcast made on the previous day,

broadcasting that bribes had been paid to senior Indian politicians and key Defence figures to win the contract awarded by the Government of

India to Bofors on 24th March 1986.

10. The above news item was again broadcast by Swedish Radio on 17th April 1987 claiming that it had documentary proof of pay-offs in four

installments to Indian accounts in Swiss banks and it had checked with Skandinaviska Enskilds Banken, the bankers for BofOrs. This news item

was refuted by Bofors denying the allegations of paying any kickbacks to Indian politicians or officials in respect of the deals. The Government of

India also issued a statement on 17tb April 1987 itself denying the allegations of payments of alleged kickbacks. On 20th April 1987, Shri K.C.

Pant, the then Minister of Defence made a suo-moto statement in the Lok Sabha stating inter-alia, that the Government of India did not employ any

representative/agent for the contract and added that ""for administrative services, e.g. hotel bookings, transportation, forwarding of letters, telexes

etc., they use the services of a local firm"". The then Defence Minister added that ""if any evidence is produced involving violations of the law, the

matter will be thoroughly investigated and the guilty, whoever they may be punished."" A similar statement was also made by the Minister of State

for Defence in the Rajya Sabha on 21st April 1987.

11. This issue created furore both in the Lok Sabha and the Rajya Sabha. Several issues were raised by the Members of both houses not only with

regard to the alleged kickbacks paid by Bofors for winning the contract but also about the quality and suitability of the gun selected for

procurement.

12. On 20th April 1987, Shri Rajiv Gandhi, the then Prime Minister of India intervening in the debate in the Lok Sabha reaffirmed the statement of

Minister for Defence in the following words:

...And like Panditji has said now, you show us any evidence, we do not want proof. We will bring the proof. You show us any evidence that there

has been involvement of middlemen, of payoffs or of bribes or commissions, we will take action and we will see that nobody however high-up is

allowed to go free.

13. Again the then Minister for Defence made the assurance based on the statement of the then Prime Minister.

14. A demand was made by the Members of both Houses - Lok Sabha and Rajya Sabha - to make a probe into the matter by a Parliamentary

Committee. When the matter stood thus, on 4th June, 1987, the Swedish Embassy in India forwarded a copy of the report dated 1st June, 1987

of the Swedish National Audit Bureau (''SNAB'' for short) with a note to the Ministry of External Affairs, Government of India, stating that what is

made available to the Government of India was only one part of the report of the SNAB but not the report in its entirety and the rest was withheld

by the Government of Sweden on the bank secrecy requirement. (The summary of the observations of SNAB is extracted in the Report of Joint

Parliamentary Committee).

15. It may be noted that the said Report did not disclose the names of the recipients of the kickbacks. The then Prime Minister after having the

discussion about this matter with the Leaders of the opposition parties on 17th June, 1987 decided to request to the Speaker of the Lok Sabha

and the Chairman of the Rajya Sabha to set up a Joint Parliamentary Committee (for short JPC). As both the Speaker and the Chairman declined

to set up the JPC on their own motion, on 29th June, 1987 the then Minister for Defence (Shri K.C. Pant) moved a motion in the Lok Sabha for

appointment of the JPC, and added in justification of the Constitution of the same that ""The Government has nothing to hide. The Government

wants to get at the truth and that is why this Committee has been set up."" Accordingly, the JPC was constituted on 28th August, 1987 to make a

probe into the above allegations. The JPC submitted its Report on 22nd April, 1988 with its conclusions and also with the dissenting note of one of

its members. The said Report of the JPC was presented to Lok Sabha on 26th April, 1988 and then laid on the table of the Rajya Sabha on the

same day. Inspite of the report of the JPC, the allegations of malpractices in the deal with Bofors, payments of kickbacks and receipt of illegal

gratification were persistently reiterated and the matter was relentlessly agitated. In the meanwhile, there was a change in the Government.

16. Thereafter, on 22nd January, 1990 the Superintendent of Police, CBI/DSPE/ACU-IV, New Delhi registered the impugned First Information

Report in Crime No. RC 1(A)/90/ACU-IV u/s 120-B read with Sections 161, 162, 163, 164 and 165-A of the Indian Penal Code read with

Sections 5(2), 5(1)(d) and 5(2)/5(1)(c) of the Presentation of Corruption Act, 1947 read with Sections 409, 420, 468 and 471 of the Indian

Penal Code against 14 accused of whom three are named, they being (1) Shri Martin Ardbo, former President of M/s. A.B. Bofors, Sweden, (2)

Shri Chadha alias Win Chadha, S/o Shri Assa Nand, President of M/s. Anatronic General Corporation/Anatomic General Companies Ltd., C/4,

Main Market, Vasant Vihar, New Delhi and Shri G.P. Hinduja, New Zealand House, Hay Market, London SW-1. The rest of the 11 accused are

stated in general as Direetors/employees/holders/beneficiaries of account code and public servants of the Government of India. The prefatory note

of the First Information Report reveals that the case was registered ""on the basis of reliable information received from certain sources, certain facts

and circumstances that have become available, media reports, report dated 1st June 1987 of the Swedish National Audit Bureau (SNAB), certain

facts contained in the report dated 22nd April, 1988 of the Joint Parliamentary Committee (JPC) and the report dated 28th April, 1988 of the

Comptroller and Auditor General of India (CAG)"". The First Information Report gives a detailed sequence of the events relating to the purchase of

guns from M/s. A.B. Bofors, Sweden and the related agreements entered thereupon in violation of the Government"s policy i.e. not to involve any

agent and the existing law of this land. Various allegations are mentioned in the FIR regarding the payment of bribes/kickbacks and receipt of illegal

gratification. It is further averred in the First Information Report that even in the letter dated 3.10.86 sent to the Swedish National Bank, Bofors

had referred to some of the payments to Svenska Inc. and the code name "Mont Blane" as ""commission payments"" and that the payment to M/s.

Morcsco/Moineao/SA/Pitco, Geneva was deposited by Bofors in three code name accounts, namely, ""Lotus"" in Suissee Bank Corporation, 2 Rue

de law Confederatio 1204, Geneva ""Tulip"" in Manufacturers Hannover Trust Company, 84 Rue du Rhone, 1204, Geneva and ""Mont Blane"" in

Credit Suissee, 2 Place Belle Air, 1204, Geneva and that these payments to code name accounts are without mentioning or disclosing the payers"

names. Ultimately, reference was also made in paragraph 112 of the FIR to the statement of Mr. Thulholm, Chairman of Noble Industries.

17. In the FIR, it is summed up that the facts and circumstances set out in the FIR disclose that the above named and unnamed accused persons

and others had entered into a criminal conspiracy at New Delhi and other places during 1982-87 in pursuance of which the accused public

servants obtained illegal gratification in the form of money from Bofors, a Swedish company through the agent firms/companies/persons as motive

or reward for such public servants who by corrupt or illegal means or by otherwise dishonestly abusing their official position as public servants

caused pecuniary advantage to themselves, Bofors, the agents and others in the matter of the said contract finalised on 24th March 1986 and that

there is reason to believe that in pursuance of the said criminal conspiracy, the impugned payments were made by Bofors and obtained by the

above firms/companies/persons as gratifications and as motive or reward for their inducing or having induced, by corrupt or illegal means or by the

exercise of Personal influence, the said public servants of the Government of India in the matter of processing and award of the said contracts to

Bofors and that the public servants had also abetted the same.

18. After the registration of the case, the Director, CBI by his letter dated 23rd January, 1990 followed by another letter dated 26th January,

1990 requested the concerned authority in Switzerland for freezing/blocking certain bank accounts said to be relevant to the case, on which the

Federal Department of Justice and Police, Switzerland moved a Geneva and a Zurich Judge who froze certain bank accounts on 29th January,

1990. It was, however, pointed out that the relevant accounts would remain frozen till 28th February, 1990 and that further necessary assistance

would be rendered only on receipt of the letter rogatory from a competent judicial authority in India.

19. On 2nd February, 1990, the second appellant (C.B.I.) requested Shri R.C. Jain, Special Judge, Delhi to issue a letter rogatory/request to

Switzerland urgently for getting the necessary assistance so that the investigation can be conducted in Switzerland lest very important and relevant

evidence would remain uncollected and the cause of justice would be frustrated.

20. The Special Judge after hearing the prosecution allowed the application by his order dated 5th February, 1990. The said order reads thus :

In the result, the application of the CBI is allowed to the extent that a request to conduct the necessary investigation and to collect necessary

evidence which can be collected in Switzerland and to the extent directed in this order shall be made to the Competent Judicial Authorities of the

Confederation of Switzerland through the Ministry of External Affairs, Government of India subject to the filing of the requisite/paper undertaking

required by the Swiss Law and assurance for reciprocity.

21. It appears that though the Examining Magistrate of Geneva decided on 26th March, 1990 to accept the letter of request, on a challnege by

two of the affected parties, the Criminal Court of Canton of Geneva held that the request for mutual judicial assistance presented by India did not

in its form satisfy the requirement of Article 28 of the Federal Act on International Mutual Assistance in Criminal Matters (for short "IMAC") and

sent back the letter rogatory for compliance of certain procedural formalities. Thereafter, the CBI submitted another application to the Special

Judge on 16th August, 1990 praying for issuance of an amended letter rogatory to the competent judicial authority in the Confederation of

Switzerland. It was also prayed to have the proceedings on this application in camera since the proceedings arising thereon involve sensitive

aspects. By that time, Shri V.S. Aggarwal assumed charge as Special Judge in place of Shri R.C. Jain.

22. It was at this relevant time i.e. on 13th August, 1990 Shri H.S. Chowdhary, an Advocate claiming to be the General Secretary of an

Organisation named as Rashtriya Jan Parishad as a public interest litigant filed Criminal Miscellaneous Case No. 12 of 1990 before the Special

Judge seeking certain prayers inclusive of not to issue letter rogatory on the request of the CBI unless the allegations against the named persons are

established and that no request for freezing bank account be made to Swiss Government etc. The details of the prayers are given in our judgments

in 286881 and 265181 . The Special Judge, Shri V.S. Aggarwal dismissed the petition of Shri H.S. Chaudhary on 18th August 1990 holding that

he has no locus standi. Then the Special Judge for the reasons mentioned in his order issued (1) Note of compliance and (2) Amended Letter

rogatory on August 21, 1990.

23. It may be recalled that H.S. Chaudhary filed a criminal revision before the High Court of Delhi which came up for hearing before Justice M.K.

Chawla who by his order dated 19th December, 1990 dismissed the revision petition holding that H.S. Chaudhary had no locus standi to present

the revision but took suo moto cognizance of the matter in exercise of powers vested on him under Sections 397 and 401 read with Section 482 of

the Criminal Procedure Code and directed the issuance of show cause notice to the CBI and the State calling them ""as to why the proceedings

initiated on the filing of FIR No. RC 1 (A)/90/ACU-IV dated 22.1.90 pending in the Court of Shri V.S. Aggarwal, Special Judge, Delhi, be not

quashed.

24. On being aggrieved by the order of Justice M.K. Chawla, H.S. Chaudhary preferred an appeal challenging the findings of the High Court that

he had no locus standi and the appellant herein (Union of India) and several political parties such as Janata Dal, Communist Party of India

(Marxist) and Indian Congress (Socialist) preferred appeals canvassing the correctness of the order of Justice M.K. Chawla taking suo moto

cognizance and issuing notice calling upon the CBI and the State to show cause as to why the proceedings initiated on the strength of the FIR be

not quashed. One independent writ petition was also filed for the same relief as sought for by the political parties. This Court by its Order dated

27th August, 1991 allowed the appeal of the Union of India and quashed the suo moto action of the High Court but reserved the reasons to be

given later on vide 286881 . Thereafter, this Bench rendered its final judgment on 28th August, 1992 giving the reasons in justificatioin of its earlier

order. In the final judgment, this Court confined the question only with regard to the scope and object of public interest litigation and the suo moto

exercise and inherent powers of the High Court and ultimately held that H.S. Chowdhary did not have any locus standi to challenge the veracity of

the First Information Report and the proceedings arising thereon and quashed the show cause notice issued to the CBI and the State. However, in

the earlier Order itself, we expressed our view as regards the right of parties aggrieved by initiation of criminal proceedings to challenge the said

proceedings, in the following words:

Even if there are million questions of law to be deeply gone into and examined in a criminal case of this nature registered against specified accused

persons, it is for them and them alone to raise all such questions and challenge the proceedings initiated against them at the appropriate time before

the proper forum and not for third parties under the garb of public interest litigants.

25. After the first round of the bout (i.e. the public interest litigation) was lost by H.S. Chowdhary, Shri W.N. Chadha, the respondent herein who

is one of the named accused in the FIR has entered into the arena by preferring Criminal Writ No. 501 of 1991 before the High Court of Delhi

through his pairokar, Shri S. Nandi of Delhi challenging the legality and validity of the First Information Report dated 22nd January, 1990 and the

letter rogatory issued by the Special Court vide its order dated 5th February, 1990 and the amended letter rogatory issued by the Special Court

on 21st August, 1990 and praying for quashing of the F.I.R. and all other proceedings arising thereon inclusive of the letters rogatory and for

restraining the appellants from further proceeding in the investigation on the basis of the FIR.

26. It appears from the judgment of the High Court that a volley of attacks had been triggered on against the entire criminal proceedings inclusive

of the registration of the case, the main contention of which are as follows:

(1) The report of the JPC pertaining to the subject matter of the impugned FIR would constitute a legal bar not only for the registration of the FIR

and the continuation of the investigation in pursuance of it but also for any further inquiry or investigation by the CBI or trial of any offence with

regard to the subject matter of the proceedings in question which had been deeply gone into by the JPC and finally decided as borne out from the

Report of the JPC.

(2) The first Information Report does not disclose the commission of any offence and at any rate against the respondent even assuming that the

respondent had received certain amount by way of winding up charges/commission through some other company.

(3) The very fact that no civil case has yet been filed by the Government of India for recovery of the so-called commission in India and elsewhere

by invoking the arbitration clause of the contract, the entire controversy is to be held as being based on mere conjectures and surmises.

(4) The report of the JPC clearly reveals that the Bofors gun was best amongst the other available guns and was offered at the minimum price.

(5) Though 31 months have passed by since the registration of the FIR, no public servant has been brought on record as accused so far.

(6) The FIR was conceived with a mala fide motivation of the persons in authority and the criminal proceeding has been initiated with an oblique

purpose.

(7) The letters rogatory are liable to be quashed on the grounds; firstly that the Special Judge had no jurisdiction to issue letter rogatory and

secondly he had not complied with the principle of audi alteram partem in the sense that he failed to issue notice to the respondent who is a named

accused in the FIR and to afford him a reasonable opportunity of being heard before issuing letter rogatory on 5/7th February, 1990 as well on

21/22nd August, 1990.

(8) The Special Judge had erred both in law and on fact in issuing the letters rogatory as he failed to appreciate that the FIR does not disclose the

involvement of the accused persons whose properties are attached and rights are affected by the letters rogatory.

(9) The allegations in the F.I.R. do not constitute any offence against the respondent warranting an investigation, leave apart the question of dual

criminality.

27. In addition to the above contentions, the respondent has also raised some more legal contentions before the High Court, those being:

(1) That the Memorandum of Understanding (MOU) entered into between India and Switzerland is neither a Treaty nor an enforceable contract

between the two Governments.

(2) The Memorandum of Understanding is incompetent because India''s Ambassador in Switzerland has no authority to negotiate or execute such

a document.

(3) The Memorandum of Undertanding was not sub-sequently ratified by the President of India or by the Parliament.

28. The appellants besides filing their counter affidavit to the main writ petition made their written submissions refuting all the challenges made by

the respondent.

29. The High Court rejected the contention of the respondent that MOU is not a Treaty holding, ""We do not find any merit in this contention.

Similarly, the High Court rejected the second contention of the respondent that the Ambassador of India in Switzerland has no authority to

negotiate and execute the MOU holding that such a contention ""is also without merit in view of the letter of credence, a copy of which has been

annexed by the respondents along with their additional written submissions."" As regards the contention that the MOU was not ratified, it has been

held ""We also do not find any merit in the third contention that MOU was not ratified by the President or Parliament as there is no express

provision in MOU envisaging its ratification"".

30. Dealing with the contention raised on behalf of the respondent that the Report of the JPC constitutes a bar to the registration of the FIR and the

continuation of the investigation, the High Court observed as follows:

Since there is no provision in the CrPC barring investigation by CBI in a case where the matter has been inquired into by JPC, we do not find any

merit in this contention. But JPC being a High Power Committee of both Houses of Parliament and having gone into substantial evidence we are of

the opinion that we also cannot totally ignore the conclusions arrived at by the JPC.

31. The above observation shows that the High Court did not favour the contention that the report of the JPC constitutes a legal bar for the

registration of the FIR and continuation of the investigation.

32. Though the High Court rejected some of the submissions made on behalf of the respondent as abovementioned, allowed the writ petition on

the other grounds and gave the followings findings drawing strength from various documents, namely, the letter dated 29.11.1985 of the then Chief

of Army Staff, report of the JPC, the approval of the CCPA in 1984 regarding the proposal for procurement of 155 mm guns along with certain

related equipments and ammunition, the negotiations of the Negotiating Committee comprising of high ranking officials, the report of the

Comptroller and Auditor General of India dated 26th April, 1989 containing the comments regarding the engagement of agents in the Bofors deal,

the opinion of the then Attorney General, embodied in the JPC Report etc. The findings are:

1. The decision regarding the finalisation of the contract with Bofors was taken in accordance with well established procedure.

2. Bofors had brought down their price compared to the competitive Sofma and gave other concessions amounting approximately to Rs. 10.5

crores even after the issuance of letter of intent. All this clearly shows that the procedure adopted for finalisation of the contract with Bofors was

perfect and bonafide.

3. There is no allegation even in the FIR that any favour was shown by the Negotiating Committee to M/s. A.B. BofOrs.

4. In the FIR, no public servant has been named as an accused.

5. Though no stay was granted to proceed with the investigation, even after expiry of more than 31 months from the date of the registration of the

FIR, CBI has failed to name any public servant as an accused.

6. In the absence of any public servant being brought as an accused, the respondent cannot be treated as an abettor.

7. As Bofors, as borne out from the records, has been corresponding directly with the authorities of the Government of India, the respondent

cannot be held to have acted as a middleman. The respondent never represented on behalf of Bofors in the finalisation of the contract and if at all

anybody is alleged to have played any role in the finalisation of the contract, it is AE Services Ltd. with whom the association of the respondent has

not been alleged even in the FIR.

8. The dominant factors in the finalisation of the contract were the price and quality of the gun system.

9. No offence under any of the provisions as mentioned in the F.I.R. is made out.

10. No offence either u/s 409 or under any other sections of IPC is made out in the F.I.R. No suit has been filed or any arbitration proceeding has

been initiated for recovery of the alleged commission.

33. The High Court has also made reference to the Judgment of this Court 28th August, 1992 (Supra) in which this Court after examining the FIR

did not agree with a positive assertion of Justice M.K. Chawla stating ""that the FIR filed by the CBI in this case on the face of it does not disclose

any offence."" For proper understanding, we would like to reproduce the earlier observation of this Court in the above cited case which reads as

follows:

We have carefully and scrupulously gone through the First Information Report and we are unable to share this view of Mr. Justice Chawla, quite

apart from the other grounds on which the accused may like to attack the First Information Report.

34. After making reference to the above observation, the High Court in its impugned judgment has recorded the following finding in unequivocal

and unambiguous terms:

With respect, we are also of the view that it may not be correct to say that the FIR on the face of it does not disclose any offence against any one,

named or unnamed accused.

(emphasis supplied)

35. Notwithstanding of the above specific finding, the High Court rendered the following conclusion:

But while dealing with the issues raised by the petitioner, in this case, we have come to the conclusion that if the allegations made in the FIR are

read by themselves or along with the conclusions by JPC (which was a high powered committee, representing both Houses of Parliament), which

are based on evidence collected by the said Committee and conclusions arrived at by us, explained hereinabove, which are again based on the

records of the case, and further that CBI has failed to name any public servant as an accused in the case, even after the expiry of more than 31

months from the registration of the case, as explained earlier, no offence is made out against the petitioner under Sections 120B, IPC read with

Sections 161, 162, 163, 164 and 165A of the IPC read with Section 5(2)/5(1)(d) and 5(2)/(5)(1)(c) of the Prevention of Corruption Act, 1947

read with Sections 409, 420, 468 and 471 IPC.

36. In the result, the High Court allowed the writ petition and quashed the impugned First Information Report, the letters rogatory issued on two

occasions and other proceedings taken and orders passed in pursuance of the said FIR by its impugned judgment dated 2nd September, 1992.

37. It appears from the judgment under challenge that after the judgment was reserved by the High Court, an application being Crl. M. 334 of

1992 was filed by Shri Prashant Bhushan, Advocate as a public interest litigant expressing his grievance that no proper submission was made as

regards the legality of the issue of letter rogatory and the competence of the Special Court in issuing the same. Such submissions were made in the

form of a written argument. The High Court after issuing notice to the counsel for the CBI as well as the respondent herein and hearing the parties

held that all the relevant points mentioned in the written argument filed by Shri Prashant Bhushan were fully argued by the counsel for the CBI and,

therefore, the allegations made against the counsel for CBI are unfounded and accordingly disposed of that application.

38. The facts and the sequence of events of this case which we have chronologically narrated more in a summary way than in describing the galaxy

of facts in detail in order to avoid prolixity clearly show that while Shri Harinder Singh Chaudhary was seaking quashing of the letter rogatory, FIR

and all other proceedings arising thereon as a public interest litigant on behalf of the accused named and unnamed inclusive of this respondent in the

FIR, the respondent (W.N. Chadha) was inexplicably silent but only after Harinder Singh Chaudhary had miserably become unsuccessful in his

attempt of thwarting the criminal proceedings even at the door step on the gound that he had no locus standi, the respondent (W.N. Chadha) has

come out of his shell - that too - through his Paiorkar and challenged the criminal proceedings raising various questions which, of couse, are

available to him de hors the questions which have already-been decided and concluded by this Court during the first round of litigation. In fact, we

ourselves in our earlier order dated 27th August 1991 have expressed the view that it is only for the aggrived parties inclusive of this respondent to

agitate and challenge the criminal proceedings at the appropriate time before the proper forum.

39. The appellants, namely, the Union of India through its Secretary, Ministry of Home Affairs, New Delhi and the Central Bureau of Investigation

through its Director have, without loss of time, approached this Court by preferring the SLP even on 4th September, 1992 along with a petition for

ad-interim ex-parte stay. A three Judges Bench of this Court presided over by Hon''ble the Chief Justice took the matter on the very same day i.e.

on 4.9.1992 and passed the following order:

Issue notice, Learned counsel for the respondent accepts notice. To come up for admission on 17th September, 1992, preferable before a Bench

presided over by Hon''ble Pandian, J.

In the meantime, it is directed that the impugned judgment of the High Court shall not be utilised before any Cantonal Court or Authority for the

purpose of obtaining release of any bank account which has been frozen or for the return or release of any information or documents till the S.L.Ps

are disposed of or till further orders.

Learned counsel for the respondent states that respondent will not make any application for the release of any documents in his favour till further

orders on the basis of the impugned judgment.

40. Thereafter on 17.9.1992, this Court to which one of us (S. Ratnavel Pandian, J) was a party granted leave and directed the interim order

passed on 4.9.1992 to continue and in addition made a further direction that the impugned judgment shall not be utilised for any purpose until

further orders.

41. The core of the grievance of the appellants is that the High Court without assimilating the averments made in the First Information Report in the

proper perspective and on a misconception that the entire proceedings are plagued by procedural wrangles and controversies has entered into the

realm of conjectures and surmises and rendered the manifestly erroneous impugned findings. According to them, the conclusions arrived at by the

High Court by overstepping its jurisdiction are totally opposed to the well established principles of law laid down by a series of decisions of this

Court. Further, it is contended that this impugned verdict has prevented the crucial evidence from ever surfacing which evidence otherwise could

have been unearthed and collected to establish the allegations made in the FIR.

42. Seriously challenging the findings of the High Court, Mr. Altaf Ahmad, the learned Additional Solicitor General assisted by M/s. C.V. Suba

Rao and Ashok Bhan, learned advocates has articulated that the High Court by slipping and stumbling on many slippery grounds has rendered its

findings which are not only opposed to law but also are contumacious. According to him it surprises in extreme that the High Court has thought that

in exercise of its prerogative powers under Article 226 of the Constitution, it could quash the F.I.R. even though the said FIR discloses the

offence/offences against the named and unnamed accused and the investigation has not yet commenced in its true sense except a preliminary effort

of obtaining some information from the Swiss banks as regards the names of the account holders and to have an access to secret bank accounts

linked with the Bofors payments. The learned Additional Solicitor General submits that there is an overwhelming weight of authority in favour of his

view that the FIR cannot be quashed if the allegations do make a prima facie case. He cited some decisions of this Court spelling out the

circumstances under which the High Court could exercise its discretion.

43. In continuation of his submission, the learned Additional Solicitor General submits that there is no legal bar in having requested the Special

Court to issue letters rogatory/request for assistance to the competent judicial authorities in the Confederation of Switzerland for investigation and

collection of evidence for solving the Bofors mystery because the investigating agency, namely, the CBI has to establish the names of the

beneficiaries, the quantum of the amounts they were paid and the nature of their services even by cutting through the thicket of legal tangles. By the

impugned judgment quashing letters rogatory, the High Court has now subverted and forestalled the collection of the requisite vital and valuable

particulars which lie buried in Swiss vaults and that unless the embargo now created by the impugned judicial pronouncement is removed by setting

aside the impugned judgment, the CBI will be paralysed and precluded from unearthing the evidence and the wider conspiracy with international

dimensions and bringing the culprits within the dragnet of prosecution and that the entire proceedings taken so far will be frustrated and halted.

44. Regarding the finding of the High Court that even after 31 months from the registration of the case, the CBI not only failed to produce any

material against anyone of the accused inclusive of the respondent but also could not name even a single public servant as accused, it is submitted

that the logic of this line of reasoning is totally fallacious in law and on fact, and this finding will be fraught with serious consequences, resulting in the

destruction of the investigation so far carried out. According to the Additional Solicitor General, it is only during the course of the investigation, the

identity of the accused persons can be brought on record; but in the present case, unfortunately the CBI is not allowed to have access to the bank

accounts which would alone reveal the identity of the accused persons. Further, ever since the registration of the case various attempts were/are

made by initiating multiple proceedings as aforementioned to thwart the investigation by putting spoke in its wheel at every stage. therefore, the

delay has occasioned more due to the multiple obstructions put forth by H.S. Chowdhary and thereafter by the present respondent and it is not

due to any procrastination on the part of the prosecution and that it cannot be said that the case is kept dangling endlessly without any evidence

against anyone of the accused.

45. The learned Additional Solicitor General has seriously urged that a bare perusal of the FIR manifestly demonstrates that huge payments have

been deposited in the account of Svenska Inc. in Swiss Bank Corporation, the principal beneficiary of which is the respondent, W.N. Chadha. He

clarifies the above submission stating that there is a clear link between Svenska Inc. Panama and Anatronic General Corproation of which the

respondent is admittedly the President, as described in detail in paragraphs 53-59 of the FIR, a persual of which will leave no doubt whatsoever

that Svenska Inc. Panama is just a front Company and belongs to the respondent. According to him, there are sufficient materials indicating the

involvement of the respondent in the commission of the offences in question. It is further stated that the connection between Svenska Inc. Panama

and AGC is discernible from the agreements of the years 1978, 1984 and 1986 entered into by Bofors with the two aforementioned concerns.

46. Finally, he requested this Court to pronounce the verdict as early as possible.

47. It may be mentioned in this connection that the first Bench presided over by the Chief Justice while issuing notice on 4.9.1992 in this appeal

also issued notice in Criminal M.P. No. 4999/92 seeking for leave to file a SLP by Shri Prashant Bhushan. There is a foot-note in the order dated

4.9.92 reading ""SLP filed by Mr. Prashant Bhushan shall also be put up along with this petition."" Apart from this petition two other unnumbered

SLPs are also filed - (1) by Shri George Fernandes through his counsel Prashant Bhushan; and (2) another by one Shri Jaswant Singh through his

counsel Ms. Kamini Jaiswal alongwith two Criminal M.P. Nos. 5201 and 5160 of 1992 seeking leave to file the special leave petitions. Mr. Shanti

Bhushan, the learned senior counsel who appeared in the unnumbered two SLPs filed by Prashant Bhushan addressed this Court on the question

of locus standi as both the SLPs are public interest litigations. Mr. Ram Jethmalani, the learned senior counsel appeared in the unnumbered SLP

filed by Jaswant Singh and addressed his arguments. Both the learned Counsel while addressing their arguments on locus standi of all the above

three petitioners in preferring their respective SLPs which are public interest litigations incidentally touched upon the merits of the case and

supplemented the submissions of the Additional Solicitor General. Mr. Jethmalani waxed eloquent on the disastrous consequences that are likely to

follow due to the quashing of the F.I.R. and the entire other proceedings and characterised the impugned judgment as being a judicial transgression

and castration of the criminal law of this land. He said that the allegations made in the FIR are very serious and outrageous in nature and the

circumstances veering the case bear chilling evidence and that if such evidence is buried fathoms deep pursuant to the impugned judgment, the

people of this nation who are having and reposing great trust and confidence in judiciary will loose their faith in the entire system of judicial

administration. He continues to state that the repetitive attempts of the respondent to frustrate and filibuster the proceedings of the prosecution -

firstly through H.S. Chowdhary as his proxy raising the same issues and secondly through his Pairokar after having become unsuccessful in his first

attempt are nothing but a ploy to escape the clutches of law. According to him the respondent residing in United Arab Emirates has committed

serious violation of the provisions of the Foreign Exchange Regulations Act and Income Tax Act by keeping his account in foreign country and that

the FIR contains sufficient allegations that the respondent had received huge amount for himself and for passing off to the public servants, and

therefore, in order to purify the stream of justice, the impugned judgment of the High Court has to be quashed. The learned Counsel has further

urged that the respondent on the pretext of false reasons of health is purposely residing in United Arab Emirates with which country there is no

extradition treaty and to which country Indian summons and warrants cannot reach and therefore, the respondent who is an out-law is not at all

entitled to the assistance of the law of this country.

48. According to the respondent, even the entire allegations in the FIR do not constitute any offence against any of the accused much less against

him and they are all frivolous, baseless and nothing more than mud slinking. Further, he has started attacking the conduct of the investigating agency

in requesting the Court to issue letter rogatory and the authority of the Special Court in issuing letters rogatory on 5/7th February, 1990 and

subsequently the ratified letter, rogatory issued on 21/22nd August, 1990. In short, before the High Court his effort was to show that the entire

criminal proceeding is an aimless voyage or a roving expedition with oblique motive and that he has been caught in a political cross fire which

smacks of personal vendetta and in which he has absolutely no role to play. The above breathtaking deliberation and debate made before the High

Court has yielded the desired effect of quashing the F.I.R., letters rogatory, and all other proceedings arising therefrom, as pointed out earlier.

49. The vital issues involved in this case have stirred much debate before this Court on the previous occasion which was the first round of litigation

by a public interest litigant and the result is the pronouncement of the preliminary order in August 1991 followed by the detailed judgment therefore

in August 1992 as repeatedly pointed out in the preceding part of this judgment. The vital part of the conclusion of our detailed judgment reads

thus:

However, it has become necessary atleast to deal with the first alleged illegality. We are constrained to do so because of the assertion of the High

Court; that being ""that the First Information Report on the face of it does not disclose any offence....

We have carefully and scrupulously gone through the First Information Report and we are unable to share this view of Mr. Justice Chawla, quite

apart from the other grounds on which the accused may likely to attack the First Information Report. None of the named accused came before

Mr. Justice Chawla raising this question of lack of allegations and particulars in the FIR so as to constitute any offence, muchless a cognizance

offence.

50. The above conclusions clearly spell out that this Court did not share the view that the First Information Report does not disclose any offence

but however the other questions which might be available for the accused persons to attack the First Information could be availed of.

51. To understand the above conclusions, it is relevant to note that one of the propositions for consideration set out by Mr. Justice M.K. Chawla

for his suo moto consideration was whether the First Information Report filed by the CBI does disclose any offence.

52. Notwithstanding the above finding of this Court, the High Court in its impugned judgment has examined various legal and factual issues

inclusive of the question whether the First Information Report does disclose any offence against the named and unnamed accused persons and

pronounced its final verdict. In fact, the High Court has taken on its shoulder some of the issues which were not really agitated upon by the

respondent about which we would deal in the later part of this judgment.

53. We shall now examine the tenability of the various grounds on the basis of which the High Court has rendered its impugned judgment. Firstly

we shall deal with vital grounds relating to the issue of letters rogatory.

Whether issue of letter rogatory is opposed to law and violative of the principle of natural justice and thereby has become liable to be quashed?

54. It appears from the impugned judgment that it has been contended before the High Court that there is no jurisdiction to issue letter rogatory by

the Special Judge unless he is satisfied with regard to the extent of dual criminality and the prima facie involvement of the accused persons whose

property or rights are sought to be affected by the letter rogatory. This being a condition precedent, the Special Judge could exercise his

jurisdiction only after giving prior notice and affording a reasonable opportunity of being heard to the named accused and the Special Judge by

non-compliance of that condition, has erred in law and on fact by issuing letter rogatory. It has been urged that the Special Judge has failed to

appreciate that the First Information Report in this case does not disclose any offence whatsoever, leave apart any offence of dual criminality.

55. The above contentions were tested by the High Court on the anvil of two legal propositions, namely, (1) There is no compliance of the

principle of audi alterant partem, in that the Special Judge has not afforded any reasonable opportunity of being heard before issuing the letter

rogatory and (2) The Special Judge has not applied his mind to all facts and circumstances of the case before passing his orders directing issue of

letters rogatory.

56. After making a long deliberation on the aspect of this question, the High Court gave its conclusion quashing letters rogatory as follows:

In view of the above discussion, we are of the view that the Special Judge had jurisdiction to issue letter rogatory on the basis of MOU 20th

February, 1989 between Government of India and Government of Switzerland and Section 166A Cr.P.C. Since in the present case, the learned

Special Judge failed to issue notice and deemed (denied) opportunity of hearing to the petitioner whose property and rights were sought to be

affected by the issue of the impugned letter rogatory and further there was non-application of mind by the learned Special Judge, we quash letters

rogatories issued in pursuance of the above orders dated 5th February, 1990 and 21st August, 1990 passed by the learned Special Judge.

57. Before embarking upon a discussion on this question, we shall see what the expression "letter rogatory" means.

58. The lexical meaning of the word "rogatory" is given in "Webster"s Encyclopedic Unabridged Dictionary of the English Language" as follows:

pertaining to asking or requesting

"Collins English Dictionary" gives the meaning of the word "rogatory" as under:

(esp. in legal contexts) seeking or authorised to seek information

59. Black"s Law Dictionary (sixth Edition) at page 905 defines the expression "letter rogatory" as follows:

A request by one court of another court in an independent jurisdiction, that a witness be examined upon interrogatories sent with the request. The

medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court

procedure peculiar thereto and entirely within the latter"s control, to assist the administration of justice in the former country.

A formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the

testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first

court for use in the pending action.

This process was also in use, at an early period between the several states of the Union. The request rests entirely upon the comity of courts

towards each other.

60. It is clear from the above meaning of the said expression that "Letter Rogatory" is a formal communication in writing sent by a Court in which

action is pending to a foreign Court or Judge requesting the testimony of a witness residing within the jurisdiction of that foreign Court may be

formally taken thereon under its direction and transmitted to the issuing Court making such request for use in a pending legal contest or action. This

request entirely depends upon the comity of Courts towards each other, that is to say, on the friendly recognition accorded by the Court of one

nation to the laws and usages of the Court of another nation.

61. It appears from the records that the First Information Report was laid before the Special Court on 22nd January, 1990. On 23rd January, the

request was made by the Director of CBI followed by another letter of request dated 26th January, 1990 to the concerned authorities in

Switzerland for freezing/blocking certain bank accounts, relevant to this case. The Federal Department of Justice and Police, Switzerland moved

the Judge of Geneva and the concerned Judge of Zurich who on being prima facie convinced of dual criminality and the need for investgation in

Switzerland froze the relevant bank accounts in this regard on 26th January, 1990 as intimated by the Federal Department of Justice and Police

through the Embassy of India in Switzerland. As per the intimation, the relevant accounts in the bank has been blocked upon 28th February, 1990.

therefore, it had become necessary for freezing the accounts beyond 28th February, 1990 and to make a request for judicial assistance to

Switzerland failing which the Swiss law obliges the withdrawal of the instructions to block the accounts. It is further disclosed from the records that

the Federal Department of Justice and Police at Berne which corresponds to the Ministry of Law and Home of the Government of India have

assured that the Swiss authorities would render assistance in the investigation in Switzerland in accordance with the mutual assistance agreement

dated 20th February, 1989 subject to the condition of the receipt of letter rogatory from the competent judicial authority in India. This necessitated

to send letter rogatory to Switzerland urgently for getting the necessary assistance for the investigation to be conducted in Switzerland lest very

valuable and relevant evidence would remain uncollected and the cause of justice would suffer.

62. It was only under those pressing pressing circumstances, the DSP, CBI/ACU-(IV)/DSPE, New Delhi (the investigating officer) submitted an

application on 2nd February, 1990 before the Special Judge praying issue of letter rogatory with certain enclosures for assistance to the competent

judicial authorities in the Confederation of Switzerland so that during the investigation of this case, the necessary evidence could be collected in

Switzerland and the investigation is taken to its logical conclusions as per the requirements of the law. The Special Judge after satisfying himself

accepted the request by its order dated 5th February, 1990 and issued letter rogatory/request enclosing therewith the copies of certain documents

on 7th February, 1990 to the competent judicial authorities in the Confederation of Switzerland. The Federal Department of Justice and Police,

Berne found the letter rogatory in order and forwarded the same to the Examining Magistrate of Geneva for taking necessary action thereon. The

examining Magistrate, Geneva after satisfying himself that the said letter of rogatory was in order accepted the same on 26th March, 1990 and

commenced the investigation as requested.

63. While it was so, two of the affected parties in Geneva filed appeals in the Criminal Court of Canton of Geneva. The Criminal Court of Geneva

passed an order on 3rd July, 1990 on the appeals expressing its view that the letter rogatory did not, in its form, satisfy the requirement of Article

28 of the Federal Act of International Mutual Assistance in Criminal Matters (IMAC) and annulled the order of admissibility of mutual judical

assistance handed down by the Examining Magistrate on 26th March, 1990 and sent back the letter rogatory for compliance of certain procedural

formalities. In that order, the Criminal Court of Canton, Geneva observed that the provisional measures ordered by the Examining Magistrate, in

particular, the seizure of documents and/or bank accounts are not affected by the order.

64. The above order dated 3rd July, 1990 was submitted to the Special Court in India on 16th August, 1990 with some enclosures since the CBI

got the copy of the order dated 3rd July, 1990 on 13th August, 1990 from the Delhi Administration. In the second application dated 16th August,

1990 the CBI requested to issue amended letter rogatory/request. The Special Judge, Shri V.S. Aggarwal who by then took charge of the Special

Court issued Note of Compliance and amended letter rogatory on August 22, 1990.

65. Be it noted that on 5/7th February, 1990 when the first letter rogatory was sent by Shri R.C. Jain, Special Judge, Section 166-A of the

Criminal Procedure Code was not in vogue. It was only thereafter an Ordinance, namely, the Criminal Procedure Code (Amendment) Ordinance,

1990 was promulgated coming into force from 19th February, 1990. Section 166A(1) as introduced by the Ordinance authorised the investigating

officer or an officer superior in rank to the investigating officer to issue a letter of request. Sub-section (2) of Section 166-A of the Ordinance

authorised the Criminal Court to issue a letter of request in its discretion on an application made by the investigating officer or any officer superior

to the rank of investigating officer. Section 166-B introduced by the above Ordinance deals with the letter of request from a country or a place

outside India to a Court or authority for investigation in India. Thereafter, the Criminal Procedure Code (Amendment Act) 10 of 1990 was

enacted on 20th April, 1990 conferring the power only on the Criminal Court but not on the investigating officer or any officer superior to the rank

of investigating officer to issue a letter of request as introduced by the Ordinance.

66. It appears from the impugned judgment that though on behalf of the respondent, a contention was raised that the Special Judge had no

jurisdiction or power to issue letter rogatory on 5/7th February, 1990, the High Court except simply mentioning that contention in the discussion

part of its judgment and then proceeding with the counter submission made by the learned Counsel for CBI submitting that that the said letters

rogatory were issued by the Special Judge on the strength of the memorandum of understanding between Government of India and Switzerland

and in the discharge of his obligation mandated on him by the Constitution and the law, did not go into that question of the jurisdiction or power of

the Special Judge to issue letter rogatory on 5/7th February, 1990 despite the fact that Copies of the letters rogatory alongwith their enclosures

issued on 7th February, 1990 and 22nd August, 1990 have been made available to the Court. Section 166-A which was introduced after the issue

of letter rogatory on 5/7th February, 1990 confers jurisdiction on the Special Judge to issue such letters. The result is that there is no specific

discussion with regard to the authority of the Court in issuing the first letter rogatory.

67. In would be significant, in this connection, to refer to the remark of the High Court reading thus:

We may point out here that in reply to written submissions filed by the petitioner, CBI had filed additional written submissions and had stated

therein that besides three contentions mentioned in the preceding paragraphs, the learned Counsel for the petitioner, during the course of oral

arguments, had not pressed the contention that the Special Judge had no jurisdiction to issue the first letter rogatory on 5/7th-2-1990.

68. There is no challenge before us to the above additional written submission of the CBI.

69. The High Court coming to the legal aspect has observed thus:

Similarly once the power has been conferred on the criminal court to issue the letter rogatory, it follows that the court will have to apply its mind

and give an opportunity of hearing to the person whose property or rights are sought to be affected by letter rogatory.

70. After observing so, the High Court proceeded only on the ground that the Special Judge has not complied with the principle of audi alteram

partem and also has not applied his mind to the facts and circumstances of the case before issuing letters rogatory, as aforementioned.

71. therefore, we are not called upon to go into the question of the jurisdiction of the Special Judge in issuing the letter rogatory but have to deal

only with the other two grounds on the basis of which the High Court quashed the letters rogatory.

72. It would not be out of place to mention here that as rightly pointed out by the Additional Solicitor General that the amended letter rogatory

issued on 22nd August, 1990 has got legal sanction u/s 166-A of the Criminal Procedure Code (for short "Code") notwithstanding the fact that

this provision was not in the statute on 5th February, 1990.

73. The High Court drawing strength from the decision of this Court in 277828 has observed that the principle of audi alteram partem which

mandates that no one shall be condemned unheard is part of the rules of natural justice which is a great humanising principle intended to invest law

with fairness and to secure justice. According to the High Court, there is a violent breach of this principle in the case on hand; in that the

respondent has not been put on notice with regard to the issue of letter rogatory and afforded a reasonable opportunity of being heard.

74. No doubt it is true that a seven-Judges Bench of this Court in Smt. Maneka Gandhi has opened a new vista in the area of personal liberty as

enshrined under Article 21 of the Constitution and emphasised the audi alterant partem rule which emphasis is of affording a fair opportunity of

being heard on prior notice to a party to whose prejudice an order is intended to be passed by the Government or its officials. Further, it is stated

by the High Court that all the safeguards in favour of an accused contained in the Criminal Procedure Code have now become a part of the

constitutional provisions and they are governed by Articles 14, 19, 20, 21 and 22 and that the procedure contemplated under Article 21 requires

that it should not be arbitrary, fanciful, oppressive or discriminatory. therefore, the failure on the part of the Special Judge in issuing notice to the

respondent and affording him a reasonable opportunity of being heard vitiates the letters rogatory.

75. Countering the above arguments, the learned Additional Solicitor General seriously contended that there is no provision conferring any right of

audience on an accused before issuing letter rogatory the object of which is to collect evidence which may be used against the accused during the

course of the trial. According to him, the accused has no right to control or interfere with the manner in which the evidence is to be collected.

Chapter XII of the Code under the heading "Information to the Police and other Powers to Investigate covering Sections 154 to 176 does not

provide for application of the concept of audi alterant partem for an accused from the very inception of a criminal proceeding till its culmination in

filing of a report u/s 173 of Cr.P.C. He continues to state that an order of the Court issued in exercise of the powers u/s 166-A of the Code is only

for the purpose of collecting the evidence and in the very nature of things such an order does not effect any right of an accused and, therefore, the

said order is beyond the purview of the High Court power even u/s 397 of the Code. Hence there is no question of the rule of audi alterant partem

being attracted in the instant case. therefore, the only important question that arises for our consideration is whether the issue of letters rogatory on

5/7th February, 1990 and on 22nd August, 1990 are liable to be quashed on the ground of non-compliance of the rule of audi alterant pattern.

76. The rule of audi alteram partem is not attracted unless the impugned order is shown to have deprived a person of his liberty or his property. In

the present case, no such consequences have arisen from the letter rogatory. If the letter rogatory is accepted by the foreign Court and acted upon

it will then disclose only the relevant facts about the identity of the account holders, quantum of the amounts standing in the names of the individual

account holders representing the credit of Bofors money and the nature of such accounts. The follow up consequences would be that the corpus of

the offence would be preserved intact by preventing the withdrawal of the money from those accounts or closure of the accounts by the account

holders till the merit of the case is decided.

77. In fact the Special Judge in Delhi is not possessed with any power or authority to deprive the liberty of the respondent residing out of the

jurisdiction of Indian Courts and having his property in question in a foreign country. Only in case where a public officer has got such a power, the

question of ''fair play in action'' will be attracted. This rule was explained by Lord Denning M.R. in Schmidt v. Secretary of State for Home Affairs

1969 (2) Cha Div 149, stating that ""where a public officer has power to deprive a person of his liberty or his property, the general principle is that

it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf"".

78. The above explanation is quoted in Maneka Gandhi.

79. The rule of audi alteram partem is a rule of justice and its application is excluded where the rule will itself lead to injustice. In A.S. de Smith''s

Judicial Review of Administrative Action, 4th Ed. at page 184, it is stated that in administrative law, a prima facie right to prior notice and

opportunity to be heard may be held to be excluded by implication in the presence of some factors, singly or in combination with another. Those

special factors are mentioned under items (1) to (10) under the heading ""Exclusion of the audi alteram partem rule''.

80. Thus, there is exclusion of the application of audi alteram partem rule to cases where nothing unfair can be inferred by not affording an

opportunity to present and meet a case. This rule cannot be applied to defeat the ends of justice or to make the law ''lifeless, absurd, stultifying and

self-defeating or plainly contrary to the common sense of the situation'' and this rule may be jettisoned in very exceptional circumstances where

compulsive necessity so demands.

81. Bhagwati, J. (as the learned Chief Justice then was) in Maneka Gandhi speaking for himself, Untawalia and Murtaza Fazal Ali, JJ. has stated

thus:

Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the

words of Lord Morris of Borth-y-Gest, from ''fair play in action'', it may equally be excluded where, having regard to the nature of the action to be

taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even

warrants its exclusion.

82. Thus, it is seen from the decision in Maneka Gandhi that there are certain exceptional circumstances and situations whereunder the application

of the rule of audi alteram pattern is not attracted.

83. Paul Jackson in Natural Justice at pages 112 and 113 observed thus:

...It was seen that any body making a decision affecting party''s right or legitimate expectation must observe the rules of natural justice. Conversely

a decision which does not affect rights, because for example, it is a preclude to taking further proceedings in the course of which the party

concerned will have an opportunity to be heard, will, very likely, not itself be subject to the requirements of natural justice, or only in a modification

form. A fortiori, the decision by, for example, the responsible Minister or official to initiate the procedure necessary to reach a preliminary

conclusion or to examine the existence of a prima facie case can be taken without first giving the person affected a hearing....

84. See also (1) Wiseman and Anr. v. Bomeman and Ors. Law Report 1971 Appeal Cases 297; (2) Pearlberg v. Varty (Inspector of Taxes)

(1972) 1 WLR 534; (3) Regina v. Barnet and Camden Rent Tribunal Ex. P. Frey Investments Ltd. Law Report (1972) 2 Q.B.D. 342; (4) and

Herring v. Templeman and Ors. (1973) 3 All ELR 569.

85. In R. v. Peterborough Justice, ex.p. Hicks (1977) 1 W.L.R. 1371, it has been held that search warrants under the Forgery Act, 1913 Section

13 may issue without the party affected being heard.

86. A Division Bench of the Allahabad High Court in 93556 All after referring to the decision in Ragina (supra) and Norwest Holst Ltd. v.

Secretary of State for Trade (1978) 1 Ch. Div. 202 said thus:

Thus, it has been recognised by Judges of undoubted eminence that a decision on substantive rights of parties is one thing and a mere decision that

another body investigate and decide on those substantive rights is quite another, and the principle of hearing is not applicable to the latter class of

cases.

87. The principle of law that could be deduced from the above decisions is that it is no doubt true that the fact that a decision, whether a prima

facie case has or has not been made out, is not by itself determinative of the exclusion of hearing, but the consideration that the decision was purely

an administrative one and a fullfledged enquiry follows is a relevant - and indeed a significant - factor in deciding whether at that stage there ought

to be hearing which the statute did not expressly grant.

88. Applying the above principle, it may be held that when the investigating officer is not deciding any matter except collecting the materials for

ascertaining whether a prima facie case is made out or not and a full enquiry in case of filing a report u/s 173(2) follows in a trial before the Court

or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of audi alteram partem superimposes an obligation to issue a

prior notice and hear the accused which the statute does not expressly recognise. The question is not whether audi alterant partem is implicit, but

whether the occasion for its attraction exists at all.

89. Under the scheme of Chapter XII of the CrPC, there are various provisions under which no prior notice or opportunity of being heard is

conferred as a matter of course to an accused person while the proceeding is in the stage of an investigation by a police officer.

90. In 280703 , this Court to which both of us (Ratnavel Pandian and K. Jayachandra Reddy, JJ.) were parties after making reference to the

decision of the Privy Council in AIR 1945 18 (Privy Council) and the decision of this Court in 283023 has pointed out that""...the field of

investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and

have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions

relating to investigation....

91. More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the

entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a

police report till the investigation culminates in filing of a final report u/s 173(2) of the Code or in a proceeding instituted otherwise than on a police

report till the process is issued u/s 204 of the Code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint

notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have

participation till the process is issued. In case the issue of process is postponed as contemplated u/s 202 of the Code, the accused may attend the

subsequent inquiry but cannot participate. There are various judicial pronouncements to this effect but we feel that it is not necessary to recapitulate

those decisions. At the same time, we would like to point out that there are certain provisions under the Code empowering the Magistrate to give

an opportunity of being heard under certain specified circumstances.

92. It may be noted that u/s 227 of the Code dealing with discharge of an accused in a trial before a Court of Sessions under Chapter XVIII, the

accused is to be heard and permitted to make his submissions before the stage of framing the charge. u/s 228 of the Code, the trial Judge has to

consider not only the records of the case and documents submitted there with but also the submissions of the accused and the prosecution made

u/s 227. Similarly, u/s 239 falling under Chapter XIX dealing with the trial of warrant cases, the magistrate may give an opportunity to the

prosecution and the accused of being heard and discharge the accused for the reasons to be recorded in case the Magistrate considers the charge

against the accused to be groundless. Section 240 of the Code dealing with framing of charge also reaffirms the consideration of the examination of

an accused u/s 239 before the charge is framed.

93. u/s 235(2), in a trial before a Court of Sessions and u/s 248(2) in the trial of warrant cases, the accused as a matter of right, is to be given an

opportunity of being heard. Unlike the above provisions which we have referred to above by way of illustration, the provisions relating to the

investigation under Chapter XII do"" not confer any right of prior notice and hearing to the accused and on the other hand they are silent in this

respect.

94. It is relevant and significant to note that a police officer, in charge of a police station, or a police officer making an investigation can make and

search or cause search to be made for the reasons to be recorded without any warrant from the Court or without giving the prior notice to any one

or any opportunity of being heard. The basic objective of such a course is to preserve secrecy in the mode of investigation lest the valuable

evidence to be unearthed will be either destroyed or lost. We think it unnecessary to make a detailed examination on this aspect except saying that

an accused cannot claim any right of prior notice or opportunity of being heard inclusive of his arrest or search of his residence or seizure of any

property in his possession connected with the crime unless otherwise provided under the law.

95. True, there are certain rights conferred on an accused to be enjoyed at certain stages under the CrPC - such as Section 50 whereunder the

person arrested is to be informed of the grounds of his arrest and to his right of bail and u/s 57 dealing with person arrested not to be detained for

more than 24 hours and u/s 167 dealing with the procedure if the investigation cannot be completed in 24 hours - which are all in conformity with

the "Right to Life" and "Personal Liberty" enshrined in Article 21 of the Constitution and the valuable safeguards ingrained in Article 22 of the

Constitution for the protection of an arrestee or detenu in certain cases. But so long as the investigating agency proceeds with his action or

investigation in strict compliance with the statutory provisions relating to arrest or investigation of a criminal case and according to the procedure

established by law, no one can make any legitimate grievance to stifle or to impinge upon the proceedings of arrest or detention during investigation

as the case may be, in accordance with the provisions of the CrPC.

96. Incidentally, it may be stated that there is no question of attachment of money of the respondent or any of the accused, named or unnamed,

standing to the credit of the account holders in Swiss banks linked with Bofors mystery but it was only freezing of the accounts as per the request

made by the Director, CBI by Ms letter dated 23rd January, 1990 and followed by another letter dated 26th January, 1990 and thereafter

pursuant to the request through letters rogatory for judicial assistance in Switzerland, But for the request made by the letter rogatory, the Swiss law

obliges withdrawal of all the instructions to block the account. therefore, we are of the view that the detailed discussion of the High Court with

reference to the Criminal Law Amendment Ordinance of 1944 though is not warranted in this regard. However, we will deal that Ordinance with

relevant provisions in the later part of this judgment.

97. If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a

procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the

provisions of law relating to the investigation lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to

the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary.

98. Reverting to the facts, it is not the case of the respondent that he is having any account in Swiss banks connected with Bofors mystery and that

that account is frozen to his prejudice. When the respondent himself has not come forward with any specific case stating as to what was the

quantum of the amount standing to his credit in Swiss banks and in what manner he is now aggrieved by the letter rogatory and in what way he is

deprived of his properties, it is incomprehensible as to how the High Court has come to the conclusion that the respondent is deprived of Ms

property. Similarly, any one of the other named or unnamed accused or any third party, not named in the FIR, has not come forward with a

complaint of grievance on account of the freezing of the accounts.

99. It will be relevant in this context to refer to a decision of the Constitution Bench of this Court in 281511 wherein it has been held that a power

of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is

necessarily regulated by law,"" and that a search and seizure of a document under the provisions of Sections 94 and 96 of the CrPC (old) is not a

compelled production thereof within the meaning of Article 20(3) and hence does not offend the said Article.

100. Shri Rajinder Singh, learned senior counsel appearing for the respondent made his submission that the Special Judge had acted unilaterally in

issuing the letter rogatory and without having a full dress enquiry. The learned Counsel after referring to Section 91 of the Code corresponding to

Section 94 of the old Code and to Sections 4 and 5 of the Bankers" Books Evidence Act, 1891 and relying on a decision in 470515 wherein it

has been held that a Magistrate making an order u/s 94 of the Code (old) for production of documents does not thereby commit himself to the

proposition that inspection of all the documents, the production of which is ordered must necessarily follows and the party producing the

documents is not precluded from objecting to their subsequent inspection, seriously contended that the banks should have been given prior notice

and heard. According to him, the banks, in such a circumstance, probably might have objected to the production of the bank accounts.

101. We are unable to see any force in the above submission of Shri Rajinder Singh because, firstly there is no request for production of the

documents; secondly there is no prayer in the letter rogatory for production of the entire account books and; thirdly till date no objection is taken

by the Swiss banks. It is pertinent to note that the High Court has not found fault with the validity of the letter rogatory on the ground of alleged

production of bank accounts or the failure of any notice to the Swiss banks.

102. It has been contended on behalf of the respondent that the Special Judge has exhibited a partiality towards the respondent by not giving any

opportunity of being heard when the prosecution was given a right of audience before issuing letter rogatory.

103. Merely because the Special Judge heard counsel for the CBI before issuing letter rogatory the respondent cannot make such a complaint that

he should have also been given prior notice to present his case as we have repeatedly pointed out that the stage of investigation is only at the door.

The order sought for from the Special Judge by CBI is only for process of judicial assistance from the competent judicial authorities in the

Confederation of Switzerland for investigation and collection of evidence. In such a case the accused has no right to raise the voice of opposition.

104. For the aforementioned discussion, we hold that the facts and circumstances of the case do not attract the audi alterant pattern rule requiring a

prior notice and an opportunity of being heard to the respondent and that the respondent has never been prejudiced and deprived of his right to

property due to the alleged non-compliance of the principle of audi alterant pattern.

Whether the issue of letter rogatory is vitiated by non-application of mind by the Special Judge?

105. The High Court for drawing its conclusion that the issue of letter rogatory suffers from non-application of mind and the said letter was issued

in a very casual and mechanical manner prejudicial to the respondent has given the following reasons:

(a) By the letter rogatory, not only the information regarding assets owned/possessed by many persons (besides the named accused) including

certain Indian citizens who are neither named in the First Information Report nor is there any allegation against them has been asked for but also the

Swiss authorities are requested to freeze the bank accounts of all those persons.

(b) The Special Judge did not apply his mind to all the points raised by the Cantonal Court for rectification of the letter rogatory issued on 5/7th

February, 1990.

(c) The Special Judge has not at all applied his mind before issuing the amended letter rogatory to the objections raised by the Cantonal Court of

Geneva with regard to the pasting of a piece of paper containing certain names which were earlier mentioned in the letter dated 26th January, 1990

given by Mr. M.K. Madhavan, CBI to the Federal Department of Justice and Police. The non-reference to the earlier letter of the CBI in the letter

rogatory issued by the Special Judge on 5/7th February, 1990 and also its absence as one of the annexures to the letter rogatory show that the

letter rogatory issued by the Special Judge had been tampered with.

(d) The CBI in its note of compliance clarifying the observations of the order of 3rd July, 1990 of the Criminal Court of Geneva not only referred

to the Criminal Law Amendment Ordinance, 1944 which empower the District Judge to pass ad interim orders attaching the money or other

property but also enclosed a copy of the same for the purpose of showing the power of the Criminal Courts in India. u/s 4(1) of the said

Ordinance a District Judge is empowered to pass an ad intertim order attaching the money or other property alleged to have been procured by

means of any offence but in terms of Section 4(2) of the said Ordinance the District Judge was required to issue a notice to the person whose

money or other property is being attached; accompanied by copies of the order, the application and affidavits and to the evidence if any recorded

calling upon the person to show cause why the order of attachment should not be made absolute.

(e) When the CBI itself has relied upon the provisions of the above Ordinance, the Special Judge ought to have complied with the mandate of

Section 4(2) by issuing a show cause notice to the respondent.

106. Though in the writ petition, this ground has not been specifically taken in the manner in which the learned Judges have framed the question,

however, under ground No. (Z), it is pleaded:

That the Special Judge ought to have conducted a preliminary enquiry by trying to look into the entire materials placed before him by thoroughly

investigating before acting pursuant to the First Information Report, which in the respectful submission of the petitioner, the learned Judge failed to

do so, thus causing miscarriage of justice to the petitioner....

107. From the judgment, it is seen that certain documents which are said to have been claimed as secret and confidential documents by the ASG

are taken into consideration for reaching to the conclusion that there was non-application of mind.

108. Then the puzzling question that comes up for consideration is as to how all the correspondence, namely, the copy of the order of the Canton

Court of Geneva and the note of compliance of the CBI came to the knowledge of the High Court especially when these documents were not

available with the respondent and not produced by the Court. The clue for answering the above question is found in the judgment itself which reads

thus;

We may point out here that pursuant to our directions copies of the original letter rogatory along with their enclosures issued on 7th February,

1990 and 22nd August, 1990 have been made available to us.

109. In yet another part of the impugned judgment, it is stated as follows:

From records, we, however, find that through letter rogatory information regarding assets owned/possessed by many persons (besides the named

accused) including certain Indian citizens, who are neither named accused in the FIR, nor there is any allegation against them in the FIR has been

asked for and even the Swiss Authroties were requested to freeze their bank accounts.

110. In this connection, the additional grounds filed by the appellants may be taken note of.

111. Ground No. ''N'' of the additional grounds reads thus:

It is submitted that the entire original record was offered to the High Court in confidence from which the High Court has even quoted....

112. Ground No. ''Q'' of the additional grounds, the appellants have stated thus:

...High Court has recorded findings beyond the scope of arguments urged at the bar on behalf of respondent herein and the pleadings on record.

113. During the argument before this Court, the Additional Solicitor General reaffirms that certain secret and confidential documents at the instance

of the court - namely the letters of the CBI to the Federal Department of Justice and Police, Berne, Switzerland dated 23rd and 26th January,

1990, the order dated 3rd July, 1990 of the Cantonal Court, the note of compliance of the CBI, the letters of the Chief of Army Staff, the minutes

of the meeting of the Negotiating Committee etc. etc. were handed over in a sealed cover with an oral request not to reveal the document to the

other side or to refer them in the judgment since otherwise the Government would be claiming privilege on the said documents. In other words, oral

privilege was claimed u/s 124 of the Evidence Act. The Additional Solicitor General continues to state that the High Court unfortunately despite the

oral request made on behalf of the CBI has freely made use of those confidential documents inclusive of the copy of the order of the Cantonal

Court. Leaving apart the submission made by the learned Additional Solicitor General before this Court, the impugned judgment itself pellucidly

discloses that the High Court has considered certain documents which were not placed by the respondent before it, but evidently by the appellants

and has relied upon those documents for quashing the letters rogatory on the ground of non-application of mind. In fact, Mr. Prashant Bhushan in

his unnumbered SLP has supported the plea of the Additional Solicitor General. No specific objection has been raised from the side of the

respondent with regard to the oral request made by the CBI not to make use of those confidential documents in the judgment.

114. In these circumstances, we have no other option except to hold that the High Court has used all those confidential documents which the Court

ought not to have used for the reasons, firstly those documents are stated to have been claimed as secret documents and secondly ignoring the

request of the CBI said to be made and without notice to the appellants herein. Besides free use of the documents, some portion of the documents

are extensively quoted. The only inescapable inference that could be drawn in those circumstances would be that the Court has made up its mind

as to the expediency of quashing the letter rogatory and thereafter has conveniently made use of those documents for the end product.

115. Be that as it may, after having gone through the orders of the Special Court dated 5th February 1990 and 21st August 1990 and all the

connected records placed before the Court, the Special Judges cannot be found with to have issued letter rogatory casually or mechanically but

only after applying their mind and on being satisfied that the FIR constitutes a cognizable offence or offences and that a competent officer under the

CrPC has made a request for issuance of letter rogatory.

116. Hence we see absolutley no reason to sustain the conclusion of the High Court that the issue of letter rogatory suffers from non-application of

mind by the Special Judge.

117. In this connection, we would like to refer to a decision of the Bombay High Court in Kekoo J. 480164 In that case a request was made by

the CBI to the Magistrate for issuing letter rogatory through the Ministry of External Affairs, Govt. of India, New Delhi to the District Court of the

United States for the Western District of Washington for issuing directions to the Washington Mutual Savings Bank, Citadel to make available

certain documents duly certified under an affidavit to the CBI, the investigating officer in that case in India. The request was granted by the learned

Magistrate, which order was challenged as illegal in the High Court. It appears that the documents called for came into possession of the CBI.

Having regard to the facts of the case while rejecting the challenge made by the petitioner, Chandurkar, J. (as he then was) while dismissing the

wirt petition observed:

Now, assuming for a moment that the order of the learned magistrate is wholly illegal and without jurisdiction as a result of that order these

documents have already come into the possession of the investigating agency.... Once the documents are in the possession of the investigating

agency, assuming that they are received by following a procedure which is illegal in the eye of law, that would not by itself make the evidence

irrelevant or inadmissible. The value to be attached to the evidence will depend on its relevancy and consequently its admissibility and whenever

such documents are produced before the appropriate Court, notwithstanding the manner in which those documents could come into the possession

of the prosecuting agency, they would still be tendered in evidence by the prosecution after satisfying the Court about their admissibility and

relevancy under law.

118. Sawant, J. (as he then was) while agreeing with the dismissal of the petition added his opinion stating thus:

This is admittedly a stage where the prosecuting agency is still investigating the offences and collecting evidence against the accused. The petitioner,

who is the accused, has therefore, no locus standi at this stage to question the manner in which the evidence should be collected. The law of this

country does not give any right to the accused to control, or interfere with, the collection of evidence. The only stage at which the accused can

come in the picture vis-a-vis the evidence, is the stage when the evidence is sought to be tendered against him, and he can challenge it only on the

ground that the evidence is inadmissible. That is why, according to me, the petition cannot be said to be a person aggrieved at this stage, and hence

he cannot claim any relief from this Court by filing a petition either under Article 227 of the Constitution or u/s 397 or 482 of the CrPC as has been

done in this case....

That is why, even assuming that the provisions of Section 91 Cr.P.C. were not open to be invoked for getting the letter rogatory issued, the

petitioner-accused is not the person who can complain against such issuance. Hence, this petition was liable to be dismissed in limine on the short

ground that the accused had no locus standi to file the same. It matters; therefore, very little whether the documents were received or were yet to

be received in this country when the petition was filed. Even if the documents were yet to be received in this country, we would have still dismissed

the petition on the aforesaid grounds.... The prosecuting agency in the present case could have secured the said documents from the United States

on its own and without reference to a Court of law. There is nothing in law to bar the prosecuting agency from collecting evidence in that manner.

119. For all the aforesaid reasons we unhesitatingly set aside the order of the High Court quashing the letter rogatory dated 5/7th February, 1990

and the rectified letter rogatory dated 21/22nd August, 1990 issued in pursuance of the orders passed by the Special Judge. The respondent who

is a named accused in the FIR has no locus standi at this stage to question the manner in which the evidence is to be collected. However, it is open

for the respondent to challenge the admissibility and reliability of the evidence only at the stage of trial in case the investigation ends up in filing a

final report u/s 173 of the Code indicating that an offence appears to have been committed.

120. Does the First Information Report prima facie disclose any offence against the respondent, W.N. Chadha and is there any material prima

facie connecting the respondent with the dealings of Bofors relating to the purchase of guns?

121. For answering the first part of the above question the High Court has made a lengthy discussion with reference to the various documents and

examined them under various heads - namely,

(a) Whether the decision for entering into and finalising the contract was followed by the well established procedure?

(b) Whether the contract finally entered is perfect and bona fide?

(c) Whether the allegations made in the FIR do constitute an offence/offences against the respondent W.N. Chadha? and

(d) Whether the non-tracing of the names of the unnamed public servants or at least any one of them generally mentioned in the FIR is entirely due

to indolence or remissness on the part of CBI?

122. In dealing with the question of the procedure followed by the Government of India in entering into the contract with Bofors the High Court

has traced the history commencing from the proposal for procurement of 155 mm guns along with certain equipments and ammunition approved in

April 1984 and ending with its finalisation on 24th March 1986, mostly relying on some original records inclusive of certain confidential documents

which, according to the Additional Solicitor General, were made available to the Court at its instance. The fact that original documents were made

use of and relied upon by the High Court is strengthened by the following observation made in the impugned judgment itself:

The urgency of acquisition of 155 mm gun is evident from the letter dated 29th November, 1985 written by the then Chief of Army Staff to the

then Raksha Rajya Mantri (A), which we have perused from the original record.

123. A scrutiny of the judgment demonstrably shows that the High Court has gone through some original records which in the very nature of them

could not have been made available by the respondent. As indicated above, the Additional Solicitor General states that the original documents

were produced by the Government in a sealed cover for the Court''s perusal with an oral request not to reveal the documents to the other side and

to make use of them in the judgment, besides orally claiming privilege. However, the High Court has not only referred to those documents but also

very much relied upon them. In fact, the High Court has reproduced a relevant portion of the letter dated 29.11.1985 of the then Chief of Army

Staff and also a portion of the minutes of the meeting of the Negotiating Committee recorded on the 4th March 1986. It was only on the basis of

the above documents the High Court drew its final conclusion regarding the procedure followed from the very proposal of the contract till its

finalisation. The relevant conclusion reads thus:

From the facts mentioned hereinabove, it is clear that the decision regarding finalisation of the contract with Bofors was not taken by one or two

persons, it was based on the recommendations of the Negotiating Committee of five Secretaries. Financial Advisor and DCAOS and these

recommendations were dully examined and approved by then Secretaries of the various departments as also by the then two Ministers of State for

Defence, the then Finance Minister and the then Prime Minister (as RM). Thus, the decision was taken in accordance with the well established

procedure.

(emphasis supplied)

124. After having recorded its finding with regard to the procedure followed the High Court has passed on to the second question as regards the

bona fide nature of the contract.

125. By making reference to the keen competition between the two finally short-listed firms, namely, M/s. Bofors and Sofma and the lower price

quoted by Bofors than that of Sofma in addition to certain further concessions amounting to approximately Rs. 10.5 crores, the Court held thus:

All this clearly shows that the procedure adopted for finalisation of the contract with Bofors was perfect and bona fide.

(emphasis supplied)

126. The High Court, after recording the above conclusions as regards the procedure followed and the nature of the contract, has examined the

vital issue as to whether the allegations made in the FIR do constitute an offence/offences under any of the provisions mentioned in the FIR

warranting a thorough investigation against the respondent.

127. Based on the correspondence exchanged between Bofors and the authorities of the Government of India and the opinion of the then Attorney

General of India contained in paras 8.6 and 8.16 of the report of the JPC the High Court has held as follows:

The petitioner (W.N. Chadha) who was getting 1 lakh SEK per month for administrative services e.g. transportation, forwarding of letters, telex

etc. cannot be called a middleman as he never represented on behalf of Bofors for the finalisation of the contract as explained hereinabove.

128. Rejecting the contention on behalf of the CBI that the principal beneficiary of payments made by Bofors to Svenska Inc. in connection with

the gun deal in question is the petitioner who is owning the AGC, the High Court has observed thus:

...that contractual obligation between M/s. Bofors on the one hand and Svenska Inc. and AGC on the other had existed much before the decision

of the Government of India taken in November, 1984 prohibiting the involvement of agents and middlemen in relation to the gun contract.

129. It has been further concluded by the High Court:

...it is clear that if at all anybody can be alleged having played any role for finalisation of the contract, it is AE Services Limited with whom

association of the petitioner has not been alleged even in the FIR.

130. The High Court has also held that the averments made in the FIR against the respondent on the basis of media reports are nothing but only

surmises and conjectures.

131. As regards the payment of SEK 1 lakh per month to AGC as revealed by the letter dated 10th March, 1986 of Bofors (vide para 96 of the

FIR) it has been held by the court below that even as per the allegations in the FIR the said amount paid to the respondent was legitimate one

towards the administrative services.

132. Then quoting the opinion of the then Chief of Army Staff recorded in his letter dated 29th November, 1985, the opinion of the then Attorney

General contained in paragraph 8.13 of the report of the JPC, the agreement between Bofors and AGC dated 24th October, 1978 and another

agreement between Svenska Inc. Panama and Bofors entered into in December, 1978 the period of which was further validated in 1984 the High

Court has held:

After the Government of India''s policy decision prohibiting involvement of agents, Bofors might have been required to settle their contractual

obligations with their agents which is a matter purely between Bofors and their former agents. If Bofors made payments out of its own resources as

alleged by the CBI to their former agents as winding up charges or commission in whatever form may be for termination of the earlier existing

contract, it would not constitute any criminal offence.

133. Thereafter referring to the opinion of the then Attorney General contained in paragraphs 8.7, 8.9 and Clause 26 of the agreement entered into

between Government of India and Bofors it has held:

...that unless there is a specific allegation regarding payment of any money to a public servant in India it cannot be said that the amount paid by

Bofors to any of his agents outside India was a bribe meant for certain public servants.

134. According to the Court below, when there is no reference to any agent or middle man in the contract and when the procedure followed for

finalisation of the contract has been perfect, there can be no case of cheating u/s 420 of the Indian Penal Code or abetment of cheating against the

respondent as well as under any of the penal provisions mentioned in the FIR.

135. As there is no allegation of wrongful gain or loss levelled against any of the named and unnamed accused by the Bofors or their agents barring

the media reports, there is no question of offences under Sections 468 and 471 having been committed. Further in the absence of any material

indicating Criminal breach of trust, there cannot be any offence u/s 409 IPC even on the basis of the allegations as contained in the FIR.

136. The High Court has further pointed out that the non-filing of any suit and the failure to initiate any arbitration proceeding for the recovery of

the alleged commission by the Government support the conclusion that there is no breach of trust.

137. At the outset we are constrained to observe that we are terribly shocked on seeing that the High Court has gone out of its authority and

overstepped its province by making use of certain original records and then on the basis of the said records proceeded to examine the entire

procedure followed right from the proposal up to the finalisation of the contract between Bofors and Government of India and its genuineness and

bona fide and ultimately affixed its seal of judicial approval holding that the contract is perfect and bona fide.

138. It is to be noted that the High Court appears to have waded through the entire original records produced before it by the Government for its

perusal and on the strength of those documents, the Court has raised the two questions, namely, whether the proper procedure in the execution of

the contract was followed and whether the contract finalised is perfect and bona fide and answered both the questions in affirmative, that is in

favour of the respondent and prejudicial to the appellants.

139. The perusal of the impugned judgment clearly discloses that the learned Judges of the High Court have freely used those documents which are

said to be secret and confidential and not only referred but also quoted certain portion of those documents in extenso as stated supra. According

to the learned A.S.G., the line of course taken by the High Court to its conclusions on the seriously disputed questions of law and fact taking its

cue from the original records cannot be countenanced. In our view, the documents (the copies of which are produced before us claiming to be

secret documents) from their very nature could have never been in possession of any third party much less with the respondent and in such a case,

the High Court was not at all justified in making use of those documents for its findings especially in a case of this nature where there are serious

and outrageous allegations. In these circumstances, one would be constrained to observe that the High Court has prejudged the issue and thereby

laid down the foundation for its subsequent findings for quashing the entire proceedings. No doubt every court has its plenary powers to deliberate

upon every issue agitated before it as well as any other issue arising on the materials placed before it in the manner known to law after giving a

prior notice and affording an opportunity of being heard. This power of discharging the statutory functions whether discretionary or obligatory

should be in the interest of justice and confined within the legal permissibility. In doing so, the Judge should disengage himself of any irrelevant and

extraneous materials which come to his knowledge from any source other than the one presented before him in accordance with law and which are

likely to influence his mind one way or the other. In this context, it may be appropriate to recall the following view expressed by Benchamin

Govdozo in his Treaties "The Judge as a Legislator".

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his

own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague

and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system....

140. We feel that it is not necessary to go deep into the matter any further except saying that the High Court is not justified in affixing its seal of

approval to the contract by holding it to be bona fide, on being executed following the proper procedure.

141. For all the reasons stated above we without any hesitation quash those finding with regard to the nature of the contract and the procedure

followed.

142. Now let us switch over to the later part of the question and examine whether there are materials prima facie connecting the respondent with

the dealings of BofOrs.

143. Admittedly the respondent was earlier Bofors" representative in India appointed in the year 1978 and from January 1986 he was appointed

as Bofors" Administrative Consultant. According to the respondent, in the agreement covering the period upto the end of 1985, there was a

provision for the payment of commission on sales to him, but his role during this period was essentially supportive in nature and not that of a full-

fledged agent who could bind Bofors in any way or enter into negotiation on their behalf.

144. The learned ASG referring to the secret part of SNAB report published by Hindu in its issue dated 9th October, 1989 and certain other

relevant documents published in the issue of Indian Express and Statesman of 13.10.1989 states that an Indian who had been agent of Bofors for

10-15 years was the principal beneficiary of payment made by Bofors to Svenska Inc. in connection with the gun deal in question and that the

respondent was very much connected with Svenska Inc. Of course, Mr. Rajinder Singh has denied any connection of the respondent with Svenska

Inc. and added that if the period of 10 or 15 years mentioned by the learned ASG is calculated backwards from 1985, it would show that the

connection of the alleged agent with Bofors should have started from 1975 and, therefore, the expression "agent" as appeared in the Press could

not refer to the respondent who became the agent only in 1978. The arguments of Mr. Rajinder Singh has been refuted by the ASG who relied on

the statement of the respondent before the investigating agencies engaged by JPC wherein the respondent is stated to have admitted that he was a

representative of M/s. Aerotronics General Agencies (for short "AGA") and tried to sell some laser guns to India but was not successful and that

some time in 1975-76 this Company AGA was taken over by Bofors and it was renamed as Bofors Aerotronics and this was his first contract

with BofOrs. On the basis of the above statement, the ASG has submitted that the respondent was working with Bofors at least since 1975 which

would unmistakably show that he was the sole beneficiary of the payment made to M/s. Svenska Inc. through his first formal agreement with the

Bofors in the name of Aerotronics General Corporation signed in 1978. According to him, the fact that in 1978 there was a written contract

between Bofors and AGC, of which the respondent to admittedly the President - signed by the respondent on 24.10.1978 and by Bofors

21.12.1978 validating the contract till 30.9.1981. Coinciding in point of time another agreement was signed between Svenska Inc. Panama and

Bofors signed by Svenska on 14.12.1978 and Bofors on 21.12.1978 validating upto 31.9.1981. The learned ASG drew our attention to the

similarities between the aforesaid agreement of Bofors with Svenska Inc. and AGC. According to him on 11.3.1981 through identical letters

signed by Martin Ardbo (one of the named accused in the FIR) who is the former President of Bofors, both agreements i.e. one between AGC

and Bofors and the other between Svenska Inc. and Bofors were renewed for another period of three years upto 30.9.1984 and that in 1984

Bofors signed another agreement with Svenska Inc. and with AGC which are also having similarities. He continues to state that Svenska Inc.

Panama belonged to the respondent and the statement made by Bofors President on 18.12.1986 before officials of the Swiss National Bank

makes it clear that the principal beneficiary in Svenska Inc. is an Indian who has been an agent for Bofors for 10-15 years as alleged in para-25 of

the FIR. He further states that the description of the payments as commission or as winding up cost is not correct but the payment was remitted by

Bofors on 30.5.1986 to the account of Svenska Inc. with Swiss Banking Corporation was to make payments to public servants in Government of

India as motivation or reward for such public servants who helped finalisation of the contract by dishonestly abusing their official position. It is

further submitted by the ASG that there are sufficient materials connecting the respondent with payment of the bribe amount and therefore, the

finding of the High Court that the amount paid to the respondent was a legitimate one as the same was for administrative services and the said

amount could not be termed as bribe by any stretch of imagination absolutely incorrect and bereft of the incriminating documentary evidence. The

above argument advanced on behalf of the appellants was stoutly resisted by the learned Counsel for the respondent, according to whom there

was a clear understanding between Government of India and Bofors that there should not be any middle man or agent and in fact the agreement

finalised for purchase of the guns does not spell out the engagement of any middle man or agent.

145. One should not lose sight of the fact that the oral understanding has not been incorporated in the written agreement about which there is no

dispute. What is stated at the bar is that the oral understanding has been confirmed by subsequent correspondence between the parties. The High

Court has extensively quoted the opinion of the then learned Attorney General and very much relied on it for its observation, reading thus:

After the Government of India''s policy decision prohibiting involvement of agents, Bofors might have been required to settle their contractual

obligations with their agents which is a matter purely between Bofors and their former agents. If Bofors made payments out of its own resources as

alleged by the CBI to their former agents as winding up charges or commission in whatever form may be for termination of the earlier existing

contract, it would not constitute any criminal offence.

146. Be that as it may, we feel that it is not necessary to go deep into the matter in the light of our earlier finding given in Criminal Appeal No.

304/91 etc. etc. the judgment of which is reported in 286881 under the caption Janata Dal v. H.S. Chowdhary wherein we have stated that we

were unable to share the assertion of Mr. Justice M.K. Chawla holding that the FIR on the face of it does not disclose any offence. Further this

Court has also expressed its feeling on the statement of Justice Chawla in the following terms:

While so, it shocks our judicial conscience that Mr. Justice M.K. Chawla before whom no aggrieved or affected party had come challenging the

FIR, has taken suo moto action and recorded such a categorical assertaion that "no offence" thereby meaning much less a cognizable offence is

made out in the FIR.

147. In fact, the High Court in its impugned judgment itself has recorded its finding that they are also of the same view as that of this Court that it

may not be correct that the FIR does not disclose any offence against anyone named or unnamed accused which definitely includes the respondent

also. In the background of the finding of this Court and that of the High Court it is not necessary to go deep into the matter by referring to various

documents such as report of the JPC, the opinion of the then learned Attorney General, report of the Comptroller and Auditor General of India

etc. lest it may affect either of the parties if the investigation ends up with the trial of the case. Though we refrain from giving any positive finding

with regard to the alleged payment of the bribe amount to the respondent, the allegations made in the FIR u/s 154 of the CrPC prima facie

constitute the offence alleged therein. Hence we set aside the finding of the High Court that no offence is made out against the respondent under

various provisions of the different Statutes.

148. It has been vehemently argued by the counsel for the respondent saying that the allegations of corruption which are wrapped in a cocoon of

ambiguity, falsehood and vagueness were conceived with mala fide motivation of the persons in authority at the time of the registration of the case

and the criminal proceedings were initiated only with an oblique political purpose. According to the counsel, the investigation geared up by those

who were in power in the then outgoing Government in order to gain mileage in the journey of their political career is highly polarised and

politicalised.

149. The above argument cannot be countenanced. As observed in Bhajan Lal, when the entire matter is only at a preliminary stage and when the

investigation has yet to go a long way to gather the requisite evidence the Court cannot come to a conclusion one way or the other on the plea of

mala fide at such a stage. Further in case the investigation discloses that the entire proceeding has been initiated only with mala fides, probably the

prosecution itself may throw the case overboard. Answering a similar contention, Bhagwati, CJ in 276375 has observed as follows:

It is a well established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not become

vitiated on account of mala fides or political vendetta of the first informant or the complainant.

150. The said observations made in Bhajan Lal and Sheonandan Paswan in this regard apply with all force to the case on hand.

151. The submission that the Government has neither filed any civil suit nor has initiated any arbitration proceeding to recover the amount of alleged

commission serves as one of the factors compelling the Court not to accept the case of the prosecution has to be simply mentioned only to be

rejected. We are of the view that this submission is meritless.

152. The High Court appears to have taken a serious note of a piece of paper pasted by the CBI on the letter rogatory forwarded by the Special

Judge to the Cantonal Court of Geneva and expressed its view stating, ""Whatever explanation for this may be, we disapprove the said action of the

officer of CBI who had done this as it may amount to tampering with the judicial records.

153. It has been vehemently contended on behalf of the appellants that the above observation of the High Court is unwarranted and unjustified

since the said observation was made without properly understanding the circumstances under which the piece of paper containing certain names of

account holders became necessary to be pasted. In relation to this observation, a Criminal Misc. Petition No. 6365 of 1992 is filed in this appeal

by Shri K. Madhavan who was then the Joint Director and Special Inspector General of Police, Central Bureau of Investigation and was in charge

of the investigation of the Bofors case alongwith some other officers and who is now stated to have voluntarily retired from the service w.e.f. 1st

November, 1992. According to Mr. Madhavan, this disparaging observation was made by the High Court without giving him any opportunity to

explain the circumstances under which the piece of paper was pasted. Mr. N. Natarajan, learned senior counsel for Madhavan explains the

circumstances stating under Article 18 of the Federal Act on International Mutual Assistance for Criminal Matters, a letter of request dated 23rd

January, 1992 was given by the Director of CBI to the Federal Department of Justice and Police, Federal Government of Switzerland, Berne

requesting for their assistance in the investigation and for freezing/blocking the credit balances/amounts available in various accounts in Swiss

banks. Thereafter, a supplementary request for freezing and blocking of more accounts was given to the Federal Department of Justice and Police

by Shri K. Madhavan on 26th January, 1990 in which he had given the particulars of the names of the account holders in respect of whose

accounts the request for freezing/blocking had been made. In continuation of his submission, he has stated that a copy of the above letter was

shown to Shri R.C. Jain, Special Judge who had perused the same and that the then Additional Solicitor General, Shri Arun Jaitley who appeared

on behalf of the CBI before the Special Judge in fact clarified to the learned Judge that the names mentioned in that letter had been furnished on the

basis of information received by the CBI. But the learned Judge, Shri R.C. Jain has not enclosed the copy of the letter alongwith other annexures

to the letter rogatory dated 7th February, 1990 forwarded to the Swiss authorities. It was under these circumstances, Shri Madhavan happened to

paste a slip containing the names of those account holders as contained in the letter dated 26th January, 1990 and handed over the letter rogatory

with the enclosures to the Swiss authorities. But when the entire letter rogatory was sent back to the Special Judge for compliance of certain

procedural formalities, this disputed piece of paper was also attached to the letter rogatory. Thereafter, the entire matter came before Shri V.S.

Aggarwal, the then Special Judge who after going through the entire records inclusive of the slip of paper sent the amended letter rogatory. It is

further stated that when Shri V.S. Aggarwal, Special Judge enquired of the then Additional Solicitor General as to whether the letter dated 26th

January, 1990 had been shown to his predecessor, Shri R.C. Jain, the Additional Solicitor General confirmed the same stating that the said letter

was shown to Shri R.C. Jain and it was only thereafter the amended letter rogatory was forwarded to the Swiss authorites with the piece of paper

already pasted on the letter. In other words, Shri V.S. Aggarwal, Special Judge has approved the piece of paper already pasted to the letter

rogatory and forwarded the same and, therefore, according to Shri Natarajan, the High Court without appreciating and understanding the

circumstances under which the piece of paper was pasted has made this disparaging observation and requested that this observation may be

expunged. In support of the above arguments, a letter dated 16th November, 1992 of the then Additional Solicitor General, Shri Arun Jaitley is

produced which letter was given by Shri Arun Jaitley to the query asked by Shri Madhavan in his letter dated 15th November, 1992. In his letter,

Shri Arun Jaitley has explained the entire matter which fully supports the present plea of the applicant, Shri Madhavan. We in order to satisfy

ourselves perused the letter of Shri Madhavan dated 26th January and the typed piece of paper pasted on the letter rogatory and are satisfied that

the piece of paper containing the names of the account holders tally with the names mentioned in the letter dated 26th January, 1990 and that it is

only reproduction of one paragraph in verbatim.

154. Though initially, Mr. Rajinder Singh took a serious objection to the conduct of the CBI in pasting this piece of paper to the letter rogatory

without the permission of the Court, when confronted by the subsequent approval of Shri V.S. Aggarwal, Special Judge he had no answer to

sustain the remark of the High Court. We are now fully convinced that there was no tempering of judicial letter rogatory but only additional

particulars were furnished for ready reference of the names of the account holders as contained in the letter dated 26th January, 1990. Even if it is

to be held that the piece of paper should not have been pasted, leave apart the explanation offered since Shri V.S. Aggarwal has approved the

letter rogatory with the pasted piece of paper on being satisfied the circumstances under which it was pasted, the CBI cannot be ostracised. It

must be noted by pasting that slip Shri Madhavan has not added any additional informatioin on his own. therefore, we expunge the remark of the

High Court, as prayed for in the Cr.M.P. In view of this finding, we hold that the High Court was not correct in holding that this has amounted to

tampering of judicial records.

155. The High Court has taken into consideration two factors alongwith the conclusions arrived at by the JPC in its report for granting the relief to

the respondent despite its finding that the allegations in the First Information Report discloses an offence against all the accused about which we will

deal in the later part of this judgment.

156. Of the two, first relates to the alleged failure on the part of the CBI to name any one of the public servants as an accused even after the 31

months from the registration of the case and the second relates to the impounding of the passport of the respondent.

157. In dealing with the first question of the two, the High Court said:

...even after the expiry of more than 31 months from the registration of the FIR, CBI has failed to name any public servant as an accused.

158. The above reasoning of the High Court is neither legally nor factually sustainable. As rightly pointed out by the Additional Solicitor General

whose submissions we have already summarised in the earlier part of this judgment, it is not due to any indolence or procrastination on the part of

the investigation but it is due to the obstructions put on the track of investigation for scuttling the same by approaching the judiciary firstly by Shri

H.S. Chowdhary as public interest litigant and secondly by the respondent through his pairokar. However, the CBI all through is maintaining stoic

silence unmindful of all the scornful criticim and vilification levelled against it, and is relentlessly and tirelessly fighting all the litigations so that it can

successfully proceed with the investigation and collect all the materials to espouse the cause of justice. To say that the prosecution has failed to

name any one of the public servants as an accused even after 31 months from the registration of the case, is a very uncharitable criticism. A survey

of the various proceedings of this litigation reveals that the investigating agency, namely the CBI was fettered at every stage and made to spare its

energy more in Court proceedings than in proceeding with the investigation. Only if the investigation is freely allowed without any hindrance, the

investigating agency can collect all the requisite particulars and bring the names of those public servants on record, the secrecy of which, it is said,

is deeply buried in various places and under various Departments. Hence this reasoning is devoid of any merit.

159. In the penultimate paragraph of the impugned judgment, the High Court has observed:

...It may be noted here that pursuant to the registration of the FIR against the petitioner his passport has been impounded. Non-bailable warrants

for his arrest were issued and the same have been quashed by a learned Single Judge of this Court and the matter is now pending before the

Supreme Court. In these circumstances, it is a fit case where investigation cannot be allowed to continue against the petitioner.

160. We are not able to see any logic in the above reasoning. When we asked the counsel for the respondent as to whether this material of the

impounding of passport was placed before the High Court, he hesitatingly stated that the order of the High Court in Crl. Misc. (Main) No. 1318 of

1990 titled Washeshwar Nath Chadha v. State, has been reported in (1991) 1 DLr 394, and thereby requested the Court to infer that the High

Court might have taken note of that reported judgment, though the judgment spells out nothing about the source of information in this regard. At the

instance of this Court, a copy of the reported judgment in Crl. Misc. case has been placed before this Court by the respondent.

161. Be that as it may, the respondent who was the petitioner in the above case filed a petition before the High Court u/s 482 Cr.P.C. read with

Article 227 of the Constitution seeking certain reliefs, namely, to permit him to inspect the FIR which is the impugned FIR in this case, and to

quash the non-bailable warrants issued against him relating to a case registered under the provisions of the Passport Act, 1967.

162. We are surprised that the High Court has taken a serious view of the impounding of the passport as being a supportive reason for its finding

of annulling the proceedings. In fact that proceeding under the Passport Act cannot have any bearing in this proceeding initiated for quashing the

FIR even though the impounding of the passport is to secure the presence of the respondent for the investigation purposes in connection with the

case on hand. However, in passing we would like to quote a sentence from the order of that case, whatever purpose it may serve. The sentence

reads ""...petitioner does not want the quashing of the FIR nor is he making a request to this Court to interfere in the investigation of the case.

(emphasis supplied)

163. It may be stated that the petitioner in that case is the respondent herein and the FIR referred to above is the impugned FIR in the present

case.

164. Now we shall pass on to a very important aspect of the case which renders the very conclusions of the High Court quashing the FIR as highly

unsustainable.

165. Coming to the close of the judgment, the High Court itself has expressed its view stating ""...it may not be correct to say that the FIR on the

face of it does not disclose any offence against any one, named or unnamed accused"" (emphasis supplied) which we have already extracted above.

Having held so, the High Court thought that in exercise of its powers under Article 226, it could quash the FIR on its findings on the other issues. It

surprises us as to how the High Court quashed the FIR after having positively found that the FIR discloses an offence/offences against named and

unnamed accused which will include the respondent also. But in the next breath, it is held that no offence is made out.

166. This Court, in its earlier proceedings, has rejected the contention that the FIR does not disclose any offence. This observation is binding on

the High Court yet the High Court strangely by way of self-contradiction has held that no offence is made out against the petitioner and thereby

stonewalled the CBI probe. This paradoxical finding perhaps by the High Court is sought to be justified by feebly relying on the fact that the

investigating agency has failed to name any public servant as an accused, on the conclusions of the JPC and also on the circumstances of the

impounding of the passport of the respondent. These aspects have been dealt by us and we have categorically held that these aspects do not in any

way affect the contents of the validity of the FIR. Placing reliance on these aspects which are irrelevant at this stage, the High Court ought not to

have taken the extreme step of quashing the very FIR.

167. We, therefore, are of the firm view that the self contradictory findings of the High Court itself gives a frontal attack to the impugned jugement,

rendering it unsustainable both in law and fact. To put it ironically, the impugned judgment "profusely bleeds due to its self inflicted injury".

168. Shri Rajinder Singh, the counsel for the respondent when confronted with the above inconsistent conclusions, finding himself on a sticky

wicket unhesitatingly stated that he is not accepting the finding of the High Court holding that the FIR discloses the offence which finding in his

opinion is an incorrect and incoherent finding. This reply of Shri Rajinder Singh cannot be countenanced and accepted. The respondent cannot be

permitted to blow hot and cold, thereby attacking one part of the judgment as erroneous and untenable and attempting to sustain the other part as

being well founded on sound reasonings.

169. It cannot be said that the Report of the JPC has acquitted the respondent and others of all the charges levelled against them on appraisal of

the entire evidence. On the other hand, the Report spells out that Bofors did not co-operate and the evidence relating to the recipients of the

amount was not forthcoming. Though we are not inclined to make a detailed survey of the Report, it would suffice to refer to some of the

conclusions of the JPC which would serve our purpose. For proper understanding, we shall reproduce hereunder the relevant portions of some of

the conclusions, recorded, under Chapter IX of the Report of JPC.

Conclusion (vi)

...Despite persistent demands from the Government of India, Bofors declined to give details of these payments and the recipients thereof.

Conclusion No. (vii)

Bofors have expressed inability to furnish copies of their initial as well as the termination agreements with the tree companies to whom winding up

costs were paid, on the plea of commercial secrecy. They have complained that such disclosure would be a breach of their confidentiality

agreement with these companies.

Conclusion No. (ix)

On the ground of commercial confidentiality, Bofors have not furnished full details of the persons to whom winding up costs were paid. Nobody

has come forward with any evidence in regard to the identity of recipients of payments made by BofOrs.... It has not been possible for either our

investigating agencies or any other sources to find any evidence regarding the identity of recipients. The Committee have, therefore, not been able

to reach any conclusion in regard to the identity of recipients.

Conclusion No. (xi)

There is no evidence to show that any middleman was involved in the process of the acquisition of the Bofors gun. There is also no evidence to

substantiate the allegations of commissions or bribes having been paid to anyone. therefore, the question of payments to any Indian or Indian

company whether resident in India or not, does not arise, especially as no evidence to the contrary is forthcoming from any quarter.

Conclusion No. (xii)

Mere suspicion as regards existence of middleman and/or payments of commissions does not constitute sufficient ground for intitiating action to

terminate the contract with Bofors or to raise claims for the reimbursement to Government of payments made by Bofors to the three foreign

companies.

Conclusion No. (xiii)

There is no evidence to establish that the Bofors'' payments totalling SEK 319.4 million involved a violation of any Indian Law.

Conclusion No. (xiv)

There is no evidence of any other payment having been made by Bofors for winning the Indian contract.

170. A perusal of the above conclusions shows that the JPC was not able to secure the entire evidence and that the Bofors also was not fully

cooperating with the enquiry furnishing the relevant documents and that, the JPC submitted its report on the available materials collected and the

legal opinion of the then learned Attorney General of India.

171. Now it is shown that the Swiss authorities are coming forward to give full co-operation and assistance in the collection of evidence at their

end. therefore, when all those are extending their helping hands though so far yet so close, there is no reason to forestall the investigation. In fact

Shri Rajiv Gandhi, the then Prime Minister of India himself wanted a complete probe and made a statement in this behalf in the Lok Sabha on 20th

April, 1987 which we have already extracted in our earlier part of this judgment. However, it may be recalled, in this connection also, his statement

reading ""You show us evidence we do not want proof, we will bring the proof. This assurance was affirmed and reaffirmed on more than one

occasion by the Minister for Defence during the course of the discussion in the Parliament. The JPC itself has felt some suspicion as regards the

existence of middleman, but what the report says is that the mere suspicion does not constitute sufficient ground for initiating action.

172. It may not be out of place to state, in this context, that there are certain provisions in the Criminal Procedure Code which authorise a police

officer to register a case and investigate the matter if there is any reason to suspect the commission of an offence or reasonable suspicion of

commission of any offence. Section 157(1) requires an officer in charge of a police station who "from information received or otherwise" has

reason to suspect the commission of an offence - that is a cognizable offence, he can investigate the matter u/s 156. The expression "reason to

suspect as occurring in Section 157(1) is not qualified as in Section 41(a) and (g) of the Code, wherein the expression reasonable suspicion" is

used. therefore, what Section 157(1) requires is that the police officer should have "reason to suspect" with regard to the commission of an

offence. See Bhajan Lal.

173. therefore, the suspicion entertained by the JPC gives room for a probe especially when there is scope of getting sufficient assistance to make

the probe. The opinion of the then learned Attorney General in the JPC report was based only on the materials available on that day and at that

stage, but not on the materials which are still to be unearthed and brought over the surface.

174. This Court in Bhajan Lal has already examined the principle of law in dealing with the exercise of the inherent power under Article 226 or the

inherent powers u/s 488 of the Code in the matter of quashing the First Information Report and also has listed out the circumstances, by way of

illustration though not exhaustively, under which the High Court can quash a FIR. We feel that it is not necessary to recapitulate the various

decisions of this Court which are already cited in the decision of Bhajan Lal.

175. All the above criminal miscellaneous petitions are filed seeking leave to file appeals challenging the judgment impugned in this case.

Admittedly, none of them was a party to the proceeding in the High Court except Shri Prashant Bhushan who filed his petition before the High

Court, when the matter was reserved for judgment, as a public interest litigant making a complaint that no proper submissions were made on behalf

of the appellants herein with regard to the legality of the issue of letter rogatory and competence of the Special Judge in issuing letters rogatory.

This petition was disposed of by the High Court as the allegations in that petition were unfounded.

176. Before this Court, Shri Shanti Bhushan appearing on behalf of Shri Prashant Bhushan stated that every crime is perpetrated only against the

society and that is why the State takes up the cause on behalf of the Society and, therefore, these petitioners who evince their interest in the

protection of the society should be granted leave to canvass the correctness of the impugned judgment as public interest litigants. In support of his

submission, he placed reliance on the observation of this Court in 283904 and 280318

177. In Arunachalam, challenging the order of acquittal of the accused in a case of murder passed by the High Court, the brother of the deceased

by name Arunachalam filed a SLP and obtained leave from this Court. A doubt was raised about the competency of the private party as

distinguished from the State to invoke the jurisdiction of this Court under Article 136 of the Constitution. It was only in that context, Chinnappa

Reddy, J. observed that ""We do not have slightest doubt that we can entertain appeals against judgments of acquittal of the High Court at the

instance of private parties also.

178. On going through the judgment, we are of the view that it will not be of any assistance for the petitioners herein since none of them was a

party to the proceedings and moreover the investigating agency, namely, the CBI and the Union of India who are the affected parties have

preferred the appeal.

179. In Union Carbide Corporation, it has been said that any member of the society must have locus to initiate a prosecution as well as to resist

withdrawal of such prosecution if initiated.

180. That proposition is also, in our opinion, cannot be availed of as the prosecution was initiated by the appellants herein and they are persecuting

and pursuing the matter upto this Court, The proposition that any one can initiate a criminal proceeding is not in dispute.

181. We have already considered the locus standi of a third party in a criminal case and rendered a considered finding in Janata Dal (supra) when

this matter came before us in the first round of its litigation. Reference also may be made to 283150 .

182. Before the Supreme Court of United States, a similar question arose in Whitmore v. Arkansas [1990] 495 US 149, 109 L. Ed. 135, 110 S

C 1717, whether a next friend can invoke the jurisdiction of the Court when a real party was not able to litigate his or her own cause. The

Supreme Court dismissed the writ of certiorari for want of jurisdiction on the ground that Whitmore, an independent person lacked standing to

proceed in the case. In said case of Whitmore, reliance has been placed on a decision, namely, Gusman v. Marrero 180 US 81, 45 L. Ed. 436,

(1901) 21 SC 293, in which it has been held thus:

However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be

enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case

like this.

183. In fact when this case on hand came up before this Court arising out of the public interest litigation of Shri H.S. Chowdhary, some other

political parties approached this Court as public interest litigants to challenge the impugned judgment in that case, but this Court rejected all those

appeals on the ground of locus standi.

184. For the above reasons stated above, all the Criminal Miscellaneous Petitions are dismissed.

185. The investigation is only at an infant stage and it has to go a long way to collect all the materials. Only after requisite particulars are collected

by the investigating agency, the further course of action would be decided. Whatever it may be, without the battle lines being properly drawn, the

Court will not be justified in making any further positive pronouncement on the merits of the serious and cloudy issues involved in this case de hors

the findings recorded in this judgment. However, as we feel that there may be a battle to be waged on a later occasion by the litigants if the matter

come up for trial, we do not propose to make any further observations.

186. In the result, for the discussion made above, we set aside the impugned judgment of the High Court quashing the letters rogatory - both dated

5/7th February, 1990 and 21/22nd August, 1990 issued by the Special Judge and the FIR registered by the CBI against the respondent under

various provisions of different Statutes and other proceedings and orders based on the said FIR.

187. Criminal Appeal No. 567 of 1992 is allowed accordingly. Crl. M.P. No. 6365 of 1992 filed by Shri K. Madhavan to expunge the

observation of the High Court is also allowed.

188. Before we part with this case, we have to observe that any views expressed or observations made by this apex court should be borne in mind

and given effect to. In the instant case, inspite of the finding of this Court in Janata Dal, the High Court has grossly erred in quashing the FIR, the

same has resulted in a glaring injustice, namely, that the investigation into grave and serious crime has got scotched and all the efforts so far taken

by the investigating agency in digging out the requisite evidence got buried. therefore, we find it imperative to quash the impugned judgment of the

High Court.