(1980) 03 CAL CK 0023

Calcutta High Court

Case No: None

In Re. Sushil Chandra Chowdhury and Others — APPELLANT

Vs

RESPONDENT

Date of Decision: March 27, 1980

Acts Referred:

- Commissions of Inquiry Act, 1952 - Section 2, 2(a), 2(a), 3, 3(1)
- Companies Act, 1956 - Section 237
- Constitution of India, 1950 - Article 226, 311, 356
- Industrial Disputes Act, 1947 - Section 10, 10(1), 12(5)
- Penal Code, 1860 (IPC) - Section 302

Citation: 84 CWN 583

Hon'ble Judges: Sabyasachi Mukharji, J

Bench: Single Bench

Advocate: Bholanath Sen, B.P Banerji and T. Paul, for the Appellant;A.P. Chatterji, Standing Counsel and Raghunath Roy, for the Respondent

Judgement

Sabyasachi Mukharji J.

1. The petitioners challenge in this application under Article 226 of the Constitution, the notification dated 12th August, 1977 being the notification No. 10117-J whereby the Chakrabarty Commission of Inquiry had been appointed. The petitioners also challenge notices issued u/s 8B of the Commissions of Inquiry Act, 1952 all dated 25th February. 1980 and the summons requiring the attendance of the petitioner" pursuant to the summons. The petitioners are six in number. They are police officers employed in the Calcutta Police. They were at the relevant time posted at Shyampukur Police Station where the alleged incident, about which I shall refer presently, took place. The petitioner no. 1 is now the Inspector of Police, Amherst Street Police Station. The petitioner no. 2 is the Sub-Inspector Fraud Section of the

Detective Department. The petitioner no. 3 is the Reserve Officer Brigade Ancillary, Calcutta. The petitioner no. 4 is the Sergeant of the Calcutta Police Traffic Department. The petitioner no. 5 is the Reserve Officer, Hackney Carriage Department of the Calcutta Police Headquarters, Lalbazar and the petitioner no. 6 is a Constable. The respondents to this application are (1) The Secretary, Chakra-borty Commission of Inquiry, (2) Sri Haratosh Chakraborty, Chairman of the Chakraborty Commission of Inquiry and (3) The State of West Bengal. As I have mentioned before, the petitioners challenge the notification dated 12th August, 1977 constituting the Commission of Inquiry. As most of the arguments refer to the constitution of the said Commission and the powers of the said Commission, it would be appropriate to refer to the relevant portions of the said notification. The said notification reads as follows :

No. 10117-J.-- 12th August, 1977 --Whereas there is a widespread demand from different sections of public for an inquiry into allegations of killings of numerous persons in this State for political motives during the period from the 20th March, 1970 to the 31st May, 1975 and killings of, and physical tortures and atrocities committed on, numerous persons in this State during the aforesaid period by public servants and|or persons belonging to or enjoying patronage of the Ruling Party in power in the State and or Centre or the Government in power, State and or Central;

And whereas the Governor is of opinion that it is necessary to appoint a Commission of Inquiry for the purpose of making inquiry into definite matters of public importance, that is killings of numerous persons in this State for political motives during the period from the 20th March, 1970 to the 31st May, 1975 and killings of and physical tortures and atrocities committed on numerous persons in this State during the aforesaid period by public servants and or persons belonging to or enjoying partronage of the Ruling Party in power in the State and|or Centre or the Government in power State and or Central:

And whereas no Commission of Inquiry has been appointed by the Central Government to inquire into the said matters;

Now, therefore, in exercise of the power conferred by section 3 of the Commissions of Inquiry Act, 1952 (60 of 1952), the Governor is pleased hereby to appoint, a Commission of Inquiry consisting of Shri Harotosh Chakraborty WBHJS.

The terms of reference of the Commission of Inquiry shall be as follows :

(a) to enquire into the facts and circumstances relating to specific instances-

(i) of killings of persons in this State for political motives during the period from the 20th March, 1970 to the rest May, 1975 and killings of, and physical tortures and atrocities committed on, persons in this State during the aforesaid period by public servants and[or persons belonging to or enjoying patronage of the Ruling Party in power in the State and|or Centre or the Government in power, State and/-or

Central;

(ii) Whether such killings, other attrocities and physical tortures had been committed with the encouragement of or had been aided or abetted by public servants;

(iii) of killings in particular, of public servants during the aforesaid period to ascertain as to whether such killings were perpetrated at the instigation of the then Government, State and|or Central :

Provided that the enquiry shall also cover the conduct of other individuals, who may have directed, instigated or aided or abetted or otherwise associated themselves with the commission of such acts, and

(b) to consider such other matter which in the opinion of the Com mission of Inquiry have any relevance to the aforesaid allegations.

3. The inquiry by the Commission of Inquiry shall be in regard to:

(i) complaints or allegations aforesaid that may be made before the Commission of Inquiry by any individual or association in such form and accompanied by such affidavites as may be prescribed by the Commission of Inquiry, and

(ii) such instances relatable to item (i) to (ii) of sub-paragraph (a) of paragraph 2 as may be brought to its notice by the State Government for inquiry.

Clause 4 of the said notification states that the Commission shall make interim reports to the State Government on the conclusion of inquiry into any particular allegation or series of allegations and shall complete its inquiry and submit its final report to the State Government within a period of six months from the date of the notification. Clause 5 of the said notification states that the Commission shall have certain ancillary power under the Commission of Inquiry Act. 1952.

2. It is also necessary in this connection to refer to the relevant provisions of the Commissions of Inquiry Art 1952. Section 2 of the said Act defines the appropriate Government which, for our present purpose is relevant and provides as follows :

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

(a) "appropriate Government means--

(i) the Central Government, in relation to a Commission appointed by it to make an inquiry into any matter relatable to any of the entries enumerated in List 1 or II or List III in the Seventh Schedule to the constitution; and

(ii) the State Government, in relation to a Commission appointed by it to make an inquiry into any matter relatable to any of the entries enumerated in List II or List III in the Seventh Schedule to the Constitution.

Section 3(1) of the said Act is in the following terms :

3. (1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the People or, as the case may be the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly.

The other provisions of the Act are not material for the present purpose. The petitioners received the summons and notices under Sec. 8B of the said Act. Section 8B of the said Act provides as follows :

8B. If, at any stage of the inquiry the Commission,

(a) considers it necessary to inquire into the conduct of any person, or

(b) is of opinion that the reputation of any person is likely to be prejudicially affected by the inquiry, the commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence : Provided that nothing in this section shall apply where the credit of a witness is being impeached.

2. As I mentioned before, the petitioner''s in this case, received notices u/s 8B. The said notice, which are in identical terms, inter alia, stated to the petitioners : "Whereas the Commission is of the opinion that your reputation is likely to be prejudicially affected by the inquiry", the commission called upon the petitioners within a particular date to file a reply in the form of an affidavit along with the relevant documents on which the petitioners wish to rely and gave other consequential directions. The Commission also supplied the particulars of the complaint on the basis of which the said notices had been issued to the petitioners. Identical notices were issued to all the petitioners and the complaints were based on identical document viz. affidavit date 26th June, 1978 of Sm. Sunity Bhattacherjee. In the said affidavit. Sm. Sunity Bhattachejee who is wife of Sri Sudhangsu Bhattacherjee, stated that her son, Samir Bhattacherjee, who was, at the relevant time, aged about 15 years of age was a brilliant student and a reputed sportsman used to support the family by the earnings of his good sportsmanship and remarkable football tournaments. She further stated that her son was never interested or engaged in any political activity of any kind and, according to her, her son had confined himself to his studies and sports only. Sometime in August, 1970, according to the deponent of the said affidavit, owing to the shortage of accommodation in her narrow living space at 21 A Mahendra Bose Lane. Calcutta, he used to sleep at a house at 5, Mahendra Bose Lane, Calcutta-3 generously arranged by one of the neighbours who "Was very fond of Samir''s popularity in that area. On the night of 17th August, 1970, according to the complainant, police from Shyampukur P.S. came and enquired about her son and she led the police party to 5, Mohendra Bose Lane, Calcutta-3 where her son. Samir was sleeping Samir was

called out and he came down. The police pounced upon him and dragged him, in spite of protests, by the police party. He was arrested and taken inside the waiting police van. According to the complainant, Samir was kicked down like a ball at Thana and beaten without sparing a single inch of his body and that scene attracted the people in the vicinity of Thana and members of the public pleaded with police /to spare Samir from further- in human torture. But this infuriated the police, according to the complainant, and they continued brutal--assaults on Samir, Samir was bleeding all over. The constables also joined and Jamadar Lalan Singh and Mistry continued the torture and even Samir''s cry for water went unheeded. Thereafter, the police called a doctor to attend Samir, who declared him to be dead. His dead body was removed to Alipore Police Hospital and then to Kidderpore Morgue. Two days later Samir was cremated at Kasi Mitra Burning -Ghat under police supervision. The complainant has also further stated that the complainant had some trouble with her landlord, who unsuccessfully tried to eject her but lost his suits in trial at Appellate Courts. According to the deponent, her apprehension was that the landlord was instrumental in manipulating the local police to take Samir into custody. The complainant has, further stated that her son''s liver, kidney and lungs had been pulverised by the beating and torture and according to the post mortem report, the complainant asserts, it was clear that her son, Samir, had been tortured to death. As there was massive public resentment displayed by the mamoth procession of mourners that followed Samir''s dead body to the cremation ground as also there was intense agitation following the death of Samir; the then Commissioner of Police. Sri R Gupta himself declared that he would personally enquire into the atrocities and bring the offender to book. But no thing happened. In these circumstances the mother prayed for an investigation by the Commission as to the death of her son, Samir at the police lock up on the 17th August, 1970 at Shyampukur police Station.

3. As I said, along with the notices u/s 8B, the petitioners were served with the summons to appear before the Commission on the 10th March, 1980 for hearing of the case. The petitioners filed their replies to the notices under Sec. 8B of the Act. Thereupon, the petitioners moved this Court under Article 226 of the Constitution on the 7th March, 1980 whereupon I issued Ride Nisi and passed an interim order restraining further proceedings before the Commission.

4. The first question, therefore, that arises in these cases is, whether the notification dated 12th August, 1977 constituting the said Commission of Inquiry is valid, proper and legal. The first ground of challenge on this basis, is, that there was no material before the State Government to form the opinion upon which the State Government has purported to constitute this Commission. It was urged that the power to constitute the Commission under Sec. 3 of the Commissions of Inquiry-Act, 1952 was dependent upon the fulfilment of the condition, that is to say, upon the opinion of the State Government that there was necessity of constituting a Commission to investigate into any definite matter of public importance. In the instant case, it was

urged, firstly that there was no opinion formed by the State Government; secondly, in any event if the opinion was formed that was without any basis or without any material, and the notification indicated the purpose of the Com mission was investigation and there was no definite matter of public importance upon which the State Government had formed the opinion. It was further urged that in any event the Commission was constituted on matters which were vague, indefinite and incapable of being made certain. It was submitted that "killings of numerous persons in this State for political motive" is a vague expression in as much as political motive is not definite. Secondly, it was submitted the period during which the alleged killings were sought to be investigated, that is to say, 20th March, 1970 and 31st May, 1975 had been fixed arbitrarily because in between that period there were two periods as there was the Presidential Rule in the State and the State was Governed by the Governor in view of the Proclamation issued by the President under Article 356 of the Constitution of India. The actions of the police officers in implementation of the orders, at the relevant time, were all actions of the employees of the Central Government on matters pertaining to the conduct of List I of the Seventh Schedule of the Constitution and were not within the jurisdiction of the State Government u/s 2 (a) of the present Act. It was further urged that ''killings of, and physical tortures and atorcities committed on numerous persons in this State'' was also a vague expression; similarly also the expression by public servants'' was, according to the advocate for the petitioners, vague. It was further urged in any event in so far as the Commission purported to seek to enquire of persons belonging to or enjoying patronage of the ruling party in power in the State and|or Central or the Government in power, State under Central was also vague and uncertain. It also indicated, according to the learned advocate for the petitioners, clear non-application of mind inasmuch as when there was Presidential Rule there were two periods to which I shall presently refer, that is to say during the period prior to 1st March, 1972 there was no ruling party in the State as such because the State being administered by the Governor by virtue of the powers under Article 356 of the Constitution. It was submitted that in any event the action of the ruling party in the Centre or of the Government in the Centre could not be justiciable by the Com mission of Inquiry constituted by the State Government in view of the definition of ''appropriate Government'' u/s 2(a) of the Act. It was, then, urged that the nature and the terms of the Commission indicated that it was only political vendetta and political rivalry of the present party in power and it was not subsurvient to genuine purpose of the Commissions of Inquiry Act, 1952 and as such malafide exercise of the power under the Act. It was, further submitted that the notices u/s 8B of the said Act and the summons pursuant thereto had been issued arbitrarily and without application of mind. The complainant had categorically, according to learned advocate for the petitioners, stated in her complaint that Samir was not interested in politics and, therefore, death of Samir had nothing to do with political activities because the police was induced, according to the complaint of the complainant, by the landlord who was unsuccessful in a landlord-tenant dispute. It was as a result of

a civil dispute that action arose and there was no whisper in the complaint of the complainant of any political motive for killing of, or physical tortures or atrocities committed on Samir. The basis on which the notices, u/s 8B of the said Act and the subsequent summons were issued, were contrary to the terms of the reference of the Commission of inquiry. These were broadly the submission urged in support of the petition. Before I deal with these submissions, I will have to set out the relevant portions of the affidavits filed in opposition to this case.

5. On behalf of the State Government, one Sri Satya Ranjan Sen Gupta, who is Assistant Secretary, Judicial Department, Government of West Bengal, has affirmed an affidavit in which he states that he is conversant with the facts of this case and he asserts that there are sufficient materials before the Government of West Bengal and after making a careful scrutiny of those materials on record the State Government and/or Governor derived subjective satisfaction as to the requirement of constitution of the Commission of Inquiry and thereafter the impugned notification was issued. He has further stated that there were wide spread demands from different sections of public for an inquiry into the allgations of killing of numerous persons in the State for political motive during the period from 20th March, 1970 to 31st March, 1975 and killings of and physical tortures and atrocities committed on numerous persons in the State during the aforesaid period by public servants and/or persons be longing to or enjoying patronage of the ruling party in power in the State and or Centre or the Government in power in State and or Centre and the same was absolutely based on facts on record. He has denied that there was any political motive behind it. He further said that even during the President''s Rule, the employees of the State Government continued to be the employees of the ate Government. Therefore there was no non-application of mind in choosing the period as it did. He has further ass erted that the public are entitled to know under what circumstances and why the numerous killings of citizens of the country have been committed by the public servants and as such the same was of immense public importance. Moreover, according to him, if a grave and serious allegation as to the killing of a citizen of the country inside the police lock up within a few hours of his arrest as a result of brutal and inhuman torture by the public servants causing death to him who were suppos ed to safeguard as well as to keep constant vigil over the security of life and property of the citizens was levelled against them, those circumstances, according to him caused greatest concern and alarm in the minds of the citizens and were bound to be matters of public importance. The other statements are legal submissions and general denial and it is not necessary for me to refer to those in detail.

6. In the affidavit in opposition filed on behalf of the respondent no. 1., who is the Secretary of the said Commission of Inquiry, has stated that after the receipt of the complaint of the complainant, the complaint was investigated by the investigating agency of the Commission and he has annexed to the affidavit the report of the investigating agency of the Commission and has asserted that on consideration of

the com plaint and the reports of the investigating agency of the Commission, the Commission was of the opinion that there was likelihood of the reputation of the persons upon whom the notices had been issued, to be prejudicially affected by the enquiry and therefore the said notices under Sec. 8B of the said Act had been issued. It is necessary to refer to certain portions of the report of the investigating agency where inter setting out the complainant''s version, it had been stated that there was an enquiry held into the complaint and it was found that the deceased Samir Bhattacherjee was a founder of a local Club styled ''Shyambazar Milan Sangha'' situated at 15, Mahendra Bose Lane, Calcutta. On the 15th August 1970 a police case was lodged with the Shyam pukur P.S. on the complaint of S. I. P. K. Dutta. It was mentioned in the FIR that 10|12 unknown persons hurled 5|6 bombs at a police vehicle at Balaram Ghose Street within Shyampukur P.S. jurisdiction around 11 a.m. on 15th August, 1970. None however was injured. Thereafter Samir Bhattacherjee was arrested. After arrest, he was lodged at the police station lock up with no injury. It was further mentioned that the post mortem report of the doctor, inter alia, stated as follows; "Death in my opinion was due to shock and haemorrhage as a result of the injuries declared ante mortem". The post mortem report also showed that there were as many as 47 external injuries including fracture of the right wrist had been noticed in forearm, back of palm, eyes, jaw, ankles, shoulder, chest, wrist, buttock and head. The then Commissioner of Police Sri Ranjit Gupta had ordered an investigation by the Deputy Commissioner of Police, Sri A. K. Gupta, Detective Department. The investigating Officer, Sri A. K. Gupta, after a preliminary enquiry, registered a case u/s 302 IPC against unknown police men on 30th September, 1970 and took up further investigation into the case. The matter was, however, declared to be closed on the basis of mistake of fact by the then Commissioner of Police Sri R N. Chatterji. In the report it was mentioned that- there was a case between the landlord and tenant, being the mother of Samir Bhattacherjee which was dismissed on contest, Samir''s maternal uncle was examined by the investigating agency. He stated that on 18th August, 1970 around 7-30 A.M. he came to know that Samir had been arrested by the local police and taken to the Thana. He then called at the Shyampukur P.S. and met the petitioner no. 1 who was the Officer-in-charge of Shyampukur P.S. at that point of time at about 9 A.M. He alleged that he was told by the said 0|C that Samir Bhattacherjee, who was arrested had been sent to Court and therefore advised him to go to Bankshall Court for getting his release. Pursuant to this instruction, he went to Bankshall Court and waited there till 4 P.M. but Samir was not produced before the Court on that day. He, thereafter, returned to the police station and there he came to learn that Samir had been murdered by the police officer inside the lock up before producing before the Magistrate The case was also reported by one Mahendra Chakrabarty, Chief Reporter of the Jugantar. The investigating report revealed that his relatives and others who tried to pursue the investigation were harassed by the police. Some instances had been mentioned in the said investigating report. The investigation report also quoted and recorded the

statements of one Sri Subhas Sen, who was arrested along with Samir Bhattacherjee and he had narrated according to him how Samir and he had been treated by the police in the police lock-up. He narrated the inhuman torture made by the police on Samir after his arrest. The officers and the police who were in the arresting party in the inhuman torture. During such torture, the police were also asking various questions of Samir and at one stage Samir had asked for water when a police man replied that he would be suplied with urine. Thereafter, the police again assaulted Samir for about 15 minutes in various parts of his body and as a result Samir sustained injuries all over his body and he became completely exhausted. Thereafter he was put inside the lock up where he was groaning with pains and then he was asked to sleep by the said Subhas Sen. Around 9.30 A.M. in the next morning when Subhas Sen got up and touched Samir''s body he found Samir''s body to be cold. Other accused persons of the lock up then raised alarm and the lock up constable was informed of Samir''s death. After about an hour, the police officer entered the lock up accompanied by a doctor. The doctor was also contacted by the investigating agency and his deposition was recorded in the investigate on report. The doctor stated that on 18th August, 1970 in the morning he was called at Shyampukur P.S. on the plea that the wife of Officer-in-charge of that police station was ill. On arriving there he found a body being covered with cloth. Therefore he did not deal with the matter and suggested the removal of the body to the morgue. There were other statements which had been incorporated in the said investigation report.

7. I have set out in extenso the investigation report because it makes a distressing and dismal picture. These are certainly allegations of very grave nature. In any case, death in the police lock up of a prisoner who, according to the evidence so far available, had no injury at the time of his arrest and as the post mortem report indicated, died as a result of injuries suffered after arrest, is certainly matter of grave public importance and all decent persons should, in my opinion, be alarmed and concerned at such an incident happenings if true in this country. As a matter of fact, this portion of the case has caused me great concern and great anxiety and I shall deal with this matter later when I shall deal with legal consequence and effect thereof. It is sometimes said in the heat of moment this incident is no: peculiar to that particular period of time. These incidents might be happening at other times when other men are in power. Be that as it may be such incidents whenever these happen, then must be concern of all decent men and any party, any Court of law or any person interested in rule of law must be emphatic in condemning such incidents and take all legal and legitimate steps that such incidents do not occur or never take place. It must be a concern for all decent political parties whether these are in power at any particular period or not that such incidents should remain uninvestigated for such long period of time.

8. In the supplementry affidavit, the petitioners have relied on two affidavits, one affirmed by Sri R. N. Chatterji and the other by Sree Amiya Kumar Dutta Gupta.

These affidavits were affirmed before the Chakraborty Commission of Inquiry and were relied on by the petitioners perhaps for the purpose of asserting their case that there was no case for enquiry against the petitioners. But the affidavits of the then Commissioner of Police and the Investigation Officer, to say the least make very distressing reading and do not inspire confidence and do not give evidence to the fact that there was any proper investigation into the allegations against the petitioners. But I refrain from making any further observations on these two affidavits as the same are not very much relevant for the preset purpose and these deponents are nut before me.

9. The main question, as I have mentioned before, is whether there were materials before the State Government for formation of opinion that there were definite matters of public importance which required investigation. On this, as 1 have mentioned, the first challenge was that there was no opinion formed at all. The factual existence of the opinion, in my view, has been corroborated by the reiteration of that fact in the notification itself and by the assertions made on behalf of the State Government in the affidavit filed, though perhaps it could have been affirmed by a more responsible officer in a matter of this nature. Therefore, in ray opinion, factually it can not be disputed that there was, in fact opinion formed.

10. Next question, is whether there were materials for the formation of such opinion, and if so, whether it was-open to Court to examine if such materials were relevant or germane for the formation of the opinion. Now this question as to whether there were materials for the formation of opinion and whether such materials were relevant or germane to the formation of the opinion is dependent upon the nature of power under the Act. On behalf of the respondents, learned Standing Counsel urged very strongly that the power of the State Government was only subject to subjective satisfaction of the State Government to form the opinion, It was open to Court to scrutinise whether there was actually the existence of an opinion but not beyond that and the basis for the formation of the opinion, according to learned Standing Counsel, was not open to judicial review because it was a matter entirely for the subjective satisfaction of the State Government by which the opinion should be formed. On this, as I said, both sides strongly relied on several decisions and I will have to refer, to some of these. But, before I deal with the general decisions on the question of power of this nature; it may be instructive to deal with the decision which dealt with the actual provisions of The Commission of Inquiry Act, 1952. Reference may be made in this connection to the decision in the case of Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, . That was a decision which dealt with the exercise of power by the Central Government which purported to appoint a Commission of Inquiry under Sec. 3(1) of the Commissions of Inquiry Act, 1952 to enquiry into, which was popularly known as, Dalmia concerns. For the present purpose, it will be relevant to refer to the observations of Chief Justice Das, at pages 549-550 of the report where the learned Chief Justice dealt with the challenge whether Section 3(1) imposed unreasonable restrictions. It was held

that there was no unreasonable restriction because that Section indicated that the appropriate Government'' could appoint the Commission of Inquiry only for the purpose of making an enquiry into a definite-matter of public importance and not into other matter. The learned Chief Justice emphasised, in other words, the subject matter of enquiry could only be a definite matter of public importance. The appropriate Government, it was stated, was not authorised by this Section to appoint a Commission of Inquiry for the purpose of enquiring into any other matter. Again, it was held that there was sufficient indication as to the manner in which the power to be exercised. It was emphasised that there must-be materials for the formation of the opinion. A: page 549 of the report, learned Chief Justice observed'', inter alia as follows :

This delegation of authority, how- '' ever, is not unguided or uncontrolled, for the discretion given to the appropriate Government to set up a Commission of Inquiry must be guided by the policy laid down, viz that the executive action of setting up a Commission of Inquiry must conform to the condition of the section, that is to say, that there must exist a definite matter of public importance into which an enquiry is. in the opinion of the appropriate Government, necessary or is required by a resolution in that behalf passed by the House of the People or the Legislative Assembly of the State." Reliance was also placed on the decision in the case of The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, . There dealing with the power u/s 237 of the Companies Act, the Supreme Court observed '' that the use of the expression "in the opinion of" govern the words ''there are circumstances suggesting and not the words ''may do so'' Therefore, in order to exercise the power of investigation under section237 of the Companies Act, 1956 there must be materials before the appropriate authorities which are relevant and germane for the formation of the opinion and in an appropriate case where a challenge had been made It was open to the Court to consider whether the materials were relevant or germane for the formation of the said opinion.

11. This principle was reiterated again in the decision in the case of Rohtas Industries Vs. S.D. Agarwal and Others, where the Supreme Court also reiterated this principle but learned Standing Counsel submitted that section 237 was a power of the investigation of an agency of production and according to him in a capitalist society Companies are agencies of production and the courts are hesitant to put restrictions on the agencies of production and because of this such a construction, according to him, had been put upon Sec. 237. If there was no question of restriction on any organs to production different considerations might have arisen, he submits.

12. On this question learned Standing Counsel drew my attention to a decision of the Supreme Court in the case of State of Madras v. C. P. Sarathy, AIP. 1959 SC 53 where considering the provision of section 10 of the Industrial Disputes Act, the Supreme Court observed that whether there was an industrial dispute or not, was a

matter which was for the subjective satisfaction of the Government and it was not open to the Court to investigate whether the Government would make a reference in a particular case and the Court cannot examine the order of reference closely to see if there was any material before the Government to support its conclusion. The Supreme Court reiterated, however, it was open to the party seeking to impugn the resulting award to show what was referred by the Government was not an industrial dispute thin the meaning of the Act, and therefore the Tribunal had no jurisdiction to make the award but the Supreme Court also reiterated that the Government could not without satisfying itself on the facts and circumstances brought to its notice whether industrial dispute existed or not make an or of reference. It is desirable that the Government wherever possible should indicate the nature of dispute in the order of reference. The Supreme Court observed that Section 10(1) of the Industrial Disputes Act was an administrative act and the fact that the Government had to form an opinion as to the factual existence of the industrial dispute as a preliminary step to. the discharge of its function does not make it not less administrative in character. But in case of an administrative action the Supreme Court has reiterated, even though, it could not be scrutinised closely and carefully as a judicial order but it was necessary if an appropriate challenge was thrown to examine whether the condition precedent for the exercise of the power, if the power was conditional, in fact, had been fulfilled or not. This aspect was again considered in the case of State of Bombay Vs. K.P. Krishnan and Others, where it dealt with section 12(5) of the Industrial Disputes Act, 1947. The Supreme Court reiterated at page 1228 that section 10 imposed an obligation that the Government must consider whether the prima facie case for reference had been made out or not and it that case had been made out only then the Government could exercise its power of making a reference and in an appropriate case if it could be made out either after an award or before that the matter referred to was not an industrial dispute under the Industrial Disputes Act, 1947 such a challenge was open to the examination of the Court. In the fact in the previously mentioned decision the Supreme Court had observed that the power u/s 10 was only to emphasize that there was an opportunity to challenge the exercise of the power either in the appropriate proceedings before the Tribunal or after the award had been made in appropriate proceedings before the Court. On, the question of the nature of the power under a particular Act and the power of the Court to scrutinise the exercise of the power on the ground of existence of facts, reference was made to the decision of the Privy Council in the case of Nakkuda Ali v. M. P. Des Jayaratne, 54 C WN 883 (PC) . There the judicial Committee at page 888 (of report of C. W. N.) dealt with the nature of the power and the Judicial Committee dealing with the observations of Lord Atkin in Libersidge vs. Anderson (1942) A.C. 206 with the expression "If A.B. has reasonable cause to believe" observed as follows--

After all, a legislature confers powers on a Minister or official. However, read, they must be intended to serve in some sense as a condition limiting the exercise of an

otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad raith; but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. The judicial Committee therefore treat the words in Regulation 62 "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller before he can validly exercise the power of cancellation.

13. Learned Standing Counsel also drew my attention to the decision in the case of M. K. Sarkar v. State, ATR 1972 Cal. 8, where the Division Bench of this Court reiterated while passing an order of requisition it was not necessary to ''hear a party affected by the order on the question whether there was actual need for the purpose. But it is well settled that if a challenge is thrown that there is no public purpose intended to be fulfilled by the order of requisition then it is obligatory for the State to established the alleged purpose is a public purpose and the Court can examine that question. Rai Bahadur Ganga Bishnu Swaika and Others Vs. Calcutta Pinjrapole Society and Others, , Western M.P. Electric Power and Supply Company Ltd. Vs. State of U.P. and Another, , and State of Gujarat Vs. Jamnadas G. Pabri and Others, . The decision in the case of AIR 1949 136 (Privy Council) was rendered in the context of an Act which was differently worded.

14. In aid of the submission that a party who felt aggrieved by the effect of an impugned notification at any rate need not be heard and there was no scope of the application of the principle of audi alteram partem, reliance was placed on several decisions viz. Wisemen v. Bornemen 1969 2 AER 275=(1971) A.C. 297 Pear/berg v. Varty (1972) 2 AER 6= (1972) 1 W.L.R. 534 Durayappah v. W.J. Fernendo (1967) 2 A.C. 337 =1967 2 AER 152 and Cozens North v. Devon Horples Management Committee & another, 1966 2 AER 799. But these cases dealt with the question of the application of the principles of natural justice. But where the power is conditional, if the power is such, then when the exercise of the power is challenged the scope of judicial review is a different question and the scope of the juridicial review cannot be restricted on the ratio of the aforesaid decisions. In this connection reliance was also placed on the observations of S. A. de Smith''s book "Judicial Review of Administrative Action "3rd Ed. pages 162-164. Learned Standing Counsel urged if there was no scope of the application of the principles of natural justice before the exercise of the power then there was no point in letting known the reasons now. I am, however, unable to agree in view of the conditional nature of the power granted to the appropriate Government under Sec. 3 of the Commissions of Inquiry Act. 1952.

15. Reliance was also placed in the case of State of Rajasthan and Others Vs. Union of India and Others, where in case of the satisfication of the President under Article 356 whether the Court has power to examine such satisfaction was considerd and there the Supreme Court observed that though the Presidential order was immune from challenge, if there was in fact colourable exercise of the power, the same should be scrutinised by the Court in appropriate cases. Reference was also made to the decision of the Supreme Court in the case of Krishna Ballabh Sahay and Others Vs. Commission of Inquiry and Others, .

16. But principles applicable to this type of power have been reviewed by the Supreme Court in the case of M.A. Rasheed and Others Vs. The State of Kerala, where the Supreme Court reiterated that the powers where conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them" or when "in their opinion" a certain state of affairs existed or when powers enable the public authorities to take "such action if they think fit" in relation to a subject matter the Courts would not readily defer to the conclusiveness of an executive authority''s opinion as to the existence of a matter of law or fact upon which the validity of exercise of power was predicated. Where reasonable conduct was expected the criterion of reasonableness was not subjective but objective,

17. This principle had been reviewed in a decision in the case of State of West Bengal v. Narendra Nath Das (1) C. L J. 1977 374 where the exercise of the power under sub clause (c) of proviso to Clause 2 of Article 311 of the Constitution of India was challenged. There reviewing the said decision I had reiterated the principles enunciated by the Supreme Court in the aforesaid decision in Rashid''s case and further held that in a society aspiring to be governed by the rule of law, the scope and extent of judicial review in respect of an administrative action would depend not upon the question whether the power is statutory or constitutional but upon the terms of the grant of the power. If the power conferred is exercisable on fulfillment of certain conditions the exercise of power is subject to judicial review to the limited extent, that is to say, whether the powers have been exercised bonafide and the Court can enquire into whether there were relevant materials on which the power has been exercised. But the sufficiency of the materials found is not a matter for judicial review. That, in my opinion, is the scope and effect of judicial enquiry of an administrative action. Therefore, in this case it is necessary to refer to the power granted. Power conferred is on the formation of opinion about the investigation of the matter of public importance. Therefore, the grounds or the materials necessary for the formation of the opinion must exist and when a challenge is thrown that there are no grounds at all for the formation of that opinion, then, by mere recital of that opinion in the notification or unless the notification so states as was in the case of Ram Krishna Dalmia''s case referred to hereinbefore, it must be shown either by averments made on behalf of the State Government or otherwise that there are materials upon which the opinion is possible and not that the opinion necessarily follows. If, that is the position, then I will have to examine whether in this case such

a challenge has unequivocally been made. In the instant case, such a challenge has been thrown and, that is apparent from the pleadings and not disputed. Therefore, it has to be examined in this case whether there are materials before this Court either in the form of recital in the notification or otherwise to satisfy that there were materials before the State Government before it issued the impugned notification. Now, apart from asserting that there were materials, learned Standing Counsel was not prepared to place on behalf of the State Government before this Court what were the materials and what were the nature of demands that were made before the formation of the Commission. No privilege about the said materials in accordance with law has been claimed. Reliance in this connection may be placed on the observations of the Supreme Court in the case of The State of Punjab Vs. Sodhi Sukhdev Singh, . If that is the position, then as such whether there were any materials at all relevant or not, germane or not, cannot be investigated by this Court. If that is the position, then, in my opinion, this challenge must be accepted that there were no relevant materials before the formation of the opinion to constitute the Commission.

18. It is true, as I have mentioned before and to this I have adverted that certain matters have come out in the investigation process which revealed certainly certain aspects which call for investigation which can be said to be a definite matter of public importance, viz. killing in the police lock up of an under trial prisoner, killing in the sense death by injury on the body which the prisoner did not have before arrest and which resulted in his death, But the question, is, whether the materials subsequently gathered can be said to be mateials which were there, before the State Government acted to form the opinion; there was no such evidence, there was no such averment made in the affidavits that the State Government had such materials. If that is the position, then, the exercise of the power for the formation of the Commission by the impugned notication cannot be held to be valid.

19. Next ground, as I said before, is whether the Commission of Inquriy was in respect of matters relatable to List I. Now, the question is, a portion of investigation by the Commission, that is to say, killing of numerous person in the State for political motive during the period of President''s rule in the State and or killings of and physical tortures and atrocities committed on numerous persons in the State during the aforesaid period by public servants are certainly matters which are referable to items of List II, viz. public order as such. In aid of the submissions that during the Presidential Rule, the employees of the State Government continued to be the employees of the State, even though they were subject to the orders of Governor, who acted on the direction of the President given at the instance of Council of Ministers at the Centre, reliance Was placed on several decisions viz. in the case of Dr. Harekrushna Mahtab Vs. The Chief Minister of Orissa and Others , in the case of Orient Paper Mills Vs. Union of India (UOI) and Others, , in the case of M. Karunnanidhi Vs. The Union of India and Another, , in the case of The Statesman Ltd. vs. The Fact Finding Committee AIR 1976 Cal 14, in the case of Manabendra Sarkar

vs. State of Assam AIR 1974 Gau 46 and also in the case of Gokulananda Roy Vs. Tarapada Mukharjee and Others, . Therefore, I am unable to accept the contention of the petitioners that during the Presidential Rule the employees of the Government of West Bengal ceased to be the employees of the State and became the Central Government employees. It is true that they acted through the direction of the Governor given by the President on the advice of the Central Council of Ministers but even, then, they remained and continued to be the State Government employees and if, in appropriate cases, their conduct had created such a situation which concerned matters of public order for the State, in my opinion, subsequently the appropriate Government could certainly appoint a Commission to investigate under The Commissions of Inquiry Act, 1952. The power of investigation in respect of item 45 of List III was reiterated by the Supreme Court in the case of State of Karnataka Vs. Union of India (UOI) and Another, at page 104 of the report paragraph 72.

20. It was, then, contended that the appointment of the Commission of Inquiry indicated non-application of mind because two periods were clubbed together, the period when there was the Ministry in the State after March, 1972 and the period before that when there was the Presidential Rule. Now, even then in my opinion, these two periods can be clubbed together in an appropriate case, if there were materials for the formation of opinion. It is true that the terms of reference, so far as murder or killings of for political motive are concerned are vague expressions. In criminal law, as far as I know, murder or killing for political motive as such is not treated differently.

Learned advocate for the petitioners, strongly criticised the fact that when certain criminals, not only suspected criminals but also criminals convicted by the appropriate Courts were being acquitted by the State Government on the ground that the crimes, under the law, had been committed for alleged political motives, it was improper to constitute the Commission of Inquiry for enquiring into murders or killings of men for political motives as if killing of for political motive was a separate killing by itself. Legally, that is true. Killing for political motive cannot be called a class by itself. But, unfortunately in India, perhaps due to past history of national liberation movement during the National Freedom struggle sometimes, we have given certain amount of legitimacy to killing or committing other crimes for political motive. Whether continuation of this attitude after national independence is good or bad, is a different matter and is a matter of policy, but it has to be recognised as a fact that killings of men for political motives have been treated in public mind often separately and differently from other killings though it is often difficult to separate that kind of killings, I would have hesitated, had it been necessary for me, to strike down this aspect of notification only on the ground of vagueness. The expression ''enjoying the patronage of the Ruing party'' is again an expression of vague import because the expression ''patronage'' may mean various things and will give a wide meaning but even in this country this political ''patronage of the Ruling party'' or

''persons in power'' are expressions which have achieved certain connotation. For that reason, I would have again hesitated, had it been necessary for me, to strike down this notification as being a vague and there being non application of mind.

21. The next challenge was, as I have mentioned before, the issuance of the notices under Sec. 8B of the Commission of Inquiry Act, 1952. If the constitution of the Commission was proper, then in the facts of this case, the issuance of the notices under Sec. 8B of the said Act was not improper because though the complaint itself did not contain any allegation or any matter relevant to the terms of the reference the investigation made by the investigating agency of the Commission revealed that there might be matters in the investigation which might prejudice the present petitioners. Therefore, on the materials before the Commission of Inquiry, it cannot be said that the Commission of Inquiry acted improperly in issuing the notices as also the summons thereof, as it did under Sec. 8B of the said Act. As I had adverted before, the facts revealed from the investigation report, from which I have set out in extenso, at least establish prima facie that a person died in police lock up with injuries and apparently he was arrested without any injury and he was not produced before the Magistrate the next day. This part of the case, as I have referred to before, caused me great anxiety and therefore I propose to direct the Commission of Inquiry to place all those materials before the State Government and the State Government should, after considering the legal aspect of the matter, take immediate steps for initiation whatever proceedings, civil or criminal that may be open against the persons or against whom those facts reveal that action should be taken. I am further of the opinion that if there are materials, specific of this nature, before the State Government and these materials themselves now would be the relevant materials upon which the State Government can reconsider whether there were killings of and physical tortures and atrocities committed on numerous persons in the State by public servants during the aforesaid period, the State Government could afresh form an opinion for constituting Commission of Inquiry under the Commission of Inquiry Act, 1952. The judgment and decision in this matter would not be a bar.
I, therefore, direct as follows :

1. As there were no materials disclosed upon which the State Government could have formed the opinion for constitution of the Commission of Inquiry under the Commissions of Inquiry Act, 1952, the impugned notification dated 12th August, 1977 is quashed and set aside and the proceedings before the Commission of Inquiry pursuant to this notification are set aside.

2. The materials, so far gathered in respect of the present petitioners, should, pursuant to the direction given above, be transmitted by the Commission of Inquiry to the State Government and the State Government should reconsider the matter in the light of the directions given above and take appropriate action in accordance with the law, against the persons concerned, if they are so advised.

3. If these materials or other relevant materials before the State Government reveal that there were killings of, and physical tortures or atrocities committed on persons by public servants during any particular period, the State Government can reconsider the matter whether it would be proper to form an opinion for Constituting a Commission of Inquiry afresh and act accordingly.

With these observations, the Rule is made absolute to the extent indicated above. There will be no order as to costs.

Rule made absolute. Directions given. No costs.