A.R. Antulay

Vs

R. S. Nayak and Another

Criminal Appeal No. 468 of 1986

(Sabyasachi Mukharji, Ranganath Misra, G.L. Oza, B.C. Ray,S. Natarajan, M.N. Venkatachaliah, S. Ranganathan JJ)

29.04.1988

JUDGMENT

SABYASACHI MUKHARJI, J.

1. (for himself, Oza and Natarajan, JJ.) - The main question involved in this appeal, is whether the directions given by this Court on February 16, 1984, as reported in R. S. Nayak v. A. R. Antulay ((1984) 2 SCR 495, 557 : (1984) 2 SCC 183, 243 : 1984 SCC (Cri) 172) were legally proper. The next question is, whether the action and the trial proceedings pursuant to those directions, are legal and valid. Lastly, the third consequential question is, can those directions be recalled or set aside or annulled in these proceedings in the manner sought for by the appellant. In order to answer these questions certain facts have to be borne in mind.

2. The appellant became the Chief Minister of Maharashtra on or about June 9, 1980. On September 1, 1981, respondent 1 who is a member of the Bharatiya Janata Party applied to the Governor of the State under Section 197 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Code') and Section 6 of the Prevention of Corruption Act, 1947 (hereinafter referred to as 'the Act') for sanction to prosecute the appellant. On September 11, 1981, respondent 1 filed a complaint before the Additional Metropolitan Magistrate, Bombay against the appellant and other known and unknown persons for alleged offences under Sections 161 and 165 of the Indian Penal Code and Section 5 of the Act as also under Sections 384 and 420 read with Sections 109 and 120-B of the Indian Penal Code. The learned Magistrate refused to take cognizance of the offences under the Act without the sanction for prosecution. Thereafter a criminal revision application being CRA No. 1742 of 1981 was filed in the High Court of Bombay, by respondent 1.

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

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

5. Respondent 1 on August 9, 1982 filed a fresh complaint against the appellant before the learned Special Judge bringing in many more allegations including those for which sanction was refused by

the Governor. It was registered as a Special Case No. 24 of 1982. It was submitted by respondent 1 that there was no necessity of any sanction since the appellant had ceased to be a public servant after his resignation as Chief Minister.

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

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

8. On February 16, 1984, in an appeal filed by respondent 1 directly under Article 136, a Constitution Bench of this Court held that a member of the Legislative Assembly is not a public servant and set aside the order of Special Judge Sule. Instead of remanding the case to the Special Judge for disposal in accordance with law, this Court suo motu withdrew the Special Cases No. 24/82 and 3/83 (arising out of a complaint filed by one P. B. Samant) pending in the Court of Special Judge, Greater Bombay, Shri R. B. Sule and transferred the same to the Bombay High Court with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court for holding the trial from day to day. These directions were given, according to the appellant, without any pleadings, without any arguments, without any such prayer from either side and without giving any opportunity to the appellant to make his submissions before issuing the same. It was submitted that the appellant's right to be tried by a competent court according to the procedure established by law enacted by Parliament and his rights of appeal and revision to the High Court under Section 9 of the 1952 Act had been taken away.

9. The directions of this Court mentioned hereinbefore are contained in the decision of this Court in R. S. Nayak v. A. R. Antulay ((1984) 2 SCR 495, 557 : (1984) 2 SCC 183, 243 : 1984 SCC (Cri) 172). There the court was mainly concerned with whether sanction to prosecute was necessary. It was held that no such sanction was necessary in the facts and circumstances of the case. This Court further gave the following directions : (SCC p. 243, para 73)

> The accused was the Chief Minister of a premier State - the State of Maharashtra. By a prosecution launched as early as on September 11, 1981, his character and integrity came under a cloud. Nearly two and a half years have rolled by and the case has not moved an inch further. An expeditious trial is primarily in the interest of the accused and a mandate of Article 21. Expeditious disposal of a criminal case is in the interest of both, the prosecution and the accused. Therefore, Special Case No. 24 of 1982 and Special Case No. 3 of 1983 pending in the Court of Special Judge, Greater Bombay Shri R. B. Sule are withdrawn and transferred to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. On being so assigned, the learned Judge may proceed to expeditiously dispose of the cases preferably by holding the trial from day to day.

10. The appellant as mentioned hereinbefore had appeared before the Special Judge and objected to

the jurisdiction of the learned Judge on the ground that the case had not been properly allocated to him by the State Government. The Special Judge Bhutta after hearing the parties had decided the case was validly filed before him and he had properly taken cognizance. He based his order on the construction of the notification of allocation which was in force at that time. Against the order of the learned Special Judge rejecting the appellant's contention, the appellant filed a revision application in the High Court of Bombay. During the pendency of the said revision application, the Government of Maharashtra issued a notification appointing Special Judge R. B. Sule, as the judge of the special case. It is the contention of the respondents before us that the appellant thereafter did not raise any further objection in the High Court against cognizance being taken by Shri Bhutta. It is important to take note of this contention because one of the points urged by Shri Rao on behalf of the appellant was that not only we should set aside the trial before the High Court as being without jurisdiction but we should direct that no further trial should take place before the Special Judge because the appellant has suffered a lot of which we shall mention later but also because cognizance of the offences had not been taken properly. In order to meet the submission that cognizance of the offences had not been taken properly, it was urged by Shri Jethmalani that after the government notification appointing Judge Sule as the Special Judge, the objection that cognizance of the offences could not be taken by Shri Bhutta was not agitated any further. The other objections that the appellant raised against the order passed by Judge Bhutta were dismissed by the High Court of Bombay. Against the order of the Bombay High Court the appellant filed a petition under Article 136 of the Constitution. The appeal after grant of leave was dismissed by a judgment delivered on February 16, 1984 by this Court in A. R. Antulay v. Ramdas Sriniwas Nayak ((1984) 2 SCR 914 : (1984) 2 SCC 500 : 1984 SCC (Cri) 277). There at page 954 of the report (SCC p. 533), this Court categorically observed that a private complaint filed by the complainant was clearly maintainable and that the cognizance was properly taken. This was the point at issue in that appeal. This was decided against the appellate. On this aspect therefore, no other point is open to the appellant. We are of the opinion that this observation of this Court cannot by any stretch of imagination be considered to be without jurisdiction. Therefore, this decision of this Court precludes any scope for argument about the validity of the cognizance taken by Special Judge Bhutta. Furthermore, the case had proceeded further before the Special Judge. Shri Sule and the learned Judge passed an order of discharge on July 25, 1983. This order was set aside by the Constitution Bench of this Court on February 16, 1984, in the connected judgment ((1984) 2 SCR 495, 557 : (1984) 2 SCC 183, 243 : 1984 SCC (Cri) 172). The order of taking cognizance had therefore become final and cannot be reagitated. Moreover Section 460(e) of the Code expressly provides that if any magistrate not empowered by law to take cognizance of an offence on a complaint under Section 190 of the Code erroneously in good faith does so his proceedings shall not be set aside merely on the ground that he was not so empowered.

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

12. Being aggrieved the appellant came up before this Court by filing special leave petitions as well as writ petition. This Court on April 17, 1984, in Abdul Rahman Antulay v. Union of India ((1984) 3 SCR 482, 483 (see as an Appendix to this case)) held that the learned Judge was perfectly justified and indeed it was the duty of the learned Judge to follow the decision of this Court which was

binding on him. This Court in dismissing the writ petition observed, inter alia, as follows : (SCC page 764)

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

13. D. N. Mehta, J. to whom the cases were transferred from Khatri, J. framed charges under 21 heads and declined to frame charges under 22 other heads proposed by respondent 1. This Court allowed the appeal by special leave preferred by respondent 1 except in regard to three draft charges under Section 384, IPC (extortion) and directed the court below to frame charges with regard to all other offences alleged. This Court requested the Chief Justice of the Bombay High Court to nominate another judge in place of D. N. Mehta, J. to take up the trial and proceed expeditiously to dispose of the case finally. See in this connection R. S. Nayak v. A. R. Antulay ((1986) 2 SCC 716 : 1986 SCC (Cri) 256 (decided on April 17, 1986)).

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

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

16. On October 11, 1986 the appellant filed a criminal miscellaneous petition for permission to urge certain additional grounds in support of the plea that the origination of the proceedings before the court of Shri P. S. Bhutta, Special Judge and the process issued to the appellant were illegal and void ab initio.

17. This Court on October 29, 1986 dismissed the application for revocation of special leave petition filed by respondent 1 and referred the appeal to a Bench of Seven Judges of this Court and indicated the points in the note appended to the order for consideration of this Bench.

18. So far as SLP (Cri) No. 2518 of 1986 against the judgment and order dated August 21, 1986 of P. S. Shah, J. of the Bombay High Court about the absence of sanction under Section 197 of the Code is concerned, we have by an order dated February 3, 1988 delinked that special leave petition inasmuch as the same involved consideration of an independent question and directed that the special leave petition should be heard by any appropriate Bench after disposal of this appeal. Similarly, Writ Petition (Cri) No. 542 of 1986 challenging a portion of Section 197(1) of the

Criminal Procedure Code as ultra vires Articles 14 and 21 of the Constitution had also to be delinked by our order dated February 3, 1988 to be heard along with Special Leave Petition No. 2518 of 1986. This judgment therefore, does not cover these two matters.

19. In this appeal two questions arise, namely, (1) whether the directions given by this Court on February 16, 1984 in R. S. Nayak v. A. R. Antulay ((1984) 2 SCR 495, 557 : (1984) 2 SCC 183, 243 : 1984 SCC (Cri) 172) withdrawing the Special Case No. 24 of 1982 and Special Case No. 3 of 1983 arising out of the complaint filed by one Shri P. B. Samant pending in the Court of Special Judge, Greater Bombay, Shri R. B. Sule, and transferring the same to the High Court of Bombay with a request to the Chief Justice to assign these two cases to a sitting Judge of the High Court, in. breach of Section 7(1) of the Act of 1952 which mandates that offences as in this case shall be tried by a Special Judge only thereby denying at least one right of appeal to the appellant was violative of Articles 14 and 21 of the Constitution and whether such directions were at all valid or legal and (2) if such directions were not at all valid or legal in view of the order dated April 17, 1984 referred to hereinbefore, is this appeal sustainable or the grounds therein justiciable in these proceedings. In other words, are the said directions in a proceeding inter partes binding even if bad in law or violative of Articles 14 and 21 of the Constitution and as such are immune from correction by this Court even though they cause prejudice and do injury ? These are the basic questions which this Court must answer in this appeal.

20. The contention that has been canvassed before us was that save as provided in sub-section (1) of Section 9 of the Code the provisions thereof [corresponding to Section 9(1) of the Criminal Procedure Code, 1898] shall so far as they are not inconsistent with the Act apply to the proceedings before the Special Judge and for purposes of the said provisions the court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting the prosecution before a Special Judge shall be deemed to be a public prosecutor.

21. It was submitted before us that it was a private complaint and the prosecutor was not the public prosecutor. This was another infirmity which this trial suffered, it was pointed out. In the back-ground of the main issues involved in this appeal we do not propose to deal with this subsidiary point which is of not any significance.

22. The only question with which we are concerned in this appeal is, whether the case which is triable under the 1952 Act only by a Special Judge appointed under Section 6 of the said Act could be transferred to the High Court for trial by itself or by this Court to the High Court for trial by it. Section 406 of the Code deals with transfer of criminal cases and provides power to this Court to transfer cases and appeals whenever it is made to appear to this Court that an order under this section is expedient for the ends of justice. The law provides that this Court may direct that any particular case or appeal be transferred from one High Court to another High Court or from a criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court. Equally Section 407 deals with the power of High Court to transfer cases and appeals. Under Section 6 of the 1952 Act, the State Government is authorised to appoint as many Special Judges as may be necessary for such area or areas for specified offences including offences under the Act. Section 7 of the 1952 Act deals with cases triable by Special Judges. The question, therefore, is whether this Court under Section 406 of the Code could have transferred a case which was triable only by a Special Judge to be tried by the High Court or even if an application had been made to this Court under Section 406 of the Code to transfer the case triable by a Special Judge to another Special Judge could that be transferred to a

High Court, for trial by it. It was contended by Shri Rao that the jurisdiction to entertain and try cases is conferred either by the Constitution or by the laws made by Parliament. He referred us to the powers of this Court under Articles 32, 131, 137, 138, 140, 142, 145(1) of the Constitution. He also referred to entry 77 of List I of the Constitution which deals with the constitution of the courts. He further submitted that the appellant has a right to be tried in accordance with law and no procedure which will deny the equal protection of law can be invented and any order passed by this Court which will deny equal protection of laws would be an order which is void by virtue of Article 13(2) of the Constitution. He referred us to the previous order of this Court directing the transfer of cases to the High Court and submitted that it was a nullity because of the consequences of the wrong directions of this Court. The enormity of the consequences warranted this Court's order being treated as a nullity. The directions denied the appellant the remedy by way of appeal as of right. Such erroneous or mistaken directions should be corrected at the earliest opportunity, Shri Rao submitted.

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

24. Section 7(1) of the 1952 Act creates a condition which is sine qua non for the trial of offences under Section 6(1) of the said Act. The condition is that notwithstanding anything contained in the Code of Criminal Procedure or any other law, the said offences shall be triable by Special Judges only. Indeed conferment of the exclusive jurisdiction of the Special Judge is recognised by the judgment delivered by this Court in A. R. Antulay v. Ramdas Sriniwas Nayak ((1984) 2 SCR 914 : (1984) 2 SCC 500 : 1984 SCC (Cri) 277) where this Court had adverted to Section 7(1) of the 1952 Act and at page 931 (SCC p. 514) observed that Section 7 of the 1952 Act conferred exclusive jurisdiction on the Special Judge appointed under Section 6 to try cases set out in Sections 6(1)(a) and 6(1)(b) of the said Act. The court emphasised that the Special Judge had exclusive jurisdiction to try offences enumerated in Section 6(1)(a) and (b). In spite of this while giving directions in the other matter, that is, R. S. Nayak v. A. R. Antulay ((1984) 2 SCR 495, 557 : (1984) 2 SCC 183, 243 : 1984 SCC (Cri) 172), this Court directed transfer to the High Court of Bombay the cases pending before the Special judge. It is true that Section 7(1) and Section 6 of the 1952 Act were referred to while dealing with the other matters but while dealing with the matter of directions and giving the impugned directions, it does not appear that the court kept in mind the exclusiveness of the jurisdiction of the Special Court to try the offences enumerated in Section 6.

25. Shri Rao made a point that the directions of the court were given per incuriam, that is to say without awareness of or advertence to the exclusive nature of the jurisdiction of the Special Court and without reference to the possibility of the violation of the fundamental rights in a case of this nature as observed by a Seven Judges Bench decision in State of W. B. v. Anwar Ali Sarkar (1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 510).

26. Shri Ram Jethmalani on behalf of the respondents submitted that the judgment of the Constitution Bench of this Court was delivered on February 16, 1984 and counsel for both sides were present and it was neither objected to nor stated by the appellant that he wanted to be heard in regard to the transfer of the trial forum. He submitted that the order of discharge was not only

challenged by a special leave petition before this court but also that a revision application before the High Court being Criminal Revision Application No. 354 of 1983 was filed but the criminal revision application by an order of this Court was withdrawn and heard along with the special leave petition. That application contained a prayer to the effect that the order of discharge be set aside and the case be transferred to the High Court for trial. Therefore, it was submitted that the order of transfer was manifestly just. There was no review against this order. It was submitted that the order of transfer to a superior court cannot in law or in fact ever cause any harm or prejudice to any accused. It is an order made for the benefit of the accused and in the interests of justice. Reliance was placed on Romesh Chandra Arora v. State ((1960) 1 SCR 924, 927 and 934 : AIR 1960 SC 154 : 1960 Cri LJ 177). It was further submitted by Shri Jethmalani that a decision which has become final cannot be challenged. Therefore, the present proceedings are an abuse of the process of the court, according to him. It was further submitted that all the attributes of a trial court were present in a court of appeal, an appeal being a continuation of trial before competent court of appeal and, therefore, all the qualifications of the trial court were there. The High Court is authorised to hear an appeal from the judgment of the Special Judge under the Act of 1952. It was submitted that a Special Judge except insofar a specific provision to the contrary is made is governed by all the provisions of the Code and he is a court subordinate to the High Court. See A. R. Antulay v. R. S. Nayak ((1984) 2 SCR 914 : (1984) 2 SCC 500 : 1984 SCC (Cri) 277) (SCR pp. 943 and 944 : SCC pp. 524-25).

27. It was submitted that power under Section 526 of the old Code corresponding to Section 407 of the new Code can be exercised qua a Special judge. This power, according to Shri Jethmalani, is exercisable by the High Court in respect of any case under Section 407(1)(iv) irrespective of the court in which it is pending. This part of the section is not repealed wholly or pro tanto, according to the learned counsel, by anything in the 1952 Act. The Constitution Bench, it was submitted, consciously exercised this power. It decided that the High Court had the power to transfer a case to itself even from a Special Judge. That decision is binding at least in this case and cannot be reopened, it was urged. In this case what was actually decided cannot be undone, we were told repeatedly. It will produce an intolerable state of affairs. This Court ought to recognise the distinction between finality of judicial orders qua the parties and the reviewability for application to other cases. Between the parties even a wrong decision can operate as res judicata. The doctrine of res judicata is applicable even to criminal trials, it was urged. Reliance was placed on Bhagat Ram v. State of Rajasthan ((1972) 2 SCC 466 : 1972 SCC (Cri) 751). A judgment of a High Court is binding in all subsequent proceedings in the same case; more so, a judgment which was unsuccessfully challenged before this Court.

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

29. It appears to us that in Gurcharan Das Chadha v. State of Rajasthan ((1966) 2 SCR 678 : AIR 1966 SC 1418 : 1966 Cri LJ 1071) an identical question arose. The petitioner in that case was a member of an All India Service serving in the State of Rajasthan. The State Government ordered his trial before the Special Judge of Bharatpur for offences under Section 120-B/161 of the Indian Penal Code and under Section 5(1)(a) and (d) and 5(2) of the Act. He moved this Court under Section 527 of the old Code praying for transfer of his case to another State on various grounds. Section 7(1) of

the act required the offences involved in that case to be tried by a Special Judge only, and Section 7(2) of the Act required the offences to be tried by a Special Judge for the area within which these were committed which condition could never be satisfied if there was a transfer. This Court held that the condition in sub-section (1) of Section 7 of the Act that the case must be tried by a Special Judge, is a sine qua non for the trial of offences under Section 6. This condition can be satisfied by transferring the case from one Special Judge to another Special Judge. Sub-section (2) of Section 7 merely distributes, it was noted, work between Special Judges appointed in a State with reference to territory. This provision is at par with the section of the Code which confers territorial jurisdiction on Sessions Judges and Magistrates. An order of transfer by the very nature of things must sometimes result in taking the case out of the territory. The third sub-section of Section 8 of the Act preserves the application of any provision of the Code if it is not inconsistent with the Act save as provided by the first two sub-sections of that section. It was held by this Court that Section 527 of the old Code, hence, remains applicable if it is not inconsistent with Section 7(2) of the Act. It was held that there was no inconsistency between Section 527 of the Code and Section 7(2) of the Act as the territorial jurisdiction created by the latter operates in a different sphere and under different circumstances. Inconsistency can only be found if two provisions of law apply in identical circumstances, and create contradictions. Such a situation does not arise when either this Court or the High Court exercises the power of transfer. Therefore, this Court in exercise of its jurisdiction and power under Section 527 of the code can transfer a case from a Special Judge subordinate to one High Court to another Special Judge subordinate to another High Court. It has to be emphasised that that decision was confined to the power under Section 527 of the previous Code and to transfer from one Special Judge to another Special Judge though of another State. It was urged by Shri Jethmalani that Chadha case ((1966) 2 SCR 678 : AIR 1966 SC 1418 : 1966 Cri LJ 1071) being one of transfer from one Special Judge to another the judgment is not an authority for the proposition that it cannot be transferred to a court other than that of a Special Judge or to the High Court. But whatever be the position, this is no longer open at this juncture.

30. The jurisdiction, it was submitted, created by Section 7 of the Act of 1952 is of exclusiveness qua the courts subordinate to the High Court. It is not exclusive qua a court of superior jurisdiction including a court which can hear an appeal against it decision. The non obstante clause does not prevail over other provisions of the Code such as those which recognise the powers of the superior courts to exercise jurisdiction on transfer. It was submitted that the power of transfer vested in the High Court is exercisable qua Special Judges and is recognised not merely by Chadha case ((1966) 2 SCR 678 : AIR 1966 SC 1418 : 1966 Cri LJ 1071) but in earlier cases also, Shri Jethmalani submitted.

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

32. It was further submitted that any case transferred for trial to the High Court in which it exercises jurisdiction only by reason of the order of transfer is a case tried not in ordinary original criminal jurisdiction but in extraordinary original criminal jurisdiction. Some High Courts had both ordinary criminal jurisdiction as well as extra ordinary criminal original jurisdiction. The former was possessed by the High Courts of Bombay, Madras and Calcutta. The first two High Courts abolished it in the '40's and the Calcutta High Court continued it for quite some time and after '50's in a

truncated form until it was finally done away with by the Code. After the Code the only original criminal jurisdiction possessed by all the High Courts is extraordinary. It can arise by transfer under the Code or the Constitution or under Clause 29 of the Letters Patent. It was submitted that it was not right that extraordinary original criminal jurisdiction is contained only in Clause 24 of the Letters Patent of the Bombay High Court. This is contrary to Section 374 of the Code itself. That refers to all High Courts and not merely all or any one of the three Chartered High Courts. In P. P. Front, New Delhi v. K. K. Birla (1984 Cri LJ 545 (Del)), the Delhi High Court recognised its extraordinary original criminal jurisdiction as the only one that it possessed. The nature of this jurisdiction is clearly explained in Sasadhar Acharjya v. Sir Charles Tegart ((1930-31) 35 Cal WN 1088) and Sunil Chandra Roy v. State (AIR 1954 Cal 305 (para 15) : 1954 Cri LJ 805). Reference may also be made to the Law Commission's 41st Report, paragraphs 3.1 to 3.6 at page 29 and paragraph 31.10 at page 259.

33. The 1952 Act was passed to provide for speedier trial but the procedure evolved should not be so directed, it was submitted, that it would violate Article 14 as was held in Anwar Ali Sarkar case (1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 510).

34. Section 7 of the 1952 Act provides that notwithstanding anything contained in the Code of Criminal Procedure, or in any other law the offences specified in sub-section (1) of Section 6 shall be triable by Special Judges only. So the law provides for a trial by a Special Judge only and this is notwithstanding anything contained in Section 406 and 407 of the Code of Criminal Procedure, 1973. Could it, therefore, be accepted that this Court exercised a power not given to it by Parliament or the Constitution and acted under a power not exercisable by it ? The question that has to be asked and answered is if a case is tried by a Special Judge or a court subordinate to the High Court against whose order an appeal or a revision would lie to the High Court, is transferred by this Court to the High Court and such right of appeal or revision is taken away would not an accused be in a worse position than others ? This Court in R. S. Nayak v. A. R. Antulay ((1984) 2 SCR 495, 557 : (1984) 2 SCC 183, 243 : 1984 SCC (Cri) 172) did not refer either to Section 406 or Section 407 of the Code. It is only made clear that if the application had been made to the High Court under Section 407 of the Code, the High court might have transferred the case to itself.

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

36. In Kiran Singh v. Chaman Paswan ((1955) 1 SCR 117 at 121 : AIR 1954 SC 340) Venkatarama Ayyar, J. observed that the fundamental principle is well established that a decree passed by a court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon - even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.

37. This question has been well put, if we may say so, in the decision of this Court in M. L. Sethi v. R. P. Kapur ((1973) 1 SCR 697 : (1972) 2 SCC 427 : AIR 1972 SC 2379) where Mathew, J. observed that the jurisdiction was a verbal coat of many colours and referred to the decision in Anisminic Ltd. v. Foreign Compensation Commission ((1969) 2 AC 147 : (1969) 1 All ER 208) where the majority of the House of Lords dealt with the assimilation of the concepts of 'lack' and 'excess' of jurisdiction or, in other words, the extent to which we have moved away from the

traditional concept of jurisdiction. The effect of the dicta was to reduce the difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point. what is a wrong decision on a question of limitation, he posed referring to an article of Professor H. W. R. Wade, "Constitutional and Administrative Aspects of the Anisminic case" (Ed. : (1969) 89 LQR 198) and concluded (SCC p. 435, para 12) : "It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack.... and there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

38. While applying the ratio to the facts of the present controversy, it has to be borne in mind that Section 7(1) of the 1952 Act creates a condition which is sine qua non for the trial of offenders under Section 6(1) of that Act. In this connection, the offences specified under Section 6(1) of the 1952 Act are those punishable under Sections 161, 162, 163, 164, and 165-A of the Indian Penal Code and Section 5 of the 1947 Act. Therefore, the order of this Court transferring the cases to the High Court on February 16, 1984, was not authorised by law. This Court, by its directions could not confer jurisdiction on the High Court of Bombay to try any case which it did not possess such jurisdiction under the scheme of the 1952 Act. It is true that in the first judgment in A. R. Antulay v. Ramdas Sriniwas Nayak ((1984) 2 SCR 914 : (1984) 2 SCC 500 : (1984) SCC (Cri) 277) when this Court was analysing the scheme of the 1952 Act, it referred to Sections 6 and 7 at page 931 of the Reports (SCC pp. 514-15). The arguments, however, were not advanced and it does not appear that this aspect with its ramifications was present in the mind of the court while giving the impugned directions.

39. Shri Jethmalani sought to urge before us that the order made by the court was not without jurisdiction or irregular. We are unable to agree. It appears to us that the order was quite clearly per incuriam. This Court was not called upon and did not decide the express limitation on the power conferred by Section 407 of the Code which includes offences by public servants mentioned in the 1952 Act to be overridden in the manner sought to be followed as the consequential direction of this Court. This Court, to be plain, did not have jurisdiction to transfer the case to itself. That will be evident from an analysis of the different provisions of the Code as well as the 1952 Act. The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal. See in this connection the observations in M. L. Sethi v. R. P. Kapur ((1973) 1 SCR 697 : (1972) 2 SCC 427 : AIR 1972 SC 2379) in which Justice Mathew considered Anisminic ((1969) 2 AC 147 : (1969) 1 All ER 208) and also see Halsbury's Laws of England, 4th edn., Vol. 10, page 327 at para 720 onwards and also Amnon Rubinstein - Jurisdiction and illegality (1965 edn., pages 16-50). Reference may also be made to Raja Soap Factory v. S. P. Shantharaj ((1965) 2 SCR 800 : AIR 1965 SC 1449).

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

41. In the aforesaid view of the matter and the principle reiterated, it is manifest that the appellant has not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of Article 21 of the Constitution. That is violative of Articles 14 and 19 of the Constitution

also, as is evident from the observations of the Seven Judges Bench judgment in Anwar Ali Sarkar case (1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 510) where this Court found that even for a criminal who was alleged to have committed an offence, a special trial would be per se illegal because it will deprive the accused of his substantial and valuable privileges of defence which, others similarly charged, were able to claim. As Justice Vivian Bose observed in the said decision at page 366 of the report, it matters not whether it was done in good faith, whether it was done for the convenience of government, whether the process could be scientifically classified and labelled, or whether it was an experiment for speedier trial made for the good of society at large. Justice Bose emphasised that it matters not how lofty and laudable the motives were. The question which must be examined is, can fair minded, reasonable, unbiased and resolute men regard that with equanimity and call it reasonable, just and fair, regard it as equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which are obtained in India today. Judged by that view that singling out of the appellant in this case for a speedier trial by the High Court for an offence of which the High Court had no jurisdiction to try under the Act of 1952 was, in our opinion, unwarranted, unprecedented and the directions given by this Court for the said purpose, were not warranted. If that is the position, when that fact is brought to our notice we must remedy the situation. In rectifying the error, no procedural inhibitions should debar this Court because no person should suffer by reason of any mistake of the court. The court, as is manifest, gave its directions on February 16, 1984. Here no rule of res judicata would apply to prevent this Court from entertaining the grievance and giving appropriate directions. In this connection, reference may be made to the decision of the Gujarat High Court in Soni Vrajlal Jethalal v. Soni Jadavji Govindji (AIR 1972 Guj 148 : (1972) 13 Guj LR 555) where D. A. Desai, J. speaking for the Gujarat High Court observed that no act of the court or irregularity can come in the way of justice being done and one of the highest and the first duty of all courts is to take care that the act of the court does no injury to the suitors.

42. It appears that when this Court gave the aforesaid directions on February 16, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar Ali Sarkar case (1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 510). See Halsbury's Laws of England, 4th edn., Vol. 26, page 297, para 578 and page 300, the relevant notes 8, 11 and 15; Dias on Jurisprudence, 5th edn., pages 128 and 130; Young v. Bristol Aeroplane Co. Ltd. ((1944) 2 All ER 293, 300) Also see the observations of Lord Goddard in Moore v. Hewitt ((1947) 2 All ER 270, 272-A) and Penny v. Nicholas ((1950) 2 All ER 89, 92-A). "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Morelle v. Wakeling ((1955) 1 All ER 708, 718-F). Also see State of Orissa v. Titaghur Paper Mills Co. Ltd. ((1985) 3 SCR 26 : 1985 Supp SCC 280) We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong.

43. The principle that the size of the Bench - Whether it is comprised of two or three or more Judges - does not matter, was enunciated in Young v. Bristol Aeroplane Co. Ltd. ((1944) 2 All ER 293, 300) and followed by Justice Chinnappa Reddy in Javed Ahmad Abdul Hamid Pawala v. State of Maharashtra ((1985) 2 SCR 8 : (1985) 1 SCC 275 : 1984 SCC (Cri) 653) where it has been held that a Division Bench of three Judges should not overrule a Division Bench of two judges, has not been followed by our courts. According to well settled law and various decisions of this Court, it is also well settled that a Full Bench or a Constitution Bench decision as in Anwar Ali Sarkar case (1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 510) was binding on the Constitution Bench because it

was a Bench of seven Judges.

44. The principle in England that the size of the Bench does not matter, is clearly brought out in the decision of Evershed, M.R. in the case of Morelle v. Wakeling ((1955) 1 All ER 708, 718-F). The law laid down by this Court is somewhat different. There is a hierarchy within the court itself here, where larger Benches overrule smaller Benches. See the observations of this Court in Mattulal v. Radhe Lal ((1975) 1 SCR 127 : (1974) 2 SCC 365 : AIR 1974 SC 1596), Union of India v. K. S. Subramanian ((1977) 1 SCR 87, 92 : (1976) 3 SCC 677, 681 : AIR 1976 SC 2433) and State of U.P. v. Ram Chandra Trivedi ((1977) 1 SCR 462, 475 : (1976) 4 SCC 52, 64 : AIR 1976 SC 2547). This is the practice followed by this Court and now it is a crystallised rule of law. See in this connection, as mentioned hereinbefore, the observations of the State of Orissa v. Titaghur Paper Mills ((1985) 3 SCR 26 : 1985 Supp SCC 280) and also Union of India v. Godfrey Philips India Ltd. (1985 Supp 3 SCR 123, 145 : (1985) 4 SCC 369, 387)

45. In support of the contention that a direction to delete wholly the impugned direction of this Court be given, reliance was placed on Satyadhyan Ghosal v. Deorajin Debi ((1960) 3 SCR 590 : AIR 1960 SC 941). The ratio of the decision as it appears from pages 601 to 603 is that the judgment which does not terminate the proceedings, can be challenged in an appeal from final proceedings. It may be otherwise if subsequent proceedings were independent ones.

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

47. In our opinion, we are not debarred from re-opening this question and giving proper directions and correcting the error in the present appeal, when the said directions on February 16, 1984, were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant, guaranteed by Articles 14 and 21 of the Constitution. The appellant has been treated differently from other offenders, accused of a similar offence in view of the provisions of the Act of 1952 and the High Court was not a court competent to try the offence. It was directed to try the appellant under the directions of this Court, which was in derogation of Article 21 of the Constitution. The directions have been issued without observing the principle of audi alteram partem. It is true that Shri Jethmalani has shown us the prayers made before the High Court which are at page 121 of the paper-book. He argued that since the transfers have been made under Section 407, the procedure would be that given in Section 407(8) of the Code. These directions, Shri Jethmalani sought to urge before us, have been given in the presence of the parties and the clarificatory order of April 5, 1985 which was made in the presence of the appellant and his counsel as well as the counsel of the State Government of Maharashtra, expressly recorded that no such submission was made in connection with the prayer for grant of clarification. We are of the opinion that Shri Jethmalani is not right when he said that the decision was not made per incuriam as submitted by the appellant. It is a settled rule that if a decision has been given per incuriam the court can ignore it. It is also true that the decision of this Court in the case of Bengal Immunity Co. Ltd. v. State of Bihar ((1955) 2 SCR 603, 623 : AIR 1955 SC 661) was not regarding an order which had become conclusive inter partes. The court was examining in that case only the doctrine of precedents and determining the extent to which it could take a different view from one previously taken in a different case between different parties.

48. According to Shri Jethmalani, the doctrine of per incuriam has no application in the same proceedings. We are unable to accept this contention. We are of the opinion that this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights

and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner. See the observations in Prem Chand Garg v. Excise Commissioner (1963 Supp 1 SCR 885 : AIR 1963 SC 996).

49. In support of the contention that an order of this Court be it administrative or judicial which is violative of fundamental right can always be corrected by this Court when attention of the court is drawn to this infirmity, it is instructive to refer to the decision of this Court in Prem Chand Garg v. Excise Commissioner (1963 Supp 1 SCR 885 : AIR 1963 SC 996). This is a decision by a Bench of five learned Judges. Gajendragadkar. J. spoke for four learned Judges including himself and Shah, J. expressed a dissenting opinion. The question was whether Rule 12 of Order XXXV of the Supreme Court Rules empowered the Supreme Court in writ petitions under Article 32 to require the petitioner to furnish security for the costs of the respondent. Article 145 of the Constitution provides for the rules to be made subject to any law made by Parliament and Rule 12 was framed thereunder. The petitioner contended that the rule was invalid as it placed obstructions on the fundamental right guaranteed under Article 32 to move the Supreme Court for the enforcement of fundamental rights. This rule as well as the judicial order dismissing the petition under Article 32 of the Constitution for non-compliance with Rule 12 of Order XXXV of the Supreme Court Rules were held invalid. In order to appreciate the significance of this point and the actual ratio of that decision so far as it is relevant for our present purpose it is necessary to refer to a few facts of that decision. The petitioner and eight others who were partners of M/s Industrial Chemical Corporation. Ghaziabad, had filed under Article 32 of the Constitution a petition impeaching the validity of the order passed by the Excise Commissioner refusing permission to the distillery to suply power alcohol to the said petitioners. The petition was admitted on December 12, 1961 and a rule was ordered to be issued to the respondents, the Excise Commissioner of U.P., Allahabad, and the State of U.P. At the time when the rule was issued, this Court directed under the impugned rule that the petitioners should deposit a security of Rs. 2500 in cash within six weeks. According to the practice of this Court prevailing since 1959, this order was treated as a condition precedent for issuing rule nisi to the impleaded respondents. The petitioners found it difficult to raise the amount and so on January 24, 1962, they moved this Court for modification of the said order as to security. This application was dismissed, but the petitioner were given further time to deposit the said amount by March 26, 1962. This order was passed on March 15, 1962. The petitioners then tried to collect the requisite fund, but failed in their efforts and that led to the said petition filed on March 24, 1962 by the said petitioners. The petitioners contended that the impugned rule, insofar as it related to the giving of security, was ultra vires, because it contravened the fundamental right guaranteed to the petitioners under Article 32 of the Constitution. There were two orders, namely, one for security of costs and another for the dismissal of the previous application under Article 32 of the Constitution.

50. This Court by majority held that Rule 12 of Order XXXV of the Supreme Court Rules was invalid insofar as it related to the furnishing of security. The right to move the Supreme Court, it was emphasised, under Article 32 was an absolute right and the content of this right could not be circumscribed or impaired on any ground and an order for furnishing security for the respondent's costs retarded the assertion or vindication of the fundamental right under Article 32 and contravened the said right. The fact that the rule was discretionary did not alter the position. Though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of

the Constitution. No question of inconsistency between Article 142(1) and Article 32 arose. Gajendragadkar, J. speaking for the majority of the judges of this Court siad that Article 142(1) did not confer any power on this Court to contravene the provisions of Article 32 of the Constitution. Nor did Article 145 confer power upon this Court to make rules, empowering it to contravene the provisions of the fundamental right. At page 899 of the Reports, Gajendragadkar, J, reiterated that the powers of this Court are no doubt very wide and they are intended and "will always be exercised in the interests of justice". But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasised that an order which this Court could make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. The court therefore, held that it was not possible to hold that Article 142(1) conferred upon this Court powers which could contravene the provisions of Article 32. It follows, therefore, that the directions given by this Court on February 16, 1984, on the ground of expeditious trial by transferring Special Case No. 24 of 1982 and Special Case No. 3 of 1983 pending in the court of Special Judge, Greater Bombay, Shri S. B. Sule, to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court was contrary to the relevant statutory provision, namely Section 7(2) of the Criminal Law Amendment Act, 1952 and as such violative of Article 21 of the Constitution. Furthermore, it violates Article 14 of the Constitution as being made applicable to a very special case among the special cases, without any guideline as to which cases required speedier justice. If that was so as in Prem Chand Garg case (1963 Supp 1 SCR 885 : AIR 1963 SC 996), that was a mistake of so great a magnitude that it deprives a man by being treated differently of his fundamental right for defending himself in a criminal trial in accordance with law. If that was so then when the attention of the court is drawn the court has always the power and the obligation to correct it ex debito justitiae and treat the second application by its inherent power as a power of review to correct the original mistake. No suitor should suffer for the wrong of the court. This Court in Prem Chand Garg case (1963 Supp 1 SCR 885 : AIR 1963 SC 996) struck down not only the administrative order enjoined by Rule 12 for deposit of security in a petition under Article 32 of the Constitution but also struck down the judicial order passed by the court for non-deposit of such security in the subsequent stage of the same proceeding when attention of the court to the infirmity of the rule was drawn. It may be mentioned that Shah, J. was of the opinion that Rule 12 was not violative. For the present controversy it is not necessary to deal with this aspect of the matter.

51. The power of the court to correct an error subsequently has been reiterated by a decision of a Bench of nine Judges of this Court in Naresh Shridhar Mirajkar v. State of Maharashtra ((1966) 3 SCR 744 : AIR 1967 SC 1). The facts were different and not quite relevant for our present purposes but in order to appreciate the contentions urged, it will be appropriate to refer to certain portions of the same. There was a suit for defamation against the editor of a weekly newspaper, which was filed in the original side of the High Court. One of the witnesses prayed that the court may order that publicity should not be given to his evidence in the press as his business would be affected. After hearing arguments, the trial judge passed an oral order prohibiting the publication of the evidence of the witness. A reporter of the weekly along with other journalists moved this Court under Article 32 of the Constitution challenging the validity of the order. It was contended that : (1) the Court did not have inherent power to pass the order; (2) the impugned order violated the fundamental rights of the petitioners under Article 19(2)(a); and (3) the order was amenable to the writ jurisdiction of this Court under Article 32 of the Constitution.

52. It was held by Gajendragadkar, C.J. for himself and five other learned Judges that the order was

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

53. Hidayatullah, J. observed at page 790 of the report that in Prem Chand Garg case (1963 Supp 1 SCR 885 : AIR 1963 SC 996) the rule required the furnishing of security in petition under Article 32 and it was held to abridge the fundamental rights. But it was said that the rule was struck down and not the judicial decision which was only revised. That may be so. But a judicial decision based on such a rule is not any better and offends the fundamental rights just the same and not less so because it happens to be a judicial order. If there be no appropriate remedy to get such an order removed because the court has no superior, it does not mean that the order is made good. When judged under the Constitution it is still a void order although it may bind parties unless set aside. Hidayatullah, J. reiterated that procedural safeguards are as important as other safeguards. Hidayatullah, J. reiterated that the order committed a breach of the fundamental right of freedom of speech and expression. We are, therefore, of the opinion that the appropriate order would be to recall the directions contained in the order dated February 16, 1984.

54. In considering the question whether in a subsequent proceeding we can go to the validity or otherwise of a previous decision on a question of law inter partes, it may be instructive to refer to the decision of this Court in Ujjam Bai v. State of U.P. ((1963) 1 SCR 778 : AIR 1962 SC 1621). There, the petitioner was a partner in a firm which carried on the business of manufacture and sale of handmade bidis. On December 14, 1957, the State Government issued a notification under Section 4(1)(b) of the U.P. Sales Tax Act, 1948. By a subsequent notification dated November 25, 1958, handmade and machine-made bidis were unconditionally exempted from payment of sales tax. The Sales Tax Officer had sent a notice to the firm for the assessment of tax on sale of bidis during the assessment period April 1, 1958 to June 30, 1958. The firm claimed that the notification dated December 14, 1957 had exempted bidis from payment of sales tax and that, therefore, it was not liable to pay sales tax on the sale of bidis. This position was not accepted by the Sales Tax Officer who passed certain orders. The firm appealed under Section 9 of the Act to the Judge (Appeals) Sales Tax, but that was dismissed. The firm moved the High Curt under Article 226 of the Constitution. The High Court took the view that the firm had another remedy under the Act and the Sales Tax Officer had not committed any apparent error in interpreting the notification of December 14, 1957. The appeal against the order of the High Court on a certificate under Article 133(1)(a) of the Constitution was dismissed by this Court for non prosecution and the firm filed an application for restoration of the appeal and condonation of delay. During the pendency of that appeal another petition was filed under Article 32 of the Constitution for the enforcement of the fundamental right under Articles 19(1)(g) and 31 of the Constitution. Before the Constitution Bench which heard the

matter a preliminary objection was raised against the maintainability of the petition and the correctness of the decision of this Court in Kailash Nath v. State of U.P. (AIR 1957 SC 790 : (1957) 8 STC 358) relied upon by the petitioner was challenged. The learned Judges referred the case to a larger Bench. It was held by this Court by a majority of five leaned Judges that the answer to the question must be in the negative. The case of Kailash Nath (AIR 1957 SC 790 : (1957) 8 STC 358) was not correctly decided and the decision was not sustainable on the authorities on which it was based. Das, J. speaking for himself observed that the right to move this Court by appropriate proceedings for the enforcement of fundamental rights conferred by Part III of the Constitution was itself a guaranteed fundamental right and this Court was not trammelled by procedural technicalities in making an order or issuing a writ for the enforcement of such rights. The question, however, was whether, a quasi-judicial authority which made an order in the undoubted exercise of its jurisdiction in pursuance of a provision of law which was intra vires, an error of law or fact committed by that authority could not be impeached otherwise than on appeal, unless the erroneous determination related to a matter on which the jurisdiction of that body depended. It was held that a tribunal might lack jurisdiction if it was improperly constituted. In such a case, the characteristic attribute of a judicial act or decision was that it binds, whether right or wrong, and no question of the enforcement of a fundamental right could arise on an application under Article 32, Subba Rao, J. was, however, unable to agree.

55. Shri Jethmalani urged that the directions given on February 16, 1984, were not per incuriam. We are unable to accept this submission. It was manifest to the Bench that exclusive Jurisdiction created under Section 7(1) of the 1952 Act read with Section 6 of the said Act, when brought to the notice of this Court, precluded the exercise of the power under Section 407 of the Code. There was no argument, no submission and no decision on this aspect at all. There was no prayer in the appeal which was pending before this Court for such directions. Furthermore, in giving such directions, this Court did not advert to or consider the effect of Anwar Ali Sarkar case (1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 510) which was a binding precedent. A mistake on the part of the court shall not cause prejudice to anyone. He further added that the primary duty of every court is to adjudicate the cases arising between the parties. According to him, it is certainly open to a larger Bench to take a view different from that taken by the earlier Bench, if it was manifestly erroneous and he urged that the trial of a corrupt Chief Minister before a High Court, instead of a judge designated by the State Government was not so injurious to public interest that it should be overruled or set aside. He invited us to consider two questions : (1) does the impugned order promote justice ? and (2) is it technically valid ? After considering these two questions, we are clearly of the opinion that the answer to both these questions is in the negative. No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental right itself renders the impugned action void. So also the violation of the principles of natural justice renders the act a nullity. Four valuable rights, it appears to us, of the appellant have been taken away by the impugned directions :

> (i) The right to be tried by a Special Judge in accordance with the procedure established by law and enacted by Parliament.
>
> (ii) The right of revision to the High Court under Section 9 of the Criminal Law Amendment Act.
>
> (iii) The right of first appeal to the High "Court under the same section.
>
> (iv) The right to move the Supreme Court under Article 136 thereafter by way of a

second appeal, if necessary.

56. In this connection Shri Rao rightly submitted that it is not necessary to consider whether Section 374 of the Criminal Procedure Code confers the right of appeal to this Court from the judgment of a learned Judge of the High Court to whom the case had been assigned inasmuch as the transfer itself was illegal. One has to consider that Section 407 of the Criminal Procedure Code was subject to the overriding mandate of Section 7(1) of the 1952 Act and, hence it does not permit the High Court to withdraw a case for trial to itself from the court of Special Judge. It was submitted by Shri Rao that even in cases where a case is withdrawn by the High Court to itself from a criminal court other than the court of Special Judge, the High Court exercised transferred jurisdiction which is different from original jurisdiction arising out of initiation of the proceedings in the High Court. In any event Section 374 of Criminal Procedure Code limits the right to appeals arising out of Clause 24 of the Letters Patent.

57. In aid of the submission that procedure for trial evolved in derogation of the right guaranteed under Article 21 of the Constitution would be bad, reliance was placed on Attorney General of India v. Lachmma Devi (AIR 1986 SC 467). In aid of the submission on the question of validity our attention was drawn to 'Jurisdiction and Illegality' by Amnon Rubinstein (1965 edn.). The Parliament did not grant to the court the jurisdiction to transfer a case to the High Court of Bombay. However, as the superior court is deemed to have a general jurisdiction, the law presumes that the court acted within jurisdiction. In the instant case that presumption cannot be taken, firstly because the question of jurisdiction was not agitated before the court, secondly these directions were given per incuriam as mentioned hereinbefore and thirdly the superior court alone can set aside an error in its directions when attention is drawn to that error. This view is warranted only because of peculiar facts and circumstances of the present case. Here the trial of a citizen in a Special Court under special jurisdiction is involved, hence, the liberty of the subject is involved. In this connection, it is instructive to refer to page 126 of Rubinstein's aforesaid book. It has to be borne in mind that as in Kuchenmeister v. Home Office ((1958) 1 QB 496) here form becomes substance. No doubt, that being so it must be by decisions and authorities, it appears to us patently clear that the directions given by this Court on February 16, 1984 were clearly unwarranted by constitutional provisions and in derogation of the law enacted by the Parliament. See the observations of Attorney General v. Herman James Sillem ((1864) 10 HLC 704 (HL)), where it was reiterated that the creation of a right to an appeal is an act which requires legislative authority, neither an inferior court nor the superior court nor both combined can create such a right, it being one of limitation and extension of jurisdiction. See also the observations of Isaacs v. Robertson ((1984) 3 All ER 140) where it was reiterated by Privy Council that if an order is regular it can be set aside by an appellate court; if the order is irregular it can be set aside by the court that made it on the application being made to that court either under the rules of that court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warranted, namely, violation of the rules of natural justice or fundamental rights. In Ledgard v. Bull ((1885-86) 13 IA 134), it was held that under the old Civil Procedure Code under Section 25 the superior court could not make an order of transfer of a case unless the court from which the transfer was sought to be made, had jurisdiction to try. In the facts of the instant case, the criminal revision application which was pending before the High Court even if it was deemed to be transferred to this Court under Article 139-A of the Constitution it would not have vested this Court with power larger than what is contained in Section 407 of Criminal Procedure Code. Under Section 407 of the Criminal Procedure Code read with the Criminal Law Amendment Act, the High Court could not transfer to itself proceedings under Sections 6 and 7 of the said Act. This Court by transferring the proceedings to itself, could not have acquired larger jurisdiction. The fact that the objection was not raised before this Court giving directions on

February 16, 1984 cannot amount to any waiver. In Meenakshi Naidoo v. Subramaniya Sastri ((1886-87) 14 IA 160) it was held that if there was inherent incompetence in a High Court to deal with all questions before it then consent could not confer on the High Court any jurisdiction which it never possessed.

58. We are clearly of the opinion that the right of the appellant under Article 14 regarding equality before the law and equal protection of law in this case has been violated. The appellant has also a right not to be singled out for special treatment by a Special Court created for him alone. This right is implicit in the right to equality. See Anwar Ali Sarkar case (1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 510).

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

60. In Nawabkhan Abbaskhan v. State of Gujarat ((1974) 3 SCR 427 : (1974) 2 SCC 121 : 1974 SCC (Cri) 467 : 1974 Cri LJ 1054), it was held that an order passed without hearing a party which affects his fundamental rights, is void and as soon as the order is declared void by a court, the decision operates from its nativity. It is proper for this Court to act ex debito justitiae, to act in favour of the fundamental rights of appellant.

61. Insofar as Mirajkar case ((1966) 3 SCR 744 : AIR 1967 SC 1) which is a decision of a Bench of nine Judges and to the extent it affirms Prem Chand Garg case (1963 Supp 1 SCR 885 : AIR 1963 SC 996), the court has power to review either under Section 137 or suo motu the directions given by this Court. See in this connection P. S. R. Sadhanantham v. Arunachalam ((1980) 2 SCR 873 : (1980) 3 SCC 141 : 1980 SCC (Cri) 649 : AIR 1980 SC 856) and Suk Das v. Union Territory of Arunachal Pradesh ((1986) 2 SCC 401 : 1986 SCC (Cri) 166). See also the observations in Asrumati Debi v. Kumar Rupendra Deb Rajkot (1953 SCR 1159 : AIR 1953 SC 198), Satyadhyan Ghosal v. Smt. Deorajin Debi ((1960) 3 SCR 590 : AIR 1960 SC 941), Sukhrani v. Hari Shanker ((1979) 3 SCR 671 : (1979) 2 SCC 463 : AIR 1979 SC 1436) and Bejoy Gopal Mukherji v. Pratul Chandra Ghose (1953 SCR 930 : AIR 1953 SC 153).

62. We are further of the view that in the earlier judgment the points for setting aside the decision, did not include the question of withdrawal of the case from the court of Special Judge to Supreme Court and transfer it to the High Court. Unless a plea in question is taken it cannot operate as res judicata. See Shivshankar Prasad Shah v. Baikunth Nath Singh ((1969) 1 SCC 710), Bikan Mahuri v.Mst. Bibi Walian (AIR 1939 Pat 633). See also S. L. Kapoor v. Jagmohan ((1981) 1 SCR 746 : (1980) 4 SCC 379 : AIR 1981 SC 136) on the question of violation of the principles of natural justice. Also see Maneka Gandhi. v. Union of India ((1978) 2 SCR 621, 674-81 : (1978) 1 SCC 248, 284-91). Though what is mentioned hereinbefore in the Bengal Immunity Co. Ltd. v. State of Bihar ((1955) 2 SCR 603, 623 : AIR 1955 SC 661), the court was not concerned with the earlier decision between the same parties. At page 623 it was reiterated that the court was not bound to follow a decision of its own if it was satisfied that the decision was given per incuriam or the attention of the court was not drawn. It is also well settled that an elementary rule of justice is that no party should suffer by mistake of the court. See Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya ((1966) 3

SCR 242 : AIR 1966 SC 1119), Jang Singh v. Brijlal ((1964) 2 SCR 145 : AIR 1966 SC 1631), Bhajahari Mondal v. State of W.B. (1959 SCR 1276, 1284-86 : AIR 1959 SC 8 : 1959 Cri LJ 98) and Asgarali N. Singaporawalla v. State of Bombay (1957 SCR 678, 692 : AIR 1957 SC 503 : 1957 Cri LJ 605).

63. Shri Rao further submitted that we should not only ignore the directions or set aside the directions contained in the order dated February 16, 1984, but also direct that the appellant should not suffer any further trial. It was urged that the appellant has been deprived of his fundamental right guaranteed under Articles 14 and 21 as a result of the directions given by this Court. Our attention was drawn to the observations of this Court in Suk Das case ((1986) 2 SCC 401 : 1986 SCC (Cri) 166) for this purpose. He further addressed us to the fact that six and a half years have elapsed since the first complaint was lodged against the appellant and during this long period the appellant has suffered a great deal. We are further invited to go into the allegations and to hold that there was nothing which could induce us to prolong the agony of the appellant. We are, however, not inclined to go into this question.

64. The right of appeal under Section 374 is limited to Clause 24 of Letters Patent. It was further submitted that the expression 'Extraordinary original criminal jurisdiction' under Section 374 has to be understood having regard to the language used in the Code and other relevant statutory provisions and not with reference to decisions wherein courts described jurisdiction acquired by transfer as extraordinary original jurisdiction. In that view the decisions referred to by Shri Jethmalani being Kavasji Pestonji Dalal v. Rustomji Sorabji Jamadar (AIR 1949 Bom 42), Sunil Chandra Roy v. State (AIR 1954 Cal 305 (para 15) : 1954 Cri LJ 805). Sasadhar Acharjya v. Sir Charles Tegart ((1930-31) 35 Cal WN 1088), Peoples' Insurance Co. Ltd. v. Sardul Singh Caveeshar (AIR 1961 Punj 87 : ILR (1960) 1 Punj 341) and P. P. Front, New Delhi v. K. K. Birla (1984 Cri LJ 545 (Del)) are not relevant.

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

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