SUPREME COURT OF INDIA

HARSHAD S. MEHTA & ORS.

Vs.

THE STATE OF MAHARASHTRA

06/09/2001

(S.P. Bharucha, Y.K. Sabharwal & Brijesh Kumar)

Appeal (crl.) 319-320 of 1996

JUDGMENT

ABHARWAL, J.

The Act provides for establishment of Special Court to consist of one or more sitting Judges of the High Court nominated by the Chief Justice of the High Court within the local limits of whose jurisdiction the Special Court is situated, with the concurrence of the Chief Justice of India. Section 6 of the Act provides that the Special Court shall take cognizance of or try cases as are instituted before it or transferred to it. Section 3 provides for appointment and functions of custodian. Sub-section (2) of Section 3 provides that the custodian may, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after the first day of April, 1991 and on or before 6th June, 1992, notify the name of such person in the Official Gazette. `Securities' includes :

(i) shares, scrips, stocks, bonds, debentures, debenture stock, units of the Unit Trust of India or any other mutual fund or other marketable securities of a like nature in or of any incorporated company or other body corporate:

(ii) Government securities; and

(iii)Rights or interests in securities.

Section 7 provides for the exclusive jurisdiction of Special Court and stipulates that notwithstanding anything contained in any other law, any prosecution in respect of any offence referred to in sub-section (2) of Section 3 shall be instituted only in the Special Court and any prosecution in respect of such offence pending in any court shall stand transferred to the Special Court. The Special Court, therefore, is a court of exclusive jurisdiction in respect of offences referred to in sub-section (2) of Section 3.

Section 9 of the Act lays down the procedure and powers of Special Court and stipulates the following of the procedure prescribed by the Code for the trial of warrant cases before a Magistrate. Section 9(2), inter alia, provides for the applicability of the provisions of the Code to the

proceedings before the Special Court insofar as they are not inconsistent with the provisions of the Act. As provided in this provision, the Special Court is deemed to be a Court of Session. The main bone of contention is the interpretation of Section 9 which reads as under :

"9. Procedure and powers of Special Court.-

(1) The Special Court shall, in the trial of such cases, follow the procedure prescribed by the Court for the trial of warrant cases before a magistrate.

(2) Save as expressly provided in this Act, the provisions of the Code shall, insofar as they are not inconsistent with the provisions of this Act, apply to the proceedings before the Special Court and for the purposes of the said provisions of the Code, the Special Court shall be deemed to be a Court of Session and shall have all the powers of a Court of Session, and the person conducting a prosecution before the Special Court shall be deemed to be a Public Prosecutor.

(3) The Special Court may pass upon any person convicted by it any sentence authorized by law for the punishment of the offence of which such person is convicted.

(4) While dealing with any other matter brought before it, the Special Court may adopt such procedure as it may deem fit consistent with the principles of natural justice."

The Act has an overriding effect as provided in Section 13 which, inter alia, stipulates that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 14 is the rule making power of the Central Government. Section 15 repeals the Ordinance.

The circumstances under which these appeals have come up in brief are that on 21st June, 1993 two separate applications were filed before the Special Court under the provisions of the Code, one by Sarvotham Vishwanath Prabhu and the other by Bhaskar Roy Choudhury praying for grant of pardon. These applications were supported by the Central Bureau of Investigation. Prabhu and Choudhury had earlier made statements under Section 164 of the Code before the Magistrate. It is claimed that in those statements they voluntarily and willingly made full disclosure of their participation in the offences and also participation of other accused in commission of the offences. The investigating officer supporting the application for grant of pardon stated before the Special Court that with a view to obtain the evidence of these two accused who are directly or indirectly concerned in or privy to offences which were under investigation, it is necessary and desirable, as well as in the interests of justice, that there applications praying for tender of pardon to them be supported so that all the facts and circumstances relating to the commission of offences and also the manner of participation by other accused may come on record during the trial. The Special Court, by order dated 22nd June, 1993, granted the application of both the accused on the condition that they will give evidence during the trial and make a full and true disclosure of the whole of the circumstances within their knowledge relating to the offence and to other problems. The conditional tender of pardon was accepted by Prabhu and Chaudhury.

The appellants by applications dated 9th January, 1996 filed before the Special Court sought revocation of the pardon. It was pleaded in the applications that the pardon granted to Prabhu and Chaudhury was void and non-est in the eyes of law mainly on the ground of lack of jurisdiction of the Special Court to grant pardon. It was urged that the power to grant pardon had to be expressly conferred; there is no inherent power in any court to grant pardon and that no such power had been

conferred on the Special Court.

The applications seeking revocation were dismissed by the Special Court by order dated 6th February, 1996 holding that the Special Court has the power to tender pardon. The Special Court rejected the contention that the orders dated 22nd June, 1993 were without jurisdiction. The legality of the order dated 6th February, 1996 is in issue in before us.

Chapter XXIV of the Code deals with the general provisions as to inquiries and trials. Sections 300 to 327 are in this Chapter. Sections 306 and 307 deal with tender of the pardon to accomplice. Section 306 confers power on Magistrates and Section 307 on the court to which the commitment is made. Section 308 provides for the consequences of not complying with the conditions of pardon by a person who has accepted tender of pardon made under Section 306 or Section 307. These three sections read as under :

"306. Tender of pardon to accomplice.-(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to--

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952)

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)-

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,-

(a) commit it for trial--

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

307. Power to direct tender of pardon.-At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

308. Trial of person not complying with conditions of pardon.-(1) Where, in regard to a person who has accepted a tender of pardon made under Section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence :

Provided that such person shall not be tried jointly with any of the other accused:

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a Court under sub-section (4) of section 306 may be given in evidence against him at such trial.

(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made, in which case it shall be for the prosecution to prove that the condition has not been complied with.

(4) At such trial the Court shall-

(a) If it is a Court of Session, before the charge is read out and explained to the accused;

(b) if it is the Court of a Magistrate before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

(5) If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall notwithstanding anything contained in this Code, pass judgment of acquittal."

The question for determination is whether the pardon provision as contained in Sections 306 and

307 of the Code apply or not to the proceedings before the Special Court under the Act. We were also told that in Criminal Appeal No.1097 of 1999 (Ram Narain Poply v. Central Bureau of Investigation) one of the questions is as to the power of a Magistrate to grant pardon to a person accused of an offence that falls within the purview of the Act. Counsel were given the opportunity to address arguments on this question as well.

To answer the question, it is necessary to closely scrutinise and consider the provisions of the Act, the Code and other enactments relied upon by Mr.Jethmalani and the effect of the said enactments on the interpretation of the provisions of the Act.

Penal laws require that the punishment shall be inflicted on every person found guilty of an offence under those laws. The grant of pardon results in the grantee escaping the punishment for the offence. The nature of power of pardon under Sections 306 and 307 is essentially different than the nature of such power under the Constitution of India whereby the President and/or Governor are empowered to grant pardon. Those powers are exercised after a person is found guilty. That is not so here. Under Sections 306 and 307, the pardon is tendered during the investigation, enquiry or trial, as the case may be. The object is to obtain evidence of an accomplice so as to facilitate conviction of others. Undoubtedly, as contended by Mr.Jethmalani, such a power has to be conferred specifically. It is a substantive power. The power has to be derived from the statutory provisions. Section 306 confers the power to grant pardon in respect of serious offences and on certain class of Magistrate. From the scheme of the section and having regard to the nature of the power, we find that Mr. Jethmalani is right in contending that the power to grant pardon is not an inherent power of a criminal court and is a substantive power to be specifically conferred. It, therefore, follows that such a substantive power does not flow from Section 9(4) of the Act and to this extent the learned Special Court was not right in concluding that Section 9(4), on account of the wide powers it confers, would include amongst others a right on the Special Court to grant pardon. Section 9(4) of the Act does not confer on the Special Court any such power. Section 9(4) is in the nature of a general provision. It confers inherent powers on the Special Court to deal with any matter that may be brought before it providing that for dealing with such a matter the Special Court may adopt its own procedure consistent with the principles of natural justice. Sections 3 and 4 of the Act show that variety of matters could come up before the Special Court for its consideration and for dealing with those matters, the Special Court was empowered to regulate its own procedure consistent with the principles of natural justice. The conferment of that inherent power does not include the power to grant pardon, which cannot be said to be a matter of procedure.

Our view in respect of Section 9(4), however, does not conclude the matter for that the main question is about the interpretation of Section 9(2) of the Act. Does it exclude the applicability of Sections 306 and 307 while making applicable the provisions of the Code to the proceedings before the Special Court, is the real question.

The Act contains fifteen sections. Most of these have already been noticed by us hereinbefore. It is evident therefrom that the Act does not contain any independent machinery or provision for the purpose of investigation, enquiry or trial. For these matters it has no legs of its own to stand. It has borrowed the legs from the Code. The legislative device of incorporation by reference is well known and duly recognised device. This device is adopted for the purpose of convenience. It obviates the need to reproduce the provisions of an existing statute sought to be adopted in a later statute. This is what has been done while enacting the Act. Instead of reproducing the provisions of the Code, it has incorporated those provisions in the Act by so providing in Section 9(2) but at the same time, the Act maintaining its own superiority as stated therein and also in Section 13.

Neither Section 9(2) nor Section 13 nor any other provision in the Act expressly exclude the applicability of Sections 306 and 307 to the proceedings before the Special Court. Whether it is so excluded by necessary implication is an aspect which needs serious consideration.

Mr. Jethmalani, learned counsel appearing for the appellant, contends that Sections 306 and 307 have not been extended to the Special Court under the Act. It is contended that the Special Court is not a class of a court enumerated in sub-section (1) of Section 306 or a court as contemplated by Section 307 to which commitment is made. Therefore, the contention is that neither Section 306 nor Section 307 is applicable to the proceedings before the Special Court under the Act and hence that court has no power or jurisdiction to tender pardon. Learned counsel further contends that it was a matter of policy for the law makers to confer or not upon the Special Court such a power and in their wisdom, probably considering the gravity of the offence and situation with which the country was confronted, it took a policy decision not to confer power of pardon so that no one should escape punishment and every accused is equally treated. Learned counsel contends that this course was adopted by the legislature despite the fact that law makers were fully conscious that in all similar earlier enactments power to grant pardon was specifically conferred by insertion of specific provision to that effect while passing law establishing Special Court. While enacting the Act the provision conferring power to grant pardon was deliberately omitted and this almost conclusively shows that such power was not intended to be conferred, is the submission of Mr.Jethmalani.

Reference has been made by learned counsel, in particular, to Section 8 of the Criminal Law (Amendment) Act, 1952 (for short, `the 1952 Act'). That Act has since been repealed by the Prevention of Corruption Act, 1988. It would be convenient to reproduce Section 8. It reads as under:

"8. Procedure and Powers of Special Judges.- (1) A Special Judge may take cognizances of offence without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 (5 of 1898) for the trial of warrant cases by Magistrate

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

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

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

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

Mr. Jethmalani contends that for all intents and purposes, the aforesaid provisions have been repeated while enacting Section 9 of the Act but by not providing in Section 9 a provision similar to abovesaid Section 8(2) conferring on the Special Court under the Act power to grant pardon almost conclusively shows the legislative intendment of not conferring power of pardon on the Special Court. This omission, according to learned counsel, provide a complete answer to the question. Our attention has also been drawn to the Special Courts Act, 1979. Section 9 thereof provides for procedure and powers of the Special Courts established under the said Act. It confers on the Special Court power to tender pardon as stipulated in sub- section (2) of Section 9 of that Act which is similar to Section 8(2) of the 1952 Act.

Mr. Jethmalani contends that a plain reading of the provisions of Sections 306 and 307 shows that these provisions do not fit in the scheme of the Act and thus cannot apply to the Special Court under the Act. The Special Court, consisting of a Judge of the High Court, is not a Magistrate falling in any of the category of the Magistrates enumerated by sub-section (1) of Section 306, is the contention of the learned counsel. Further the contention is that Section 307 is also not applicable since the case is not committed to the Special Court and Section 307 can apply where commitment of a case is made and is available only to a court to which the commitment is made. The submission is that the Act does not postulate any commitment to be made to the Special Court for it provides for the institution of or transfer of a case before the Special Court and institution of any prosecution in respect of any offence referred to in Section 3(2) only in the Special Court (Sections 6 and 7).

We have no difficulty in accepting the contention that the Special Court, per se, is not a Magistrate falling in any of the categories of Magistrates as enumerated in Section 306(1) and also that it is not a court to which the commitment of a case is made. But, it does not necessarily follow therefrom that the power to tender pardon under Sections 306 and 307 has not been conferred on the Special Court.

The Special Court may not be a criminal court as postulated by Section 6 of the Code. All the same, it is a criminal court of original jurisdiction. On this count the doubt, if any, stands resolved by the decision of Constitution Bench of this Court in A.R. Antulay v. Ramdas Sriniwas Nayak & Anr. ([1984] 2 SCC 500). In Antulay's case the Constitution Bench said that shorn of all embellishment, the Special Court is a court of original criminal jurisdiction and to make it functionally oriented some powers were conferred by the statute setting it up and except those specifically conferred and specifically denied, it has to function as a court of original criminal jurisdiction not being hide bound by the terminological status description of Magistrates or a Court of Session. Under the Code, it will enjoy all powers which a court of original criminal jurisdiction enjoys save and except the ones specifically denied.

Therefore, let us see whether the power to grant pardon has been specifically denied to the Special Court established by the Act.

In support of the contention that the Special Court has no power to tender pardon in the absence of specific provision to that effect in the Act, strong reliance has been placed by Mr. Jethmalani on the decision of this Court in Lt. Commander Pascal Fernandes v. The State of Maharashtra & Ors. [(1968) 1 SCR 695]. The relevant passage reads thus:

"Before we discuss the validity or propriety of the tender of pardon to Jagasia we shall refer briefly to the statutory provisions on the subject of the tender of pardon. The topic of tender of pardon to an accomplice is treated in the twenty-fourth chapter of the Code as part of the general provisions as to inquiries and trials. Sections 337 to 339 and 339-A contain all the provisions which refer to courts of criminal jurisdiction established under the Code. The Special Judge created under the Criminal Law Amendment Act, 1952 (Act 46 of 1952) is not one of them. For the cases triable by Special Judges under the Criminal Law Amendment Act a special provision is to be found in s.8(2) of that Act, for tender of pardon to an accomplice, as part of the procedure and powers of Special Judges. The section is set out below. The second sub- section necessarily differs in some respects from the provisions of the Code because the procedure of trial before the Special Judge is different, but on the tender of pardon by the Special Judge the provisions of ss. 339 and 339A of the Code apply. The tender of pardon by the Special Judge is deemed by fiction to be one tendered under s.338 of the Code for purposes of sections 339 and 339A."

Reliance has also been placed by Mr. Jethmalani on State of Tamil Nadu v. V. Krishnnaswami Naidu & Anr. [(1979) 3 SCR 928]. The passage relied upon by the learned counsel reads thus:

"It may be noted that the Special Judge is not a Sessions Judge, Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure though no person can be appointed as a Special Judge unless he is or has been either a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge. The Special Judge is empowered to take cognizances of the offences without the accused being committed to him for trial. The jurisdiction to try the offence by a Sessions Judge is only after committal to him. Further the Sessions Judge does not follow the procedure for the trial of warrant cases by Magistrates. The Special Judge is deemed to be a Court of Sessions only for certain purposes as mentioned in Section 8(3) of the Act while the first part of sub-section (3) provides that except as provided in sub- sections (1) and (2) of Section 8 the provisions of the Code of Criminal Procedure, 1898 shall so far as they are not inconsistent with this Act, apply to the proceedings before the Special Judge. The sub-section further provides that `for the purpose of the said provisions, the Court of the Special Judge shall be deemed to be a Court of session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special judge shall be deemed to be a public prosecutor'. The deemed provisions has to be confined for the purposes mentioned in the sub-section. Section 8(2) enables the Special Judge to tender a pardon to a person with a view to obtaining evidence supposed to have been concerned for the commission of an offence and the pardon so tendered was for the purposes of Section 339 and 339(a) of the Code of Criminal Procedure, 1898. This sub-section was enacted because Special Judge not being a Court to which a commitment has been made cannot tender pardon under the provisions of Section 338 and so this section is introduced to enable the Special Judge to tender a pardon. Sub- section 3(a) has made the provisions of section 350 and 549 applicable to proceedings before a Special Judge and for the purposes of the said provisions a Special Judge shall be deemed to be a Magistrate. Section 350 of the Code of Criminal Procedure enables a succeeding Special Judge to act on the evidence recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself. Section 549 empowers a Magistrate when any person is brought before him charged with an offence for which he is liable to be tried by a Court to which this Court applies or by a Court-martial, the Magistrate shall deliver him to the Commanding Officer of the Regiment for the purpose of being tried by the Court-martial. This provision also is made specifically applicable to the Special Judge. Section 8(A) empowers the Special Judge to try certain offences in a summary way and the provisions of section 262 to 265 of the Criminal Procedure Code is made applicable so far as they may apply."

The contention of learned counsel is that in the case in hand the Act does not postulate commitment of the case being made to the Special Court and no provision having been inserted in the Act to empower Special Court to tender pardon, the impugned order granting pardon is without jurisdiction.

Mr.Jethmalani further contends that simply to confer on the Special Court the power to tender pardon by itself is not enough without conferring on it the power to punish the person who accepts tender of pardon in case of violation by him of terms and conditions on which the pardon is tendered. The submission is that a reading of the provisions of the Act clearly shows that the power as contained in Section 308 of the Code to punish the accomplice for violation of the terms and conditions of the pardon has not been conferred on the Special Court and, therefore, it is evident that the power to tender pardon has also not been conferred on that court.

Counsel submits that for deciding these matters the paramount question one is required to ask himself is why provisions similar to the one in 1952 Act and other such enactments conferring specific power to grant pardon and to inflict punishment in the event of violation of the terms and conditions of the pardon were omitted from the Act. The obvious and the only answer of the question, according to learned counsel, is that the intention of the legislature was not to confer the power of pardon on the Special Court and any other interpretation will defeat that intention of the legislature.

Mr.Jethmalani also sought to invoke the doctrine of implied repeal. Pointing out that the Code is a general law and the Act - a special later enactment, Section 13 whereof shows its predominance and superiority, this Court should not have any reluctance to accept the applicability of doctrine of implied repeal in these matters, was the submission of learned counsel though he, very fairly and rightly, conceded that there is a presumption against a repeal by implication.

The reason for the presumption as aforesaid is that the legislature while enacting a law has a complete knowledge of the existing laws on the subject matter and, therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. The burden to show that there has been a repeal by implication lies on the party asserting it. Relying upon statutory interpretation by Francis Bennion (1984 Edition), counsel contends that where, as in the present case, the provisions of the later enactment (the Act) are contrary to those of the earlier (the Code), the later by implication repeals the earlier in accordance with the maxim leges posteriores priores contrerios abrogant (later laws abrogate earlier contrary laws). This is, however, subject to the exception embodied in the maxim generatia specialitous non derogant (a general provision does not derogate from a special one). One of the important test to determine the issue of implied repeal would be whether the provisions of the Act are irreconcilably inconsistent with those of the Code that the two cannot stand together or the intention of the legislature was only to supplement the provisions of the Code. This intention is to be ascertained from the provisions of the Act. Courts lean against implied repeal. If by any fair interpretation both the statutes can stand together, there will be no implied repeal. If possible implied repeal shall be avoided. It is, however, correct that the presumption against the intent to repeal by implication is overthrown if the new law is inconsistent with or repugnant to the old law, for the inconsistency or repugnancy reveals an intent to repeal the existing laws. Repugnancy must be such that the two statutes cannot be reconciled on reasonable construction or hypothesis. They ought to be clearly and manifestly irreconcilable. It is possible, as contended by Mr.Jethmalani, that the inconsistency may operate on a part of a statute. Learned counsel submits that in the present case the presumption against implied repeal stands rebutted as the provisions of the Act are so inconsistent with or repugnant to the

provisions of the earlier Acts that the two cannot stand together. The contention is that the provisions of Sections 306 and 307 cannot be complied with by the Special Court and thus the legislature while enacting the Act clearly intended that the said existing provisions of the Code would not apply the proceedings under the Act. Learned counsel contends that this court will not construe the Act in a manner which will make Sections 306 and 307 or at least part of the said sections otiose and thereby defeat the legislative intendment whatever be the consequences of such an interpretation.

THE CONTENTION FURTHER IS THAT THE DEFICIENCY IN THE ACT, IF ANY, CANNOT BE PROVIDED BY THE COURT PARTICULARLY WHEN THE LANGUAGE IS PLAIN AND SIMPLE AND THE ASSUMED GAPS CANNOT BE FILLED BY THE COURT AND THAT THE WILFUL OMISSION MADE BY THE LEGISLATURE HAS TO BE RESPECTED BY THE COURT. ON THE LEGISLATURE WILFULLY OMITTING TO INCORPORATE SOMETHING OF AN ANALOGOUS LAW IN A SUBSEQUENT STATUTE, OR EVEN IF THERE IS A CASUS OMISSUS IN A STATUTE, THE LANGUAGE OF WHICH IS OTHERWISE PLAIN AND UNAMBIGUOUS, THE COURT IS NOT COMPETENT TO SUPPLY THE OMISSION UNDER THE GUISE OF INTERPRETATION BY ANALOGY OR IMPLICATION, SOMETHING WHAT IT THINKS TO BE A GENERAL PRINCIPLE OF JUSTICE AND EQUITY, RELIANCE HAS BEEN PLACED UPON THE COMMISSIONER OF SALES TAX, U.P., LUCKNOW V. M/S. PARSON TOOLS AND PLANTS, KANPUR ([1975] 4 SCC 22), LORD HOWARD DE WALDEN V. INLAND REVENUE COMMISSIONERS (1948 (2) ALL E.R 825), JOHNSON & ANR. V. MORETON (1978 (3) ALL E.R. 37) AND HARCHARAN SINGH V. SMT.SHIVRANI & ORS. ([1981] 2 SCC 535). THE CONTENTION IS THAT ANY INTERPRETATION BY THIS COURT OTHER THAN THE ONE PROPOUNDED WOULD BE ENTRENCHING UPON THE POWER OF LEGISLATURE. ON THE PRINCIPLES OF INTERPRETATION ON DETAIL CONSIDERATION OF VARIOUS DECISIONS OF THIS COURT AND COURTS OF OTHER COUNTRIES, IN S.P.GUPTA & ORS. ETC. ETC. V. UNION OF INDIA & ORS. ETC.ETC. (AIR 1982 SC 149), A BENCH OF SEVEN

JUDGES SAID:

"But there is one principle on which there is complete unanimity of all the courts in the world and this is that where the words or the language used in a statute are clear and cloudless, plain, simple and explicit unclouded and unobscured, intelligible and pointed so as to admit of no ambiguity, vagueness, uncertainty or equivocation, there is absolutely no room for deriving support from external aids. In such cases, the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom (para 197).

WHERE, HOWEVER, THE WORDS OR EXPRESSIONS USED IN THE CONSTITUTIONAL OR STATUTORY PROVISIONS ARE SHROUDED IN MYSTERY, CLOUDED WITH AMBIGUITY AND ARE UNCLEAR AND UNINTELLIGIBLE SO THAT THE DOMINANT OBJECT AND SPIRIT OF THE LEGISLATURE CANNOT BE SPELT OUT FROM THE LANGUAGE, EXTERNAL AIDS IN THE NATURE OF PARLIAMENTARY DEBATES, IMMEDIATELY PRECEDING THE PASSING OF THE STATUTE, THE REPORT OF THE SELECT COMMITTEES OR ITS CHAIRMAN, THE STATEMENT OF OBJECTS AND REASONS OF THE STATUTE, IF ANY, OR ANY STATEMENT MADE BY THE SPONSOR OF THE STATUTE WHICH IS IN CLOSE PROXIMITY TO THE ACTUAL INTRODUCTION OR INSERTION OF THE STATUTORY PROVISION SO AS TO BECOME, AS IT WERE, A RESULT OF THE STATEMENT MADE, CAN BE PRESSED INTO SERVICE IN ORDER TO

ASCERTAIN THE REAL PURPORT, INTENT AND WILL OF THE LEGISLATURE TO MAKE THE CONSTITUTIONAL PROVISION WORKABLE. WE MIGHT MAKE IT CLEAR THAT SUCH AIDS MAY NEITHER BE DECISIVE NOR CONCLUSIVE BUT THEY WOULD CERTAINLY ASSIST THE COURTS IN INTERPRETING THE STATUTE IN ORDER TO DETERMINE THE AVOWED OBJECT OF THE ACT OR THE CONSTITUTION AS THE CASE MAY BE.(PARA 271(2)."

ON THE PRINCIPLES OF INTERPRETATION, WE HAVE NO DIFFICULTY IN ACCEPTING THE CONTENTIONS OF MR. JETHMALANI BUT THE QUESTION IS ABOUT THE APPLICABILITY THEREOF. There is no doubt that if the words are plain and simple and call for only one construction that construction is to be adopted whatever be its effect. The question in the present case, however, is can it be said from the plain language of the Act that the power to grant pardon has been excluded from the purview of the Special Court, either expressly or by necessary implication by not incorporating in Section 9 of the Act a provision similar to Section 8(2) of the 1952 Act.

There cannot be any controversy that there is no express provision in the Act excluding therefrom the applicability of Sections 306 and 307 of the Code. Can it be said to be so, by necessary implication is what we have to determine.

THE CASES (FERNANDES AND KRISHNNASWAMI NAIDU) RELIED UPON BY MR.JETHMALANI, IT HAS TO BE BORNE IN MIND, RELATE TO THE INTERPRETATION OF THE PROVISION RELATING TO GRANT OF PARDON AS THEY EXISTED IN THE CODE OF 1898. THIS COURT, HOWEVER, IS CONCERNED WITH THE PROVISIONS IN 1973 CODE. THERE IS A DEPARTURE IN THE LANGUAGE OF THE PROVISIONS OF SECTIONS 306 TO 308 OF THE CODE ON ONE HAND AND SECTIONS 337 TO 339A OF 1898 CODE ON THE OTHER. FURTHER THE LEGAL POSITION HAS UNDERGONE A SUBSTANTIAL CHANGE AFTER THE DECISION IN THE CASE OF A.R.ANTULAY WHICH ASPECT WE WILL ADVERT TO LITTLE LATER.

Let us first examine the Fernandes's case. At this stage we may note some of the significant departure in the relevant provisions of old Code and the Code. Under the old Code (Section 338), after commitment, the court to which commitment is made could either tender pardon itself or order the committing Magistrate or the District Magistrate to so do. Now under Section 307, there is no power to so order the committing Magistrate. In the old Code, the Court of Session and that of the Magistrate had concurrent jurisdiction to grant pardon seems evident. In State of U.P. v. Kailash Nath Agarwal & Ors. [(1973) 1 SCC 751] the question for consideration was whether a District Magistrate is competent under Section 337 of the old Code to exercise power of pardon even after commitment and the conferment of the power to grant pardon on the Special Judge under Section 338. It was held that Section 338 does not deprive the District Magistrate of his power to grant pardon under Section 337 of the old Code. This Court said that even after commitment, a District Magistrate will have power to grant pardon, though it was necessary to bear in mind that the authorities under Sections 337 and 338 have to exercise jurisdiction in harmony in order to further the interest of justice and avoid conflicting orders being passed. This decision also takes note of other provision of the old Code which provide for exercise of conferment of concurrent powers and when the Legislature intended that the two authorities should not exercise concurrent jurisdiction on an identical matter, it used appropriate language to that effect. Now, the facts in brief of Fernandes's case are that grant of pardon to one Jagasia was opposed by his co-accused, the objection besides others being that powers of the Special Judge in tendering conditional pardon under Section 8(2) of

1952 Act, are limited to application by the prosecution in that behalf and the Special Judge cannot act suo motu without being invited by the prosecution to consider the tender of pardon to one of the accused before him. This Court upholding the order of the High Court dismissing the revision petition of the co-accused challenging the order granting pardon to Jagasia, noticed that before the High Court the prosecution had supported grant of pardon to him. That decision brings out the width of power under Section 8(2) of the 1952 Act and the width of the power to direct tender of pardon under Section 338 of the 1898 Code. It was held that the fiction in latter part of Section 8(2) providing that pardon sought under law for the purposes of Sections 339 and 339A of the 1898 Code be deemed to have been tendered under Section 338 of that Code is only that the tender of pardon is deemed to be one under Section 338 for purposes of applying Sections 339 and 339A. The whole of Section 338 is not applicable. The power to order the committing Magistrate or the District Magistrate to tender pardon is not available to the Special Judge because the fiction does not cover that part of Section 338. After noticing the distinction between the powers granted under the Code and the powers under the 1952 Act to tender pardon, it was held that the conditions for exercise of the power by the Courts under the 1898 Code are not applicable when the Special Judge exercises that power whose powers are not circumscribed by any condition except one, namely, that action must be with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence. The powers under the 1952 Act were held to be enabling and wide enough to enable the Special Judge to tender a pardon to any person who is supposed to have been directly or indirectly concerned in or privy to an offence even when such a person is not arraigned before the Special Court. There was distinction in exercise of the power under the two provisions which were under consideration before the Special Court which is evident from the following :

"It follows that the powers of the Special Judge are not circumscribed by any condition except one, namely, that the action must be with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to an offence. The pardon so tendered is also on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor. The disclosure must be complete as to himself and as to any other person concerned as principal or abettor. There is no provision for the recording of reasons for so doing, nor is the Special Judge required to furnish a copy to the accused. There is no provision for recording a preliminary statement of the person.

There can be no doubt that the section is enabling and its terms are wide enough to enable the Special Judge to tender a pardon to any person who is supposed to have been directly or indirectly concerned in, or privy to an offence. This must necessarily include a person arraigned before him. But it may be possible to tender pardon to a person not so arraigned. The power so conferred can also be exercised at any time after the case is received for trial and before its conclusion. There is nothing in the language of the section to show that the Special Judge must be moved by the prosecution. He may consider an offer by an accused as in this case. The action, therefore, was not outside the jurisdiction of the Special Judge in this case."

It is understandable that if powers wider than the one contemplated by the Code are intended to be conferred, a provision to that effect will have to be made. It does not follow therefrom that in an altogether different statute, if no special provision is made, an inference can be drawn that even where the powers under the Code and not wide powers were intended to be conferred, save and except where it is so stated specifically, the effect of omission would be that the Special Court will not have even similar power as are exercised by the ordinary criminal courts under the Code.

Similarly, the observations made in the earlier reproduced passage in Krishnnaswami Naidu's case have also to be appreciated in the context of what we have said above regarding the conferment of wider power than the Code under the 1952 Act. It is in this context that the observations were made in that case to the effect that "This sub-section was enacted because the Special Judge not being a court to which a commitment has been made cannot tender pardon under the provisions of Section 338 and so this sub-section is introduced to enable the Special Judge to tender a pardon". These observations do not mean that if same powers as are in Code are intended to be conferred, that cannot be achieved by sub-section (2) of Section 9 of the Act. Legislature inserted Section 8(2) since wider powers were to be conferred on the Special Judge under 1952 Act.

THERE IS ALSO ANOTHER ASPECT OF KRISHNNASWAMI NAIDU'S CASE AND THAT IS IN RELATION TO SECTION 167 OF THE CODE. IN THAT CASE WHILE NOTICING THAT SECTION 167 OF THE CODE REQUIRES THAT WHENEVER ANY PERSON IS ARRESTED AND DETAINED IN CUSTODY AND WHEN IT APPEARS THAT THE INVESTIGATION CANNOT BE COMPLETED WITHIN A PERIOD OF 24 HOURS, THE POLICE OFFICER IS REQUIRED TO FORWARD THE ACCUSED TO THE MAGISTRATE AND IF THE MAGISTRATE TO WHOM THE ACCUSED IS FORWARDED IS NOT THE MAGISTRATE HAVING JURISDICTION TO TRY THE CASE, HE MAY AUTHORIZE THE DETENTION OF THE ACCUSED IN SUCH CUSTODY AS HE THINKS FIT FOR A TERM NOT EXCEEDING 15 DAYS ON THE WHOLE. IF HE HAS NO JURISDICTION TO TRY THE CASE AND IF HE CONSIDERS THAT THE FURTHER DETENTION IS NECESSARY, HE MAY ORDER THE ACCUSED TO BE FORWARDED TO ANY MAGISTRATE HAVING JURISDICTION WHO MAY AUTHORIZE DETENTION OF THE KIND PROVIDED BEYOND PERIOD OF 15 DAYS BUT FOR A TOTAL PERIOD NOT EXCEEDING 60 DAYS. THE ACCUSED IN THAT CASE WERE PRODUCED BEFORE THE SPECIAL JUDGE WHO HAD THE JURISDICTION TO TRY THE CASE. THE CONTENTION WHICH FOUND FAVOUR WITH THE HIGH COURT WAS THAT THE WORDS `MAGISTRATE HAVING JURISDICTION' CANNOT APPLY TO A SPECIAL JUDGE HAVING JURISDICTION TO TRY THE CASE. IT WAS HELD IN THIS CASE THAT NO DOUBT THE WORD `SPECIAL JUDGE' IS NOT MENTIONED IN SECTION 167 BUT THE QUESTION IS WHETHER THAT WOULD EXCLUDE THE SPECIAL JUDGE FROM BEING A MAGISTRATE HAVING JURISDICTION TO TRY THE CASE. ON EXAMINING VARIOUS PROVISIONS OF THE CODE INCLUDING SECTION 193 THEREOF, IT WAS HELD THAT IN TAKING COGNIZANCE OF AN OFFENCE WITHOUT THE ACCUSED BEING COMMITTED TO HIM, HE IS NOT A SESSIONS JUDGE FOR SECTION 193 OF THE CODE PROVIDES THAT NO COURT OF SESSIONS JUDGE SHALL TAKE COGNIZANCE FOR ANY OFFENCE AS A COURT OF ORIGINAL JURISDICTION UNLESS THE CASE HAS BEEN COMMITTED TO IT BY A MAGISTRATE UNDER THE CODE AND STRICTLY HE IS NOT A SESSIONS JUDGE FOR NO SESSIONS JUDGE CAN TAKE A COGNIZANCE AS A COURT OF SESSION WITHOUT COMMITTAL. REFERRING TO THE CRIMINAL LAW (AMENDMENT) ACT, IT WAS HELD THAT THE PROVISIONS OF THE CODE ARE NOT EXCLUDED UNLESS THEY ARE INCONSISTENT WITH THE CRIMINAL LAW (AMENDMENT) ACT AND, THUS, READ THERE COULD BE NO DIFFICULTY IN COMING TO THE CONCLUSION THAT THE CODE IS APPLICABLE WHEN THERE IS NO CONFLICT WITH THE PROVISIONS OF CRIMINAL LAW (AMENDMENT) ACT. THE COURT SAID THAT "IF A SPECIAL JUDGE WHO IS EMPOWERED TO TAKE COGNIZANCE WITHOUT COMMITTAL IS NOT EMPOWERED TO EXERCISE POWERS OF REMANDING AN ACCUSED PERSON PRODUCED BEFORE HIM OR RELEASE HIM ON BAIL IT WILL LEAD TO AN ANOMALOUS SITUATION" (EMPHASIS SUPPLIED). THE

CONTENTION URGED BY MR.JETHMALANI THAT AT PRE-COGNIZANCE STAGE SPECIAL COURT UNDER THE ACT HAS NO JURISDICTION CLEARLY RUNS CONTRARY TO THE AFORESAID DICTUM. THE COURT IN THAT CASE FURTHER WENT ON TO EXPLAIN THE ANOMALY. IT WAS SAID THAT TO HOLD THAT A MAGISTRATE OTHER THAN A MAGISTRATE HAVING JURISDICTION CANNOT KEEP HIM IN CUSTODY FOR MORE THAN 15 DAYS AND AFTER THE EXPIRY OF THE PERIOD IF THE MAGISTRATE HAVING JURISDICTION TO TRY THE CASE DOES NOT INCLUDE THE SPECIAL JUDGE, IT WOULD MEAN THAT HE WOULD HAVE NO AUTHORITY TO EXTEND THE PERIOD OF REMAND OR TO RELEASE HIM ON BAIL. FURTHER IF THE SPECIAL JUDGE IS NOT HELD TO BE A MAGISTRATE HAVING JURISDICTION, A CHARGE SHEET UNDER SECTION 173 CANNOT BE SUBMITTED TO HIM. REFERRING TO CLAUSE (32) OF SECTION 3 OF THE GENERAL CLAUSES ACT AND SECTION 3 OF THE CODE, IT WAS HELD THAT THERE CAN BE NO DIFFICULTY IN CONSTRUING THE SPECIAL JUDGE AS A MAGISTRATE FOR THE PURPOSE OF SECTION 167 AND, THUS, REJECTING THE CONTENTION AND REVERSING THE ARGUMENTS WHICH WEIGHED WITH THE HIGH COURT THAT THE WORDS "MAGISTRATE HAVING JURISDICTION" CANNOT APPLY TO A SPECIAL JUDGE HAVING JURISDICTION TO TRY THE CASE, THIS COURT HELD :

"It is relevant to note that the General Clauses Act Section 3(32) defines a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. Section 3 of the Criminal Procedure Code provides that any reference without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires in the manner stated in the sub-sections. If the context otherwise requires the word `Magistrate' may include Magistrates who are not specified in the Section. Read along with the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the Special Judge as a Magistrate for the purposes of Section 167."

MR.JETHMALANI, OF COURSE, CONTENDS THAT TO THE AFORESAID EXTENT, KRISHNNASWAMI NAIDU'S CASE IS NOT CORRECTLY DECIDED. WE ARE UNABLE TO ACCEPT THE CONTENTION. Mr.Jethmalani also contends that at pre-cognizance stage no power of any nature has been conferred on the Special Court under the Act and this, counsel says is clear from the language of Sections 6 and 7 of the Act. It, however, needs to be noticed that while Section 6 uses the expression `case' in the context of Special Court taking cognizance or trying `such cases' as instituted before it or transferred to it as provided therein, on the other hand, Section 7 uses the expression `prosecution' in the context of institution thereof in respect of any offence referred to in sub-section (2) of Section 3 of the Act or transfer of any pending `prosecution'. In the present context, the institution of the prosecution as envisaged by Section 7, is wider than the taking cognizance of or trying of such cases as provided in Section 6. It does not appear from the language of Sections 6 and 7 read with Sections 3 and 9 that at pre-cognizance stage all steps including those of remand, bail are required to be taken before the normal criminal courts constituted under Section 6 of the Code. It does not seem that after the enforcement of the Act, the legislature intended that in relation to the offences under the Act, the normal criminal courts should continue to have power at the stage earlier to taking of cognizance by the Special Court. Further, admittedly in practice, all such proceedings including those of remand, bail, production of the accused at pre-cognizance stage have always been taken before the Special Court and not before criminal courts constituted under the Code. It also does not appear that a Magistrate has a power to grant pardon under Section 306 to alleged offenders under the Act at any stage of the proceedings. MR. JETHMALANI DOES NOT DISPUTE THAT SPECIAL COURT CONSTITUTED UNDER THE ACT IS A COURT OF ORIGINAL CRIMINAL JURISDICTION (ANTULAY'S CASE). MR.JETHMALANI,

HOWEVER, SUBMITS THAT IT IS ONLY THAT COURT OF ORIGINAL CRIMINAL JURISDICTION ON WHICH SPECIAL POWER OF PARDON IS CONFERRED THAT CAN EXERCISE SUCH A POWER OR IT CAN BE EXERCISED BY THE NORMAL CRIMINAL COURTS CONSTITUTED UNDER SECTION 6 OF THE CODE AND NO OTHER COURT OF ORIGINAL CRIMINAL JURISDICTION. SUCH A POWER WAS CONFERRED ON COURT OF ORIGINAL CRIMINAL JURISDICTION WITH WHICH THIS COURT WAS CONCERNED IN ANTULAY'S CASE AND HAS NOT BEEN CONFERRED ON THE COURT OF ORIGINAL CRIMINAL JURISDICTION WITH WHICH WE ARE CONCERNED, IS THE CONTENTION OF MR.JETHMALANI. IT IS POINTED OUT THAT ANTULAY'S CASE DID NOT HOLD THAT THE SPECIAL COURT WAS A COURT OF ORIGINAL CRIMINAL JURISDICTION AS POSTULATED BY THE CODE. SINCE THE POWER OF PARDON IS NOT INHERENT IN EVERY COURT OF CRIMINAL JURISDICTION, THE OBSERVATION THAT THE SPECIAL COURT IS A COURT OF ORIGINAL CRIMINAL JURISDICTION DOES NOT CARRY THE CASE OF THE PROSECUTION ANY FURTHER IS THE SUBMISSION OF MR.JETHMALANI. REGARDING SECTION 307 PRESCRIBING THE POWER OF THE COURT, THREE REASONS ARE GIVEN BY THE LEARNED COUNSEL IN SUPPORT OF THE SUBMISSION THAT THE SAID PROVISION HAS NOT BEEN EXTENDED TO THE SPECIAL COURT, NAMELY, (1) NO COMMITMENT IS MADE TO THE SPECIAL COURT, (2) IT OPERATES `AFTER COMMITMENT' AND ONLY THEREAFTER THE COURT WILL HAVE POWER TO GRANT PARDON AND (3) IT DOES NOT CONFER POWER TO GRANT PARDON DURING INVESTIGATION OF THE OFFENCE. IT WAS SUBMITTED THAT IN THESE APPEALS THE PARDON WAS GRANTED DURING INVESTIGATION AS THE ORDER WAS PASSED BY SPECIAL COURT GRANTING PARDON ON 22ND JUNE, 1993 WHEREAS THE CHARGE SHEET WAS FILED LATER I.E. ON 24TH JUNE, 1993.

Section 306(4)(a) postulates that every person accepting a tender of pardon made under sub-section (1) of Section 306, shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Here, it is pointed out, the cognizance cannot be taken by the Magistrate in view of Sections 6 and 7 of the Act and it can be exclusively taken by the Special Court and, therefore, this section becomes redundant, is the contention. Likewise, Section 306(5) is also inapplicable since there can be neither any committal nor is the Special Court one of the court enumerated in this sub-section and the effect, according to learned counsel, is that Section 306(4) and (5) cannot be complied by Special Court and they stand excluded with a consequence that the entire Section 306 of the Code would stand excluded from its applicability to the Act.

Mr.Jethmalani, however, does not dispute the applicability of Section 4(2) subject to superiority of the Act as postulated in Section 13 of the Act but submits that the effect of it only is that at pre-cognizance stage it is the normal court of criminal jurisdiction as constituted under Section 6 which would have power and jurisdiction to deal with matters at pre-cognizance stage and not the Special Court. To a query from this Court that if it is so, would not such normal court have power under Section 306 of the Code, to grant pardon, the answer of Mr.Jethmalani is that those courts will not have the said powers since the legislature intended to exclude that power from the Special Court, it would be evident that it also intended to so exclude normal courts as well. Alternatively, it was contended that assuming such powers at pre-cognizance stage vest with normal courts, it does not mean that Special Court would also have the power of pardon. There is no anomaly in grant of power of pardon at the stage of investigation and enquiry and denial of such power at the stage of trial to the Special Court as it is a question of policy, according to Mr.Jethmalani.

It is not possible to accept that the legislature could ever intend to create such a anomalous position

where a Magistrate will have power to grant pardon at pre-cognizance stage but after cognizance the Special Court will not have that power. It makes no sense. It is not possible to attribute such an absurdity to the legislature. It does not flow from the provisions of the Act. For this purpose we are assuming that at pre-cognizance stage, all aspects are required to be dealt with by normal courts although as dealt with later, in our view, at that stage too power vests in Special Court.

IN ANY CASE LEARNED COUNSEL CONTENDS, THAT THE COURT WILL NOT CONSTRUE THE PROVISIONS OF THE ACT IN A MANNER WHICH WILL MAKE SUB-SECTIONS (4) AND (5) OF THE CODE REDUNDANT IN ITS APPLICABILITY TO THE PROVISIONS OF THE SPECIAL LAW, NAMELY, THE ACT. RELYING UPON J.K.COTTON SPINNING AND WEAVING MILLS CO.LTD. V. STATE OF U.P. & ORS. (AIR 1961 SC 1170), IT WAS CONTENDED THAT THERE IS A PRESUMPTION THAT THE LEGISLATURE INSERTS EVERY PART OF A STATUTE FOR A PURPOSE AND THAT EVERY PART SHOULD HAVE EFFECT AND SINCE SUB-SECTIONS (4) AND (5) OF SECTION 306 WOULD NOT HAVE EFFECT AS THOSE SUB-SECTIONS CANNOT BE COMPLIED, IT IS EVIDENT THAT THE POWER OF SECTION 306 WAS NOT INTENDED TO BE CONFERRED ON THE SPECIAL COURT BY THE LEGISLATURE WHEN THAT COURT WITH EXCLUSIVE POWER OF COGNIZANCE CANNOT COMPLY WITH SECTION 306 OF THE CODE. THE LATER PART OF SUBMISSION DOES NOT FOLLOW FROM J.K.COTTON SPINNING AND WEAVING MILLS' CASE. EVEN THE EARLIER PART OF THE SUBMISSION DOES NOT LEAD TO THE CONCLUSION THAT POWER OF PARDON WAS INTENDED TO BE EXCLUDED. THE RELIANCE UPON THE DECISION IN THE CELEBRATED CASE OF WILLIE (WILLIAM) SLANEY V. STATE OF MADHYA PRADESH (AIR 1956 SC 116) (PARA 100) LAYING DOWN THAT EVERY PROVISION OF THE CODE OF CRIMINAL PROCEDURE IS MEANT TO BE OBEYED IS ALSO OF NO HELP FOR RESOLVING THE ISSUE IN THESE APPEALS.

To our mind, the Special Court has all the powers of a Court of Session and/or Magistrate, as the case may be, after the prosecution is instituted or transferred before that Court. The width of the power of the Special Court will be same whether trying such cases as are instituted before it or transferred to it. The use of different words in Sections 6 and 7 of the Act as already noticed earlier also show that the words in Section 7 that the prosecution for any offence shall be instituted only in Special Court deserve a liberal and wider construction. They confer on the Special Court all powers of the Magistrate including the one at the stage of investigation or enquiry. Here, the institution of the prosecution means taking any steps in respect thereof before the Special Court. The scheme of the Act nowhere contemplates that it was intended that steps at pre-cognizance stage shall be taken before a court other than a Special Court. We may note an illustration given by Mr. Salve referring to Section 157 of the Code. Learned counsel submitted that the report under that Section is required to be sent to a Magistrate empowered to take cognizance of offence. In relation to offence under the Act, the Magistrate has no power to take cognizance. That power is exclusively with the Special Court and thus report under Section 157 of the Code will have to be sent to the Special Court though section requires it to be sent to the Magistrate. It is clear that for the expression `Magistrate' in Section 157, so far as the Act is concerned, it is required to be read as `Special Court' and likewise in respect of other provisions of the Code. If the expression `Special Court' is read for the expression `Magistrate', everything will fall in line. This harmonious construction of the provisions of the Act and the Code makes the Act work. That is what is required by principles of statutory interpretation. Section 9(1) of the Act provides that the Special Court in the trial of such cases follow the procedure prescribed by the Code for the trial of warrant cases before the Magistrate. The expression `trial' is not defined in the Act or the Code. For the purpose of the Act, it has a wider

connotation and also includes in it the pre- trial stage as well. Section 9(2) makes the Special Court, a Court of Session by a fiction by providing that the Special Court shall be deemed to be a Court of Session and shall have all the powers of a Court of Session. In case, the Special Court is held not to have the dual capacity and powers both of the Magistrate and the Court of Session, depending upon the stage of the case, there will be a complete hiatus. It is also to be kept in view that the Special Court under the Act comprises of a High Court Judge and it is a court of exclusive jurisdiction in respect of any offence as provided in Section 3(2) which will include offences under Indian Penal Code, Prevention of Corruption Act and other penal laws. It is only in the event of inconsistency that the provisions of the Act would prevail as provided in Section 13 thereof. Any other interpretation will make the provision of the Act unworkable which could not be the intention of the Legislature. Section 9(2) does not exclude Sections 306 to 308 of the Code from the purview of the Act. This section rather provides that the provisions of the Code shall apply to the proceedings before the Special Court. The inconsistency seems to be only imaginary. There is nothing in the Act to show that Sections 306 to 308 were intended to be excluded from the purview of the Act.

Reliance has been placed by the learned Solicitor General on A.R. Antulay's case. That case holds that in contra-distinction to the Sessions Court, the Court of Special Judge to be a court of original criminal jurisdiction and wherever the expression `Magistrate' occurs, the expression `Special Judge' is required to be read and the provisions of Sections 238 to 250 of the Code stood incorporated in 1952 Act by application of the doctrine of `Legislation by incorporation'.

After the pronouncement of a Constitution Bench decision in Antulay's case, there can now be no doubt that the Special Court under the Act will enjoy all powers which a court of original criminal jurisdiction enjoys whether of a Magistrate or a Court of Session, save and except the one specifically denied. The passage from Antulay's case relevant for the present purposes reads thus :

"It is, however, necessary to decide with precision and accuracy the position of a Special Judge and the Court over which he presides styled as the Court of a Special Judge because unending confusions have arisen by either assimilating him with a Magistrate or with a Sessions Court. The Prevention of Corruption Act, 1947 was enacted for more effective prevention of bribery and corruption. Years rolled by and experience gathered showed that unless a special forum for the trial of such offences as enumerated in the 1947 Act is created, the object underlying the 1947 Act would remain a distant dream. This led to the enactment of the Criminal Law accompanying the Bill refers to the recommendations of the Committee chaired by Dr. Bakshi Tek Chand appointed to review the working of the Special Police Establishment and to make recommendations for improvement of laws relating to bribery and corruption. To take the cases of corruption out of the maze of cases handled by Magistrates, it was decided to set up special courts. Section 6 conferred power on the State Government to appoint as many Special Judges as may be necessary with power to try the offences set out in clauses (a) and (b). Now if at this state a reference is made to Section 6 of the Code of Criminal Procedure which provides for constitution of criminal courts, it would become clear that a new court with a new designation was being set up and that it has to be under the administrative and judicial superintendence of the High Court. As already pointed out, there were four types of criminal courts functioning under the High Court. To this list was added the court of a Special Judge. Now when a new court which is indisputably a criminal court because it was not even whispered that the Court of Special Judge is not a criminal court, is set up, to make it effective and functionally oriented, it becomes necessary to prescribe its powers, procedure, status and all ancillary provisions. While setting up a court of a Special Judge keeping in view the fact that the high dignitaries in public life are likely to be tried by such a court, the qualification prescribed was that the person to be appointed as a Special Judge has to be either a Sessions Judge, Additional

Sessions Judge or Assistant Sessions Judge. These three dignitaries are above the level of a Magistrate. After prescribing the qualification, the Legislature proceeded to confer power upon a Special Judge to take cognizance of offences for the trial of which a Special court with exclusive jurisdiction was being set up. If a Special Judge has to take cognizance of offences, ipso facto the procedure for trial of such offences has to be prescribed. Now the Code prescribes different procedures for trial of cases by different courts. Procedure for trial of a case before a Court of Sessions is set out in Chapter XVIII; trial of warrant cases by Magistrates is set out in Chapter XIX and the provisions therein included catered to both the types of cases coming before the Magistrate, namely, upon police report or otherwise than on a police report. Chapter XX prescribes the procedure for trial of summons cases by Magistrates and Chapter XXI prescribes the procedure for summary trial. Now that a new criminal court was being set up, the Legislature took the first step of providing its comparative position in the hierarchy of courts under Section 6 Cr.P.C. by bringing it on level more or less comparable to the Court of Sessions, but in order to avoid any confusion arising out of comparison by level, it was made explicit in Section 8(1) itself that it is not a Court of Sessions because it can take cognizance of offences without commitment as contemplated by Section 193 Cr.P.C. Undoubtedly in Section 8(3) it was clearly laid down that subject to the provisions of sub-sections (1) and (2) of Section 8, the Court of Special Judge shall be deemed to be a Court of Session trying cases without jury or without the aid of assessors. In contra-distinction to the Sessions Court this new court was to be a court of original jurisdiction. The Legislature then proceeded to specify which out of the various procedures set out in the Code, this new court shall follow for trial of offences before it. Section 8(1) specifically says that a Special Judge in trial of offences before him shall follow the procedure prescribed in the Code of Criminal Procedure for trial of warrant cases by Magistrates. The provisions for trial of warrant cases by the Magistrate are to be found in Chapter XXI of 1898 Code. A glance through the provisions will show that the provisions therein included catered to both the situations, namely, trial of a case initiated upon police report (Sec.251A) and trial of cases instituted otherwise than on police report (Sec. 252 to 257). If a Special Judge is enjoined with a duty to try cases according to the procedure prescribed in foregoing provisions he will have to first decide whether the case was instituted upon a police report or otherwise than on police report and follow the procedure in the relevant group of sections. Each of the Secs. 251A to 257 of 1898 Code which are in pari materia with Secs. 238 to 250 of 1973 Code refers to what the Magistrate should do. Does the Special Judge, therefore, become a Magistrate? This is the fallacy of the whole approach. In fact, in order to give full effect to Section 8(1), the only thing to do is to read Special Judge in Sections 238 to 250 wherever the expression `Magistrate' occurs. This is what is called legislation by incorporation. Similarly, where the question of taking cognizance arises, it is futile to go in search of the fact whether for purposes of Section 190 which conferred power on the Magistrate to take cognizance of the offence, Special Judge is a Magistrate? What is to be done is that one has to read the expression `Special Judge' in place of Magistrate, and the whole thing becomes crystal clear. The Legislature wherever it found the grey area clarified it by making specific provision such as the one in sub-section (2) of Section 8 and to leave no one in doubt further provided in sub-section (3) that all the provisions of the Code of Criminal Procedure shall so far as they are not inconsistent with the Act apply to the proceedings before a Special Judge. At the time when the 1952 Act was enacted what was in operation was the Code of Criminal Procedure, 1898. It did not envisage any Court of a Special Judge and the Legislature never wanted to draw up an exhaustive Code of Procedure for this new criminal court which was being set up. Therefore, it conferred power (taking cognizance of offences), prescribed procedure (trial of warrant cases by a Magistrate), indicated authority to tender pardon (Section 338) and then after declaring its status as comparable to a Court of Session proceeded to prescribe that all provisions of the Code of Criminal Procedure will apply in so far as they are not inconsistent

with the provisions of the 1952 Act. The net outcome of this position is that a new court of original jurisdiction was set up and whenever a question arose as to what are its powers in respect of specific questions brought before it as court of original criminal jurisdiction, it had to refer to the Code of Criminal Procedure undaunted by any designation claptrap. When taking cognizance, a Court of Special Judge enjoyed the powers under Section 190. When trying cases, it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and by way of status it was equated with a Court of Session. The entire argument inviting us to specifically decide whether a court of a Special Judge for a certain purpose is a Court of Magistrate or a Court of Session revolves round a mistaken belief that a Special Judge has to be one or the other, and must fit in the slot of a Magistrate or a Court of Session. Such an approach would strangulate the functioning of the court and must be eschewed. Shorn of all embellishment, the court of a Special Judge is a court of original criminal jurisdiction. As a court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the court. Except those specifically conferred and specifically denied, it has to function as a court of original criminal jurisdiction not being hide bound by the terminological status description of Magistrate or a Court of Session. Under the Code, it will enjoy all powers which a court of original criminal jurisdiction enjoys save and except the ones specifically denied."

The Code has been incorporated in the Act by application of the doctrine of legislation by incorporation. The power to grant pardon has not been denied expressly or by necessary implication. As earlier stated after decision in the case of A.R.Antulay, it was not necessary to make specific provision in the Act conferring power on the Special Court to grant pardon at trial or pre-trial stage. The Special Court is a court of original criminal jurisdiction and has all the powers of such a court under the Code including those of Sections 306 to 308 of the Code, the same not having been excluded specifically or otherwise.

There is no provision in the Act which negates the power of the Special Court to grant pardon. The Special Court has power to grant pardon at any stage of the proceedings. The power under Section 307 cannot be denied merely because no commitment of the case is made to the Special Court. Learned Solicitor General, in our view, rightly contends that the other statutes are only an external aid to the interpretation and to rely upon the omission of a provision which is contained in another different enactment, it has to be shown that two acts are similar which is not the position here. The scheme of two acts is substantially different as has been earlier noticed by us. It is also evident from Fernandes's case as well.

As noticed, the provisions of Sections 6 and 7 of the Special Courts Act confer much wider power. Everything after institution of the prosecution is required to be done by the Special Court. There is nothing in those provisions or in Section 9 to warrant exclusion of Sections 306 to 308 of the Code from the purview of the Act. Reference may also be made to Section 4(2) of the Code which stipulates that the investigation, inquiry and trial of all offences under any other law than the Indian Penal Code shall also be dealt with according to the provisions of the Code but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. Mr. Salve also relies upon the decision in the case of Directorate of Enforcement v. Deepak Mahajan & Anr.[(1994) 1 SCR 445]. In that case, one of the question that came up for consideration was whether the jurisdiction of the Magistrate to authorize detention of an arrestee produced before him either in judicial custody or otherwise under Section 167(2) of the Code is completely excluded or ousted by the absence of any specific provision in the FERA or the Customs Act empowering the Magistrate to `authorise the detention' of the arrestee under the Code. After surveying the relevant statutory provisions and various judgments including

that of Antulay's case this Court summed up that Section (4) of the Code is comprehensive and Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). It was held that the provisions of the Code would be applicable to the extent in the absence of any contrary provision in the Special Act or any special provision excluding the jurisdiction or applicability of the Code.

In the present case, we are unable to find either any inconsistency or any provision which may indicate expressly or by necessary implication the exclusion of the provision of the Code empowering grant of pardon. The fact that there is no commitment to the Special Court only shows that section will apply to the extent applicable but that does not lead to exclusion of the power of the Special Court to grant pardon. Section 6 does away with the procedure of commitment of a case to the Sessions Court. It is the Special Court which is to take cognizance of the cases instituted before it or transferred to it. Another deviation is provided in Section 7 which stipulates that any prosecution of any offence relating to transactions in securities shall be instituted only in Special Court. Provisions of the Code not inconsistent with the Act shall apply to the proceedings before the Special Court (Section 9{2}).

The power to tender pardon is not controlled by sub- sections (4) or (5) of Section 306. These sub-sections deal with the matters pertaining to post-pardon stage. These provisions only show that where there is no commitment, sub-section (5) of Section 306 will not apply. But this does not take away the power of pardon as provided in sub-section (1) of Section 306. It only means that these provisions will apply to the extent applicable. Reference may also be made to a decision of Calcutta High Court strenuously relied upon by Mr. Salve. In Harihar Sinha & Ors. v. Emperor [AIR 1936 Calcutta 356] a Full Bench of Calcutta High Court was faced with a question whether a Special Magistrate appointed under Section 24 of the Bengal Suppression of Terrorist Outrages Act, XII of 1932 had power to tender a pardon under Section 337 of 1898 Code or otherwise. The facts of the said case relevant for the present purposes were that the Special Magistrate therein tendered a conditional pardon to one of the accused under Section 337; that accused was taken out of the dock, put into the witness box and he gave evidence in the trial before the Special Magistrate. The contention urged on behalf of the appellants before the High Court was that the Special Magistrate on grant of pardon by virtue of sub- section 2(a) which provided that in every case, where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be. In the Code, similar provisions are in sub-section (5) of Section 306. Before Full Bench, the contentions that are relevant for our purposes which were urged were two. One - that the Special Magistrate had no power to tender a conditional pardon under Section 337 to Gouranga because the duty of the Special Magistrate was to try Gouranga and not to pardon him. The contention was not accepted. It was observed that the Special Magistrate was charged with the duty of trying the appellants with Nalini and Gouranga. Nalini had been earlier discharged under sub-section (a) of Section 494 but thereupon he went into box and gave evidence; the public prosecutor was of the opinion that Nalini had not told all he knew and was hostile to the prosecution and, thus, applied to the District Magistrate to have him recommitted to take his trial along with the accused which was ordered and thereafter Gouranga was tendered conditional pardon and examined as a witness. The Court held that it is not infrequently happens in a trial that the only way in which justice can be done is through one of the accused giving evidence on behalf of the Crown, and if this evidence is given according to law, there is nothing wrong in it though as the evidence of an accomplice it is open to suspicion and that Section 337 provides the terms on and the machinery by

which the pardon, for the purpose of giving evidence, can be granted by the Magistrate, and the Magistrate was acting within his powers in granting the conditional pardon.

The second contention which in fact is more relevant for the present purpose was that the Special Magistrate having tendered a conditional pardon to Gouranga was bound, under sub-section (2-A), to commit the other accused for trial to the Court of Session or the High Court but as he was directed to try the accused himself and, therefore, could not commit them to the Sessions or the High Court, the whole of the provisions of Section 337 are nugatory in this case, from which it follows that if he is to try the accused, he cannot pardon any one of them under Section 337. The contention was held not to be sound and for that basis, the provision of Section 26(2) of the aforesaid 1932 Act in question was referred to. The said provision provided that the provisions of the Code so far as they are not inconsistent with the Chapter (i.e. Chapter 2), shall apply to the proceedings of a Special Magistrate and Section 34 of the said Act provided that the provisions of the Criminal Procedure Code in so far as they may be applicable and insofar as they are not inconsistent with the provisions of this Chapter (i.e. Chapter 2), shall apply to all matters connected with, arising from or consequent upon a trial by Special Magistrates. It was concluded from these provisions that a Magistrate may, acting under Section 337(1) tender a conditional pardon and under Section 337(2) examine the pardoned man as a witness in his court, but must, acting under the Bengal Suppression of Terrorist Outrages Act, 1932, try the accused himself instead of committing him for trial to the Court of Session or the High Court as Section 337(2-A) of the Code provides. Reference was made by the Full Bench to an earlier decision of the Calcutta High Court reported in Abdul Majid v. Emperor [60 Cal. 652] wherein a Special Magistrate tried certain prisoners under the provisions of Ordinance 2 of 1932. Sections 37(1), 37(2) and 52 of the Ordinance as reproduced in that decision read as under :

"37(1) In the trial of any case under this Ordinance a Special Magistrate shall follow the procedure laid down in sub-section (1) of Section 32 for the trial of cases by a Special Judge.

37(2) In matters not coming within the scope of sub-section (1), the provisions of the Code in so far as they are not inconsistent with this Ordinance shall apply to the proceedings of a Special Magistrate; and for the purposes of the said provisions, the Special Magistrate shall be deemed to be a Magistrate of the first class.

52. The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Ordinance, shall apply to all matters connected with, arising from or consequent upon a trial by special criminal Courts constituted under this Ordinance."

The Full Bench noticed that the afterquoted provisions are respectively essentially the same as Sections 26 and 34 of the Bengal Suppression of Terrorist Outrages Act, 1932. In Abdul Majid's case one of the accused who was granted conditional pardon under Section 337 by the Special Magistrate proceeded to give evidence against his co- accused before the Special Magistrate who dealt with the case and sentenced the prisoners. It was objected on appeal that the Special Magistrate had no power to tender a conditional pardon and afterwards dispose of the case himself, instead of sending it to the Sessions Court or the High Court. The appeal from the conviction was dismissed. The observations of the Chief Justice Rankin from that decision which was cited with approval by the Full Bench are to the following effect :

"It is right to notice the contention that was put forward to the effect that the proceedings before the

Special Magistrate were bad. It is said that his having tendered pardon to the approver, sub-section 2-A, S.337, Criminal P.C., made it obligatory upon him to commit the accused for trial to the Court of Session. It is not disputed that, under the Ordinance (2 of 1932), he certainly could not commit the accused for trial to any Court of Session. When we look at the Ordinance, we find that there is an express provision that the provisions of the Code are to apply in the case of Special Magistrates so far as they are not inconsistent with the Ordinance, and similar phrasing is used more elaborately in S.52 and also in connection with Sessions Judges in S.32. It makes no difference whatever, so far as I can see, whether the Magistrate tendering the pardon had been the District Magistrate and not the Magistrates trying the case. The provisions of sub- s.(2-A) would apply equally, whoever had been the Magistrate tendering the pardon, and it is quite clear that the Special Magistrate is the Magistrate who, under the Ordinance, is to try the case. Unless, therefore, we were to hold that no approver could ever give evidence before a Special Magistrate, the appellants would not succeed in making the argument logical. But it is quite clear that, in so far as the Ordinance is inconsistent with sub-s.(2-A), the Ordinance prevails and there is no ground for supposing that it is impossible for the Special Magistrate to hear the evidence."

The Full Bench accordingly held that the Special Magistrate could try the case himself even after grant of pardon and it does not follow that the absence of power to commit the accused to the Court of Session or the High Court would show that the Special Magistrate has no power to tender pardon. The position here also is almost identical. To the extent the provisions of sub-sections (4) and (5) of Section 306 cannot be followed by the Special Court, they are not required to be followed. As already held these sub-sections do not control the power to grant pardon. Under these circumstances, Mr. Jethmalani contended that the minority opinion expressed by Mukherji, J. in the Full Bench decision lays down the law correctly. For the reasons already indicated, we do not agree. The majority decision of the Full Bench, with which we are in agreement, is almost a complete answer to the submissions of Mr. Jethmalani. It has held the field for more than half a century. It seems evident that the power to tender pardon stands alone and others are matter of procedure. If in such situation, the matters of procedure are not applicable, it would not negate the power to grant pardon. Insofar as procedural matters are concerned, it would only mean that the same apply to the extent applicable. We are, therefore, unable to accept the contention that there was any implied repeal. It is also not possible to accept that it was intended by necessary implication that the Special Court under the Act shall not have the power to grant pardon. All powers of Sections 306 to 308 to the extent applicable and can be complied are available to the Special Court under the Act. The provision of the Act and the Code can stand together. There is no inconsistency. The two statutory provisions can harmoniously operate without causing any confusion or resulting in absurd consequences and the scheme of Code can, without any difficulty, fit in the scheme of the Act. In the end, we may also note that jurisdiction to try a case is conferred on the Special Court not by committal but by the statute which has established that court.

Our conclusion, therefore, is that the Special Court established under the Act is a court of exclusive jurisdiction. Sections 6 and 7 confer on that court wide powers. It is a court of original criminal jurisdiction and has all the powers of such a court under the Code including those of Sections 306 to 308.

For the foregoing reasons, we are of the opinion that the learned Special Court rightly rejected the application of the appellants for revocation of the order of pardon. The appeals are accordingly dismissed. The intervention applications are also dismissed.