SUPREME COURT OF INDIA

Mahmadhusen Abdulrahim Kalota Shaikh

Vs.

Union of India (UOI)

Crl.A.No.1113 and 1498-1500 of 2005

(K.G.Balakrishnan,C.J. and Dalveer Bhandari,J.,)

21.10.2008

JUDGMENT

K.G. Balakrishnan, C.J.

1. Leave granted in SLP (Crl.) No. 3015-3016/2005. The appellants in these two appeals are the kith and kin of some persons killed in the Godhra Train Burning incident and in the Akshardham Temple attack. They2 have challenged the judgment dated 13.4.2005 of the Gujarat High Court in SCA Nos. 1103 & 1105/2005 filed by them. For convenience, the appellants in these two appeals will be referred to as the `relatives of victims'.

2. The appellants in Criminal Appeal Nos. 1113/2005, 1498- 1500/2005, 359/2006, 734/2007, 735/2007 and 736/2007 are persons who have been charged in respect of offences under the provisions of the Prevention of Terrorism Act, 2002, in terrorism related cases. In these appeals, they have also challenged the said judgment dated 13.4.2005 of the Gujarat High Court in SCA Nos. 1103 & 1105 of 2005, and other judgments of the said High Court and the judgment of the Bombay High Court which follow the said decision. The appellants in these appeals will be referred to as `POTA accused'.

3. These appeals involve questions relating to the constitutional validity as also the interpretation of Section 2(3) and (5) of Prevention of Terrorism (Repeal) Act 2004. While the relatives of victims are aggrieved by the rejection of their challenge to Section 2(3) and (5) of the said Act, the POTA accused are aggrieved by the direction to read Section 2(3) subject to Section 321 of Code of Criminal Procedure, 1973. To appreciate the rival contentions, the reasons that led to enactment of the Prevention of Terrorism Act, 2002 and its repeal, require to be noted.

4. To meet the challenge of terrorists indulging in wanton killings, arson, looting, and other heinous crimes in various parts of India, the Terrorist and Disruptive Activities (Prevention) Act (hereinafter referred to as `TADA') was enacted by the Parliament in the year 1985. There was widespread criticism that TADA contained some draconian provisions.

5. The constitutional validity of TADA was challenged before this Court in Kartar Singh v. State of Punjab : 1994CriLJ3139 . It was contended before this

Court that many of the stringent provisions of TADA were likely to be abused by the police. In particular, it was submitted that the provisions relating to confession made to the police may lead to illegal extraction of confessions by the police; and that the provision relating to grant of bail were violative of human rights and the fundamental rights guaranteed by the Constitution of India. While upholding the constitutional validity of TADA, this Court observed that it was necessary to ensure that the provisions of the Act were not misused by the security agencies/Police. Certain guidelines were set out to ensure that confessions obtained in pre-indictment interrogation by the police will be in conformity with principles of fundamental fairness. This Court also indicated that the Central Government should take note of those guidelines by incorporating them in TADA and the rules framed thereunder by appropriate amendments. This Court also held that in order to prevent the misuse of the provisions of TADA, there must be some Screening or Review Committees. In the lead judgment, Pandian, J. held (para 265):

In order to ensure higher level of scrutiny and applicability of TADA Act, there must be a screening Committee or a Review Committee constituted by the Central Government consisting of the Home Secretary, Law Secretary and other secretaries concerned of the various Departments to review all the TADA cases instituted by the Central Government as well as to have a quarterly administrative review, reviewing the States' action in the application of the TADA provisions in the respective States, and the incidental questions arising in relation thereto. Similarly, there must be a Screening or Review Committee at the State level constituted by the respective States consisting of the Chief Secretary, Home Secretary, Law Secretary, Director General of Police (Law and Order) and other officials as the respective Government may think it fit, to review the action of the enforcing authorities under the Act and screen the cases registered under the provisions of the Act and decide the further course of action in every matter and so on.

6. In 1995, TADA was allowed to lapse. A few years later, the Prevention of Terrorism Ordinance, 2001, was promulgated on 24.10.2001, followed by Prevention of Terrorism (Second) Ordinance promulgated on 30-12-2001. In 2002, the Prevention of Terrorism Act, 2002, (`POTA' for short) was enacted replacing the Prevention of Terrorism (Second) Ordinance, 2001. Section 60 of POTA provided for constitution of Review Committees to discharge the functions specified in Sections 19(4), 40 and 46 of POTA. The said section is extracted below:

> "60. Review Committee**:** (1) The Central Government and each State Government shall, whenever necessary, constitute one or more Review Committee for the purposes of this Act.
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> (2) Every such Committee shall consist of a Chairperson and such other members not exceeding three and possessing such qualifications as may be prescribed.

(3) A Chairperson of the Committee shall be a person who is, or has been, a Judge of a High Court, who shall be appointed by the Central Government, or as the case may be, the State Government, so however, that the concurrence of the Chief Justice of the High Court shall be obtained in the case of a sitting Judge: Provided that in the case of a Union Territory, the appointment of a person who is a Judge of the High Court of a State shall be made as a Chairperson with the concurrence of the Chief Justice of the concerned High Court."

7. POTA was amended by the Prevention of Terrorism (Amendment) Ordinance, 2003, promulgated on 27.10.2003. By the said ordinance Sub-sections (4) to (6) were added in Section 60 of POTA entrusting an additional function to the Review Committees. The said Ordinance was replaced by the Prevention of Terrorism (Amendment) Act 2003 (Act 4 of 2004) which inserted Sub-sections (4) to (6) as also further Sub-section (7) in Section 60 with retrospective effect from 27-10-2003. The Sub-sections (4) to (7) of Section 60 read as under:

"(4) Without prejudice to the other provisions of this Act, any Review Committee constituted under Sub-section (1) shall, on an application by any aggrieved person, review whether there is a prima facie case for proceeding against the accused under this Act and issue directions accordingly.

(5) Any direction issued under Sub-section (4):

(i) by the Review Committee constituted by the Central Government, shall be binding on the Central Government, the State Government and the police officer investigating the offence; and

(ii) by the Review Committee constituted by the State Government, shall be binding on the State Government and the police officer investigating the offence.

(6) Where the reviews under Sub-section (4) relating to the same offence under this Act, have been made by a Review Committee constituted by the Central Government and a Review Committee constituted by the State Government, under Sub-section (1), any direction issued by the Review Committee constituted by the Central government shall prevail.

(7) Where any Review Committee constituted under Sub-section (1) is of opinion that there is no prima facie case for proceeding against the accused and issues directions under Sub-section (4), then, the proceedings pending against the accused shall be deemed to have been withdrawn from the date of such direction.

The effect of the amendment was to make any direction issued by the Review Committee on review, about the existence of prima facie case for proceeding against

> the accused under POTA, binding on the Central Government as well as State Government and the police officer investigating the offence."

8. The constitutional validity of Sub-sections (4) to (7) of Section 60 inserted by the Prevention of Terrorism (Amendment) Act, 2003 was challenged by the Government of Tamil Nadu in the Madras High Court. It was contended, inter alia, that enacting a provision that made the decisions of the Review Committee binding on the State Government was an encroachment upon the power and authority of the State to prosecute an offender. It was also contended that a provision that a proceeding pending in a court shall be deemed to have been withdrawn when the Review Committee opined that there is no prima facie case for proceeding against the accused, would amount to interference with judicial functions and encroachment of `judicial power' by the executive, in violation of the constitutional scheme.

9. The High Court of Madras upheld the validity of Sub-sections (4) to (7) of Section 60 of POTA. But it further held that the opinion rendered by the Review Committee would not result in automatic withdrawal of cases pending in court; that as the opinion was binding on the State government, the State government was bound to instruct the Public Prosecutor to withdraw the prosecution under Section 321 of the Code; that the public prosecutor should apply his mind and then file an application seeking the consent of the court; and that only on such consent being given, the proceedings shall stand withdrawn. The High Court held:

> "The exercise of power by the Review committee cannot be termed as scuttling the judicial process.... Criminal cases are deemed to be pending and can be concluded only on the delivery of judgment. Upto that stage, the prosecution can always be withdrawn subject to such limitations as are prescribed in Section 321 Cr.PC.... A plea made to the Public Prosecutor to withdraw the proceedings cannot be construed as an encroachment on the judicial power. At any stage before the pronouncement of the judgment in a criminal case, the State Government can instruct the Public Prosecutor to withdraw the prosecution. In POTA also, the State Government can exercise such power. But if it is not willing to do so, it does not bar the Review Committee exercising the powers under Section 60 thereof and the Review Committee can always decide as to whether, in its opinion, the case is a fit one to proceed further even if it is in part-heard stage. If the Review Committee comes to the conclusion that the case is fit to be withdrawn from prosecution under POTA, it can address the State Government, which, in turn, has to instruct the Public Prosecutor to invoke Section 321 of Code of Criminal Procedure. The role of Review Committee is limited only that far and no further. When the role of the Review Committee ends, then it is for the Public Prosecutor to apply his mind independently according to the well settled legal principles interpreting Section 321 of Code of Criminal Procedure and ultimately it is for the Special Court trying the cases to decide whether the plea of the Public Prosecutor to withdraw the prosecution, if made, is acceptable or not.... It is only Section 321 of Cr.PC, which is applicable for withdrawing prosecution under POTA. Hence, we hold that upto the stage of formulating an opinion regarding prima facie case under POTA, the Review Committee's decision, one way or the other, cannot amount to interference in the judicial process."

10. The State of Tamil Nadu challenged the judgment of the Division Bench of Madras High Court by filing Special Leave Petition before this Court. While dismissing the Special Leave Petition on 8-3-2004 this Court observed as follows:

> "By the amendment, the decision of the Review Committee is made binding on the Central Government, State Governments and the Police Officers investigating the offence. The High Court has held, in our-view correctly, that these amendments are based on the recommendations made by the Constitution Bench of the Court in Kartar Singh v. State of Punjab reported in : 1994CriLJ3139 and the judgment of this Court in R.M. Tiwari v. State : 1996CriLJ2872 . These are the provisions which provide safeguards against misuse of' the stringent provisions of such an Act. In our view, the High Court has correctly held that the challenge cannot be sustained. The High Court has also correctly held that the directions given by the Review Committee could only be subject to Section 321 of the Criminal Procedure Code."

11. In view of adverse reports about the misuse of the provisions of POTA in some States, the Parliament repealed POTA, by the Prevention of Terrorism (Repeal) Ordinance, 2004 promulgated on 21.9.2004, later replaced by Prevention of Terrorism (Repeal) Act, 2004 (`Repealing Act' for short). Section 2 of the Repealing Act reads as follows:

> *"2. Repeal of Act 15 of 2002 and Saving:* The Prevention of Terrorism Act, 2002 (hereinafter referred to as the Principal Act) is hereby repealed.
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> (2) The repeal of the principal Act shall not affect -
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> (a) the previous operation of, or anything duly done or suffered under the principal Act, or
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> (b) any right, privilege or obligation or liability acquired, accrued or incurred under the principal Act, or
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> (c) any penalty, forfeiture or punishment incurred in respect of any `offence under' the principal Act, or
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> (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, -forfeiture or punishment as aforesaid, and, any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the principal Act had not been repealed. Provided that notwithstanding anything contained in this sub-section or in any other law for the time being in force, no court shall take cognizance of an offence under the Principal Act after the expiry of the period of one year from the commencement of this Act.

(3) Notwithstanding the repeal of Section 60 of the principal Act, the Review Committee constituted by the Central Government under Sub-section (1) of that section, whether or not an application under Sub-section (4) of that section has been made, shall review all cases registered under the principal Act as to whether there is a prima-facie case for proceeding against the accused thereunder and such review shall be completed within a period of one year from the commencement of this Act and where the Review Committee is of the opinion that there is no prima facie case for proceeding against the accused, then-(a) in cases in which cognizance has been taken by the court, the cases shall be deemed to have been withdrawn; and

(b) in cases in which investigations are pending, the investigations shall be closed forthwith, with effect from the date of issuance of the direction by such Review Committee in this regard.

(4) The Review Committee constituted by the Central Government under Sub-section (1) of Section 60 of the principal Act shall, while reviewing cases, have powers of a civil Court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:

(a) discovery and production of any document;

(b) requisitioning any public record or copy thereof from any court or office.

(5) The Central Government may constitute more Review Committees, as it may consider necessary, for completing the review within the period specified in Sub-section (3)."

12. The provisions of Sub-sections (3) and (5) of Section 2 of the Repealing Act were challenged before the High Court of Gujarat, by the relatives of victims. By judgment dated 13.4.2005, the High Court upheld the constitutional validity of the said provisions of the Repealing Act. The High Court was of the view that the provisions of Section 2(3) of the Repealing Act were similar to the provisions of Section 60(4) to (7) of POTA. Therefore following the decision of Madras High Court relating to the validity of Section 60(4) to (7) of POTA, it held that Section 2(3) of the Repealing Act did not dispense with the requirements of Section 321 of the Code; and where the Review Committee, in regard to any case where cognizance had been taken by the court, held that there was no prima facie case for proceeding against the accused under the provisions of POTA, such opinion of the Review Committee will not have the effect of deemed withdrawal of the case from the court, until the procedure prescribed in Section 321 of the Code was complied with. The said conclusion was based on the following reasoning:

When the Parliament enacted the Repeal Act, it was aware of the fact that the Division Bench of the Madras High Court had made Sub-section (7) of Section 60 of the 2002 Act subject to Section 321 of the Code and the view of the Madras High Court had been expressly approved by the Supreme Court and yet it did not choose to exclude the applicability of Section 321 of the Code from the scheme of Section 2(3) of the Repeal Act. Rather, the language of Sub-section (7) read with Section 4 of the 2002 Act was substantially retained in the Repeal Act. Thus, the Parliament will be deemed to have accepted the interpretation placed by the Madras High Court on the provisions of Sub-sections (4) to (7) of Section 60 from the scheme of Section 2 of the Repeal Act is in our opinion, inconsequential because the language of Sub-section (3) of Section 2 thereof is substantially similar to Sub-section (7) of Section 60 of the 2002 Act, in so far as they provide for deemed withdrawal of the pending cases under the 2002 Act.

13. Consequently, the High Court prescribed the following procedure: that the Review Committee shall forward its opinion to the Public Prosecutor appointed under Section 28 of POTA for being placed before the Special Court; that the Public Prosecutor shall then file appropriate application under Section 321 of the Code alongwith the opinion of the Review Committee and other relevant records without any delay; and that the Special Court will then pass appropriate orders by giving due weightage to the opinion of the Review Committee, keeping in view the observations of this Court in R.M. Tiwari Advocate v. State (NCT) OF Delhi : 1996CriLJ2872 and Shaheen Welfare Association v. Union of India and Ors.: 1996CriLJ1866 .

14. We may refer to Section 321 of the Code and the observations of this Court in *R.M. Tiwari and Shaheen Welfare Association* referred to by the High Court at this stage. Section 321 of the Code relates to withdrawal from prosecutioin. The relevant portion thereof reads thus:

The public prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the court at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried;....

In *R.M. Tiwari* (supra), a case under TADA, this Court observed:

7. It is, therefore, clear that the Designated Court was right in taking the view that withdrawal from prosecution is not to be permitted mechanically by the court on an application for that purpose made by the public prosecutor. It is equally clear that the public prosecutor also has not to act mechanically in the discharge of his statutory function under Section 321 CrPC on such a recommendation being made by the Review Committee; and that it is the duty of the public prosecutor to satisfy himself that it is a fit case for withdrawal from prosecution before he seeks the consent of the court for that purpose.

8. It appears that in these matters, the public prosecutor did not fully appreciate the requirements of Section 321 CrPC and made the applications for withdrawal from prosecution only on the basis of the recommendations of the Review Committee. It was necessary for the public prosecutor to satisfy himself in each case that the case is fit for withdrawal from prosecution in accordance with the settled principles indicated in the decisions of this Court and then to satisfy the Designated Court of the existence of a ground which permits withdrawal from prosecution under Section 321 CrPC.

11. It has also to be borne in mind that the initial invocation of the stringent provisions of the TADA Act is itself subject to sanction of the Government and, therefore, the revised opinion of the Government formed on the basis of the recommendation of the High Power Committee after scrutiny of each case should not be lightly disregarded by the court except for weighty reasons such as mala fides or manifest arbitrariness. The worth of the material to support the charge under the TADA Act and the evidence which can be produced, is likely to be known to the prosecuting agency and, therefore, mere existence of prima facie material to support the framing of the charge should not by itself be treated as sufficient to refuse the consent for withdrawal from prosecution. It is in this manner an application made to withdraw the charges of offences under the TADA Act pursuant to review of a case by the Review Committee has to be considered and decided by the Designated Courts.

Shaheen Welfare Association (supra) also related to a case under TADA where this Court observed:

The purpose of constituting such committees was to ensure a higher level of scrutiny regarding applicability of the provisions of TADA to the case in point. The need for such committees is amply borne out by the results which have been annexed in the affidavits filed on behalf of the Union of India before us relating to the number of cases so reviewed by the Review Committees where it has been found that the provisions of TADA ought not to have been applied.

15. The said decision of the Division Bench of the Gujarat High Court and the decisions following the said judgment are challenged in these appeals. When these matters came up before B.P. Singh and H.S. Bedi JJ, on 22.2.2007, being of the view that the provisions of Section 60 of POTA were different from the provisions of Section 2 of Repealing Act, they directed that the matter should be heard by a larger bench. The reference order (after correcting certain typographical errors) reads thus:

It appears that similar provisions, though not exactly in the same terms, under the earlier Ordinance and the Amendment Act came up for consideration before the High Courts in India and one of the judgments was appealed against and was disposed of by this Court by its order of 8th March, 2004. This Court noticed that by the amendment of 2002 the decision of the Review Committee is made binding on the Central Government, the State Governments

and the Police Officers investigating the offence. This Court went on to observe that the High Court had correctly held that the challenge cannot be sustained. The High Court had correctly held that the direction given by the Review Committee could only be subject to Section 321 of the Code of Criminal Procedure.

We notice that by reason of the amendment of the Prevention of Terrorism Act, the provisions introduced namely, Sub-sections (4) to (7) in Section 60 did provide that if the Review Committee was of the opinion that there was no prima facie case for proceeding against the accused and issued directions under Sub-section (4), then the proceeding pending against the accused shall be deemed to have been withdrawn from the date of such direction. Whereas Sub-section (7) of Section 60 inserted by the Amendment Act used the words "the proceedings pending against the accused shall be deemed to have been withdrawn", Sub-section (3) of Section 2 (of the Repealing Act) refers to two types of proceedings pending against the accused namely, cases in which cognizance has been taken by the court and the case which are at the stage of investigation. It is therefore, submitted before us that whatever may have been the ambiguity in Sub-section (7) of Section 60 of the Prevention of Terrorism Act, that ambiguity has been removed by explicitly providing that even in cases where cognizance has been taken by the Court they shall be deemed to have been withdrawn.

To accept the submission urged on behalf of the appellants, we must hold that the provisions of the Repealing Act relied upon by the appellants overrides the provisions of Section 321 of the Code of Criminal Procedure which provides for withdrawal of prosecutions at the instance of the Public Prosecutor in-charge of the case and with the consent of the Judge trying the accused.

However, we feel that in view of the reasons and the observations contained in the earlier order of this Court disposing of the Special Leave Petitions from the judgment and order of the High Court of Gujarat, and later from the High Court of Madras, it would be appropriate if the matters be placed before a larger bench for consideration."

It is in this background these matters are placed before this three Judge Bench. We have heard the submissions of the learned counsel.

16. According to the POTA accused, the provisions of Section 2(3) of the Repealing Act are materially different from the wording of Section 60(4) to (7) of POTA. Under Section 2(3) of the Repealing Act, the opinion of the Review Committee is final and conclusive and if the opinion is to the effect that there is no prima facie case for proceeding against the accused under POTA, the cases in which cognizance has been taken by the court, shall be deemed to have been withdrawn, and in cases where investigations are pending, the investigations shall be closed forthwith. They contend that the clear legislative intent is that after the repeal of POTA, continuance of any proceedings initiated under POTA in which cognizance has been taken by the court, shall be subject to the opinion of the Review Committee under Section 2(3) of the Repealing Act and once the Review Committee holds that there was no prima facie case to continue the proceedings against the accused, the case shall be deemed to have been withdrawn with effect from the date of issuance of the direction by such Review

Committee. It is submitted that in such cases, Section 321 of the Code would have no application and there is neither any need for the Public Prosecutor to file any application for withdrawal from prosecution, nor any need or occasion for the court to consider whether consent should be given for such withdrawal from prosecution, as the proceedings are deemed to have been withdrawn with effect from the date of the issuance of the direction by the Review Committee.

17. The counsel for the State of Gujarat, on the other hand, contended that the High Court had rightly held that Sub-section (3) of Section 2 of the Repealing Act does not dispense with the requirements of Section 321 of the Code for withdrawal and that after the Review Committee formed an opinion, the same will have to be placed before the court by the Public Prosecutor, with an application and the Court will have to independently consider such application and come to a conclusion whether it should consent to the prosecution being withdrawn or not.

18. The relatives of victims contend that Section 2(3) & (5) of Repealing Act ought to be declared as unconstitutional on the ground that they amount to encroachment on the judicial power of the State. Alternatively they supported the decision of the High Court and contended that once the Special Judge took cognizance of the offence, the proceedings could be withdrawn only under Section 321 of the Code. It was contended that the Review Committee being purely a committee appointed by the executive, has no right to determine the innocence or otherwise of an accused. It was submitted that merely because the Chairman of the Review Committee is a retired Judge, the Committee does not become a judicial authority. It was further submitted that the Committee could only be characterized as an external body and such a Committee cannot be a clothed with a judicial power to withdraw the pending cases from the Court. Reference to various decisions of this Court was made wherein this Court delineated the scope and ambit of Section 321 of the Code. Our attention was drawn to the following observations of Justice V.R. Krishna Iyer in Balwant singh and Ors. v. State of Bihar : 1977CriLJ1935 :

The Court has to be vigilant when the case has been pending before it and not succumb to executive suggestion made in the form of application for withdrawal with a bunch of papers tacked on. Moreover, the State should not stultify the Court by first stating that there is a true case to be tried and then make a volte face to the effect that on a second investigation the case has been discovered to be false.

Reliance was also placed to the following observations of Justice V.R. Krishna Iyer in Subhash Chander v. State (Chandigarh Administration) and Ors. : 1980CriLJ324 :

When a case is pending in a criminal court, its procedure and progress are governed by the Criminal Procedure Code or other relevant statute. To intercept and recall an enquiry or trial in a court, save in the manner and to the extent provided for in the law, is itself a violation of the law. Whatever needs to be done must be done in accordance with the law. The function of administering justice, under our constitutional order, belongs to those entrusted with judicial power. One of the few exceptions to the uninterrupted flow of the court's process is Section 321 Cr.P.C., 1973. But even here it is the Public Prosecutor, and not any executive authority, who is entrusted by the Code with the power to withdraw from a prosecution, and that also with the consent of the court. We repeat for emphasis. To interdict, intercept or jettison an enquiry or trial in a court, save in the manner and to the extent provided for in the Code itself, is lawlessness. The even course of criminal justice cannot be thwarted by the executive, however, high the accused, however sure government feels a case is false, however unpalatable the continuance of the prosecution to the powers-that-be who wish to scuttle court justice because of hubris, affection or other noble or ignoble consideration. Justicing, under our constitutional order, belongs to the judges. Among the very few exceptions to this uninterrupted flow of the court process is Section 494, Cr.P.C. 1898. Even here, the Public Prosecutor -not any executive authority- is entrusted by the Code with a limited power to withdraw from a prosecution, with the Court's consent whereupon the case comes to a close. What the law has ignited, the law alone shall extinguish

Reference was next made to Sheonandan Paswan v. State of Bihar and Ors. : 1987CriLJ793 and other decisions of this Court taking a similar view, to contend that proceedings pending in a court, where cognizance has already been taken against the accused, could be withdrawn only in the manner contemplated in Section 321 of the Code and therefore, there can be no automatic withdrawal from prosecution on the basis of Sub-section (3) of Section 2 of the Repealing Act. It was submitted that the appointment of the Review Committee and the opinion expressed by such Committee would only enable the Public Prosecutor to take steps for withdrawal from prosecution; and that once the Court takes cognizance, the proceedings against the accused shall have to be continued until the Court give consent to a withdrawal under Section 321 of the Code, on being satisfied that there are valid grounds for withdrawal from prosecution.

19. In so far as Union of India is concerned, we find that there is a slight shift from the stand taken before the High Court. In the High Court, Union of India contended that the power of the Review Committee under Section 2(3) of the Repealing Act was subject to Section 321 of the Code. In fact, Union's stand was accepted and upheld by the High Court, as is evident from the following observations of the High Court:

we are inclined to agree with the learned Additional Solicitor General that the impugned provisions should be read in conjunction, with Section 321 of the Code and the same do not, in any manner, encroach upon the judicial power of the State and that the opinion formed by the Review Committee on the prima-facie nature of the case under the 2002 Act has to be

given due weightage by the Special Court and accepted unless there are exceptional reasons for not doing so.

But before us the Union has taken a stand, which in principle supports the contention of the POTA accused, though the Union has not challenged the decision of the High Court. The stand of the Union, as set out in its counter is extracted below:

However, in view of the difference in language between Section 60(5), 60(6) and 60(7) as added by POTA (Amendment) 2003 and Section 2(3) of the Repeal Act, the issues raised by the petitioners necessitate examination. It is respectfully submitted that the language used in Sub section 2(3) of the Repeal Act ex-facie reveals that Section 60(5) of the amended POTA (2003) has been omitted by the legislature in the provisions of Section 2(3) of the Repeal Act. Section 60(5) of the former Act made the opinion of the Review Committee binding on the Central Government, State Government and the Police Officer investigating the case. Section 2(3) of the Repeal Act is a new provision, enacted by the legislature, which provides for deemed withdrawal of a case (even if cognizance has been taken by the court), if the Review Committee forms an opinion that there is no prima facie case made out.

20. The learned Additional Solicitor General elaborating upon the said stand submitted that the power exercised by the Review Committee under Section 2(3) of the Repealing Act, though not subject to the supervising power of the Special court under Section 321 of the Code, is amenable to the power of judicial review of the High Court under Article 226. He therefore submitted that there are adequate safeguards against any misuse or abuse of power by the Review Committee under Section 2(3).

21. On the contentions urged the questions that arise for our consideration are: (i) Whether Sub-section (3) & (5) of Section 2 of the Repealing Act are unconstitutional and therefore invalid; and (ii) Having regard to Section 2(3) of the Repealing Act, when the Review Committee records an opinion that there is no prima facie case for proceeding against the accused under POTA, whether the proceedings shall be deemed to have been withdrawn against such accused or whether it is necessary for the Public Prosecutor to file an application seeking consent of the court for withdrawal from prosecution under Section 321 of the Code.

22. The following well settled principles have to be kept in view while examining the constitutional validity of Section 2(3) and (5) of the Repealing Act:

(a) Parliament has the exclusive competence to legislate on terrorism and terrorist and disruptive activities which threaten the security, integrity and sovereignty of the country, as they fall under Entry 1 of List I of the Seventh Schedule to the Constitution. Alternatively, they would fall under the residuary power conferred on Parliament under Article 248 read

with Entry 97 of List I of Seventh Schedule (vide Kartar Singh v. State of Punjab : 1994CriLJ3139).

(b) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it, to show that there has been a clear transgression of the constitutional principles. (Vide *State of Jammu & Kashmir* v. *Triloki Nath Kosha*: (1974)ILLJ121SC)

(c) A law made by the Parliament can be struck down by courts on two grounds and two grounds alone: (1) lack of legislative competence; and (2) violation of fundamental rights guaranteed under Part-III of the Constitution or any other constitutional provision. There is no third ground. (Vide *State of Andhra Pradesh* v. *Mcdowell & Co.*: [1996]3SCR721).

(d) The power and competence of Parliament to make laws in regard to the subjects covered by the legislative fields committed to it, carries with it the power to repeal laws on those subjects. The power of the Parliament to repeal a law is co-extensive with the power to enact such a law. (See Justice G.P. Singh's Principles of Statutory Interpretation - 11th Edition, Page 633).

(e) The Legislature may prescribe special procedure to meet special situations and to meet special objectives so long as they are not arbitrary or discriminatory. [*Kathi Raning Rawat v.: The State of Saurashtra* 1952CriLJ805 and *In Re: The Special Courts Bill, 1978*: [1979]2SCR476].

(f) If any Central Act is repealed, without making any provision for savings, the provisions contained in Section 6 of General Clauses Act, 1897 will apply. But where the repealing Act itself contains specific provisions in regard to savings, the express or special provision in the Repealing Act will apply. Section 6 of General Clauses Act makes it clear that it will not apply, when a different intention appears in the Repealing Statute. Where the provision relating to savings is excluded, the repeal will have the effect of complete obliteration of the statute. (vide *State of Orissa v.: M.A. Tullock & Co.* [1964]4SCR461 , *Nar Bahadur Bhandari v.: State of Sikkim* 1998CriLJ3013 and *Southern Petrochemicals Industries Co. Ltd. v.: Electricity Inspector* AIR2007SC1984).

23. The Repealing Act contains an exhaustive provision relating to savings in Sub-sections (2) to (5) of Section 2. Therefore the savings from repeal will be governed by Section 2(2) to 2(5) of the Repealing Act and not by Section 6 of the General Clauses Act, 1897.

24. The Parliament in its plenary power, can make an outright repeal which will not only destroy the effectiveness of the repealed act in future, but also operate to destroy all existing inchoate rights and pending proceedings. This is because the effect of repealing a statute is to obliterate it completely from the record, except to the extent of savings. If the Parliament specifically excludes any saving clause in a Repealing Act, or severely abridges the provision for savings, which it has the power to do, the effect would be that after the repeal of the statute, no proceeding can continue, nor can any punishment be inflicted for violation of the

statute during its currency. When Parliament has the power to repeal a law outright without any savings and thereby put an end to all pending prosecutions and proceedings forthwith (without any need to comply with Section 321 of the Code), can it be said that it does not have the power to make a provision in the Repealing Act for the pending proceeding to continue, but those proceedings to come to an end, when a duly constituted Review Committee with a sitting or retired Judge of the High Court as Chairman, reviews the cases registered under the repealed Act and reaches the opinion that there is no prima facie case for proceeding against the accused ? Surely, the wider and larger power includes the narrower and smaller power. It should be remembered that continuation of a proceedings in respect of any offence under an Act, after the repeal of such Act, is itself as a result of a deeming fiction. Natural consequence of repeal, as noticed above, is complete obliteration including pending proceedings. Continuation of a pending proceeding is possible only on account of the deeming fiction created by the savings clause in the Repealing Act which provides for continuation of the proceedings as if the Principal Act had not been repealed. Therefore any provision in the Repealing Act for saving a pending proceeding, with any further provision for termination of such pending proceedings, is a provision relating to `winding up' matters connected with the Repealed Act. By no stretch of imagination such a provision can be termed as interference with judicial power, even assuming that such a provision in a live unrepealed statute may be considered as interference with judicial power. It is therefore unnecessary to examine whether Section 2(3) of the Repealing Act is an encroachment of judicial power, though such an examination was done with reference to the challenge to Section 60(4) to (7) of POTA. Many tests applied for deciding the constitutional validity of live and current statutes, may not apply to `winding up' provisions in a savings clause of a Repealing Act, dealing with repeal. The Parliament has the legislative competence to make the Repealing Act. The Repealing Act repeals POTA and provides for certain savings from repeal, to meet the special features of the repealed statute. It does not violate any constitutional provisions. Hence the Repealing Act and in particular Section 2(3) and (5) thereof are valid and constitutional.

25. This takes us to the second question as to the true import of Section 2(3) of the Repealing Act. Sub-section (2) of Section 2 of the Repealing Act makes it clear that the repeal of POTA will not affect any investigation or legal proceeding in respect of any penalty or punishment under the principal Act, and any such investigation or legal proceedings may be instituted or continued, as if the principal Act had not been repealed. The proviso to Sub-section (2) of Section 2 makes it clear that no court shall take cognizance of an offence under the principal Act after the expiry of the period of one year from the commencement of the Repealing Act. The Repealing Act came into force on 21.9.2004 and the period of one year from the date of repeal having also elapsed, no fresh offence punishable under the POTA can be taken cognizance of by the court from 21.9.2005. Certain further provisions are made in regard to pending proceedings in Sub-section (3) of Section 2 [Sub-sections (4) and (5) of Section 2 of the Repealing Act are merely supplemental to Sub-section 93) of Section 2 and have no existence independent of Section 2(3)]. Sub-section (3) provides that notwithstanding the repeal of Section 60 of the principal Act, the Review Committee constituted by the Central Government under Sub-section (1) of Section 60, shall review within one year from the commencement of the repealing Act, all cases registered under the principal Act as to

whether there is a prima facie case for proceeding against the accused thereunder; and where the Review Committee is of the opinion that there is no prima facie case for proceeding against the accused, then, in cases in which cognizance has been taken by the Court, the cases shall be deemed to have been withdrawn, and in cases in which investigations are pending, the investigations shall be closed forthwith, with effect from the date of issuance of the direction by such Review Committee. Section 2(3) of the Repealing Act does not contemplate or provide for compliance with Section 321 of the Code, before the withdrawal comes into effect. The clear intention of Section 2(3) of the Repealing Act is that when the Review Committee opines that there is no prima facie case for proceeding against the accused, on review of the pending POTA cases, such cases, even though cognizance has been taken by the court, shall be deemed to have been withdrawn without anything further to be done. In view of expression of such clear legislative intent in Section 2(3) of the Repealing Act, there is no question of bringing Section 321 of the Code into play. If Section 321 is held to be applicable, then the provision in Section 2(3) that the cases shall be deemed to be withdrawn, is rendered nugatory and the cases are not actually withdrawn until the requirements of Section 321 are complied with. That would amount to rewriting Section 2(3) which is clearly impermissible.

26. The High Court proceeded on the basis that Section 2(3) of the repealing Act is similar to Section 60(4) to (7) of POTA, and therefore it should be interpreted and dealt with in the same manner as Section 60(4) to (7) of POTA. It noted that the Madras High Court had upheld the validity of Section 60(4) to (7) of POTA by holding that the decision of the Review Committee was binding only on the State Government and the Investigating Officer and not on the Public prosecutor or the court, and that the procedure prescribed by Section 321 of the Code will have to be complied with, even after the decision by the Review Committee that there was no prima facie case to proceed against the accused. It held that the said declaration of law would also apply to Section 2(3) of the Repealing Act. It therefore upheld the validity of Section 2(3) of the Repealing Act subject to a rider that even where Review Committee has opined under Section 2(3) that there was no prima facie case, the deemed withdrawal will be subject to fulfilment of the requirements of Section 321 of the Code. But the question is whether the High Courts were justified in assuming in the impugned judgments that the provisions of Section 2(3) of the repealing Act are similar to Sections 60(4) to (7) of POTA, and the decision of the Madras High Court as upheld by this Court, will not apply while interpreting Section 2(3) of the Repealing Act.

27. The Madras High Court proceeded on the basis that the exercise of power by the Review Committee in regard to review of POTA cases, was governed by Sub-sections (4) to (6) of Section 60 of POTA. It found that these Sub-sections provided that the decision of the Review Committee on review, was binding only on the State Government and police officers and not on the public prosecutor or the court. The Madras High court got over Sub-section (7) of Section 60 of POTA (which provided that when the Review Committee opines that there is no prima facie case, then the proceedings pending against the accused shall be deemed to have been withdrawn from the date of such direction), by holding that the said sub-section did not create any new right other than those mentioned in Sub-sections (4) to (6) of Section 60, and was only in the nature of an explanation spelling out the effect of the

exercise of the power in Sub-sections (4) to (6) of Section 60 of POTA. It held that Sub-section (7) of Section 60 cannot be read independently by itself. It further held that Sub-section (7) of Section 60 of POTA had to be understood only in the context of Section 321 of the Code, to mean that if the Review Committee forms an opinion that the prosecution of the accused did not attract the provisions of POTA, the State Government which was bound by the direction, will have to address the Public Prosecutor to withdraw the prosecution; and as the public prosecutor was not bound by the direction of the Review Committee, he could formulate his independent opinion under Section 321 of the Code.

28. But the scheme of Section 2(3) of the Repealing Act is different from the scheme of Sub-sections (4) to (7) of Section 60 of POTA. The scheme under Sub-sections (4) to (7) of Section 60 under POTA (which applied to proceedings initiated under POTA when the Act was in force) was as follows: (a) the Review Committee was required to review a POTA case under Section 60(4), only when an application was made by an aggrieved person; (b) any direction issued by the Review Committee on such review, was binding on the concerned Government and investigating officer, but not the public prosecutor or the court under Section 321 of the Code. The scheme under Section 2(3) of the Repealing Act is categorical. The review by the Review Committee is not dependent upon an application by any aggrieved person. The Review Committee had to make a general review of all cases registered under POTA which were pending at the time of repeal, irrespective of whether an application for review was made by the accused or not. The purpose of such general review was to identify the cases where there was no prima facie case for proceeding against the accused, so that they could be withdrawn. If the Review Committee expressed the opinion that there is no prima facie case for proceeding against the accused, then the cases pending in court, even where cognizance has been taken by the court, shall be deemed to have been withdrawn with effect from the date of issuance of direction by such Review Committee. The express provision in Section 2(3) of the Repealing Act that even where cognizance has been taken by the court, the cases shall be deemed to have been withdrawn, is not found in Section 60(4) to (7) of POTA. Once the law made by the Parliament specifically states that wherever the Review Committee is of the opinion that there is no prima facie case for proceeding against the accused, the cases shall be deemed to have been withdrawn. If the Parliament wanted to make the provisions of Section 2(3) of the Repealing Act subject to Section 321 of the Code, it would have been done by making appropriate provisions therefor. As that is not done, plain meaning of the words of the legislation has to be given effect to.

29. Section 2(3) of the Repealing Act also contains clear indications which exclude Section 321 of the Code. They are: (i) The review is by Review Committee with a sitting or retired Judge of the High Court as the Chairman, having the power of a civil court in respect of discovery and production of documents and requisitioning records. (ii) All cases registered under POTA are required to be reviewed irrespective of whether any application was made by an aggrieved person or not, so as to find out whether there is a prima facie case for proceeding against the accused under POTA; (iii) The sub-section clearly provides that where a Review Committee opines that there is no prima facie case for proceeding against the accused, cases pending in court also shall be deemed to have been withdrawn with effect from the date of issuance of such direction by the Review Committee. The wording is clear

and unambiguous and does not contemplate or provide for a further application of mind by the Public Prosecutor or grant of consent by the court under Section 321 Cr.P.C. We are therefore of the view that the High Court was not right in assuming that the decision of the Madras High Court approved by this Court with reference to Section 60(4) to (7) of POTA will apply in regard to Section 2(3) of the Repealing Act.

30. An apprehension was expressed that if the review committee reaches a wrong opinion there will be no remedy. It was pointed out that if Section 321 Cr.P.C. was applicable, there will at least be a judicial scrutiny before the opinion resulted in withdrawal. The scope of the role played by a court under Section 321 of the Code was explained in Sheonandan Paswan (supra), thus:

Since Section 321 finds a place in this chapter immediately after Section 320, one will be justified in saying that it should take its colour from the immediately preceding Section and in holding that this Section, which is a kindred to Section 320, contemplates consent by the court only in a supervisory manner and not essentially in an adjudicatory manner, the grant of consent not depending upon a detailed assessment of the weight or volume of evidence to see the degree of success at the end of the trial. All that is necessary for the court to see is to ensure that the application for withdrawal has been properly made, after independent consideration, by the Public Prosecutor and in furtherance of public interest...he section does not insist upon a reasoned order by the Magistrate while giving consent. All that is necessary to satisfy the section is to see that the Public Prosecutor acts in good faith and that the Magistrate is satisfied that the exercise of discretion by the Public Prosecutor is proper.

31. The opinion of the Review Committee is open to judicial review under Article 226 of the Constitution. Any person aggrieved by the opinion can challenge it in a writ petition. As long as an aggrieved person could challenge the opinion expressed by the Review Committee by invoking judicial review, the apprehension that there will be no remedy in the event of wrong opinion by Review committee, is unwarranted. The opinions of the Review Committee under Section 2(3) of the Repealing Act are limited in number and are required to be given as an one time measure with reference to a repealed statute. The availability of judicial review under Article 226 in the event of errors and abuse, is a sufficient safeguard and deterrent against any wrong doing by the Review Committee.

32. We therefore hold that once the Review Committee on review under Section 2(3) of the Repealing Act, expresses the opinion that there is no prima facie case for proceeding against the accused, in cases in which cognizance has been taken by the Court, such cases shall be deemed to have been withdrawn. The only role of the Public Prosecutor in the matter is to bring to the notice of the court, the direction of the Review Committee. The court on satisfying itself as to whether such an opinion was rendered, will have to record that the case stands withdrawn by virtue of Section 2(3) of the Repealing Act. The court will not examine the correctness or propriety of the opinion nor exercise any supervisory jurisdiction in regard

to such a opinion of the Review Committee. But we make it clear that if the opinion of the Review Committee is challenged by any aggrieved party in writ proceedings and is set aside, the Court where the proceedings were pending, will continue with the case as if there had been no such opinion.

33. In view of the above the appeals are disposed of as follows:

(i) The judgments under challenge to the extent they declare Section 2(3) and (5) of the Repealing Act are not unconstitutional, are upheld.

(ii) The judgments under appeal are set aside to the extent they hold that in spite of deemed withdrawal of the cases, the procedure under Section 321 of the Code has to be followed for withdrawal.

(iii) The appeals filed by POTA accused are allowed in part accordingly. The appeals by the relatives of victims are disposed of reserving liberty to challenge the opinions of the Review Committee, wherever they are aggrieved.

(iv) We do not express any opinion on the merits of the cases of the POTA accused or in regard to the opinions expressed by the Review Committee.

Dalveer Bhandari, J.

1. I have had the benefit of going through the judgment prepared by Hon'ble the Chief Justice. I am in agreement with the conclusions arrived at by him, however, looking to the importance of the matter, I deem it appropriate to add my reasons for arriving at the same conclusions.

2. The relations of those who died in the Godhra incident filed special civil applications in the High Court of Gujarat, seeking to strike down Sections 2(3) and 2(5) of the Prevention of Terrorism (Repeal) Act, 2004 (for short "POTA (Repeal) 2004". These Sections allow the Central Review Committee to withdraw pending cases against the alleged accused. The relations of the victims argued that these Sections violated Articles 14 and 21 of the Constitution, were the antithesis of the rule of law and encroached on the judicial power of the State. In its judgment, the High Court of Gujarat relied to a great extent on the judgment of the Madras High Court. On 04.02.2004, in The Government of Tamil Nadu and Ors. *v*: Union of India and Anr. 2004(1)CTC641 , the Madras High Court read the thrust of Section 321 of the Code of Criminal Procedure (for short the "Cr.P.C.") into POTA 2002.

3. The Madras High Court ordered the Special Court to give "due consideration" to the Review Committee's decision. A two-Judge Bench of this Court on 8.3.2004, in a short order while dismissing the special leave petition arising out of the Madras High Court judgment, upheld the application under Section 321 of Cr.P.C. The said order is reproduced as under:

the Special Leave Petitions are filed against the judgment of the High Court challenging the amendments to the Prevention of Terrorism Act, 2002 which gives to the Review Committee powers which earlier it did not have. By the amendment, the decision of the Review Committee is made binding on the Central Government, State Governments and the Police Officers investigation the offence. The High Court has held, in our view correctly, that these amendments are based on the recommendations made by the Constitution Bench of this Court in Kartar Singh v. State of Punjab reported in (1994) 3 SCC and the judgment of this Court in R.M. Tiwari v. State (1998) 2 SCC 610. There are the provisions which provide safeguards against misuse of the stringent provisions of such an Act. In our view, the High Court has also correctly held that the directions given by the Review Committee could only be subject to Section 321 of the Criminal Procedure Code. We, therefore, see no reason to interfere. The Special Leave Petitions are accordingly dismissed.

4. The High Court of Gujarat was dealing with a POTA (Repeal) 2004 question, not POTA 2002, it sought to find language that was *pari materia* to both statutes. If the statutes were effectively the same, then the Madras High Court judgment would be relevant to the Gujarat case. Moreover, the Gujarat High Court *could* argue that the Supreme Court gave its imprimatur of approval.

5. The High Court reasoned that Section 2(3) of POTA (Repeal) 2004 is *pari materia* with Section 60(7) read with Section 60(4) of POTA 2002. Section 2(3) of POTA (Repeal) 2004 provides that where the Review Committee is of the opinion that there is no prima facie case for proceeding against the accused, then, in cases in which cognizance has been taken by the Court, the cases shall be deemed to have been withdrawn.

6. Section 60(7) of POTA 2002 states that where any Review Committee constituted under Sub-section (1) is of opinion that there is no prima facie case for proceeding against the accused and issues directions under Sub-section (4), then the proceedings pending against the accused shall be deemed to have been withdrawn from the date of such direction. In the High Court's words:

though, the language of Sub-section (3) of Section 2 of the Repeal Act is not identical to that of Sub-section (4) read with Sub-section (7) of the 2002 Act, it is substantially pari materia to those provisions inasmuch as the opinion formed by the Review Committee on the prima-facie nature of the case for not proceeding against the accused under the 2002 Act has been given primacy and virtually made conclusive in the scheme of both the provisions. The only difference between the scheme of Sub-sections (4) to (7) of Section 60 (as amended in the year 2003) and Section 2(3) of the Repeal Act is that while in the former case the Review Committee could initiate action on an application made by an aggrieved person and the direction given by it were treated binding on the Central Government etc. under Sub-section (3) of Section 2 of the Repeal Act the Review Committee is required to examine all the pending cases registered under the 2002 Act for determining whether there is a prima-facie case for proceeding against the accused under the said Act. *One starking similarity between*

the two sets of provisions is that once the Review Committee forms an opinion that there is no prima-facie case for proceeding against the accused under the 2002 Act, the pending cases were treated as automatically withdrawn. Therefore, keeping in view the ratio of the judgment of Madras High Court which has been approved by the Supreme Court, we are inclined to agree with the learned Additional Solicitor General that the impugned provisions should be read in conjunction, with Section 321 of the Code and same do not, in any manner, encroach upon the judicial power of the State and that the opinion formed by the Review Committee on the prima-facie nature of the case under the 2002 Act has to be given due weightage by the Special court and accepted unless there are exceptional reasons for not doing so.

(emphasis added)

7. It appears as though the Gujarat High Court considered "proceedings pending against the accused" to include those proceedings in which the Special Court had taken cognizance of the matter. From this limited interpretation, one can call the statutes *pari materia.* It seems that the High Court correctly downplayed the difference between the Review Committee's having to receive an application before taking action and the Review Committee's having to take action immediately and review all pending cases.

8. Ultimately, the debate over whether the statutes are pari materia misses the point. If Section 321 of Cr.P.C. itself cannot apply, the issue comes for consideration is whether or not POTA (Repeal) 2004 encroaches on the jurisdiction and powers is clearly violative of the concept of the separation of powers. Here, the High Court neither provides analysis nor support for its conclusion that judicial review is not affected. Then again, judicial review is only slightly modified when Section 321 of Cr.P.C. has been read into POTA Repeal 2004, as the High Court did. That is likely why the High Court chose not to analyze the question from a judicial review standpoint. The Special Court still gets the last word, but it now has to give the Review Committee's decision "due weightage" or it must accept the Review Committee's opinion "unless there are exceptional reasons for not doing so." Of course, it is the public prosecutor who is most affected by the Gujarat High Court's Scheme. He no longer chooses whether to file an application for withdrawal or not. The Review Committee can compel him to do so. This is at odds with Section 321 of Cr.P.C. That said, it may have been the High Court's attempt at harmoniously interpreting two competing statutes. The High Court while concluding observed thus:

...once the Review Committee, after hearing the concerned parties and perusing the relevant records/material forms an opinion that no prima facie case is made out for proceeding against the accused under the 2002 Act, the Public Prosecutor appointed under Section 28 of the Act will have to file appropriate application under Section 321 of the Code without any delay and the Special Court will be required to pass appropriate order giving due weightage to the opinion of the Review Committee and keeping in view the observations made by the: 1996CriLJ2872 and Shaheen Welfare Association Supreme Court in R.M. Tiwari' v. State of Delhi v.: Union of India 1996CriLJ1866

9. Before proceeding, I note that R.M. Tiwari's case was dealt with by a two-Judge Bench. Several States had constituted Review Committees, to review cases brought under TADA, 1987. The Committees were appointed in compliance with Kartar Singh v. State of Punjab : 1994CriLJ3139 . Relying on Sheonandan Paswan v.: State of Bihar and Ors. 1983CriLJ348 (and other cases that analyzed Section 321 of Cr.P.C. in the absence of a statute to the contrary, the Court found that the Committee's recommendation to withdraw was not binding and was subject to Section 321 of Cr.P.C. This case does not apply to the present dispute because the Court was not dealing with POTA (Repeal) 2004, whose text expressly states that the Committee can deem a case withdrawn. Instead, the case was interpreting the State Review Committee's interpretation of *Kartar Singh's* directions, which are ambiguous as to whether Section 321 of Cr.P.C. should apply to the Committee(s) it spawned.

10. The Madras High Court took a similar stand but more closely adhered to the case law that has interpreted Section 321 of Cr.P.C. by retaining the public prosecutor's ability to make an independent decision. The High Court observed thus:

The words in Sub-section (7) of Section 60 of POTA, `the proceedings pending against the accused shall be deemed to have been withdrawn from the date of such direction' shall have to be understood only in the context of Section 321 of Code of Criminal Procedure to mean that if the Review Committee forms an opinion that the prosecution under POTA against the accused respondents does not attract the provisions of POTA, appropriate directions can be issued to the State Government and if the directions are in the nature of addressing the Public Prosecutor to withdraw the prosecution, then such a direction is binding on the State Government. But the said direction is not binding on the Public Prosecutor, as under Section 321 Code of Criminal Procedure, he has to formulate his opinion on his independent application of mind and even if an application under Section 321 Code of Criminal Procedure is filed, the ultimate arbiter is the Special Court, which has to consider the matter taking the over all situation but by giving due consideration to the opinion of the Review committee....

11. Before turning to the Supreme Court's brief order in which it upheld this case, I must examine the Madras High Court's reasoning with regard to the issue of encroachment on judicial power in violation of separation of powers. The Madras High Court assumes that Section 321 of Cr.P.C. applies to POTA. No detailed analysis is provided Sections 4 and 5 of Cr.P.C. are not raised; nor is the question as to why Parliament would require two reviews. If I were to assume that Section 321 of Cr.P.C. applies, the question of interference with the judiciary becomes moot.

12. It has become imperative to deal the aspect of removal of judicial review on basic structure of the Constitution.

DOES REMOVAL OF JUDICIAL REVIEW, WHICH IS THE CONCEPT BEHIND SECTION 321 **Cr.P.C., VIOLATE THE BASIC STRUCTURE?**

13. While Section 321 of Cr.P.C. itself does not apply, the principle of judicial review embodied therein does. In other words, Section 321 of Cr.P.C. is a codified version of judicial review. At the trial court level, Section 321 of Cr.P.C. ensures that the judiciary makes the final decision by approving the public prosecutor's decision to withdraw a case. Even if Section 321 of Cr.P.C. is made inapplicable by a special law like POTA (Repeal) 2004 or POTA 2002, judicial review still applies. Section 321 of Cr.P.C. is a general provision that can be subjected to special laws.

14. On the other hand, judicial review should not suffer the same fate. A violation of judicial review is another way of saying that the separation of powers between the principal three organs of the State have been violated. Judicial review forms part of the basic structure of the Constitution. And when judicial review is removed - even at the trial court level - the question becomes one of degree: has the basic structure been destroyed? Our short answer is that because POTA (Repeal) 2004 has not removed judicial review under Article 226 or Article 136, the basic structure has not been destroyed. Given the gravity of this question, I deem it necessary to explain my reasoning.

15. The Courts' powers to grant consent to a prosecutor's request to withdraw exits in the absence of Section 321 of Cr.P.C. This is because in the matter concerning judiciary, it should have the final say over cases that have been placed before it. It goes without saying that the Court's decision to grant consent to an application for withdrawal is a judicial function. If it is granted, the case is over. Resolving legal disputes is the core function of the judiciary. The power to take a final decision once a case is before a Court, irrespective of the stage at which the determination is made, should rest with the judge. To the extent POTA (Repeal) 2004 takes this decision away from the judge, it implicates the basic structure doctrine.

16. This Court has not had the opportunity to analyze what is behind Section 321 of Cr.P.C. Before POTA, there was no need to ask whether judicial review exists in the absence of Section 321 of Cr.P.C. That is why the cases analyzing Section 321 of Cr.P.C. are illustrative of the importance of judicial review, but they are not on point. For example, in the State of Bihar v.: Ram Naresh Pandy and Anr. 1957CriLJ567 , this Court observed as under:

3...The section is an enabling one and vests in the Public Prosecutor the discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The consent, if granted, has to be followed up by his discharge or acquittal, as the case may be. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the Court is to grant its consent. There can be no doubt, however, that the resultant order, on the granting of the consent, being an order of 'discharge' or 'acquittal', would attract the applicability of correction by the High Court under

sections 435, 436 and 439 or 417 of the Code of Criminal Procedure. The function of the Court, therefore, in granting its consent may well be taken to be a judicial function. It follows that in granting the consent the Court must exercise a judicial discretion....

As far back as 1957, this Court recognized that the High Court could still correct the trial court's decision to withdraw.

17. In Sheonandan Paswan's case (supra), a three- Judge Bench of this Court stated:

89...The exercise of the power to accord or withdraw consent by the Court is discretionary. Of course, it has to exercise the discretion judicially. The exercise of the power of the Court is judicial to the extent that the Court, in according or refusing consent, has to see (i) whether the grounds of withdrawal are valid; and (ii) whether the application is bona fide or is collusive....

A Constitution Bench in Sheonandan Paswan v. State of Bihar : 1987CriLJ793 referred to and approved the above judgment.

SEPARATION OF POWERS IS PART OF THE BASIC STRUCTURE:

18. In His Holiness Kesavananda Bharati Sripadagalvaru v.:State of Kerala and Anr. AIR1973SC1461 , the Court opined that separation of powers is a part of the basic structure of the Constitution of India.: AIR1973SC1461 , per Sikri, C.J., as paras 292 and 293, per Shelat and Grover JJ at para 582 - "Demarcation of power between the legislature, the Executive and the Judiciary".

19. I need not dwell on the fact that the separation of powers is part of the basic structure. This has been well established in a plethora of cases. [*See: S.R. Bommai and Ors. v. : Union of India and Ors.* [1994]2SCR644 , Per Chandrachud, J. at 2742, per Beg. J. at 2426-30, 2472, per Ray, C.J., at 2320; *State of Bihar and Anr. v. : Bal Mukund Sah and Ors.* [2000]2SCR299 ; *I.R. Coelho (Dead) by LRs v : State of Tamil Nadu* AIR2007SC861 ; *Indira Nehru Gandhi v. :Raj Narain* [1976]2SCR347 ; *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* : [1981]1SCR206 ; *Sub-Committee on Judicial Accountability v. Union of India and Ors.* : AIR1992SC320 ;

I. Manilal Singh v.: Dr. H. Borobabu Singh and Anr. [1993]1SCR769 ; *Union of India v.: Association for Democratic Reforms and Anr.* [2002]3SCR696 ; *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter),* : AIR2003SC87 ; *Pratap Singh v.:State of*

Jharkhand and Anr. 2005CriLJ3091 ; *Rameshwar Prasad and Ors. (VI) v. Union of India and Anr.* : AIR2006SC980 ; *Kuldeep Nayar and Ors. v. Union of India and Ors.* : AIR2006SC3127 ; *Raja Ram Pal v. : Hon'ble Speaker, Lok Sabha and Ors.* (2007)3SCC184 .

20. However, our Constitution does not envisage a strict separation of powers. There is separation by necessary implication. In fact, the Constituent Assembly negated strict separation of powers. Amendment 40 was proposed. It read, "40-A. There shall be complete separation of powers as between the principal organs of the State viz. the Legislative, the Executive, and the Judicial." This was resisted by Dr. Ambedkar and others on the ground that what was required was a harmonious governmental structure and not a strict or complete separation of powers [See Constitution Assembly Debates, Vol.VII, p.959].

21. From the very beginning, the Supreme Court has recognised the existence of an implied separation of powers. See: In Re Delhi Laws Act, 1912, Ajmer- Merwara (Extension of Laws) Act, 1947 v. Part `C' States (Laws) Act, 1950 (Reference under Article 143 of the Constitution of India) AIR 1951 SC 332; Rai Sahib Ram Jawaya Kapur and Ors. v. : State of Punjab [1955]2SCR225 and Ram Krishna Dalmia and Ors. v. Justice S.R. Tendolkar and Ors. [1959]1SCR279 .

22. With each organ of the State overseeing its sphere of control, the Court has had occasion to protect the judiciary from executive and/or legislative encroachment. Where judicial review is curbed or outrightly removed, the Court may review the constitutional validity of such an action.

23. Indira Nehru Gandhi case (supra) provided one of the occasions in which separation of powers was invoked. In response to this judgment, the Parliament passed the Election Laws (Amendment) Act, 40 of 1975. This Act, inter alia, provided that services rendered by government servants shall not be deemed to be in furtherance of the candidate's election. Shortly thereafter, Parliament passed the 39th Amendment by which, inter alia, Article 329A was inserted into the Constitution. [Para 3]. Article 329A(1) and (2) provided that, in the future, a Prime Minister's election to either House of Parliament could not be questioned by the judiciary. [Paras 5-6].

24. Article 329A(4) stated that no election laws apply or shall be deemed to have applied to Parliamentary elections. [Para 8]. In addition, it nullified any court order that had voided an election. [Para 8]. Article 329A(5) directed the Court to dismiss any appeal pending before the Supreme Court consistent with 329(A)(4). [Para 9]. Article 329(A)(6) stated that the provisions of 329 would go in effect notwithstanding anything contained in the Constitution. [Para 10].

25. The Court struck 329A(4), holding it in violation of the basic structure. Article 329(A)(4) appropriated the Court's power to adjudicate election laws, encroaching on the judiciary in

violation of separation of powers. In voiding this part of the 39th Amendment, the Court declared that separation of powers and judicial review (by necessary implication) are part of the basic structure because of the retrospective effect of the Election Laws (Amendment) Act, 40 of 1975. I turn to a number of relevant passages for further guidance:

Para 60: (Ray, C.J.) It is true that no express mention is made in our Constitution of vesting in the judiciary the judicial power as is to be found in the American Constitution. But a division of the three main functions of Government is recognised in our Constitution. Judicial power in the sense of the judicial power of the State is vested in the Judiciary. Similarly, the Executive and the Legislature are vested with powers in their spheres. Judicial power has lain in the hands of the Judiciary prior to the Constitution and also since the Constitution. It is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature or that the powers of the Legislature or the Executive should pass to or be shared by the Judiciary.

Para 64: (Ray, C.J.) "Clause 5 in Article 329A states that an appeal against any order of any court referred to in Clause 4 pending, before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court, shall be disposed of in conformity with the provisions of Clause 4. The appeal cannot be disposed of in conformity with the provisions of Clause 4 inasmuch as the validation of the election cannot rest on Clause 4.

26. I note that the very fact that the Court did not dispose of the appeal by writing a summary order citing to Clause 5 shows that the Court dismissed outright the Parliament's attempt to remove a pending appeal from the Court's purview. By holding Article 329(A)(4) unconstitutional, Clause (5) became moot. Justice Chandrachud, as he then was, recognized this technical point and held both Clauses (4) and (5) unconstitutional. The others did not seem it necessary to deal with Clause (5). [see Khanna, J. at para 185]

27. At para 688, Justice Chandrachud further expounded the doctrine of separation of powers:

I do not suggest that such an encroaching power will be pursued relentlessly or ruthlessly by our Parliament. But no Constitution can survive without a conscious adherence to its fine checks and balances. Just as Court ought not to enter into problems entwined in the "political thicket", Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which "has in it the precept, innate in the prudence of self-preservation (even if history has not repeatedly brought it home), that discretion is the better part of valour" Social Dimensions of Law and Justice-Julius Stone (1966). p. 668.] Courts have, by and large, come to check their valorous propensities. In the name of the Constitution, the Parliament may not also turn its attention from the important task of legislation to deciding court cases for which it lacks the expertise and the apparatus. If it gathers facts, it gathers facts of policy. If it records findings, it does so without a pleading and without framing any issues. And worst of all, if it decides a Court case, it decides without hearing the parties and in defiance of the fundamental principles of natural justice.

28. This raises the issue of the Review Committee's competence to decide the court case. Even a ruling wherein prima facie cases are withdrawn, the decision to withdraw is final and terminates the case in favour of the accused. A case has thus been decided. The question regarding the Committee's competence loses some relevance when I consider that the aggrieved party could still file an appeal against such a decision. Nevertheless, the Review Committee is an executive body that is making a judicial decision.

29. The Executive appoints the Review Committee. A majority of its members belong to the Executive Branch. Under POTA (Repeal) 2004, the Executive's Review Committee has the power to decide cases. Thus, judicial review has been implicated. Given that judicial review forms part of the basic structure, it is our job to determine if POTA (Repeal) 2004 has gone too far.

30. In order to reach its decision, the Review Committee can conduct discovery. It has the power to compel parties to produce any document. In addition, it can requisition any public record pursuant to the Code of Civil Procedure, 1908.

31. Despite its access to the relevant information, it is not a court and could be more easily swayed by political considerations. Owing allegiance to the Executive, the Review Committee could be tempted to decide the outcome of a case based on that which is politically expedience. After all, it is an Executive body that is performing a purely judicial decision. At para 689 (Chandrachud, J. as he then was) observed that:

...The "separation of powers does not mean the equal balance of powers". says Harold Laski, but the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances.

32. Ultimately, at para 696, Justice Chandrachud held:

...that Clauses (4) and (5) of Article 329A are unconstitutional and therefore void...." Justice Khanna at para 213 finds 329A(4) to violate the principle of free and fair elections. Embedded within this principle is the idea that a forum must be provided for the resolution of the dispute.

As a result of the above. I strike down Clause (4) of Article 329A on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure of the Constitution inasmuch as (1) <u>it abolishes the forum without providing for another forum for going into the dispute....</u>

33. Citing the decisions of foreign countries wherein election disputes are resolved by the Legislature itself, Justice Khanna did not strike the amendment on the sole ground that it failed to provide for a judicial forum; instead, other forums would have also been acceptable. [paras 198 and 207]. His concern was that no forum whatsoever was provided. In the instant case, a judicial forum - the High Courts and the Supreme Court - is there for those who are aggrieved by the Review Committee's decision.

34. Justice Mathew's opinion shows how judicial review is necessarily linked to the separation of powers doctrine. By stripping the Court of judicial review of election cases, Article 329A(4) bestows a power on an organ of government that is incapable of providing a just result. Justice Mathew stated at para 325 that:

...it was an essential feature of democracy as established by the Constitution, namely, (that there should be a) a resolution of an election dispute by an authority by the exercise of judicial power by ascertaining the adjudicative facts and applying and applying the relevant law for determining the real representative of the people.

35. At para 327, Justice Mathew holds Article 329A(4) unconstitutional, in violation of the separation of powers. Given that our separation of powers is somewhat flexible, he finds that the Parliament could only remove judicial review by enacting a constitutional amendment. Para 327 reads as under:

...The amending body, though possessed of judicial power, had no competence to exercise it, unless it passed a Constitutional law enabling it to do so. If, however, the decision of the amending body to hold the election of the appellant valid was the result of the exercise of an 'irresponsible despotic discretion' governed solely by what it deemed political necessity or expediency, then, like a bill of attainder, it was a legislative judgment disposing of a particular election dispute and not the enactment of a law resulting in an amendment of the Constitution. And, even if the latter process (the exercise of despotic discretion) could be regarded as an amendment of the Constitution, the amendment would damage or destroy an essential feature of democracy as established by the Constitution, namely, the resolution of election dispute by an authority by the exercise of judicial power by ascertaining the adjudicative facts; the amending body cannot gather these facts by employing legislative process; they can be gathered only by judicial process.

36. In ***Minerva Mills*** (supra), Section 55 of the 42nd Amendment was at issue. Section 55 inserted Sub-section (4) and (5) into Article 368 to bar judicial review of constitutional amendments. The Court held that Section 55 of the 42nd Amendment was beyond the amending power and was void "since it removes all limitations on the power of Parliament to amend the Constitution and confers powers upon it to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure." Justice Bhagwati, as

he then was, struck the Parliament's attempt to immunize all amendments from judicial review:

...So long as Clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in Kesavananda Bharati's case, would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it would not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending power of Parliament would stand enlarged, contrary to the decision of this Court in Kesavananda Bharati's case. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers, I shall immediately proceed to state the reasons why I think that these two features form part of the basic structure of the Constitution.

37. L. Chandra Kumar v:Union of India [1997]228ITR725(SC) is another case wherein the Court struck down a constitutional amendment that sought to remove judicial power. This Court reviewed the 42nd Amendment through which the Parliament sought to insert Articles 323A and 323B in the Constitution. [para 5]. Article 323-B(2) empowered the Parliament or the State Legislatures to set up Tribunal to resolve a wide variety of disputes: tax cases, foreign exchange matters, industrial and labour cases, ceiling or urban property, criminal matters etc. [para 35]. Article 323-B(3)(d) excluded the jurisdiction of all courts, save for the Supreme Court's Article 136 jurisdiction. [para 35]. In effect, this provision enabled the Government to divest the lower and High Courts of the bulk of their workload. [para 35].

38. The Court held that judicial review, under Articles 226 and 227 in the High Courts and under Article 32 in the Supreme Court respectively is an essential feature of the Constitution and forms part of the basic structure. [para 78]. Thus, it is inviolable. [para 99]. By ousting the higher judiciary of its jurisdiction under Articles 226/227 and 32, the impugned Articles 323A(2)(d) and 323B(3)(d)) violated court's power of judicial review. The Court allowed Parliament and State Legislatures to set up Tribunals, provided the higher judiciary retains its Article 226-227/32 jurisdiction. [para 81].

39. A nine-Judge Bench in I.R. Coehlo (supra) was constituted to clarify the following question of fundamental importance:

The fundamental question is whether on and after 24th April, 1973 when basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize

legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court." (para 4)

40. If a law abrogates or abridges a fundamental right *(by amendment or by insertion in the 9th Schedule),* the Court may exercise its judicial review power and examine it on the touchstone of the basic structure doctrine as reflected in Article 21 read with Articles 14 and 9 by application of the "rights" and "essence of the right" tests. [See conclusions (i) and (iii)]. The Court in ***Coehlo*** observed as under:

The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine.

41. Of course, POTA (Repeal) 2004 is not a constitutional amendment. Nor does it entirely remove judicial power. Under POTA (Repeal) 2004, a portion of judicial review has been removed. The trial court no longer has the power to override the Review Committee's decision to withdraw, as it would have had under Section 321 of Cr.P.C. But this is not as drastic as it sounds, given that the Review Committee's job is to act as a filter. Where there is obviously no case against the accused, the Review Committee should withdraw the case. That is, "...where the Review Committee is of the opinion that there is no prima facie case for proceeding against the accused," then the case shall be deemed withdrawn. [See POTA (Repeal) 2004, Section 3(a) and (b)]. Where there is some evidence that suggests that a case against the accused might exist, the Review Committee must allow the proceedings to continue.

42. Those who are aggrieved by the Review Committee's decision to withdraw still have judicial recourse under Article 226 of the Constitution. Under this Article, it may take appropriate steps in the High Court (or in this Court) against the Review Committee's decision to withdraw. One cannot say that the aggrieved parties are without a remedy, when those parties can approach the High Court (or this Court). I make it clear that the High Court should examine the aggrieved parties' cases, if those parties choose to contest the Review Committee's decision to withdraw.

43. Unlike the provisions at issue in the Election case, Minerva Mills, L. Chandra and I. R. Coehlo (supra), POTA (Repeal) 2004 do not strip the higher judiciary of judicial review. As such, POTA (Repeal) 2004 survives. A violation of separation of powers need not rise to such a level before this Court will consider it an abrogation of the basic structure.

44. With the constitutional analysis behind us, I recognize the pragmatic effect of this ruling. It is now up to those who feel aggrieved by the Review Committee's decision to file a writ

petition under Article 226 of the Constitution. While a review of the Review Committee seems cumbersome and redundant, it is nevertheless essential and required.

45. Under Section 3 of POTA (Repeal) 2004, where no prima facie case is made out, the case "shall" be deemed withdrawn. It is important to note that POTA (Repeal) 2004 does not expressly reject Section 321 of Cr.P.C. Had the Parliament used a non-obstante clause to preclude the application of Section 321 of Cr.P.C. to POTA (Repeal) 2004, POTA 2002 had done in a number of provisions - our analysis would have been much simpler. That said, Section 56 of POTA 2002, whose operation is saved by Section 2(2)(a) of POTA (Repeal) 2004, states that POTA 2002 is to override "anything inconsistent therewith." As noted, Section 321 of Cr.P.C. is inconsistent with the POTAs, as it makes the Review Committee's decision to withdraw contingent upon the public prosecutor and the Court.

POTA (REPEAL) 2004 IS A SPECIAL ACT THAT OVERRIDES GENERAL ACTS SUCH AS THE Cr.P.C.:

46. In addition, POTA (Repeal) 2004 is a special Act that trumps a general Act such as the Cr.P.C. This is consistent with the general principle of statutory interpretation. What is more, the CrPC itself allows the Parliament to deviate from the Cr.P.C. when necessary. The Cr.P.C. says that it is a general law that is subject to special laws. Sections 4(1) and (2) and (5) of Cr.P.C. read as under:

Section 4(1): All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

Section 4(2): All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.
Section 5: "Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by another law for the time being in force.

47. The Special Act must be deemed to supercede the provisions of the general Act. In *Harbans Singh and Ors. v.: The State,* AIR1953All179 , the U.P. Private Forests Act (Act No. 6 of 1949) was a special statute that precluded Magistrates of the First Class from trying violations under the Act. Under Schedule III of the general Cr.P.C. of 1898, Magistrates of the First Class had the power to try similar offences. The Allahabad High Court held that the special law must trump the general and set aside the conviction entered by the Magistrate of the First Class. The Court relied on Section 5 of the CrPC 1898, from which Section 5 of the CrPC, 1973 borrowed:

Para 4. It is, therefore clear that the powers conferred under the general provisions of the Code of Criminal Procedure are subject to any special provisions that might be made with regard to the exercise or regulation of those powers by any special Act. The special Act having made such provisions with regard to the offences under the said Act must be deemed to supersede the provisions of the general Act.

48. The provisions of the Special Law must prevail and the CrPC must give way. In an earlier case, *Kripa Ram and Ors. v.: Ram Asrey* AIR1951All414 , the Allahabad High Court emphasized this principle. The accused had allegedly stolen mangoes valued at less than Rs. 50. Section 52 of the Village Panchayat Raj Act provided that offences where less than Rs. 50 was at stake were to be tried by the Panchayat Adalat. The provision as to the amount in controversy was special relative to the general provisions of the Penal Code, under which the Judicial Magistrate convicted the accused. Therefore, the High Court set aside the lower court's conviction and transferred the case to the Panchayat Adalat. Even where Special Courts had not been constituted and transfer of the case to a non-existing court could lead to lawlessness, the rule of special vis-`a-vis general was to be followed. Paragraph 3 reads as under:

...The fact that the Panchayati Adalats had not been constituted would not affect the provision taking away jurisdiction from the other Courts, although it may result in inconveniences and lawlessness.

49. The Statement of Objects and Reasons of POTA (Repeal) 2004 expressly says that it is special. The POTA, like the TADA before, deviate from the general criminal Codes (the Indian Penal Code, 1860 and the Criminal Code of Procedure, 1973) and provide special substantive and procedural rules for acts of terrorism. It was first reasoned by the Legislature that harsher laws were necessary to combat and deter terrorism. While reviewing the Constitutionality of TADA, the Court in ***Kartar Singh*** (supra) gave the Parliament a substantial amount of deference and upheld all but Section 22 of TADA - subject to a few modifications - finding that the Parliament had the legislative competence to make harsh laws for harsh times. [See: Justice Pandian's summary at page 712 at para 368].

SYNOPTIC ANALYSIS OF POTA (REPEAL) 2004:

50. It takes time to give effect to Section 321 of Cr.P.C. even when both the public prosecutor and the Court have to decide whether withdrawal is appropriate. Under one reading of the statute, withdrawal occurs on the spot. Under the other, it is to languish before the public prosecutor.

51. If the public prosecutor approves of the decision to withdraw, then it is presented to the Special Court for a final decision. Inserting Section 321 of Cr.P.C. itself into POTA (Repeal) 2004 defies logic and produces an absurd result. "The object of the construction of a statute being to ascertain the will of the Legislature, it may be presumed that neither injustice nor absurdity was intended." (Owen Thomas Mangin v. Inland Revenue Commissioner (1971) 2 WLR 39, p. 42 (PC) (Lord Donovan), as referred in Justice G.P. Singh's celebrated book, *Principles of Statutory Interpretation,* 11th Edition, 2008 at page 129.

52. The appellant further argued that requiring two withdrawals disregards Parliamentary intent. The Statute's Statement of Objects and Reasons expresses the Parliament's intent. It reads as under:

The provisions of Terrorism Act, 2002 was enacted as a Special law to deal with terrorist acts.

2. There have been allegations of gross misuse of the provisions of the Act by some State Governments. Views have been expressed that provisions of the Act were misused in cases where they should not have been invoked. It has also been observed in various quarters that the Act has failed to serve its intended purpose and as a result, there have been persistent demands that this At should be repealed.

3. The Government has concerned with the manner in which provisions of the Act were grossly misused in the past two years. It was, therefore, felt necessary to repeal the Act. As Parliament was not in session, the Prevention of Terrorism (Repeal) Ordinance, 2004 was promulgated on 21-9.2004. The Ordinance empowers the Central Review Committee to review all cases pending in the courts or at various stages of investigation and complete the review within the period of one year from the date of repeal of the Act and to give its directions. Whenever, in the opinion of the Central Review Committee no prima facie case is made out either in respect of cases pending in the courts, or under investigation, such cases shall be deemed to have been withdrawn and investigation closed, as the case may be.

4. The Prevention of Terrorism (Repeal) Bill, 2004 seeks to replace the Prevention of Terrorism (Repeal) Ordinance, 2004 and to achieve the above objects.
Sd/-

New
Delhi
Shivraj
V. Patil
The 23rd November, 2004.

53. This Bill became the POTA (Repeal) Act 2004, out of which the instant case arises. This statement gives us guidance in two areas. First, the allegations of misuse of POTA 2002 were directed at some of the State Governments. This is relevant because it shows that the Parliament wanted a mechanism by which it could reverse the State Governments' alleged misuse of POTA 2002. Subjecting the Central Review Committee's decision to the will of the State Government's Public Prosecutor, as is done when Section 321 of Cr.P.C. applies, clearly goes against the very objective of POTA (Repeal) 2004.

54. It is reiterated that those aggrieved by the Review Committee's decision are not without any remedy, they can have recourse under Article 226 of the Constitution. In this view of the matter, the basic principle of separation of power is not violated. No provisions of the Constitution are violated by repealing the Act by the Parliament.

55. I agree with the conclusions arrived at by Hon'ble the Chief Justice. The appeals are accordingly disposed of.