**SUPREME COURT OF INDIA**

Kamlesh Kumar

Vs.

State of Jharkhand

S.L.P.(Crl.) Nos.6219-6220 of 2012

(Madan B. Lokur and H.L. Gokhale JJ.)

26.09.2013

**JUDGEMENT**

**H.L. GOKHALE, J**

1. These Special Leave Petitions (Criminal) seek to challenge the judgment and order dated 19.7.2012, whereby a Learned Single Judge of the Jharkhand High Court dismissed the two Writ Petitions bearing Nos. Writ Petition Nos.95 & 112 of 2003 filed by Shri Kamlesh Kumar and three others, all children of one Dr. K.M. Prasad who worked earlier as the Director of Animal Husbandry department in Government of Bihar. They are being prosecuted under the provisions of Foreign Exchange Regulation Act, 1973 (in short FERA), and those cases have been transferred to the Special Judge hearing the Fodder scam cases. In the above referred Criminal Writ Petitions they had challenged the transfer of those cases to the Special Court by contending that the transfer order was bad on various grounds, the principal amongst them being that the State Government had no jurisdiction to authorise the Special Judge to try these cases under FERA. Those Criminal Writ Petitions have been rejected, and hence these Special Leave Petitions (Criminal) have been filed.

Facts leading this Criminal Petition are as follows:-

2. The above referred Dr. K.M. Prasad, father of the petitioners, was working earlier as the Director of Animal Husbandry department, Government of Bihar. He is being prosecuted along with some others by the Central Bureau of Investigation (C.B.I.) in the Court of Special Judge at Ranchi for conspiracy to defraud the State Government to the extent of Rs.7,09,92,000/- during 1980-90 on the basis of fake

allotment letters purportedly issued by him for the purchase of medicines. It is claimed that fake supplies were shown as made by the suppliers, and the money withdrawn towards such fake allotments was misappropriated by the accused persons.

3. During the course of investigation it was realized that the amount involved was much more, i.e. Rs.19,81,66,460/- approximately, and that the accused Dr. K.M. Prasad had acquired huge movable as well as immovable assets in his own name, and in the name of his children and others at different places. The said Dr. K.M. Prasad and his children were also therefore prosecuted in the case arising out of this investigation, and charges have already been submitted by the CBI against them, and the cases are pending in the court of Special Judge CBI at Ranchi.

4. It was further revealed during the course of investigation, that Mr. Kamlesh Kumar and three others, children of Dr. K.M. Prasad, had received huge amounts of Foreign Exchange over U.S. $3,15,000 and British £1000. It was suspected that these remittances were not actually genuine gifts as claimed by them, but were amounts arranged by certain persons involved in the animal husbandry scam in violation of the provisions of FERA. It was alleged that they had violated the provisions of Section 9(1) (a) and (b) and 64(2) of the FERA, and rendered themselves liable to be prosecuted under Section 56 of the said Act.

5. The Enforcement Director accordingly filed cases against the petitioners before the Chief Judicial Magistrate Ranchi for taking cognizance under Section 56 of FERA. The Enforcement Director however, realized that many of the offenders in the FERA cases were also accused in the cases which were pending before the Special Judge in the Fodder scam cases, and the documents relied upon and the witnesses to be examined were common. The Director, therefore, wrote to the State Government on 25.1.2002 seeking to have these cases tried by the same court. Accordingly, the Law Secretary of the Government of Jharkhand wrote to the Registrar General of the High Court on 2.3.2002 and on 25.4.2002. Thereafter, the full Court of Jharkhand High Court passed a resolution on 25.4.2002, to empower the Special Judge, CBI Animal Husbandry scam cases, to try the cases of FEMA, 1999. (This is because in the meanwhile, from 1.6.2000, FERA had been replaced by the Foreign Exchange Management Act, 1999 – FEMA for short). Accordingly a notification was issued by the State of Jharkhand on 17.5.2002, empowering the Special Judge CBI (AHD Scam cases) to try the cases under FEMA. Pursuant to that notification, the Complaint filed on 23.5.2002 before the Chief Judicial Magistrate, Ranchi was transferred by order dated 31.5.2002, for trial to the court

of the Learned Additional Judicial Commissioner cum Special Judge CBI (AHD Scam cases) Ranchi.

6. This made the petitioners file the above referred Criminal Writ Petitions to quash the notification dated 17.5.2002. The Learned Single Judge of the Jharkhand High Court at Ranchi dismissed the said Writ Petitions by his judgment and order dated 19.7.2012. It is this order which is under challenge in the present Special Leave Petitions (Criminal).

7. The notification issued by the Jharkhand Government dated 17.5.2002 reads as follows:-

> "JHARKHAND GOVERNMENT LAW (JUSTICE), DEPARTMENT NOTIFICATION RANCHI dated 17th May, 2002
>
> Sr. Prabhu Tiwari, Special Judge, CBI (A.H.D Scam cases), Ranchi, is being authorized for disposal of cases of FEMA, 1979, in addition to his own works in the light of letter No. 3449/APPTT dated 06/05/2002 of Jharkhand High Court, Ranchi.
>
> By the order of Governor
>
> (Prashant Kumar) Secretary to Government
>
> Law(Justice) Department
>
> Jharkhand, Ranchi
>
> Memo No. 1-A/court-Gathan-103/2001-1111/J Ranchi dated 17th May 2002
>
> Copy to, Superintendent, State Press, Post-Doranda, Ranchi for publishing the same in the next state gazette.
> Secretary to Government
>
> Law (Justice) Department
> Jharkhand, Ranchi"
>
> This notification had been issued in the light of letter dated 6.5.2002 from the Registrar General of the High Court of Jharkhand, which reads as follows:-

"Office:-501449

Res:-503024

Fax No: 0651-501114

No. 3449/APPT

Dated, Ranchi 06/05/2002

IBRAR HASSAN

Registrar General High Court of Jharkhand, Ranchi

To

The Secretary to the Government

Law (Judl.) Department, Govt. of Jharkhand, Ranchi

Sir

With reference to your Letter No. 1/A/Court-Estab-103/2001 J 531 dated 02/03/2002, I am directed to say that the Court has been pleased to resolve that Sri Prabhu Tiwary, Special Judge, C.B.I. (AHD Scam cases) at Ranchi be vested with the Powers to try cases under Foreign Exchange Management Act, 1999.

I am further directed to say that since the vesting of this power has to be effective before 31st May, 2002 immediate notification to this effect may be issued.

Yours faithfully

Registrar General

06.05.2002"

Submissions on behalf of the Petitioners:-

8. It was firstly submitted on behalf of the petitioners that the transfer of appellants' prosecution under FERA / FEMA from the Magistrate's Court to the Court of the Special Judge was unlawful, since the disputed transfer was being made to a Court which had no jurisdiction to try the offence. In this context, it was submitted by learned senior counsel Mr. Shekhar Naphade appearing for the petitioners that for the offences for which the petitioners were being prosecuted under Section 56 of FERA, the punishment did not exceed 7 years of imprisonment. Since we are concerned with sub-section (1) of Section 56, we may reproduce the said sub-section. We may note at this stage that though FERA came to be repealed and replaced by FEMA with effect from 1.6.2000, in view of Section 49 (4) of FEMA, all offences committed under FERA continue to be governed by the provisions of FERA, as if that Act had not been repealed. This Section 56 (1) of FERA reads as follows:-

> "56. Offences and prosecution- (1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act [other than section 13, clause (a) of sub-section (1) of [section 18, section 18A], clause (a) of sub-section (1) of section 19, sub- section (2) of section 44 and sections 57 and 58], or of any rule, direction or order made thereunder he shall, upon conviction by a court, be punishable-
>
> (i) in the case of an offence the amount or value involved in which exceeds one lakh of rupees, with imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine:
>
> Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months;
>
> (ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both."

9. It was then submitted that the punishment being less than 7 years, as provided under the second entry of Part-II of First Schedule to Cr.P.C.the offences which are punishable with imprisonment for three years and upwards but not more than seven years, and are cognizable and non- bailable offences, are triable by the Magistrate of the first class. The State Government was therefore, not competent to transfer the prosecution under Section 56 of FERA from the Court of Chief Judicial

Magistrate to the Court of the Special Judge. This is because if so permitted it will result into denial of one right of appeal to the petitioner.

10. (i) Reliance was placed in support of this proposition on the judgment of a Constitution Bench of this Court in the case of A.R. Antulay v. R.S. Nayak and Anr. reported in 1988 (2) SCC 602, and particularly paragraphs 55, 56, 77, 78 and 91 thereof to submit that this transfer will reduce the right of appellants to appeal. The transfer of the prosecution against the petitioner A.R. Antulay, from the Court of the Special Judge to the High Court of Bombay was held to be in violation of the Fundamental Rights of the petitioner, and therefore, without jurisdiction and null and void. It was held that the right of the petitioner to prefer an appeal against the decision of the Special Judge to the High Court was taken away by such a transfer.

(ii) Reliance was also placed in this behalf on a judgment of a Division Bench of Delhi High Court in the case of A.S. Impex Limited & Ors. v. Delhi High Court & Ors. reported in 107 (2003) Delhi Law Times 734. In that matter, the Court was concerned with the administrative order passed by the High Court to transfer cases filed under Section 138 of the Negotiable Instrument Act, 1881, from the Courts of Magistrates to the Courts of Additional Sessions Judges. The High Court relied upon A.R. Antulay (supra) and held that to deal with the dishonour of cheques, a special jurisdiction was conferred on the Metropolitan Magistrates or Judicial Magistrates First Class, to try the offences under Section 138 of the Negotiable Instrument Act 1881, and that jurisdiction could not be taken away by transferring these matters to the Sessions Courts.

11. It was also submitted, that the transfer of the cases could not have been effected by the High Court without following the procedure laid down under Section 407 of the Cr.P.C., and impugned orders of transfer of cases were therefore bad in law.

Reply on behalf of the Respondents:-

12. The arguments of the learned counsel for the petitioner were countered by Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the respondents. He firstly drew our attention to the fact that in Antulay's case, as recorded in paragraph 19 of that judgment, the petitioner was being prosecuted under Section 7(1) of the Criminal Law Amendment Act 1952, and Section 7(1) of the said Act specifically mandated that offences in such cases shall be tried by a Special Judge only.

13. Mr. Malhotra submitted that when the statute made such a specific provision, the prosecution could not be withdrawn from the specified court and transferred even to the High Court. It was in this context that Shri A.R. Antulay had suffered a prejudice in as much as his right of appeal to the High Court would get affected. In the present case, there was no such specific provision that the offence shall be tried by a Magistrate only. In support of his submissions Mr. Malhotra drew our attention to a specific judgment of this Court in Ranvir Yadav v. State of Bihar reported in 1995 (4) SCC 392 where the legal proposition as stated in A.R. Antulay (supra) came to be explained in paragraph 14 thereof. In Ranvir Yadav (supra) this Court was concerned with the administrative power of the High Court to transfer cases. While upholding the order of transfer, this is what this Court observed in paragraph 14 thereof:-

> "14. Coming now to A.R. Antulay case we find that the principles of law laid down in the majority judgment, to which Mr. Jethmalani drew our attention have no manner of application herein. There questions arose as to whether (i) the High Court could transfer a case triable according to Criminal Law Amendment Act, 1952 ("1952 Act" for short) by a Special Court constituted thereunder to another court, which was not a Special Court and (ii) the earlier order of the Supreme Court transferring the case pending before the Special Court to the High Court was valid and proper. In answering both the questions in the negative the learned Judges, expressing the majority view, observed that (i) Section 7(1) of the 1952 Act created a condition which was sine qua non for the trial of offences under Section 6(1) of the said Act. The condition was that notwithstanding anything contained in the Code of Criminal Procedure or any other law the said offence shall be triable by Special Judges only. By express terms therefore it took away the right of transfer of cases contained in the Code to any other court which was not a Special Court and this was notwithstanding anything contained in Sections 406 and 407 of the Code and (ii) the earlier order of the Supreme Court transferring the case to the High Court was not authorised by law, namely, Section 7(1) of the 1952 Act and the Supreme Court, by its direction, could not confer jurisdiction on the High Court of Bombay to try any case for which it did not possess such jurisdiction under the scheme of the 1952 Act. As in the present case the 5th Court was competent under the Code to conduct the sessions trial, the order of transfer conferring jurisdiction on that court and the trial that followed cannot be said to be bad in law."

(emphasis supplied)

14. One of the submissions for the petitioners was that since the offences under Section 56(1) are punishable with imprisonment for a term which may extend to seven years only, they are triable by Magistrates of the First Class only. Mr. Malhotra, pointed out that it would be so if the offences are cognizable as per the second entry of Part-II of First Schedule to Cr.P.C. In the present case, the offences were non-cognizable under Section 56 of FERA, and the petitioners were being prosecuted thereunder. Section 62 of the FERA had made the offences punishable under Section 56 as non-cognizable ones. Section 62 of FERA reads as follows:-

> "62. Certain offences to be non-cognizable- Subject to the provisions of section 45 and notwithstanding anything contained in the [Code of Criminal Procedure, 1973 (2 of 1974], an offence punishable under section 56 shall be deemed to be non-cognizable within the meaning of that Code."

Consideration of rival submissions

15. It had been submitted on behalf of the petitioner that one of the submissions accepted in A.R. Antulay (supra) was that his right to file an appeal would be affected. Mr. Malhotra pointed out that in the present case such a situation would not arise. An appeal would lie certainly to the High Court against the decision of the Special Judge. It would always be argued that if the prosecution was conducted before the Court of the Magistrate, an appeal would lie to the Court of Sessions, and then a revision would be available to the High Court. Thus by transferring the case from the Court of Magistrate to a Sessions Judge, the opportunity of the petitioner to avail of a revision would be affected. Mr. Malhotra however pointed out that there was no right to file a revision as such, as distinguished from the right of filing an appeal to the High Court. The petitioner can not claim to have suffered any prejudice on that count, since there was no vested right to file a revision. In support of this proposition he relied upon the following paragraph from the Constitution Bench judgment of this Court in Pranab Kumar Mitra v. The State of West Bengal and Anr. reported in 1959 Supp 1 SCR 63 at page 70:-

> "In our opinion, in the absence of statutory provisions, in terms applying to an application in revision, as there are those in s. 431 in respect of criminal appeals, the High Court has the power to pass such orders as to it may seem fit and proper, in exercise of its revisional jurisdiction vested in it by s. 439 of the Code. Indeed, it is a discretionary power which has to be exercised in aid of justice. Whether or not the High Court will exercise its revisional

> jurisdiction in a given case, must depend upon the facts and circumstances of that case. The revisional powers of the High Court vested in it by s. 439 of the Code, read with s. 435, do not create any right in the litigant, but only conserve the power of the High court to see that justice is done in accordance with the recognised rules of Criminal Jurisprudence, and that subordinate criminal courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code. On the other hand, as already indicated a right of appeal is a statutory right which has got to be recognised by the courts, and the right to appeal, where on exists, cannot be denied in exercise of the discretionary power even of the High Court……"

16. It was further pointed out by Mr. Malhotra that this view had been followed by the High Courts, and for reference he referred to a Division Bench judgment of Bombay High Court in Suraj Prakash Seth and another v. R.K. Gurnani and another reported in 1975 Mh.L.J 588, where the proposition laid down in P.K. Mitra (supra) had been referred to in support. The High Court observed in paragraph 15 which reads as follows:-

> "15. …. The point which we wish to emphasise, however, is that a party to a proceeding cannot as a matter of right come to this Court for revision of any order passed by the lower Court, but it is a matter of practice that such applications are entertained by this Court as a matter of expediency. But no party has any vested right either in procedure or in practice."

17. The First Schedule to Cr.P.C. deals with the Classification of Offences. Part-1 thereof deals with the offences under the Indian Penal Code, Part-II deals with classification of offences against other laws, which would include offences under laws such as FERA. The petitioners were being prosecuted under Section 56 of FERA, wherein the maximum punishment that could be awarded was up to seven years. The second entry of this Part- II laid down that such offences were triable by Magistrate of first Class, provided those offences were cognizable offences. As noted earlier, Section 62 of FERA made the offence under Section 56 non-cognizable. Besides, Section 61 (1) of FERA stated that 'it shall be lawful' for the Magistrate to pass the necessary sentence under Section 56. It does not state that the Magistrate alone is empowered to pass the necessary sentence, in which case the proceeding cannot be transferred from his Court. This provision is not like the one in the case of A.R. Antulay (supra) where under Section 7(1) of Criminal Law Amendment 1952 Act, the offence was 'triable by special judge only'. In the instant case it was merely lawful for the Magistrate to try the offences under Section 61, but the Court of Magistrate was not a court of exclusive jurisdiction as

in Antulay's case. The offence was a non-cognizable one, and therefore it was not mandatory that it ought to have been tried only by the Magistrate of the First Class. Thus the petitioner could not claim that the Magistrate had the special jurisdiction to try the offence, and that the State could not transfer the case to the Sessions Judge. In view of what is stated above, it cannot be said that the Magistrate's Court had an exclusive jurisdiction to try the cases relating to violations of the provisions of FERA, and those cases could not be transferred to the Special Judge. In the present case the accused were common, many of the witnesses would be common, and so also their evidence. The administrative power of the High Court in such a situation to effect transfer has been upheld in the case of Ranvir Yadav (supra), and there is no reason for this Court to take a different view in the facts of the present case.

18. The petitioner had relied upon the judgment of a Division Bench of Delhi High Court in the case of A.S. Impex Limited (supra), on the question of transfer of a proceeding. Mr. Malhotra pointed out that although the judgment in Ranvir Yadav (supra) was brought to the notice of the Division Bench in that matter, the Division Bench had erroneously held that the reliance thereon to be a 'misplaced' one, as can be seen from the sentence at the end of paragraph 12 of that judgment. This judgment has been distinguished and found to be not laying down a good law by another Division Bench of Delhi High Court in Mahender Singh v. High Court of Delhi and Anr. reported in 2009 (151) Company Cases 485 (Delhi). In that matter, the Court was concerned with transfer of prosecutions under Securities and Exchange Board Act, 1992 from the Magistrate's Court to Court of Sessions, and the High Court has held it to be valid and permissible. The Division Bench in Mahender Singh (supra) has in terms held that reliance on the judgment in A.R. Antulay (supra) to oppose such transfer was of no help, and rightly so. There is no difficulty in stating that A.S. Impex Limited (supra) does not lay down the correct proposition of law.

19. The High Court does have the power to transfer the cases and appeals under Section 407 of the Cr.P.C. which is essentially a judicial power. Section 407 (1) (c) of Cr.P.C. lays down that, where it will tend to the general convenience of the parties or witnesses, or where it was expedient for the ends of justice, the High Court could transfer such a case for trial to a Court of Sessions. That does not mean that the High Court cannot transfer cases by exercising its administrative power of superintendence which is available to it under Article 227 of the Constitution of India. While repelling the objection to the exercise of this power, this Court observed in paragraph 13 of Ranvir Yadav (supra) as follows:-

> "13. We are unable to share the above view of Mr. Jethmalani. So long as power can be and is exercised purely for administrative exigency without impinging upon and prejudicially affecting the rights or interests of the parties to any judicial proceeding we do not find any reason to hold that administrative powers must yield place to judicial powers simply because in a given circumstance they coexist……"

20. For the reasons stated above, there is no substance in the objections raised by the petitioners. The High Court has looked into Section 407 of Cr.P.C., referred to Articles 227 and 235 of the Constitution of India, and thereafter in its impugned judgment has observed as follows:-

> "Having perused Section 407 Cr.P.C. and Article 227 and 235, I have no hesitation to hold that this Court either in the administration side or in the judicial side has absolute jurisdiction to transfer any criminal cases pending before one competent Court to be heard and decided by another Court within the jurisdiction of this Court. This Court in its administrative power can issue direction that cases of particular nature shall be heard by particular court having jurisdiction."

In view of what is stated earlier, we have no reason to take a view different from the one taken by the High Court.

21. Both the Special Leave Petitions (Crl.) are, therefore, dismissed.

**MADAN B. LOKUR, J**

22. While I endorse the views of my learned Brother Gokhale, I have thought it appropriate to separately express my opinion in the matter.

23. The facts of the case have been succinctly brought out by my learned Brother and it is not necessary to repeat them.

Validity of the notification of transfer

24. The notification authorizing the Special Judge to dispose of cases under the Foreign Exchange Management Act, 1999 and thereby effectively transferring the petitioners' case pending before the Magistrate to the Special Judge is said to be unlawful since the transfer is to a court that has no jurisdiction to try the offence.

25. Part II of the First Schedule to the Code of Criminal Procedure, 1973 (for short the Code) provides that for an offence punishable with imprisonment for three years and upwards but not more than seven years, the case would be triable by a Magistrate of the first class. Section 56 of the Foreign Exchange Regulation Act, 1973 (for short the FERA) now repealed by the Foreign Exchange Management Act, 1999 provides, inter alia, that for a violation of its provisions, the maximum punishment would be imprisonment which may extend to seven years and with fine. Therefore, effectively transferring the petitioners' case to a Special Judge (of the rank of a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge) functioning under the Criminal Law Amendment Act, 1952 (for short the CLA Act) meant its trial by a court that lacked jurisdiction over the subject matter. In support of this contention, great reliance was placed on some passages in A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602.

26. The question in Antulay (to the extent relevant) was whether this Court could have transferred the case against Antulay from the Special Judge appointed under the Criminal Law Amendment Act, 1952 to the High Court. (See R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183). This Court answered the question in the negative and three principal reasons, relevant to the present case, were given for this conclusion.

27. Firstly, it was noted that Section 7 of the CLA Act gave exclusive jurisdiction to the Special Judge to try the offences under sub-section (1) of Section 6 of the CLA Act. Section 7 of CLA Act reads as follows:-

> "Cases triable by Special Judges:-
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), or in any other law the offences specified in sub-section (1) of Section 6 shall be triable by Special Judges only.
>
> (2) Every offence specified in sub-section (1) of Section 6 shall be tried by the Special Judge for the area within which it was committed, or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government.
>
> (3) When trying any case, a Special Judge may also try any offence other than an offence specified in Section 6 with which the accused may, under the Code of Criminal Procedure, 1898 (5 of 1898), be charged at the same trial."

28. This Court noted that since it is only the Special Judge who could try offences under Section 6 of CLA Act, the case against Antulay could not have been transferred to the High Court. It was noted that the trial by a Special Judge is a sine qua non for the trial of offences under Section 6 of CLA Act and even this Court could not pass an order not authorized by law.

29. Secondly, Section 7(1) of CLA Act provides for trial of the case by the Special Judge notwithstanding anything contained in the Code. Therefore, the statutory power available to this Court to transfer cases under Section 406 of the Code was statutorily taken away. Additionally, Section 406 of the Code only enabled this Court to transfer cases and appeals from one High Court to another High Court or from one criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court. Section 406 of the Code did not empower this Court to transfer a case from the Special Judge under the CLA Act to the High Court and even if it did, that power was taken away by the CLA Act. Section 406 of the Code reads as follows:-

> "406. Power of Supreme Court to transfer cases and appeals:-
>
> (1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.
>
> (2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a partly interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.
>
> (3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case."

30. The third reason related to the power of transfer available to this Court under Article 142 of the Constitution. In this context, reference was made to a Constitution Bench decision of this Court in Prem Chand Garg v. Excise Commissioner, 1963 Supp (1) SCR 885 wherein it was observed that:

> "The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."

31. Since the order of this Court transferring the case from the Special Judge to the High Court was contrary to the statutory law and (as held in a later part in Antulay) contrary to Article 14 and Article 19 of the Constitution, the order of transfer was liable to be set aside.

32. In this context, this Court also noted that the power to create or enlarge jurisdiction is legislative in character and no court, whether superior or inferior or both combined, could enlarge the jurisdiction of a court. On this basis, inter alia, this Court concluded that the transfer of Antulay's case from the Special Judge to the High Court was erroneous in law.

33. Antulay subsequently came up for consideration in Ranbir Yadav v. State of Bihar, (1995) 4 SCC 392. In paragraph 14 of the Report, it was noted that the express language of Section 7(1) of the CLA Act, took away the right of transfer of cases contained in the Code to any other court which was not a Special Court and that this was notwithstanding anything contained in Section 406 and Section 407 of the Code. This is what was said in this regard:

> "Coming now to A.R. Antulay case we find that the principles of law laid down in the majority judgment, to which Mr. Jethmalani drew our attention have no manner of application herein. There questions arose as to whether (i) the High Court could transfer a case triable according to Criminal Law Amendment Act, 1952 ("1952 Act" for short) by a Special Court constituted thereunder to another court, which was not a Special Court and (ii) the earlier order of the Supreme Court transferring the case pending before the Special Court to the High Court was valid and proper. In answering both the

> questions in the negative the learned Judges, expressing the majority view, observed that (i) Section 7(1) of the 1952 Act created a condition which was sine qua non for the trial of offences under Section 6(1) of the said Act. The condition was that notwithstanding anything contained in the Code of Criminal Procedure or any other law the said offence shall be triable by Special Judges only. By express terms therefore it took away the right of transfer of cases contained in the Code to any other court which was not a Special Court and this was notwithstanding anything contained in Sections 406 and 407 of the Code and (ii) the earlier order of the Supreme Court transferring the case to the High Court was not authorised by law, namely, Section 7(1) of the 1952 Act and the Supreme Court, by its direction, could not confer jurisdiction on the High Court of Bombay to try any case for which it did not possess such jurisdiction under the scheme of the 1952 Act."

34. In so far as the present case is concerned, it is apparent from a reading of Section 56 of the FERA as also Section 61 of the FERA that exclusive jurisdiction has not been conferred on the Magistrate to try cases relating to a violation of the provisions of the FERA. Absent jurisdictional exclusivity, the principle of law laid down in Antulay is not applicable and the Special Judge could have been conferred jurisdiction to try the case against the petitioners.

Right of appeal

35. It was contended that assuming that at law the case could validly have been transferred to the Special Judge, the petitioners are seriously prejudiced in as much as their right of appeal from the decision of a Magistrate to a Sessions Judge is taken away. Due to this prejudicial action, which was taken by the High Court without hearing the petitioners, the notification conferring power on the Special Judge to try the case should be struck down.

36. The right of appeal available to the petitioners in the present case is not taken away by transferring the case from the Magistrate to the Special Judge. The petitioners continue to have the right to appeal, but it is only the forum that has changed. They can now prefer an appeal from the order of the Special Judge to the High Court. Therefore, it is not as if the petitioners are denuded of any right to agitate their cause in a superior forum by the transfer of the case to the Special Judge.

37. It is now well settled that a litigant has neither a right to appeal to a particular forum nor to insist on a particular procedure being followed in his case. This was settled way back in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, 1953 SCR 118 wherein a Constitution Bench of this Court held:

> "A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except insofar as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

38. This dictum was followed in Union of India v. Sukumar Pyne, AIR 1966 SC 1206.

39. Similarly, In Maria Cristina De Souza Sodder v. Amria Zurana Pereira Pinto, (1979) 1 SCC 92 it was held somewhat more elaborately:

> "It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof…….. This position, has also been settled by the decisions of the Privy Council and this Court (vide Colonial Sugar Refining Company Ltd. v. Irving, [1905] AC 369 and Garikapatti Veeraya v. N. Subbiah Choudhury, 1957 SCR 488 but the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which has arisen under a repealed Act, will have to be lodged in a forum provided for by the repealing Act."

40. In T. Barai v. Henry Ah Hoe, (1983) 1 SCC 177 it was observed in paragraph 17 of the Report that a person accused of the commission of an offence has no right to trial by a particular procedure. This view was followed in M/s Rai Bahadur Seth Shreeram Durgaprasad v. Director of Enforcement, (1987) 3 SCC 27.

41. Therefore, it cannot be seriously urged that the petitioners were prejudiced by a change of the appellate forum.

Procedure for transfer:

42. Was the transfer of the case by the High Court at all permissible in law without following the procedure laid down in Section 407 of the Code?

43. A similar question came up for consideration in Ranbir Yadav and this Court noted the duality of power in the High Court. It was observed that the High Court has the judicial power of transfer of a case from one court to another under Section 407 of the Code. It also has the administrative power to transfer a case from one court to another under Article 227 of the Constitution.

44. In the context of Article 227 of the Constitution, this Court observed in paragraph 12 of Ranbir Yadav that the High Court has superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction and that in its plenary administrative power, the High Court could transfer a case from one court to another. It was further held thatso long as the power is exercised for administrative exigency, without impinging upon or prejudicially affecting the rights and interests of the parties to any judicial proceeding, there is no reason to hold that administrative powers must yield to judicial powers simply because in a given circumstance they coexist.

45. In the present case, the High Court could have exercised its judicial power of transfer under Section 407 of the Code (if called upon to do so) and it could also have exercised its administrative power of transfer under Article 227 of the Constitution, which it did, as is evident from the letter dated 6th May 2002 issued by the Registrar General of the High Court of Jharkhand to the Secretary to the Government, Law (Judl.) Department, Government of Jharkhand. The fact that for an administrative exigency, the High Court decided to exercise its plenary administrative power does not per se lead to the conclusion that the transfer of the case from the Magistrate to the Special Judge was unlawful. The legality of the action cannot be called in question in this case since no prejudice has been caused to the petitioners by such a transfer.

Right of revision

46. Is the petitioners' right of revision taken away if the case is transferred from the Magistrate to the Special Judge?

47. This question proceeds on the assumption that there is a right of revision. A Constitution Bench of this Court in Pranab Kumar Mitra v. State of West Bengal 1959(1) Suppl. SCR 63 set the "right" issue at rest several decades ago. It was held that the power to revise an order is a discretionary power which is to be

exercised in aid of justice and the exercise of that power will depend on the facts and circumstances of a given case. It was held:

> "The revisional powers of the High Court vested in it by Section 439 of the Code, read with Section 435, do not create any right in the litigant, but only conserve the power of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence, and that subordinate Criminal Courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code."

48. In Akalu Ahir v. Ramdeo Ram, (1973) 2 SCC 583 this Court once again adverted to the power of revision invested in a superior Court and described it as an "extraordinary discretionary power" to set right grave injustice. Clearly, therefore, it cannot be said that a litigant has a "right" to have an adverse order revised by a superior court. On the contrary, if there is any "right" to revise, it is invested in the superior court.

49. While the revisional power of a superior court actually enables it to correct a grave error, the existence of that power does not confer any corresponding right on a litigant. This is the reason why, in a given case, a superior court may decline to exercise its power of revision, if the facts and circumstances of the case do not warrant the exercise of its discretion. This is also the reason why it is felicitously stated that a revision is not a right but only a "procedural facility" available to a party. If the matter is looked at in this light, the transfer of a case from a Magistrate to a Special Judge does not take away this procedural facility available to the petitioners. It only changes the forum and as already held above, the petitioners have no right to choose the forum in which to file an appeal or move a petition for revising an interlocutory order.

50.. Reliance was placed by learned counsel for the petitioners on a Division Bench decision of the Delhi High Court in A.S. Impex Ltd. v. Delhi High Court, 107 (2003) DLT 734. This reliance is not only misplaced but, in my opinion, that decision should be overruled as not laying down the correct law.

51. In that case, the High Court administratively decided to transfer cases filed under Section 138 of the Negotiable Instruments Act, 1881 on or before 31st December 2001 and pending before the Magistrates to the Additional Sessions Judges. A notification for transfer of cases was accordingly issued and this was struck down by the Delhi High Court by, inter alia, relying on the law laid down in Antulay. As already noted above, the law laid down in Antulay has limited

application and is not relevant to cases such as the one we are dealing with. This was clearly explained in Ranbir Yadav but the Delhi High Court ignored the observations of this Court without much ado by holding: "In that case the Court transferred the case from the Court of one Magistrate to the Court of another Magistrate for the reason that there was shortage of accommodation in the first Court. That is not the case in hand. It was not a case where the jurisdiction was transferred from the Court of Magistrate to the Court of Sessions." The Delhi High Court also proceeded on an erroneous basis that the exercise of plenary administrative power available to the High Court to transfer cases meant the bypassing or circumventing of statutory provisions empowering Magistrates to try cases under Section 138 of the Negotiable Instruments Act, 1881 and conferring that jurisdiction on Additional Sessions Judges. The High Court did not correctly appreciate the power available to a High Court under Article 227 of the Constitution.

52. The error in A.S. Impex was correctly understood by the Division Bench of the Delhi High Court in Mahender Singh v. High Court of Delhi, (2009) 151 Comp Cas 485 (Delhi) and in N.G. Sheth v. C.B.I., 151 (2008) DLT 89. The Division Bench in both cases took a view different from that in A.S. Impex. However, both decisions having been rendered by Division Benches, A.S. Impex, could not be overruled. Therefore, I complete the formality and overrule A.S. Impex since it does not lay down the correct law in this regard.

53. For the reasons abovementioned, the Special Leave Petitions are dismissed.