REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 753-755 of 2009

State of Punjab …Appellant

Versus

Davinder Pal Singh Bhullar & Ors. etc. …Respondents

With

CRIMINAL APPEAL NO. 2258-2264 of 2011
(Arising out of SLP(Crl.) Nos. 6503-6509 of 2011)

Sumedh Singh Saini …Appellant

Versus

Davinder Pal Singh Bhullar & Ors …Respondents

J U D G M E N T

Dr. B.S. Chauhan, J.

1. Leave granted in the Special Leave Petitions filed by Shri Sumedh Singh Saini.

2. These appeals have been preferred against the orders dated 30.5.2007, 22.8.2007, 5.10.2007 and 4.7.2008 in Crl. Misc. No. 152-

MA of 2007; order dated 19.9.2007 in Crl. Misc. No. 86286 of 2007 in Crl. Misc. No. 152-MA of 2007; and orders dated 2.11.2007 and 6.11.2007 in Crl. Misc. No. 93535 of 2007 in Crl. Misc. No. 152-MA of 2007 passed by the High Court of Punjab and Haryana at Chandigarh. For the sake of convenience of disposal of the appeals, we would refer only to the criminal appeals filed by the State.

3. The Appeals herein raise peculiar substantial questions of law as to whether the High Court can pass an order on an application entertained after final disposal of the criminal appeal or even suo motu particularly, in view of the provisions of Section 362 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) and as to whether in exercise of its inherent jurisdiction under Section 482 Cr.P.C. the High Court can ask a particular investigating agency to investigate a case following a particular procedure through an exceptionally unusual method which is not in consonance with the statutory provisions of Cr.P.C.

4. **FACTS:**

(A) An FIR No.334/91 under Sections 302, 307, 323, 437 and 120-B of the Indian Penal Code, 1860 (hereinafter called the 'IPC') and

Sections 3 & 4 of Explosive Substances Act, 1908 was registered at Police Station, Sector 17, Chandigarh. In connection with an FIR dated 13.12.1991, one Balwant Singh Multani was arrested in a case in respect of the FIR No.440 registered under Sections 212 and 216 IPC, Sections 25/54/69 of Arms Act 1959, and Sections 3 & 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter called as 'TADA Act') at Police Station, Sector-17, Chandigarh. On 19.12.1991, the said accused Balwant Singh Multani escaped from the custody of the police from Police Station Qadian (Punjab) for which FIR No.112 dated 19.12.1991 under Sections 223 and 224 IPC was registered at Police Station Qadian (Punjab). Shri Darshan Singh Multani, father of Balwant Singh Multani filed Criminal Writ Petition No.1188 of 1991 before the High Court of Punjab & Haryana under Article 226 of the Constitution of India, 1950, (hereinafter called "Constitution"), for production of the said accused Balwant Singh Multani. The State Government filed a reply to the same, explaining that the said accused had escaped from police custody and after considering the case, the High Court dismissed the *Habeas Corpus* Petition. After completion of the investigation in respect of FIR No.112 of 1991 regarding the escape of Balwant Singh Multani, a challan was

filed before the competent court wherein he was declared a proclaimed offender vide order dated 12.5.1993. After completion of the investigation in FIR No.334 of 1991 dated 29.8.1991, the Police chargesheeted eight persons. The chargesheet revealed that an attempt was made by terrorists on the life of the then SSP, Chandigarh, by using explosives. In a thunderous explosion that followed, the Ambassador Car of the SSP, Chandigarh, was blown high into the air whereafter it fell down ahead at some distance completely shattered. HC Amin Chand, the driver of the car and ASI Lalu Ram, PSO, died on the spot. ASI Ramesh Lal, PSO, and CRPF jawans in the Escort vehicle were grievously injured. The bomb explosion was carried out by the terrorists from a parked car in order to kill the SSP, UT, Chandigarh, and other police personnel and this explosion was conducted with explosives operated with a remote control, because of which, two police personnel died on the spot and many others were grievously injured. Three of the accused, namely, Davinder Pal Singh Bhullar alias Master, Partap Singh Maan and Gursharan Kaur Maan were subjected to trial. The other co-accused namely, Navneet Singh, Manjit Singh, Manmohan Jit Singh, Gurjant Singh and Balwant Singh were not traceable. They were declared proclaimed offenders.

(B) On conclusion of the trial, the Court vide judgment and order dated 1.12.2006 acquitted the three accused giving them benefit of doubt.

(C) Aggrieved, the State (U.T., Chandigarh) preferred Criminal Miscellaneous No.152-MA of 2007 before the High Court challenging the said acquittal. However, the appeal was dismissed vide judgment and order dated 11.5.2007.

(D) After 20 days of the disposal of the said Crl. Misc. No.152-MA of 2007, i.e., appeal against acquittal, the High Court again took up the case *suo motu* on 30.5.2007 and directed the authorities to furnish full details of the proclaimed offenders in respect of the FIR No.334/91 dated 29.8.1991 and the Bench marked the matter "Part Heard".

(E) Shri Dinesh Bhatt, SSP, Chandigarh submitted an affidavit dated 4.8.2007, giving information regarding all the proclaimed offenders in that case. One of them was Davinder Pal Singh Bhullar, who had initially been declared as a proclaimed offender in the said case on 2.3.1993. However, he had subsequently been arrested in a case relating to FIR No.316 of 1993, Police Station, Parliament Street, Delhi and FIR No.150 of 1993, Police Station, Srinivas Puri, New Delhi and had been sentenced to death in a case in which an assassination

attempt was made on the life of Shri M.S. Bitta, the then President, All India Youth Congress, in which several persons were killed and Shri Bitta's legs were amputated. It was also mentioned therein that Balwant Singh Multani escaped from police custody and his whereabouts were not known. One proclaimed offender, Navneet Singh had been killed in a police encounter in Rajasthan on 26.2.1995.

(F) After considering the said affidavit filed by Shri Dinesh Bhatt, SSP, the High Court vide order dated 22.8.2007 directed the Chandigarh Administration to constitute a Special Investigation Team to enquire into all aspects of the proclaimed offenders and submit a status report. The High Court also issued notice to the Central Bureau of Investigation (hereinafter called the 'CBI').

(G) It was during the pendency of these proceedings that Shri Darshan Singh Multani, father of Balwant Singh Multani, whose *habeas corpus* writ petition had already been dismissed by the High Court in the year 1991, approached the Court by filing a miscellaneous application on 16.9.2007, for issuance of directions to find out the whereabout of his son Balwant Singh Multani.

(H) In response to the show cause notice dated 22.8.2007, the CBI submitted its reply on 3.10.2007 requesting the High Court not to

handover the enquiry to the CBI, as it was already overburdened with the investigation of cases referred to it by various courts; suffered from a shortage of manpower and resources; and the case did not have any inter-state ramifications.

(I) The High Court vide order dated 19.9.2007 took note of the fact that Manmohan Jit Singh, an employee of IBM, was reported by the US Department of Justice, Federal Bureau of Investigation, to be one of the proclaimed offenders. In view thereof, an affidavit was filed by Chandigarh Administration dated 5.10.2007 submitting that the proclaimed offender Manmohan Jit Singh had left for abroad.

(J) However, the High Court vide order dated 5.10.2007, directed the CBI to investigate the allegations of Darshan Singh Multani regarding his missing son and further directed the CBI not to disclose the identity of any of the witnesses to anyone except the High Court and to code the names of witnesses as witness A, B & C and further to submit periodical status reports. The order further reads:-

> *"However, Shri Sumedh Singh Saini, Director, Vigilance Bureau, Punjab, who at that time, i.e., on 11.2.1991 was posted as Senior Supdt. of Police was at helm of affairs of Chandigarh Police and was serving as the Sr. Supdt. of Police, UT. As of date, he is holding a very important post and is in a position to influence the investigating officer if it is*

handed over to the Punjab Police or even for that matter to the Chandigarh Police."

(K) In the same matter, the Bench entertained another Criminal Miscellaneous Application on 30.10.2007 filed by Davinder Pal Singh Bhullar, (a convict in another case and lodged in Tihar Jail) regarding allegations that his father Shri Balwant Singh Bhullar and maternal uncle Shri Manjit Singh had been abducted in the year 1991. The High Court vide order dated 6.11.2007 directed the CBI to investigate the allegations made in the complaint filed by Davinder Pal Singh Bhullar and further to get his statement recorded under Section 164 Cr.P.C., so that the witness may not resile under duress or be won over by any kind of inducement. An order was passed rejecting the submission made on behalf of the CBI that the alleged kidnapping of Shri Balwant Singh Bhullar and Shri Manjit Singh had no connection with the said case arising out of FIR No.334 dated 29.8.1991.

(L) The CBI after making a preliminary investigation/enquiry on the application, registered an FIR on 2.7.2008 under Sections 120-B, 364, 343, 330, 167 and 193 IPC against Shri S.S. Saini, the then SSP, UT, Chandigarh, Shri Baldev Singh Saini, the then DSP, UT, Chandigarh, Shri Harsahay Sharma, the then SI, P.S. Central,

Chandigarh, Shri Jagir Singh, the then SI, P.S. Central, Chandigarh and other unknown police officials of UT Police, Chandigarh, and P.S. Qadian. The CBI further submitted a status report on 4.7.2008 and after considering the same, the High Court issued further directions to complete the investigation within the stipulated period and submit a further report.

5. The State of Punjab, being aggrieved, approached this Court submitting that it has to espouse the cause of its officers who fought war against terrorism, putting themselves at risk during the troublesome period in the early 1990s. That Shri S.S. Saini, SSP, has been one of the most decorated officers of the State having outstanding entries in his Service Book. He is an honest and hardworking officer and has taken drastic steps to curb terrorism in the State in early 1990s. The terrorists had planned a diabolical act and an attempt was made on his life, wherein his three bodyguards were killed and three others were seriously injured. The officer himself suffered grievous injuries. The terrorists had also even chased him up to England when he went there for a social visit. They had planned to attack the said officer. They were arrested by the police and put to trial and also stood convicted. A sentence of four years had been imposed. These appeals have been

filed on various grounds, including: the judicial bias of the Judge presiding over the Bench by making specific allegations that the officer named in the order i.e. Shri S.S. Saini had conducted an enquiry against the Presiding Judge (hereinafter called "Mr. Justice X") on the direction of the Chief Justice of Punjab & Haryana High Court and, thus, the said Judge ought not to have proceeded with the matter, rather should have recused himself from the case. More so, as the judgment in appeal against acquittal had been passed by the Court on 11.5.2007 upholding the judgment of acquittal, the Court has become *functus officio* and it had no competence to reopen the case vide order dated 30.5.2007.

6. This Court vide order dated 11.7.2008 stayed the investigation until further orders.

7. Shri Ram Jethmalani, Shri Ravi Shankar Prasad and Shri Ranjit Kumar, learned senior counsel appearing for the appellants, have submitted that once the judgment in appeal against acquittal has been rendered by the High Court on 11.5.2007, in view of the complete embargo of the provisions of Section 362 Cr.P.C., the Court having become *functus officio* was not competent to reopen the case and, thus,

proceedings subsequent to 11.5.2007 are a nullity for want of competence/jurisdiction. More so, the proceedings that continued after the said judgment, by illegally reopening the case, were a result of judicial bias of Mr. Justice X, which was just to take revenge against Shri S.S. Saini, who had conducted an inquiry against Mr. Justice X and thus, all such proceedings are liable to be quashed. None of the parties had ever named Mr. S.S. Saini in connection with any of the cases. It was Mr. Justice X, who, on his personal knowledge, mentioned his name in court order dated 5.10.2007. Such a course is not permissible in law. More so, so far as Balwant Singh Multani's case is concerned, his father Darshan Singh Multani (at the relevant time an officer of Indian Administrative Service) had approached the High Court for the same relief and the case stood dismissed in the year 1991 and he had not taken up the matter any further. Thus, the proceedings attained finality. Application of Mr. Multani could not have been entertained after the expiry of 16 years. The same position existed in respect of the application filed by Davinder Pal Singh Bhullar (who had been convicted and awarded a death sentence in another case and the same stood confirmed by this Court) in respect of abduction of his father Balwant Singh Bhullar and uncle Manjit Singh in the year 1991 without

furnishing any explanation for delay of 16 years. More so, Mrs. Jagir Kaur, sister of Balwant Singh Bhullar, had filed Crl. W.P. No. 1062 of 1997 for production of Balwant Singh Bhullar, which stood dismissed vide order dated 15.7.1997 only on the ground of delay. A second writ petition for *habeas corpus* is not maintainable and is barred by the principles of *res judicata*. The CBI submitted that investigation of the said alleged abduction be not tagged with that of the involvement of the officer and disappearance of Balwant Singh Multani, as both the incidents were separate and independent and had no connection with each other. The High Court after taking note of the said submissions in its order dated 6.11.2007 illegally clubbed both the said applications. The applications filed by Davinder Pal Singh Bhullar and Darshan Singh Multani could not be filed/entertained in the disposed of criminal appeal. Had the said applications been filed independently, the same could be rejected as being filed at a much belated stage. Even otherwise, the said applications could have gone to a different Bench. Thus, by entertaining those applications in a disposed of criminal appeal, the Bench presided over by Mr. Justice X violated the roster fixed by the Chief Justice. Thus, the proceedings are liable to be quashed.

8. On the other hand, S/Shri K.N. Balgopal and Colin Gonsalves, learned senior counsel appearing for respondents – private parties and Shri P.K. Dey, learned counsel appearing for the CBI, have submitted that in order to do complete justice in the case, the High Court has exercised its power under Section 482 Cr.P.C., no interference is required by this Court on such technical grounds. The provisions of Section 362 Cr.P.C. are not to be construed in a rigid and technical manner as it would defeat the ends of justice. The two-fold aim of criminal justice is that "guilt shall not escape nor innocence suffer." Allegations made against the Presiding Judge are scandalous and false and do not require any consideration whatsoever. The name of Mr. S.S. Saini, SSP stood mentioned in the record of the case before the Bench. The chargesheet filed after investigation of allegations in the FIR dated 19.8.1991 and in the judgment of the Trial Court dated 1.12.2006 speak that the attack was made on him. It is wrong that his name has been added by the Presiding Judge in the Bench for his personal revenge on his personal knowledge. So far as names of two proclaimed offenders, who had been killed in an encounter are concerned, it has been mentioned in the chargesheet itself that Navneet Singh and Gurjant Singh, proclaimed offenders, had been killed in encounters. However,

such fact could not be brought to the notice of the High Court by the public prosecutor. The State of Punjab filed an application for intervention but did not raise any issue of bias or prejudice against the Presiding Judge of the Bench. The Union Territory of Chandigarh has approached this Court against the same impugned judgment and order and special leave petition has been dismissed *in limine*. More so, after conducting a preliminary enquiry, the CBI has registered a First Information Report (hereinafter called the "FIR") on 2.7.2008 which should not be quashed. The CBI be permitted to investigate the cases. Thus, the appeals are liable to be dismissed.

9. We have considered the rival submissions made by learned counsel for the parties and perused the record.

LEGAL ISSUES :

I. JUDICIAL BIAS

10. There may be a case where allegations may be made against a Judge of having bias/prejudice at any stage of the proceedings or after the proceedings are over. There may be some substance in it or it may be made for ulterior purpose or in a pending case to avoid the Bench if a party apprehends that judgment may be delivered against him.

Suspicion or bias disables an official from acting as an adjudicator. Further, if such allegation is made without any substance, it would be disastrous to the system as a whole, for the reason, that it casts doubt upon a Judge who has no personal interest in the outcome of the controversy.

11. In respect of judicial bias, the statement made by Frank J. of the United States is worth quoting:-

> *"If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial and no one will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions ……. Much harm is done by the myth that, merely by……. taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."*
>
> [In re: Linahan, 138 F. 2nd 650 (1943)]

(See also: **State of West Bengal & Ors. v. Shivananda Pathak & Ors.**, AIR 1998 SC 2050).

12. To recall the words of Mr. Justice Frankfurter in **Public Utilities Commission of the District of Columbia v. Franklin S. Pollak**, 343 US 451 (1952) 466: The Judicial process demands that a judge moves within the framework of relevant legal rules and the covenanted modes

of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that, on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.

13. In **Bhajan Lal, Chief Minister, Haryana v. M/s. Jindal Strips Ltd. & Ors.**, (1994) 6 SCC 19, this Court observed that there may be some consternation and apprehension in the mind of a party and undoubtedly, he has a right to have fair trial, as guaranteed by the Constitution. The apprehension of bias must be reasonable, i.e. which a reasonable person can entertain. Even in that case, he has no right to ask for a change of Bench, for the reason that such an apprehension may be inadequate and he cannot be permitted to have the Bench of his choice. The Court held as under:-

> *"Bias is the second limb of natural justice. Prima facie no one should be a judge in what is to be regarded as 'sua causa', whether or not he is named as a party. The decision-maker should have no interest by way of gain or detriment in the outcome of a proceeding. Interest may take many forms. It may be direct, it may be indirect, it may*

arise from a personal relationship or from a relationship with the subject-matter, from a close relationship or from a tenuous one."

14. The principle in these cases is derived from the legal maxim – ***nemo debet esse judex in causa propria sua.*** It applies only when the interest attributed is such as to render the case his own cause. This principle is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof, is treated as a violation of the principles of natural justice. (Vide: **Rameshwar Bhartia v. The State of Assam,** AIR 1952 SC 405; **Mineral Development Ltd. v. The State of Bihar & Anr.**, AIR 1960 SC 468**; Meenglas Tea Estate v. The Workmen**, AIR 1963 SC 1719; and **The Secretary to the Government, Transport Department, Madras v. Munuswamy Mudaliar & Ors.**, AIR 1988 SC 2232).

The failure to adhere to this principle creates an apprehension of bias on the part of the Judge. The question is not whether the Judge is actually biased or, in fact, has really not decided the matter impartially, but whether the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. (Vide: **A.U. Kureshi v. High Court of**

Gujarat & Anr., (2009) 11 SCC 84; and **Mohd. Yunus Khan v. State of U.P. & Ors.**, (2010) 10 SCC 539).

15. In **Manak Lal, Advocate v. Dr. Prem Chand Singhvi & Ors.**, AIR 1957 SC 425, this Court while dealing with the issue of bias held as under:

> *"Actual proof of prejudice in such cases may make the appellant's case stronger but such proof is not necessary…. What is relevant is the reasonableness of the apprehension in that regard in the mind of the appellant."*

16. The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether the adjudicator was likely to be disposed to decide the matter only in a particular way. Public policy requires that there should be no doubt about the purity of the adjudication process/administration of justice. The Court has to proceed observing the minimal requirements of natural justice, i.e., the Judge has to act fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality, is a nullity and the trial *"coram non judice"*. Therefore, the consequential order, if any, is liable to be quashed. (Vide: **Vassiliades v. Vassiliades**, AIR 1945 PC 38; **S.**

Parthasarathi v. State of Andhra Pradesh, AIR 1973 SC 2701; and **Ranjit Thakur v. Union of India & Ors.**, AIR 1987 SC 2386).

17. In **Rupa Ashok Hurra v. Ashok Hurra & Anr**., (2002) 4 SCC 388, this Court observed that public confidence in the judiciary is said to be the basic criterion of judging the justice delivery system. If any act or action, even if it is a passive one, erodes or is even likely to erode the ethics of judiciary, the matter needs a further look. In the event, there is any affectation of such an administration of justice either by way of infraction of natural justice or an order being passed wholly without jurisdiction or affectation of public confidence as regards the doctrine of integrity in the justice delivery system, technicality ought not to outweigh the course of justice — the same being the true effect of the doctrine of *ex debito justitiae*. It is enough if there is a ground of an appearance of bias.

While deciding the said case, this Court placed reliance upon the judgment of the House of Lords in **Ex Parte Pinochet Ugarte** (No.2) 1999 All ER, 577, in which the House of Lords on 25.11.1998, restored warrant of arrest of Senator Pinochet who was the Head of the State of Chile and was to stand trial in Spain for some alleged offences. It came to be known later that one of the Law Lords (Lord Hoffmann),

who heard the case, had links with Amnesty International (AI) which had become a party to the case. This was not disclosed by him at the time of the hearing of the case by the House. Pinochet Ugarte, on coming to know of that fact, sought reconsideration of the said judgment of the House of Lords on the ground of appearance of bias and not actual bias. On the principle of disqualification of a Judge to hear a matter on the ground of appearance of bias, it was pointed out:

> *"An appeal to the House of Lords will only be reopened where a party though no fault of its own, has been subjected to an unfair procedure. A decision of the House of Lords will not be varied or rescinded merely because it is subsequently thought to be wrong."*

18. In **Locabail (UK) Ltd. v. Bayfield Properties Ltd. & Anr.,** (2000) 1 All ER 65, the House of Lords considered the issue of disqualification of a Judge on the ground of bias and held that in applying the real danger or possibility of bias test, it is often appropriate to inquire whether the Judge knew of the matter in question. To that end, a reviewing court may receive a written statement from the Judge. A Judge must recuse himself from a case before any objection is made or if the circumstances give rise to automatic disqualification or he feels personally embarrassed in hearing the case. If, in any other case, the

Judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. Where objection is then made, it will be as wrong for the Judge to yield to a tenuous or frivolous objection as it will be to ignore an objection of substance. However, if there is real ground for doubt, that doubt must be resolved in favour of recusal. Where, following appropriate disclosure by the Judge, a party raises no objection to the Judge hearing or continuing to hear a case, that party cannot subsequently complain that the matter disclosed gives rise to a real danger of bias.

19. In **Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee**, (2011) 8 SCC 380, this Court has held that in India the courts have held that, to disqualify a person as a Judge, the test of real likelihood of bias, i.e., real danger is to be applied, considering whether a fair minded and informed person, apprised of all the facts, would have a serious apprehension of bias. In other words, the courts give effect to the maxim that *'justice must not only be done but be seen to be done'*, by examining not actual bias but real possibility of bias based on facts and materials.

The Court further held:

"The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undetected. He should not allow his personal prejudice to go into the decision-making. The object is not merely that the scales be held even; it is also that they may not appear to be inclined. If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially."

20. Thus, it is evident that the allegations of judicial bias are required to be scrutinised taking into consideration the factual matrix of the case in hand. The court must bear in mind that a mere ground of appearance of bias and not actual bias is enough to vitiate the judgment/order. Actual proof of prejudice in such a case may make the case of the party concerned stronger, but such a proof is not required. In fact, what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. However, once such an apprehension exists, the trial/judgment/order etc.

stands vitiated for want of impartiality. Such judgment/order is a nullity and the trial "*coram non-judice"*.

II. DOCTRINE OF WAIVER:

21. In **Manak Lal** (Supra), this Court held that alleged bias of a Judge/official/Tribunal does not render the proceedings invalid if it is shown that the objection in that regard and particularly against the presence of the said official in question, had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of its right to challenge the presence of such official. The Court further observed that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. "Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question."

Thus, in a given case if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an

unfavourable order, he adopted the device of raising the issue of bias. The issue of bias must be raised by the party at the earliest.

(See: **M/s. Pannalal Binjraj & Ors. v. Union of India & Ors**., AIR 1957 SC 397; and **Justice P.D. Dinakaran** (Supra))

22. In **M/s. Power Control Appliances & Ors. v. Sumeet Machines Pvt. Ltd.**, (1994) 2 SCC 448 this Court held as under:–

> *"Acquiescence is sitting by, when another is invading the rights…. It is a course of conduct inconsistent with the claim… It implies positive acts; not merely silence or inaction such as involved in laches. ..... The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant....."*

Inaction in every case does not lead to an inference of implied consent or acquiescence as has been held by this Court in **P. John Chandy & Co. (P) Ltd. v. John P. Thomas**, AIR 2002 SC 2057. Thus, the Court has to examine the facts and circumstances in an individual case.

23. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no

waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide: **Dawsons Bank Ltd. v. Nippon Menkwa Kabushihi Kaish**, AIR 1935 PC 79; **Basheshar Nath v. Commissioner of Income-tax, Delhi and Rajasthan & Anr.,** AIR 1959 SC 149; **Mademsetty Satyanarayana v. G. Yelloji Rao & Ors**., AIR 1965 SC 1405; **Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh,** AIR 1968 SC 933; **Jaswantsingh Mathurasingh & Anr. v. Ahmedabad Municipal Corporation & Ors.,** (1992) Suppl 1 SCC 5; **M/s. Sikkim Subba Associates v. State of Sikkim,** AIR 2001 SC 2062; and **Krishna Bahadur v. M/s. Purna Theatre & Ors**., AIR 2004 SC 4282).

24. This Court in **Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants' Association & Ors.**, AIR 1988 SC 233 considered the issue of waiver/acquiescence by the non-parties to the proceedings and held:

> *"In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must*

necessarily be determined on the facts of each case…….

There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights, by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition."

25. Thus, from the above, it is apparent that the issue of bias should be raised by the party at the earliest, if it is aware of it and knows its right to raise the issue at the earliest, otherwise it would be deemed to have been waived. However, it is to be kept in mind that acquiescence, being a principle of equity must be made applicable where a party knowing all the facts of bias etc., surrenders to the authority of the Court/Tribunal without raising any objection. Acquiescence, in fact, is sitting by, when another is invading the rights. The acquiescence must be such as to lead to the inference of a licence sufficient to create rights in other party. Needless to say that question of waiver/acquiescence would arise in a case provided the person apprehending the bias/prejudice is a party to the case. The question of waiver would not

arise against a person who is not a party to the case as such person has no opportunity to raise the issue of bias.

III. BAR TO REVIEW/ALTER- JUDGMENT

26. There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C. is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes *functus officio* and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes *functus officio* the moment the order for disposing of a case is signed. Such an order cannot be **altered** except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. (See: **Hari Singh Mann v. Harbhajan Singh Bajwa & Ors.**, AIR 2001 SC 43; and **Chhanni v. State of U.P.**, AIR 2006 SC 3051).

Moreover, the prohibition contained in Section 362 Cr.P.C. is absolute; after the judgment is signed, even the High Court in exercise of its inherent power under Section 482 Cr.P.C. has no authority or jurisdiction to alter/review the same. (See: **Moti Lal v. State of M.P.**, AIR 1994 SC 1544; **Hari Singh Mann** (supra)**;** and **State of Kerala v. M.M. Manikantan Nair**, AIR 2001 SC 2145).

27. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the *audi alteram partem* rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault. (Vide: **Chitawan & Ors. v. Mahboob Ilahi**, 1970 Crl.L.J. 378; **Deepak Thanwardas Balwani v. State of Maharashtra & Anr.,** 1985 Crl.L.J.

23; **Habu v. State of Rajasthan,** AIR 1987 Raj. 83 (F.B.); **Swarth Mahto & Anr. v. Dharmdeo Narain Singh,** AIR 1972 SC 1300; **Makkapati Nagaswara Sastri v. S.S. Satyanarayan**, AIR 1981 SC 1156; **Asit Kumar Kar v. State of West Bengal & Ors.**, (2009) 2 SCC 703; and **Vishnu Agarwal v. State of U.P. & Anr.,** AIR 2011 SC 1232).

28. This Court by virtue of Article 137 of the Constitution has been invested with an express power to review any judgment in Criminal Law and while no such power has been conferred on the High Court, inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code itself. (Vide: **State Represented by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran & Ors.,** AIR 2009 SC 46).

29. In **Smt. Sooraj Devi v. Pyare Lal & Anr.,** AIR 1981 SC 736, this Court held that the prohibition in Section 362 Cr.P.C. against the Court altering or reviewing its judgment, is subject to what is "otherwise provided by this Code or by any other law for the time being in force". Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to

alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 Cr.P.C. and, therefore, the attempt to invoke that power can be of no avail.

30. Thus, the law on the issue can be summarised to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes *functus officio*. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law.

IV. INHERENT POWERS UNDER SECTION 482 Cr.P.C.

31. The inherent power under Section 482 Cr.P.C. is intended to prevent the abuse of the process of the Court and to secure the ends of justice. Such power cannot be exercised to do something which is expressly barred under the Cr.P.C. If any consideration of the facts by way of review is not permissible under the Cr.P.C. and is expressly barred, it is not for the Court to exercise its inherent power to reconsider the matter and record a conflicting decision. **If there had been change in the circumstances of the case,** it would be in order for

the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there are no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under Section 362 Cr.P.C. (See: **Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee & Anr**, (1990) 2 SCC 437).

32. The inherent power of the court under Section 482 Cr.P.C. is saved only where an order has been passed by the criminal court which is required to be set aside to secure the ends of justice or where the proceeding pending before a court, amounts to abuse of the process of court. Therefore, such powers can be exercised by the High Court in relation to a matter pending before a criminal court or where a power is exercised by the court under the Cr.P.C. Inherent powers cannot be exercised assuming that the statute conferred an unfettered and arbitrary jurisdiction, nor can the High Court act at its whim or caprice. The statutory power has to be exercised sparingly with circumspection and in the rarest of rare cases. (Vide: **Kurukshetra University & Anr. v.**

State of Haryana & Anr., AIR 1977 SC 2229; and **State of W.B. & Ors. v. Sujit Kumar Rana**, (2004) 4 SCC 129).

33. The power under Section 482 Cr.P.C. cannot be resorted to if there is a specific provision in the Cr.P.C. for the redressal of the grievance of the aggrieved party or where alternative remedy is available. Such powers cannot be exercised as against the express bar of the law and engrafted in any other provision of the Cr.P.C. Such powers can be exercised to secure the ends of justice and to prevent the abuse of the process of court. However, such expressions do not confer unlimited/unfettered jurisdiction on the High Court as the "ends of justice" and "abuse of the process of the court" have to be dealt with in accordance with law including the procedural law and not otherwise. Such powers can be exercised *ex debito justitiae* to do real and substantial justice as the courts have been conferred such inherent jurisdiction, in absence of any express provision, as inherent in their constitution, or such powers as are necessary to do the right and to undo a wrong in course of administration of justice as provided in the legal maxim "*quando lex aliquid alique, concedit, conceditur et id sine quo res ipsa esse non potest*". However, the High Court has not been given nor does it possess any inherent power to make **any order**, which in the

opinion of the court, could be in the interest of justice as the statutory provision is not intended to by-pass the procedure prescribed. (Vide: **Lalit Mohan Mondal & Ors. v. Benoyendra Nath Chatterjee,** AIR 1982 SC 785; **Rameshchandra Nandlal Parikh v. State of Gujarat & Anr.,** AIR 2006 SC 915; **Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS & Anr.,** AIR 2006 SC 2872; **Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors.,** AIR 2008 SC 251; and **Pankaj Kumar v. State of Maharashtra & Ors.,** AIR 2008 SC 3077).

34. The High Court can always issue appropriate direction in exercise of its power under Article 226 of the Constitution at the behest of an aggrieved person, if the court is convinced that the power of investigation has been exercised by an Investigating Officer malafide or the matter is not investigated at all. Even in such a case, the High Court cannot direct the police as to how the investigation is to be conducted but can insist only for the observance of process as provided for in the Cr.P.C. Another remedy available to such an aggrieved person may be to file a complaint under Section 200 Cr.P.C. and the court concerned will proceed as provided in Chapter XV of the Cr.P.C. (See: **Gangadhar Janardan Mhatre v. State of Maharashtra & Ors.,**

(2004) 7 SCC 768; and **Divine Retreat Centre v. State of Kerala & Ors**., AIR 2008 SC 1614).

35. The provisions of Section 482 Cr.P.C. closely resemble Section 151 of Code of Civil Procedure, 1908, (hereinafter called the `CPC'), and, therefore, the restrictions which are there to use the inherent powers under Section 151 CPC are applicable in exercise of powers under Section 482 Cr.P.C. and one such restriction is that there exists no other provision of law by which the party aggrieved could have sought relief. (Vide: **The Janata Dal v. H.S. Chowdhary & Ors.,** AIR 1993 SC 892).

36. In **Divisional Forest Officer & Anr. v. G.V. Sudhakar Rao & Ors.,** AIR 1986 SC 328, this Court held that High Court was not competent under Section 482 Cr.P.C. to stay the operation of an order of confiscation under Section 44(IIA) of the Andhra Pradesh Forest Act as it is distinct from a trial before a court for the commission of an offence.

37. In **Popular Muthiah v. State** represented by Inspector of Police, (2006) 7 SCC 296, explaining the scope of Section 482 Cr.P.C., this Court held :

> *"The High Court cannot issue directions to investigate the **case from a particular angle** or by a particular agency."* (Emphasis added)

Thus, in case, the High Court in exercise of its inherent powers, issues directions contravening the statutory provisions laying down the procedure of investigation, it would be unwarranted in law.

38. In **Rajan Kumar Machananda v. State of Karnataka**, 1990 (supp.) SCC 132, this Court examined a case as to whether the bar under Section 397(3) Cr.P.C. can be circumvented by invoking inherent jurisdiction under Section 482 Cr.P.C. by the High Court. The Court came to the conclusion that if such a course was permissible it would be possible that every application facing the bar of Section 397(3) Cr.P.C. would be labelled as one under Section 482 Cr.P.C. Thus, the statutory bar cannot be circumvented.

39. This Court has consistently emphasised that judges must enforce laws whatever they may be and decide the cases strictly in accordance with the law. "The laws are not always just and the lights are not always luminous. Nor, again, are judicial methods always adequate to secure justice". But the courts "are bound by the Penal Code and Criminal Procedure Code" by the very 'oath' of the office.

(See: **Joseph Peter v. State of Goa, Daman and Diu,** AIR 1977 SC 1812).

40. It is evident from the above that inherent powers can be exercised only to prevent the abuse of the process of the court and to secure the ends of justice. However, powers can be used provided there is no prohibition for passing such an order under the provisions of Cr.P.C. and there is no provision under which the party can seek redressal of its grievance. Under the garb of exercising inherent powers, the Criminal Court cannot review its judgment. Such powers are analogous to the provisions of Section 151 CPC and can be exercised only to do real and substantial justice. The rule of inherent powers has its source in the maxim *"Quadolex aliquid alicui concedit, concedere videtur id sine quo ipsa, ess uon potest"* which means that when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist. The order cannot be passed by-passing the procedure prescribed by law. The court in exercise of its power under Section 482 Cr.P.C. cannot direct a particular agency to investigate the matter or to investigate a case from a particular angle or by a procedure not prescribed in Cr.P.C. Such powers should be exercised very sparingly to prevent abuse of process of any court.

Courts must be careful to see that its decision in exercise of this power is based on sound principles.

To inhere means that it forms a necessary part and belongs as an attribute in the nature of things. The High Court under Section 482 Cr.P.C. is crowned with a statutory power to exercise control over the administration of justice in criminal proceedings within its territorial jurisdiction. This is to ensure that proceedings undertaken under the Cr.P.C. are executed to secure the ends of justice. For this, the Legislature has empowered the High Court with an inherent authority which is repository under the Statute. The Legislature therefore clearly intended the existence of such power in the High Court to control proceedings initiated under the Cr.P.C. Conferment of such inherent power might be necessary to prevent the miscarriage of justice and to prevent any form of injustice. However, it is to be understood that it is neither divine nor limitless. It is not to generate unnecessary indulgence. The power is to protect the system of justice from being polluted during the administration of justice under the Code. The High Court can intervene where it finds the abuse of the process of any court which means, that wherever an attempt to secure something by abusing the process is located, the same can be rectified by invoking such

power. There has to be a nexus and a direct co-relation to any existing proceeding, not foreclosed by any other form under the Code, to the subject matter for which such power is to be exercised.

Application under Section 482 Cr.P.C. lies before the High Court against an order passed by the court subordinate to it in a pending case/proceedings. Generally, such powers are used for quashing criminal proceedings in appropriate cases. Such an application does not lie to initiate criminal proceedings or set the criminal law in motion. Inherent jurisdiction can be exercised if the order of the Subordinate Court results in the abuse of the "process" of the court and/or calls for interference to secure the ends of justice. The use of word 'process' implies that the proceedings are pending before the Subordinate Court. When reference is made to the phrase "to secure the ends of justice", it is in fact in relation to the order passed by the Subordinate Court and it cannot be understood in a general connotation of the phrase. More so, while entertaining such application the proceedings should be pending in the Subordinate Court. In case it attained finality, the inherent powers cannot be exercised. Party aggrieved may approach the appellate/revisional forum. Inherent jurisdiction can be exercised if injustice done to a party, e.g., a clear mandatory provision of law is

overlooked or where different accused in the same case are being treated differently by the Subordinate Court.

An inherent power is not an omnibus for opening a pandorabox, that too for issues that are foreign to the main context. The invoking of the power has to be for a purpose that is connected to a proceeding and not for sprouting an altogether new issue. A power cannot exceed its own authority beyond its own creation. It is not that a person is remediless. On the contrary, the constitutional remedy of writs are available. Here, the High Court enjoys wide powers of prerogative writs as compared to that under Section 482 Cr.P.C. To secure the corpus of an individual, remedy by way of *habeas corpus* is available. For that the High Court should not resort to inherent powers under Section 482 Cr.P.C. as the Legislature has conferred separate powers for the same. Needless to mention that Section 97 Cr.P.C. empowers Magistrates to order the search of a person wrongfully confined. It is something different that the same court exercising authority can, in relation to the same subject matter, invoke its writ jurisdiction as well. Nevertheless, the inherent powers are not to provide universal remedies. The power cannot be and should not be used to belittle its own existence. One cannot concede anarchy to an inherent power for that

was never the wisdom of the Legislature. To confer un-briddled inherent power would itself be trenching upon the authority of the Legislature.

V. JURISDICTION OF THE BENCH :

41. The court is "not to yield to spasmodic sentiments to vague and unregulated benevolence". The court "is to exercise discretion informed by tradition, methodized by analogy, disciplined by system". This Court in **State of Rajasthan v. Prakash Chand & Ors.**, AIR 1998 SC 1344 observed as under:

> *"Judicial authoritarianism is what the proceedings in the instant case smack of. It cannot be permitted under any guise. Judges must be circumspect and self-disciplined in the discharge of their judicial functions……It needs no emphasis to say that all actions of a Judge must be judicious in character. Erosion of credibility of the judiciary, in the public mind, for whatever reasons, is the greatest threat to the independence of the judiciary. Eternal vigilance by the Judges to guard against any such latent internal danger is, therefore, necessary, lest we "suffer from self-inflicted mortal wounds". We must remember that the Constitution does not give unlimited powers to anyone including the Judge of all levels. The societal perception of Judges as being detached and impartial referees is the greatest strength of the judiciary and every member of the judiciary must ensure that this perception does not receive a setback consciously or*

unconsciously. Authenticity of the judicial process rests on public confidence and public confidence rests on legitimacy of judicial process. Sources of legitimacy are in the impersonal application by the Judge of recognised objective principles which owe their existence to a system as distinguished from subjective moods, predilections, emotions and prejudices. It is most unfortunate that the order under appeal founders on this touchstone and is wholly unsustainable".

42. This Court in **State of U.P. & Ors. v. Neeraj Chaubey & Ors.**, (2010) 10 SCC 320, had taken note of various judgments of this Court including **State of Maharashtra v. Narayan Shamrao Puranik**, AIR 1982 SC 1198; **Inder Mani v. Matheshwari Prasad**, (1996) 6 SCC 587; **Prakash Chand (Supra); R. Rathinam v. State**, (2002) 2 SCC 391; and **Jasbir Singh v. State of Punjab**, (2006) 8 SCC 294, and came to the conclusion that the Chief Justice is the master of roster. The Chief Justice has full power, authority and jurisdiction in the matter of allocation of business of the High Court which flows not only from the provisions contained in sub-section (3) of Section 51 of the States Reorganisation Act, 1956, but inheres in him in the very nature of things. The Chief Justice enjoys a special status and he alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or Full Bench. He has jurisdiction to decide which case will be heard by which Bench. The Court held that a Judge or a Bench of

Judges can assume jurisdiction in a case pending in the High Court only if the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from this procedure is permissible.

In **Prakash Chand** (Supra), this Court dealt with a case wherein the Chief Justice of Rajasthan High Court had withdrawn a part-heard matter from one Bench and directed it to be listed before another Bench. However, the earlier Bench still made certain observations. While dealing with the issue, this Court held that it was the exclusive prerogative of the Chief Justice to withdraw even a part-heard matter from one Bench and to assign it to any other Bench. Therefore, the observations made by the Bench subsequent to withdrawal of the case from that Bench and disposal of the same by another Bench were not only unjustified and unwarranted but also **without jurisdiction** and made the Judge coram *non-judice*.

It is a settled legal proposition that no Judge or a Bench of Judges assumes jurisdiction unless the case is allotted to him or them under the orders of the Chief Justice.

It has rightly been pointed out by the Full Bench of Allahabad High Court in **Sanjay Kumar Srivastava v. Acting Chief Justice**, 1996 AWC 644, that if the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they would like to hear and decide, the machinery of the court could have collapsed and judicial functioning of the court could have ceased by generation of internal strife on account of hankering for a particular jurisdiction or a particular case.

43. In view of the above, the legal regime, in this respect emerges to the effect that the Bench gets jurisdiction from the assignment made by the Chief Justice and the Judge cannot choose as which matter he should entertain and he cannot entertain a petition in respect of which jurisdiction has not been assigned to him by the Chief Justice as the order passed by the court may be without jurisdiction and made the Judge *coram non-judice.*

VI. <u>WHEN CBI ENQUIRY CAN BE DIRECTED:</u>

44. In **Secretary, Minor Irrigation and Rural Engineering Services, U.P. & Ors. v. Sahngoo Ram Arya & Anr.,** AIR 2002 SC

2225, this Court placed reliance on its earlier judgment in **Common Cause, A Registered Society v. Union of India & Ors,** (1999) 6 SCC 667 and held that before directing CBI to investigate, the court must reach a conclusion on the basis of pleadings and material on record that a prima facie case is made out against the accused. The court cannot direct CBI to investigate as to whether a person committed an offence as alleged or not. The court cannot merely proceed on the basis of `ifs' and `buts' and think it appropriate that inquiry should be made by the CBI.

45. In **Divine Retreat Centre** (Supra), this Court held that the High Court could have passed a judicial order directing investigation against a person and his activities only after giving him an opportunity of being heard. It is not permissible for the court to set the criminal law in motion on the basis of allegations made against a person in violation of principles of natural justice. A person against whom an inquiry is directed must have a reasonable opportunity of being heard as he is likely to be adversely affected by such order and, particularly, when such an order results in drastic consequence of affecting his reputation.

46. In **D. Venkatasubramaniam & Ors. v. M.K.Mohan Krishnamachari & Anr.,** (2009) 10 SCC 488, this Court held that an order passed behind the back of a party is a nullity and liable to be set aside only on this score. Therefore, a person against whom an order is passed on the basis of a criminal petition filed against him, he should be impleaded as a respondent being a necessary party.

47. This Court in **Disha v. State of Gujarat & Ors.,** AIR 2011 SC 3168, after considering the various judgments of this Court, particularly, in **Vineet Narain & Ors. v. Union of India & Anr.**, AIR 1996 SC 3386; **Union of India v. Sushil Kumar Modi**, (1998) 8 SCC 661; **Rajiv Ranjan Singh 'Lalan' (VIII) v. Union of India**, (2006) 6 SCC 613; **Rubabbuddin Sheikh v. State of Gujarat & Ors.,** AIR 2010 SC 3175; and **Ashok Kumar Todi v. Kishwar Jahan & Ors.**, (2011) 3 SCC 758; held that the court can transfer the matter to the CBI or any other special agency only when it is satisfied that the accused is a very powerful and influential person or the State Authorities like high police officials are involved in the offence and the investigation has not been proceeded with in proper direction or the investigation had been conducted in a biased manner. In such a case, in

order to do complete justice and having belief that it would lend credibility to the final outcome of the investigation, such directions may be issued.

48. Thus, in view of the above, it is evident that a constitutional court can direct the CBI to investigate into the case provided the court after examining the allegations in the complaint reaches a conclusion that the complainant could make out prima facie, a case against the accused. However, the person against whom the investigation is sought, is to be impleaded as a party and must be given a reasonable opportunity of being heard. CBI cannot be directed to have a roving inquiry as to whether a person was involved in the alleged unlawful activities. The court can direct CBI investigation only in exceptional circumstances where the court is of the view that the accusation is against a person who by virtue of his post could influence the investigation and it may prejudice the cause of the complainant, and it is necessary so to do in order to do complete justice and make the investigation credible.

INSTANT CASES :

49. The present appeals are required to be decided in the light of the aforesaid settled legal propositions.

50. It is evident from the judgment and order dated 11.5.2007 that Criminal Misc. No.152-MA of 2007 stood dismissed. The order sheet dated 30.5.2007 reveals that in spite of the disposal of the said criminal appeal it had been marked therein as "put up for further hearing" and the order dated 30.5.2007 reveals the directions given to the Trial Court to furnish a detailed report as to the measures taken by it to bring the proclaimed offenders, namely Navneet Singh, Manjit Singh, Manmohan Singh, Gurjant Singh and Balwant Singh before the Court and the case was adjourned for 2nd July, 2007.

51. Two different orders are available on the record of this case. The aforesaid marking "put up for further hearing" had been shown in the order sheet dated 11.5.2007, i.e., the date of disposal of criminal appeal against acquittal. While in another copy, it is not in the order sheet dated 11.5.2007 but on the order sheet dated 30.5.2007. In view of this confusion, this Court vide order dated 17.3.2011 has called for the original record. It appears from the original record that no such order had been passed on 11.5.2007. More so, there is nothing on record to show as under what circumstances the file was put up before the Court

on 30.5.2007 as no order had ever been passed by the court in this regard.

The proceedings dated 10.7.2007, 25.7.2007, 31.7.2007, 6.8.2007 and 9.8.2007 show that the case has been adjourned for short dates. The order dated 5.9.2007 shows that the Bench headed by Mr. Justice X was furnished with full information regarding proclaimed offenders by the authorities. However, the case was adjourned for 19.9.2007. The order dated 19.9.2007 reveals that the Bench not only entertained the application filed by Darshan Singh Multani, IAS (Retd.), but also expressed its anguish that nothing could be done since the year 1993 by the Chandigarh Police to procure the presence of the proclaimed offenders. The Police by filing the replies had adopted the delaying tactics only to derail the process of the court without bringing the proclaimed offenders to justice. The application filed by the U.T., Chandigarh to file a reply to the application filed by Darshan Singh Multani was rejected. The CBI was further directed to investigate the case properly, as no worthwhile steps were being taken by the Chandigarh Police.

The order dated 5.10.2007 passed by the Bench shows that the CBI had been impleaded as respondent in the petition suo motu by the court. The CBI submitted its reply to the Crl.Misc. Application No. 86287 of 2007 opposing the said application and further submitted that the matter be not entrusted to the CBI and petition be dismissed being devoid of any merit.

The order dated 6.11.2007 reveals that the Court enlarged the scope of investigation by the CBI by including investigations qua Balwant Singh Bhullar and Manjit Singh.

Relevant part of the order dated 4.7.2008 reads as under:

> *"After going through the status report, it comes out that the encounter of Navneet Singh son of late Tirath Singh of Qadian was a genuine encounter with the Rajasthan police. We feel that there is no need to further investigate the matter in the case of Navneet Singh son of late Tirath Singh. In the case of Manjit Singh son of late Rattan Singh, no evidence is coming forth and the CBI is at liberty to drop the investigation of Manjit Singh son of late Rattan Singh, if it so desires."*

Thus, it is clear that the Bench was aware of the fact that two proclaimed offenders had been killed in encounters. Thus, the CBI was given liberty not to further investigate the matter in case of Navneet Singh and Manjit Singh, if it so desired.

52. The record reveals that Davinder Pal Singh Bhullar was involved in M.S. Bitta's assassination attempt and had absconded to Germany on a fake passport. He was arrested there and was extradited to India and arrested on 18.1.1995. He was tried for the said offence, convicted in the year 2001 and given the death sentence. It was confirmed by the High Court as well as by this Court and the review petition also stood rejected in January 2003. Ever since 2003, he remained silent regarding the investigation of the alleged disappearances of his father and uncle and suddenly woke up in the year 2007 when the Bench presided by Mr. Justice X started suo motu hearing various other matters after the disposal of the criminal appeal against acquittal. The Court was fully aware that another relative of Bhullar i.e. his father's sister had filed a case before the High Court in the year 1997, for production of Balwant Singh Bhullar, the father of Davinder Pal Singh Bhullar above and not for his uncle Manjit Singh. The High Court had rejected the said petition vide order dated 15.7.1997 and the matter was not agitated further. Thus, it attained finality.

53. The application of the Punjab Government dated 19.5.2008 bearing Crl. Misc. No. 23084 of 2008 to get itself impleaded in the matter is still pending consideration, though order dated 23.5.2008 gives a different impression altogether.

54. Admittedly, the application for Leave to Appeal stood disposed of vide judgment and order dated 11.5.2007. The matter suddenly appeared before the Bench on 30.5.2007 and the Court directed the Police to furnish information regarding the proclaimed offenders and a detailed report as to the measures taken to procure the presence of the said proclaimed offenders, namely, Navneet Singh, Manjit Singh, Manmohan Singh, Gurjant Singh and Balwant Singh so that they may face trial. However, after hearing the matter on few dates, the Court vide order dated 5.10.2007 closed the chapter of proclaimed offenders observing as under:

> *"Since the police of U.T. Chandigarh has now woken up, that the proclaimed offenders have to be brought to justice and are making efforts to procure their presence, we feel that there is no need for the Special Investigation Team (S.I.T.) The Inspector General of Police, Union Territory, Chandigarh had been directed by this Court vide order dated 5.9.2007 to set up a Special Investigation Team (S.I.T.) for this purpose. At this stage, now, there is no need for this Special Investigation Team.* ***The Inspector General of Police, UT, Chandigarh is***

directed to disband the Special Investigation Team *and proceed as per law in the normal course to procure the presence of the proclaimed offenders, who are allegedly in foreign countries."* (Emphasis added)

Therefore, it is evident that the court was very much anxious to know about the proclaimed offenders, however, after getting certain information, the Court stopped monitoring the progress in procuring the presence of any of those proclaimed offenders. By this time, the Court also came to know that applicant Darshan Singh Multani's son had also been killed. Therefore, the chapter regarding the proclaimed offenders was closed. There was no occasion for the Court to proceed further with the matter and entertain the applications under Section 482 Cr.P.C., filed by Darshan Singh Multani and Davinder Pal Singh Bhullar. At this stage, the Court started probing regarding **missing persons**. The question does arise as to whether applications under Section 482 Cr.P.C. could be entertained in a disposed of appeal or could be heard by a Bench to which the roster has not been assigned by Hon'ble the Chief Justice.

In view of the law referred to hereinabove, the Bench was not competent to entertain the said applications and even if the same had been filed in the disposed of appeal, the court could have directed to

place the said applications before the Bench dealing with similar petitions.

55. It is evident from the order dated 30.5.2007 that in spite of the fact that the appeal stood disposed of vide judgment and order dated 11.5.2007, there appears an order in the file: "put up for further hearing". That means the matter is to be heard by the same Bench consisting of Judges 'X' and 'A'. However, the matter was listed before another Bench on 2.7.2007 and the said Bench directed to list the matter before DB-IV after taking the appropriate order from the Chief Justice. In absence of the Chief Justice, the senior most Judge passed the order on 5.7.2007 to list the matter before the DB-IV. The matter remained with the Presiding Judge, though the other Judge changed most of the time, as is evident from the subsequent order sheets. Order sheet dated 30.5.2007 reveals that it was directed to put up the case for further hearing. Thus, it should have been heard by the Bench as it was on 30.5.2007.

56. In the counter affidavit filed by Davinder Pal Singh Bhullar, respondent no.1 before this Court, it has been stated as under:

> *"W,X, Y&Z That in reply to these grounds, it is submitted that the answering respondent being*

behind the bars awaiting his death sentence moved an application through his counsel in the Hon'ble High Court, when he came to know from the news item published in the news paper regarding marking of CBI enquiry in the case of abduction of Balwant Singh Multani an Engineer, son of Mr. Darshan Singh Multani a retired IAS Officer, who was then a serving officer. ***When the answering respondent found that Mr. Sumedh Singh Saini has now been taken to task by the Hon'ble Division Bench of Punjab and Haryana High Court, the answering respondent also moved the Hon'ble High Court for seeking enquiry regarding the abduction and murder of his father and his maternal uncle who were abducted by the lawless police officials headed by Mr. Sumedh Singh Saini the then SSP of Chandigarh and the Hon'ble Bench extended the scope of the enquiry vide order dated 6.11.2007.*** *So the delay is not worthy to be taken note of as the past record of the Mr. Sumedh Singh Saini which has been mentioned in preliminary submissions clearly shows that he was able to threaten and overawe an Hon'ble Punjab and Haryana High Court Judge in year 1995 and even though he has been charged by a court for abduction for murder of three individuals in year 1995, but the trial of the case is still pending in the year 2008.* ***So throughout this period the manner in which Mr. Sumedh Singh Saini has been able to subvert judicial processes did not allow the respondent to move a court of law and now when an Hon'ble Division Bench has shown courage to uphold the majesty of law, that the respondent also gathered his courage to move the Hon'ble High Court****, with the hope that at some time justice would prevail."*

(Emphasis added)

57. So far as the issue in respect of the proclaimed complainants/offenders is concerned, the document was before the High Court to show that a letter had been sent by the U.S Department of Justice Federal Wing of Investigation to the CBI disclosing that Manmohan Jit Singh had died on December 2006. Thus, information in respect of one of the proclaimed offenders was with the court. The judgment of the Trial Court was before the High Court under challenge. Thus, the High Court could have taken note of the proclaimed offender and there was no new material that came before the High Court on the basis of which proceedings could be revived. The chargesheet in the Trial Court itself revealed that two persons had died. It appears that the State counsel also failed to bring these facts to the notice of the court.

58. The impugned order dated 5.10.2007 though gives an impression that the High Court was trying to procure the presence of the proclaimed offenders but, in fact, it was to target the police officers, who had conducted the inquiry against Mr. Justice X. The order reads that particular persons were eliminated in a false encounter by the police and it was to be ascertained as to who were the police officers responsible for it, so that they could be brought to justice.

59. There could be no justification for the Bench concerned to entertain applications filed under Section 482 Cr.P.C. as miscellaneous applications in a disposed of appeal. The law requires that the Bench could have passed an appropriate order to place those applications before the Bench hearing 482 Cr.P.C. petitions or place the matters before the Chief Justice for appropriate orders.

60. As the High Court after rejecting the applications for leave to appeal had passed several orders to procure the presence of the proclaimed offenders so that they could be brought to justice, neither the State of Punjab nor Mr. S.S. Saini could be held to be the persons aggrieved by such orders and therefore, there could be no question of raising any protest on their behalf for passing such orders even after disposal of the application for leave to appeal as such orders were rather in their favour. The appellants became aggrieved only and only when the High Court entertained the applications filed under Section 482 Cr.P.C. for tracing out the whereabouts of certain persons allegedly missing for the past 20 years. Such orders did not have any connection with the incident in respect of which the application for leave to appeal had been entertained and rejected. An application for leave to appeal that has been dismissed against an order of acquittal cannot provide a

platform for an investigation in a subject matter that is alien and not directly concerned with the subject matter of appeal.

Mr. K.N. Balgopal, learned Senior counsel appearing for the respondents has submitted that the issue of bias must be agitated by a party concerned at the earliest and it is not permissible to raise it at such a belated stage. The legal proposition in this regard is clear that if a person has an opportunity to raise objections and fails to do so, it would amount to waiver on his part. However, such person can raise objections only if he is impleaded as a party-respondent in the case and has an opportunity to raise an objection on the ground of bias. In the instant case, neither the State of Punjab nor Mr. S.S. Saini have been impleaded as respondents. Thus, the question of waiver on the ground of bias by either of them does not arise.

61. Undoubtedly, in respect of such missing persons earlier *habeas corpus* petitions had been filed by the persons concerned in 1991 and 1997 which had been dealt with by the courts in accordance with law. The writ petition for *habeas corpus* filed by Mrs. Jagir Kaur in respect of Balwant Singh Bhullar had been dismissed in 1997 only on the ground of delay. We fail to understand how a fresh petition in respect

of the same subject matter could be entertained after 10 years of dismissal of the said writ petition.

62. A second writ petition for issuing a writ of *habeas corpus* is barred by principles of *res judicata*. The doctrine of *res judicata* may not apply in case a writ petition under Article 32 of the Constitution is filed before this Court after disposal of a *habeas corpus* writ petition under Article 226 of the Constitution by the High Court. However, it is not possible to re-approach the High Court for the same relief by filing a fresh writ petition for the reason that it would be difficult for the High Court to set aside the order made by another Bench of the same court. In case, a petition by issuing Writ of *Habeas Corpus* is dismissed by the High Court and Special Leave Petition against the same is also dismissed, a petition under Article 32 of the Constitution, seeking the same relief would not be maintainable.

(See: **Ghulam Sarwar v. Union of India & Ors.**, AIR 1967 SC 1335; **Nazul Ali Molla, etc. v. State of West Bengal**, 1969 (3) SCC 698; **Niranjan Singh v. State of Madhya Pradesh,** AIR 1972 SC 2215; **Har Swarup v. The General Manager, Central Railway & Ors.,** AIR 1975 SC 202; **T.P. Moideen Koya v. Government of Kerala &**

Ors., AIR 2004 SC 4733; and **K. Vidya Sagar v. State of Uttar Pradesh & Ors.,** AIR 2005 SC 2911).

63. There may be certain exceptions to the rule that a person was not aware of the correct facts while filing the first petition or the events have arisen subsequent to making of the first application. The Court must bear in mind that doctrine of *res judicata* is confined generally to civil action but inapplicable to illegal action and fundamentally lawless order. A subsequent petition of *habeas corpus* on fresh grounds which were not taken in the earlier petition for the same relief may be permissible. (Vide: **Lalubhai Jogibhai Patel v. Union of India & Ors.**, AIR 1981 SC 728; **Ajit Kumar Kaviraj v. Distt. Magistrate, Birbhum & Anr**., AIR 1974 SC 1917; and **Sunil Dutt v. Union of India & Ors.,** AIR 1982 SC 53).

64. While dealing with a similar issue, this Court in **Srikant v. District Magistrate, Bijapur & Ors.**, (2007) 1 SCC 486 observed as under:

> *"Whether any new ground has been taken, has to be decided by the court dealing with the application and no hard-and-fast rule can be laid down in that regard. But one thing is clear, it is the substance and not the form which is relevant. If some surgical changes are made with the context, substance and*

essence remaining the same, it cannot be said that challenge is on new or fresh grounds".

65. Thus, in view of the above, the law in the issue emerges that a case is to be decided on its facts taking into consideration whether really new issues have been agitated or the facts raised in subsequent writ petition could not be known to the writ petitioner while filing the earlier writ petition.

Be that as it may, the parties concerned had not filed fresh writ petitions, rather chosen, for reasons best known to them applications under Section 482 Cr.P.C., which could not have been entertained.

66. A large number of documents have been submitted to the court under sealed cover by the State of Punjab on the direction of this court. We have gone through the said documents and suffice is to mention here that Shri Sumedh Singh Saini, IPS had conducted the enquiry in 2002 against Mr. Justice X on the direction of the Chief Justice of the Punjab and Haryana High Court on the alleged appointment of certain judicial/executive officers in Punjab through Shri Ravi Sandhu, Chairman of the Public Service Commission. Shri S.S. Saini had filed reports against Mr. Justice X. The Chief Justice of Punjab and Haryana High Court confronted Mr. Justice X with the said reports. On the basis

of the said reports, the Chief Justice of the High Court submitted his report to the Chief Justice of India, on the basis of which a Committee to investigate the matter further was appointed. This Committee even examined one Superintendent of Police of the intelligence wing who had worked directly under Shri S.S. Saini while conducting the enquiry.

67. The High Court has adopted an unusual and unwarranted procedure, not known in law, while issuing certain directions. The court not only entertained the applications filed by Shri Davinder Pal Singh Bhullar and Darshan Singh Multani in a disposed of appeal but enlarged the scope of CBI investigation from proclaimed offenders to other missing persons. The court directed the CBI to treat affidavits handed over by the applicant Shri Bhullar who admittedly had inimical relation with Shri S.S. Saini, as statement of eye-witnesses. The court further directed the CBI to change the names of witnesses to witness (A), (B) or (C) and record their statements under Section 164 Cr.P.C. so that they could not resile at a later stage. We fail to understand how the court could direct the CBI to adopt such an unwarranted course.

68. The High Court accepted certain documents submitted by Shri R.S. Bains, advocate, as is evident from the order dated 22.8.2007 and

it was made a part of the record though Shri Bains had not been a counsel engaged in the case nor he had been representing any of the parties in the case.

69. When the matter came up for hearing on 2.4.2008, in spite of the fact that the matter was heard throughout by a particular Division Bench, Mr. Justice X alone held the proceedings, and accepted the status report of the CBI sitting singly, as the proceedings reveal that the other Judge was not holding court on that day. The order sheet dated 2.4.2008 reads as under:

> "Status report, which has been presented by the CBI in Court in a sealed cover, is taken in custody.
>
> Hon'ble Mr. Justice Harbans Lal, who has to hear the case along with me, as it is a part-heard case, is not holding court today.
>
> To come up on 4.4.2008.
>
> Sd/-
> Judge"

70. The FIR unquestionably is an inseparable corollary to the impugned orders which are a nullity. Therefore, the very birth of the FIR, which is a direct consequence of the impugned orders cannot have any lawful existence. The FIR itself is based on a preliminary enquiry

which in turn is based on the affidavits submitted by the applicants who had filed the petitions under Section 482 Cr.P.C.

71. The order impugned has rightly been challenged to be a nullity at least on three grounds, namely, judicial bias; want of jurisdiction by virtue of application of the provisions of Section 362 Cr.P.C. coupled with the principles of constructive *res judicata*; and the Bench had not been assigned the roster to entertain petitions under Section 482 Cr.P.C. The entire judicial process appears to have been drowned to achieve a motivated result which we are unable to approve of.

72. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "*sublato fundamento cadit opus*" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

73. In **Badrinath v. State of Tamil Nadu & Ors**., AIR 2000 SC 3243; and **State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr.**, (2001) 10 SCC 191, this Court observed that once the basis of a

proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally.

74. Similarly in **Mangal Prasad Tamoli** (dead) by Lrs. **v. Narvadeshwar Mishra** (dead) by Lrs. **& Ors.,** (2005) 3 SCC 422, this Court held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be *non est* and have to be necessarily set aside.

75. In **C. Albert Morris v. K. Chandrasekaran & Ors.**, (2006) 1 SCC 228, this Court held that a right in law exists only and only when it has a lawful origin.

(See also: **Upen Chandra Gogoi v. State of Assam & Ors.,** (1998) 3 SCC 381; **Satchidananda Misra v. State of Orissa & Ors.**, (2004) 8 SCC 599; **Regional Manager, SBI v. Rakesh Kumar Tewari,** (2006) 1 SCC 530; and **Ritesh Tewari & Anr. v. State of U.P. & Ors.,** AIR 2010 SC 3823).

76. Thus, in view of the above, we are of the considered opinion that the orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/orders/FIR/ investigation stand automatically vitiated and are liable to be declared *non est*.

77. The submission advanced on behalf of the respondents that as the Special Leave Petition filed against the impugned judgment by some other party, stood dismissed by this Court, these matters also have to be dismissed at the threshold without entering into merit, is not worth acceptance.

The issue as to whether the dismissal of the special leave petition by this Court in limine, i.e., by a non-speaking order would amount to affirmation or confirmation or approval of the order impugned before this Court, has been considered time and again. Thus, the issue is no more *res integra*.

A large number of judicial pronouncements made by this Court leave no manner of doubt that the dismissal of the Special Leave Petition *in limine* does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition had been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for a reason, which may be other than merit of the case. An order rejecting the Special Leave Petition at the threshold without detailed

reasons, therefore, does not constitute any declaration of law or a binding precedent.

The doctrine of *res judicata* does not apply, if the case is entertained afresh at the behest of other parties. No inference can be drawn that by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected. So it has no precedential value.

(See: **The Workmen of Cochin Port Trust v. The Board of Trustees of the Cochin Port Trust & Anr.**, AIR 1978 SC 1283; **Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. The Workmen & Anr.**, AIR 1981 SC 960; **Indian Oil Corporation Ltd. v. State of Bihar & Ors.**, AIR 1986 SC 1780; **Yogendra Narayan Chowdhury & Ors. v. Union of India & Ors.**, AIR 1996 SC 751; **Union of India & Anr. v. Sher Singh & Ors.**, AIR 1997 SC 1796; **M/s Sun Export Corporation, Bombay v. Collector of Customs, Bombay & Anr.**, AIR 1997 SC 2658; **Kunhayammed & Ors. v. State of Kerala & Anr.**, AIR 2000 SC 2587; **Saurashtra Oil Mills Association, Gujarat v. State of Gujarat & Anr.,** AIR 2002 SC 1130; **Union of India & Ors. v. Jaipal Singh**, AIR 2004 SC 1005; and **Delhi Development Authority v. Bhola Nath Sharma** (dead) by L.Rs. **& Ors**., AIR 2011 SC 428).

CONCLUSIONS :

78. The error in the impugned orders of the High Court transgresses judicious discretion. The process adopted by the High Court led to greater injustice than securing the ends of justice. The path charted by the High Court inevitably reflects a biased approach. It was a

misplaced sympathy for a cause that can be termed as being inconsistent to the legal framework. Law is an endless process of testing and retesting as said by Justice Cardozo in his conclusion of the Judicial Process, ending in a constant rejection of the dross and retention of whatever is pure and sound. The multi-dimensional defective legal process adopted by the court below cannot be justified on any rational legal principle. The High Court was swayed away by considerations that are legally impermissible and unsustainable.

79. In view of the above, the appeals succeed and are accordingly allowed. The impugned orders challenged herein are declared to be nullity and as a consequence, the FIR registered by the CBI is also quashed.

80. However, it is open to the applicants who had filed the petitions under Section 482 Cr.P.C. to take recourse to fresh proceedings, if permissible in law.

…….J.
(Dr. B.S. CHAUHAN)

…….J.
(A.K. PATNAIK)

New Delhi,
December 7, 2011