

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ 1. W.P.(CRL) 312/2007 & CRL.M.A.2670/2007

N.G. SHETH Petitioner through
! Mr.Siddhartha Luthra, Sr. Adv.
with Ms.Arundhati Katju,
Mr. P.K. Dubey and
Mr.Anurag Ahluwalia, Advocates

versus

\$ C.B.I & ORS Respondent through
^ Mr.Harish Gulati, Adv.for CBI/R-1
Mr.P.P.Malhotra, Ld. ASG with
Mr.Chetan Chawla and
Mr. Ashwani Bhardwaj,
Advocates for R-2.

WITH

2. W.P.(CRL) 451/2008

ANIRUDDHA BAHAL Petitioner through
Mr.Siddhartha Luthra, Sr. Adv.
with Ms.Arundhati Katju,
Mr. P.K. Dubey and
Mr.Anurag Ahluwalia, Advocates

versus

C.B.I & ORS Respondent through
Mr.R.M.Tewari, Adv. for CBI/R-1
Mr.P.P.Malhotra, Ld. ASG with
Mr.Chetan Chawla, Adv. for R-3

Date of Hearing : 21st May, 2008

% Date of Decision : 11th July, 2008

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of local papers may be allowed to see the Judgment?	Yes
2. To be referred to the Reporter or not?	Yes
3. Whether the Judgment should be reported in the Digest?	Yes

VIKRAMAJIT SEN, J.

J U D G M E N T

1. The legal nodus which has arisen in these writ petitions concerns the interpretation of Section 13 of the Official Secrets Act, 1923 (OS Act for short), read in conjunction with sundry sections of the Criminal Procedure Code, 1973 (CrPC hereafter). Vide Gazette Notification dated 6.3.1998 the Central Government, in exercise of powers conferred upon it by Section 13(1) of the OS Act, empowered the Chief Metropolitan Magistrate (CMM), Delhi to try offences punishable under this statute. In terms of Notification dated 21.6.2006 of the Ministry of Home Affairs the Central Government rescinded the earlier Notification dated 6.3.1998 thereby withdrawing the special empowerment of the CMM under the OS Act in this regard. Predicated on the decision of the Delhi High Court on the Administrative side the Registrar General, Delhi High Court addressed a letter No.28088/G-3/OS Act/Gaz/06 dated 7.12.2006 to the District & Sessions Judge, Delhi directing that all the cases pending under the OS Act be withdrawn from the Court of the CMM and be assigned to the Special/Sessions Judges. It is this administrative decision of the Delhi High Court that has been challenged by the Petitioners.

2. In WP(Crl.) 312/2007 a Complaint was lodged on 30.8.1983 under Section (5)(1)(a) of the OS Act and its cognizance was taken on 25.10.1983. Thereafter, on 23.8.2002 the Petitioner had orally exercised the option made available to him by virtue of Section 13 and has declined to be tried by the Court of Sessions. Consequent upon the passing of the impugned Notification dated 21.6.2006 counsel for the Petitioner submits that the CMM has committed the case to the Court of Sessions. We have called for the Trial Court Records and find that this submission is not correct. On the contrary the application filed by the Central Bureau of Investigation for committal of the case to the Court of Sessions in view of the Notification dated 21.6.2006 of the Government of India is still pending. Emphasis has been laid on the fact that the Petitioners had, on 20.9.2002, exercised the option in writing to be tried by the CMM, Delhi. Mr. Siddhartha Luthra, learned Senior Counsel underscores the further position that the Trial has commenced under Chapter XIX Part B of the CrPC and the case is at the stage of recording of pre-charge evidence.

3. In Writ Petition (Crl.) 451/2008 the Petitioner was facing trial in the Court of Chief Metropolitan Magistrate, Delhi for offences under Sections 3 and 5 of the OS Act read with Section 120-B of the Indian Penal Code (IPC). By virtue of

Notification dated 6.3.1998 the Central Government had empowered the CMM to try offences punishable under the OS Act. The CMM took cognizance on 15.6.2005. As we have already mentioned, in terms of Notification dated 21.6.2006 of the Ministry of Home Affairs, the Central Government has rescinded the earlier Notification dated 6.3.1998 empowering the CMM under the OS Act. By way of the implementation of an administrative decision of this Court, in terms of directions dated 7.12.2006 of the Registrar General, High Court of Delhi, the subject complaint case was transferred by the Sessions Judge, Delhi from the Court of the CMM to Court of Shri Vinod Goel, Special Judge. It is this transfer which has been assailed by the Petitioner.

4. Our principal concern centres upon the interpretation of Section 13 of the OS Act which reads thus:-

13. Restriction on trial of offences.--(1)No court (other than that of a Magistrate of the first class specially empowered in this behalf by the Appropriate Government) which is inferior to that of a District or Presidency Magistrate, shall try any offence under this Act.

(2) If any person under trial before a Magistrate for an offence under this Act at any time before a charge is framed, claims to be tried by the Court of Sessions, the Magistrate shall, if he does not discharge the accused, commit the case for trial by that

court, notwithstanding that it is not a case exclusively triable by that court.

(3) No court shall take cognizance of any offence under this Act unless upon complaint made by order of, or under authority from, the Appropriate Government or some officer empowered by the Appropriate Government in this behalf:

(4) For the purposes of the trial of a person for an offence under this Act, the offence may be deemed to have been committed either at the place in which the same actually was committed or at any place in India in which the offender may be found.

(5) In this section, the appropriate Government means-

(a) in relation to any offences under section 5 not connected with a prohibited place or with a foreign power, the State Government; and

(b) in relation to any other offence, the Central Government.

Our research shows that the parenthesis that is to be found in sub-section(1) exists from the commencement of the Act. It appears to us that Section 13(2) makes it absolutely clear that the Legislature intended that only in the extraordinary course was the trial of offences under the Act to be conducted by the Magistrate of the First Class. It is noteworthy that if the offences were normally triable by the Magistrate of the First Class/MM Section 13(2) would become unnecessary and otiose. When we read Section 13(2) it fortifies us in the view that, even

in those abnormal cases where jurisdiction to try an offence has been vested in the MM by virtue of a special empowerment, the Court of Sessions would nevertheless not be divested of the power to try those very offences under the OS Act. Furthermore, special empowerment would be unnecessary if the Magistrate of the First Class had competency to try these offences.

5. We must straight away determine the procedure that has to be followed with regard to prosecutions under the OS Act. Section 4(2) of the CrPC, 1973 prescribes that offences under any law other than the IPC shall be investigated, inquired into, tried or otherwise dealt with according to the provisions of the CrPC, subject to any other enactment in force. Section 5 of CrPC, 1973 removes any doubts that may prevail in this context by clarifying that any special or local law that may then have been in existence shall remain unaffected by the provisions of CrPC. Therefore, whilst the trial of offences under Section 381 of IPC must be conducted in consonance with the CrPC (as laid down in Section 4(1) thereof), for offences under the OS Act (being statute other than the IPC) the provisions of the CrPC would not be attracted if they are in variance with or incongruent or irreconcilable thereto. In other words, any part of the CrPC which is in disharmony with the OS Act will not have any pertinence or efficacy.

This is also the position that obtains so far as the Court which is to try offences under the OS Act is concerned, as adumbrated by Section 26(2) of CrPC. Ergo, the correct course to charter is to first ascertain the postulations in the OS Act, and only if there are none, should one travel to the CrPC and not the other way around. This distinction will be of seminal importance when the sundry sections are interpreted by us.

6. A piquant position had emerged in State of *Uttar Pradesh -vs- Sabir Ali*, AIR 1964 SC 1673 because in the duration of the Trial under the UP Private Forest Act, 1948, the Presidency Officer, who was a Magistrate of the Second Class, had been conferred with powers of the Magistrate of the First Class. The sentence passed by him was successfully challenged on the premise that Section 15(2) of that Act prescribed that offences would be triable by a Magistrate of the Second or Third Class. Their Lordships opined that the provisions of the CrPC (that is Section 29 of the repealed Code corresponding to Section 26 of the extant Code) were peremptory. Connected to the conundrum before us, their Lordships had also observed *en passant* that in view of the position that a Magistrate of the Second or Third Class was not empowered under the CrPC to impose the maximum

sentence prescribed by Section 15(1) of the UP Private Forest Act, two possibilities could arise, namely, either “that by implication the powers of these Magistrates are extended beyond what is prescribed under Section 32” (of the CrPC 1898) or that if “the Magistrate feels that a heavier punishment should be imposed he can take recourse to the provisions of Section 349 of the Code and make a recommendation to a Magistrate who can impose adequate punishment in the case”; (Section 349 corresponds to Section 325 of the CrPC 1973). In the context of the CrPC this question has now been definitively answered in ***Rosy -vs- State of Kerala***, 2002(2) SCC 230. In our opinion it would be untenable to extrapolate the ***Rosy*** opinion to any Special Act which is to be construed, especially in view of the 'peremptory' quality and character of Section 26(b) of the CrPC. In the case of a Special Act which prescribes the Court which is to try and then punish the offender for the offence, the first postulate of ***Sabir Ali*** would apply, namely, that it would have to be assumed that the powers of that Court, to impose a sentence greater than that contemplated in the CrPC, stand automatically augmented. Keeping the impugned Notification and the Administrative decision of this High Court in perspective, this question does not arise before us.

7. Sections 6 of CrPC, 1898 and CrPC, 1973 are reproduced in juxtaposition for ready reference and comparison, and this exercise will reveal one of the significant changes brought about is the deletion of the Court of the Presidency Magistrate in the current Code:

CrPC 1898	CrPC 1973
6.Classes of Criminal Courts.--- Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in India, namely: I Courts of Session : II Presidency Magistrates : III Magistrates of the first class : IV Magistrates of the second class : V Magistrates of the third class.	6.Classes of Criminal Courts.--- Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:-- (i) Courts of Session; (ii) Judicial Magistrate of the first class and, in any metropolitan area, Metropolitan Magistrate; (iii) Judicial Magistrate of the second class; and (iv) Executive Magistrates.

8. Section 13(1) of the OS Act makes reference to the District or Presidency Magistrate. A perusal of the Table will show that Presidency Magistrates were at the second tier in the hierarchy of courts contemplated in the old CrPC at the time when the OS Act came into existence. This grade of magistrates stands abrogated in the current CrPC, on the promulgation of which appropriate changes ought to have been simultaneously carried out in Section 13(1) of the OS Act. Had this exercise been undertaken at the relevant time, the conundrum before us would not have manifested itself now.

Unfortunately this exercise has been overlooked, and thereby the formidable task pertaining to the interpretation of the statute has to be completed by us. Not the least of these difficulties is to determine whether or not the posts of District Magistrate and Presidency Magistrate are mirror posts in the present procedural dispensation, as are to be found in the extant CrPC. We have perforce to revert to Section 3 of the CrPC 1973 which clarifies that, unless the context otherwise requires, any reference in any enactment passed before 1973 to a Presidency Magistrate or a Chief Presidency Magistrate shall be construed as a reference, respectively, to an MM or the CMM.

9. Prior to the passing of the Union Territories (Separation of Judicial and Executive Functions) Act, 1969 the entire magistracy operated under the District Magistrate of Delhi; it now functions under the direct control of the High Court. Towns having a population in excess of one million can be declared as metropolitan areas. Delhi was so designated by Notification No.155 dated 28.3.1974 under Section 8 of the CrPC, 1973 with effect from 1.4.1974. Presently, there are only MMs, Additional CMMs and CMMs functioning in the Union Territory of Delhi. Furthermore, consequent upon the separation of the Executive from the Judiciary, today there is

no functionary/official corresponding to the post of District Magistrate as it existed prior to October, 1969. In this regard, it is necessary to refer to Section 20 of the CrPC which postulates the appointment of Executive Magistrates, now at the lowest level of the magistracy, one of whom is appointed as the District Magistrate. It is palpably clear, but the distinction must be drawn, that the present post of District Magistrate does not correspond in powers and functions to the extremely important and multifariously powerful post of District Magistrate prior to October, 1969. So far as Presidency Magistrates are concerned, we have already mentioned that they now correspond to MMs, unless the context otherwise requires. These underlined words will assume great significance in the interpretation of Section 13 of the OS Act, as we shall presently discuss. One of the conclusions of our analysis of pertinent law is that any MM can be specially empowered by the appropriate government to try any offence under the OS Act by virtue of its Section 13(1). One vexed question is whether such empowerment shall always remain subject and restricted to the trying of offences which do not attract punishment in excess of three years so far as the OS Act is concerned, which we have expanded upon below. Section 17 of the CrPC vests in the High Court the power of appointment of any MM as the CMM and

Additional Chief Metropolitan Magistrate(ACMM). It is beyond cavil that the CMM as well as the ACMM can also, consequent upon special empowerment by the appropriate government, try any offence under the OS Act.

10. The interesting yet intricate question which is in our hands has already engaged the energies and attention of three Single Benches of this Court. *Major General F.D. Larkins -vs- State*, 26(1984) DLT 486, decided by J.D. Jain, J. holds that those offences under the OS Act which attract a sentence of upto 14 years can be tried by Court of Sessions alone, regardless of any special empowerment by the appropriate government in favour of an MM. The learned Judge spoke of Section 13(1) of the OS Act as “a disabling provision so far as inferior courts are concerned”, which indeed cryptically interprets the said Section. The reason for our reference to these words requires a comparison between the old and current Criminal Procedure Codes, which we furnish for facility of perusal. We have deleted columns 1, 4, 6 and 7 of the Table below (pertaining to the old CrPC) since it is not relevant for the purpose of comparison with the extant CrPC:

CrPC, 1898

Offence	Whether the police may arrest without warrant or not	Whether bailable or not	By what Court triable
2	3	5	8
If punishable with death or imprisonment for 7 years or upwards.	May arrest without warrant.	Not bailable	Court of Session
If punishable with imprisonment for 3 years and upwards, but less than 7.	Ditto	Ditto ...	Court of Session. Presidency Magistrate or Magistrate of the first class.
If punishable with imprisonment for 1 year and upwards, but less than 3 years.	Shall not arrest without warrant.	Bailable	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
If punishable with imprisonment for less than 1 year, or with fine only.	Ditto ...	Ditto ...	Any Magistrate

CrPC, 1973

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4
If punishable with death, imprisonment for life, or imprisonment for more than 7 years.	Cognizable	Non-bailable	Court of Session
If punishable with imprisonment for 3 years, and upwards but not more than 7 years.	Cognizable	Non-bailable	Magistrate of the first class
If punishable with imprisonment for less than 3 years or with fine only.	Non-cognizable	Bailable	Any Magistrate

11. Penalties for spying are prescribed in Sections 3 and 5 of the OS Act and are in two categories only--(i) imprisonment which may extend upto 3 years and/or with fine or (ii) upto 14 years. Under the old Code the first category of offences were triable even by a Magistrate of the second class; the present CrPC prescribes that such offences shall be triable by any Magistrate. In other words Section 13(1) of the OS Act disables the Magistrate Courts from trying espionage cases. This provision further generally disables even the next rung of Courts, namely Magistrates of the First Class or MMs, from exercising jurisdiction inasmuch as special empowerment is

required to be infused into them by the appropriate government for them to enjoy or attain competency. Mr. Luthra has unduly laid great store on the decision of a learned Single Judge of the Himachal Pradesh High Court reported as *Syed Khushanand Anwar Naqvi -vs- State of HP*, 2006(2) ShimLC 180. After recording the concession of the Advocate General to the effect that no special empowerment has been made, the Court held the ongoing proceedings to be *non est*. The question whether any other or superior Court, such as the Sessions Court, was competent to try the complaint neither arose for consideration nor was contemplated upon. It is irrefutable that a Magistrate of the First Class or an MM is altogether incompetent to try any offence under the OS Act in the absence of a special empowerment in its favour.

12. Our learned Brother, Badar Durrez Ahmed, J. while following ***Larkins*** has perspicuously analysed the law in ***Rachna Singh -vs- State of NCT of Delhi*** decided on 31.5.2006. The ASJ had upheld the sentence of seven years rigorous imprisonment but in Revision the conviction and sentence was set aside by Ahmed, J. holding that since the maximum sentence was upto 14 years, only the Court of Sessions was competent to try the case. In ***Saimuddin -vs- State*** decided by our learned Brother P.K. Bhasin, J. both the earlier decisions of ***Larkins*** and ***Rachna*** were applied.

13. *Pankajbhai Nagjibhai Patel -vs- State of Gujarat*, 2001(2) SCC 595 is of topical importance. The Judicial Magistrate First Class had convicted the accused of an offence under Section 138 of the Negotiable Instrument Act, 1881 (NI Act for short) and sentenced him to imprisonment for six months and a fine of Rs.83,000/-. Their Lordships referred to Section 29(2) of the CrPC which stipulates that the Court of a Magistrate of the First Class may pass a sentence of imprisonment for a term not exceeding three years, and/or a fine not exceeding Rupees ten thousand, or of both. Mention was also made to Section 4(2) of the CrPC which lays down that in the case of offences under any law other than the IPC investigation or inquiry or trial or any other dealing would be in accordance with the CrPC subject to any procedure prescribed in such other enactment. For purposes relevant to the task before us Section 142(c) of the NI Act specifies that, notwithstanding anything contained in the CrPC, no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable under Section 138. The Apex Court held that Section 142 of the NI Act had not conferred any “special jurisdiction or power” on a Judicial Magistrate of the First Class and therefore it only excluded the powers of other Magistrates from trying offences under Section 138 thereof but did not, in any way, enhance the amplitude of its jurisdiction or powers. Speaking for the Court Hon'ble Justice Thomas upheld the sentence of imprisonment for six months but deleted the direction for payment of

Rs.83,000/- as compensation to the Respondent/Complainant. Obviously, this was because the quantum of the fine exceeded the sum of Rs.10,000/- set down in Section 29(2) CrPC. The ratio of this case can be applied to the facts before us in two ways. Firstly, that the powers of the Court specially empowered to try any offence can be increased and widened, but in the absence of any such stipulation, the CrPC prescriptions would apply. This is in consonance with what ***Sabir Ali*** enunciates. Secondly, enactments of this category or species restrict the vesting of powers of trial of offences under special Act only to those specially empowered to do so. Applying them to the case in hand, there would have to be an explicit provision in the OS Act overriding the Schedules of the old and the current CrPC so far as the punishment awardable by the Court is concerned. In the absence thereof even where the MM has been specially empowered by the appropriate government such Court would not have the power to try a case which attracts a possible sentence extending upto 14 years.

14. We have already reproduced Section 13 of the OS Act, which, regrettably, can be read in diverse and disparate manners. Ignoring the parenthesis found therein, the Section could indicate that no Court other than that of a Magistrate of the First Class specially empowered in this behalf by the appropriate Government can try any offence under the OS Act. The use of the phrase 'other than'

confounds the task of interpretation. An analysis of these words can be found in Fowler's Modern English Usage which records that their use is a matter which cannot be resolved. The Cambridge Guide to English Usage by Pam Peters states that "other" is historically an adjective meaning "second" or "alternative". The Random House Dictionary ascribes as many as twelve meanings to the word 'other' including additional or further, different. The Concise Oxford Dictionary speaks of the use of the word 'other' to refer to "a person or thing that is different from one already mentioned or known; alternative of two; those not already mentioned. The word could also mean additional or that which is distinct from, different from, or opposite to something or oneself". Collins Cobuild English Dictionary for Advanced Learners contains fifteen connotations of the word 'other' which include - "You use **nothing other than** and **no other than** when you are going to mention a course of action, decision, or description and emphasize that it is the only one possible in the situation". The same Dictionary then states - "You use **other than** after a negative statement to say that the person, item, or thing that follows is the only exception to the statement." The American Heritage ® Dictionary defines 'other than' as - "With the except of; except for; besides". We have gone into considerable depth on the meaning of the word 'other' because we were of the opinion, at first blush, that the opening words of the Section appear to indicate that it is a Magistrate of the First Class, specially empowered in this behalf

by the appropriate Government, who can alone or exclusively try offences under the Act. This is also what learned counsel for the Petitioners would have us hold; but is contrary to the administrative decision of this Court which has been resolutely defended by the learned Additional Solicitor General. However, the use of the negative word 'no' at the very commencement of the Section is a pointer to the position that the section specifies that there is only one exception, viz, the specially empowered Magistrate of the First Class, to the normal appointment, namely, a Court not inferior to a District or Presidency Magistrate. In other words, the appointment and empowerment of the Magistrate of the First Class is an exception to the rule.

15. The use of punctuations such as brackets/parenthesis endeavours to achieve the same outcome, namely, to clarify that an MM of the First Class can be specially empowered to try cases under the OS Act although this ought not to be the usual practice. The English Cobuild Dictionary defines parenthesis as a pair of curved marks that are to be put around the numbers to indicate that they are additional, separate, or less important. The 21st Century Dictionary speaks of parenthesis as a “digression”. American Heritage® Dictionary defines parenthesis as “(a) a qualifying or amplifying word, phrase or sentence inserted within written matter in such a way as to be independent of the surrounding grammatical structure and

(b) a comment departing from the view of discourse; a digression". Fowler's Modern English Usage explains that parenthesis interrupts the flow of a sentence, generally in order to explain or elaborate on something just written and because they are interruptions, parenthesis should be kept short. A Guide to Punctuation and its allies by Eric Partridge, John W. Clark inter alia states - "The essence of all parentheses is that, without them, the sentence is grammatically and logically complete: they explain or modify, but they do not determine the sense. 'The test of a parenthesis is whether the other words make sense without it' (CHARLES C. BOYD, Grammar for great or small, 1928) : If they do not, either the whole or a part of the parenthesis should be removed from within parenthesis". The New Oxford American Dictionary states the meaning of parenthesis as - "A word, clause or sentence inserted as an explanation or afterthought into a passage that is grammatically complete without it, in writing usually marked off by curved brackets, dashes, or commas". Therefore, essentially the flow of Section 13(1) of the OS Act is to the effect - "No court which is inferior to that of a District or Presidency Magistrate shall try any offence under this Act". The reference to the Magistrate of the First Class connotes and indicates the exception to the rule. Therefore, in normal course offences under the OS Act are to be tried by a Court which was not inferior to the erstwhile District or Presidency Magistrate. Magistrates of the First Class would have jurisdiction only in the event of their special empowerment by the

appropriate government. Since a state of vacuum is always a abomination, common sense dictates that a Court higher in status to that of an MM or Magistrate of the First Class, should ordinarily exercise jurisdiction over alleged offences under the OS Act.

16. Rules of interpretation of statutes inter alia recommend that each and every word found in any legislation should be given a meaning; that words should not be introduced by the Court into the Section so as to give it a particular meaning, unless no sense whatsoever can be derived from the statutory provision as it stands. In practical terms these rules of statutory construction obviate the possibility of a Judge imparting a meaning or interpretation to legislation in keeping with his own preference or thinking, rather than that of the Legislature. "A judge must not alter the material of which the Act is woven, but he can and should iron out the creases" – Lord Denning in *Seaford Court Estates -vs- Asher*, (1994) 2 All ER 155. Approbation of this approach can be found in *Bangalore Water Supply -vs- A Rajappa*, AIR 1978 SC 548:(1978) 2 SCC 213. The roots of an enactment have to be nourished and strengthened rather than deracinating the plant and provisions by adopting a negative or destructive dialectic; to avoid absurdities and incongruities that may have crept in because of clumsy or incomplete and inchoate amendment. The constant jural endeavour should be to give complete effect to the legislative policy, intention and objective. The rule that a

Judge should abjure the rejection of words as surplusages would be inappropriate if, because of it, the policy or intent of the legislation is likely to be defeated. Since the Court is required, so to speak, to penetrate into the mind of the Legislator, where myriad meanings or numerous interpretations are plausible, the Court should revert or relate back to the state of affairs prevailing at the time of the passing of the statute. Otherwise the incongruences and inconsistencies which invariably become evident in any anachronism, will mar the result. At the time when the OS Act was passed the repealed CrPC, 1898 was in force, in terms whereof the Magistrate of the First Class occupied a rung lower or inferior to that of the Presidency Magistrate. In order to interpret the Section to indicate that only the Metropolitan Magistrate or Judicial Magistrate of the First Class can try offences under the OS Act one would have to excise or ignore the words “which is inferior to that of a District or Presidency Magistrate” for the simple reason that a Magistrate of the First Class was inferior to that of the District or Presidency Magistrate in the jural dispensation that had been brought into being by the erstwhile/repealed CrPC. Normally an interpretation which ignores or treats as a surplusage some words in the Section, should be abjured.

17. Section 13 of the OS Act could also be read simply to mandate that no Court inferior to that of a District or Presidency Magistrate shall try any offence under the Act. There are several similar

provisions that can be found such as, to give only a few examples, Section 142(c) of the NI Act (supra), and also Section 26(2) of the Securities and Exchange Board of India, 1992 (SEBI), which we shall advert to when we analyse the very recent decision of a Division Bench of this Court reported as ***Mahender Singh -vs- High Court of Delhi***, 148(2008) DLT 391(DB). The SEBI provision previously prescribed that no Court inferior to that of Metropolitan Magistrate or Judicial Magistrate of the First Class could try an offence punishable under that Act. Consequent upon the 2002 Amendment, Section 26(2) now reads that -“No Court inferior to that of a Court of Session shall try any offence punishable under this Act”. Section 511 of Schedule-II of the old CrPC dealt with offences under other laws, which enabled a Second Class Magistrate along with the Court of Sessions, Presidency Magistrate or Magistrate of the First Class to try any offence punishable for one year and upwards but less than three years. The Legislature was mindful of this position and obviously was of the view that offences under the OS Act should be entrusted for trial to a senior and experienced Judge of the level of at least a Presidency Magistrate. It is with this intent in mind that Section 13 states, in a fashion akin to the NI Act or the SEBI Act, that no Court inferior to that of the Presidency Magistrate can try offences under the OS Act. At the same time the Legislature thought it prudent to carve out an exception to this general rule, conceivably because the Presidency Magistrate may, at a given point of time, be inundated with dockets.

The exception that was created by the Legislature was the Magistrate of the First Class, but since he was 'inferior' to the Presidency Magistrate, he would have to be specially empowered by the appropriate government in this regard. Once this understanding of the Section is preferred, none of the words contained therein are required to be ignored.

18. We have already observed that the CrPC, 1973 has abolished the tier of Presidency Magistrates. Section 3(3) states that unless the context otherwise requires any reference in any enactment passed before the commencement of this Code to a Presidency Magistrate shall be construed as a reference to a Metropolitan Magistrate. In the case in hand, keeping the annals of the OS Act in perspective, we are of the view that the context requires us not to equate Presidency Magistrate with that of Metropolitan Magistrate. Since the extant CrPC has eliminated from the then existing hierarchy of Courts Judges occupying the tier of Presidency Magistrates, we reiterate that Parliament ought to have simultaneously incorporated the logical and necessary change in Section 13 of the OS Act by substituting the existing words "which is inferior to that of a District or Presidency Magistrate" by the words "which is inferior to that of a Court of Sessions". Alternatively, if their resolve was that such cases should henceforward normally be tried by an MM, it should have mentioned so. This would, however, have led to an absurdity since

there are no Courts 'inferior' to that of an MM. We may also reiterate that the use of the parenthesis/brackets is to indicate the creation of an exception either to the preceding word or to the words that follow. Since a Magistrate of the Second Class (under the old CrPC) and a Metropolitan Magistrate or Magistrate of the First Class in the current Code is ordinarily competent to try offences which attract a punishment upto three years, Section 13 has the effect of disabling them from doing so, unless specially empowered by the Central Government to do so. The conclusion, therefore, is that if a Metropolitan Magistrate or Magistrate of the First Class is to be made competent to try offence under the OS Act he would require special empowerment by the appropriate government, but all courts 'superior' to that of a Metropolitan Magistrate/Magistrate of the First Class (Court of Sessions and the High Court in the existing hierarchy of courts) would ordinarily possess jurisdiction in this regard. No intelligent purpose can be achieved by the statutory draftsman in mentioning in Section 13 of the OS Act a particular Court and immediately speaking of a Court inferior thereto so far as jurisdictional powers are concerned.

19. The interpretation of Section 13 to the effect that no Court inferior to the Court of Sessions can ordinarily try cases under the OS Act, and that only a Metropolitan Magistrate who has been specially empowered in this behalf by the Central Government would be

competent to try such cases, renders the decisions of Single Benches of this Court in ***Larkins***, ***Rachna*** and ***Saimuddin*** in harmony with our views. We reiterate our view that on the coming into force of the CrPC 1973, with the deletion of the Court of Presidency Magistrates, which was earlier sandwiched between the Court of Sessions and the Magistrate of the First Class, and with the separation of the executive and judicial functions which resulted in the emasculation of the powers of the erstwhile District Magistrate, and with a view to give effect to the Legislature's intentions, it is the Court of Sessions that normally and ordinarily possesses jurisdiction to try cases under the OS Act. It is axiomatic that the MM would not be competent to try these cases unless and until he is 'specially empowered' to do so. The words 'specially empowered' cannot be ignored or rendered otiose. The Central Government by virtue of being the appropriate government can always exercise the option of specially empowering any MM or the ACMM/CMM to exercise jurisdiction in these matters.

20. In this analysis we hold that the Court of Sessions shall ordinarily be competent to try any offences under the OS Act unless an MM or a Magistrate of the First Class is specially empowered to try any offence under the OS Act. This is implicit in the stand of the Union of India which has supported the administrative decision of this High Court since all that has been carried out by the withdrawal of the Notification dated 6.3.1998 by the impugned Notification dated

21.6.2008 is to divest the MM of powers specially conferred on it by the Central Government to try offences under the OS Act.

21. Mr. Luthra, learned Senior Counsel for the Petitioners, has drawn attention to *A.R. Antulay -vs- R.S. Nayak*, AIR 1988 SC 1531 for two reasons. Firstly, because it has been enunciated therein by the Supreme Court that wherever a special Court has been created for the trial of offences by a special statute, they cannot be tried by any other even if it be a superior court. Their Lordships have observed - "The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal." We are unable to agree with Mr. Luthra that the Administrative Orders of this Court, or the Order of the Sessions Court, suffer from the vice of unauthorisedly eradicating the right to appeal. Since a Magistrate of the First Class is competent to try such offences only if it had been specially empowered to do so, these offences would normally be triable by the Court of Sessions. The situation is altogether dissimilar to that which existed in *Antulay*. The Legislature has bestowed and reposed the authority of special empowerment on the appropriate government, and not the Supreme Court which directed the High Court to assume jurisdiction. It has not been argued that this power of special empowerment by the Central Government cannot be withdrawn by it. If and when this event transpires, the Court must pass appropriate orders to give effect to

either or both actions. Ergo, the two impugned Orders do not stem from the Courts volition but rather are prompted by the purpose of implementing the decision of the appropriate government, and consequently removing the cases from a Court which had lost jurisdiction to one which always possessed it.

22. Reliance on ***Antulay*** has also been placed by Mr. Luthra to buttress his argument that, upon the transfer of the cases to the Court of Sessions, the Petitioners have lost one forum of appeal. In ***Antulay*** the Supreme Court ordered the trial to be conducted by a Bench of the Bombay High Court. It was in that context that their Lordships observed that “the appellant has a further right under Article 21 of the Constitution a right to trial by a Special Judge under section 7(1) of the 1952 Act which is the procedure established by law made by the Parliament, and a further right to move the High Court by way of revision or first appeal under section 9 of the said Act.” This is not the situation before us. The answer to this vexed question, that is perceived loss of one appeal, can be found in the detailed Judgment of another Division Bench of this Court in ***Mahender Singh***. Certain complaints had been filed by SEBI which, at that time, attracted a punishment which could not exceed one year term of imprisonment. By an amendment of the SEBI Act the maximum punishment was increased to ten years imprisonment, thereby necessitating a Sessions' trial. It was in this context that ***Antulay*** came to be

discussed in the Judgment authored by our learned Brother, A.K. Sikri, J.. As in the present case, if the trial had been conducted by an MM, an appeal would lie under Section 374(3)(c) of the CrPC to the Court of Sessions. It was held that the Petitioners did not have a vested right of appeal to the Court of Sessions since this right is granted by the statute itself. The Judgment further holds that the right of Revision had not been curtailed or affected in any manner. We are in respectful agreement with the ***Mahender Singh*** ratio and find that it applies to the case in hand. Reverting back to Section 13 of the OS Act, and reiterating our view, the intent of the enactment is that offences under the OS Act would normally be triable by the Court of Sessions. It cannot, therefore, be argued that the Petitioners have a vested right to appeal to the Court of Sessions. That right would exist only in these exceptional instances where the appropriate government had considered it expedient to specially empower an MM to try the offences under the OS Act. This argument is accordingly rejected.

23. Our attention has also been drawn by Mr. Luthra to the decision of Division Bench of this Court in ***A.S. Impex Ltd. -vs- Delhi High Court***, 108(2003) DLT 559(DB). This Court had transferred complaints under Section 138 of the NI Act from the Court of the MM to the Court of the Additional Sessions Judge. The Division Bench held that since these offences were triable by the MM, the High Court was not possessed of powers to order that the trial be conducted by

the Court of Sessions. The *ratio decidendi* is that “the High Court on the administrative side by invoking the provisions of Article 227 of the Constitution or for that matter Section 497 of the code could not have widened or expanded the powers beyond what is fixed under the Act.” We humbly concur with this opinion which is exactly on the lines drawn in ***Antulay***. However, as already analysed above, the wordings of the two provisions are not in *pari materia*. If the Legislature's intent was to vest jurisdiction only with the MM it could have unambiguously ordained that - “Offences under this Chapter shall be tried by the Court of the Metropolitan Magistrate.” The Division Bench had specifically noticed Section 143 (introduced into the NI Act with effect from 6.2.2003) which simply speaks so. It needs to be clarified that the *non-obstante* clause in Section 142 is with prejudice to the CrPC, and not the rest of its provisions including sub-section(c). It seeks to allay doubts that despite the provisions of the CrPC which indicate that an offence punishable with imprisonment upto one year (which has been increased to two years by Act 5 of 2005) a Magistrate of the Second Class is competent to try the case, by virtue of Section 29(3) of the CrPC.

24. In fairness to Mr. Luthra ***A.S. Impex Ltd.*** was cited by him on the grievance of the loss of the appeal to the Sessions Judge and the perceived loss of the remedy of a Revision to the High Court. It must immediately be reiterated that the so called “right” of appeal is a

misnomer since it is a bestowal of the legislature or is a creature of the statute which contains it. This continues to be the view of the Apex Court in *State of Haryana -vs- Maruti Udyog Ltd.*, AIR 2000 SC 2941 wherein their Lordships opined that the “right of appeal is the creature of the statute and has to be exercised within the limits and according to the procedure provided by law. It is filed for invoking the powers of the superior Court to redress the error of Court below, if any. No right of appeal can be conferred except by express words. An appeal, for its maintainability, must have a clear authority of law”. *Ganga Bai -vs- Vijay Kumar*, (1974) 2 SCC 393 clarifies that whereas there is an inherent right in every person to file a civil suit, “the right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law”. *Vijay Prakash D. Mehta/Shri Jawahar D. Mehta -vs- Collector of Customs (Preventive), Bombay*, (1988) 4 SCC 402 is to the same effect and this facet of law has been articulated in these words-“Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant”.

25. It is somewhat difficult to reconcile ***A.S. Impex Ltd.*** with the very recent Judgment of another Division Bench in ***Mahender Singh***. Placed in this situation, with due respect to the views in ***A.S. Impex***

Ltd. we are in agreement with the approach and understanding of the law in ***Mahender Singh***. We have carefully read the former Judgment of which the decision on this point is to be found in its paragraph 16. The Bench has, however, not articulated the reasons for arriving at the conclusion that it finds force in the submissions of the Petitioners that two ladders of remedies have been taken away. There can be no gainsaying that the scrutiny in an Appeal, which is always in exercise of a right granted by the statute to the appellant, is much wider than in a Revision, which is a discretionary relief. Since a person can avail of a full hearing before the High Court in the exercise of appellate jurisdiction, no prejudice or detriment can possibly be suffered by him merely because these two remedies coalesce with each other where an offence is triable by the Court of Sessions. In the view that we have taken, that is, that it is the Court of Sessions which is competent to try offences under the OS Act unless/except where the Central Government especially empowers an MM to do so, the result is exactly similar. Our view, therefore, is in harmony on this point with ***Mahender Singh***.

26. The NI Act reveals several conundrums in the context of the legal nodus confronting us, one of which is the apparent overlapping between its Sections 142 and 143, both of which are in the fasciculus of Chapter XVII, which deals with "Penalties in case of Dishonour of certain cheques for insufficiency of funds in the Accounts." Whilst

Section 142 of NI Act prescribes with effect from 1.4.1989 that no Court inferior to an MM shall try any offence punishable under Section 138, Section 143 requires with effect from 6.2.2003 that all offences under Chapter XVII (which includes Section 138) shall be tried by an MM. The difference in language normally indicates that disparate treatment is intended by the legislature, which in fact is not so. The earlier Section speaks of “taking cognizance” and the later of “shall be tried by.” Is there a difference in the contemplated jural activity? Black's Law Dictionary defines cognizance as - “Jurisdiction, or the exercise of jurisdiction, or power to try and determine causes; judicial examination of a matter, or power and authority to make it. Judicial notice or knowledge; the judicial hearing of a cause; acknowledgment; confession; recognition.” It, therefore, seems to us that the jural enquiry is the same and amendments have been introduced without keeping existing provisions in perspective. If exclusive jurisdiction is to be given to any Court the words that should be employed should be unambiguous and definitive such as are to be found in Section 143 -viz. “offences ... shall be tried ... by a Judicial Magistrate/MM”. However, where concurrent jurisdiction is intended to be bestowed on more than one Court it would be appropriate to ordain it by using the words “no Court inferior to that of an MM/JM Ist Class ...” We are of the conviction that this applies as much to the NI Act as to the OS Act.

27. It has next been contended by Mr. Luthra that the Petitioners should not be prejudiced by the impugned Notification inasmuch as they have already exercised the right or election made available to them by virtue of Section 13(2) of the OS Act for trial by the ACMM. We have already expressed the opinion that Section 13 postulates that, in the normal course, trial of offences under the Act would be conducted by the Court of Sessions. When we read Section 13(2) it fortifies us in the view that even in those abnormal cases where jurisdiction to try such offences has been vested in the MM by virtue of a special empowerment, the Court of Sessions would nevertheless not lose the power to try those very offences under the Act. Whenever a statute alludes to a Court which is not inferior to any other it endeavours to preserve the concurrent jurisdiction of more than one Court. We now revert to the argument of Mr. Luthra that the option bestowed on the accused to be tried by the Court of Sessions has been rendered nugatory by virtue of the impugned Notifications. This is indeed so. However, this appears to us to be the intent of the Legislature.

28. *N.G. Mitra -vs- State of Bihar*, AIR 1970 SC 1636 clarifies that common law enjoins that all pending proceedings will be governed by the amended law, with the qualification that whatever was concluded under the old law would retain legal propriety. In *Waheed Hasan Khan -vs- State of Hyderabad*, AIR 1954 Hyderabad 204 the Full

Bench comprising five Learned and Worthy Judges of what is now the Andhra Pradesh High Court, were called upon to decide whether the accused could exercise his right of further cross-examination under the repealed Hyderabad Criminal Procedure Code. The Full Bench opined that a qualified procedural right cannot be preserved even after the amendment or repeal of the statute which conferred it; that the analogy of an appeal cannot be extended to such cases. Hence, the law that was in force at the time of the trial would alone be efficacious. In the wake of the coming into force of the Companies Act, 1956 the Full Bench of the Punjab High Court in *National Planners Ltd. -vs- Contributories*, AIR 1958 P&H 230 had to decide the fate of winding-up proceedings pending in the Court of the District Judge. The Court reiterated the common law that when an action is brought under a statute which is afterwards repealed, the Court loses jurisdiction of the suit pending under the repealed Act and is unable to deliver judgment thereon; that the repeal of a statute giving jurisdiction to a Court deprives it of the right to pronounce judgment in proceedings then pending. The Full Bench, however, noted that Section 647 of the Companies Act, 1956 specifically saved the proceedings pending before the District Judge by virtue of Section 647(II) thereof which reads - "The other provision with respect to winding up contained in this Act shall not apply, but the company shall be wound up in the same manner and with the same incidents as if this Act had not been passed". Although we are presently dealing

with an appointment which has been recalled, if this principle is superimposed on the facts of this case, the consequence would be that had the trial been concluded before the MM, in the pendency of an appeal, the appointment would endure and remain steadfast. Applying this enunciation of the law to the case in hand, the inchoate proceedings pending before the MM would be devoid of jurisdiction consequent upon the withdrawal of the special empowerment in terms of the impugned Notification dated 21.6.2006. We are also unable to accept the argument of Mr. Luthra that those proceedings were 'saved' by the Notification itself inasmuch as it states that this rescission "shall not affect anything done or omitted to be done under the said notification before such rescission". In our opinion, in order to nullify an amendment or a repeal there must be a specific and unequivocal saving such as is contained in Section 647 of the Companies Act, 1956. The impugned Notification could have stated, but it significantly does not do so, that proceedings pending in any Court at the time of the rescission would continue in that Court.

29. It is trite that alongwith the power to appoint there is always the right to withdraw the appointment. The impugned Notification has the effect of withdrawing the special empowerment of the MM and as soon as this takes place exercise of any option during the period when that functionary possessed power is automatically rendered ineffectual. Since the accused would now, in the normal

course, be tried by the Court of Sessions, he cannot seek perpetuation of the abnormality. In fact, great pains have been taken by the Legislator to protect the interests of the accused by allowing him to exercise the option to be tried before the Court of Sessions even in the exceptional or extraordinary cases where an MM had been specially empowered to try the offences. We do not, therefore, find any merit in this contention. We find a fallacy in the reliance of Mr. Luthra on Section 6 of the General Clauses Act, 1897, for the simple reason that it contemplates the repeal of any Central Act or Regulation and in such event preserves any right or privilege accrued under that enactment. The right is a qualified one; it is a concession which springs from the exercise of discretion. Such a 'right' cannot be viewed as an absolute one, insulated and impervious to change. The impugned Notification is not a Central Act or Regulation. It essentially is procedural in nature and therefore not immutable. It is trite that procedural changes take effect retrospectively.

30. Mr. Luthra has argued that the mandate of Section 13 of the OS Act stands satisfied as soon as a prosecution under the OS Act is taken up by the CMM or the ACMM, specially empowered in this regard, since neither of them are 'inferior' to that of the erstwhile 'District' or 'Presidency' Magistrates. The argument is beset with problems. We cannot accept that the CMM and the ACMM are 'superior' to the MMs or that the latter are 'inferior' to the former.

Black's Law Dictionary contains this topical entry viz.:- "Superior and inferior courts -- The former being courts of general original jurisdiction in the first instance, and which exercise a control or supervision over a system of lower courts, either by appeal, error, or certiorari; the latter being courts of small or restricted jurisdiction, and subject to the review or correction of higher courts. Sometimes the former term is used to denote a particular group or system of courts of high powers, and all others are called inferior courts". We have already mentioned that Section 6 of the CrPC has only four categories of criminal courts. The MMs including the CMM and ACMM function below the Courts of Session. Section 17 speaks of the power of the High Court to appoint an MM to be a CMM and any MM to be an ACMM. Thereafter, Section 19 specifies that every MM shall, subject to the general control of Sessions Judge, be subordinate to the CMM. Sub-section(2) thereof preserves the power of the the High Court to define the extent of the subordination, if any, of the ACMM to the CMM. Sub-section(3) of Section 19 empowers the CMM to make rules or give special orders as to the distribution of business among the MMs and as to the allocation of business to an ACMM. Section 29(1) empowers the Chief Judicial/Metropolitan Magistrate to pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years. The distinction in the powers of the CMM vis-a-vis MMs is borne out from Sub-section(2) of Section 29 which stipulates that the

MM cannot pass a sentence for a term exceeding three years. We have not been shown any provision of the CrPC which is indicative of the position that MMs are inferior in the strict legal sense as per Black's definition, to that of the CMM or ACMM. We would like to exorcise the ghost of the old CrPC as well as the extant CrPC with regard to the powers of the sundry Magistrates but continue to be drawn under their spell. In the present case, since we are dealing with a special statute, which specifically stipulates the courts which must try offences under that statute, we need not refer to the repealed or the extant CrPC, especially in view of Section 26(b) of the CrPC, 1973 which lays down that any offence under the OS Act shall be tried by the Court mentioned in Section 13 of the OS Act. To that extent Part II of the First Schedule of the CrPC is, therefore, redundant and irrelevant for our purposes. For the same reason Section 3(3)(c) of the CrPC which enunciates that unless the context otherwise requires any reference in any enactment passed before the commencement of the CrPC 1973 to a Presidency Magistrate or Chief Presidency Magistrate shall be construed as a reference respectively to an MM or the CMM. So far as Section 13 of the OS Act is concerned, its context requires otherwise inasmuch as it speaks of Courts 'inferior' to that of a Presidency Magistrate but there are no Courts inferior to an MM. It would therefore be erroneous to extrapolate Section 3(3)(c) of CrPC into the scheme of the OS Act because it would create a formulaic incongruity in the Section. We

must hasten to add that in non-metropolitan areas this interpretive difficulty would not arise since in those areas there are in existence Courts 'inferior' to that of the Judicial Magistrate of the First Class. Nevertheless, our understanding of the import of the Section remains unchanged even so far as these areas are concerned.

31. One point which has generated considerable cogitation is the seeming contradiction in the trial of offences under the OS Act attracting punishment of imprisonment of upto fourteen years by an MM who is competent under the CrPC to order incarceration for a term not exceeding seven years. Mr. Luthra has painstakingly culled out Sections 326, 327, 363A, 377, 386, 388, 389, 392, 394, 409, 454, 455, 457, 458, 467, 472, 474, 475, 477, 493, 495 from the other provisions of the CrPC where the possible punishment exceeds seven years. We do not propose to delve deeper in the muddle since it does not detain us here for the reason that the alleged offences are punishable by imprisonment of not more than three years. So far as offences dealt with by the IPC is concerned the CrPC applies and therefore the answer can be resolved by adverting to and implementing **Rosy**. In respect of special statutes such as the OS Act, as adumbrated in **Sabir Ali**; there are two possible views, namely, either that the powers of the Court stand automatically enhanced, or, that the **Rosy** procedure has to be adhered to. *State of UP -vs- Khushi Ram*, AIR 1960 SC 905 is very relevant.

32. Mr. Luthra has also submitted that because of the very nature of prosecution under the OS Act it is imperative, in the interests of justice and fairplay, that a warrants case trial should be conducted before an MM. According to him, since the criminal proceedings are not predicated on police investigations, the accused should have the right to cross-examine the complainant and any of the witnesses produced by him. We have taken the view that Section 13 of the OS Act enables a trial by an MM only on special empowerment, and in its absence, nay in the normal course, a Sessions Trial is contemplated on the coming into effect of the extant CrPC. We must record that Mr. Luthra has not argued that the Court of Sessions is incompetent to try offences under the OS Act. The intendment of the statute appears to expect the appropriate government to keep all the peculiarities of a prosecution in perspective for coming to the conclusion that trial by an MM is not essential in the interests of justice. Criminal jurisprudence fastens the pious obligation on the prosecution to safeguard the interests of each and every citizen; to ensure that an innocent person is not vexatiously prosecuted; and to preserve the rights of every accused to a fair trial. This obligation does not rest on the Court alone.

33. In these circumstances, we do not find merit in the Petitions. The cumulative effect of the impugned Notification is that the CMM has ceased to have jurisdiction to try the criminal cases pending

before him. Consequent upon the withdrawal or rescission of the special empowerment the Court of Sessions would have jurisdiction to try the cases. The impugned administrative decision of this Court, therefore, validly transfers the pending cases from the Court of CMM to the Court of Sessions. The Petitions are dismissed but in view of the complexity of the contentions raised before us imposition of costs would be totally unjustified.

(VIKRAMAJIT SEN)
JUDGE

July 11, 2008
tp

(RAJIV SAHAI ENDLAW)
JUDGE