

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 27.05.2009

+ **WP(CRL) 1712/2005**

**STATE [THROUGH DEPUTY SECRETARY (HOME)
GOVERNMENT OF NCT OF DELHI]** ... Petitioner

- versus -

IBOTOMBI SAPAM AND OTHERS ... Respondents

AND

WP(CRL) 754/2006

**STATE [THROUGH DEPUTY SECRETARY (HOME)
GOVERNMENT OF NCT OF DELHI]** ... Petitioner

- versus -

IRSHAD AHMAD MALIK AND OTHERS ... Respondents

Advocates who appeared in this case:

For the Petitioners : Ms Mukta Gupta

For the Respondent No.1 : Mr N.D. Pancholi with Mr N. Mahendra Singh and
Mr Ch. Nripenchandra

For the Respondent No.2/UoI: Ms Gita Dhingra

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE P.K. BHASIN

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 Digest ? Yes

BADAR DURREZ AHMED, J

1. These petitions have been filed by the State (Government of NCT of Delhi) seeking the issuance of writs of certiorari quashing the opinions of the Review Committee to the effect that there is no *prima facie* case for proceeding against the respondents under the Prevention of Terrorism Act, 2002 (hereinafter referred to as 'POTA'). The two cases are unconnected but have been heard together as common legal issues arise for determination. In the case of Irshad Ahmad Malik, the Review Committee's opinion is dated 16.08.2005, whereas in the case of Ibotombi Sapam, the Review Committee gave its opinion on 11.05.2005.

2. Two questions arise for our consideration in these writ petitions:-
- i) Whether the State Government can challenge the opinion of the Review Committee by way of a writ petition ?
 - ii) If yes, whether the opinion of the Review Committee in each of the two cases is liable to be set aside on the ground that the Review Committee in each case has travelled beyond the scope of its jurisdiction ?

Whether the State Government can challenge the opinion of the Review Committee by way of a writ petition ?

Ms Mukta Gupta, appearing for the State Government, contended that the answer to this question has to be in the affirmative. She placed

reliance on the Supreme Court decision in the case of Mahmadhusen

AbdulRahim Kalota Shaikh v. Union of India & Others: 2008 (13)

Scale 398. She laid particular emphasis on paragraphs 31 and 32 of the opinion of K.G. Balakrishnan, CJI, wherein it was observed as under:-

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

32. We therefore hold that once the Review Committee on review under Section 2(3) of the Repealing Act, expresses the opinion that there is no prima facie case for proceeding against the accused, in cases in which cognizance has been taken by the Court, such cases shall be deemed to have been withdrawn. The only role of the Public Prosecutor in the matter is to bring to the notice of the court, the direction of the Review Committee. The court on satisfying itself as to whether such an opinion was rendered, will have to record that the case stands withdrawn by virtue of Section 2(3) of the Repealing Act. The court will not examine the correctness or propriety of the opinion nor exercise any supervisory jurisdiction in regard to such a opinion of the Review Committee. But we make it clear that if the opinion of the Review Committee is challenged by any aggrieved party in writ proceedings and is set aside, the Court where the proceedings were pending, will continue with the case as if there had been no such opinion.”

(underlining added)

3. Ms Mukta Gupta submitted that the above observations with regard to judicial review of the opinion of the Review Committee were made in the context of the apprehension that if the Review Committee arrived at a wrong opinion, there would be no remedy. She submitted that this is apparent from the following sentence in paragraph 30 of the said decision:-

“30. An apprehension was expressed that if the Review Committee reaches a wrong opinion, there will be no remedy. ...”

4. Ms Mukta Gupta then referred to the decision of the Supreme Court in the case of **Jasbhai Motibhai Desai v. Roshan Kumar Haji Bashir Ahmed**: 1976 (1) SCC 671. In that decision, the Supreme Court noted that, it had laid down in a number of decisions that in order to have the *locus standi* to invoke the extraordinary jurisdiction under Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject matter of the application, though in the case of some of the writs like *habeas corpus* or *quo warranto*, this rule is relaxed or modified. The court observed that as a general rule, infringement of some legal right or prejudice to some legal interest in hearing the petitioner is necessary to give him a *locus standi* in the matter. The Supreme Court further observed that in the context of a writ of certiorari, a petitioner may ordinarily fall in any of the following three categories:-

- i) Person aggrieved;
- ii) Stranger;
- iii) Busybody or meddlesome interloper.

5. The Supreme Court further noted that the persons in the last category were easily distinguishable from those coming under the first two categories inasmuch as, such persons, *inter alia*, indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives and that the High Court would do well to reject the applications of such busybodies at the threshold. The Supreme Court, however, felt that the distinction between the first and the second categories of applicants, though real, was not always well-demarcated. It observed that the first category has, as it were, two concrete zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a ‘sliding centrifugal scale’, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of “persons aggrieved”. In the grey outer circle, the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a ‘centrifugal’ direction. The Supreme Court observed that all the persons in this outer zone may not be “persons aggrieved”. In this backdrop, the Supreme Court observed as under:-

“39. To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person "against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something? Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular Individuals?”

It is, therefore, clear that ultimately the question of “person aggrieved” has to be decided in the context of whether the person approaching the High Court for a writ of certiorari under Article 226 of the Constitution had a legal right under the statutory provisions or under the general law which has been subjected to injury.

6. Ms Mukta Gupta also relied upon the decision of the Supreme Court in the case of **State of U.P. v. Ram Swarup and Another**: AIR

1974 SC 1570, in particular, she laid emphasis on the observations appearing in paragraph 37 thereof which reads as under:-

“37. The locus standi of State Governments to file appeals in this Court against judgments or orders rendered in criminal matters, particularly those commenced otherwise than on private complaints, has been recognised over the years and for a valid reason. All crimes raise problems of law and order and some raise issues of public disorder. The effect of crime on the ordered growth of society is deleterious and the State Governments are entrusted with the enforcement and execution of laws directed against prevention and punishment of crimes. They have, therefore, a vital stake in criminal matters which explains why all public prosecutions are initiated in the name of the Government. The objection of Mr. Garg that the State Government has no locus standi to file this appeal must accordingly be rejected.”

7. We may say straightaway that this decision would be of no help to Ms Mukta Gupta inasmuch as the Supreme Court was concerned with the *locus standi* of the State Government in relation to its right to file appeals and was not concerned with the *locus standi* in connection with a writ petition. The right of appeal is a statutory right and if it is available under the statute to the State Government, there can be no dispute with regard to the State Government's *locus standi* in filing any such appeal. The *locus standi* of the State Government in filing a writ petition against an order of the Review Committee constituted under the Prevention of Terrorism (Repeal) Act, 2004 stands on an entirely different footing. Merely because the State Government has, “a vital stake in criminal matters”, does not enable the State Government to file

a writ petition challenging the opinion of the Review Committee under the said Repealing Act of 2004.

8. The next decision cited by Ms Mukta Gupta is that of **Maharaj Singh v. State of Uttar Pradesh and Others**: AIR 1976 SC 2602. The said decision was rendered in the context of the U.P. Zamindari Abolition and Land Reforms Act, 1951. One of the questions that was considered was that of *locus standi* of the State to file an appeal against the decision of a lower court in the absence of the *Gaon Sabha*. One of the observations made in the context of the expression “person aggrieved” in the said decision was that where a wrong against the community interest is done, “no *locus standi*” will not always be a plea to non-suit an interested public body chasing the wrong doer in court. In that case, the Supreme Court felt that the Government fell within the category of “person aggrieved” inasmuch as there is right of resumption of an estate from the *Gaon Sabha*, meant to be exercised in public interest, which would otherwise have been seriously jeopardized if the estate was allowed to slip into the hands of a trespasser. The Supreme Court further observed that the estate belonged to the State, was vested in the *Gaon Sabha* for community benefit and was controlled by the State through directions to the Land Management Committee and was liable to be divested without ado any time. It was in that context that the Supreme Court held that the State was entitled to

appeal under Section 96 of the Code of Civil Procedure. It is clear that this decision would also be of no help to the petitioner. This is so because in ***Maharaj Singh*** (*supra*), the estate clearly vested in the State Government. The appeal filed by the State was, therefore, to protect its vested interest and that of the community at large. In that context, the State was considered to have *locus standi* being a “person aggrieved”. The State obviously had a legal right inasmuch as the estate vested in the State. Therefore, to ensure that its legal right was not jeopardized, the State was entitled to seek remedy for the infringement of such a right. The position in the present case is entirely different. This shall become clear from the discussion below.

9. Lastly, Ms Mukta Gupta referred to the decision of the Supreme Court in the case of **State of Orissa v. Union of India and Another**: **1995 Supp.(2) SCC 154**. She submitted that this was an instance where the State Government filed a writ petition and the Supreme Court held that it had *locus standi* to do so. She referred to paragraphs 11 and 12 of the said decision which read as under:-

“11. We have to consider whether the Orissa High Court was right in dismissing the writ petition filed by the State Government challenging the order of the Central Government dated 10.5.78 on the ground that the writ petition was not competent and maintainable.

12. In this connection, it is necessary to note that in the first place, the State Government is not merely an authority

subordinate to the Central Government which would, undoubtedly, be bound by the revisional orders of the superior authority. It is also the owner of the mines and minerals in question. If it is directed to issue a mining lease in favour of any party, it has locus stands to challenge that order under Article 226 of the Constitution of India.”

10. From the above extract itself, it becomes immediately clear that that decision stands on an entirely different footing from the present case. The State Government was clearly the owner of the mines and minerals in question and any direction given by the Central Government with regard to the issuance of a mining lease in favour of any party would undoubtedly affect the rights of the State Government as owners of the mines and minerals. Consequently, its legal right would be affected and, if such rights were adversely affected, it would fall within the ambit of the expression “aggrieved person”. Consequently, the State Government, in such a situation, would clearly have *locus standi* to challenge any such direction or order passed by the Central Government under Article 226 of the Constitution of India. However, the position in the present case is entirely different. It is not clear as to what is the legal right that has been affected by the rendering of the opinions by the Review Committee. We shall discuss this in greater detail below.

11. Mr Pancholi, appearing on behalf of the respondents, submitted that the question of the State Government’s *locus standi* in challenging

the opinion of the Review Committee by way of the present writ petition arises in the backdrop of the question of withdrawal from the prosecution. According to him, in the matter of serious crimes, the State is vitally interested in prosecuting the cases in relation thereto. The State, however, also has the power to withdraw from the prosecution. Under the normal law, it is the provisions of Section 321 of the Code of Criminal Procedure, 1973 which would apply. In that instance, although the move for withdrawing from a case may be initiated by the State Government, it is ultimately the public prosecutor, who, after satisfying himself, that it is a case fit for withdrawal, has to move an application before the court for withdrawing from the prosecution. Thereafter, it is for the court in exercise of its supervisory jurisdiction to consent to such withdrawal. He submitted that by virtue of the Repealing Act of 2004, the discretion which vested with the State and consequently with the public prosecutor with regard to withdrawal from the prosecution has been taken away. The State as also the public prosecutor has no say in the withdrawal from the prosecution. All the cases registered under POTA automatically fell for review by virtue of Section 2 (3) of the Repealing Act of 2004. The Review was to be done by the Review Committee constituted under Section 60 of POTA. The purpose of review was to consider as to whether there was a *prima facie* case for proceeding against the accused under POTA. It is further stipulated under Section 2(3) of the Repealing Act of 2004 that the

review is to be completed within one year from the commencement of the Act, i.e., from 21.09.2004.

12. Mr Pancholi further submitted that even the supervisory jurisdiction of the court under Section 321, CrPC has been taken away. Consequently, by virtue of the Repealing Act of 2004, once the Review Committee is of the opinion that there is no *prima facie* case for proceeding against the accused under POTA, then, in cases in which cognizance has been taken by the court, the cases are deemed to have been withdrawn. Such withdrawal would, therefore, result in the discharge of the accused if the withdrawal is at a stage before the charge has been framed and, if it is at a stage after the charge has been framed, the same shall result in an acquittal.

13. Mr Pancholi also submitted that the reference to an “aggrieved party” in *M.A.K. Shaikh* (*supra*) is clearly to the relatives of the victims or the accused themselves, but definitely not to the State Government. He referred to paragraph 33 (iii) of the said decision wherein, the Supreme Court directed as under:-

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

14. According to Mr Pancholi, this direction in itself makes it clear that when the Supreme Court used the expression “aggrieved party”, it nowhere contemplated the State Government to be the aggrieved party. Consequently, Mr Pancholi submitted that the State Government is not entitled to challenge the opinion of the Review Committee and, therefore, the writ petitions ought to be dismissed.

15. We may note that this entire controversy with regard to *locus standi* arises in the backdrop of the question of withdrawal from prosecution. The Supreme Court in the case of **State of Bihar v. Ram Naresh Pandey and Another: AIR 1957 SC 389**, with reference to Section 494 of the Criminal Procedure Code, 1898, which is similar to Section 321 of the Criminal Procedure Code, 1973, observed that in understanding and applying the Section, two main features thereof have to be kept in mind. The initiative is that of the public prosecutor and what the court has to do is only to give its consent and not to determine any matter judicially. According to the said decision, the judicial function, implicit in the exercise of the judicial discretion for granting the consent for withdrawal from a case, would normally mean that the court has to satisfy itself that the executive function of the public prosecutor had not been improperly exercised or that it was not an attempt to interfere with the normal course of justice for illegitimate

reasons or purposes. The Supreme Court also observed that “it has also to be appreciated that in this country, the scheme of administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified as cognizable offences) is on the executive authorities”. In **Rahul Agarwal v. Rakesh Jain and Another: 2005 (2) SCC 377**, the Supreme Court, after considering the said decision in **Ram Naresh Pandey** (*supra*) which was rendered in the context of Section 494 of the 1898 Code and the later decisions in the cases of **Sheonandan Paswan v. State of Bihar and Others: 1987 (1) SCC 288** and **Abdul Karim and Others v. State of Karnataka and Others: 2000 (8) SCC 710**, which were in the context of Section 321 of the present Code of Criminal Procedure, 1973, observed that:-

“10. From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The discretion under Section 321 Code of Criminal Procedure is to be carefully exercised by the Court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the

crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawal of the prosecution shall be permitted only when valid reasons are made out for the same.”

16. We may also note the observations of the Supreme Court in the case of **Rajender Kumar Jain v. State through Special Police Establishment and Others: 1980 (3) SCC 435**, to the following effect:-

14. “Thus, from the precedents of this Court, we gather:

1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.
3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.
5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes Sans Tammany Hall enterprise.
6. The Public Prosecutor is an officer of the Court and responsible to the Court.
7. The Court performs a supervisory function in granting its consent to the withdrawal.

8. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.”

17. From the above decisions, it is clear that under Section 321, CrPC, the public prosecutor performs an executive function when he decides to withdraw from the prosecution. The court, before whom an application for withdrawing from the prosecution is made by the public prosecutor, performs a supervisory function in granting consent. It is also clear that the Government may suggest to the public prosecutor that he may withdraw from the prosecution, but cannot compel him to do so.

18. Having set the backdrop for discussion of the scope of the Repealing Act of 2004, we shall now examine the provisions thereof.

Section 2 of the said Act is material and is set out hereunder:-

“2. Repeal of Act 15 of 2002 and saving.—(1) The Prevention of Terrorism Act, 2002 (hereinafter referred to as the principal Act) is hereby repealed.

- (2) The repeal of the principal Act shall not affect-
 - (a) the previous operation of, or anything duly done or suffered under the principal Act, or

- (b) any right, privilege or obligation or liability acquired, accrued or incurred under the principal Act, or
- (c) any penalty, forfeiture or punishment incurred in respect of any offence under the principal Act, or
- (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and, any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the principal Act had not been repealed:

Provided that notwithstanding anything contained in this sub-section or in any other law for the time being in force, no court shall take cognizance of an offence under the principal Act after the expiry of the period of one year from the commencement of this Act.

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

- (a) in cases in which cognizance has been taken by the Court, the cases shall be deemed to have been withdrawn; and
- (b) in cases in which investigations are pending, the investigations shall be closed forthwith,

with effect from the date of issuance of the direction by such Review Committee in this regard.

(4) The Review Committee constituted by the Central Government under subsection (1) of section 60 of the principal Act shall, while reviewing cases, have powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:-

- (a) discovery and production of any document;
- (b) requisitioning any public record or copy thereof from any court or office.

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

19. It is clear that Section 2 (3) of the Repealing Act stipulates that whether or not an application under Section 60(4) of POTA had been made for review of the case, all cases registered under POTA, would be subjected to review by the Review Committee constituted under Section 60 (1) of POTA and that such review shall be completed within one year from the commencement of the Repealing Act of 2004, i.e., from 21.09.2004. Section 2(3) of the Repealing Act of 2004 also makes it clear that where the Review Committee forms an opinion that there is no *prima facie* case for proceeding against the accused under POTA, then in cases in which cognizance has been taken by the court, such cases shall be deemed to have been withdrawn and in cases in which investigations are pending, the investigation shall be closed

forthwith with effect from the date of issuance of the direction by the Review Committee in this regard.

20. Prior to the Repealing Act of 2004, the position of law with regard to withdrawal from cases under POTA was settled by the Supreme Court decision in the case of **S.K. Shukla and Others v. State of U.P. and Others: 2006 (1) SCC 314.** The Supreme Court in **S.K. Shukla** (*supra*) had come to the conclusion that the public prosecutor could not act as a post box or act on the dictates of the State Government. He had to act objectively inasmuch as he was also an officer of the court. The Supreme Court also pointed out that the court was not bound by the direction of the Review Committee and the courts were also free to assess whether a *prima facie* case was made out or not. Therefore, as the law stood after **S.K. Shukla** (*supra*), in a case where the Review Committee constituted under Section 60 of POTA came to the conclusion that *prima facie* no case was made out, it would have still been incumbent upon the public prosecutor to apply his mind and then move an application requesting the court to permit withdrawal from the case. The court also had power to accept or reject such an application of the public prosecutor for withdrawing from the case. But, as pointed out in **M.A.K. Shaikh** (*supra*), the position in law, after the Repealing Act of 2004, is entirely different. As already pointed out above, in **M.A.K. Shaikh** (*supra*), the Supreme Court clearly held that

after the Repealing Act of 2004, the only role of the public sector, in the case where the Review Committee is of the opinion that no *prima facie* case for proceeding against the accused is made out is to bring to the notice of the court, such direction of the Review Committee. The role of the court is also limited to satisfying itself as to whether such an opinion was rendered. If it is so satisfied, the court has no option but to record that the case stands withdrawn by virtue of Section 2(3) of the Repealing Act of 2004. The Supreme Court clearly indicated that the court shall not examine the correctness or propriety of the opinion nor exercise any supervisory jurisdiction in regard to such an opinion of the Review Committee.

21. It is apparent that by virtue of the Repealing Act of 2004, the executive function of deciding whether to withdraw from the prosecution or not which vested in the public prosecutor under Section 321, CrPC, has been taken away. The public prosecutor is not left with any such executive function. Even the supervisory function of the court, which is available under the normal provisions of Section 321, CrPC, has been expressly taken away by the Repealing Act of 2004.

22. Before we proceed any further, it would be instructive to notice the statement of objects and reasons of the Repealing Act of 2004. The same reads as under:-

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

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

3. The Government has concerned with the manner in which provisions of the Act were grossly misused in the past two years. It was, therefore, felt necessary to repeal the Act. As Parliament was not in session, the Prevention of Terrorism (Repeal) Ordinance, 2004 was promulgated on 21.9.2004. The Ordinance empowers the Central Review Committee to review all cases pending in the courts or at various stages of investigation and complete the review within the period of one year from the date of repeal of the Act and to give its directions. Whenever, in the opinion of the Central Review Committee no prima facie case is made out either in respect of cases pending in the courts, or under investigation, such cases shall be deemed to have been withdrawn and investigation closed, as the case may be.

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

Sd/-
New Delhi
Shivraj V. Patil
The 23rd November, 2004.”

23. As pointed out in the opinion of Dalveer Bhandari, J, in ***M.A.K. Shaikh*** (*supra*), the said statement of objects and reasons gives us guidance in two areas. The first being that the allegations of misuse of POTA were directed at some of the State Governments. It was

observed that this is relevant because it showed that Parliament wanted a mechanism by which it could reverse the State Governments' alleged misuse of POTA. Secondly, and, more importantly, it was observed that “*subjecting the Central Review Committee's decision to the will of the State Government's public prosecutor, as is done when Section 321 of CrPC applies, clearly goes against the very objective of POTA (Repeal) 2004*”. These observations contained in the said decision in **M.A.K. Shaikh** (*supra*) clearly indicate that it was Parliament's intention to, first of all, introduce a mechanism which could remedy / reverse the State Governments' alleged misuse of the POTA provisions. Secondly, it was also Parliament's intention to take away the executive function from the public prosecutors, who would, in all practicality, be subject to the will of the State Governments. This can be explained further by considering a case where POTA was misused against an accused. If the intention of the Parliament was to reverse such misuse by a State Government, then it would have been counter-productive to have left it to the discretion of the public prosecutor of that very State to consider the question of withdrawal from prosecution. Even if the Review Committee came to the opinion that no *prima facie* case was made out against the said accused, such an opinion could easily be blocked by the public prosecutor by not making an application for withdrawal from the case. This is so because prior to the Repealing Act of 2004, in view of the decision in **S.K. Shukla** (*supra*), the public

prosecutor was not to act as a mere post office but had the discretion to make or not to make the application for withdrawing from the case even where the Review Committee had come to the clear opinion that no *prima facie* case was made out against the accused under POTA.

24. Similarly, the intention of the Parliament was also that the supervisory function exercised by the court in granting consent under the normal provisions of Section 321, CrPC should not come in the way of withdrawing from cases by clearly making a provision for deemed withdrawal by virtue of Section 2 (3) of the Repealing Act of 2004.

25. We now come to the question as to who could be an aggrieved party when the Review Committee is of the opinion that there is no *prima facie* case for proceeding against the accused. Neither the State nor the public prosecutor can be regarded as an aggrieved party. This is so because even under the provisions of Section 321, CrPC, although the process of withdrawal may be initiated by the State Government, it is the public prosecutor alone, who, on an application of mind and in exercise of the executive functions vested in him, is to make the application for withdrawing from the case. Even under Section 321, CrPC, in case the public prosecutor, without any indication from the State Government, moved an application for withdrawing from the case

and the court in exercise of its supervisory function granted its consent to such withdrawal, the State Government could not be construed as an aggrieved party. But, after the Repealing Act of 2004, whereby Parliament expressly took away the executive function of withdrawing from the case from the public prosecutor, in view of the backdrop of gross misuse of the provisions of POTA by some State Governments, the State Government can definitely not be regarded as an aggrieved party when the Review Committee arrives at the opinion that there is no *prima facie* case for proceeding against the accused.

26. However, where the Review Committee is of the opinion that there is no *prima facie* case for proceeding against the accused, the victims or the families of the victims or other affected citizens may be aggrieved. In case where the Review Committee is of the opinion that there is a *prima facie* case for proceeding against the accused, the accused would also be an aggrieved person. When the Supreme Court in ***M.A.K. Shaikh*** (*supra*) observed that any person aggrieved by the opinion of the Review Committee could challenge it in a writ petition, it, to our minds, did not contemplate the State Government as an aggrieved party. This is also indicated by paragraph 33 (iii) of the decision in ***M.A.K. Shaikh*** (*supra*) wherein the Supreme Court clearly observed that the appeals by the relatives of the victims are disposed of

reserving liberty to challenge the opinions of the Review Committee, wherever they are aggrieved.

27. Another aspect of the matter is that Section 60(5) of POTA, *inter alia*, stipulated that any direction issued by the Review Committee under sub-Section (4) would be binding on the State Government as also the police officer investigating the offence. As observed by the Supreme Court in ***M.A.K. Shaikh*** (*supra*) in paragraph 28 thereof, the direction issued by the Review Committee under Section 60(4) of POTA was binding on the concerned Government and investigating officer “but not the public prosecutor or the court under Section 321 of the Code”. But by virtue of the Repealing Act of 2004, the provisions of Section 2(3) thereof were not subject to Section 321, CrPC and clearly excluded the provisions thereof. The wordings of the Repealing Act were clear and unambiguous and did not contemplate or provide for a further application of mind by the public prosecutor or grant of consent by the court under Section 321, CrPC. It is, therefore, clear that the decision of the Review Committee, after the Repealing Act of 2004, was not only binding on the concerned Government and the investigating officer, but also on the public prosecutor and the court in a case where cognizance had been taken by such court. Thus, the binding nature of the Review Committee’s opinion under Section 60(5) of POTA was extended even further by the Repealing Act of 2004 so as

to also bind the public prosecutor and the concerned court. Once the decision of the Review Committee is binding on the State Government, it is difficult for us to understand as to how the State Government can challenge the same by way of a writ petition under Article 226 of the Constitution of India.

28. For all these reasons, the first question has to be answered in the negative. Consequently, the second question set out at the beginning of this judgment does not arise for our consideration and the writ petitions are liable to be rejected straightaway.

The writ petitions are dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

P.K. BHASIN, J

MAY 27, 2009

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