

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 03.11.2009
Date of decision: 10.11.2009

+ **WP (CRL.) No.852 of 2009**

DR.NARAYAN WAMAN NERUKAR ...PETITIONER

Through: Mr. Mukul Rohtagi, Sr. Advocate
with Mr.Soumitra Chatterjee,
Advocate.

Versus

THE STATE ...RESPONDENT

Through: Mr.Vikas Pahwa and Mr.Biswajit
Kumar Patra, Advocate for CBI.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

SANJAY KISHAN KAUL, J.

1. A case was registered on 17.4.1987 under Section 120-B of the Indian Penal Code, 1860 r/w Section 3 and 5 of the Official Secrets Act, 1923 ('the OS Act' for short) on a complaint dated 15.04.1987 of one Sh.Navin Sikand of M/s Trident Express Courier Service. A courier packet on suspicion was opened and found to contain zerox copy of documents relating to secret information on country's

defence. The petitioner is one of the accused. The accused persons numbering five were alleged to have obtained, collected and communicated defence secrets prejudicial to the safety or interest of the State in pursuance to a criminal conspiracy. On completion of investigation, a complaint was filed on 07.02.1989 in the court of CMM, Delhi and the case was committed to the Court of Sessions on 13.09.1989.

2. The learned Special Judge, Delhi handing the cases under the OS Act discharged all the accused on 22.07.1995 on account of want of sanction under Section 197 of the Code of Criminal Procedure, 1973 ('the said Code' for short). This resulted in a fresh complaint being filed on 17/18.12.1996 after obtaining the said sanction for prosecution. This complaint filed before the learned CMM was once again committed to the Court of Sessions on 01.12.1997 but met the same fate as the last complaint on 30.05.1998, on the ground that the sanction was issued without application of mind. It was, however, observed that the order would not debar the CBI from coming to the Court for a third time after complying with the requirements of law. A complaint was thus filed for the third time on 22.06.1999 when the learned CMM took cognizance and issued process against the accused for their appearance.
3. The petitioner was aggrieved by this Order of taking cognizance and issuing process and approached the

Delhi High Court by filing W.P.(Cr.) No.40/2000. The petitioner inter alia pleaded that the delay in proceedings against him had deprived him of his fundamental rights to life and liberty and was thus in violation of Article 21 of the Constitution of India. It was also the case of the petitioner that the documents in question were regarding equipment which had already been given due publicity in various magazines and the matter was not a secret. This writ petition found favour with the Division Bench of this Court in terms of the Order dated 30.05.2001. It was found that there was no justification or reason given for defective sanction for which the prosecution alone was to blame. The Division Bench placed reliance on the judgments of the Supreme Court in Raj Deo Sharma v. State of Bihar; 1998 (5) Scale 477; JT 1998 (7) SC 1 and A.R.Antulay v.R.S.Nayak; 1992 (1) SCC 225 dealing with the guidelines for speedy trial. It was found that there was sufficient material on record to come to the conclusion that the trial had been unnecessarily delayed by the prosecution and the proceedings were quashed.

4. The CBI aggrieved by this Order preferred a SLP (Criminal) No.6873/2001 which was registered as Criminal Appeal No.858/2002 and was allowed by the Supreme Court in terms of the Order dated 26.08.2002. The Supreme Court referred to the observations of a seven-Judge Bench of that Court in P.Ramachandra Rao v. State of Karnataka; JT 2002 (4) SC 92 dealing with the

aspect of delay in trial and Article 21 of the Constitution of India. The Judgments in two common causes cases – “Common Cause” A Registered Society v. Union of India and Ors; (1996) 4 SCC 33; JT 1996(4) SC 701 & “Common Cause” A Registered Society v. Union of India and Ors; (1996) 6 SCC 775; Raj Deo Sharma v. State of Bihar’s case (supra) and Raj Deo Sharma (II) v. State of Bihar; JT 1999 (7) SC 317 were found not correctly decided on certain aspects and that it was neither advisable, feasible nor judicially permissible to prescribe an outer limit for conclusion of all criminal proceedings. No generalization was possible and ought not to be done. These aspects not having been examined by the High Court while quashing the proceedings, the impugned judgment of the High Court was quashed and the matter was remitted back to the High Court. It was observed that normally aspects like the question about the proper provision applicable to a case and a definite finding about the maximum sentence should be left to the Trial Court. The High Court was directed to hear the matter afresh after permitting the parties to place material on record and to take a fresh decision in accordance with law.

5. In view of the aforesaid directions, the matter was again placed before the Division Bench of this Court. The petitioner appeared in person and was heard at length as noticed by the Division Bench. The petitioner stated that

he would be content if the case was set down before the learned Magistrate who was recording the pre-charge evidence on a day-to-day basis and made time-bound, to which the CBI made no opposition. Since the matter had been pending for quite some time before the Trial Court, the High Court directed the learned CMM, Delhi dealing with the matter to proceed with recording of pre-charge evidence on a day-to-day basis and complete the same within four weeks of the learned CMM taking up the case in the first instance. This order was passed on 13.11.2006.

6. The matter was thereafter listed before the CMM on 17.11.2006. The order passed by the High Court had not been received till date. It is the CMM who brought to the notice of the parties the Notification dated 21.06.2006 issued in exercise of power under Section 13(1) of the OS Act r/w Section 21 of the General Clauses Act, 1897 rescinding the Notification published earlier on 06.03.1998 with immediate effect though the same shall not affect anything done or omitted to be done under the earlier Notification before such rescission. The earlier Notification dated 06.03.1998 was also in exercise of powers conferred under Section 13(1) of the OS Act whereby the Central Government empowered the CMM, Delhi to try offences punishable under the OS Act.
7. Learned counsel for the CBI has explained this aspect and submitted that the CMM's court used to try cases for

offences committed under the OS Act till 1985 whereafter the cases were tried by the Sessions Court in view of the judgment of the learned Single Judge of this Court in Frank Dalton Larkins and etc. v. State (Delhi Administration); 1985 CrL.J.377. On issuance of Notification dated 06.03.1998, once again the CMM was trying these offences but on the Notification being issued on 21.06.2006 it would only be the Court of Sessions which could try the offences under the OS Act.

8. The learned CMM in terms of the Order dated 17.11.2006 noticed the said two Notifications as well as the judgment in Frank Dalton Larkins and etc. v. State (Delhi Administration)'s case (supra). The public prosecutor for CBI sought time to discuss the matter with the Department and thus the matter was directed to be listed on 30.11.2006. On the said date, application filed by the co-accused K.K.Jajodia was listed whereby a prayer was made to make a reference to the High Court. A separate application was also moved by the public prosecutor for CBI for passing appropriate directions by the Court. This arose on account of the direction dated 13.11.2006 of the High Court to the CMM to proceed with recording of pre-charge evidence on a day-to-day basis. CMM took the view that all matters under the OS Act were now required to be tried by the Court of Sessions and thus the direction of the High Court dated 13.11.2006 to the CMM should be construed as a direction to the Trial Court, the

direction having arisen on account of the High Court being informed about the pendency of the matter before the CMM, Delhi. The case was committed to the Court of Sessions under Sections 323/209 of the said Code.

9. On the matter being placed before the Court of Sessions, an application was once again filed by the co-accused K.K.Jajodia challenging the said committal to the Court of Sessions. This application was, however, dismissed on 16.11.2007. A Criminal Revision Petition No.737/2007 was thereafter filed by the co-accused K.K.Jajodia in the High Court of Delhi. On 12.12.2007, interim directions were passed to the Trial Court not to pass any further orders which were modified only on 09.04.2009 to the effect that no final order would be passed and trial would proceed. The petitioner, on 30.01.2008, moved an application to be impleaded as a party in the Criminal Revision Petition No.737/2007 and on there being no objection of the CBI, the petitioner was so impleaded. The application was based on the premise that since the petitioner was also facing prosecution along with the co-accused Mr.K.K.Jajodia and his interests were inextricably connected with the complaint case as well as the Criminal Revision Petition, serious prejudice would be caused to him if he was not heard along with the co-accused K.K.Jajodia. This order was passed on 30.01.2008, but surprisingly the petitioner filed another application which came to be listed on 06.04.2009 in

which a prayer was made that the petitioner was not interested to be impleaded as a party and thus his name may be deleted from the array of respondents. This prayer was allowed on 06.04.2009 subject to the condition that the deletion of the name of the petitioner from the Criminal Revision Petition No.737/2007 would not be used as an obstacle in the process of trial by the petitioner.

10. The petitioner thereafter proceeded to file an application in the earlier disposed of W.P.(Crl.) 40/2000 once again seeking quashing of the criminal proceedings *inter alia* on ground of delay but after some arguments the counsel for the petitioner withdrew the application stating that liberty be granted to the petitioner to take resort to substantive remedy to challenge the committal order. The order was thus passed by a Division Bench of the Court on 29.05.2009 clarifying that if any substantive remedy in accordance with law is available to the petitioner, the same can be availed of by him.
11. The Criminal Revision Petition filed by the co-accused K.K.Jajodia came to be dismissed two days prior to this order of 27.05.2009. The co-accused K.K.Jajodia thereafter filed a SLP (Criminal) No.4370/2009 which was dismissed on 01.07.2009 after noticing that the counsel for the petitioner therein had argued at length.
12. The present criminal writ petition was filed three days later on 04.07.2009 seeking quashing of the criminal

proceedings. An application for interim relief for stay of proceedings before the learned Special Judge was also moved. We issued notice on the writ petition but did not grant any interim relief and we are informed that the hearing is going on before the Special Court for framing of charge.

13. Learned senior counsel for the petitioner submitted that the scope of challenge was three-fold:

- i) Despite lapse of 22 years from the FIR being registered, even charges were not framed and there was inordinate delay in trial which was violative of the constitutional rights of the petitioner for a speedy trial guaranteed under Article 21 of the Constitution of India.
- ii) The order dated 30.11.2006 passed by the learned CMM directing the case to be committed to Court of Sessions was erroneous in law.
- iii) There was non compliance by the CMM of the order dated 13.11.2006 passed by the Division Bench of this Court

14. We would like to deal with the third plea at the first instance since the same is predicated on the ground that once there was a direction passed on 13.11.2006 by the Division Bench of this Court for recording pre-charge evidence on a day-to-day basis, the CMM ought not to have interpreted the Order of the Court but could have made a reference under Section 395 of the said Code.

We find no basis for this plea since the order of the learned CMM dated 30.11.2006 only seeks to give true meaning and intent to the order passed by the Division Bench of this Court on 13.11.2006. This is so since the object of the order dated 13.11.2006 was speedy trial of the matter. In the considered view of the learned CMM, the trial had to take place before a Court of Sessions in view of the pronouncement in Frank Dalton Larkins and etc. v. State (Delhi Administration)'s case (supra) and the two Notifications issued on 06.03.1998 and 21.06.2006. Nothing precluded the petitioner from seeking any clarification from the High Court or seeking recourse to a remedy in accordance with law in case he was aggrieved by the Order dated 30.11.2006 of the learned CMM. The petitioner chose to do neither. It is only in the present writ petition that the petitioner seeks to challenge the order dated 30.11.2006 after more than two and a half years.

15. The submission of the learned senior counsel for the petitioner is, however, predicated on the plea that since the petitioner is seeking quashing of the proceedings on account of delay in trial, lapse of two and a half years should not come in his way in challenging the said order. We find not much force in this plea for any aggrieved party must challenge orders in accordance with law within the stipulated time. The petitioner failed to avail of the remedy and now seeks to encompass the question

of challenge to the order dated 30.11.2006 by once again raking up the issue of prejudice on account of delayed trial in this writ petition. In any case, it certainly does fall within the grievance of non compliance of the earlier order of the Division Bench dated 13.11.2006.

16. The main substratum of the present petition is the issue of delayed trial. The plea advanced on behalf of the petitioner was that the consent Order dated 13.11.2006 was based on the premise that the pre-charge evidence would be recorded and the petitioner would have an opportunity to seek discharge at that stage. Once that course of action is withdrawn, the petitioner is free to rake up the issue of delayed trial once again.
17. We are unable to accept the contention for the reason that the question of delayed trial was raised by the petitioner before this Court in W.P.(Crl.) 40/2000 and the petitioner succeeded in terms of the Order dated 30.05.2001. This order, however, did not find favour with the Supreme Court which set aside the order on 26.08.2002 and remitted the matter back to the High Court for re-consideration. The parameters of re-consideration were set out by the Supreme Court itself and no hard and fast rule could be laid down that in every case of delay of trial, the proceedings must be quashed. The seven-Judge Bench judgment of the Supreme Court in P.Ramachandra Rao v. State of Karnataka's case (supra) was taken note of which had

held the legal position prevalent prior to that date as enunciated in Raj Deo Sharma v. State of Bihar's case (supra) and certain other cases as not sustainable. Raj Deo Sharma v. State of Bihar's case (supra) formed basis of the earlier order of the Division Bench dated 30.05.2001. The petitioner faced with this position while hearing was once again going in the W.P.(Crl.) 40/2000 gave a consent to the subsequent order dated 13.11.2006. The petitioner did not challenge the course of action adopted by the High Court on 13.11.2006 subsequently as it was based on consent. If the legal position has been subsequently correctly enunciated by the CMM in the Order dated 30.11.2006, there is really no further delay which has been occasioned.

18. We also cannot lose sight of the fact that the proceedings before the Trial Court remained stayed on account of the revision petition being filed by the co-accused K.K.Jajodia. This revision petition arose on account of the rejection of the plea of the co-accused K.K.Jajodia that the Court of Sessions should not try the matter. The petitioner joined in those proceedings and was impleaded as a party. The petitioner enjoyed the benefits of the said order granted on 12.12.2007 till 09.04.2009 when the interim order was modified. The petitioner suddenly sought deletion of his name only on 06.04.2009. We thus cannot say that there is such delay which would result in quashing of the criminal proceedings.

19. The last aspect arises out of the challenge to the order dated 30.11.2006 passed by the learned CMM. We have already noticed that there is an unexplained delay in challenging to this Order, but despite this fact we have examined the plea on merits. It is the contention of the learned senior counsel for the petitioner that in terms of the provisions of Section 13 of the OS Act, the matter has to be tried by CMM unless the accused prays for a trial by the Court of Sessions. The relevant provision of Section 13 reads as under:

“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 Session, 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.”

20. Learned counsel has referred to the provision of Section 3(3)(c) of the said Code which reads as under:

“3. Construction of references.

....

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code, -

.....

(c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate."

It has thus been explained that the reference to the Presidency Magistrate or Chief Presidency Magistrate is to be deemed to be a reference to the CMM.

21. Learned counsel did not dispute that since the procedure for trial before the CMM was governed by Chapter XV of the said Code, pre charge evidence could only take place in such a trial and in a Sessions trial governed by Chapter XVIII there could be no question of such pre charge evidence.
22. We asked the learned senior counsel to explain his stand regarding the judgment of the learned Single Judge of this court in Frank Dalton Larkins and etc. v. State (Delhi Administration)'s case (supra) where it was held, on interpretation of Section 13 of the OS Act, that Section 13(1) of the OS Act was a disabling provision so far as inferior courts are concerned but it did not lay down that the CMM was empowered to try offence even though it is exclusively triable by the Court of Sessions under the said Code. Section 13(2) of the OS Act on a para-materia basis was held to be an enabling clause. A perusal of parts I and II of said Code shows that if an offence is punishable with death, imprisonment for life or

imprisonment for more than seven years, it is triable exclusively by the Court of Sessions. In view thereof, the offence under Section 3(1)(c) of the OS Act was clearly triable by the Court of Sessions. The learned Single Judge further elucidated the provisions of Section 4 and 5 of the said Code which read as under:

4. Trial of Offences under the Indian Penal Code and other laws. –

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

2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving. –

Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

In the aforesaid context, it was observed as under:

7. Section 4 deals with cognizable offences triable under the IPC and other laws. Its sub-section (1) lays down that all offences under the IPC shall be investigated, enquired into, tried and otherwise dealt with according to the provisions contained in the Code. However, its sub-section (2) provides that all offences under any other law shall be investigated, enquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the

manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. Evidently this sub-section contains a statutory recognition of the principle that a special law creating offences may also create special procedure for dealing with them. In other words, the special law creating any special procedure would not be invalid as being inconsistent with the provisions of the Code. However, there can be no manner of doubt that where an enactment provides a special procedure only for some matters, its provisions must apply in regard to those matters and the provisions of the Code will apply to the matters on which the special law is silent. This position is further amplified by S. 5 of the Code which provides that nothing in the Code shall affect any special law. The said provision embodies the maxim "generalalia specialibus non derogant."

8. The question would, therefore, arise whether the provisions contained in sub-secs. (1) & (2) of S. 13 of the Act are in any way inconsistent with or repugnant to the general provisions contained in the Code so as to override the same. As already observed by me, sub-section (1) is only intended to ensure trial of offences by a relatively senior class of a Magistrate but it nowhere lays down that offence under S. 3(1)(c) will be triable by the court of a Magistrate of the first class specially empowered or Presidency Magistrate etc. even though it falls within the category for which sentence may extend to imprisonment for 14 years. It may be pertinent to notice here that S. 3(1)(c) of the Act also comprises offences which are punishable with sentence of imprisonment up to three years only. In other words, the offences described in S. 3 comprise two distinct categories, one punishable with imprisonment up to three years and the other punishable with imprisonment up to 14 years. The allegations contained in the complaint instituted against the petitioners prima facie make out an offence falling under the latter category and as such it will be triable exclusively by the Court of Session. Even attempt to commit or abetment to commit an offence under the Act is punishable with the same punishment

and the accused is liable to be proceeded against in the same manner as if he had committed such an offence by virtue of S. 9 of the Act. Indeed, sub-section (2) of S. 13 in terms recognises two distinct categories of offences under the Act itself, one triable exclusively by the Court of Session and the other triable by the court of a Magistrate of the first class etc. as would be clear from the words "notwithstanding that it is not a case exclusively triable by that Court" appearing therein. These words, to my mind, clinch the issue in favor of the view that all the offences under the Act are not triable by a court of the Magistrate specified in sub-section (1) of S. 13. I am fortified in the view I have taken indirectly if not directly by order dt. 12th November, 1981 of a learned Judge of this Court in Cr. M.(M) No. 448/81, Tikka Ram Kashyap v. State (Delhi Administration), dismissing in limine the revision petition which was directed against an order of an Additional Sessions Judge holding that an offence falling under clause (c) of S. 3(1) is exclusively triable by the Court of Session. Hence, this contention of the petitioners' counsel is devoid of any merit."

23. The answer of the learned senior counsel was that the said judgment did not correctly interpret the aforesaid provision.
24. Learned counsel for the State also brought to our notice a Judgment of the Division Bench in N.G.Sheth and Ors. v. CBI & Ors; 2008 VII AD (Delhi) 233 on the question of interpretation of Section 13 of the OS Act where it was held that CMM has ceased to have jurisdiction to try criminal cases pending before him after the Notification dated 21.06.2006 came into force and consequent upon withdrawal of rescission of special empowerment the Court of Sessions would have the jurisdiction to try the

cases. The Division Bench referred to the earlier judgment in Frank Dalton Larkins and etc. v. State (Delhi Administration)'s case (supra). The Division Bench was of the view that a true construction must be given to the meaning and intent of Section 13 of the OS Act. The plea that the Section mandates of no court other than that of a Magistrate of First Class specially empowered in this behalf by the appropriate Government to try any offence under the OS Act was negated. There is a detailed discussion in this behalf in para nos.14 and 20 of the judgment in N.G.Sheth and Ors. v. CBI & Ors's case (supra) with the conclusion recorded in para 20. It would be useful to reproduce the same:

“14. We have already reproduced Section 13 of the OS Act, which, regretfully, 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.”

25. Learned senior counsel for the petitioner did not dispute that this judgment went against the plea sought to be advanced by the petitioner, but once again made an endeavour to persuade us to differ from the said view as it did not correctly lay down the legal proposition and thus wanted us to make a reference to a larger Bench. Learned counsel also submitted that once the provisions of the Statute were clear, it is only in the manner prescribed by the Statute that act should be done relying upon the observations of the Privy Council in Nazir Ahmad v. King-Emperor; AIR 1936 Privy Council 253(2) to the effect that :

“Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.”

This principle has been re-affirmed *inter alia* in Kunwar Pal Singh v. State of U.P.; (2007) 5 SCC 85 by observing that the principle is well-settled that where any statutory provision provides a particular manner for doing a

particular act, then, that thing or act must be done in accordance with the manner prescribed therefor in the Act.

26. We are unable to persuade ourselves to re-open the chapter which stands closed with the judgment in Frank Dalton Larkins and etc. v. State (Delhi Administration)'s case (supra), as affirmed in N.G.Sheth and Ors.v.CBI & Ors's case (supra), or to differ from the same. The legal principles have correctly been settled in these cases.
27. Learned counsel for the CBI has brought to our notice an order passed in Crl.M.C.No.1416/2007 filed by the co-accused Brigadier R.S.Deol which was decided on 29.10.2007 where learned Single Judge of this Court held that the CMM was justified in committing the case to a Court of Sessions because of the withdrawal of the notification dated 06.03.1998 by the Notification dated 21.06.2006. Learned counsel has also referred to the observations of the Supreme Court in Birendra K.Singh v. State of Bihar; (2000) 8 SCC 498 to the effect that it is the Court of Sessions which has to entertain objections after committal of the case to it. The question raised was of sanction contemplated by Section 197 of the said Code and the Supreme Court opined that the stage for raising objections should be when the accused is called upon to address arguments under Sections 227 and 228 of the said Code and such a stage would reach only if the case is committed to the Court of Sessions. In a nutshell, the

plea is that it is open to the petitioner to make all grievances on the lack of material to frame any charge at that stage.

28. We find force in the submission of learned counsel for CBI that under chapter XVIII dealing with trial before a Court of Sessions, the petitioner can always pray for seeking discharge under Section 227 of the said Code and a reading of Sections 227 and 228 of the said Code shows that both options are available to the Court – to discharge the accused or frame charges. The petitioner is thus not prejudiced in any manner by giving his consent to the directions passed on 13.11.2006 as it is always open to the petitioner to pray for discharge under Section 227 of the said Code. As noticed earlier, arguments are taking place before the Trial Court on the framing of charge.
29. We also find that the petitioner has been adopting a strategy of wait and watch by looking to the fate of the litigation initiated by the co-accused, joining those proceedings and again withdrawing from the same and then filing independent proceedings. The endeavour is to delay the trial. The petitioner makes no mention of the dismissal of the special leave petition by the Supreme Court on 01.07.2009 challenging the order dated 27.05.2009. To say that the petitioner was unaware would be quite unacceptable as he had even joined those proceedings for quite some time till he sought to get

himself deleted from the proceedings on 06.04.2009. The petitioner thus seeks to take advantage of proceedings of co-accused K.K.Jajodia and when he feels that they may not result in any success, seeks to re-open another channel to make independent challenges. In fact, normally the present petition ought to have been listed before the learned Single Judge of this Court but for an endorsement by the petitioner that the case of the petitioner has been taken up earlier by the Division Bench in W.P.(Crl.) 40/2000. Learned counsel for the CBI has made a grievance that these were only endeavours to avoid particular Benches which had taken adverse view in the case of the co-accused K.K.Jajodia.

30. Be that as it may, the petitioner is certainly playing ducks and drakes with the various proceedings of the Court in getting impleaded and then withdrawing from those proceedings and initiating separate proceedings from the co-accused even though the substratum remains the same.
31. We find that the present writ petition is devoid of any merit and dismiss the same with costs quantified at Rs.15,000/-.

SANJAY KISHAN KAUL, J.

NOVEMBER 10, 2009
dm

AJIT BHARIHOKE, J.