

(2015) 11 DEL CK 0246

In the Delhi High Court

Case No : Criminal M.C. No. 2784/2011, Crl. M.A. Nos. 10129/2011 and 6144/2012 and Crl. M.C. 3342/2011

Arvind Khanna

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 30-11-2015

Acts Referred:

Bengal General Clauses Act, 1899 — Section 16(1)(a), 8, 8(1)(c)
Constitution of India, 1950 — Article 20, 20(1)
Criminal Procedure Code, 1973 (CrPC) — Section 166A, 200, 202, 203, 204
Foreign Contribution (Regulation) Act, 1976 — Section 2(1)(c), 2(1)(e), 23, 23(1), 24
Foreign Contribution (Regulation) Act, 2010 — Section 11, 3, 35, 4, 4(b)
General Clauses Act, 1897 — Section 31, 6, 6(d), 6(e)
Income Tax Act, 1961 — Section 147
Penal Code, 1860 (IPC) — Section 302, 323, 384, 452, 465
Terrorist and Disruptive Activities (Prevention) Act, 1985 — Section 3(2)

Citation : (2015) 153 DRJ 350 : (2016) 134 SCL 116

Hon'ble Judges : Suresh Kait, J.

Bench : Single Bench

Advocate : Arvind Nigam, Atul Nanda, Senior Advocates, Rameeza Hakeem, Sandeep Kapoor, Apoorva Pandey and Rajat Brar, Advocates, for the Appellant; Narender Mann, Special Public Prosecutor, Manoj Pant and Utkarsha Kohli, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Suresh Kait, J.—Vide Crl. M.C. No. 2784/2011, the petitioner seeks quashing of FIR bearing No. RC-AC-1-2007-A-0003 dated 02.04.2007, chargesheet dated 13.12.2010 and the order dated 05.07.2011 passed by the learned Additional Chief Metropolitan Magistrate-01 (ACMM), Patiala House Courts, New Delhi, whereby cognizance under Section 35 read with Section 3 of the Foreign Contribution (Regulation) Act, 2010 (hereinafter shall be called "FCRA, 2010) was taken and summons were issued against the petitioner.

2. Vide Crl. M.C. No. 3342/2011, the petitioner seeks quashing of the order

dated 20.08.2011 passed by the learned Revisional Court in Criminal Revision No. 02/2011 filed by the Central Bureau of Investigation (CBI). While allowing the said revision petition, order dated 05.07.2011 was substituted providing that deemed cognizance has been taken under Section 23 read with Section 4 of the Foreign Contribution (Regulation) Act, 1976 (hereinafter shall be called "FCRA, 1976").

3. Since the issues raised in both the petitions are inter-related, therefore, both these petitions were heard together and are decided together by this common judgment.

4. Brief facts of the case are that the petitioner held the office of Member of Legislative Assembly (MLA), Punjab, from 24.02.2002 to 27.02.2007. During holding of said office from 06.03.2002 to 04.03.2006, he received a sum of Rs. 9,04,84,770/- (Nine Crores Four Lacs Eighty Four Thousand Seven Hundred Seventy) from his father Mr. Vipin Khanna, albeit, through eight foreign entities, one of which is known as New Heaven Nominees". The other seven entities are managed by an entity known as "CI Law Trust". The Ministry of Home Affairs by letter dated 18.12.2006 had sanctioned investigation in terms of Section 28 FCRA, 1976 alleging that the petitioner received funds without obtaining prior permission of the Central Government. Accordingly, the Central Bureau of Investigation (CBI) on 02.04.2007, registered the FIR mentioned above for violation of Section 23(1) read with Section 4(1) FCRA, 1976, against the petitioner for receiving the contribution from foreign entities without prior permission of the Central Government while he was an MLA.

5. Mr. Arvind Nigam, learned senior counsel appearing on behalf of the petitioner submitted that the aforesaid amount was a gift received by the petitioner from his father Mr. Vipin Khanna, who is an Indian passport holder. The foreign entities through whom such funds were sent were holding the same on behalf of his father. To this effect, said Mr. Vipin Khanna made a statement dated 11.07.2006, whereby stated that these funds were sent on his instructions to the petitioner. Moreover, vide statement dated 13.04.2007, New Heaven Nominees" stated that the funds sent to the petitioner by way of gifts were from funds standing to the credit of petitioner's father Mr. Vipin Khanna with them. It is further stated that similar gifts or funds were also given to the petitioner's siblings, namely, Mr. Aditya Khanna, Mr. Naveen Khanna and Ms. Vineeta Singh by Mr. Vipin Khanna. The statement dated 10.08.2007 made by CI Law Trust, corroborated the fact that funds sent to the petitioner were paid by way of gifts from funds standing to the credit of Mr. Vipin Khanna and stated that similar gifts or funds were given by father of the petitioner to other siblings mentioned above.

6. Learned senior counsel further submitted that the similar income received by the petitioner from the same CI Law Trust (formerly known as West Way) had been treated as a "gift" from the father of the petitioner by the Income Tax Authorities vide order dated 11.12.2010 passed by the Commissioner of Income Tax (Appeals) in proceedings under Section 147 of the Income Tax Act, 1961.

The said order stands confirmed by the order dated 15.04.2014 passed by the Income Tax Appellate Tribunal in ITA Nos. 1915 to 1917/DEL/2010.

7. Learned senior counsel further submitted that CBI had filed an application for issuance of Letters Rogatory (LRs), which was allowed by the learned ACMM vide order dated 10.12.2007 for the purpose of collection of evidence from United Kingdom. However, the prosecution has received only part/incomplete execution of such LRs, which can be seen from letter dated 11.02.2010, which states that witnesses' statements will be sent in due course and also makes it clear that notice had been issued only to one of the eight foreign entities, i.e., CI Law Trust Group.

8. Mr. Nigam pointed out that vide letter dated 26.11.2010 sanction issued to prosecute the petitioner under Section 27 FCRA, 1976, is based on violation of Section 8(e) FCRA, 1976, i.e., receipt of funds from a relative but without prior permission of the Central Government.

9. The learned senior counsel further submitted that CBI filed the chargesheet on 13.12.2010 alleging violation of Section 4 read with Section 23 FCRA, 1976. The incomplete execution of LRs has been stated in para 16.9 of chargesheet, whereby stated as under:-

"In order to verify the nature of these remittances, Letters Rogatory (LR) issued by this Hon'ble Court u/s. 166A Cr.P.C. on 16.12.2008 was sent to the United Kingdom on 08.01.2008 in February, 2010, a part execution report of the LR was received from U.K. This part execution report contains copies of documents relating to instructions given by remitting entity to the remittance bank to transfer the stipulated sum to the account No. 522-1-002126-4 of Sh. Arvind Khanna in Standard Chartered Bank, 17, Parliament Street, New Delhi. The bank, after debiting the stipulated sum to the account of requesting entity in turn intimates it that the same has been credited as desired."

10. In Para 16.15, it is stated as under:-

"The sanction for prosecution in terms of Section 27 of FCRA, 1976 to prosecute Shri Arvind Khanna in the Court of law has been received vide letter No. II-21022/52(43)/2009-FC.II(MU) dated 26.11.2010 and is attached in original along with this charge-sheet. For the time being, photocopies of all documents as received from UK Central Authority through official channel as a result of execution of Letter Rogatory report are being filed in the court. UK Central Authority has been requested to execute the remaining part of Letter Rogatory and also sent the certified copies of the documents at the earliest."

However, till date, no further documents have been received by the Investigating Authority.

11. Mr. Nigam submitted that FCRA, 1976, stood repealed and replaced by FCRA, 2010, with effect from 01.05.2011. Section 4 FCRA, 2010, now removes the requirement of prior permission from the Central Government. Accordingly, the

petitioner is completely exempted from any charge under Section 3 FCRA, 2010, as no prior permission is required. Moreover, Section 41 FCRA, 2010, now made such offences as compoundable.

12. Learned senior counsel further submitted that the learned ACMM vide order dated 05.07.2011 proceeded to take cognizance of offence under Section 35 read with Section 3 FCRA, 2010, and accordingly, issued summons against the petitioner. The above order dated 05.07.2011 was challenged by the CBI itself before the learned Revisional Court by way of Criminal Revision No. 02/2011, which was allowed vide order dated 20.08.2011 directing deemed cognizance under FCRA, 1976, however, no notice was issued to the petitioner of those proceedings. In such an eventuality, since the petitioner was only aware of the summoning order dated 05.07.2011, he preferred Crl. M.C. No. 2784/2011 seeking quashing of the FIR, chargesheet as well as order dated 05.07.2011 whereby the learned ACMM had taken cognizance of offence under FCRA, 2010, and summoned the petitioner. However, vide order dated 24.08.2011 passed in Crl. M.C. No. 2784/2011, this Court stayed the proceedings pending before the learned ACMM.

13. Being aggrieved by order dated 20.08.2011 passed by the learned Revisional Court, the petitioner filed a second petition bearing Crl. M.C. No. 3342/2011 under Section 482 of the Code of Criminal Procedure, 1973, wherein while issuing notice, proceedings pending before the Trial Court were stayed.

14. Mr. Nigam submitted that since offences were now compoundable under Section 41(1) FCRA, 2010, petitioner filed an application dated 04.06.2012 before the Ministry of Home Affairs seeking composition of offences in terms of Section 41 FCRA, 2010, however, the Ministry of Home Affairs by order dated 28.04.2014, rejected the same. Thereafter, the petitioner challenged said rejection order vide W.P. (Crl.) No. 1168/2014, while setting aside the same vide order dated 08.07.2014, this Court directed that a fresh hearing be given to the petitioner. Accordingly, the same was granted to the petitioner in the said compounding proceedings on 09.03.2015, which is still pending for decision.

15. Mr. Nigam, submitted that case of the prosecution is that the sanction for investigation under Section 27 FCRA, 1976, and sanction for prosecution under Section 28 FCRA, 1976, were based on lack of prior permission and violation of Section 8(e) FCRA, 1976, i.e., receipt of gift from a relative (father) without prior permission. He further submitted that father of the petitioner, being an Indian and not a foreign source and it being a transaction between two Indians, neither provisions of FCRA, 1976 nor FCRA, 2010, would apply in the present case. The only case where an MLA may receive a foreign contribution after obtaining prior permission under FCRA, 1976, is where such funds are from a relative under Section 8(e) FCRA, 1976. In fact, the entire basis on which the petitioner was investigated and then prosecuted was the alleged violation of Section 8(e) FCRA, 1976 on account of receipt of funds from a relative without prior permission from the Central Government. Thus, whole case of the petitioner moves around

Section 8(e) FCRA, 1976, and accordingly, Ministry of Home Affairs sanctioned investigation on the ground that no prior permission was obtained from the Central Government for receipt of funds from a relative. Even the chargesheet filed by the CBI is only based on lack of prior permission from the Central Government. However, since it is the prosecution's own premise that funds came from father of the petitioner but without prior permission under Section 8(1)(e) FCRA, 1976. As per definition of "foreign source" in Section 2(1)(e) FCRA, 1976, only citizens of a foreign country or territory come under this category. Therefore, being an Indian, no foreign contribution regulatory legislation would apply on father of the petitioner. Not only the provisions of FCRA, 1976, but also FCRA, 2010, would be outside the realm of both these Legislations as the transaction being between an Indian father and Indian Son.

16. Mr. Nigam further submitted that without prejudice to the proposition mentioned above, assuming applicability of some legislation, since Section 4(e) FCRA, 2010, provides a complete exemption when such funds are received from a relative, (without the need for any prior permission), provisions of FCRA, 1976, would not be applicable in this case and the provisions of FCRA, 2010, would be applied. Therefore, the prosecution against the petitioner can neither be sustained nor continued.

17. Mr. Nigam submitted that the FCRA, 2010 has come into force w.e.f. 01.05.2011 and such new law undoubtedly expands the categories of transactions exempted from the Act and further makes all offences compoundable. Thus, viewed in the present facts, FCRA, 2010 is more lenient legislation than the FCRA, 1976.

18. Mr. Nigam submitted that in the case of T. Barai Vs. Henry Ah Hoe and Another, , the Hon"ble Supreme Court held so, notwithstanding Section 8(1) (c) , (d) & (e) of the Bengal General Clauses Act, 1899, which is pari materia with Section 6 of the General Clauses Act and relied upon by the Prosecution. In Paras 17 and 22 to 25, the Apex Court observed as under:

"17.....

..... The submission is that in view of Clause(c), (d) and (e) of Sub-section(1) of Section 8 of the Bengal General Clauses Act, 1899 which provide that if any law is repealed then unless a different intention appears, the repeal shall not affect any liability incurred under any enactment so repealed or affect any legal proceeding or remedy in respect of such liability, penalty or punishment as aforesaid. It is said that there was a liability incurred by the commission of an offence punishable under Section 16(1)(a) of the Act as amended by the West Bengal Amendment Act and Section 8 of the Bengal General Clauses Act, 1899 preserved the continued operation of the repealed West Bengal Amendment Act for imposition of that punishment. The contention is that where rights and procedure are dealt with together by the repealing Act, then, the intention of the legislature is that the old rights are still to be determined by the old procedure.

In support of the contention, reliance is placed on the decision of the Sargant, J. in *Re Hale's Patent*. We are afraid, the contention cannot prevail. Just as a person accused of the commission of an offence has no right to trial by a particular court or to a particular procedure, the prosecutor equally has no right to insist upon that the accused be subjected to an enhanced punishment under the repealed Act. The dictum of Sargant, J., in *Re Hale's Patent* is therefore not applicable.

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22.But insofar as the Central Amendment Act reduces the punishment for an offence punishable under Section 16(1)(a) of the Act, there is no reason why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction requires that even *ex post facto* law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense. This finds support in the following passage from *Craies on Statute Law*, 7th edn. at pp. 338-89:

".....it is a good general rule that a law should have no retrospect, but in cases in which the laws may justly and for the benefit of the community and also of individuals relate to a time antecedent to their commencement : as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed.....".

23. To illustrate, if Parliament were to re-enact Section 302 of the Indian Penal Code, 1860 and provide that the punishment for an offence of murder shall be sentence for imprisonment for life, instead of the present sentence of death or imprisonment for life, then it cannot be that the Courts would still award a sentence of death even in pending cases.

24.who delivered a majority opinion, concluded that in considering the question, the rule of beneficial construction required that even *ex post facto* law of the type involved in that case should be applied to reduce the punishment.

25. It is settled both on authority and principle that when a later statute again describes an offence created by an earlier statute and imposes a different punishment, or varies the procedure, the earlier statute is repealed by implication. In *Michell v. Brown*. Lord Cambell put the matter thus:

"It is well settled rule of construction that, if a later statute again describes an offence created by a former statute and affixes a different punishment, varying the procedure, the earlier statute is repealed by the later statute See also *Smith v. Benabo* [1937] 1 All. E.R. 523."

In *Regina v. Youle* (1861) 158 E.R. 311 Martin, B. said in the oft-quoted passage:

"If a statute deals with a particular class of offences, and a subsequent Act is passed which deals with precisely the same offences, and a different punishment is imposed by the later Act, I think that, in effect, the legislature has declared

that the new Act shall be substituted for the earlier Act."

19. Mr. Nigam further submitted that even the International Covenant on Civil and Political Rights, 1966, Article 15, Clause-1, ratified by India states that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If subsequent to the commission of the offence, the provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

20. Mr. Nigam submitted that given the above application of law, the petitioner would be entitled to the beneficial application of 2010 Act, being a later and more benevolent legislation which expands the number and width of the exclusions from the Act and also makes all offences compoundable. Section 4(e) completely excludes from the operation of 2010 Act, any foreign contribution received from a relative. This being the position, receipt of such funds by the petitioner from his father, would neither be a violation under the law nor the subject matter of prosecution.

21. Learned senior counsel submitted that even otherwise, there is material to show that the funds were indeed a gift from the father of the petitioner. The prosecution has neither disproved this fact as false nor alleged as a matter of certainty that the funds in question did not belong to the father of the petitioner. Moreover, the prosecution had sent LRs to ascertain the authenticity of documents; however, no documents have been received by the prosecution in execution of such LRs which shows that the above documents are falsified in any manner. In addition, the order dated 11.12.2010 passed by the Commissioner of Income Tax (Appeals) and thereafter confirmed by the Income Tax Appellate Tribunal vide order dated 25.04.2014 have become final, which cannot be disputed by the prosecution.

22. Mr. Nigam, learned senior counsel further submitted that sanction for prosecution order dated 26.11.2010 does not survive after the repeal of FCRA, 1976 and hence the bar imposed by Section 40 FCRA, 2010/Section 27 FCRA, 1976 (which prohibits cognizance without sanction) would trigger, rendering cognizance by the Id. Trial Court barred in law. He submitted that the sanction for prosecution vide order dated 26.11.2010 was passed under the FCRA, 1976. It was passed on the basis of violation of Section 8(e) of the FCRA, 1976, i.e., petitioner's failure to take prior permission from the Central Government for receipt of funds from a relative. The sanctioning authority was thus of the mind that while funds have been received from a relative, no prior permission was taken from the Central Government.

23. Learned senior counsel has referred to the following provisions of law:-

"Section 40 of FCRA, 2010.

"Bar on prosecution of offences under the Act: No court shall take cognizance of any offence under this Act, except with the previous sanction of the Central Government or any officer authorised by that Government in this behalf.

Section 27 of FCRA, 1976

"Bar to the prosecution of offences under the Act: No court shall take cognizance of any offence under this Act, except with the previous sanction of the Central Government or any officer authorised by that Government in this behalf."

24. He submitted that after the repeal of FCRA, 1976 and the enactment of FCRA, 2010, in terms of Section 54(2)(a) FCRA, 2010, only those Sections taken "which would include sanction orders" under the old Act and which are not inconsistent with the new FCRA, 2010 would remain alive and saved. Under Section 4(e) FCRA, 2010, receipt of funds from a relative is a complete exemption from law, and there is no necessity for prior permission of the Central Government.

25. Section 54 FCRA, 2010 reads as under:

"Repeal and saving: (1) XXXXXXXX

(2) Notwithstanding such repeal -

(a) anything done or any action taken or purported to have been done or taken under the repealed Act shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

XXXXXXXXXXXXXXXXXX"

26. Thus, the very reasoning and basis on which the sanctioning authority applied its mind and issued sanction order dated 26.11.2010 under Section 27 FCRA, 1976, is now inconsistent with the provisions of the FCRA, 2010. As a result of which, cover of Section 54(2)(a) FCRA, 2010, evaporates and the sanction order stands non-est in the eyes of law. There being no sanction for prosecution, given the bar under Section 40 FCRA, 2010/Section 27 FCRA, 1976, which prohibits the cognizance by the Id. Trial Court without such a sanction order, no cognizance could have been taken either by the Trial Court under the 2010 Act or by Id. Sessions Court under the 1976 Act.

27. Id. Sr. Counsel further submitted that the prosecution is incorrect in contending that the 1976 Act would apply to the petitioner as the offence was committed during the currency of the said Act and all offences committed under 1976 Act are "saved" and are to be dealt with under the FCRA, 1976 by an operation of Section 54 FCRA, 2010 and Section 6 of the General Clauses Act, 1897. Section 54(2)(a) FCRA, 2010, saves "anything done" or "action taken" under the old FCRA, 1976. This contemplates acts and actions done validly and legally under the Act, i.e., orders, rules and notifications etc.

28. To strengthen his arguments Id. Counsel has relied upon a case of State of Punjab v. Mohar Singh Pratap Singh, AIR 1955 SC 84, wherein held as under:

"9. We agree with the High Court that the expression "anything done" occurring in the Section does not mean or include an act done by a person in contravention with the provisions of the Ordinance. What the section contemplates and keeps alive are rules, notifications or other official acts done in exercise of the powers conferred by or under the ordinance and thus the powers are mentioned in the severed sections of the Act. But although the lodging of claim does not come within the purview of Section 11 of the Act, we are of opinion that the proviso of Section 4 of the Act clearly shows that the claim filed under the ordinance would be treated as one filed under the Act with all the consequences attached thereto....."

29. Id. Senior Counsel further submitted that by the very language of Section 6 , this provision would apply "unless a different intention appears" from the new Act. The different intention is to be established from an overall reading of the provisions of the new FCRA Act, 2010, and if they manifest an intention contrary to Section 6 as held in the case of Mohar Singh (Supra). There is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. Hence, Section 41 FCRA, 2010, specifically makes all offences in which prosecution has not been instituted as being compoundable. The Supreme Court in the case of General Officer Commanding Vs. CBI and Another, , held as under:

"41. Thus, in view of the above, it is evident that the expression "Institution" has to be understood in the context of the scheme of the Act applicable in a particular case. So far as the criminal proceedings are concerned, "Institution" does not mean filing; presenting or initiating the proceedings, rather it means taking cognizance as per the provisions contained in Cr.P.C."

30. Learned senior counsel has submitted that this is clearly a different intention from that of saving all offences, investigations and legal proceedings as contemplated by Section 6(d) and (e) of the General Clauses Act. On the date FCRA 2010 came into effect, i.e., 01.05.2011, cognizance in the petitioner's case had yet not been taken. This was taken thereafter on 05.07.2011. Hence, considering the date of repeal of FCRA, 1976 and coming into force of FCRA, 2010, case of the petitioner was itself compoundable under Section 41 FCRA, 2010. This being so, application of Section 6 of the General Clauses Act, 1897 is ruled out and the application of FCRA, 1976 would stand repealed to the facts of the petitioner's case.

31. In the alternative, learned senior counsel submitted that even if provisions of Section 6 of the General Clauses Act, 1897, were to be treated as being applicable, Section 6(d) only saves as penalty, for the forfeiture or punishment

incurred in respect of any offence committed.

32. Similarly, in Section 6(e) of the aforesaid Act, it is not every investigation or legal proceedings which is saved rather investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid. A combined reading of Section 6(d) & (e) of the said Act shows that it is not the commission or the prosecution simpliciter of the offence which is saved but what is saved is restricted to (i) penalty, forfeiture or punishment incurred in respect of any offence committed, and (ii) investigation, legal proceeding or remedy in respect of such incurred liability penalty, forfeiture or punishment.

33. Learned senior counsel submitted that the petitioner has not yet incurred any penalty, forfeiture or punishment and consequently there can be no saving of such penalty, forfeiture or punishment or of any proceeding in respect of such penalty, forfeiture or punishment which he has incurred. Prior to the repeal of the 1976 Act, the prosecution had only filed the charge sheet on 31.12.2010 and can at best could expect or hope for a conviction and penalty/punishment which may follow. Section 6 does not save such abstract rights or possibilities or expectations. It applies to specific events which have occurred under the old Act.

34. To strengthen his arguments, on the issue raised above, learned senior counsel has relied upon the decision of the Apex Court rendered in M.S. Shivananda Vs. Karnataka State Road Transport Corporation and Others, , wherein it has been held as under:-

"13. It is settled both on principle and authority, that the mere right existing under the repealed Ordinance, to take advantage of the provisions of the repealed Ordinance, is not a right accrued. Sub-section (2) of Section 31 of the Act was not intended to preserve abstract rights conferred by the repealed Ordinance

14. What were the "things done" or "action taken" under the repealed Ordinance? The High Court rightly observes that there was neither anything done nor action taken and, therefore, the petitioners did not acquire any right to absorption under sub-clause (3) to clause 20. The employees of the former contract carriage operators in normal course filled in the proforma giving their service particulars and reported to duty.....

15. The distinction between what is, and what is not a right preserved by the provisions of Section 6 of the General clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere "hope or expectation of", or liberty to apply for, acquiring a right."

35. Further, this Court in R.P. Sablok Vs. Smt. Kaushalya Devi, held as under:

"14. Before, however, parting with this case 1 may note that while going through the record of the Additional Sessions Judge's Court I have found that in the

revision petition no notice was issued to the petitioner herein, R.P. Sablok. The order sheet shows that the impugned order was passed after hearing only the complainant's counsel.

15. Mr. Tiger Singh, learned counsel for respondent Smt. Kaushlya Devi submitted at the bar that as the revision petition was directed against the order of dismissal of the complaint, no notice was sent to the petitioner herein who had been named as an accused. According to him in such like revision petitions the Sessions Courts do not issue notice and only the counsel for the petitioner or the Public Prosecutor is heard while deciding them.

16. This practice of not sending notice of the revision petition to the person who is likely to be prejudiced by any order to be passed by the Court is not in accordance with law. It appears to me that the amended provision of sub section (2) of Section 401 of the Criminal P.C. 1973, was not brought to the notice of the learned Additional Sessions Judge. The said sub section reads as follows:

"(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

(emphasis added):

Under Section 399 of the Code a Sessions Judge exercises the same powers as the High Court under Section 401 of the Code. Sub-section (2) of Section 399 of the Code specifically lays down "Where any proceeding by way of revision is commenced before a Sessions Judge under sub section (1), the provisions of sub-sections (2), (3), (4) and (5) of Section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge."

17. It is thus clear that it is mandatory for the Sessions Judge while exercising his powers of revision not to make any order which would prejudice the accused or other person unless he had been given an opportunity of being heard."

36. Also in Bal Manohar Jalan Vs. Sunil Paswan, Hon''ble Supreme Court held as under:-

"5. The main contention of the learned counsel for the appellant is that though Section 401(2) of the Criminal Procedure Code stipulated that no order in exercise of the power to revision shall be made by the High Court to the prejudice of the accused unless he had an opportunity of being heard either personally or by pleader in his own defence, the High Court in criminal revision did not issue notice to the appellant herein who is Accused 4 in the first information report and without providing an opportunity to him has exercised jurisdiction under Section 401 CrPC by directing to proceed in accordance with law treating the protest petition as the complaint, to the prejudice of the appellant herein and hence the impugned order of the High Court is liable to be set aside. In support of his submission he relied on the decision of this Court in

Manharibhai Muljibhai Kakadia v Shaileshbhai Mohanbhai Patel. We also heard the learned amicus curiae on the submissions made by the learned counsel for the appellant.

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7. The right of hearing given to the accused under Section 401 sub-section (2) of the Criminal Procedure Code was elaborately dealt with by this Court in Manharibhai Muljibhai Kakadia v Shaileshbhai Mohanbhai Patel and it is laid down as follows:-

"46. The legal position is fairly well settled that in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, up to the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204 , yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

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48. In a case where the complaint has been dismissed by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under Section 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401 , it cannot be said that the person against whom the allegations of having committed the offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203 , has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203 -although it is :at preliminary stage-nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is

laid to such order at the instance of the complainant in a revision petition before the High Court or the Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get the right of hearing before the Revisional Court although such order was passed without their participation. The right given to "accused" or "the other person" under Section 401(2) of being heard before the Revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200 , 202 , 203 and 204 . In the revision petition before the High Court or the Sessions Judge at the instance of the complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post-process stage."

8. In the present case challenge is laid to the order dated 4-3-2009 at the instance of the complainant in the revision petition before the High Court and by virtue of Section 401(2) of the Code, the accused mentioned in the first information report get the right of hearing before the Revisional Court although the impugned order therein was passed without their participation. The appellant who is an accused person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code and on this ground/ the impugned order of the High Court is liable to be set aside and the matter has to be remitted".

37. In Raghu Raj Singh Rousha Vs. Shivam Sundaram Promoters (P) L and Another, , the Hon"ble Supreme Court held as under:

"12. Section 397 of the Code empowers the High Court to call for records of the case to exercise its power of revision in order to satisfy itself as regards correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court. Sub-section (2) of Section 397 of the Code, however, prohibits exercise of such power in relation to any interlocutory order passed in any proceeding.

13. Whereas Section 399 of the Code deals with the " Sessions Judge"s power of revision, Section 401 thereof deals with the High Court"s power of revision.

Sub-section (2) of Section 401 of the Code reads thus:

"(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

14. Submission of Mr. Jaspal Singh that by reason of the impugned order the appellant was not prejudiced and in any event at the presuming stage, he was not an accused, cannot be accepted. Sub-section (2) of Section 401 of the Code refers not only to an accused but also to any person and if he is prejudiced,

he is required to be heard.

15. In *Makkapati Nagaswara Sastri v. S.S. Satyanarayan*, 1989 CrLJ 617, this Court opined that the principle of *audi alteram partem* is applicable in a proceeding before the High Court.

16. Yet again, in *P. Sundarrajan & Ors. v. R. Vidhya Sekar* this Court held:

"4. On the above basis, it proceeded to consider the material produced by the petitioner before it and without taking into consideration the defence that was available to the respondent proceeded to set aside the order of the Magistrate, and directed the said court to take the complaint on file and proceed with the same in accordance with law.

5. In our opinion, this order of the High Court is *ex facie* unsustainable in law by not giving an opportunity to the appellant herein to defend his case that the learned Judge violated all principles of natural justice as also the requirement of law of hearing a party before passing an adverse order."

38. Learned senior counsel submitted that an order issuing summons to an accused is an interlocutory order and the only remedy against such an order is the filing of a petition under Section 482 Cr.P.C.

39. To support his submissions, learned senior counsel has relied upon the case of *Subramaniam Sethuraman Vs. State of Maharashtra and Another*, , wherein the Supreme Court held that:-

"14. In *Adalat Prasad*'s case, this Court considered the said view of the Court in *K.M. Mathew*'s case and held that the issuance of process under Section 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under the Code for review of an order by the same court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order.....

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17. As observed by us in *Adalat Prasad*'s case the only remedy available to an aggrieved accused to challenge an order in an interlocutory stage is the extraordinary remedy under Section 482 of the Code and not by way of an application to recall the summons or to seek discharge which is not contemplated in the trial of a summons case."

40. This Court in *Bhiku Ram Jain etc. Vs. Municipal Corporation of Delhi and Others*, , held as under:-

"12. The Code does not defined what is a "final order" or an "interlocutory order". This aspect has been considered in a chain of authorities and it is now well-settled that an order which does not decide any matter in issue or put an

end to the litigation between the parties cannot be said to be final order. In other words, an order which does not bind and affect the rights of the parties of its own force is not deprived of its interlocutory character. Framing of a charge cannot be said to be finally determining the matter in issue, setting at rest the controversy between the parties. It only formulates specifically as to what are the accusations against an accused person which he has to meet during the trial. In framing a charge a Magistrate only specifies the accusation against an accused person and communicates the same to him so that he may not be prejudiced in defending himself. In issuing of a process under section 204 of the Code, the Magistrate does not decide the matter finally between the parties. By no stretch of imagination can it be said that while issuing the process an accused person is found guilty of the offence complained of. It only requires the accused person to appear before the Court and face and answer the allegations made by the aggrieved party.....

13. An order framing a charge against or issuing summons to an accused person is simply procedural in nature and does not terminate the matter finally before the Court; such an order leaves the rights of the parties to be determined by the Court on adducing evidence. However, important or vital issue may have been decided in framing a charge or issuing summons against an accused person as the main matter still remains to be decided, the order is an interlocutory order and the fact that the order decides an important or a vital issue is by itself not material. It is now beyond the pale of controversy that if after the order the cause is still a live cause in which the rights of the parties are yet to be determined, the order has the attribute of an interlocutory order because finality has to be a finality in relation to the cause and must terminate the proceedings and not keep it alive to be terminated by a subsequent final order.

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20. A Bench of our own Court in Amrik Singh Vs. State etc., held that when process is issued under section 204 of the Code the proceedings commence by way of an interlocutory order requiring the attendance of the accused so that the Court on hearing both the parties may reach its ultimate decision. The issue of the process does not signify that the accused person had been found guilty of the offence complained of. It was also held that framing of a charge does not terminate the proceedings. In framing of a charge or in issuing a process the only consideration is that there exists a prima facie case on the assumption that what is stated can be true and that at that stage the grounds indicate the need for proceeding further in the matter in order to discover the truth after a full and proper investigation.

21. We are in respectful agreement with the above view, the same is in consonance with the judicial consensus on the question under consideration".

41. Learned senior counsel submitted that learned Trial Court while taking cognizance had not applied its judicial mind and as such non application of mind

vitiates the order of summoning. The Magistrate is mandated to apply his judicial mind to the facts of the case at the time of issuing process/summons and such application of judicial mind must be reflective from the order passed.

42. In *Devendra and Others Vs. State of U.P. and Another*, , the Apex Court held:-

"28. Furthermore, in a case of this nature where even, according to Mr. Das, no case has been made out for taking cognizance of an offence under Section 420 of the Penal Code, it was obligatory on the part of the learned Chief Judicial Magistrate to apply his mind to the contents of the charge-sheet. Such application of mind on his part should have been reflected from the order. [See *State of Karnataka and Another Vs. Pastor P. Raju*, and *Pawan Kumar Sharma v. State of Uttaranchal*]."

43. Also in *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, , it was held:

"5..... Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed."

44. Learned senior counsel submitted that this being strict position in law, learned Trial Court could not have issued the process against the petitioner and the learned Sessions Judge could not have substituted its own satisfaction as to the commission of an offence under the provisions of FCRA, 1976 and directed deemed cognizance, as had been done in the present case.

45. Further to another question, whether the donation given by an individual of Indian origin and having foreign nationality is treated "foreign contribution"? It is replied in the affirmative by stating that every donation from an Indian, who has acquired foreign citizenship, is treated as foreign contribution. This will also apply to PIO card holders and to overseas citizens of India. However, this will not apply to NRIs who still hold Indian citizenship.

46. On the other hand, Mr. Narender Mann, learned standing counsel for respondent CBI submitted that the present petition is not maintainable under Section 482 Cr.P.C. as the allegations made in the First Information Report (FIR) and the charge sheet, prima facie discloses commission of offences under Section 4 read with Section 23 FCRA, 1976, however, it is an offence under Section 3 read with Section 35 FCRA, 2010. The FIR was registered on authorization by the Ministry of Home Affairs, Government of India, vide letter dated 18.12.2006, by which CBI was authorized under Section 28 FCRA, 1976, to investigate receipt of

foreign funds amounting to Rs. 9.6 Crores by the petitioner, the then MLA from Punjab, in his saving account from eight overseas companies without obtaining prior permission of the Central Government or intimation.

47. He further submitted that as per Section 2(1)(c) FCRA, 1976, if the origin of the currency which has been remitted lies in a foreign source, it amounts to foreign contribution and is an offence. Once it is proved that the remittance has been received from a foreign source, it amounts to foreign contribution and is an offence. It is further submitted that once it is proved that the remittance has been received from a foreign source, the Court is under an obligation to presume that it is a foreign contribution as contemplated in Section 2(1)(c) FCRA, 1976, and further fortified by the explanation to the said provision. The foreign source(s) (eight entities/companies are registered in United Kingdom) had transferred the foreign currency through their Bankers to the account of petitioner maintained by him with his Bank, i.e., Standard Chartered Bank, and such transfer amounts to transfer/delivery of currency by a foreign source as contemplated under the foreign contribution.

48. Mr. Mann submitted that "foreign source" has been defined under Section 2(1)(e) FCRA, 1976, which includes a corporation, not being a foreign company, incorporated in a foreign country or territory and a foreign trust by whatever name called, or a foreign foundation which is either in the nature of trust or is mainly financed by a foreign country or territory.

49. Further submitted that it is an admitted and undisputed fact that the petitioner was an MLA of Punjab from 24.02.2002 to 27.02.2007 and during this period he received foreign contribution to the tune of USD 19,52,735.20 equivalent to INR 9,04,84,770.33 in his Saving Bank Account No. 522-002-002126-4 maintained with Standard Chartered Bank, New Delhi, from eight overseas companies/entities. It is also not in dispute that these eight entities are not registered/incorporated in India and none of them has been exempted from the definition of "Foreign Source", as defined in FCRA, 1976. It is also an admitted fact that the petitioner has neither sought prior approval of the Central Government for accepting the above said contribution nor intimated the Central Government about the receipt of such contribution. The transfer of money/contribution from the eight entities is a "foreign contribution" and falls within the purview of definition "foreign source" as defined in the FCRA, 1976.

50. Mr. Mann submitted that composite reading of Section 2(1)(c) FCRA, 1976, along with explanation, creates a deeming fiction, that if the transfer of currency is received from a foreign source, it shall be deemed to be a foreign contribution. In other words, if the origin of the currency which has been remitted lies in a foreign source, it is a foreign contribution. The documents relied upon by the petitioner and the plea that the money was a gift from his father, is contrary of the documents/material collected by the CBI during the course of the investigation.

51. Mr. Mann further submitted that the petitioner received foreign contribution from a foreign source and the remittances received by the petitioner were neither gift nor sent by his relative/father. This is clear from the documents filed along with the reply showing instructions given to the Banks. Moreover, during investigation, a plea was taken by the petitioner that these remittances were sent as gift to his account on the instructions of his father out of the funds standing to his credit with these eight entities in United Kingdom. Though investigation pertaining to 30 transactions was carried out but during the course of the investigation the documents pertaining to 24 transactions were received as part of the execution report and a charge sheet was filed before the learned Trial Court with regard to the 24 transactions only. The plea of the petitioner that these remittances were sent as gift was not found tenable during the course of the investigation because the remittances have emanated from the accounts of entities which are registered/incorporated in U.K. and thus are within the meaning of "foreign source". As per the explanation to Section 2(1)(c) FCRA, 1976, if the transfer of currency is received from a foreign source, it shall be deemed to be a foreign contribution.

52. Further submitted that during the verification of these remittances, LRs was issued and part execution report of LR's was received from United Kindom. This part execution report contains a letter dated 03.02.2010 enclosed with a file containing details of 24 remittances and these documents relate to instructions given by the remitting entity (C I Law Trust, Tiffany International, Baccano Holdings Ltd. etc.) to the remitting Bank to transfer the stipulated sum to the account of the petitioner. The intimation by their Bank that the sum has been credited as desired, would reveal that there were specific instructions to the remitting Bank to include the reference as part of the transfers such as, reference as "TSL Budget requirement etc." with another qualification "please ensure the beneficiary receives full amount intact and the reference is included as part of the transfer". Even in the confirmation/intimation, the reference is specifically mentioned as "TSL Technology Ltd. June Budget Funds".

53. Mr. Mann submitted that similar references are made in all the 24 remittances. The remittances were utilized by the petitioner by issuing high value cheques issued from his account for almost equal/approximate amounts corresponding to the remitted amount, to the Companies, viz., M/s. Clan Morgan Holdings Private Limited, M/s. Dynamic Sales and Service International Private Limited, Tiger Corporation Private Limited and TSL Defence Technologies Private Limited, wherein the petitioner is neither a director nor shareholder. The entire transactions would reveal that the remittances were received by the petitioner as per the directions/instructions/reference given by the remitting party for a specific purpose/reference, which by no stretch of imagination could be termed as a gift or transfer by the petitioner from his father.

54. Further submitted, the documents submitted by the petitioner are not reliable as the basic scheme of these documents is that there is a document

"basic document/Certificate" purportedly signed by an authorized signatory of the remitting party, which are certified by a Notary Public by merely referring to the "basic document/Certificate" by a title such as a letter of confirmation, which title does not even find mention on the "basic document/Certificate". The signatures of the Notary Public are in turn attested by the Indian High Commission with clear rider that the attestation is merely with respect to the signatures and not in respect of the contents. It is submitted that the attesting Notary only certifies the signature of an authorized signatory on the annexed document without exactly identifying the basic document or certifying contents thereof. The notary certificate does not even carry the sample signatures of the authorized signatory. Even there are no marks of identification/stamp or certificate on the basic documents, which may suggest that this was "the document" which was attested by the Notary Public.

55. Learned counsel for the CBI submitted that when the instructions of the remitting party (Foreign Source) to its Bankers are clear from the documents that the remittance is for a specific purpose, i.e., "TSL Budget requirement etc." and the petitioner has used the remitted amount as per the directions/reference, now the petitioner cannot be allowed to take a contrary plea that it was a gift from his father. It is submitted that when language used in a document is plain and unambiguous and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

56. The charge sheet in the case was filed much before the FCRA, 2010, came into force, i.e., on 01.05.2011 and the Revisional Court rightly hold that cognizance and summoning of the petitioner deemed to have been taken under Section 3 r/w Section 24 FCRA, 1976. Benefit of Section 41 FCRA, 2010, is not available to the petitioner as the same is available to the offences committed under the Act of 2010.

57. Mr. Mann submitted that Section 6 of the General Clauses Act, protects actions under repealed statutes unless a different intention appears 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 repealing Act or Regulation had not been passed. It is further submitted that Sections 54(1) and 54(2) FCRA, 1976, stipulates that notwithstanding such repeal, anything done or any action taken or purported to have been taken under the repealed Act shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act, would protect actions, offences, punishment etc. It is submitted that Section 54(3) FCRA, 1976, prescribes that save as provided in sub-section (2), mention of particular matters in that sub-section shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897, with regard to the effect of repeal.

58. The issue whether for the purposes of computing the period of limitation under Section 468 Cr.P.C., the relevant date is the initiation of process or the

date when cognizance is taken by the Court, has been decided by the Constitution Bench of the Apex Court in the case of Mrs. Sarah Mathew Vs. The Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian and Others, . The relevant portion of the same is reproduced below:-

"37. We are inclined to take this view also because there has to be some amount of certainty or definiteness in matters of limitation relating to criminal offences. If, as stated by this Court, taking cognizance is application of mind by the Magistrate to the suspected offence, the subjective element comes in. Whether a Magistrate has taken cognizance or not will depend on facts and circumstances of each case. A diligent complainant or the prosecuting agency which promptly files the complaint or initiates prosecution would be severely prejudiced if it is held that the relevant point for computing limitation would be the date on which the Magistrate takes cognizance. The complainant or the prosecuting agency would be entirely left at the mercy of the Magistrate, who may take cognizance after the limitation period because of several reasons; systemic or otherwise. It cannot be the intention of the legislature to throw a diligent complainant out of the court in this manner. Besides it must be noted that the complainant approaches the court for redressal of his grievance. He wants action to be taken against the perpetrators of crime. The courts functioning under the criminal justice system are created for this purpose. It would be unreasonable to take a view that delay caused by the court in taking cognizance of a case would deny justice to a diligent complainant. Such an interpretation of Section 468 of the Code of Criminal Procedure would be unsustainable and would render it unconstitutional. It is well settled that a court of law would interpret a provision which would help sustaining the validity of the law by applying the doctrine of reasonable construction rather than applying a doctrine which would make the provision unsustainable and ultra vires the Constitution. (U.P. Power Corporation Ltd. v. Ayodhya Prasad Mishra).

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39. As we have already noted in reaching this conclusion, light can be drawn from legal maxims. Legal maxims are referred to in Bharat Kale, Japani Sahoo and Vanka Radhamanohari (Smt.). The object of the criminal law is to punish perpetrators of crime. This is in tune with the well known legal maxim "nullum tempus auto locus occurrit regi", which means that a crime never dies. At the same time, it is also the policy of law to assist the vigilant and not the sleepy. This is expressed in the Latin maxim "vigilantibus et non dormientibus, jura subveniunt". Chapter XXXVI of the Code of Criminal Procedure which provides limitation period for certain types of offences for which lesser sentence is provided draws support from this maxim. But, even certain offences such as Section 384 or 465 of the Indian Penal Code, which have lesser punishment may have serious social consequences. Provision is, therefore, made for condonation of delay. Treating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation under Section 468 of the Code is

supported by the legal maxim "actus curiae neminem gravabit" which means that the act of court shall prejudice no man. It bears repetition to state that the court's inaction in taking cognizance i.e. court's inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complainant. Chapter XXXVI thus presents the interplay of these three legal maxims. Provisions of this Chapter, however, are not interpreted solely on the basis of these maxims. They only serve as guiding principles.

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51. In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 of the Code of Criminal Procedure the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale which is followed in *Japani Sahoo* lays down the correct law. *Krishna Pillai* will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 Cr.P.C."

59. I have heard the learned counsel for the parties at length.

60. Admittedly, the amount in question has been received by the petitioner from his father Mr. Vipin Khanna, who is an Indian passport holder. The foreign entities through whom such funds were sent were holding the same on behalf of his father. To this effect, Mr. Vipin Khanna made a statement dated 11.07.2006, whereby stated that these funds were sent on his instructions to the petitioner. Moreover, vide statement dated 13.04.2007, *New Heaven Nominees* stated that the funds sent to the petitioner by way of gifts were from funds standing to the credit of petitioner's father with them. Moreover, similar gifts or funds were also given to the petitioner's siblings, namely, Mr. Aditya Khanna, Mr. Naveen Khanna and Ms. Vineeta Singh by Mr. Vipin Khanna, i.e., their father. The statement dated 10.08.2007 made by CI Law Trust, corroborated that funds sent to the petitioner were paid by way of gifts from funds standing to the credit of Mr. Vipin Khanna and further stated that similar gifts or funds were given to other siblings mentioned above by father of the petitioner.

61. It is pertinent to mention that the Income Tax Authorities vide order dated 11.12.2010 passed by the Commissioner of Income Tax (Appeals) in proceedings under Section 147 of the Income Tax Act, 1961, that similar income received by the petitioner from the same CI Law Trust (formerly known as West Way) had been treated as a "gift" from the father of the petitioner. The above order stands confirmed by order dated 15.04.2014 passed by the Income Tax Appellate Tribunal in ITA Nos. 1915 to 1917/DEL/2010.

62. It is further important to note here that the Ministry of Home Affairs by order dated 28.04.2014, rejected the compounding application of the petitioner. Accordingly, the petitioner challenged said rejection order vide W.P. (Crl.) No. 1168/2014, which was set aside by this Court vide order dated 08.07.2014 and

directed a fresh hearing to the petitioner. Accordingly, a fresh hearing was granted on 09.03.2015, however, till date no decision is taken thereon by the Ministry.

63. The case of the prosecution is that sanction for investigation under Section 27 FCRA, 1976, and sanction for prosecution under Section 28 FCRA, 1976, were based on lack of prior permission and violation of Section 8(e) FCRA, 1976, i.e., receipt of gift from a relative without prior permission. Accordingly, the Ministry of Home Affairs sanctioned investigation on the ground that no prior permission was obtained from the Central Government for receipt of funds from a relative. Even the chargesheet filed by the CBI is only based on lack of prior permission from the Central Government.

64. As per the definition of "foreign source" in Section 2(1)(e) FCRA, 1976, only citizens of a foreign country or territory come under this category. Therefore, being an Indian, no foreign contribution regulatory legislation would apply on father of the petitioner. Thus, the provisions of FCRA, 1976 or FCRA, 2010, would be outside the realm of both these Legislations as the transaction being between an Indian father and Indian Son.

65. The FCRA, 2010 came into force w.e.f. 01.05.2011 and this Act, undoubtedly, expands the categories of transactions exempted from the Act and further makes all offences compoundable.

66. It is a settled law that where after commission of offence, there has been an amendment in the law which modifies the severity of the law or reduces the rigors of the law, then the accused is entitled to the benefit of such subsequent beneficial amendment in the law.

67. In the case of T. Barai (supra), the Apex Court agreed upon the ratio of foreign judgments referred to para 27, which reads as under:-

"27. It is settled both on authority and principle that when a later statute again describes an offence created by an earlier statute and imposes a different punishment, or varies the procedure, the earlier statute is repealed by implication. *Michell v. Brown* [1959] 120 E.R. 909. Lord Cambell put the matter thus:

"It is well settled rule of construction that, if a later statute again describes an offence created by a former statute and affixes a different punishment, varying the procedure, the earlier statute is repealed by the later statute See also *Smith v. Benabo* [1937] 1 All. E.R. 523."

In *Regina v. Youle* (1861) 158 E.R. 311 Martin, B. said in the oft-quoted passage:

"If a statute deals with a particular class of offences, and a subsequent Act is passed which deals with precisely the same offences, and a different punishment is imposed by the later Act, I think that, in effect, the legislature has declared that the new Act shall be substituted for the earlier Act."

68. In State Through CBI, Delhi Vs. Gian Singh, , the Apex Court held as under:

"30.In TADA Act 1985 (during the subsistence of which the offence in this case was committed) the extreme penalty, without any alternative, has been provided for the most serious offence under Section 3(2) . But in the succeeding legislation the harshness of the sentence has been diluted for the same offence by providing an alternative option to the court to impose.

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32. What is the jurisprudential philosophy involved in the second limb of Clause (1) of Article 20 of the Constitution?

No person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

It is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribed, and no ex post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation would downgrade the harshness of the sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence.

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34. There is inconsistency between the sentencing scope in Section 3(2) of TADA Act 1985 and in the corresponding provision in TADA Act 1987. The expression "in any enactment other than this Act" would, under Section 25 , encompass even enactment which, though expired by efflux of time, continues to operate by virtue of any saving clause. Accordingly, the exclusivity of the extreme sentence contained in Section 3(2) of TADA Act 1987 must stand superseded by the corresponding benevolent provision in TADA Act 1987. It is a permissible course and the express prohibition contained in Article 20(1) of the Constitution is not a bar for resorting to the corresponding Sub-section in TADA Act 1987."

69. Moreover, the International Covenant on Civil and Political Rights, 1966, Article 15, Clause-1, ratified by India states, "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If subsequent to the commission of the offence, the provision is made by law for the imposition of lighter penalty, the offender shall get benefit thereof.

70. Section 4(e) completely excludes from the operation of FCRA, 2010, if any foreign contribution received from a relative. This being the position, receipt of such funds by the petitioner from his father, would neither be a violation under the law nor the subject matter of prosecution.

71. Even otherwise, there is material to show that the funds were indeed a gift from the father of the petitioner. The prosecution has neither disproved this fact as false nor alleged as a matter of certainty that the funds in question did not belong to the father of the petitioner. Moreover, the prosecution had sent LR's to ascertain the authenticity of documents; however, no documents have been received by the prosecution in execution of such LR's which shows that the above documents are falsified in any manner.

72. In its reply to the petitioner's two petitions, the prosecution has denied that the funds were received by the petitioner from his father instead contended that the funds were transmitted to the petitioner with specific instructions stated therein such as "TSL budget requirement" etc. and other like instructions pertaining to companies owned and controlled by the petitioner. The prosecution has taken this position in Para 10 and 11 of its reply.

73. The petitioner in his rejoinder dated 09.05.2012 replied that if contention of the prosecution is that the funds were transmitted for business purposes, then this clearly came within another exclusion clause contained in both Sections 8(b) FCRA, 1976 and Section 4(b) FCRA, 2010, which exempted from the provisions of the Act, i.e., any funds which were received inter alia under the ordinary course of business. The petitioner, thus, has not one but two exemptions in his credit.

74. Therefore, investigating and prosecuting the petitioner for an offence for lack of prior permission from the Central Government as per Section 8(e) FCRA, 1976, has now a complete exemption under Section 4(e) FCRA, 2010 Act and continuation of the same would amount to an action taken under the FCRA, 1976 which is now rendered "inconsistent with the provisions of this Act" contained in Section 54 FCRA, 2010. Thus, it amounts to removing such action from the ambit of protective saving provided by Section 54 FCRA, 2010. The prosecution has relied upon Section 6(d) and (e) of General Clauses Act, 1897 and contended that the repeal shall not affect offences, investigations, legal proceedings which were commenced under the FCRA, 1976. This argument has been rejected by the Supreme Court in case of T. Barai (Supra) wherein the Apex Court has held that the accused would be entitled to the cover of all subsequent beneficial legislation, notwithstanding Section 8(1)(c), (d) and (e) of the Bengal General Clauses Act, 1899 which is *pari materia* with Section 6 of the General Clauses Act and relied upon by the prosecution.

75. In addition to above, the prosecution had no right of revision against order dated 05.07.2011 passed by learned Trial Court being an interlocutory order and hence order dated 20.08.2011 passed by learned Additional Sessions Judge which is impugned in Criminal M.C. No. 3342/2011 is without jurisdiction and a nullity. Moreover, in terms of Sections 397, 399 and 401(2) Cr. P.C., no order can be passed in exercise of revisionary jurisdiction without notice to the accused person, as was done by the learned Sessions Court in this case, thus, on this ground also the order is bad in law.

76. In case of Mohd. Afzal Vs. Noor Nisha Begum, , this Court held as under:-

"7..... The next limb of argument put forward by the learned counsel for the respondent is that since the complaint was dismissed and the petitioners were never summoned by the Magistrate, hence the learned Additional Sessions Judge while disposing of the revision petition against the impugned order passed by the learned Magistrate was under no obligation to call them and to hear them. Therefore, according to him, there is no illegality and invalidity in the course adopted by the learned Additional Sessions Judge.

xxxx xxxx xxxx

9. Section 399 of the Code of Criminal Procedure deals with the powers of revisions of a Court of Sessions. Hence the provisions of the said section can be adverted to with profit. It is in the following words. "In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401 . Where any proceeding by way, of revision is commenced before a Sessions Judge under sub-section{1}, the provisions of Sub-sections (2), (3), (4) and (5) of Section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge."

10. It is crystal clear from above that a Sessions Judge enjoys the same powers in case of a revision as that of a Judge of the High Court. Hence, the Sessions Judge has got all the powers which the High Court has under Section 401 of the Cr P C and the powers of the Sessions Judge are subject to the same limitation which has been put on the powers of the High Court. The powers of the High Court have been dealt with under Section 401 of the Cr. P.C. It lays down :- "In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 386 , 389 , 390 and 391 or on a Court of Sessions by Section 307 and, when the Judge composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392 ."

11. Section 401(2) is to the following effect: "No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by Pleader in his own defence."

12. It is abundantly clear from the relevant provisions of law reproduced above that no order to the prejudice or an accused or any other person can be made unless the said accused or the said person had been given an opportunity of being heard.

13. Admittedly in the instant case an order to the detriment of the petitioners was passed by the learned Sessions Judge inasmuch as the learned Magistrate was directed to summon them under Sections 323 /452 of the IPC, yet the said

order was passed in their absence. Hence I felt the said order is illegal and invalid and is liable to be set aside.

14. I am fortified in my above view by the observations of a Single Judge of this Court as reported in R.P. Sablok Vs. Smt. Kaushalya Devi, "It is thus clear that it is mandatory for Sessions Judge while exercising his power of revision not to made any order which would prejudice the accused or other persons unless he had been given an opportunity of being heard."

77. In view of the material placed on record by the prosecution, ingredients of offence under Section 4 FCRA, 1976, are not made out as "foreign source", as defined under Section 2(1)(e) FCRA, 1976, or the offence under Section 4 of the 1976 Act has attended by the prosecution. The prosecution has alleged violation of Section 4 read with Section 23 FCRA, 1976, by the petitioner. In order to do so, the prosecution has failed to contend that the petitioner has received all foreign contribution within the meaning of Section 2(1)(c) FCRA, 1976, from a foreign source. However, such "foreign source" has been defined separately and categorically under Section 2(1)(e) FCRA, 1976.

78. In order to make out violation of Section 4 FCRA, 1976, the charge sheet must state as to from which of the foreign sources as set out in Section 2(1)(c) FCRA, 1976, or like foreign source, the petitioner received such foreign contribution. However, the prosecution has failed to do so.

79. A bare reading of charge sheet, specially para (16.4) (16.5) shows that the prosecution merely states that the petitioner has received funds from overseas firms/companies/trusts which are not registered/incorporated anywhere in India, without specifically finding the nature of foreign sources in order to bring them within the ambit of definition "foreign sources", as prescribed in Section 2(1)(e) FCRA, 1976. In fact, a firm is not even covered under the definition of foreign source. As far as companies are concerned, only those which are the companies within the meaning of Section 591 of the Companies Act, 1956 where more than 50% of nominal value is held by the government or citizen of a foreign country or a corporation or trust, the society registered in a foreign country would come under Section 2(1)(e) FCRA, 1976. As far as trusts are concerned, it is those foreign trusts and funds which are financed by a foreign country. The prosecution has not even adverted to foreign entities from whom the petitioner received the funds are companies or trusts/firms. The charge sheet has simply lumped on these entities by labelling them as overseas firms/companies/trusts whether these are collectively treated under Section 2(1)(e) FCRA, 1976. The only barebones reference made in para 16.14 of the charge sheet is that bank account of such entities are in United Kingdom and hence, they are foreign sources. However, in my considered opinion, this is not the definition of a foreign source under the Act.

80. It is pertinent to mention here the question asked from "Foreign Donation of FCRA", whether the donation given by Non Residents Indian (NRIs) is treated as

foreign contribution? The answer thereto is that the contribution made by a citizen of India living in another country (Non-Resident Indian), from his personal savings, through the normal banking channels, is not treated as foreign contribution. However, while accepting any donation from such NRI, it is advisable to obtain his passport details to ascertain that he/she is an Indian Passport holder. Admittedly, father of the petitioner is an Indian Passport holder and transaction is through banking channel.

81. It is also pertinent to mention here that since the petitioner was only aware of the summoning order dated 05.07.2011, he preferred CrI. M.C. No. 2784/2011 seeking quashing of FIR bearing No. RC-AC-1-2007-A-0003 dated 02.04.2007, chargesheet dated 13.12.2010 and the order dated 05.07.2011 by which the learned ACMM had taken cognizance of offence under FCRA, 2010 and summoned the petitioner. This Court vide order dated 24.08.2011 stayed the proceedings pending before the said court.

82. In view of the facts recorded above and the law discussed, I am of the opinion that the material placed on record with chargesheet by prosecution is not sufficient even to frame charge against the petitioner. Therefore, I hereby quash the FIR mentioned above with all proceedings emanating thereto with liberty to the Central Government to compound the case of the petitioner under Section 41(1) FCRA, 2010.

83. Accordingly, both the petitions are allowed with no order as to costs.

84. Trial Court Record be sent back to the concerned Court.

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With the disposal of the petitions itself, these applications have become infructuous. The same are accordingly dismissed.