
(1975) 09 BOM CK 0008

In the Bombay High Court

Case No : Criminal Revision Application No. 77 of 1975

D.B. Bhappu

APPELLANT

Vs

Parasmal Nemaji Bhimani

RESPONDENT

Date of Decision : 09-09-1975

Acts Referred:

Constitution of India, 1950 — Article 141, 22, 226, 227, 276

Criminal Procedure Code, 1973 (CrPC) — Section 252, 253, 254, 255, 256

Customs Act, 1962 — Section 135

Evidence Act, 1872 — Section 145, 165

Citation : (1976) 78 BOMLR 500

Hon'ble Judges : Joshi, J;Deshmukh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Deshmukh, J.—This was originally a revision application which is now permitted to be converted into a writ petition under Articles 226 and 227 of the Constitution. The petitioner is the original complainant, Assistant Collector of Customs, Bombay, on whose complaint Criminal Case No. 279/CW of 1973 is pending before the Chief Metropolitan Magistrate. The petition seeks to challenge the legality and propriety of the order of the Chief Metropolitan Magistrate dated October 30, 1974 directing production in Court of the customs statements of witnesses and the documents on which they might be intending to rely in order to enable the defence advocate to inspect them and take down short notes or copies thereof. The application is opposed.

2. The prosecution pending before the learned Magistrate is one u/s 135(7) and 135(ft)(6) of the Customs Act, 1962. As we have pointed out earlier, it is a prosecution commencing on a private complaint by the Assistant Collector of Customs. By about the time the complaint was reaching the stage of trial, the accused made an application dated June 12, 1974 before the learned Magistrate. The accused stated that it would be fair and just and equitable and in the interest of justice and necessary for conducting the defence properly that all the

statements recorded, documents recovered and panchnamas made during the investigation in this case should be disclosed to the defence before the Court starts recording evidence in the case. It was, therefore, prayed that the prosecution be ordered to give inspection to the defence of all statements, panehnamas and documents recorded, made and recovered during the course of investigation in this case and the defence be permitted to make copies thereof before the recording of evidence begins. This application was opposed on behalf of the complainant by the special, public prosecutor Mr. Khandalawala.

3. After hearing both sides, the learned Magistrate passed an order on the basis of the powers vested in him u/s 165 of the Indian Evidence Act and on the basis of two judgments of this Court, one being of a single Judge and the other of a Division Bench, and directed the production of documents, as stated before, on which they might be intending to rely and permitting copying thereof by the accused as well as his advocate. This order is being challenged by the complainant before us.

4. Shri Porus Mehta, learned Counsel for the accused respondent No. 1, raised a preliminary objection to the entertaining of Criminal Revision Application as such. According to him though the trial may be a pending trial on April 1, 1974 and may have to be concluded uiyler the provisions of the old Criminal Procedure Code, but so far as the filing of the revision application in respect of an interim order by the Magistrate is concerned, the provision of the Criminal Procedure Code, 1973 would apply. Sub-section (2) of Section 397 of the new Code lays down that powers of revision conferred by Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. It being so, this Court has no jurisdiction at all to entertain the revision application. That appeared to be a correct technical objection.

5. Realising the situation, the learned Government pleader prayed, that he should be permitted to convert the Criminal Revision Application into an application under Article 227 of the Constitution. That was also opposed by Shri Mehta. However, we have over-ruled that objection and permitted the conversion of the revision application into an application under Article 227 of the Constitution. The reason is that the order passed by the learned Magistrate on proper analysis will show that it runs counter to the law of this land laid down by the Supreme Court. It runs counter to the statutory provisions of the Criminal Procedure Code for the purpose of trial of warrant cases. Then again it involves an issue which is of a far-reaching nature and would be a common issue in all trials which commence otherwise than on a police report, not only private complaints filed through the complainants which lead to the trial of warrant cases but the recent enactment of several statutes by the Government of India authorising complaints being filed by certain officers of various departments, like the Customs, the Railway Police Protection Force, Officers of the Foreign Exchange Department etc. Cognizance of offence is permissible by Magistrate either on a complaint or a police report. For the purpose of trial of offences to

which the warrant procedure applies, the Legislature has provided filing of complaints only of two categories. One is a police report and the other is a complaint which is otherwise than on a police report. The order of the learned Magistrate would cover the entire body of litigation which commences otherwise than on a police report and therefore assumes general importance. We are conscious of the argument of Mr. Mehta that the emphasis of the Parliament in the new Criminal Procedure Code is to eliminate the interference by higher Courts by way of revision applications in the case of interlocutory orders passed and that should weigh with us as additional ground for not lightly to interfere with the order passed by the learned Magistrate.

6. However, apart from the powers of revision application which do not seem to be available in relation to interlocutory orders, it is obvious that disposition of justice civil or criminal must be done by the Court in accordance with the statutory provisions laid down by the various Acts as also by adherence to the procedural law which is meant for doing justice between the parties. If, therefore, an interlocutory order is passed which does violence not only to the statutory law but seems to bypass a pronounced judgment of the Supreme Court, which binds every Court in this country under Article 141 of the Constitution, a fit case arises where the powers of superintendence of the High Court must be exercised and the erroneous order must be corrected. In such circumstances, not only it is the right of the High Court but it is its duty to interfere and point out how the trials must be conducted in accordance with the procedure established by law and interpreted by the highest Court of this land. It is for these reasons that we are inclined to entertain this application and to consider it on merits.

7. In a way the proposition is simple and does not seem to be debatable. It is already covered in terms by a judgment of the Supreme Court, to which a reference has been made by the learned Magistrate but he has proceeded to pass the order on the basis of certain observations of two judgments of this Court. It seems to be the tenor of the order passed by the Magistrate and also of the arguments addressed to us that the two judgments of this Court, to which we will refer in due course, deal with the right of an accused person to obtain production of certain documents in Court, inspect them and take copies, which right has not been considered by the Supreme Court at all, and, therefore, a different right as if of the accused persons is considered by the two judgments of the learned Judges of this Court and certain directions given. That being so, the learned Magistrate thought that since the orders passed by the Judges of this Court cover a field not covered by the Supreme Court and the facts before him invited the application of those observations, he was not only entitled but was bound to follow those observations and give directions which he has given. It is this approach of the learned Magistrate and a certain interpretation that Mr. Porus Mehta has put upon the two judgments of the learned Judges of this Court and the distinctive, right so called, apart from the rights considered by the Supreme Court, which lie argued before us, requires some consideration.

8. Before we go to the judgments of the learned Judges, let us consider the nature of the case that is pending before the Magistrate and the judgment of the Supreme Court, which in our view, seems to cover the point on all fours. Having considered the judgment of the Supreme Court, its real meaning and the effect thereof, we will proceed to consider whether there are other arguable points which survive and which are or could be covered by the judgments of any Courts subordinate to the Supreme Court and which can be considered by the learned Magistrate in the manner in which he has done.

9. The criminal case before the learned Magistrate is one u/s 135(1) and 135(a) and (b) of the Customs Act, 1962. It is a case upon a complaint of the Assistant Collector of Customs, Bombay, which is a case commencing otherwise than on a police report. There is no doubt about this proposition. It is also not disputed that since this case was pending trial before April 1, 1974, the provisions of Section 484(2) of the Code of Criminal Procedure, 1973, would be attracted and the trial of the case before the learned Magistrate will have to be continued and disposed of, as if the Criminal Procedure Code of 1973 was not passed at all. In other words the old Criminal Procedure Code, 1898 (Act V of 1898) applies to the trial of the criminal case before the Magistrate.

10. Admittedly, the procedure that applies is one for the trial of warrant cases. That being so, the provisions of Chapter XXI of the old Code would be the relevant provision and this being a case otherwise than on a police report, the Magistrate was to follow the procedure laid down by Sections 252 to 259 of that Code. So far as the trial of a case instituted on a police report is concerned, the trial is to be conducted under the provisions of Section 251-A of the old Code. In such a case, by an application dated June 12, 1974, the accused prays for certain reliefs. The very draft of this application exhibits consciousness that the provisions of Section 173 of the old Code do not apply to the trial at all and the accused is not entitled to the copies of the statements recorded during investigation, as also documents collected by way of evidence for the purpose of proving the charges against him. Bearing this in mind, the prayer made is that the prosecution be ordered to give inspection to the defence of all statements, panch-namas and documents recorded, made and recovered during the course of investigation in this case and the defence be permitted to make copies thereof before recording of evidence. There is no specific prayer that the production of documents be ordered in Court. The substantive prayer is that the accused should get inspection and also permission to make copies of such of the documents as the accused may want to have. Even during the argument before us, it is not being pressed that the accused is entitled to copies from the prosecuting agency. It is also not being doubted that where the judgment of the Supreme Court in the case of Assistant Collector of Customs and Another Vs. L.R. Malwani and Another, is attracted the accused persons will not be entitled to copies. However, a distinction is sought to be made between the right of getting copies from the prosecuting agency and the right of inspection with the permission to make copy by the accused himself or his advocate, as if the two

are distinct and different, and therefore the prayer made and granted is outside the judgment of the Supreme Court and is not covered by it.

11. That being so, it is urged that the principles laid down by the judgment of the Division Bench of this Court are attracted and since a Division Bench had laid down certain principles in cases of this type, that judgment is binding on this Court which is a Court of parallel jurisdiction. Even if this Court were of the opinion that the view taken by the earlier Bench requires re-consideration, a decision cannot be so made, but a reference will have to be made to a larger Bench with such a request to the learned. Chief Justice. We will deal with this part of the argument a little later when the learned Judge's judgment will be examined by us. However, if it could be pointed out that the prayer made in the application of the accused dated June 12, 1974, is nothing but the same prayer for getting copies from the prosecution it would be equally clear that even the prayer of the present type would be covered by a judgment of the Supreme Court already delivered in 1970.

12. Let us first consider whether the procedure for the trial of warrant cases on the basis of a police report or on the basis of a complaint otherwise than on a police report has any substantial difference at all. What is the historical background of these two procedures well established by law in this country ever since the enactment of the old Code? What is the position after the amendment of Criminal Procedure Code by Act 26 of 1955 when Section 251-A and Sub-section (4) of Section 173 were added and the provisions of Section 252 were suitably amended? The procedure for the trial of warrant cases, otherwise than on a police report does not seem to have undergone any change at all for all these years and such trials are governed by the provisions of Sections 252 to 259 of the old Code. Though the procedure for trials upon a police report has undergone a change by the amending Act 26 of 1955, the procedure for trials otherwise than on a police report has not been affected at all. In other words, the procedural law for the trial of offence otherwise than on a police report remains unchanged.

13. At this stage a brief reference to the trials of warrant cases on police report would be relevant. Before the amendment of 1955 the procedure for all warrant cases was the same, whether they were commenced on police report or otherwise than on a police report. The prosecution had to lead sufficient evidence to satisfy the Magistrate that a charge required to be framed and while that evidence in the enquiry before charge was being recorded, the accused had a right of cross-examination. The record of such evidence before charge in the enquiry against the accused notified to the accused the precise case of the prosecution and the nature of evidence that is sought to be led. He undoubtedly had a broad notice when the summons was served on him and he could look at the complaint, which contained not only material allegations constituting the offence, but also contained a list of witnesses which are to be relied upon by the prosecution. With a general or broad intimation of the nature of the case against

him from the complaint, the accused was posted with additional information when evidence in enquiry was recorded till the stage of framing a charge. In case of trials where the investigation was conducted under chap. XIV and the statements of witnesses were recorded in writing in such investigation, the accused was given a right of access to the copies of the statement in terms of the first proviso to Sub-section (1) of Section 162 as it stood after the amendment Act of 1923. Under that proviso, if the Court found that statement of the witness was recorded in investigation under chap. XIV, it was bound, on the request of the accused, to refer to such writing and direct that the accused be furnished with a copy thereof in order that any part of such statement if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. That was the right of the accused in respect of cases investigated under chap. XIV. It may be noted that in trials otherwise than on a police report, there was no such right or no such right was laid down in the Code, but there was undoubtedly a general right to contradict a witness with the help of his previous statement u/s 145 of the Indian Evidence Act. It is because of that right that if there was a previous statement of the witness and that was in the possession of the prosecution where it commenced otherwise than on a police report, at a proper stage, viz. when the witness is being cross-examined in the trial, the Court directed copy being made available to the accused, if such a request was made on behalf of the accused. That was the legal position upto 1955 in respect of all the trials under chap. XXI whether the cases commenced upon the police report or otherwise than on a police report.

14. By the amendment of 1955, Section 251 referred to two types of criminal cases contained in Clauses (a) and (b) thereof which are described as cases instituted upon a police report to which the procedure of added Section 251-A applied and to all other cases otherwise than on a police report, the procedure to be followed was the one specified in the Chapter. In simpler language it means that the procedure for other cases was contained in Sections 252 to 259 of the old Code.

15. Section 162 of the old Code was also amended, as we have pointed out, and the Legislature introduced a change in Section 173 also. The intention of the Legislature in making this amendment was, as has been pointed out on various occasions by this Court and the Supreme Court that the warrant trials should be expeditiously held and the procedure of enquiry before framing a charge should be shortened or eliminated. A scheme was, therefore, devised that instead of recording evidence of witnesses before charge, as soon as a report is forwarded by the officer-in-charge of a police station, he was obliged to furnish to the accused free of cost a copy of the report forwarded and of the first information report recorded u/s 154 and all other documents or relevant extracts thereof, on which the prosecution proposed to rely, including the statements and confessions, if any, recorded u/s 164 and the statements recorded under Sub-section (5) of Section 161 of all the persons whom the prosecution proposed to examine as its witnesses. This was a change brought about in the procedure of

warrant cases instituted upon a police report. By looking into these documents of which copies were already furnished the Magistrate could merely hear the advocates and proceed to frame a charge. As soon as the charge was framed the recording of evidence began and when the examination-in-chief was over the accused was already armed with the previous statements of the witnesses to enable him to cross-examine the witnesses. In order to shorten the procedure and to expedite the hearing of the warrant cases, the Legislature thought it fit to hand over to the accused copies of all the relevant evidence and the statements of witnesses instead of making a copy available at the request of accused after the examination-in-chief of witness, as was the position u/s 162 before its amendment in 1955.

16. The primary purpose of the amendment, therefore, was to shorten the warrant trials. It, therefore, saved the witnesses' trouble of visiting the Court twice. As the procedure expected a criminal case to be normally heard continuously after the hearing commenced, the handing over of the copies of all the relevant documents and statements in the case enabled that process without any grievance being made by the accused that he had no time to study the evidence which was to be led against him. Undoubtedly the Legislature also intended that expeditious trial should be held and justice should be done to the accused. It is with this twin ideals of shortening procedure and eliminating delays of trials that amendments of 1955 were made.

17. When these amendments were introduced for holding all trials of warrant cases instituted on a police report, the Legislature prescribed the same old procedure for the trial of warrant cases instituted otherwise than on a police report. This was a conscious act done by the Parliament as they found that the procedure laid down by Sections 252 to 259 was a proper procedure for such trials. The Parliament was also aware that in the case of trials of private complaints, there was no specific procedural right enacted for the accused to get copies of previous statements of witnesses but the manner in which that right was being exercised in Courts in view of provisions of Section 145 of the Evidence Act enabled the holding of a fair trial, and that procedure was retained undisturbed.

18. Pausing here for a minute, if we forget the amendments of 1955 and go back to the trials between 1923 and 1955 in respect of all warrant trials, could it, be said that the accused persons were not getting a fair trial at that time? The right to get copies or to know the contents thereof statutorily arose then only after the witness was put in the witness-box and the accused requested the Court to find out from the contents of the statement whether it was contrary to the evidence given in the Court. Ordinarily accused knows what he has done or has not done, and he is able to build up his own defence from the information that is available to him from the complaint and the statements recorded in Court before charge. It was considered by the Legislature that that was enough material for him to prepare his defence and if the evidence given by witnesses in Court was found

contrary to their previous statements, inspection of those statements during trial was good enough to enable the accused to exercise his right u/s 145 of the Indian Evidence Act.

19. In a case where the statement was too long or complicated which required some study by the advocate before some questions could be put, invariably Courts granted adjournment for the further examination of that witness and adequate time of a day or two was normally allowed. That was the concept of fair trial, and fairness of which was never doubted before any Court, If the same type of trial is now available for an accused whose case is instituted otherwise than on a police report, how does that type of trial now become unfair simply because the Parliament in its anxiety to expedite the hearing of cases instituted on a police report introduced Sub-section (4) of Section 173 and made the copies of the documents available to the accused in those cases? Approaching the proposition on first principle we find that since there is no change introduced at all in the procedure to be followed in cases otherwise than on a police report, the trial in those cases is equally fair and just before 1955 as also after 1955.

20. The only difference that now has been brought about is that in cases instituted on a police report the material in the form of prior statements and documents is available to the accused in the forms of copies supplied u/s 173(4) before the witness steps into the witness-box. In other cases the witnesses are examined in an enquiry first with a right of cross-examination to the accused, and the same witness or such of them as the accused desires to cross-examine after charge with a further right to cross-examine and the right to get copies at the appropriate time by making a request to the Court for the purpose of cross-examination in relation to Section 145 of the Evidence Act.

21. In other words, since the procedure of warrant trials on private complaints has remained unchanged nothing seems to have happened by which the accused is entitled to have access to the contents of prior statements of witnesses and documents in possession of the prosecutor. The accused never seems to have that right before and no provisions are pointed out to us of any law which gave the accused that right which the accused persons in cases instituted on a police report have u/s 173(4). Admittedly, that section is not attracted at all to the trial of the present type.

22. With this background of the two types of trials before and after amendment of 1955 of the old Code, let us consider the real meaning and intent of the application dated June 12, 1974, made by "the present accused. He wants the inspection of all the statements and documents in possession of the prosecutor and he wants permission to make copies thereof. If this is permitted, what is the difference between the provisions of Section 173(4) and the order granting the application of the present type made by the accused? At best it means that the prosecution has saved the manual labour and cost of making copies and the accused is volunteering to do that part of the, job. Having done that the accused should be in a possession of the entire material with the prosecutor including the

prior statements, if any, and would be on par with the position that the amended provision of the old Code allowed u/s 173(4) thereof. If that section is not attracted at all, can we imagine a situation where the same situation can be permitted to be brought about indirectly by such contrivance as a sort of sportive offer to reduce the manual labour and cost of the prosecution? It seems to have been assumed that the application is drafted in a very ingenious way so that without referring to Section 173(4) the accused may be in a position to achieve the same object. In our view, the attempt is too obvious and our only surprise is that it has succeeded.

23. When the Legislature deliberately maintained the old procedure for trials of cases otherwise than on a police report, and accordingly amended the procedure for cases instituted on police report, were they merely worried about the writing material and the cost of making copies? When the amendment was consciously made it means that the well established procedure laid down over years for the trial of the case of the present type is to be continued as before without reference to the amended procedure introduced for certain other types of cases, viz. those on police report. In making the prosecution give copies to the accused and in permitting the accused to inspect the record and to make copies himself, we see no distinction or difference, and if at all any it is the distinction between Tweedledum and Tweedledee. Since both lead to the same result, viz. giving the accused full information of all the documents in possession of the prosecutor, and since such a result was not in the contemplation of the Legislature while retaining the old procedure under Sections 252 to 259 for trials of cases of the present type, it would not be proper for the Court to so interpret the provisions of the procedural law as to bring about a result which was never intended by the Legislature.

24. If by this ingenious method the accused is to be permitted to take full copies of every document, it would amount to effecting a departure from the procedure enacted for trials of cases of this type contained in Sections 252 to 259 of the old Code along with the other enabling provisions of the other Acts like Section 145 of the Evidence Act. It would also mean that the Court should be indirectly legislating and introducing the provisions of Section 173(4) into the trial of offences where the case commences otherwise than on a police report. This does not seem to be permissible and must be deemed to be contrary to the provisions of the statute laying down, the proper procedure. We are, therefore, of the view that the prayer for inspection and permission to make copies of all the statements and documents in possession of the prosecutor is nothing but a well disguised prayer to obtain copies, which right the accused never had in cases otherwise than on a police report. Even though different language is sought to be used, the prayer in the application dated June 12, 1974, in fact and in law amounts to asking a prayer similar to the one u/s 173(4) of the old Code. Granting of such an application means introducing the provision of Section 173(4) of the old Code into the trial which falls under Sections 252 and 259 of the same Code. In our view, this is clearly unlawful. However, the important

point to remember at this stage is that this prayer is nothing but an attempt to extend the provisions of Section 173(4) to the trials of offences of the present type. A judicial pronouncement of the highest Court in relation to such a right in terms of Section 173(4) would govern a prayer of the present type.

25. With this background we may briefly refer to what the Supreme Court has already decided when a similar case went before them. That was again a trial on the complaint of Assistant Collector of Customs against an accused known as L.R. Melwani. Melwani made an application before the Presidency Magistrate, 26th Court, for various prayers for various reliefs. Prayer (4) is relevant for our purpose. It is as follows:

(4) The copies of statements of various witnesses whom the prosecution intends to examine and also of the documents on which the prosecution proposes to rely including statements of the accused persons as well as notings, note sheets and reports of the Customs Officers made during the course of the investigation be supplied. In the alternative, it was prayed that summons be issued u/s 84, Criminal Procedure Code, directing the Collector of Customs or the Special Prosecutor to produce in the Court the aforesaid statements, documents, notings, note sheets and reports of the Customs Officers before the commencement of the inquiry into the complaint.

The trial Magistrate rejected the application including the prayer quoted above and against that order, accused Nos. 1 and 2 made application initially before a Division Bench of this Court. That judgment is reported as L.R. Melwani v. State (1968) 69 Bom. L.R. 421. The learned Judges of the, Division Bench rejected the prayer for giving copies but directed the production of all the documents referred to above u/s 94 of the Code of Criminal Procedure. Against that order of the Division Bench an appeal was carried to the Supreme Court and that was the judgment of the Supreme Court to which we have referred already. In this case, which we will refer to as Melwani's case, the first conclusion drawn by the Supreme Court is that the procedure for trials of warrant cases on police report and otherwise than upon a police report is distinct and different. To cases of the present type commencing upon a complaint of Assistant Collector of Customs, the provisions of Section 173(4) are not at all applicable. There is, therefore, no right in the accused persons of getting copies at all. They point out in para. 11 of the report that before the amendment of the Code in 1955, the handing over of copies during the recording of evidence under the provisions of Section 162 of the Code as it then stood was considered enough and sufficient safeguard of the interest of the accused. That being so and since that right is still available in a trial of the present type, their Lordships wondered how the trial is rendered unfair unless copies are made available before the commencement of the trial. The right to get copies is thus rejected not only because there is no statutory provision, but also because making copies available at the appropriate time for the purpose of cross-examination with reference to Section 145 of the Evidence Act was a sufficient safeguard to the interest of the accused. In other words, if

that facility is made available to the accused, the trial is fair enough as it was before and fairness of that trial is in no way affected because some other procedure has been laid down for trials commencing upon a police report.

26. Having thus rejected the right to get copies the learned Judges proceed to consider whether the direction to produce in Court documents and statements was proper. We may pointedly note that mere production of documents in Court for a certain purpose is quite different than permitting inspection of those documents by adverse parties. It is possible to imagine that either in a civil suit or a criminal trial there may be apprehension in the mind of one of the parties that the other party has certain other document in his possession which may be destroyed or tampered with so as to adversely affect the course of justice. If such allegation is made and a Court is satisfied of those apprehensions the Court has undoubtedly power to get the documents produced and preserve them until the stage of trial is reached. So far as the case before the Supreme Court is concerned, it appears that Section 94 of the Criminal Procedure Code was referred to as the enabling provision in that behalf. We have referred to this distinction between production and inspection with a particular purpose.

27. The Division Bench of this Court while allowing the application of accused Melwani stated that the application succeeded so far as the prayers made in the application, in so far as they are based u/s 94, Criminal Procedure Code are concerned. It may be noted that the only prayer was that a summons be issued u/s 94 directing the Customs authorities or Special Prosecutor to produce the aforesaid documents, noting-sheets etc. It means that out of the prayers, prayer (4) quoted above for the demand for supply of copies of all the documents including note sheets was rejected by the Court, but the prayer for production u/s 94, Criminal Procedure Code, alone was granted. There was neither a prayer for inspection and making of copies nor a specific order directing making of such copies. Even this prayer has been rejected by the Supreme Court and the reasons why it is so done are worth noting.

28. The right of a Magistrate to direct any person to produce documents which are considered necessary or desirable is not in doubt. In that case the Magistrate in his order said that the powers u/s 94 are to be exercised only when the Court considers that the production of documents was necessary or desirable for the purpose of any enquiry, trial etc. Before commencement of the trial what are the means for the Magistrate to consider that the production of any particular document or thing is necessary or desirable. This reasoning of the Magistrate has been fully accepted by the Supreme Court and they say that the reasons given by the learned Magistrate in support of his order are good reasons. The High Court has not come to the conclusion that the documents in question, if not produced in Court are likely to be destroyed or tampered with or the same are not likely to be made available when required. The High Court has proceeded on the erroneous basis that the accused would not have a fair trial unless they are supplied with the copies of those statements even before the enquiry commences.

29. The approach of the Supreme Court, therefore, is that the Magistrate undoubtedly had the power u/s 94 to issue a summons and get produced any document, but that power is to be exercised only when the conditions for its exercise exists. The documents to be produced or a thing to be produced is in the first instance to be considered necessary or desirable. Such a finding or consideration is by itself not enough. It may be that a document is necessary but the prosecution is offering to produce it at the proper time. Can the Court still say that the document must be produced before the trial begins? The Supreme Court, therefore, points out that a document or thing considered necessary and desirable may not be preserved or may be tampered with by the party in whose possession it is. If that happens the course of justice will be adversely affected. Undoubtedly, the Magistrate has power in that case to compel production. However, the Supreme Court merely stops at that and refuses to decide the right to take a copy thereof or to direct giving a copy to the other side, in fact in para. 12 of the report, the Supreme Court points out that on the plain language of Section 94 merely a production of document is permissible. It was impermissible for the High Court to read into Section 94, the requirement of Section 173(4). The High Court was not justified in indirectly applying to cases instituted on private complaints the requirements of Section 173(4), Criminal Procedure Code. These observations of the Supreme Court clearly make a distinction between the power of the Court to get a document produced and to preserve it for the purpose of being read in evidence at a proper time and the right of the other side to look into the contents of that document and obtain a copy either from the party who produces it or by making a copy himself.

30. The real ratio of the judgment of the Supreme Court therefore appears to be that the Legislature has consciously provided two different procedures for trials of different types of cases depending upon their origination on the police report or otherwise. The procedure which is prescribed for cases originating on police report and more particularly the provisions of Section 173(4) of the old Code, cannot be transferred to the trial of the other group of cases which commence on complaints otherwise than a police report. The powers of the Magistrate u/s 94 though wide enough, are to be used only when the Magistrate is satisfied about two existing circumstances. The first is that the Court must consider the production of that document or thing necessary and desirable, and the other is that at the pre-trial stage when such a demand is made there must be an apprehension that unless so produced the document is likely to be lost or tampered with, or the same was not likely to be made available.

31. In the case before the Division Bench the Special Prosecutor in charge of the case gave an undertaking that he would make the copies of the statements of witnesses examined available to the accused as and when the examination of the witnesses is over. He also gave an undertaking that other documents when produced, copies will also be handed over to the accused. What documents and statements in possession of the prosecutor were was also notified to the Court. There was no grievance that there are other documents than those disclosed and

those documents were either necessary or desirable for a proper trial and those were likely to be destroyed or tampered with. In these circumstances the entire petition of the accused was rejected by the Supreme Court and the Division Bench judgment of this Court stood reversed.

32. This, in our view, has completely settled the entire law on the subject by the highest Tribunal of this land. When such a pronouncement is made and the law is laid down by the Supreme Court, Article 141 enjoins a duty upon every Court not only on those who are subordinate, but upon the Supreme Court itself to follow that law. It may be that by rules of procedure of that Court a judgment earlier given is liable to be modified or set aside by larger Benches, but until that happens the law declared by the Supreme Court shall be binding on all Courts within the territory of India as laid down by Article 141 of the Constitution.

33. Since we have come to the conclusion that there is no difference between the prayer of the accused for permission to make copies of all the documents on which the prosecution wants to rely and the prayer asking the prosecutor to supply to the accused copies of documents on which the prosecution desires to rely and since both of them really mean the same thing, whether the first or the second type of prayer is made, the question involved is already decided by the Supreme Court, and it is not open at any rate to the subordinate Courts to take a different view of the matter simply because the same old prayer is camouflaged by some ingenious language.

34. If this is the real position and the judgment of the Supreme Court was already available from 1970, how is it that the learned trial Magistrate came to pass the present disputed order? He seems to have fallen into some obvious errors. The learned Magistrate was misled by the language of the application dated June 12, 1974, and thought that the prayer for production and inspection and permission to take copies was different than the prayer to make the copies available to the accused at the instance of the prosecuting agency. It is this misreading of the application itself that led him to select some of the passages from two of the judgments of this Court and support the final order on the basis of those decisions. The judgment of the Supreme Court in Melwani's case was brought to the notice of the learned Magistrate but he felt that the provisions of Sub-section (4) of Section 173 of the old Code may not be bodily applicable to the facts and circumstances of the case before him, but the prayer made in the application dated June 12, 1974, was substantially different than the prayer for copies at the hands of the prosecuting agency. He also felt, though he has not said so in so many words that after considering the judgment of the Supreme Court in Melwani's case, this Court interpreted the relevant provisions of the Code still to mean that production can be directed with permission to take copies by the accused person. This is the understanding not only of the learned Magistrate but this is also the argument emphatically put before us by Mr. Porus Mehta for the accused. He told us that the right of inspection and taking copies by the accused is different from the right of getting copies from the prosecutor.

He says so far as the second right is concerned the question has been settled by the Division Bench of this Court and it is not ordinarily open to a Court of co-ordinate jurisdiction to take a different view. He of course added a rider that if this Court was inclined to take different view, the point will have to be referred to a larger Bench. It is the correctness of these submissions which we are now called upon to examine.

35. There are two judgments of this Court, the earlier dated December 3, 1973 by Mr. Justice Vaidya reported as Qovind Baghunath v. Kakade (1978) 77 Bom. L.R. 214. The other judgment is by a Division Bench consisting of Mr. Justice Vaidya and Mr. Justice Gandhi reported as Balkishan Devidayal v. State (1974) 77 Bom. L.R. 295. That was decided on January 17, 18, 19, 1974. In the Division Bench judgment subsequently decided, Mr. Porus Mehta the same counsel who is now representing the accused before us, appeared for the Attorney-General as there were some constitutional challenges raised in the petition. Mr. Tipnis then appeared before the Division Bench as Assistant Government Pleader for the State of Maharashtra and Shri B.A. Desai with Suraj M. Shah appeared for the applicant-original accused. We are aware that if a question has been decided by a Division Bench and another Bench is inclined to take a different view of the same question or point involved, a reference must be made to a larger Bench. The succeeding Bench cannot proceed to decide the issue involved. It is, however, necessary in the first instance to see what has been done by these judgments" Has any issue been decided, as is being canvassed before us by Mr. Porus Mehta and is that a judgment of the Division Bench? If that is not so, there is no binding judgment of this Court so far as the present Bench is concerned, and it is free to decide according to its own light and understanding. Assuming that there was such a decision, what we find in the present case is that the issue involved in the present case has been covered by the Supreme Court's judgment in Melwami's case. If the issues are directly covered by the Supreme Court and there is a judgment of this Court which is contrary to the decision of the Supreme Court, the law that prevails is the judgment of the Supreme Court, and in that case a judgment of this Court, even though of a Bench of co-ordinate jurisdiction, cannot have binding effect. With respect, we must follow the judgment of the Supreme Court and dispose of the matter before us in the light of the observations made and decision given by the Supreme Court.

36. Some times it is argued that if the Supreme Court's judgment is once interpreted by a Division Bench of this Court, that interpretation would be binding on a succeeding Division Bench and the succeeding Bench cannot interpret the Supreme Court's judgment in a different manner. Fortunately for us, we find that neither the single Judge's judgment nor the Division Bench judgment has interpreted the judgment of the Supreme Court in Melwani's case. If they had come to the conclusion to which they have come on a certain interpretation of the judgment of the Supreme Court, it was a question to consider whether we could ignore that interpretation and whether reference to a larger Bench was necessary. This last possibility is to be excluded in this case because as our

discussion will hereafter show that the Division Bench has not interpreted Melwami's ease which has already settled the law in this country.

37. In Govind Raghunath v. Kakade the learned single Judge considered a similar prayer for giving copies to the accused in a case which arose under the Railway Property (Unlawful Possession) Act. The learned Judge has undoubtedly found that the provisions of Section 173(4) of the old Code do not apply to a trial u/s 252 onwards of that Code. However, the learned single Judge by referring to discussion in a law periodical in England and certain observations in a judgment of Lord Denning M.R. felt that even though there may not be a statutory right to obtain copies, there is no technical reason why the prosecuting police authority should not suo mstu supply copies to the accused or produce them in the Court for the protection and enforcement of fundamental right of defence under Article 22(7) of the Constitution and also on the ground of ordinary principles of natural justice. The learned Judge further felt that it appeared to be the moral and ethical duty of the prosecutor at least to produce before the Court the statements of the witnesses, whom he wants to examine in the Court when the accused applies for such production. The learned Judge further proceeds to observe that apart from the ethical and moral duty, the Court possesses u/s 165 of the Evidence Act, subject to restrictions, powers to compel any party to produce any document to meet the ends of justice. With the formulation of the principles in this manner and after admitting that they had no support in any statutory law of this country, the learned Judge directed that in the circumstances of the case it was the duty of the prosecutor to supply copies or at least to produce them in Court. This was the gist of the judgment made by the learned single Judge in Govind Raghunath's case.

38. We may point out, with respect, that the learned Judge's attention was attracted directly to an unreported judgment of a learned single Judge in The State of Maharashtra v. Vishwanath Rajaram Mourya (1078) CRA 10, 1973 (Unrep.). No. 156 of 1973, decided by Rege, J. on July. From the tenor of the judgment it appears that the learned Assistant Government Pleader did not pointedly draw the attention of the learned Judge to the discussion of the Supreme Court in Melwani's case. However, the judgment of Mr. Justice Rege in the above mentioned criminal revision application in the case of The State of Maharashtra v. Vishwanath Rajaram Mourya was cited before him. The learned Judge distinguished that judgment on the ground that the facts in that ease were different. "We have carefully gone through this judgment in The State of Maharashtra v. Vishwamnath Rajaram Mourya. It shows that a witness was in the box in the trial and at that stage not only copy of the statement of that witness but copies of all other statements of witnesses who were going to be examined were claimed by the accused and granted by the trial Magistrate. Being aggrieved by that order directing giving of copies in that wholesale manner, the State of Maharashtra filed that revision application. The learned Magistrate had directed copies to be given by observing that it was not sufficient to say that the provisions of Section 161, Criminal Procedure Code do not apply to such

statements recorded by the Railway Protection Force Officer, lie observed that in any case the accused must get a fair deal and should be provided with the copies of statements on which, he can have the cross-examination of a witness, so as to put before the Court the true version of a witness, given at the earliest opportunity. On that supposed requirement of a fair trial, without any support from any statutory provisions, the learned Magistrate had directed that copies be given to the accused of the statements of all witnesses who would be examined recorded by the police. In this judgment, Mr. Justice Rege has cited and discussed several judgments of the Calcutta High Court, this High Court and the Supreme Court including Melwani's case, viz. Asst. Customs Collector, Bombay v. L.R. Melwani. We presume that this judgment was brought to the notice of Mr. Justice Vaidya. Either the learned Assistant Government Pleader did not draw the attention of the learned Judge pointedly to the Supreme Court's judgment in Melwani's case or some how a slip occurred and that judgment was not discussed and considered before deciding the case.

39. We will shortly point out that there is reason to make this assumption because when this judgment was cited, analysed and emphasised before the learned Judge in the Division Bench subsequently given, he makes an order completely consistent with the Supreme Court's judgment. We, therefore, assume that if the contents of the Supreme Court's judgment were pointedly brought, to his notice and the ratio of that judgment was indicated, the case of Govind Raghunath would not have been decided in the manner in which it has been done.

40. Here we are reminded of some rule of precedents which was emphasised before us by Mr. Porus Mehta. The judgment of Mr. Justice Rege was an earlier judgment and so far as the subsequent judgment made by Mr. Justice Vaidya was concerned, it was a judgment of a Court of co-ordinate jurisdiction. When that judgment was placed for consideration, the view was ordinarily binding upon a Court of co-ordinate jurisdiction and if a different view was to be taken, a reference to a larger Bench was necessary. However, from the subsequent development to which we will immediately proceed, it appears that the attention of the learned Judge was not pointedly drawn to the real ratio of the Supreme Court's judgment in Melwani's case.

41. That takes us to the judgment of the Division Bench which is the main prop of the argument of Mr. Porus Mehta in telling us that the point is already covered by a Court of co-ordinate jurisdiction. We have gone through the judgment of the Division Bench in Balkishan Devidayal v. State very carefully. When we found that the report of the case only included the judgment of the Court written by Mr. Justice Vaidya with a bracketed reference that the other learned Judge has delivered a concurrent judgment followed by the order passed by the Court, we sent for the original record to verify what is the reasoning of the other learned Judge (Gandhi J.)

42. So far as the published report is concerned, we were unable to find how Mr.

Porus Mehta could make out a claim that the present point of right of the accused to get copies apart from the provisions of Section 173(4), and apart from what has been decided by the Supreme Court, was decided by the Division Bench. Two questions arose before the Division Bench. It was against a prosecution under the Railway Property (Unlawful Possession) Act. The accused person insisted upon copies of statements and application made in that behalf by the accused was rejected by the Magistrate. In the revision application filed by the accused, the learned Counsel Mr. B.A. Desai raised two questions for consideration of the Court. The first argument was that a member of the Railway Protection Force was a police officer and the complaint filed by him was in the nature of a police report. That being so, the provisions of Section 173(4) already applied and the accused persons were entitled to the copies of all the statements and documents on which the prosecution wanted to rely. The leading judgment of the Court has been written by Mr. Justice Vaidya.

43. When we looked into the original judgment, we were satisfied that the judgment of Mr. Justice Vaidya as reported in the Bombay Law Reporter is a complete judgment and no part of it is left out. The major part of the judgment is devoted to the consideration of the status of an officer of the Railway Protection Force. The learned Judge found that that officer was not a police officer. However, the judgment refuses to express as to whether the provisions of chap. XIV could apply generally to the investigation made by such officer, because the second pointed question before them was a refusal of the copies u/s 173(4), when an application was made u/s 251-A. Having come to that conclusion by the middle of page 312 of the report, the learned Judge proceeded to consider the other question relating to the contention of Mr. Desai whether Section 173 of the old Code applied to an enquiry u/s 8 of the R.P.T.J.P. Act. It appears that the judgment of the Supreme Court in Melwani's case was pointed out and emphasised before the Bench. The leading judgment on page 312 of the report at once states that this point raised by Mr. Desai was no more res integra. It was well-settled that Section 173(4) of the old Code does not apply unless there is a charge-sheet filed by the police u/s 173(7). Reference is at once made to the Supreme Court's judgment in the case of Asst. Customs Collector, Bombay v. L.B. Melwani. The learned Judge says in this paragraph that where the criminal prosecution is instituted on a private complaint, the documents mentioned in Sub-section (4) of Section 173 cannot be made available to the accused.

44. It appears that another judgment of the former Chief Justice of this Court, Kotval C.J. in State v. Dattatraya Maharudra Borker (1968) CRA 7 (1970) Criminal Revision Application No. 321 of 1968, decided by Kotval C.J., No. 1135 of 1963, decided by Deshpande J., on July 15, 1968 (Unrep.). was brought to his notice which says that even where the police filed a complaint and not a charge-sheet or report as required by Section 173(7), the accused was not entitled to copies u/s 173(4). The attention of the Bench was also drawn to another unreported judgment of Deshpande J. in Ajghar Babu Tanvbe v. The State of

Maharashtra (1970) CRA 1135 of 1969, decided by Deshpande J., on January 15, 1970 (Unrep.). where a similar view was taken in relation to an officer of the Railway Protection Force, The learned Judge then notes in that paragraph that a similar view was taken by Rege J. in the case of The State of Maharashtra V. Vishwcmath Bajaram Mourya, which arose out of a prosecution under the R.P.U.P. Act. The learned Judge then adds the following sentence ; "... We agree with these decisions.""

45. We may incidentally point out that this very judgment of Mr. Justice Rege was brought to the notice of the learned Judge who wrote the leading judgment while hearing the case reported at page 214 of the same year's report of the Bombay Law Reporter when he observed that the facts there were different. We have already pointed out that having gone through the judgment of Mr. Justice Rege we find hardly anything different in the facts or points of law involved in that case and the case before the learned single Judge.

46. Mr. Desai learned Counsel arguing before the Division Bench in that case then said that those judgments could not be said to be correctly decided as to why the Parliament, which stated that the offence should be inquired into as a cognizable one though it is declared to be not a cognizable offence, should discriminate against the accused charged under R.P.T.J.P. Act in the matter of supply of copies. The learned Judge in the leading judgment thereafter immediately makes very pertinent observations, with which we agree with respect. Those observations are as follows: " It is not for us to question the wisdom of Parliament. We have to interpret the section as it stands." This was also the view taken by the Supreme Court in "Melwani"s case. That argument of Mr. Desai stood rejected as is clear from the concluding portion of paragraph on page 313. In the first paragraph on page 313 of the report, the learned Judge considers what is the complaint and ultimately points out that the complaint filed by the officer of the Railway Protection Force cannot be considered as the report of a police officer within the meaning of Section 173(7) of the old Code and that argument of Mr. Desai was declared as untenable. The next paragraph on that page deals with the argument of Mr. Desai that even if Section 173(4) is inapplicable to an enquiry u/s 8 of the R.P.U.P. Act every accused against whom a complaint was filed before a Magistrate, was entitled to ask the complainant to supply copies of at least the documents which are referred to in the complaint, as a matter of fair play and natural justice. Mr. Desai submitted relying upon the list of witnesses and the list of documents annexed to the complaint in that case, which are referred to above, that the accused is entitled to all the copies of the documents which are mentioned in the list of documents annexed to the complaint. The reply of the learned Judge to this argument is worth quoting in his own words (p. 313) :

...This contention is without any merit. A party to a litigation cannot demand copies from the other Side as a matter of right. It is only if law enables him to get the copies from the other side that he can ask the other side to furnish

copies. Mr. Desai is unable to point out any provisions of the Criminal Procedure Code and/or any other relevant Act which entitled the accused in a case under the RPUP Act to demand copies from the complainant.

47. The next paragraph of the report points out that Mr. Tipnis learned Assistant Government Pleader, drew their attention to a judgment of Deshmukh and Apte JJ. in *The State of Maharashtra v. Hind Cycle Ltd* (1971) Criminal Revision Application No. 1037 of 1970, decided by Deshmukh and Apte JJ., on July 14, 1971 (Unrep.). which arose out of a prosecution under the Imports and Exports (Control) Act, 1947. That Bench had taken the view that the accused was not entitled to obtain copies of the police statements u/s 173(4) as those provisions were inapplicable to a prosecution under that Act. The conclusion at the end of the paragraph is as follows (p. 313):

"...The contention of Mr. Tipnis must be upheld as the accused has no right to be furnished with copies by the complainant under any law. (Italics supplied)

We are in full agreement, with respect, with the final, conclusion reached above.

48. It may, however, be of some interest to note that in the earlier judgment delivered by the same learned Judge in *Govind Raghunath's* case he has observed on page 217 of the report that the learned Magistrate appears to have lost sight of Section 165 of the Indian Evidence Act, 1872. That section is then quoted and the learned Judge observes that the only restriction on this plenary power conferred on Court is to be found in Sections 131 and 148 and 149 of the Evidence Act. The judgment then proceeds to state that nobody drew the attention of the learned Magistrate to the provisions of Section 165, Evidence Act which confer that power on every Court to compel any party to produce any document to meet the ends of justice subject to the restrictions mentioned in that section. What we find is that having so observed in the earlier judgment which was delivered on December 3, 1973, the learned Judge has come to the conclusion while writing the leading judgment of the Bench that there was no law under which the accused had any right to ask for any copies in such cases. This Division Bench judgment is delivered on January 17, 18, 19, 1974.

49. In our view the judgment of the Division Bench given by the leading judgment of the senior Judge out of that Bench came to an end and the application of Balkishan, the accused, stood rejected. It is true that in terms that conclusion is not drawn because of certain developments which took place when the judgment was being dictated. After the judgment ending with the above quotation on page 313, the only formal order that was to be passed then ought to be that the application stood rejected. Mr. Desai then made out a case of moral appeal to the Bench on the basis of the learned single Judge's judgment in the case of *Govind Raghunath*, as the next paragraph of the leading judgment shows that notwithstanding this, viz. the legal position that the accused has no right to ask for such copies, relying on a judgment delivered by "me" while sitting single, in *Govind Raghunath v. Kahade*, Mr. Desai submitted that the

statements of at least the witnesses, who were examined by the complainant before the framing of the charge and of the witnesses, who are likely to be examined in proof of the case must be ordered to be produced in Court by the complainant and inspection of the said documents must be given to the counsel of the accused, including the right to take copies of the said statements in Court, if so required. The above sentence is practically reproduced by us verbatim from the judgment. However, what follows thereafter is rather interesting and we are inclined to produce that part of the judgment as follows (p. 313):

Mr. Tipnis, the learned Assistant Government Pleader, appearing for the State, fairly stated that the State had no objection to the production in Court of such statements. Mr. Porus Mehta appearing for the Attorney General also agreed that although he was appearing for the Attorney General and was concerned with the constitutional point only, the requisites of a fair trial required such an order to be made in every case. In his opinion, the judgment in *Govind Raghunath v. Kakade* was welcome in the interest of fair trial of the accused charged with offences under the RPUP Act and in cases instituted by officers like the Railway Protection Force clothed with powers of the police in the matter of enquiring into the offences.

It appears that the moral appeal of Mr. Desai based upon the earlier judgment of the learned single Judge was heeded by the learned Assistant Government Pleader who showed his willingness to produce the document. Mr. Porus Mehta added his might in that behalf and made a concession far beyond his own role in that case. He was conscious of it, and therefore says that he makes that statement though he was appearing for Attorney-General. A notice to the Attorney-General is issued in a case where the vires and constitutionality of any Act is challenged. No such challenge had survived as we have gone to the close of that judgment. The role of the Attorney-General was over as the question of constitutional validity was over. Since the same learned advocate was available to us, we were interested to know how he made that broad concession and he told us that he took instructions before making that concession. This, however, does not improve the situation.

50. Attorney-General's role in that case was only for constitutional challenges and the moment that was over, for the other part of the case it was in the nature of an expression of private opinion and not an opinion of Legislature or the State, who have made the law and are enforcing the same. At this stage before proceeding to quote the remaining portion of the judgment, which is also relevant for certain purposes, we will point out. our own conclusions from the leading Division Bench judgment upon this point. The effect of the leading judgment of the learned Judge obviously is that on the basis of the Supreme Court's judgment in *Melwani's* case he has rejected all the argument of Mr. Desai which were also raised before him in *Govind Raghunath's* case. To put it in clear language the earlier decision of the learned Judge stood overruled by his leading judgment in the Division Bench case. Apart from that, it is obvious, in

view of the discussion we have made above, that the learned single Judge's judgment was contrary to the law pronounced by the Supreme Court and had no binding effect on any one including the Courts subordinate to this Court.

51. Before the final order in that case was made what the learned Judge recites is the concession made by him in the penultimate paragraph of the report in the Bombay Law Reporter. That paragraph is as follows (p. 314) :

The grounds discussed so far were the only grounds urged in support of the petition. No other ground was urged in support of the prayer for quashing the proceedings or the charge. The only order to which the petitioner is, therefore, entitled to is an order for production in the trial Court of statements of witnesses already examined by the complainant or likely to be examined hereinafter in the Court, recorded by the Officers of the Railway Protection Force in the course of the inquiry relating to the offences which is the subject-matter of the complaint in the present case. We, therefore, order that the said statements be produced in the Court of the Presidency Magistrate trying the case. The accused and his counsel shall be entitled to take copies thereof.

Hereafter follows the reference in the reported judgment which is bracketed that Gandhi J. delivered a concurring judgment, and thereafter follows the order Per Court, which is again interesting. It is as follows (p. 314) :

P.C.; For the reasons stated above, the orders passed by the Presidency Magistrate dated August 3, 1973 and September 7, 1973 are set aside and the complainant is directed u/s 165 of the Evidence Act to produce in the Court the true copies of the statements of the witnesses already examined and to be examined hereafter by the complainant and of the documents on which the complainant desired to depend, and it is declared that the accused and his counsel shall be entitled to inspect the same and take copies thereof if necessary in Court. It is declared that Section 9 of the RPUP Act is not ultra vires the Constitution. Rule made absolute to the extent mentioned here-inabove. Rule in terms Df prayer (aa) in the petition is discharged.

Not being satisfied with this cryptic reference of the judgment of the other learned Judge, we called for the original and have gone through the entire judgment delivered by Gandhi J. also.

52. Before, however, referring to the unreported judgment of Gandhi J. let us summarise the effect that is being created by the report published in the Bombay Law Reporter. The report as is made available clearly shows that the Division Bench has decided that an accused person being tried on a complaint other than on a police report is not entitled to get copies not only u/s 173(4) of the old Code, but under any law whatsoever of this land. In effect but without expressly saying so, this judgment over-rules the earlier judgment of Vaidya J. in the case of Govind Raghunath, This judgment accepts the law in that behalf as has already been laid down by the Supreme Court in Melwani's case and under no circumstances the accused persons have a right of getting copies, because of the

procedure which was being "followed in such cases even before the amendment of the Criminal Procedure Code. This means that only after witness is examined and before cross-examination, the accused has a right to claim a copy or inspection of the original previous statements. At no earlier point of time had the accused any right of getting a copy or inspect his previous statement as the procedural law in respect of such cases commencing otherwise than on a police report has never been amended or touched by the Legislature when the procedure for cases commencing on the police report was amended.

53. The next conclusion that follows from the published report is that in spite of such a law and in spite of the fact that the accused persons had no right what" sever at that stage, the learned Assistant Government Pleader Mr. Tipnis appears to be satisfied that the law was properly pronounced and the right of the accused was negatived. The moment that academic success was obtained so far as the facts of that case were concerned, Mr. Tipnis had no objection to make available or making the documents available if the accused person wished to make his own copies thereof. We are of the view, that the final order of directing production and permitting" the accused to inspect the record and make copies is purely based on concession of Mr. Tipnis and that direction is not a result of any findings given in favour of the accused or reasoning in the body of the judgment supporting any right of the accused. "With that Gandhi J. agreed but perhaps a direction was added that the Courts had a power u/s 165 of the Evidence Act to direct production and accordingly production should be directed. This may be the result of the unreported judgment, to which we shall now refer and we will also consider in due course the relevancy of Section 165 in a case of this type.

54. If all the points raised by Mr. Desai before the Division Bench were already rejected by the leading judgment and if as the opening clause of sentences of the unreported judgment of Gandhi J. show that he is in agreement generally with the reasoning of the other learned Judge"s already dictated judgment, there was not much occasion for writing a separate judgment. However, when important points are involved, separate judgments are some time a written giving different reasons or emphasising the same reasons when conclusion is also agreed upon. Here the conclusion is agreed upon not because the Court had anything to do with it, but because the Assistant Government Pleader had conceded. We are not at all able to appreciate the statement of Mr. Porus Mehta, may be on instruction from Attorney-General, that principle of the earlier single Judge"s judgment in Govind Raghuntith"s case was a welcome principle and that such order should be passed in all such cases. We have already pointed out that this part of the case, the concession given by Mr. Tipnis and a final order being passed on. the concession where the Attorney-General was not concerned at all. May be that a Court might have asked the learned Counsel what he felt about it. The proper reply would have been that since the constitutionality of all the provisions has been upheld, the Attorney-General no more figures in the picture and if the Assistant Government Pleader is making a concession on behalf of the department it is for the Court to consider what order should be passed. In the

circumstances, the concession made is in the nature of the expression of private views of the Attorney-General and if that view is contrary to the statutory provisions as they exist and as they are interpreted by the Supreme Court and the matter is finally concluded by the final Court of this land, that view cannot be considered relevant for deciding a disputed issue in a case of this type. We will presently point out after reference to the unreported judgment of Gandhi J. the nature of the part and the concession made by the Attorney-General through Mr. Porus Mehta when the operative order was being passed. One thing is clear to us that that case was decided on concessions so far as the making of the record available to the accused is concerned but so far as the legal right of the accused was concerned, it was totally negated, and rightly so by relying upon the judgement of the Supreme Court in Melwani's case.

55. The major portion of Gandhi J.'s judgment deals with the question whether the officer of the Railway Protection Force had the status of a policeman and whether the complaint filed by him could be treated as a police report so as to attract the provisions of Section 173(4). That part of the judgment reiterates the same reason which is already contained in the leading judgment and the conclusion drawn is the same, viz. that the accused person has no such right of getting copies.

56. While dealing with the question of entitlement of the accused persons for copies of the documents, apart from Section 173(4), the learned Judge has pointed out the importance of cross-examination as a weapon of defence. Undoubtedly, it is a very important weapon in the armory of the accused to establish his defence or to demolish the case of the prosecution. It is also a well recognized method of testing the veracity of the witnesses and exposing their weaknesses. The learned Judge, however, points out that this right of cross-examination cannot be effective unless either copies are made available to the accused by the prosecution, or by the indirect method of permitting inspection and taking down copies the accused is placed in possession of the entire material in the possession of the prosecution, long before the time for cross-examination arises. This expression of opinion is undoubtedly his personal view. The procedure prescribed by the Legislature for such cases for all these 9 years before and after 1955 has been the same, viz. making the copies available only if the witness is examined and shortly before cross-examination begins. Though this method was followed all these years, it does not appear that the defence of the accused was thwarted or could not be made sufficiently available to him. No objection seems to have been raised to such procedure either on the legal or moral ground or on the ground of supposed injustice for not following the principles of natural justice.

57. Towards the close of his unreported judgment the learned Judge refers to the provisions of Section 165 of the Evidence Act as giving power to the Courts to direct production of documents and prior statements of witnesses with a view to enable inspection and taking down copies of the documents by the accused. Even

while doing so, the learned Judge refers to the concessions made by Mr. Tipnis, the Assistant Government Pleader, which has made it possible for the Judges to give direction which they ultimately gave. Reference to Section 165 in the unreported judgment is again in the nature of the learned Judge's personal view that it is an enabling provision empowering the Courts to issue direction for production and inspection. This is not the reasoning on the strength of which the case has been disposed of. As we have emphasised many times earlier that the final operative order is passed purely on concessions given by Mr. Tipnis, with respect to the learned Judges, we must point out that the learned single Judge who wrote the leading judgment had relied upon the provisions of Section 165 in his earlier reported judgment in Govind Ragunath's case, but he has not referred to that section at all throughout the leading judgment in Balkishan's case. On the contrary he has pointed out that Mr. Desai could not point out any provisions of law whatsoever on the strength of which the accused had the right to claim copies of the previous statements of witnesses. Undoubtedly, therefore, by implication it follows that the leading judgment lays down the law that even u/s 165 the accused person has no right to make any demand. That judgment in Govind Ragunath's case, as we have pointed out, was expressly over-ruled by the leading judgment in Balkishan's case and it was also contrary to the judgment of the Supreme Court in Melwani's case. Since this part of the reasoning of unreported judgment referring to Section 165 does not constitute the basis of disposal of the "Division Bench matter, how should those observations be looked at?

58. In our view, those observations of the learned Judge in the unreported part of the judgment in Balkishan's case as also the gracious concessions made by Mr. Porus Mehta on behalf of the Attorney-General are more in the nature of address to the Legislature whether they are inclined to revise the procedure but they are neither reasonings on which the cases are to be disposed of nor do they constitute a valid argument on which the Courts of law can direct giving of copies of documents in the face of the Supreme Court's judgment in Melwani's case.

59. We might as well hasten now to point out why we have taken so much pains to analyse the leading judgment as well as the unreported judgment in Balkishan's case. Ordinarily, we would not have undertaken such detailed analysis of the two separate judgments written by the two learned Judges, but Mr. Porus Mehta who had once represented the Attorney-General and who now represents the accused person in the enquiry told us in an emphatic manner that the point of making copies available to the accused in cases commencing otherwise than on a police report has been finally concluded by a Division Bench of this Court, and we as a Court of parallel jurisdiction cannot take a different view, in view of the judgment in Balkishan's case. We have told Mr. Mehta that our reading of the ease is that the point is nowhere concluded nor any principle has been laid down, as Mr. Mehta wanted to argue. His main emphasis was on the fact that the direction to the prosecution for production of the documents and to give inspection and also to allow to make copies thereof is one thing, and

direction to the prosecution to give copies of the documents and statements of witnesses on whom they wish to rely is quite another. This part of his argument, is so much devoid of any merit, that it is enough to state it for being rejected. Whether there is any distinction, between the two or not, the proposition seems to be already covered by the judgment of the Supreme Court. It is for this purpose, viz. the right of making copies available to the accused is not concluded by the Division Bench as is stated by Mr. Mehta, that we have analysed the judgments very closely.

60. Even assuming that this impression can be gathered, as Mr. Mehta wanted to argue, we do not think that we are precluded from making the present judgment. Article 141 of the Constitution is clear enough. If a point is concluded by the Supreme Court it binds all Courts including the Supreme Court itself until the law is revised. No subordinate Court can take a different view of the law. If there is a judgment which has taken the view contrary to the Supreme Court's judgment, the only effect is that one such judgment by subordinate Court is contrary to the view taken by the Supreme Court. Such a judgment cannot constitute precedent and cannot be cited for its binding effect. It is precisely this approach under Article 141 which was missed by the learned Chief Metropolitan Magistrate and he felt that he was bound to follow certain observations in Goyind Raghunath's case as also the unreported judgment of Gandhi J. in Baikishan's case. The learned Magistrate has fallen into double error as he has not been able to appreciate as we have pointed out earlier, that Govind Raghunath's case has been over-ruled by the Division Bench judgment and the only effective law laid down by the Division Bench judgment now is, following the Supreme Court's judgment in Melwani's case, that the accused person in a trial of this type has not been given any right of getting any copies in any law and that which has not been given to the accused by any statutory law and cannot be made available to him by the Courts of law and the prayer for inspection and copies of documents on which the prosecution wants to rely must be rejected as having no substance at all.

61. We might now very briefly refer to Section 165 of the Evidence Act and examine for ourselves the real nature thereof. Mr. Mehta argued that the provisions of Section 165 are much wider than the provisions of Section 94 of the old Code. In a sense that seems to be true because though the powers u/s 94 are plenary they are confined to enquiry, trial or other proceedings under the "Code. There is no such limitation on Section 165 which can apply to all proceedings, civil or criminal. However, what is the real manner in which the unlimited power vesting in Court u/s 165 is to be exercised? Section 165 deals with two situations. It falls in chap. X styled "Of the examination of witnesses". In chapter dealing with examination of witnesses, Section 165 vests in the Judge un-limited powers in order "to discover" or "to obtain proper proof of relevant facts". Though the power is unlimited, it is meant for only two purposes, viz. either to discover relevant facts or to obtain proper proof of relevant facts. This being the purpose of the powers, they are unlimited, They are to be exercised

only for this purpose and no other. Two different things are permitted to be done. One is to ask to any witness or a party in any form, at any time any question covering relevant or irrelevant matter. It stands to reason that so far as a witness is concerned he could be before the Court only when he is cited as such and put in the witness-box by a party. Though a list of witnesses is furnished in civil and criminal cases, many times it happens that some of them are not examined after the trial begins. The unlimited right of the Court to put any question at any time in any form, can be exercised so far as the witness is concerned only when he is put in the witness-box. If the party is before the Court he can be questioned by the Court.

62. There is another provision in the section by which the Court may order production of any document or a thing. Such a direction to produce can be given either to a witness or to a party. As we have already pointed out earlier while discussing the provisions of Section 94 which party has a right of pressing its case and the material supporting the case in the manner it pleases. If material evidence or witness is being suppressed the Court has undoubtedly power in civil as well as criminal matters to call witnesses and direct production of documents. A provision like Section 165 of the Evidence Act is rarely used before the trial.

63. Though we requested the learned Counsel on either side to show us any case where this section was utilised for completing pre-trial formalities, no such judgment was ever shown to us. We have gone through the commentaries of leading authors like Sarkar, Monir and Field but we have never come across such cases. Mr. Mehta, however, argued by looking at the section itself that since there are no limitations on the Courts, it could be used before the trial begins for directing production of documents. We may assume without further discussion that such a power exists in a Court, but what is the purpose for which that power can be used. It could be used either for discovering relevant facts or for obtaining proper proof of relevant facts. In a case where a party is in possession of documents and prior statement and is making a voluntary offer by way of undertaking to the Court that he will produce the relevant documents at the proper time, what is the occasion for using the power u/s 165. Where a Court comes across a case where the evidence in possession of a party is relevant for the purpose of the case but there is danger of that evidence being tampered with or destroyed, it is possible to say that the Court might be induced to exercise its power u/s 165. In similar circumstances, the Court might exercise its powers u/s 165 so far as production is concerned. But direction of production is one thing and permitting the other side to look into the record and make copies thereof and exercise the right of making copies of such documents- is quite another, which is clearly not envisaged by the provisions of Section 165.

64. If a case is made out of the apprehension of any loss or tampering with the evidence, the Court might direct production and preservation of the documents under its seal unless the party gives an assurance to produce the document and make copies available, as in this case. In our view, therefore, where a party is

making an offer by giving an undertaking to the Court, as in this case, reference to Section 165 cannot be and need not be made. If an order is to be made for production with a view to permit the other side to inspect and make copies, we are afraid it is not permissible to make use of Section 165. In our view, it will be a misuse of the provisions of Section 165. We are of the opinion, therefore, that at the pre-trial stage the provisions of Section 94, Criminal Procedure Code, 1898, can be used. With respect, therefore, we are unable to agree with the reasoning of the judgment of the learned Judge (Gandhi J.) in his unreported judgment which is similar to the reasoning in Govind Raghunath's case, which is over-ruled by the leading judgment in Balkishan's case, to which Gandhi J, himself was a party.

65. We have already pointed out that Section 165 may at best be used in the manner in which Section 94 could be used. How Section 94 is to be used is already clear from the observations of the Supreme Court in the portion of para. 13 of the report in Melwani's case. We may point out that similar view was taken by this Court of Section 94 in the years 1940 and 1941. In *Emperor v. Bilal Mahomed* [1940] AIR Bom. 361 :42 Bom. L.R. 787 the then learned Chief Justice writing for the Division Bench observed that the discretion u/s 94 must be exercised judicially, and it should be exercised in such a way as not to conflict with the policy of the Legislature as disclosed in Section 162 of the Code and in Sections 123 to 125 Evidence Act. Statements made to the police are in their nature confidential and Section 162 of the Code illustrates the limited purposes for which their production should be required. While reiterating the same principles in a subsequent judgment in *Hussenbhoy v. Rashid B. Vershi* A.I.R [1941] BoM. 259, 43 Bom. L.R. 523 the Full Bench of this Court further adds a rider. Section 94 may be utilised for production of documents. However, the Full Bench says that an order for production does not involve an obligation on the Court to give inspection of all the books produced to the complainant though the Court has power to order such inspection. The Magistrate must consider that question at a later stage of the proceeding, either at the trial or inquiry or on a special application at which he can hear the accused as well as the complainant, and he should only order inspection of those books which the complainant satisfies him are really relevant.

66. A combined reading of these judgments of this Court shows that a distinction has always been made between production of documents from the possession of one party and granting inspection thereof to another party. Production must be ordered wherever there is a fear of destruction or tampering. Inspection can be allowed only when there is a right of inspection and copies could be permitted to be taken when there is a right to inspect and receive such copies. If the right arises at a particular point of time, either inspection or taking of copies could not be ordered earlier than that point of time.

67. We are thus satisfied that the order of the learned Chief Metropolitan

Magistrate is contrary to the statutory provisions of law and is also against the law pronounced by the Supreme Court. The direction given by him is not supported by any provisions of law. The principles of natural justice do not supplant the statutory law but merely supplement it. Where the field is covered by the statutory provision there is no scope for taking the assistance of principles of natural justice.

68. In fact the Supreme Court in the case of Union of India (UOI) Vs. Col. J.N. Sinha and Another, has observed that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so. But if a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice then the Court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice. When the Legislature has laid down two distinct types of procedures for trial of offences commencing upon a police report and commencing otherwise than on a police report, there is nothing to suppose that this statutory provision relating to the two procedures require to be further supplemented by any additional rules on the supposed ground of natural justice.

69. It is the argument of Mr. Mehta that in Melwani's case Section 165 of the Evidence Act was not referred to in the argument and not discussed by the Supreme Court. It is, therefore, possible for this Court to take a different view by referring to the provisions of Section 165. We are afraid that argument cannot be accepted. The proposition seems to be well established, that the High Court cannot proceed to take a different view and ignore the judgment of the higher Court on the ground that relevant provisions were not brought to the notice of that Court. By way of illustration we may refer to observations of the Supreme Court in para. 4 of the report in B.M. Lakhani v. Malkapur Municipality. While considering the provisions of Article 276 of the Constitution putting ceiling on the powers of taxation of the Municipality, the Supreme Court observed that the point was already covered by their earlier judgment. They then point out as follows (p. 1003) :

...The decision was binding on the High Court and the High Court could not ignore it because they thought that "relevant provisions were not brought to the notice of the Court.

70. In our view, therefore, the learned Magistrate was bound to follow the judgment of the Supreme Court in L.B. Melwani's case and should have refused production, much less inspection and taking copies by the accused, of all the documents and statements on which the prosecutor wanted to rely. "When we say this, it is not supposed that the Magistrate has no power to direct production of the documents, if he is satisfied that certain documents are likely to be lost or tampered with and therefore they should be preserved in his custody under seal.

71. We thus allow this petition, quash and set aside the order of the learned

Chief Metropolitan Magistrate. Interim stay of further proceedings stands vacated and the trial Court will now proceed ahead according to law. Rule made absolute.

72. If any record is brought to this Court, it will be returned to the trial Magistrate.