

(2008) 01 BOM CK 0042

In the Bombay High Court

Case No : Criminal Application No. 2238 of 2007 and Writ Petition No. 338 of 2007

Videocon International and Others

APPELLANT

Vs

Securities and Exchange Board of India and Others

Dilip Sudhakar Pendse and Others Vs The State of
Maharashtra and Another

RESPONDENT

Date of Decision : 16-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Companies Act, 1956 — Section 235, 236, 237, 238, 239
Constitution of India, 1950 — Article 136, 14, 142, 20, 20(1)
Criminal Law (Amendment) Act, 1932 — Section 9
Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 164, 165, 173
General Clauses Act, 1897 — Section 6
Income Tax Act, 1961 — Section 27(1)
Securities and Exchange Board of India (Amendment) Act, 2002 — Section 24, 24(1), 24(2)
Securities and Exchange Board of India Act, 1992 — Section 11, 11A, 11C, 11C(1), 11D
Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 — Section 7
Taxation Laws (Amendment) Act, 1970 — Section 274(2)

Citation : (2008) 110 BOMLR 215 : (2009) 151 CompCas 548 : (2009) 5 RCR(Civil) 34 : (2008) 82 SCL 460

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : Adik Shirodkar, Cousnel and Neeta Rajda, instructed by D.S.R. Associates in application No.2238 of 2007, Adik Shirodkar and Neeta Rajda, instructed by Surendra Raja, in application No. 2239 of 2007, Nitin Pradhan, S.D. Khot and Maheen Pradhan, instructed by Ameeta Kuttikrishnan, in W.P. 338 of 2007, S.V. Marwadi, in W.P. 1154 of 2007, J.P. Shah, Gaurav Agarwal and Sachin Kudalkar, instructed by J.P.S. Legal in W.P. 1557 of 2007, Amit Desai, Pranav Badheka, Sandeep Parekh and Gopal Shenoy, instructed by J.P.S. Legal in W.P. 1598 of 2007, Nitin Deshpande, in W.P. 1611 of 2007 and S.V. Marwadi, instructed by S.P. Narkar, in W.P. 1773 of 2007, for the Appellant; H.H. Ponda V.N. Shingnapurkar and Amit Borkar for SEBI in W.P. 338/07, R.F. Lambay, for Union of India in W.P. 1611/2007 and P.A. Pol, APP for State, for the Respondent

Judgement

B.H. Marlapalle, J.—Heard the learned Counsel for the respective parties. Rule. With the consent of the parties, the petitions/applications have been finally heard at length.

2. This group of petitions/applications filed under Article 227 of the Constitution and/or u/s 482 of Cr.P.C. raise a common grievance viz. that the complaints filed against the petitioners/applicants for the offences punishable u/s 24 read with Section 27 of the Securities Exchange Board of India Act, 1992 ("the SEBI Act" for short) ought to be tried by the Court of Chief Metropolitan/Additional Chief Metropolitan/Metropolitan Magistrate in Mumbai rather than being committed to the Court of Sessions for Greater Mumbai, despite the SEBI (Amendment) Act, 2002 having been brought into force with effect from 29th October 2002 whereunder only the Court of Session can try the said offences and hence they have been heard together and are being decided by a common judgment. The details of the complaints giving rise to these petitions/applications are set out in the following tabular form:

3. On perusal of the R. & P. called from the Court of the Metropolitan Magistrate/Sessions Court the following admitted position emerges:

(a) The complaints have been filed on behalf of the SEBI (Securities and Exchange Board of India) by the authorised officer under a specific order passed by the Chairman of SEBI and the said officer is the Legal Manager/Asst. Legal Manager.

(b) In all the complaints the cause of action is prior to 29/10/2002, but some of them have been filed prior to 29/10/2002 and the remaining have been filed thereafter and even the complaints 29/10/2002 pray for the conviction and the accused by the learned Metropolitan/Additional Chief Metropolitan/Chief Metropolitan Magistrate.

(c) In some complaints SEBI has even engaged a private advocate rather engaging the services of the Public/Asst. Public Prosecutor.

(d) Along with the complaint, though the list of filed after sentence of witnesses has been filed, no statements of any witnesses as recorded by the Investigating Officer/Authorised Officer, on oath or otherwise, have been placed on record by the complainant and obviously the investigation as per Section 11C of the SEBI Act was not conducted before the complaints were filed after 29/10/2002.

(e) Though the complaints were pending anywhere from three to six years, at no point of time even after 29th October 2002 the SEBI filed an application for committal of the complaints u/s 209 of Cr.P.C. and the committal orders have been passed only on the basis of the order dated 30th June 2006 issued by the Registrar General of this Court regarding establishment of a Special Court for trial of the cases filed under the SEBI Act.

(f) After the complaints were committed to the Sessions Court u/s 209 of Cr.P.C., separate applications were filed before the Sessions Court but the relief prayed for was not on the same lines. In one set of cases the accused prayed for quashing of the committal order on the ground that it did not comply with the requirements of Sections 200, 202 and 208 of Cr.P.C. and consequently it was prayed that the complaints be returned to the Court of Metropolitan Magistrate so as to pass a fresh order of committal after complying with the said provisions of Cr.P.C. Whereas in the other set of complaints the accused filed an application contending that the alleged offences pertained to the period prior to 29/10/2002 and, therefore, in view of the guarantee under Article 20 of the Constitution the complaints were required to be tried by the Metropolitan/Additional Chief Metropolitan/Chief Metropolitan Magistrate and the Sessions Court did not have the jurisdiction to try the said complaints and consequently it was prayed for remitting the complaints back to the Court which had passed the order of committal. All such applications have been dismissed by the Sessions Court and it has been held by the said Court that the quantum of sentence to be awarded to the accused, if found guilty, shall be as per the pre-amended provisions i.e. a maximum of one year or fine or both and that the Sessions Court is competent to try Summons/Warrant cases, and thus upholding the contentions of SEBI while opposing all such applications.

4. However, in these petitions/applications, as noted earlier, a common contention raised is that the above mentioned complaints are not required to be committed/transferred to the Court of Sessions and they are to be tried by the Courts before whom they were presented by the authorised officer at the first instance.

5. The SEBI Act was enacted to provide for the establishment of a Board to protect the interest of investors in securities and to promote the development and to regulate the securities market and for matters connected therewith or incidental thereto and it was brought into force on 30th January 1992. The SEBI notified Regulations for the prevention of fraudulent and unfair trade practices in transactions relating to securities and titled as Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995. It also framed the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulation, 1992. The Parliament amended the SEBI Act by SEBI (Amendment) Act, 2002 and the amendments were brought into force with effect from 29/10/2002 and as per the unamended Section 26, the Court competent to try the complaints for the offences u/s 24 read with Section 27 of the SEBI Act was the Court of Metropolitan Magistrate or Judicial Magistrate of the First Class. However, as per the amended Section 26(2) no Court inferior to that of a Court of Session shall try any offence punishable under the said Act and no Court shall take cognizance of any offence punishable or any Rules or Regulations framed thereunder, save on a complaint made by the Board, thereby deleting the words "with the previous sanction of the Central Government" from Sub-section (1) of Section 26.

6. Briefly stated the grounds in support of the prayer that the above stated complaints ought to be tried by the Court before whom they were presented at the first instance and that the Court of Session does not have power to try these cases are as under:

(a) Article 20(1) of the Constitution of India lays down the doctrine of prospective effect and no person alleged to have committed an offence can be prosecuted and convicted of any offence except for violation of a law in force at the time of commission of the act charged as an offence and at the same time he/she cannot 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 alleged offence. u/s 24(1) of the old Act, an accused could be punished with imprisonment for a term upto one year or with fine or with both. Whereas u/s 24(2) of the old Act, if any person failed to pay the penalty imposed by the adjudicating officer, the punishment prescribed was imprisonment for a term which would not be less than one month but which may extend upto three years or with fine which shall not be less than Rs. 2000/- which may extend upto Rs. 10,000/- or with both. Thus the offences u/s 24(1) were summons cases whereas u/s 24(2) they were warrant cases and to be tried only by the Court of Metropolitan Magistrate or the Judicial Magistrate, First Class as set out u/s 26(2) of the old Act. Under the amended Act the sentence upto one year or upto three years has been enhanced upto ten years and the fine amount which was not quantified under the old Act has been extended to rupees twenty-five crores. The accused are required to be tried for the offences u/s 24 read with Section 27 of the Old Act and not under the amended Act as the cause of action is admittedly prior to 29/10/2002 in all the complaints, in view of the guarantee enshrined under Article 20(1) of the Constitution.

(b) The amendments to Section 24 are substantial in nature and the amendment in Section 26 of the SEBI Act is consequential, though may be termed as procedural and, therefore, the amended provisions will be applicable prospectively and not retrospectively. Consequently the trial of the complaints must be under the old Act i.e. as per the SEBI Act as applicable prior to 29/10/2002 as the cause of action arose prior to the said date of amendment.

(c) If the period of sentence was upto one year, obviously the period of limitation to file the complaint as per the provisions of Cr.P.C. would be three years only and in some of these complaints, as referred to hereinabove, a separate application was moved by the accused praying to dismiss the complaints as they were filed beyond the limitation of three years.

(d) Though the amendments in the SEBI Act were brought into force with effect from 29/10/2002, till 14th June 2007 the complainant did not move any application before the learned Metropolitan Magistrate praying that the complaint be committed to the Court of Sessions in view of the amended Act and that the learned Metropolitan Magistrate did not have the jurisdiction to try the complaint.

(e) Article 20(1) of the Constitution read with Section 6 of the General Clauses Act, 1897 must lead to the conclusion that all the proceedings and the rights, privileges, obligations accrued/arising within Sections 24 and 26 of the SEBI Act, 1992 have remained in-tact and cannot be disturbed by the SEBI Amendment Act, 2002 which is prospective in operation and it cannot be made retrospective. If Section is given prospective effect and Section 26 is provided with retrospective effect, there will be a good amount of anomalies created which was beyond the contemplation of the Legislature such as (a) the Sessions Court will not be in a position to try any offender entitled to be punished for a maximum punishment of one year under the old Act summarily in view of the command of Section 260 of Cr.P.C. and (b) the accused would not be entitled to exercise his vested right as contemplated u/s 256 of Cr.P.C.

(f) In SEBI Appeal No.1 of 2002, SEBI Appeal No.8 of 2002 and SEBI Appeal No.9 of 2002 which were decided by this Court (Division Bench) it was the contention of the Board that the complaints filed for the offences that had taken place prior to 29/10/2002 shall be governed by the unamended SEBI Act of 1992 and not by the amended SEBI Act, 2002.

(g) If the complaints are tried by the learned Metropolitan Magistrate or the learned Judicial Magistrate, First Class the remedy of appeal would be before the Court of Sessions and thereafter the accused, if unsuccessful, would still have a remedy of revision u/s 397 of Cr.P.C. before this Court. Whereas if the above stated complaints are tried by the Sessions Court, an appeal at the instance of the accused would lie to this Court and thus an additional statutory remedy of revision u/s 397 read with Section 401 of Cr.P.C. would be taken away.

(h) When the complaints were filed by the authorised officer, apart from the list of witnesses no statements of witnesses on the lines of investigation to be carried out u/s 164 of Cr.P.C. or Section 11C of the SEBI Act, have been filed and the process was issued by the learned Metropolitan Magistrate u/s 204 of Cr.P.C. without recording the statement of the complainant and/or the witnesses as the complaint was filed by a public officer. Consequently the requirements of Section 208 of Cr.P.C. would not be met for committal of the complaint to the Court of Sessions u/s 209 thereunder.

(i) The right of speedy trial is a guarantee to the accused as enshrined under Article 21 of the Constitution of India and if the complaints are committed to the Sessions Court, the trial would be covered by Chapter XVIII and not under Chapter XX or Chapter XXI of Cr.P.C. Consequently the accused will be deprived of the guarantee of speedy trial which otherwise before the learned Metropolitan Magistrate, would be summary or warrant trial, as the case may be. It was also submitted that the benefit of Sections 256, 257 and 258 of Cr.P.C. as available in favour of the accused would be taken away if the complaints are tried before the Court of Sessions.

(j) The trial by Sessions Court would result in procedural discrimination which is

impermissible in law and intolerable of the fundamental rights as envisaged under Articles 14 and 21 of the Constitution. Sections 200, 202 proviso, 204, and 209 of Cr.P.C. are those steps provided under the Code for private complaint relating to offences exclusively triable by Court of Sessions and as regards the proceedings initiated on the police report, the relevant provisions would be Sections 154, 173, 207 and 209 of the said Code. The provisions of Section 200 and Section 202 cannot be read in isolation but the entire scheme will have to be taken into account to ascertain the legislative intent and to fathom the true meaning thereof. There cannot be a situation where an accused based on a police report is at advantageous position qua the procedural fairness or the receipt of the entire material collected during investigation and produced at the stage u/s 173 of Cr.P.C. in order to give him a reasonable idea about the accusations likely to be faced during trial before the Sessions Court. In support of these contentions the learned Counsel for the accused referred to the added provision of Section 11C to the SEBI Act with effect from 29/10/2002 regarding investigation and it was contended that the scheme of Section 11C is on the lines of the provisions of Sections 164, 165, 175 of Cr.P.C. and such powers of investigation were not provided under the SEBI Act of 1992.

(k) The accused had, on the day the complaint was filed by the authorised officer, a vested right of forum and that cannot be taken away by the amended provision of Section 26(2) of the SEBI Act, by holding that the said amendment is retrospective in nature. The Amendments of 2002 are substantive in nature and consequently procedural and, therefore, they are prospective in nature.

In support of all these contentions the learned Counsel for the accused relied upon the following decisions

- (1) Transmission Corporation of A.P. Vs. Ch. Prabhakar and Others,
- (2) Rosy and Another Vs. State of Kerala and Others,
- (3) Paranjothi Udyar and Others Vs. State and Others,
- (4) Kamal Krishna De Vs. State and Another,
- (5) Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others,
- (6) R.S. Nayak Vs. A.R. Antulay,

7. Mr. Ponda, the learned Counsel for the SEBI, on the other hand, urged before this Court supporting the order of committal and submitted that the trial of the pending complaints as on 29/10/2002 or filed thereafter but pertaining to the cause of offence that was prior to 29/10/2002 are required to be committed to and tried by the Sessions Court only in view of the mandate of Section 26(2) of the amended SEBI Act. When the mandate of Section 26(2) of the SEBI Act states that no court inferior to that of a Court of Sessions shall try any offence punishable under the Act, there is no choice left with the learned Metropolitan

Magistrate but to commit the pending complaint to the Sessions Court u/s 209 of Cr.P.C. The words of the Act are unambiguous and they cover all trials of offences irrespective of whether they were filed before the amendment or after and whether they are punishable with imprisonment upto one year or ten years. He further submitted that if the Legislature wanted to have the cases filed before the amendment or in respect of offences committed prior to the said amendment should be tried by the Metropolitan Magistrate, the same could have been mentioned in the section itself and, therefore, it is not permissible for the Courts to add any words in the language of the statute and the statute must receive the interpretations based on the plain words used by the Legislature. While admitting that the sentence to be awarded in the abovementioned complaints shall be as per unamended Section 24 i.e. a sentence upto one year or upto three years or fine or both, there is no reason which stops the Sessions Court to proceed with the trial of the committed complaints as per the procedure applicable to the summons cases under Chapter XX or the warrant cases under Chapter XIX, notwithstanding the fact that the trial before the Sessions Court is dealt with under Chapter XVIII of the Cr.P.C. Mr.Ponda referred to Schedule I to Cr.P.C. and pointed out that some warrant cases for the offences under IPC are triable by the Sessions Court and there is no jurisdictional bar for trial of the complaints by the Sessions Court as summons cases or warrant cases. As per Mr.Ponda the accused have a vested right for trial but they do not have any such right for selecting a forum. The right of fair and speedy trial is envisaged under Article 21 of the Constitution but at the same time the accused cannot choose a forum or insist that he/she must be tried by a specific Court. Referring to the amendment to Section 26 of the SEBI Act, it was contended by Mr. Ponda that the same is procedural in nature and, therefore, it must have a retrospective effect inasmuch as all the pending cases as on 29/10/2002 or filed thereafter in respect of the offences that have taken place prior to the said date are required to be committed to the Sessions Court which must try the said complaints and the Court of Metropolitan Magistrate or the Court of Judicial Magistrate, First Class will have no power to try such complaints after 29/10/2002. He relied upon a recent decision of the Delhi High Court (S.B.) in the case of Pran Nath Dhall and Another Vs. State and pointed out that the interpretation of the amended Section 26(2) as set out therein is in keeping with the principles applicable in criminal jurisprudence and should be followed by this Court as well. By change of forum, there is no violation of the fundamental rights guaranteed under Articles 14 and 21 of the Constitution and the observations in the case of A.R. Antulay Vs. R.S. Nayak and Another, do not lay down the general principles in law when by an Act of Parliament the existing forum is changed, the observations made by the Apex Court in the said case cannot be treated to hold that the pending complaints pertaining to the offence prior to 29/10/2002 ought to be tried by the Courts before whom they were presented rather than committing the same to the Sessions Court. In short, as per Mr.Ponda, the observations made in A.R.Antulays case are an obiter and they do not lay down any specific principles regarding the retention of forum. The learned Counsel further urged that a right to appeal is a

vested right but such is not the case when it comes to the remedy of revision in criminal jurisprudence and, therefore, the plea that the accused are deprived of the remedy of revision u/s 397 of Cr.P.C. before this Court on committal of the complaints to the Sessions Court cannot be accepted and on that ground there is no reason to hold that the complaints are required to be tried by the Court before whom they were presented. As per Mr.Ponda, the law laid down in the case of *Rosy v. State of Kerala* (Supra) and *Transmission Corporation of A.P. and Ors. v. Chi. Prabhkar and Ors.* (Supra) does not support the case of the accused that the complaints are required to be tried by the learned Metropolitan Magistrate only and that they cannot be committed to the Sessions court u/s 209 of Cr.P.C. In support of his defence to the impugned orders passed by the Sessions Court and to the orders of committal passed by the learned Metropolitan Magistrate, Mr. Ponda has relied upon the following decisions in addition to the ones already referred to hereinabove:

- (1) *Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh*,
- (2) *union of india (UOI) Vs. Sukumar Pyne*,
- (3) *Nani Gopal Mitra Vs. The State of Bihar*,
- (4) *Anant Gopal Sheorey Vs. The State of Bombay*,
- (5) *Rajendra Kumar Vs. Kalyan (D) by Lrs.*,
- (6) *Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others*,
- (7) *Shiv Shakti Co-opp. Housing Society, Nagpur v. Swaraj Developers and Ors.*
AIR SC 2434

8. In the case of *Rao Shiv Bahadur Singh* (Supra) Constitution Bench held that what is prohibited Article 20 is only conviction or sentence under "ex post facto" law and not the trial thereof. trial under a procedure different from what at the time of commission of offence or by a different from that which had competence at the cannot "ipso facto" be held to be unconstitutional. A person accused of the commission of offence has no fundamental right to trial by a particular Court or by particular procedure except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental rights may be involved. The same view was reiterated in *Anand Gopal Sheorey* (Supra) and *Union of India v. Sukumar Pyne* (Supra). In the case of *The State of Maharashtra Vs. Vishnu Ramchandra*, on the issue of an enactment to operate prospectively or retrospectively their Lordships observed as under:

...The question whether an enactment is meant to operate prospectively or retrospectively has to be decided in accordance with well settled principles. The cardinal principle is that statutes must always be interpreted prospectively, unless the language of the statute makes them retrospective, either expressly or by necessary implication. Penal statutes which create new offences are always prospective, but penal statutes which create disabilities, though ordinarily

interpreted prospectively, are sometimes interpreted retrospectively intendment events....

The Constitution Bench in the case of *Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha*, while dealing with the said issue stated,

...While it is the ordinary rule substantive rights should not be held to be taken away except by express provision or clear implication, many Acts, though prospective in form, have been given retrospective operation, if the intention of the legislature is apparent. This is more so, when the Acts are passed to protect the public against some evil or abuse....

In *Halsburys Laws of England (Fourth Edition)*, Volume 44, Page 571 it has been stated,

The general rule is that all statutes, other than those which are merely declaratory. or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature....

In the case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, the Supreme Court referred to its earlier decisions in the case of *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, and *Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another*, and stated,

...the principle is well-established that a retrospective operation is not to be given to a statute so as to impair an existing right. This is the general rule. But the Legislature is competent to pass a statute so as to have retrospective operation, either by clearly expressing such intention or by necessary and distinct intendment.

In the case of *P. Mahendran and others Vs. State of Karnataka and others*, , a three-Judge Bench observed as under,

It is well settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure.

In *Hitendera Thakurs* case (Supra) the Supreme Court stated as under:

(i) A statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment. Whereas a Statute which merely affects procedure, unless such a

construction is textually impossible is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature.

(iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law.

(iv) A procedural Statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A Statute which not only changes the procedure but also creates a new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

9. The first question, therefore, that arises for consideration in these petitions/applications is whether the amendments brought into force from 29/10/2002 in the SEBI Act are substantive in nature or they are procedural in nature or they are substantial in nature and by consequence there are procedural changes regarding the forum of trial u/s 26.

10. The Delhi High Court in the case of Panther Fincap and Management Services Ltd. (Supra) has held that the amendment brought in Section 26 of the SEBI Act is only an amendment relating to the forum and, therefore, it would be only procedural in nature as it affects merely the procedure and there is nothing in the language used to enable to take a contrary view. I find it difficult to be persuaded by the said view of the learned Single Judge of the High Court of Delhi and it would not be safe to read the amendment to Section 26 in isolation to examine whether the amendments brought into force with effect from 29/10/2002 are substantive in nature or they are merely procedural.

11. The SEBI (Amendment) Act, 2002 has added Section 11C providing for investigation, Section 11D-cease and desist proceedings, Section 12A prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control, Section 15HA -penalty for fraudulent and unfair trade practices, Section 15HB penalty for contravention where no separate penalty has been provided, Section 15JA -crediting sum realised by way of penalties to Consolidated Fund of India and it has amended Sections 4(d), 11, 11A, 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15L, 15M, 15N, 15O, 15Z, 24 and 26. Section 24 pertains to the offences and it is divided in two parts. Sub-section (1) provides for sentence if any person contravenes or attempts to contravene or abets the contravention of the provisions of the Act or any Rules or Regulations made thereunder. Whereas Sub-section (2) provides for punishment if any person fails to pay the penalty imposed by the adjudicating officer or fails to

comply with any of his directions or orders. Prior to the Amendment Act, 2002 under Sub-section (1) the accused would be punishable with imprisonment for a term extending to one year or fine or with both. Whereas under Sub-section (2) the accused was punishable with imprisonment for a term which shall not be less than one month but which may extend to three years or with fine which shall not be less than two thousand rupees which may extend to ten thousand rupees or with both. On amendment the punishment has been substantially enhanced. Under Sub-section (1) the accused shall be punishable with imprisonment for a term which may extend to ten years or with fine which may extend to twenty five crore rupees or with both.

12. As per Section 2(w) of Cr.P.C. "summons case" means a case relating to an offence, and not being a warrant case. Whereas u/s 2(x) "warrant case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Section 4 of Cr.P.C. deals with the trial of offences under the Indian Penal Code and other laws. Thus when the offence is punishable with imprisonment for more than seven years, it ought to be tried by a Court of Sessions when such offence is set out in other laws (other than the Indian Penal Code). The SEBI Act falls in the category of "other laws" and, therefore, when the offence is punishable with imprisonment for more than seven years, necessarily it has to be tried by a Court of sessions and if the offence is punishable with imprisonment upto seven years, it ought to be tried by the Judicial Magistrate, First Class. In the unamended SEBI Act, the sentence of imprisonment provided was upto one year or three years as the case may be and, therefore, u/s 26(2) of the unamended Act, the forum for trial of the complaints was that of Metropolitan Magistrate or Judicial Magistrate, First Class. On amendment to Section 24 by the SEBI Amendment Act, 2002, the sentence under Sub-section (1) as well as Sub-section (2) has been enhanced upto ten years and, therefore, in consequence to this enhancement of sentence the forum for trial of the complaint has been changed to the Court of Sessions which indicates that the forum of trial has been changed only on account of the enhancement of the sentence from one year to ten years or from three years to ten years. It, therefore, cannot be accepted that the amendment to Section 26(2) of the SEBI Act is merely procedural in nature and it ought to be held that the said amendment is a consequential amendment in view of the enlargement of sentence period u/s 24. Undoubtedly the amendment to Section 24 is substantial in nature. When the forum of trial has been changed in consequence of the substantial amendment, it has to be read with the main section providing for sentence and it cannot be read in isolation. Consequently the amendment to Section 24 read with Section 26 must be held to be prospective in operation.

Both these sections are complimentary to each other and inseparable in operation. The amended provision has virtually repealed old provision, namely Sections 24 and 26 bringing into effect the enhanced punishment and corresponding change in forum making it compatible with the Schedule to Cr.P.C. The effect of such a repeal is covered by Section 6 of the General Clauses Act,

1897, which mandates that the repeal shall not,

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) enactment suffered so affect the previous repealed or anything thereunder; operation duly of done any or or liability any

(c) affect any acquired, enactment right, accrued so privilege, or repealed; obligation incurred or under or

(d) punishment committed or affect incurred against any in any penalty, forfeiture respect of any enactment so or offence repealed;

(e) or remedy privilege, forfeiture affect any investigation, legal in respect of any such obligation, liability, or punishment as proceeding right, penalty, aforesaid. of 1897, rights, out have

In view of Article 20(1) of the Constitution India and Section 6 of the General Clauses it is apparent that all the proceedings and privileges, obligations accrued or of Sections 24 and 26 of the unamended SEBI remained in tact and cannot be disturbed on Act, the arising Act the enforcement of the amended Act. The SEBI (Amendment) Act, 2002 is, therefore, prospective in operation and cannot be made retrospective only on the basis of the change in forum u/s 26.

13. It is undoubtedly true that an accused does not have a vested right of selecting a forum for trial and what is guaranteed is a right of trial and that too a fair trial either to prosecute or to defend. However, in the instant case the arguments advanced on behalf of the accused need not be taken as the arguments insisting for a particular forum for trial. The case made out for the accused in these petitions in support of their contentions that the above stated complaints must be tried by the Court to which they were presented, is based on the scheme of the Criminal Procedure Code in respect of the complaints filed otherwise than on the police report. It is in this context that the reference has been made to the provisions of Section 190, 200, 202, 204, 208 and 209 of Cr.P.C. Section 4(1) of Cr.P.C. provides for investigation, enquiry or trial for every offence under IPC whereas Section 4(2) provides for offences under any other laws which may be investigated, enquired into, tried and otherwise dealt with according to the provisions of Cr.P.C. but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. In the absence of a specific provision made in the statute indicating that the offences will have to be investigated, enquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, enquired into tried and otherwise dealt with according to the Cr.P.C. In other words, Cr.P.C. is the parent statute which provides for investigation, enquiry into and trial of cases by criminal Courts of various designations. Section of Cr.P.C. provides for setting up of criminal Courts besides the High Court in every State and they are,

- (a) Courts of Session;
- (b) Judicial Magistrates of the first class and in any metropolitan area, Metropolitan Magistrate;
- (c) Judicial Magistrates of the second class;
- and
- (d) Executive Magistrates.

Section 190 of Cr.P.C. confers powers on the Magistrate to take cognizance of an offence who are of the manners therein proscribed and the term "Magistrate" in the said section is a compendious term which includes Judicial Magistrate First Class, Metropolitan Magistrate, Judicial Magistrate of Second Class and Executive Magistrate. At the same time there is another Court of original jurisdiction viz. the Court of Session also being set up u/s 6 of Cr.P.C. u/s 193 of Cr.P.C. except as otherwise expressly provided therein or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate. In other words, a Court of Session can take cognizance of an offence only upon an order of committal made by the Magistrate u/s 209 of Cr.P.C. and in no other manner. If the Magistrate takes cognizance of an offence upon a complaint which appears to be exclusively triable by the Court of Session, he has to proceed according to Sections 202(2), 208 and 209. Chapter XVIII incorporates provisions prescribing the procedure for the trial before a Court of Session. Chapter XIX deals with the procedure for trial of warrant cases, Chapter XX deals with the procedure for trial of summons cases and Chapter XXI prescribes the procedure for summary trial. As per Section 260(1) of Cr.P.C., notwithstanding anything contained in the Code, any Chief Judicial Magistrate, any Metropolitan Magistrate, any Magistrate of the First Class specially empowered in that behalf by the High Court, may, if he thinks fit, try in a summary way the offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years. It is thus clear that the offences u/s 24 of the unamended SEBI Act could be tried by the Metropolitan Magistrate in a summary way in respect of the offences which are alleged to have taken place prior to 29/10/2002. The scheme of Cr.P.C. provides for speedy trials in certain class of cases and with this view in mind it makes four different sets of provisions for the trial of four classes of cases, i.e. summary trials, trial of summons cases, trial of warrant cases and trial of cases triable by the Court of Session. Broadly speaking this classification of the offences for the purpose of applying these different sets of provisions is according to the gravity of the offences, though in classifying the offences fit for summary trial, the experience and power of the trying Magistrate has also been taken into consideration but the net result of these provisions is that the offences which are summarily triable can be more speedily tried than summons cases, summons cases can be more speedily tried than warrant cases and warrant cases can be more speedily tried than the sessions cases [The State

of West Bengal Vs. Anwar Ali Sarkar,]. It is in this context that the petitioners insist that in the respective complaints, the trial ought to be continued before the learned Metropolitan Magistrate, so that they face the trial under Chapter XIX, XX or XXI as the case may be. The submissions of Mr.Ponda that the summary trial can be conducted by the Sessions Court has no support in law. As noted earlier, Part II of the First Schedule to Cr.P.C. classifying the offences under the laws other than IPC clearly states that the offences punishable with imprisonment for less than three years or with fine only are to be tried by Magistrate which means Magistrate of First Class or the Metropolitan Magistrate. There is one more danger in accepting the submissions of Mr.Ponda in this regard viz. it would imply that the amendments to Section 24 of the SEBI Act are prospective in nature but the amendments in Section 26 of the SEBI Act are retrospective. In fact the scheme of Sections 24 and 26 of the SEBI Act is complimentary to each other and inseparable in operation inasmuch as Section 24 deals with the imposition of penalty whereas Section 26(2) deals with the trial of such offences upon filing of complaint u/s 26(1). All these steps/aspects of trial of offences under the SEBI Act are procedurally dependent upon Cr.P.C.

In the case of Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., the Constitution Bench while recognising the right to speedy trial flowing from Article 21 of the Constitution set out certain propositions and proposition nos.1, 2 and 3 read as under,

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial....

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) ...

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal.

(c) ...

Since it is the accused who is charged with the offence and is also the person whose life/liberty is at peril, it is but fair to say that he has a right to be tried speedily. Being an accused of crime is cause for concern and it affects the reputation and the standing of the person in the society. It is a cause for worry and expense. The provisions of the Criminal Procedure Code, as noted

hereinabove provide for different trials before different forums as set out under Chapters XVIII to XXI. Comparatively the trial by the Sessions Court may prolong for a long period than a summary trial/summons case trial or a warrant case trial. The accused, therefore, are justified in claiming that they are deprived of a speedy trial if the pending complaints are transferred/committed to the Court of Session for trial as per the amended SEBI Act.

14. There is one more aspect which also requires consideration and that is the absence of a specific provision for transfer of the pending complaints from the Court of Metropolitan Magistrate/Judicial Magistrate First Class to the Court of Session in the amended SEBI Act. Reference was made to Section 7 of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 wherein all the pending cases were required to be transferred to the new forum and there is no such provision in the SEBI (Amendment) Act. This is one more test in support of the prospectivity in operation of the SEBI (Amendment) Act. In the case of Commissioner of Income Tax v. Dhadi Sahu AIR 1993 SCW 3578 the Income Tax Officer had initiated proceedings for the imposition of penalty u/s 27(1)(c) of the Income Tax Act, 1961 and the matter was referred to the Inspecting Assistant Commissioner u/s 274(2) of the said Act which on the date of reference read as under:

Notwithstanding anything contained in Clause (iii) of Sub-section (1) of Section 271, if in a case falling under Clause (c) of that sub-section, the minimum penalty imposable exceeds a sum of rupees one thousand, the Income Tax Officer shall refer the case to the Inspecting Assistant Commissioner, who shall for the purpose, have all the powers conferred under this Chapter for imposition of penalty.

Pending reference, Section 274(2) came to be amended with effect from 1/4/1971 by the Taxation Laws (Amendment) Act, 1970 and it read as under:

Notwithstanding anything contained in Clause (iii) of Sub-section (1) of Section 271, if in a case falling under Clause (c) of that sub-section, the amount of income (as determined by the Income Tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds, a sum of twenty five thousand rupees, the Income Tax Officer shall refer the case to the Inspecting Assistant Commissioner, who shall for the purpose, have all the powers conferred under this Chapter for the imposition of penalty.

On the issue of transfer of the proceedings from the old forum to the new forum Their Lordships in Dhadi Sahus case observed as under:

It may be stated at the outset the general principle is that a law which brings about a change in the forum does not affect pending actions unless an intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change over of proceedings from the Court or the Tribunal where they are pending to the Court or the tribunal which, under the

new law, gets jurisdiction to try them.

It is also true that no litigant has any vested right in the matter of procedural law but, where the question is of change of forum, it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the Tribunal or the Court of first instance and, unless the Legislature has, by express words or by necessary implication, clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different Tribunals or forums.

15. In *Garikapati Veeraya v. N. Subbiah Choudhry* (Supra), the following principles have been laid down by the Constitution Bench regarding the vested rights of legal remedies:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

It was contended on behalf of the accused by referring to the above principles that the same apply for all the remedies available to an accused under the Criminal Procedure Code including a remedy of revision u/s 397 read with Section 401 of the said Code. Mr.Ponda, the learned Counsel for the Board, however, did not agree with these submissions and as per him, the remedy of revision cannot be compared with the remedy of an appeal. While Mr.Ponda admitted that the remedy of appeal is a substantive right or a vested right, but such is not the case with the remedy of revision before the High Court. In this regard he referred to the scheme of Section 115 of CPC and the decision in the case of *Shiv Shakti Co-op. Housing Society* (Supra) and more particularly the following observations:

(a) It is fairly well settled position in law that the right of appeal is a substantive right but there is no such substantive right in making an application u/s 115.

(b) Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the subordinate court to approach the High Court for relief. The scope for making a revision u/s 115 is not linked with a substantive right.

(c) Right of appeal is statutory and when conferred by statute it becomes a vested right. The distinction between the right of appeal and right of revision is based on differences implicit in the two expressions. An appeal is continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power.

16. The learned Counsel for the accused, on the other hand, submitted that the remedy of revision u/s 397 read with Section 401 of Cr.P.C. cannot be compared with the remedy of revision u/s 115 of CPC and, therefore, the submissions of Mr. Ponda do not come in their way to hold that the remedy of revision under the Criminal Procedure Code is a remedy alike an appeal and in any case is a much wider remedy as compared to the scope of revision u/s 115 of CPC. As per the accused the remedy of revision is a statutory remedy which was available to them on the day the concerned complaint was presented before the learned Metropolitan Magistrate, in case the trial Court and the lower Appellate Court would go against them and if the complaints are to be committed and tried by the Sessions Court as urged by the Board through Mr. Ponda, the said remedy of revision is taken away. Reliance has been placed in the case of Paul George Vs. State, . In the case of Dilip S. Dahanukar Vs. Kotak Mahindra Co. Ltd. and Another, , their Lordships referred to the earlier decision in the case of Garikapati Veeraya (Supra) and held that an appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is also a fundamental right affecting the liberty of a person keeping in view the expansive definition of Article 21 of the Constitution.

17. When a revision application u/s 397 of Cr.P.C. is presented to the High Court, the High Courts powers to decide such revision are set out in Section 401 therein. Section 401, Cr.P.C. reads as under:

401. High Courts power of revision. -(1) 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 Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by

section 392

(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.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

As per Sub-section (1) of Section 401 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, while deciding a revision application u/s 397. As per Sub-section (2), no order in a revision application 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 a pleader in his defence and Sub-section (3) does not empower the High Court to convert a finding of acquittal into one of conviction which means a revision application cannot be treated as an appeal against an order of acquittal as set out u/s 378 of the Code. As per Sub-section (4) where an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. At the same time as per Sub-section (5) of Section 401, where an appeal lies under the Cr.P.C. but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto, and that it is necessary in the interest of justice so to do, the High Court may consider the application for revision as a petition of appeal and deal with the same accordingly.

18. Whereas Section 115 of C.P.C. reads as under:

115. Revision -(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation -In this section, the expression, "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

19. In the case of Ch. Prabhakar and Others Vs. The State of A.P. and Another, , a Division Bench of the Andhra Pradesh High Court was dealing with the remedy of criminal revision application and its negation in view of the amendments effected by the State of Andhra Pradesh by Indian Electricity (Andhra Pradesh Amendment) Act, 2000 and it is apt to reproduce the following observations of the Division Bench:

In a country where democratic form of Government is adopted, liberty of citizen is of paramount importance and our Constitution provides for several procedural safeguards in that regard. While dealing with the liberty of a subject meant for safeguarding the interest of the accused, the procedure play an important role. The history of liberty is said to be the history of procedure. An accused person who is alleged to have committed an offence must ordinarily be tried in accordance with law as existed at the relevant time when the offence was alleged to have been committed. Clause (1) of Article 20 of the Constitution forbids enhancement of punishment. No person shall be liable for punishment under any penal law except for violation of a law in force at the time of commission of the act charged as an offence nor he or she shall be inflicted with greater punishment than that which might have been inflicted under the law in force at the time of the commission of the offence. By reason of the Amending Act, 2000, the accused is not only deprived from a procedure which was beneficial to him but he is also deprived of a right to file a criminal revision in terms of Sections 397 and 401 of the Code of Criminal Procedure....

It is pertinent to note that the words used by Their Lordships are "to be tried in accordance with law as existed at the relevant time" in stead of "be punished in accordance with law as existed at the relevant time". The learned Counsel for the accused, therefore, submitted that even though the Sessions Court has held that in the trial before it the accused in the committed cases, if found guilty, would be sentenced according to the old Section 24, the law demands that the trial has to be conducted as per the amended Act and which means that the complaint has to be tried by the Metropolitan Magistrate and it cannot be committed to the

Sessions Court.

20. It is thus clear that the remedy of revision u/s 397 read with Section 401 of Cr.P.C. is not comparable with the remedy of revision application u/s 115 of C.P.C. and the said remedy under Cr.P.C. empowers the High Court, in its discretion to exercise any of the powers conferred on a Court of appeal by Sections 386, 389, 390 and of the said Code. When the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392 which also falls in the chapter of Appeals. In the case of A.R. Antulay Vs. R.S. Nayak and Another, a seven-Judge Bench observed, inter alia, as under:

...Four valuable rights, it appears to us, of the appellant have been taken away by the impugned directions,

(i) The right to be tried by a Special Judge in accordance with the procedure established by law and enacted by Parliament.

(ii) The right of revision to the High Court u/s 9 of the Criminal Law Amendment Act.

(iii) The right of first appeal to the High Court under the same section.

(iv) The right to move the Supreme Court under Article 136 thereafter by way of a second appeal, if necessary.

The Supreme Court thus recognised the right of revision as one of the valuable rights available to an accused. It was submitted by Mr.Ponda that the above stated observations made by Their Lordships are only an obiter and the same cannot be taken as legal precedents of binding nature under Article 142 of the Constitution. I am not impressed by these submissions more so when the powers of revision by the High Court are exercised u/s 401 of Cr.P.C. and they are akin to the powers available to a Court of appeal against an order of conviction. I am, therefore, inclined to hold that the revision application u/s 397 read with Section 401 of Cr.P.C. is a statutory remedy and if the complaints are allowed to be tried by the Sessions Court, in the absence of any specific provision in the amended SEBI Act for transfer of the cases from the Court of Metropolitan Magistrate to the Sessions Court, the accused will be deprived of such a statutory remedy of revision and on that count also the complaints are required to be tried by the Courts before whom they were presented by the authorised officer. From the eight complaints stated in para 2 above, some of them have been filed after 29/10/2002 though the cause of action arose prior to the said date.

21. Section 11C was introduced in the SEBI Act by the Amendment of 2002 and it provides for investigation to be undertaken by the Board through an Investigating Authority. The complaints filed after 29/10/2002 clearly showed that no investigation was carried out u/s 11C of the SEBI Act and consequently even though the complaints have been committed, they are without any investigation papers including the statement of witnesses recorded on oath

during the course of investigation. Section 11C consists of eleven sub-sections as under:

Sub-section (1) provides that where the Securities and Exchange Board of India has reasonable ground to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market, or any intermediary or any person associated with the securities market has violated any of the provisions of the Act or the rules or the regulations made or directions issued by the Board thereunder, it may, at any time by order in writing, direct any person (hereafter in this section referred to as the Investigating Authority) specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board.

Sub-section (2) provides that, without prejudice to the provisions of Sections 235 to 241 of the Companies Act, 1956, it shall be the duty of every manager, managing director, officer and other employee of the company and every intermediary referred to in Section 12 of the Act or every person associated with the securities market to preserve and to produce to the Investigating Authority or any person authorized by him in this behalf, all the books, registers, other documents and record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

Sub-section (3) provides that the Investigating Authority may require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before him or any person authorised by him in this behalf as he may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of its investigation.

Sub-section (4) provides that the Investigating Authority may keep in its custody any books, registers, other documents and record produced under Sub-section (2) or Sub-section (3) for six months and thereafter shall return the same to any intermediary or any person associated with securities market by whom or on whose behalf the books, registers, other documents and record are produced. However, the Investigating Authority may call for any book, register, other document and record if they are needed again. However, if the person on whose behalf the books, registers, other documents and records are produced requires certified copies of the books, registers, other documents and record produced before the Investigating Authority, it shall give certified copies of such books, registers, other documents and record to such person or on whose behalf the books, registers, other documents and records were produced.

Sub-section (5) provides that any person, directed to make an investigation under Sub-section (1), may examine on oath, any manager, managing director,

officer and other employee of any intermediary or any person associated with securities market in any manner, in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before him personally.

Sub-section (6) provides that if any person fails without reasonable cause or refuses (a) to produce to the Investigating Authority or any person authorised by him in this behalf any book, register, other document and record which it is his duty under Sub-section (2) or Sub-section (3) to produce; or (b) to furnish any information which it is his duty under Sub-section (3) to furnish; or (c) to appear before the Investigating Authority personally when required to do so under Sub-section (5) or to answer any question which is put to him by the Investigating Authority in pursuance of that sub-section; or (d) to sign the notes of any examination referred to in sub-section (7), he shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one crore rupees, or with both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.

Sub-section (7) provides that notes of any examination under sub-section (5) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.

Sub-section (8) provides that where in the course of investigation, the Investigating Authority has reasonable ground to believe that the books, registers, other documents and record of, or relating to, any intermediary or any person associated with securities market in any manner, may be destroyed, mutilated, altered, falsified or secreted, the Investigating Authority may make an application to the Judicial Magistrate of the first class having jurisdiction for an order for the seizure of such books, registers, other documents and record.

Sub-section (9) provides that after considering the application and hearing the Investigating Authority, if necessary, the Magistrate may, by order, authorise the Investigating Authority (a) to enter, with such assistance, as may be required, the place or places where such books, registers, other documents and records are kept; (b) to search that place or those places in the manner specified in the order; and (c) to seize books, registers, other documents and record, it considers necessary for the purposes of the investigation.

However, the Magistrate shall not authorise seizure of books, registers, other documents on record, of any listed public company or a public company (not being the intermediaries specified u/s 12) which intends to get its securities listed on any recognised stock exchange unless such company indulges in insider trading or market manipulation.

Sub-section (10) provides that the Investigating Authority shall keep in its custody the books, registers, other documents and record seized under this section for such period not later than the conclusion of the investigation as it

considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person, from whose custody or power they were seized and inform the Magistrate of such return. However, the Investigating Authority may, before returning such books, registers, other documents and record as aforesaid, place identification marks on them or any part thereof.

Sub-section (11) provides that every search or seizure made under this section, save as otherwise provided in the proposed section, shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 relating to searches or seizures made under that Code.

22. The learned Counsel for the accused rightly submitted that the intention of the Parliament in introducing Section 11C was to provide for an investigation to be carried out by the Investigating Authority at the instance of the Board and to empower the Investigating Officer with consequential authority, on par with the scheme of Sections 164, 165 of Cr.P.C. and the said report could be filed with the complaint to be presented to the Court of Metropolitan Magistrate/Judicial Magistrate, First Class at the first instance and the same would also comply with the requirements of Section 208 so as to pass an order of committal u/s 209 of Cr.P.C. In the absence of the powers of investigation with the Board prior to 29/10/2002 and in the absence of such investigation not having been carried out u/s 11C in the complaints filed after 29/10/2002, there would be no compliance of the requirements of Section 208 before passing the order of committal u/s 209 of Cr.P.C. In the absence of the compliance of Section 208 of Cr.P.C., it was submitted by the learned Counsel for the accused that there shall be no material for the learned Prosecutor to proceed with the trial of the complaint before the Sessions Court and the complaints will have to be dismissed and consequently the accused will have to be discharged u/s 227 of Cr.P.C. In this regard the learned Counsel for the accused have relied upon the view taken by Hon'ble Shri Justice K.T. Thomas (as then he was) in the case of Rosy (Supra). His Lordship examined the question whether the Magistrate should have examined all the witnesses of the prosecution before the case was committed to the Court of Session or before the process was issued to the accused. Chapter XIV of Cr.P.C. sets out conditions requisite for initiation of proceedings and Section 190 thereunder specifies the power of a Magistrate to take cognizance of the offence by three different courses i.e. (a) upon receiving a complaint of facts which constitutes such offence, (b) upon a police report of such facts and (c) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Taking cognizance of the offence involves the exercise of deciding whether process should be issued to the accused as envisaged u/s 204 of Cr.P.C. However, there is an interregnum stage between the filing of the complaint and issuance of process and that is Section 202 of Cr.P.C. which deals with postponement of the process and it is under Chapter XV "Complaints to Magistrates". Sub-section (1) states that any Magistrate on receipt of complaint of offence may, if he thinks fit, postpone the

issue of process against the accused for resorting to any of the two courses i.e. either enquire into the case himself or direct an investigation to be made. But if the offence is triable by Court of Session, the Magistrate cannot make a direction for investigation. Hence the Magistrate taking cognizance of an offence upon a complaint, when such offence is not triable by Sessions Court, can adopt either of the three courses viz. (i) straightway issue the process, or (ii) he can postpone the issue of process for holding an enquiry, or (iii) he can direct an investigation to be made but if the offence is triable by a Court of Session, it is impermissible for the Magistrate to direct an investigation, as per the proviso below sub-section (2) of Section 202. On the interpretations of Section 202(2) of Cr.P.C., Thomas, J. in Rosys case observed in para 14 as under:

14. The crucial issue therefore is, when the offence, sought to be taken cognizance of by the magistrate, is exclusively triable by the Court of Session, it is incumbent on the magistrate to conduct an inquiry as enjoined in the proviso to Section 202(2) of the Code or can he dispense with such inquiry. The answer would not have been difficult if we go by the placement of the said proviso alone, as it can then be said that inquiry is not a must. If the said proviso was placed in Section 200 of the Code even a doubt that the legislative idea is to have all witnesses examined by the magistrate when the offence complained of is triable exclusively by the Court of Sessions would have been displaced. Nonetheless the placement of the proviso is not the only criteria in discerning the legislative intent. Indications can be gathered from other connected provisions for taking a contrary view.

His Lordship proceeded to observe in paras 15 to 19 as under:

15. Chapter XVI of the Code contains provisions for commencement of proceedings before magistrate. Section 204, which is already referred to, enjoins on the magistrate to issue process if the magistrate forms the opinion that there is "sufficient ground for proceeding". When the offence is triable by a Court of Sessions the task of the magistrate cannot be restricted to considering whether process should be issued. There must be sufficient ground for proceeding. Proceeding to what? In this context Section 208 of the Code is important and hence it is extracted below:

208. Supply of copies of statements and documents to accused in other cases triable by Court of Session. Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process u/s 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

- (i) the statements recorded u/s 200 or Section 202, of all persons examined by the Magistrate;
- (ii) the statements and confessions, if any, recorded u/s 161 or Section 164;
- (iii) any documents produced before the Magistrate on which the prosecution

proposes to rely;

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

16. Three categories of documents are mentioned in the aforesaid section the copies of which the magistrate, who proceeds from the stage in Section 204, has to supply to the accused free of cost (in a complaint case involving an offence triable exclusively by a Court of Sessions). As the words used are "shall furnish" it is almost a compelling duty on the magistrate to supply the said documents to the accused. How can the magistrate supply such documents (In the present context the documents referred to in the third category mentioned in Clause (iii) are not important.) The first category delineated in Clause (i) of Section 208 consists of "statement recorded u/s 200 or Section 202 of all persons examined by the magistrate." It is now important to note that the words "if any" have been used in the second category of documents which is delineated in Clause (ii) of Section 208 but those words are absent while delineating the first category. In my view those two words have been thoughtfully avoided by Parliament in Clause (i).

17. If a magistrate is to comply with the aforesaid requirements in Section 208 of the Code (which he cannot obviate as the language used in the sub-section is of any indication) what is the manner in which he can do it in a case where he failed to examine the witnesses before issuing process to the accused. The mere fact that the word "or" employed in Clause (I) of Section 208 is not to be understood as an indication that the magistrate is given the freedom to dispense with the inquiry if he has already examined the complainant u/s 200. A case can be visualized in which the complainant is the only eye witness or in which all the eye witnesses were also present when the complaint was filed and they were all examined as required in Section 200. In such a case the complainant, when asked to produce all his witnesses u/s 202 of the Code, is at liberty to report to the magistrate that he has no other witness than those who were already examined u/s 200 of the Code. When such types of cases are borne in the mind it is quite possible to grasp the utility of the word "or" which is employed in the first clause of Section 208 of the Code. So the intention is not to indicate that the inquiry is only optional in the cases mentioned in Section 208.

18. It is pertinent to consider yet another aspect. It is of importance from practical point of view also. Section 209 of the Code enjoins on the magistrate to commit the case to the Court of Session after complying with the provisions in Section 208 of the Code. Once the case is committed it proceeds to the next stage for which the venue is the Court of Session. The trial in the Court of Session is envisaged in Chapter XVIII. It must be borne in mind that in the Sessions Court a public Prosecutor alone can conduct prosecution, whether the case was instituted on police report or on complaint. Section 226, falling within the aforesaid Chapter, requires the public prosecutor to make the open address

to the Session Court. That section reads thus:

226. Opening case for prosecution: When the accused appears or is brought before the Court in pursuance of a commitment of the case u/s 209 the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.

19. If a case instituted on complaint is committed to the Court of Session without complying with the requirements in Clause (I) of Section 208 of the Code how is it possible for the public prosecutor to know in advance what evidence he can adduce to prove the guilt of the accused. If no inquiry u/s 202 is to be conducted a magistrate who decides to proceed only on the averments contained in the complaint filed by a public servant (who is not a witness to the core allegation) and such a case is committed to the Court of Sessions, its inevitable consequence would be that the Sessions Judge has to axe down the case at the stage of Section 226 itself as the public prosecutor would then be helpless to state "by what evidence he proposes to prove the guilt of the accused." If the offence is of a serious nature or is of public importance the consequence then would be miscarriage of justice.

23. Undoubtedly the view taken by the other member of the Bench (M.B. Shah, J.) are not on the same lines regarding the interpretations of Sections 202 and 204 of Cr.P.C. However, in the instant complaints, though the list of witnesses has been placed on record, the statements of such witnesses have not been recorded either in the course of investigation u/s 11C of the SEBI Act or by the learned Metropolitan Magistrate before issuance of process by himself by postponing the issuance of process u/s 202 as the complaint was filed by a public servant purporting to act in the discharge of his official duties. Consequently, while the committal order was passed u/s 209 in the complaints (except two), the requirements of Section 208 of Cr.P.C. were not complied with inasmuch as there were no statements recorded u/s 200 or Section 202 of any persons examined by the Magistrate or any statement recorded during the course of investigation undertaken u/s 11C of the SEBI Act before filing of the complaint and hence the accused are right in their contentions that the order of committal so passed was vitiated and the same is unsustainable. A Division Bench of this Court in the case of Shyamkant Wamanrao Pawar and others Vs. State of Maharashtra and others, while approving the view taken earlier by this Court in the case of Laxmanlal v. Judicial Magistrate, First Class, Khamgaon, Satara reiterated that it was obligatory on the part of the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath if the offence is triable exclusively by the Court of Session and in case the same is not done, obviously the order passed issuing process would be patently in violation of the mandatory requirement of the proviso to Section 202(2) of Cr.P.C.

24. The committal order in all the committed complaints has been passed only on the basis of the notification dated 9th June 2003 issued by the Law and

Judiciary Department and published in the State Government Gazette. As per the said notification a Special Court for offences arising from the SEBI Act has been constituted so as to conduct the trials for the offences punishable u/s 24 read with Section 27 of the SEBI Act. The order further states that as the complaint was filed before the constitution of such a Special Court and cognizance was taken thereof by the Court to which the complaint was presented, the case was required to be committed for trial to the Special Court u/s 209 of Cr.P.C. The committal order does not speak about the compliance of Section 208 of Cr.P.C. which undoubtedly is the condition precedent for passing the committal order. No application was moved by the SEBI for committal of these complaints from the Court of Metropolitan Magistrate to the Sessions Court and in fact it is not proper to say that a Special Court was constituted for trial of these complaints. The complaints are required to be tried as per Section 26 by the Court of Session and not by a Special Court. As a specific Sessions Court has been designated to try these complaints, perhaps, the learned Magistrate referred to the same as a Special Court. The nomenclature as "Special Court" does not have support even in the amended SEBI Act. The fact remains that the order of committal has been obviously passed without application of mind and this is one more reason to quash and set aside the order of acquittal. At the same time the issue as to whether the Session Court had the powers to adjudicate upon the committal order was not raised.

25. In the premises these petitions/applications succeed and the same are hereby allowed as under:

(a) It is held that the amendment in Section 24 of the SEBI Act brought into force with effect from 29/10/2002 is a substantial amendment and the amendment in Section 26 of the said Act is only consequential, though procedural.

(b) The said amendments shall have prospective effect and not retrospective and, therefore, are not applicable to the above stated complaints.

(c) The complaints filed before or after 29/10/2002 but in respect of the alleged offences that have taken place prior to the said date are required to be tried by the Court to which they were presented and they are not required to be committed to the Court of Sessions. Hence the above referred complaints shall be tried by the Court they were presented at the first instance.

(d) The committal orders passed by the Court of Metropolitan Magistrate/Addl. Chief Metropolitan Magistrate/Chief Metropolitan Magistrate in the complaints referred are hereby quashed and set aside. The Court of Session to return the concerned complaints to the respective Courts which had passed the committal order.

(e) Trial of the complaints is expedited.

26. Rule is made absolute in terms of the above directions.