1993 AIR SC 1082 . 1993 CRI LJ 859 . 1992 SCALE 3 396 . 1993 SUPP SCC 4 260 . 1992 SUPP SCR 3 594 . 1993 CRLJ 99 859 . 1993 S SCC 4 260 . 1992 AIR SC 1082 . 1993 SCC CR 0 1171 . 1993 CRLJ 0 859 . 1992 SUPP JT 1 255 . 1993 SCC 0 1171 . 1993 AIR SC 1083 . 1993 SUPP SCC 4 280 . 1993 SUPP SCC 3 260 . 1993 CRILJ 859 . 1992 JT 255 . 1993 CRLJ SC 859 . 1993 SUPPL SCC 4 260 . 1993 SCC CR 1171 . 1993 SCC 4 260 . 1993 SCC CRI 1171 . 1993 SCC 260 . 1992 SUPPSCR 3 594 .

Union Of India And Another v. W.N Chadha .

Supreme Court Of India (Dec 17, 1992)

CASE NO.

Criminal Appeal No. 567 of 1992, decided on December 17, 1992

ADVOCATES

Altaf Ahmed, Addl. Solicitor General (Ashok Bhan and C.V.S Rao, Advocates, with him) for the Appellants;

Rajendra Singh and Dinesh Mathur, Senior Advocates (Ashok Grover, Rahul P. Dave, Krishan Kumar and Ms Ruby Anand, Advocates, with them) for the Respondent.

JUDGES

S. Ratnavel Pandian

K. Jayachandra Reddy, JJ.

IMPORTANT PARAS

1. 112. Ground No. 'N' of the additional grounds reads thus:
2. 59. Collins English Dictionary gives the meaning of the word 'rogatory' as under:
3. 86. In R v. Peterborough Justice, ex parte Hicks 1977 1 WLR 1371 it has been held that search warrants under the Forgery Act, 1913, Section 13 may issue without the party affected being heard.
4. 87. A Division Bench of the Allahabad High Court in Indian Explosives Ltd. (Fertiliser Division) Panki, Kanpur v. State of U.P 1981 2 LLJ 159 after referring to the decision in Barnet and Norwest Holst Ltd. v. Secretary of State for Trade

1978 Ch 201 said thus:

5. It has been further concluded by the High Court:

6. 127. Based on the correspondence exchanged between Bofors and the authorities of the Government of India and the opinion of the then Attorney General of India contained in paras 8.6 and 8.16 of the report of the JPC the High Court has held as follows:

7. 168. A perusal of the above conclusions shows that the JPC was not able to secure the entire evidence and that the Bofors also was not fully cooperating with the enquiry furnishing the relevant documents and that, the JPC submitted its report on the available materials collected and the legal opinion of the then learned Attorney General of India.

8. 166. Shri Rajinder Singh, the counsel for the respondent when confronted with the above inconsistent conclusions, finding himself on a sticky wicket unhesitatingly stated that he is not accepting the finding of the High Court holding that the FIR discloses the offence which finding in his opinion is an incorrect and incoherent finding. This reply of Shri Rajinder Singh cannot be countenanced and accepted. The respondent cannot be permitted to blow hot and cold, thereby attacking one part of the judgment as erroneous and untenable and attempting to sustain the other part as being well-founded on sound reasonings.

9. 78. In fact the Special Judge in Delhi is not possessed with any power or authority to deprive the liberty of the respondent residing out of the jurisdiction of Indian Courts and having his property in question in a foreign country. Only in case where a public officer has got such a power, the question of 'fair play in action' will be attracted. This rule was explained by Lord Denning M.R in Schmidt v. Secretary of State for Home Affairs 1969 2 Ch 149 stating that "where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf".

10. 79. The above explanation is quoted in Maneka Gandhi.

11. (emphasis supplied)

12. 129. The High Court has also held that the averments made in the FIR against the respondent on the basis of media reports are nothing but only surmises and conjectures.

13. 103. It has been contended on behalf of the respondent that the Special Judge has exhibited a partiality towards the respondent by not giving any opportunity of being heard when the prosecution was given a right of audience before issuing letter rogatory.

14. 138. We feel that it is not necessary to go deep into the matter any further except saying that the High Court is not justified in affixing its seal of approval to the contract by holding it to be bona fide, on being executed following the proper procedure.

15. 136. It is to be noted that the High Court appears to have waded through the entire original records produced before it by the Government for its perusal and on the strength of those documents, the court has raised the two questions, namely, whether the proper procedure in the execution of the contract was followed and whether the contract finalised is perfect and bona fide — and answered both the questions in affirmative, that is in favour of the respondent and prejudicial to the appellants.

16. 76. Countering the above arguments, the learned Additional Solicitor General seriously contended that there is no provision conferring any right of audience on an accused before issuing letter rogatory the object of which is to collect evidence which may be used against the accused during the course of the trial. According to him, the accused has no right to control or interfere with the manner in which the evidence is to be collected. Chapter XII of the Code under the heading 'Information to the Police and other Powers to Investigate' covering Sections 154 to 176 does not provide for application of the concept of audi alteram partem for an accused from the very inception of a criminal proceeding till its culmination in filing of a report under Section 173 of CrPC. He continues to state that an order of the Court issued in exercise of the powers under section 166-a of the code is only for the purpose of collecting the evidence and in the very nature of things such an order does not affect any right of an accused and, therefore, the said order is beyond the purview of the High Court power even under section 397 of the code. Hence there is no question of the rule of audi alteram partem being attracted in the instant case. Therefore, the only important question that arises for our consideration is whether the issue of letters rogatory on February 5/7, 1990 and on August 22, 1990 are liable to be quashed on the ground of non-compliance of the rule of audi alteram partem.

17. 140. Now let us switch over to the later part of the question and examine whether

there are materials prima facie connecting the respondent with the dealings of Bofors.

18. 75. No doubt it is true that a seven-Judge Bench of this Court in Maneka Gandhi has opened a new vista in the area of personal liberty as enshrined under Article 21 of the Constitution and emphasised the audi alteram partem rule which emphasis is of affording a fair opportunity of being heard on prior notice to a party to whose prejudice an order is intended to be passed by the Government or its officials. Further, it is stated by the High Court that all the safeguards in favour of an accused contained in the Criminal Procedure Code have now become a part of the constitutional provisions and they are governed by Articles 14, 19, 20, 21 and 22 and that the procedure contemplated under Article 21 requires that it should not be arbitrary, fanciful, oppressive or discriminatory. Therefore, the failure on the part of the Special Judge in issuing notice to the respondent and affording him a reasonable opportunity of being heard vitiates the letters rogatory.

19. 96. True, there are certain rights conferred on an accused to be enjoyed at certain stages under the Code of Criminal Procedure — such as Section 50 whereunder the person arrested is to be informed of the grounds of his arrest and to his right of bail and under Section 57 dealing with person arrested not to be detained for more than 24 hours and under Section 167 dealing with the procedure if the investigation cannot be completed in 24 hours — which are all in conformity with the 'Right to Life' and 'Personal Liberty' enshrined in Article 21 of the Constitution and the valuable safeguards ingrained in Article 22 of the Constitution for the protection of an arrestee or detenu in certain cases. But so long as the investigating agency proceeds with his action or investigation in strict compliance with the statutory provisions relating to arrest or investigation of a criminal case and according to the procedure established by law, no one can make any legitimate grievance to stifle or to impinge upon the proceedings of arrest or detention during investigation as the case may be, in accordance with the provisions of the Code of Criminal Procedure.

20. 71. After observing so, the High Court proceeded only on the ground that the Special Judge has not complied with the principle of audi alteram partem and also has not applied his mind to the facts and circumstances of the case before issuing letters rogatory, as aforementioned.

21. 88. The principle of law that could be deduced from the above decisions is that it is no doubt true that the fact that a decision, whether a prima facie case has or has

not been made out, is not by itself determinative of the exclusion of hearing, but the consideration that the decision was purely an administrative one and a full-fledged enquiry follows is a relevant — and indeed a significant — factor in deciding whether at that stage there ought to be hearing which the statute did not expressly grant.

22. 157. In the penultimate paragraph of the impugned judgment, the High Court has observed:

23. 90. Under the scheme of Chapter XII of the Code of Criminal Procedure, there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is in the stage of an investigation by a police officer.

24. 93. It may be noted that under section 227 of the code dealing with discharge of an accused in a trial before a Court of Sessions under Chapter XVIII, the accused is to be heard and permitted to make his submissions before the stage of framing the charge. Under section 228 of the code, the trial Judge has to consider not only the records of the case and documents submitted therewith but also the submissions of the accused and the prosecution made under Section 227. Similarly, under Section 239 falling under Chapter XIX dealing with the trial of warrant- cases, the Magistrate may give an opportunity to the prosecution and the accused of being heard and discharge the accused for the reasons to be recorded in case the Magistrate considers the charge against the accused to be groundless. section 240 of the code dealing with framing of charge also reaffirms the consideration of the examination of an accused under Section 239 before the charge is framed.

25. 92. More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under Section 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under section 204 of the code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under section 202 of the code, the accused may attend the subsequent inquiry but cannot participate. There are various

judicial pronouncements to this effect but we feel that it is not necessary to recapitulate those decisions. At the same time, we would like to point out that there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances.

26. 102. We are unable to see any force in the above submission of Shri Rajinder Singh because, firstly there is no request for production of the documents; secondly there is no prayer in the letter rogatory for production of the entire account books and; thirdly till date no objection is taken by the Swiss banks. It is pertinent to note that the High Court has not found fault with the validity of the letter rogatory on the ground of alleged production of bank accounts or the failure of any notice to the Swiss banks.

27. 94. Under Section 235(2), in a trial before a Court of Sessions and under Section 248(2) in the trial of warrant-cases, the accused as a matter of right, is to be given an opportunity of being heard. Unlike the above provisions which we have referred to above by way of illustration, the provisions relating to the investigation under Chapter XII do not confer any right of prior notice and hearing to the accused and on the other hand they are silent in this respect.

28. 117. Hence we see absolutely no reason to sustain the conclusion of the High Court that the issue of letter rogatory suffers from non-application of mind by the Special Judge.

29. 113. Ground No. 'Q' of the additional grounds, the appellants have stated thus:

SUMMARY

1. The order was placed by the Government of India to Bofors on March 24, 1986 for the supply of 410 numbers (400 plus 10 free) of 155mm Field Howitzer 77-B gun system/spare guns vide contract No. 6(9)/84.D (GS-IV) for a total amount of SEK 8410.66 million (Swedish Kroners) equivalent to about Rs 1437.72 crores.

2. The JPC was constituted on August 28, 1987 to make a probe into the above allegations.

3. The Court by its order dated August 27, 1991 allowed the appeal of the Union of India and quashed the suo motu action of the High Court but reserved the reasons to be given later on vide Janata Dal v. H.S Chowdhary.

4. 29. The High Court rejected the contention of the respondent that MOU is not a Treaty holding, "We do not find any merit in this contention."

5. 31. The above observation shows that the High Court did not favour the contention that the report of the JPC constitutes a legal bar for the registration of the FIR and continuation of the investigation.

6. 33. The High Court has also made reference to the judgment of this Court dated August 28, 1992 in which this Court after examining the FIR did not agree with a positive assertion of Justice M.K Chawla stating "that the FIR filed by the CBI in this case on the face of it does not disclose any offence".

7. 36. In the result, the High Court allowed the writ petition and quashed the impugned FIR, the letters rogatory issued on two occasions and other proceedings taken and orders passed in pursuance of the said FIR by its impugned judgment dated September 2, 1992.

8. M. 334 of 1992 was filed by Shri Prashant Bhushan, Advocate as a public interest litigant expressing his grievance that no proper submission was made as regards the legality of the issue of letter rogatory and the competence of the Special Court in issuing the same.

9. The High Court after issuing notice to the counsel for the CBI as well as the respondent herein and hearing the parties held that all the relevant points mentioned in the written argument filed by Shri Prashant Bhushan were fully argued by the counsel for the CBI and the allegations made against the counsel for CBI are unfounded and disposed of that application.

10. 42. Seriously challenging the findings of the High Court, Mr Altaf Ahmad, the learned Additional Solicitor General assisted by M/s C.V Subba Rao and Ashok Bhan, learned advocates has articulated that the High Court by slipping and stumbling on many slippery grounds has rendered its findings which are not only opposed to law but also are contumacious.

11. The delay has occasioned more due to the multiple obstructions put forth by H.S Chowdhary and thereafter by the present respondent and it is not due to any procrastination on the part of the prosecution and that it cannot be said that the case is kept dangling endlessly without any evidence against anyone of the accused.

12. He has started attacking the conduct of the investigating agency in requesting the

Court to issue letter rogatory and the authority of the Special Court in issuing letters rogatory on February 5/7, 1990 and subsequently the ratified letter rogatory issued on August 21/22, 1990.

13. Before the High Court his effort was to show that the entire criminal proceeding is an aimless voyage or a roving expedition with oblique motive and that he has been caught in a political crossfire which smacks of personal vendetta and in which he has absolutely no role to play.

14. 52. Notwithstanding the above finding of this Court, the High Court in its impugned judgment has examined various legal and factual issues inclusive of the question whether the FIR does disclose any offence against the named and unnamed accused persons and pronounced its final verdict.

15. 54. It appears from the impugned judgment that it has been contended before the High Court that there is no jurisdiction to issue letter rogatory by the Special Judge unless he is satisfied with regard to the extent of dual criminality and the prima facie involvement of the accused persons whose property or rights are sought to be affected by the letter rogatory.

16. "A request by one court of another court in an independent jurisdiction, that a witness be examined upon interrogatories sent with the request.

17. The medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country.

18. A formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action.

19. It had become necessary for freezing the accounts beyond February 28, 1990 and to make a request for judicial assistance to Switzerland failing which the Swiss law obliges the withdrawal of the instructions to block the accounts.

20. Sub-section (2) of Section 166-A of the Ordinance authorised the Criminal Court to issue a letter of request in its discretion on an application made by the investigating officer or any officer superior to the rank of investigating officer.

21. Section 166-B introduced by the above Ordinance deals with the letter of request from a country or a place outside India to a Court or authority for investigation in India.

22. "Similarly once the power has been conferred on the criminal court to issue the letter rogatory, it follows that the court will have to apply its mind and give an opportunity of hearing to the person whose property or rights are sought to be affected by letter rogatory."

23. 71. After observing so, the High Court proceeded only on the ground that the Special Judge has not complied with the principle of audi alteram partem and also has not applied his mind to the facts and circumstances of the case before issuing letters rogatory, as aforementioned.

24. 72. we are not called upon to go into the question of the jurisdiction of the Special Judge in issuing the letter rogatory but have to deal only with the other two grounds on the basis of which the High Court quashed the letters rogatory.

25. 75. No doubt it is true that a seven-Judge Bench of this Court in Maneka Gandhi has opened a new vista in the area of personal liberty as enshrined under Article 21 of the Constitution and emphasised the audi alteram partem rule which emphasis is of affording a fair opportunity of being heard on prior notice to a party to whose prejudice an order is intended to be passed by the Government or its officials.

26. It is stated by the High Court that all the safeguards in favour of an accused contained in the Criminal Procedure Code have now become a part of the constitutional provisions and they are governed by Articles 14, 19, 20, 21 and 22 and that the procedure contemplated under Article 21 requires that it should not be arbitrary, fanciful, oppressive or discriminatory.

27. The failure on the part of the Special Judge in issuing notice to the respondent and affording him a reasonable opportunity of being heard vitiates the letters rogatory.

28. The only important question that arises for our consideration is whether the issue of letters rogatory on February 5/7, 1990 and on August 22, 1990 are liable to be quashed on the ground of non-compliance of the rule of audi alteram partem.

29. the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as

the investigation proceeds in compliance with the provisions relating to investigation...."

30. We are of the view that the detailed discussion of the High Court with reference to the Criminal Law Amendment Ordinance of 1944 though is not warranted .

31. It is pertinent to note that the High Court has not found fault with the validity of the letter rogatory on the ground of alleged production of bank accounts or the failure of any notice to the Swiss banks.

32. The Additional Solicitor General continues to state that the High Court unfortunately despite the oral request made on behalf of the CBI has freely made use of those confidential documents inclusive of the copy of the order of the Cantonal Court.

33. 115. In the circumstances, we have no other option except to hold that the High Court has used all those confidential documents which the Court ought not to have used for the reasons, firstly those documents are stated to have been claimed as secret documents and secondly ignoring the request of the CBI said to be made and without notice to the appellants herein.

34. The only inescapable inference that could be drawn in those circumstances would be that the Court has made up its mind as to the expediency of quashing the letter rogatory and thereafter has conveniently made use of those documents for the end product.

35. 117. we see absolutely no reason to sustain the conclusion of the High Court that the issue of letter rogatory suffers from non-application of mind by the Special Judge.

36. The petitioner, who is the accused, has no locus standi at this stage to question the manner in which the evidence should be collected.

37. The petition was liable to be dismissed in limine on the short ground that the accused had no locus standi to file the same.

38. It matters very little whether the documents were received or were to be received in this country when the petition was filed.

39. 120. For all the aforesaid reasons we unhesitatingly set aside the order of the High Court quashing the letter rogatory dated 5/7th February, 1990 and the rectified letter rogatory dated 21st/22nd August, 1990 issued in pursuance of the orders

passed by the Special Judge.

40. The decision was taken in accordance with the well-established procedure."

41. 134. The High Court has further pointed out that the non-filing of any suit and the failure to initiate any arbitration proceeding for the recovery of the alleged commission by the Government support the conclusion that there is no breach of trust.

42. Mr Rajinder Singh has denied any connection of the respondent with Svenska Inc. and added that if the period of 10 or 15 years mentioned by the learned ASG is calculated backwards from 1985, it would show that the connection of the alleged agent with Bofors should have started from 1975 and the expression 'agent' as appeared in the Press could not refer to the respondent who became the agent only in 1978.

43. 145. the High Court in its impugned judgment itself has recorded its finding that they are also of the same view as that of this Court that it may not be correct that the FIR does not disclose any offence against anyone named or unnamed accused which definitely includes the respondent also.

44. 150. The High Court appears to have taken a serious note of a piece of paper pasted by the CBI on the letter rogatory forwarded by the Special Judge to the Cantonal Court of Geneva and expressed its view stating, "Whatever explanation for this may be, we disapprove the said action of the officer of CBI who had done this as it may amount to tampering with the judicial records".

45. Shri V.S Aggarwal, Special Judge has approved the piece of paper already pasted to the letter rogatory and forwarded the same and according to Shri Natarajan, the High Court without appreciating and understanding the circumstances under which the piece of paper was pasted has made this disparaging observation and requested that this observation may be expunged.

46. 152. Though initially, Mr Rajinder Singh took a serious objection to the conduct of the CBI in pasting this piece of paper to the letter rogatory without the permission of the Court, when confronted by the subsequent approval of Shri V.S Aggarwal, Special Judge he had no answer to sustain the remark of the High Court.

47. We expunge the remark of the High Court, as prayed for in the Cr.M.P In view of this finding, we hold that the High Court was not correct in holding that this has

amounted to tampering of judicial records.

48. Non-bailable warrants for his arrest were issued and the same have been quashed by a learned Single Judge of this Court and the matter is now pending before the Supreme Court.

49. When we asked the counsel for the respondent as to whether this material of the impounding of passport was placed before the High Court, he hesitatingly stated that the order of the High Court in Cri.

50. Petition (Main) No. 1318 of 1990 titled Washeshwar Nath Chadha v. State 1991 1 Del Lawyer 394 and thereby requested the Court to infer that the High Court might have taken note of that reported judgment, though the judgment spells out nothing about the source of information .

51. It surprises us as to how the High Court quashed the FIR after having positively found that the FIR discloses an offence/ offences against named and unnamed accused which will include the respondent also.

52. The paradoxical finding perhaps by the High Court is sought to be justified by feebly relying on the fact that the investigating agency has failed to name any public servant as an accused, on the conclusions of the JPC and also on the circumstances of the impounding of the passport of the respondent.

53. 165. We are of the firm view that the self-contradictory findings of the High Court itself gives a frontal attack to the impugned judgment, rendering it unsustainable both in law and fact.

54. The Committee have not been able to reach any conclusion in regard to the identity of recipients."

55. The question of payments to any Indian or Indian company whether resident in India or not, does not arise, especially as no evidence to the contrary is forthcoming from any quarter."

56. When all those are extending their helping hands though so far so close, there is no reason to forestall the investigation.

57. What Section 157(1) requires is that the police officer should have 'reason to suspect' with regard to the commission of an offence.

58. 174. Before the Court, Shri Shanti Bhushan appearing on behalf of Shri Prashant

Bhushan stated that every crime is perpetrated only against the society and that is why the State takes up the cause on behalf of the Society and these petitioners who evince their interest in the protection of the society should be granted leave to canvass the correctness of the impugned judgment as public interest litigants.

59. 175. In Arunachalam challenging the order of acquittal of the accused in a case of murder passed by the High Court, the brother of the deceased by name Arunachalam filed an SLP and obtained leave from this Court.

60. 180. Before the Supreme Court of United States, a similar question arose in Whitmore v. Arkansas 495 US 149 whether a next friend can invoke the jurisdiction of the Court when a real party was not able to litigate his or her own cause.

61. 181. when this case on hand came up before this Court arising out of the public interest litigation of Shri H.S Chowdhary, some other political parties approached this Court as public interest litigants to challenge the impugned judgment in that case, but this Court rejected all those appeals on the ground of locus standi.

62. 185. Criminal Appeal No. 567 of 1992 is allowed .

63. In spite of the finding of this Court in Janata Dal the High Court has grossly erred in quashing the FIR, the same has resulted in a glaring injustice, namely, that the investigation into grave and serious crime has got scotched and all the efforts so far taken by the investigating agency in digging out the requisite evidence got buried.

64. We find it imperative to quash the impugned judgment of the High Court.

S. Ratnavel Pandian, J. — The above appeal is preferred before this Court challenging the judgment of the High Court of Delhi dated September 2, 1992 rendered in Criminal Writ Petition No. 501 of 1991 knocking down the very registration of the FIR (first information report) and all the proceedings arising thereon including the issue of the letters rogatory in the second round of the bout of this litigation.

2. The first round of the litigation came before this Court on an appeal preferred by Shri H.S Chowdhary challenging the order of the learned Single Judge, Justice M.K Chawla of the High Court of Delhi dated December 19, 1990 dismissing his petition on the ground that he has no locus standi to file his petition and a few other appeals preferred by the Union of India and some political parties which had been seriously

litigated before this Court on the earlier occasion and resulted in the pronouncement of an order dated August 27, 19911, giving only the conclusions and the final judgment on August 28, 1992 vide Janata Dal v. H.S Chowdhary 1992 4 SCC 305 the decisions of which were rendered by this Bench.

3. The synoptical resumption of the case of the prosecution leading to the initiation of the proceedings inclusive of the organic synthesis of the events and the circumstances veering the case have been encapsuled and presented in the order and judgment of this Court rendered in the first round of the batch of appeals. Nonetheless, to assimilate the controversial issues both legal and factual involved, we would like to give a terse sketch, shorn of the detailed facts of the case, as borne out from the records, which has given rise to this appeal.

4. The respondent, namely, W.N *Chadha* who is now residing at Dubai in United Arab Emirates (UAE) had his first agreement in 1978 with M/ s A.B Bofors (hereinafter referred to as 'Bofors') to provide representation services to it in India with regard to supply of arms and ammunition to Indian Government. The terms of the said representation services agreement were extended from time to time until the end of 1985. However, in January 1986, Bofors and Anatronic General Corporation Private Ltd. (for short 'AGC') promoted by the respondent entered into a consultancy agreement in 1986 with Bofors in respect of its business in India. According to the respondent, at no stage he or any of his concerns was made agent of Bofors. Similarly, he or his concern was not entitled to enter into negotiations with Government of India on behalf of Bofors or to commit or to bind Bofors to any agreement or arrangement with the Government of India but as stated supra, he was to render administrative consultancy services to Bofors.

5. The Ministry of Defence, Government of India approved in August 1980 a proposal forwarded by Army Headquarters recommending, inter alia, the introduction of 155 mm calibre medium guns both towed and self-propelled to meet its defence operational requirements. The choice for purchasing the said guns was shortlisted in December 1982 to (1) M/s Sofma of France, (2) M/s A.B Bofors of Sweden (Bofors), (3) M/s International Military Services (IMS) of U.K and (4) M/s Voest Alpine of Austria.

6. In April 1984, the Cabinet Committee on Political Affairs ('CCPA' for short) approved the proposal for procurement of 155mm guns along with certain related equipments and ammunition at a total estimated cost of Rs 1600 crores. In May 1984, a Negotiating Committee comprising of the Defence Secretary as the Chairman,

Secretary (DP&S), Scientific Adviser to Raksha Mantri (i.e Secretary, Research and Development), Secretary (Expenditure), Additional Secretary, Department of Economic Affairs, Financial Adviser, Defence Services and the Deputy Chief of Army Staff as members was constituted for detailed negotiations with the various suppliers.

7. The Negotiating Committee started its deliberation in June 1984 and decided that fresh sealed technical and commercial offers should be invited from the four short-listed firms. After the offers were received from the aforesaid four firms, technical and commercial negotiations were held with all the said firms and thereafter revised offers were invited and the same were received on 1st September. Offers were also invited from the ammunition manufacturers. After seeking certain clarifications from the aforesaid firms with a view to evaluate the offers of all the competitors, all the four firms submitted fresh commercial offers on May 10, 1985. Thereafter, members of the Negotiating Committee requested the Army Headquarters to give their recommendations of the guns acceptable to them taking into account the technical aspects, delivery schedule etc. and clearly indicate their preference from amongst the acceptable guns. The then Deputy Chief of the Army Staff told the committee that the French gun was the best and the Swedish gun was the second best and that if the price difference was marginal, they should go for the former. The recommendations of the Army Headquarters to shortlist only M/s Sofma of France and M/s A.B Bofors of Sweden for further negotiations were accepted by the Negotiating Committee which, however, felt that the choice between the two was open and it would depend on a combination of technical and financial considerations. The above two shortlisted firms were called for negotiation in the middle of December 1985. Three ammunition manufacturers were also called in the middle of January 1986. The commercial, contractual and technical aspects of purchase and licence production were negotiated with the said two firms.

8. On March 4, 1986, the Negotiating Committee expressed the view that the Bofors gun had a clear edge over the Sofma gun of France with which view the then Deputy Chief of the Army Staff also agreed. On March 12, 1986 the Negotiating Committee recommended that a letter of intent might be issued to Bofors to the effect that the Government of India would be willing to award the contract to them subject to the condition of being satisfied on all aspects of the purchase, licensed production, credit and other arrangements. Finally, the order was placed by the Government of India to Bofors on March 24, 1986 for the supply of 410 numbers (400 plus 10 free) of 155mm Field Howitzer 77-B gun system/spare guns vide contract No. 6(9)/84.D (GS-IV) for a

total amount of SEK 8410.66 million (Swedish Kroners) equivalent to about Rs 1437.72 crores. The related contract for supply of the gun package (towed) and other related agreements/ contracts were concluded, approved and signed on March 24, 1986 with Bofors.

9. On April 17, 1987, some newspapers in India gave prominent coverage to a Swedish Radio broadcast made on the previous day, broadcasting that bribes had been paid to senior Indian politicians and key Defence figures to *win* the contract awarded by the Government of India to Bofors on March 24, 1986.

10. The above news item was again broadcast by Swedish Radio on April 17, 1987 claiming that it had documentary proof of pay- offs in four instalments to Indian accounts in Swiss banks and it had checked with Skandinaviska Enskilds Banken, the bankers for Bofors. This news item was refuted by Bofors denying the allegations of paying any kickbacks to Indian politicians or officials in respect of the deal. The Government of India also issued a statement on April 17, 1987 itself denying the allegations of payments of alleged kickbacks. On April 20, 1987, Shri K.C Pant, the then Minister of Defence made a suo motu statement in the Lok Sabha stating inter alia, that the Government of India did not employ any representative/ agent for the contract and added that "for administrative services, e.g hotel bookings, transportation, forwarding of letters, telexes etc., they use the services of a local firm". The then Defence Minister added that "if any evidence is produced involving violations of the law, the matter will be thoroughly investigated and the guilty, whoever they may be, punished". A similar statement was also made by the Minister of State for Defence in the Rajya Sabha on April 21, 1987.

11. This issue created furore both in the Lok Sabha and the Rajya Sabha. Several issues were raised by the Members of both Houses not only with regard to the alleged kickbacks paid by Bofors for winning the contract but also about the quality and suitability of the gun selected for procurement.

12. On April 20, 1987, Shri Rajiv Gandhi, the then Prime Minister of India intervening in the debate in the Lok Sabha reaffirmed the statement of Minister for Defence in the following words:

"… And like Panditji has said now, you show us any evidence, we do not want proof. We will bring the proof. You show us any evidence that there has been involvement of middlemen, of payoffs or of bribes or commissions, we will take action and we will see that nobody however high-up is allowed to go free."

13. Again the then Minister for Defence made the assurance based on the statement of the then Prime Minister.

14. A demand was made by the Members of both Houses — Lok Sabha and Rajya Sabha — to make a probe into the matter by a Parliamentary Committee. When the matter stood thus, on June 4, 1987, the Swedish Embassy in India forwarded a copy of the report dated June 1, 1987 of the Swedish National Audit Bureau ('SNAB' for short) with a note to the Ministry of External Affairs, Government of India, stating that what is made available to the Government of India was only one part of the report of the SNAB but not the report in its entirety and the rest was withheld by the Government of Sweden on the bank secrecy requirement. (The summary of the observations of SNAB is extracted in the Report of the Joint Parliamentary Committee).

15. It may be noted that the said report did not disclose the names of the recipients of the kickbacks. The then Prime Minister after having a discussion about this matter with the leaders of the opposition parties on June 17, 1987 decided to request the Speaker of the Lok Sabha and the Chairman of the Rajya Sabha to set up a Joint Parliamentary Committee (for short JPC). As both the Speaker and the Chairman declined to set up the JPC on their own motion, on June 29, 1987 the then Minister for Defence (Shri K.C Pant) moved a motion in the Lok Sabha for appointment of the JPC, and added in justification of the constitution of the same that "The Government has nothing to hide. The Government wants to get at the truth and that is why this Committee has been set up." Accordingly, the JPC was constituted on August 28, 1987 to make a probe into the above allegations. The JPC submitted its report on April 22, 1988 with its conclusions and also with the dissenting note of one of its members. The said report of the JPC was presented to Lok Sabha on April 26, 1988 and then laid on the table of the Rajya Sabha on the same day. In spite of the report of the JPC, the allegations of malpractices in the deal with Bofors, payments of kickbacks and receipt of illegal gratification were persistently reiterated and the matter was relentlessly agitated. In the meanwhile, there was a change in the Government.

16. Thereafter, on January 22, 1990 the Superintendent of Police, CBI/DSPE/ACU-IV, New Delhi registered the impugned FIR in Crime No. RC 1(A)/90.ACU-IV under **Section 120-B read with Sections 161, 162, 163, 164 and 165-A of the Indian Penal Code read with Sections 5(2), 5(1)(d) and 5(2)/5(1)(c) of the Prevention of Corruption Act, 1947 read with Sections 409, 420, 468 and 471 of the Indian Penal Code** against 14

accused of whom three are named, they being (1) Shri Martin Ardbo, former President of M/s A.B Bofors, Sweden, (2) Shri *Chadha* alias *Win Chadha* , S/o Shri Assa Nand, President of M/s Anatronic General Corporation/ Anatronic General Companies Ltd., C/4, Main Market, Vasant Vihar, New Delhi and Shri G.P Hinduja, New Zealand House, Hay Market, London SW-1. The rest of the 11 accused are stated in general as Directors/ employees/ holders/ beneficiaries of account code and public servants of the Government of India. The prefatory note of the FIR reveals that the case was registered "on the basis of reliable information received from certain sources, certain facts and circumstances that have become available, media reports, report dated June 1, 1987 of the Swedish National Audit Bureau (SNAB), certain facts contained in the report dated April 22, 1988 of the Joint Parliamentary Committee (JPC) and the report dated April 28, 1988 of the Comptroller and Auditor General of India (CAG)". The FIR gives a detailed sequence of the events relating to the purchase of guns from M/s A.B Bofors, Sweden and the related agreements entered thereupon in violation of the Government's policy i.e not to involve any agent and the existing law of this land. Various allegations are mentioned in the FIR regarding the payment of bribes/ kickbacks and receipt of illegal gratification. It is further averred in the FIR that even in the letter dated October 3, 1986 sent to the Swedish National Bank, Bofors had referred to some of the payments to Svenska Inc. and the code name 'Mont Blane' as "commission payments" and that the payment to M/s Moresco/Moineao/SA/Pitco, Geneva was deposited by Bofors in three code name accounts, namely, "Lotus" in Suisee Bank Corporation, 2 Rue de la Confederation 1204, Geneva; "Tulip" in Manufacturers Hannover Trust Company, 84 Rue du Rhone, 1204, Geneva and "Mont Blane" in Credit Suissee, 2 Place Belle Air, 1204, Geneva and that these payments to code name accounts are without mentioning or disclosing the payers' names. Ultimately, reference was also made in paragraph 112 of the FIR to the statement of Mr Thulholm, Chairman of Noble Industries.

17. In the FIR, it is summed up that the facts and circumstances set out in the FIR disclose that the above named and unnamed accused persons and others had entered into a criminal conspiracy at New Delhi and other places during 1982-87 in pursuance of which the accused public servants obtained illegal gratification in the form of money from Bofors, a Swedish company through the agent firms/companies/persons as motive or reward for such public servants who by corrupt or illegal means or by otherwise dishonestly abusing their official position as public servants caused pecuniary advantage to themselves, Bofors, the agents and others in the matter of the said contract finalised on March 24, 1986 and that there is reason to believe that in

pursuance of the said criminal conspiracy, the impugned payments were made by Bofors and obtained by the above firms/companies/persons as gratifications and as motive or reward for their inducing or having induced, by corrupt or illegal means or by the exercise of personal influence, the said public servants of the Government of India in the matter of processing and award of the said contracts to Bofors and that the public servants had also abetted the same.

18. After the registration of the case, the Director, CBI by his letter dated January 23, 1990 followed by another letter dated January 26, 1990 requested the concerned authority in Switzerland for freezing/ blocking certain bank accounts said to be relevant to the case, on which the Federal Department of Justice and Police, Switzerland moved a Geneva and a Zurich Judge who froze certain bank accounts on January 29, 1990. It was, however, pointed out that the relevant accounts would remain frozen till February 28, 1990 and that further necessary assistance would be rendered only on receipt of the letter rogatory from a competent judicial authority in India.

19. On February 2, 1990, the second appellant (CBI) requested Shri R.C Jain, Special Judge, Delhi to issue a letter rogatory/request to Switzerland urgently for getting the necessary assistance so that the investigation can be conducted in Switzerland lest very important and relevant evidence would remain uncollected and the cause of justice would be frustrated.

20. The Special Judge after hearing the prosecution allowed the application by his order dated February 5, 1990. The said order reads thus:

"In the result, the application of the CBI is allowed to the extent that a request to conduct the necessary investigation and to collect necessary evidence which can be collected in Switzerland and to the extent directed in this order shall be made to the Competent Judicial Authorities of the Confederation of Switzerland through the Ministry of External Affairs, Government of India subject to the filing of the requisite/paper undertaking required by the Swiss law and assurance for reciprocity."

21. It appears that though the Examining Magistrate of Geneva decided on March 26, 1990 to accept the letter of request, on a challenge by two of the affected parties, the Criminal Court of Canton of Geneva held that the request for mutual judicial assistance presented by India did not in its form satisfy the requirement of **Article 28 of the Federal Act** on International Mutual Assistance in Criminal Matters (for short 'IMAC') and sent back the letter rogatory for compliance of certain procedural

formalities. Thereafter, the CBI submitted another application to the Special Judge on August 16, 1990 praying for issuance of an amended letter rogatory to the competent judicial authority in the Confederation of Switzerland. It was also prayed to have the proceedings on this application in camera since the proceedings arising thereon involve sensitive aspects. By that time, Shri V.S Aggarwal assumed charge as Special Judge in place of Shri R.C Jain.

22. It was at this relevant time i.e on August 13, 1990 Shri H.S Chowdhary, an Advocate claiming to be the General Secretary of an Organisation named as Rashtriya Jan Parishad as a public interest litigant filed Criminal Miscellaneous Case No. 12 of 1990 before the Special Judge seeking certain prayers inclusive of not to issue letter rogatory on the request of the CBI unless the allegations against the named persons are established and that no request for freezing bank account be made to Swiss Government etc. The details of the prayers are given in our judgments in Janata Dal v. H.S Chowdhary,. The Special Judge, Shri V.S Aggarwal dismissed the petition of Shri H.S Chowdhary on August 18, 1990 holding that he has no locus standi. Then the Special Judge for the reasons mentioned in his order issued (1) Note of compliance and (2) Amended Letter Rogatory on August 21, 1990.

23. It may be recalled that H.S Chowdhary filed a criminal revision before the High Court of Delhi which came up for hearing before Justice M.K Chawla who by his order dated December 19, 1990 dismissed the revision petition holding that H.S Chowdhary had no locus standi to present the revision but took suo motu cognizance of the matter in exercise of powers vested on him under Sections 397 and 401 read with Section 482 of the Criminal Procedure Code and directed the issuance of show-cause notice to the CBI and the State calling them "as to why the proceedings initiated on the filing of FIR No. RC 1(A)/90.ACU- IV dated January 22, 1990 pending in the Court of Shri V.S Aggarwal, Special Judge, Delhi, be not quashed."

24. On being aggrieved by the order of Justice M.K Chawla, H.S Chowdhary preferred an appeal challenging the findings of the High Court that he had no locus standi and the appellant herein (Union of India) and several political parties such as Janata Dal, Communist Party of India (Marxist) and Indian Congress (Socialist) preferred appeals canvassing the correctness of the order of Justice M.K Chawla taking suo motu cognizance and issuing notice calling upon the CBI and the State to show cause as to why the proceedings initiated on the strength of the FIR be not quashed. One independent writ petition was also filed for the same relief as sought for by the political parties. This Court by its order dated August 27, 1991 allowed the

appeal of the Union of India and quashed the suo motu action of the High Court but reserved the reasons to be given later on vide Janata Dal v. H.S Chowdhary. Thereafter, this Bench rendered its final judgment on August 28, 1992 giving the reasons in justification of its earlier order. In the final judgment, this Court confined the question only with regard to the scope and object of public interest litigation and the suo motu exercise and inherent powers of the High Court and ultimately held that H.S Chowdhary did not have any locus standi to challenge the veracity of the FIR and the proceedings arising thereon and quashed the show-cause notice issued to the CBI and the State. However, in the earlier order itself, we expressed our view as regards the right of parties aggrieved by initiation of criminal proceedings to challenge the said proceedings, in the following words: (**SCC p. 768**, para 26)

"Even if there are million questions of law to be deeply gone into and examined in a criminal case of this nature registered against specified accused persons, it is for them and them alone to raise all such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the garb of public interest litigants."

25. After the first round of the bout (i.e the public interest litigation) was lost by H.S Chowdhary, Shri W.N *Chadha* , the respondent herein who is one of the named accused in the FIR has entered into the arena by preferring Criminal Writ No. 501 of 1991 before the High Court of Delhi through his pairokar, Shri S. Nandi of Delhi challenging the legality and validity of the FIR dated January 22, 1990 and the letter rogatory issued by the Special Court vide its order dated February 5, 1990 and the amended letter rogatory issued by the Special Court on August 21, 1990 and praying for quashing of the FIR and all other proceedings arising thereon inclusive of the letters rogatory and for restraining the appellants from further proceeding in the investigation on the basis of the FIR.

26. It appears from the judgment of the High Court that a volley of attacks had been triggered on against the entire criminal proceedings inclusive of the registration of the case, the main contentions of which are as follows:

(1) The report of the JPC pertaining to the subject-matter of the impugned FIR would constitute a legal bar not only for the registration of the FIR and the continuation of the investigation in pursuance of it but also for any further inquiry or investigation by the CBI or trial of any offence with regard to the subject-matter of the proceedings in question which had been deeply gone into by the JPC and finally decided as borne out from the Report of the JPC.

(2) The FIR does not disclose the commission of any offence and at any rate against the respondent even assuming that the respondent had received certain amount by way of winding up charges/commission through some other company.

(3) The very fact that no civil case has yet been filed by the Government of India for recovery of the so- called commission in India and elsewhere by invoking the arbitration clause of the contract, the entire controversy is to be held as being based on mere conjectures and surmises.

(4) The report of the JPC clearly reveals that the Bofors gun was best amongst the other available guns and was offered at the minimum price.

(5) Though 31 months have passed by since the registration of the FIR, no public servant has been brought on record as accused so far.

(6) The FIR was conceived with a mala fide motivation of the persons in authority and the criminal proceeding has been initiated with an oblique purpose.

(7) The letters rogatory are liable to be quashed on the grounds; firstly that the Special Judge had no jurisdiction to issue letter rogatory and secondly he had not complied with the principle of audi alteram partem in the sense that he failed to issue notice to the respondent who is a named accused in the FIR and to afford him a reasonable opportunity of being heard before issuing letter rogatory on 5/7th February, 1990 as well on 21/22nd August, 1990.

(8) The Special Judge had erred both in law and on fact in issuing the letters rogatory as he failed to appreciate that the FIR does not disclose the involvement of the accused persons whose properties are attached and rights are affected by the letters rogatory.

(9) The allegations in the FIR do not constitute any offence against the respondent warranting an investigation, leave apart the question of dual criminality.

27. In addition to the above contentions, the respondent has also raised some more legal contentions before the High Court, those being:

(1) That the Memorandum of Understanding (MOU) entered into between India and Switzerland is neither a Treaty nor an enforceable contract between the two Governments.

(2) The Memorandum of Understanding is incompetent because India's Ambassador in Switzerland has no authority to negotiate or execute such a document.

(3) The Memorandum of Understanding was not subsequently ratified by the President of India or by the Parliament.

28. The appellants besides filing their counter-affidavit to the main writ petition made their written submissions refuting all the challenges made by the respondent.

29. The High Court rejected the contention of the respondent that MOU is not a Treaty holding, "We do not find any merit in this contention." Similarly, the High Court rejected the second contention of the respondent that the Ambassador of India in Switzerland has no authority to negotiate and execute the MOU holding that such a contention "is also without merit in view of the letter of credence, a copy of which has been annexed by the respondents along with their additional written submissions". As regards the contention that the MOU was not ratified, it has been held "We also do not find any merit in the third contention that MOU was not ratified by the President or Parliament as there is no express provision in MOU envisaging its ratification".

30. Dealing with the contention raised on behalf of the respondent that the Report of the JPC constitutes a bar to the registration of the FIR and the continuation of the investigation, the High Court observed as follows:

"Since there is no provision in the Code of Criminal Procedure barring investigation by CBI in a case where the matter has been inquired into by JPC, we do not find any merit in this contention. But JPC being a High Power Committee of both Houses of Parliament and having gone into substantial evidence we are of the opinion that we also cannot totally ignore the conclusions arrived at by the JPC."

31. The above observation shows that the High Court did not favour the contention that the report of the JPC constitutes a legal bar for the registration of the FIR and continuation of the investigation.

32. Though the High Court rejected some of the submissions made on behalf of the respondent as abovementioned, it allowed the writ petition on the other grounds and gave the following findings drawing strength from various documents, namely, the letter dated November 29, 1985 of the then Chief of Army Staff, report of the JPC, the approval of the CCPA in 1984 regarding the proposal for procurement of 155mm guns along with certain related equipments and ammunition, the negotiations of the Negotiating Committee comprising high ranking officials, the report of the Comptroller and Auditor General of India dated April 26, 1989 containing the comments regarding the engagement of agents in the Bofors deal, the opinion of the

then Attorney General, embodied in the JPC Report etc. The findings are:

(1) The decision regarding the finalisation of the contract with Bofors was taken in accordance with well-established procedure.

(2) Bofors had brought down their price compared to the competitive Sofma and gave other concessions amounting approximately to Rs 10.5 crores even after the issuance of letter of intent. All this clearly shows that the procedure adopted for finalisation of the contract with Bofors was perfect and bona fide.

(3) There is no allegation even in the FIR that any favour was shown by the Negotiating Committee to M/s A.B Bofors.

(4) In the FIR, no public servant has been named as an accused.

(5) Though no stay was granted to proceed with the investigation, even after expiry of more than 31 months from the date of the registration of the FIR, CBI has failed to name any public servant as an accused.

(6) In the absence of any public servant being brought as an accused, the respondent cannot be treated as an abettor.

(7) As Bofors, as borne out from the records, has been corresponding directly with the authorities of the Government of India, the respondent cannot be held to have acted as a middleman. The respondent never represented on behalf of Bofors in the finalisation of the contract and if at all anybody is alleged to have played any role in the finalisation of the contract, it is AE Services Ltd. with whom the association of the respondent has not been alleged even in the FIR.

(8) The dominant factors in the finalisation of the contract were the price and quality of the gun system.

(9) No offence under any of the provisions as mentioned in the FIR is made out.

(10) No offence either under Section 409 or under any other sections of IPC is made out in the FIR. No suit has been filed or any arbitration proceeding has been initiated for recovery of the alleged commission.

33. The High Court has also made reference to the judgment of this Court dated August 28, 1992 in which this Court after examining the FIR did not agree with a positive assertion of Justice M.K Chawla stating “that the FIR filed by the CBI in this case on the face of it does not disclose any offence”. For proper understanding, we

would like to reproduce the earlier observation of this Court in the above-cited case which reads as follows: (**SCC p. 362**, para 159)

"We have carefully and scrupulously gone through the FIR and we are unable to share this view of Mr Justice Chawla, quite apart from the other grounds on which the accused may like to attack the FIR."

34. After making reference to the above observation, the High Court in its impugned judgment has recorded the following finding in unequivocal and unambiguous terms:

"With respect, we are also of the view that it may not be correct to say that the FIR on the face of it does not disclose any offence against anyone, named or unnamed accused."

(emphasis supplied)

35. Notwithstanding the above specific finding, the High Court rendered the following conclusion:

"But while dealing with the issues raised by the petitioner, in this case, we have come to the conclusion that if the allegations made in the FIR are read by themselves or along with the conclusions by JPC (which was a high- powered committee, representing both Houses of Parliament), which are based on evidence collected by the said Committee and conclusions arrived at by us, explained hereinabove, which are again based on the records of the case, and further that CBI has failed to name any public servant as an accused in the case, even after the expiry of more than 31 months from the registration of the case, as explained earlier, no offence is made out against the petitioner under Sections 120-B, IPC read with Sections 161, 162, 163, 164 and 165- A of the IPC read with Sections 5(2)/5(1) (d) and 5(2)/5(1) (c) of the Prevention of Corruption Act, 1947 read with Sections 409, 420, 468 and 471 IPC."

36. In the result, the High Court allowed the writ petition and quashed the impugned FIR, the letters rogatory issued on two occasions and other proceedings taken and orders passed in pursuance of the said FIR by its impugned judgment dated September 2, 1992.

37. It appears from the judgment under challenge that after the judgment was reserved by the High Court, an application being Crl. M. 334 of 1992 was filed by Shri Prashant Bhushan, Advocate as a public interest litigant expressing his grievance that no proper submission was made as regards the legality of the issue of letter rogatory and the competence of the Special Court in issuing the same. Such

submissions were made in the form of a written argument. The High Court after issuing notice to the counsel for the CBI as well as the respondent herein and hearing the parties held that all the relevant points mentioned in the written argument filed by Shri Prashant Bhushan were fully argued by the counsel for the CBI and, therefore, the allegations made against the counsel for CBI are unfounded and accordingly disposed of that application.

38. The facts and the sequence of events of this case which we have chronologically narrated more in a summary way than in describing the galaxy of facts in detail in order to avoid prolixity clearly show that while Shri Harinder Singh Chowdhary was seeking quashing of the letter rogatory, FIR and all other proceedings arising thereon as a public interest litigant on behalf of the accused named and unnamed inclusive of this respondent in the FIR, the respondent (W.N *Chadha*) was inexplicably silent but only after Harinder Singh Chowdhary had miserably become unsuccessful in his attempt of thwarting the criminal proceedings even at the doorstep on the ground that he had no locus standi, the respondent (W.N *Chadha*) has come out of his shell — that too — through his Pairokar and challenged the criminal proceedings raising various questions which, of course, are available to him dehors the questions which have already been decided and concluded by this Court during the first round of litigation. In fact, we ourselves in our earlier order dated August 27, 1991 have expressed the view that it is only for the aggrieved parties inclusive of this respondent to agitate and challenge the criminal proceedings at the appropriate time before the proper forum.

39. The appellants, namely, the Union of India through its Secretary, Ministry of Home Affairs, New Delhi and the Central Bureau of Investigation through its Director have, without loss of time, approached this Court by preferring the SLP even on September 4, 1992 along with a petition for ad interim ex parte stay. A three-Judge Bench of this Court presided over by the Hon'ble the Chief Justice took the matter on the very same day i.e on September 4, 1992 and passed the following order:

“Issue notice. Learned counsel for the respondent accepts notice. To come up for admission on September 17, 1992, preferably before a Bench presided over by Hon'ble Pandian, J.

In the meantime, it is directed that the impugned judgment of the High Court shall not be utilised before any Cantonal Court or Authority for the purpose of obtaining release of any bank account which has been frozen or for the return or release of any information or documents till the SLPs are disposed of or till further orders.

Learned counsel for the respondents states that respondent will not make any application for the release of any documents in his favour till further orders on the basis of the impugned judgment."

40. Thereafter on September 17, 1992, this Court to which one of us (S. Ratnavel Pandian, J.) was a party granted leave and directed the interim order passed on September 4, 1992 to continue and in addition made a further direction that the impugned judgment shall not be utilised for any purpose until further orders.

41. The core of the grievance of the appellants is that the High Court without assimilating the averments made in the FIR in the proper perspective and on a misconception that the entire proceedings are plagued by procedural wrangles and controversies has entered into the realm of conjectures and surmises and rendered the manifestly erroneous impugned findings. According to them, the conclusions arrived at by the High Court by overstepping its jurisdiction are totally opposed to the well-established principles of law laid down by a series of decisions of this Court. Further, it is contended that this impugned verdict has prevented the crucial evidence from ever surfacing which evidence otherwise could have been unearthed and collected to establish the allegations made in the FIR.

42. Seriously challenging the findings of the High Court, Mr Altaf Ahmad, the learned Additional Solicitor General assisted by M/ s C.V Subba Rao and Ashok Bhan, learned advocates has articulated that the High Court by slipping and stumbling on many slippery grounds has rendered its findings which are not only opposed to law but also are contumacious. According to him it surprises in extreme that the High Court has thought that in exercise of its prerogative powers under **Article 226 of the Constitution,** it could quash the FIR even though the said FIR discloses the offence/ offences against the named and unnamed accused and the investigation has not yet commenced in its true sense except a preliminary effort of obtaining some information from the Swiss banks as regards the names of the account holders and to have an access to secret bank accounts linked with the Bofors payments. The learned Additional Solicitor General submits that there is an overwhelming weight of authority in favour of his view that the FIR cannot be quashed if the allegations do make a prima facie case. He cited some decisions of this Court spelling out the circumstances under which the High Court could exercise its discretion.

43. In continuation of his submission, the learned Additional Solicitor General submits that there is no legal bar in having requested the Special Court to issue letters

rogatory/ request for assistance to the competent judicial authorities in the Confederation of Switzerland for investigation and collection of evidence for solving the Bofors mystery because the investigating agency, namely, the CBI has to establish the names of the beneficiaries, the quantum of the amounts they were paid and the nature of their services even by cutting through the thicket of legal tangles. By the impugned judgment quashing letters rogatory, the High Court has now subverted and forestalled the collection of the requisite vital and valuable particulars which lie buried in Swiss vaults and that unless the embargo now created by the impugned judicial pronouncement is removed by setting aside the impugned judgment, the CBI will be paralysed and precluded from unearthing the evidence and the wider conspiracy with international dimensions and bringing the culprits within the dragnet of prosecution and that the entire proceedings taken so far will be frustrated and halted.

44. Regarding the finding of the High Court that even after 31 months from the registration of the case, the CBI not only failed to produce any material against anyone of the accused inclusive of the respondent but also could not name even a single public servant as accused, it is submitted that the logic of this line of reasoning is totally fallacious in law and on fact, and this finding will be fraught with serious consequences, resulting in the destruction of the investigation so far carried out. According to the Additional Solicitor General, it is only during the course of the investigation, the identity of the accused persons can be brought on record; but in the present case, unfortunately the CBI is not allowed to have access to the bank accounts which would alone reveal the identity of the accused persons. Further, ever since the registration of the case various attempts were/ are made by initiating multiple proceedings as aforementioned to thwart the investigation by putting a spoke in its wheel at every stage. Therefore, the delay has occasioned more due to the multiple obstructions put forth by H.S Chowdhary and thereafter by the present respondent and it is not due to any procrastination on the part of the prosecution and that it cannot be said that the case is kept dangling endlessly without any evidence against anyone of the accused.

45. The learned Additional Solicitor General has seriously urged that a bare perusal of the FIR manifestly demonstrates that huge payments have been deposited in the account of Svenska Inc. in Swiss Bank Corporation, the principal beneficiary of which is the respondent, W.N *Chadha* . He clarifies the above submission stating that there is a clear link between Svenska Inc., Panama and Anatronic General Corporation of which the respondent is admittedly the President, as described in

detail in paragraphs 53-59 of the FIR, a perusal of which will leave no doubt whatsoever that Svenska Inc. Panama is just a front Company and belongs to the respondent. According to him, there are sufficient materials indicating the involvement of the respondent in the commission of the offences in question. It is further stated that the connection between Svenska Inc., Panama and AGC is discernible from the agreements of the years 1978, 1984 and 1986 entered into by Bofors with the two aforementioned concerns.

46. Finally, he requested this Court to pronounce the verdict as early as possible.

47. It may be mentioned in this connection that the first Bench presided over by the Chief Justice while issuing notice on September 4, 1992 in this appeal also issued notice in Criminal M.P No. 4999/92 seeking for leave to file a SLP by Shri Prashant Bhushan. There is a footnote in the order dated September 4, 1992 reading "SLP filed by Mr Prashant Bhushan shall also be put up along with this petition". Apart from this petition two other unnumbered SLPs are also filed — (1) by Shri George Fernandes through his counsel Prashant Bhushan; and (2) another by one Shri Jaswant Singh through his counsel Ms Kamini Jaiswal along with two Criminal M.P Nos. 5201 and 5160 of 1992 seeking leave to file the special leave petitions. Mr Shanti Bhushan, the learned senior counsel who appeared in the unnumbered two SLPs filed by Prashant Bhushan addressed this Court on the question of locus standi as both the SLPs are public interest litigations. Mr Ram Jethmalani, the learned senior counsel appeared in the unnumbered SLP filed by Jaswant Singh and addressed his arguments. Both the learned counsel while addressing their arguments on locus standi of all the above three petitioners in preferring their respective SLPs which are public interest litigations incidentally touched upon the merits of the case and supplemented the submissions of the Additional Solicitor General. Mr Jethmalani waxed eloquent on the disastrous consequences that are likely to follow due to the quashing of the FIR and the entire other proceedings and characterised the impugned judgment as being a judicial transgression and castration of the criminal law of this land. He said that the allegations made in the FIR are very serious and outrageous in nature and the circumstances veering the case bear chilling evidence and that if such evidence is buried fathoms deep pursuant to the impugned judgment, the people of this nation who are having and reposing great trust and confidence in judiciary will loose their faith in the entire system of judicial administration. He continues to state that the repetitive attempts of the respondent to frustrate and filibuster the proceedings of the prosecution — firstly through H.S Chowdhary as his proxy raising the same issues and secondly through his Pairokar after having become unsuccessful in his first

attempt are nothing but a ploy to escape the clutches of law. According to him the respondent residing in United Arab Emirates has committed serious violation of the **provisions of the Foreign Exchange Regulations Act and Income Tax Act** by keeping his account in foreign country and that the FIR contains sufficient allegations that the respondent had received huge amount for himself and for passing off to the public servants, and therefore, in order to purify the stream of justice, the impugned judgment of the High Court has to be quashed. The learned counsel has further urged that the respondent on the pretext of false reasons of health is purposely residing in United Arab Emirates with which country there is no extradition treaty and to which country Indian summons and warrants cannot reach and therefore, the respondent who is an outlaw is not at all entitled to the assistance of the law of this country.

48. According to the respondent, even the entire allegations in the FIR do not constitute any offence against any of the accused much less against him and they are all frivolous, baseless and nothing more than mud-slinging. Further, he has started attacking the conduct of the investigating agency in requesting the Court to issue letter rogatory and the authority of the Special Court in issuing letters rogatory on February 5/7, 1990 and subsequently the ratified letter rogatory issued on August 21/22, 1990. In short, before the High Court his effort was to show that the entire criminal proceeding is an aimless voyage or a roving expedition with oblique motive and that he has been caught in a political crossfire which smacks of personal vendetta and in which he has absolutely no role to play. The above breathtaking deliberation and debate made before the High Court has yielded the desired effect of quashing the FIR, letters rogatory, and all other proceedings arising therefrom, as pointed out earlier.

49. The vital issues involved in this case have stirred much debate before this Court on the previous occasion which was the first round of litigation by a public interest litigant and the result is the pronouncement of the preliminary order in August 1991 followed by the detailed judgment therefor in August 1992 as repeatedly pointed out in the preceding part of this judgment. The vital part of the conclusion of our detailed judgment reads thus: (SCC pp. 361-62, paras 158 and 159)

"… However, it has become necessary at least to deal with the first alleged illegality. We are constrained to do so because of the assertion of the High Court; that being 'that the FIR on the face of it does not disclose any offence'.

… We have carefully and scrupulously gone through the FIR and we are unable to share this view of Mr Justice Chawla, quite apart from the other grounds on which

the accused may like to attack the FIR. None of the named accused came before Mr Justice Chawla raising this question of lack of allegations and particulars in the FIR so as to constitute any offence, much less a cognizable offence."

(emphasis in original)

50. The above conclusions clearly spell out that this Court did not share the view that the FIR does not disclose any offence but however the other questions which might be available for the accused persons to attack the First Information could be availed of.

51. To understand the above conclusions, it is relevant to note that one of the propositions for consideration set out by Mr Justice M.K Chawla for his suo motu consideration was whether the FIR filed by the CBI does disclose any offence.

52. Notwithstanding the above finding of this Court, the High Court in its impugned judgment has examined various legal and factual issues inclusive of the question whether the FIR does disclose any offence against the named and unnamed accused persons and pronounced its final verdict. In fact, the High Court has taken on its shoulder some of the issues which were not really agitated upon by the respondent about which we would deal in the later part of this judgment.

53. We shall now examine the tenability of the various grounds on the basis of which the High Court has rendered its impugned judgment. Firstly we shall deal with vital grounds relating to the issue of letters rogatory.

Whether issue of letter rogatory is opposed to law and violative of the principle of natural justice and thereby has become liable to be quashed?

54. It appears from the impugned judgment that it has been contended before the High Court that there is no jurisdiction to issue letter rogatory by the Special Judge unless he is satisfied with regard to the extent of dual criminality and the prima facie involvement of the accused persons whose property or rights are sought to be affected by the letter rogatory. This being a condition precedent, the Special Judge could exercise his jurisdiction only after giving prior notice and affording a reasonable opportunity of being heard to the named accused and the Special Judge by non-compliance of that condition, has erred in law and on fact by issuing letter rogatory. It has been urged that the Special Judge has failed to appreciate that the FIR in this case does not disclose any offence whatsoever, leave apart any offence of dual criminality.

55. The above contentions were tested by the High Court on the anvil of two legal propositions, namely, (1) There is no compliance of the principle of audi alteram partem, in that the Special Judge has not afforded any reasonable opportunity of being heard before issuing the letter rogatory and (2) The Special Judge has not applied his mind to all facts and circumstances of the case before passing his orders directing issue of letters rogatory.

56. After making a long deliberation on the aspect of this question, the High Court gave its conclusion quashing letters rogatory as follows:

"In view of the above discussion, we are of the view that the Special Judge had jurisdiction to issue letter rogatory on the basis of MOU dated February 20, 1989 between Government of India and Government of Switzerland and Section 166-A CrPC. Since in the present case, the learned Special Judge failed to issue notice and deemed (denied) opportunity of hearing to the petitioner whose property and rights were sought to be affected by the issue of the impugned letter rogatory and further there was non-application of mind by the learned Special Judge, we quash letters rogatories issued in pursuance of the above orders dated February 5, 1990 and August 21, 1990 passed by the learned Special Judge."

57. Before embarking upon a discussion on this question, we shall see what the expression 'letter rogatory' means.

58. The lexical meaning of the word 'rogatory' is given in Webster's Encyclopaedic Unabridged Dictionary of the English Language as follows:

"pertaining to asking or requesting".

59. Collins English Dictionary gives the meaning of the word 'rogatory' as under:

"(esp. in legal contexts) seeking or authorised to seek information".

60. Black's Law Dictionary (6th Edn.) at page 905 defines the expression 'letter rogatory' as follows:

"A request by one court of another court in an independent jurisdiction, that a witness be examined upon interrogatories sent with the request. The medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country.

A formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action.

This process was also in use, at an early period, between the several States of the Union. The request rests entirely upon the comity of courts towards each other."

61. It is clear from the above meaning of the said expression that 'Letter Rogatory' is a formal communication in writing sent by a Court in which action is pending to a foreign Court or Judge requesting that the testimony of a witness residing within the jurisdiction of that foreign Court may be formally taken thereon under its direction and transmitted to the issuing Court making such request for use in a pending legal contest or action. This request entirely depends upon the comity of Courts towards each other, that is to say, on the friendly recognition accorded by the Court of one nation to the laws and usages of the Court of another nation.

62. It appears from the records that the FIR was laid before the Special Court on January 22, 1990. On 23rd January, the request was made by the Director of CBI followed by another letter of request dated January 26, 1990 to the concerned authorities in Switzerland for freezing/blocking certain bank accounts, relevant to this case. The Federal Department of Justice and Police, Switzerland moved the Judge of Geneva and the concerned Judge of Zurich who on being prima facie convinced of dual criminality and the need for investigation in Switzerland froze the relevant bank accounts in this regard on January 26, 1990 as intimated by the Federal Department of Justice and Police through the Embassy of India in Switzerland. As per the intimation, the relevant accounts in the bank had been blocked up to February 28, 1990. Therefore, it had become necessary for freezing the accounts beyond February 28, 1990 and to make a request for judicial assistance to Switzerland failing which the Swiss law obliges the withdrawal of the instructions to block the accounts. It is further disclosed from the records that the Federal Department of Justice and Police at Berne which corresponds to the Ministries of Law and Home of the Government of India have assured that the Swiss authorities would render assistance in the investigation in Switzerland in accordance with the mutual assistance agreement dated February 20, 1989 subject to the condition of the receipt of letter rogatory from the competent judicial authority in India. This necessitated to send letter rogatory to Switzerland urgently for getting the necessary assistance for the investigation to be conducted in Switzerland lest very valuable and relevant evidence would remain

uncollected and the cause of justice would suffer.

63. It was only under those pressing circumstances, the DSP, CBI/ACU-(IV)/DSPE, New Delhi (the investigating officer) submitted an application on February 2, 1990 before the Special Judge praying issue of letter rogatory with certain enclosures for assistance to the competent judicial authorities in the Confederation of Switzerland so that during the investigation of this case, the necessary evidence could be collected in Switzerland and the investigation is taken to its logical conclusions as per the requirements of the law. The Special Judge after satisfying himself accepted the request by its order dated February 5, 1990 and issued letter rogatory/ request enclosing therewith the copies of certain documents on February 7, 1990 to the competent judicial authorities in the Confederation of Switzerland. The Federal Department of Justice and Police, Berne found the letter rogatory in order and forwarded the same to the Examining Magistrate of Geneva for taking necessary action thereon. The Examining Magistrate, Geneva after satisfying himself that the said letter of rogatory was in order accepted the same on March 26, 1990 and commenced the investigation as requested.

64. While it was so, two of the affected parties in Geneva filed appeals in the Criminal Court of Canton of Geneva. The Criminal Court of Geneva passed an order on July 3, 1990 on the appeals expressing its view that the letter rogatory did not, in its form, satisfy the requirement of **Article 28 of the Federal Act of International Mutual** Assistance in Criminal Matters (IMAC) and annulled the order of admissibility of mutual judicial assistance handed down by the Examining Magistrate on March 26, 1990 and sent back the letter rogatory for compliance of certain procedural formalities. In that order, the Criminal Court of Canton, Geneva observed that the provisional measures ordered by the examining Magistrate, in particular, the seizure of documents and/or bank accounts are not affected by the order.

65. The above order dated July 3, 1990 was submitted to the Special Court in India on August 16, 1990 with some enclosures since the CBI got the copy of the order dated July 3, 1990 on August 13, 1990 from the Delhi Administration. In the second application dated August 16, 1990 the CBI requested to issue amended letter rogatory/request. The Special Judge, Shri V.S Aggarwal who by then took charge of the Special Court issued Note of Compliance and amended letter rogatory on August 22, 1990.

66. Be it noted that on February 5/7, 1990 when the first letter rogatory was sent by Shri R.C Jain, Special Judge, Section 166-A of the Criminal Procedure Code was not

in vogue. It was only thereafter an Ordinance, namely, the Criminal Procedure Code (Amendment) Ordinance, 1990 was promulgated coming into force from February **19, 1990. Section 166- A(1)** as introduced by the Ordinance authorised the investigating officer or an officer superior in rank to the investigating officer to issue a letter of request. **Sub- section (2) of Section 166- A** of the Ordinance authorised the Criminal Court to issue a letter of request in its discretion on an application made by the investigating officer or any officer superior to the rank of investigating officer. **Section 166-B** introduced by the above Ordinance deals with the letter of request from a country or a place outside India to a Court or authority for investigation in India. Thereafter, the **Criminal Procedure Code (Amendment Act) 10 of 1990** was enacted on April 20, 1990 conferring the power only on the Criminal Court but not on the investigating officer or any officer superior to the rank of investigating officer to issue a letter of request as introduced by the Ordinance.

67. It appears from the impugned judgment that though on behalf of the respondent, a contention was raised that the Special Judge had no jurisdiction or power to issue letter rogatory on February 5/7, 1990, the High Court except simply mentioning that contention in the discussion part of its judgment and then proceeding with the counter submission made by the learned counsel for CBI submitting that the said letters rogatory were issued by the Special Judge on the strength of the Memorandum of Understanding between Government of India and Switzerland and in the discharge of his obligation mandated on him by the Constitution and the law, did not go into that question of the jurisdiction or power of the Special Judge to issue letter rogatory on February 5/7, 1990 despite the fact that copies of the letters rogatory along with their enclosures issued on February 7, 1990 and August 22, 1990 have been made available to the Court. Section 166-A which was introduced after the issue of letter rogatory on February 5/7, 1990 confers jurisdiction on the Special Judge to issue such letters. The result is that there is no specific discussion with regard to the authority of the Court in issuing the first letter rogatory.

68. It would be significant, in this connection, to refer to the remark of the High Court reading thus:

"We may point out here that in reply to written submissions filed by the petitioner, CBI had filed additional written submissions and had stated therein that besides three contentions mentioned in the preceding paragraphs, the learned counsel for the petitioner, during the course of oral arguments, had not pressed the contention that the Special Judge had no jurisdiction to issue the first letter rogatory on February 5/7,

1990."

69. There is no challenge before us to the above additional written submission of the CBI.

70. The High Court coming to the legal aspect has observed thus:

"Similarly once the power has been conferred on the criminal court to issue the letter rogatory, it follows that the court will have to apply its mind and give an opportunity of hearing to the person whose property or rights are sought to be affected by letter rogatory."

71. After observing so, the High Court proceeded only on the ground that the Special Judge has not complied with the principle of audi alteram partem and also has not applied his mind to the facts and circumstances of the case before issuing letters rogatory, as aforementioned.

72. Therefore, we are not called upon to go into the question of the jurisdiction of the Special Judge in issuing the letter rogatory but have to deal only with the other two grounds on the basis of which the High Court quashed the letters rogatory.

73. It would not be out of place to mention here that as rightly pointed out by the Additional Solicitor General that the amended letter rogatory issued on August 22, 1990 has got legal sanction under Section 166-A of the Criminal Procedure Code (for short 'Code') notwithstanding the fact that this provision was not in the statute on February 5, 1990.

74. The High Court drawing strength from the decision of this Court in Maneka Gandhi v. Union of India 1978 1 SCC 248 has observed that the principle of audi alteram partem which mandates that no one shall be condemned unheard is part of the rules of natural justice which is a great humanising principle intended to invest law with fairness and to secure justice. According to the High Court, there is a violent breach of this principle in the case on hand; in that the respondent has not been put on notice with regard to the issue of letter rogatory and afforded a reasonable opportunity of being heard.

75. No doubt it is true that a seven-Judge Bench of this Court in Maneka Gandhi has opened a new vista in the area of personal liberty as enshrined under **Article 21 of the Constitution** and emphasised the audi alteram partem rule which emphasis is of affording a fair opportunity of being heard on prior notice to a party to whose prejudice an order is intended to be passed by the Government or its officials.

Further, it is stated by the High Court that all the safeguards in favour of an accused contained in the Criminal Procedure Code have now become a part of the constitutional provisions and they are governed by **Articles 14, 19, 20, 21 and 22** and that the procedure contemplated under Article 21 requires that it should not be arbitrary, fanciful, oppressive or discriminatory. Therefore, the failure on the part of the Special Judge in issuing notice to the respondent and affording him a reasonable opportunity of being heard vitiates the letters rogatory.

76. Countering the above arguments, the learned Additional Solicitor General seriously contended that there is no provision conferring any right of audience on an accused before issuing letter rogatory the object of which is to collect evidence which may be used against the accused during the course of the trial. According to him, the accused has no right to control or interfere with the manner in which the evidence is to be collected. Chapter XII of the Code under the heading 'Information to the Police and other Powers to Investigate' covering Sections 154 to 176 does not provide for application of the concept of audi alteram partem for an accused from the very inception of a criminal proceeding till its culmination in filing of a report under Section 173 of CrPC. He continues to state that an order of the Court issued in exercise of the powers under section 166-a of the code is only for the purpose of collecting the evidence and in the very nature of things such an order does not affect any right of an accused and, therefore, the said order is beyond the purview of the High Court power even under section 397 of the code. Hence there is no question of the rule of audi alteram partem being attracted in the instant case. Therefore, the only important question that arises for our consideration is whether the issue of letters rogatory on February 5/7, 1990 and on August 22, 1990 are liable to be quashed on the ground of non-compliance of the rule of audi alteram partem.

77. The rule of audi alteram partem is not attracted unless the impugned order is shown to have deprived a person of his liberty or his property. In the present case, no such consequences have arisen from the letter rogatory. If the letter rogatory is accepted by the foreign Court and acted upon it will then disclose only the relevant facts about the identity of the account holders, quantum of the amounts standing in the names of the individual account holders representing the credit of Bofors money and the nature of such accounts. The follow-up consequences would be that the corpus of the offence would be preserved intact by preventing the withdrawal of the money from those accounts or closure of the accounts by the account holders till the merit of the case is decided.

78. In fact the Special Judge in Delhi is not possessed with any power or authority to deprive the liberty of the respondent residing out of the jurisdiction of Indian Courts and having his property in question in a foreign country. Only in case where a public officer has got such a power, the question of 'fair play in action' will be attracted. This rule was explained by Lord Denning M.R in **Schmidt v. Secretary of State for Home Affairs1969 2 Ch 149** stating that "where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf".

79. The above explanation is quoted in Maneka Gandhi.

80. The rule of audi alteram partem is a rule of justice and its application is excluded where the rule will itself lead to injustice. In S.A de Smith's Judicial Review of Administrative Action, (4th Edn.) at page 184, it is stated that in administrative law, a prima facie right to prior notice and opportunity to be heard may be held to be excluded by implication in the presence of some factors, singly or in combination with another. Those special factors are mentioned under items (1) to (10) under the heading "Exclusion of the audi alteram partem rule".

81. Thus, there is exclusion of the application of audi alteram partem rule to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case. This rule cannot be applied to defeat the ends of justice or to make the law "lifeless, absurd, stultifying and self-defeating or plainly contrary to the common sense of the situation" and this rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands.

82. Bhagwati, J. (as the learned Chief Justice then was) in Maneka Gandhi speaking for himself, Untwalia and Murtaza Fazal Ali, JJ. has stated thus: (**SCC p. 290**, para 14)

"… Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from 'fair play in action', it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion."

83. Thus, it is seen from the decision in Maneka Gandhi that there are certain exceptional circumstances and situations whereunder the application of the rule of

audi alteram partem is not attracted.

84. Paul Jackson in Natural Justice at pages 112 and 113 observed thus:

"… It was seen that anybody making a decision affecting party's right or legitimate expectation must observe the rules of natural justice. Conversely a decision which does not affect rights, because for example, it is a prelude to taking further proceedings in the course of which the party concerned will have an opportunity to be heard, will, very likely, not itself be subject to the requirements of natural justice, or only in a modified form. A fortiori, the decision by, for example, the responsible Minister or official to initiate the procedure necessary to reach a preliminary conclusion or to examine the existence of a prima facie case can be taken without first giving the person affected a hearing …."

85. See also (1) Wiseman v. Borneman 1971 AC 297; (2) **Pearlberg v. Varty (Inspector of Taxes)1972 1 WLR 534**; (3) **Regina v. Barnet and Camden Rent Tribunal, ex. parte, Frey Investments Ltd.1972 2 QB 342** and (4) **Herring v. Templeman1973 3 All ER 569 CA**.

86. In **R v. Peterborough Justice, ex parte Hicks1977 1 WLR 1371** it has been held that search warrants under the Forgery **Act, 1913, Section 13** may issue without the party affected being heard.

87. A Division Bench of the Allahabad High Court in Indian Explosives Ltd. (**Fertiliser Division) Panki, Kanpur v. State of U.P**1981 2 LLJ 159 after referring to the decision in Barnet and **Norwest Holst Ltd. v. Secretary of State for Trade1978 Ch 201** said thus:

"Thus, it has been recognised by Judges of undoubted eminence that a decision on substantive rights of parties is one thing and a mere decision that another body investigate and decide on those substantive rights is quite another, and the principle of hearing is not applicable to the latter class of cases."

88. The principle of law that could be deduced from the above decisions is that it is no doubt true that the fact that a decision, whether a prima facie case has or has not been made out, is not by itself determinative of the exclusion of hearing, but the consideration that the decision was purely an administrative one and a full-fledged enquiry follows is a relevant — and indeed a significant — factor in deciding whether at that stage there ought to be hearing which the statute did not expressly grant.

89. Applying the above principle, it may be held that when the investigating officer is

not deciding any matter except collecting the materials for ascertaining whether a prima facie case is made out or not and a full enquiry in case of filing a report under Section 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of audi alteram partem superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether audi alteram partem is implicit, but whether the occasion for its attraction exists at all.

90. Under the scheme of Chapter XII of the Code of Criminal Procedure, there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is in the stage of an investigation by a police officer.

91. In State of Haryana v. Bhajan Lal**1992 Supp 1 SCC 335, 359** this Court to which both of us (Ratnavel Pandian and K. Jayachandra Reddy, JJ.) were parties after making reference to the decision of the Privy Council in Emperor v. Khwaja Nazir Ahmad AIR 1945 PC 18 and the decision of this Court in State of Bihar v. J.A.C Saldanha1980 1 SCC 554 has pointed out that: (**SCC p. 359**, para 40)

"… the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation…."

92. More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under **Section 173(2) of the Code** or in a proceeding instituted otherwise than on a police report till the process is issued under section 204 of the code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under section 202 of the code, the accused may attend the subsequent inquiry but cannot participate. There are various judicial pronouncements to this effect but we feel that it is not necessary to recapitulate those decisions. At the same time, we would like to point out that there are certain provisions under the Code empowering the Magistrate

to give an opportunity of being heard under certain specified circumstances.

93. It may be noted that under section 227 of the code dealing with discharge of an accused in a trial before a Court of Sessions under Chapter XVIII, the accused is to be heard and permitted to make his submissions before the stage of framing the charge. Under section 228 of the code, the trial Judge has to consider not only the records of the case and documents submitted therewith but also the submissions of the accused and the prosecution made under Section 227. Similarly, under Section 239 falling under Chapter XIX dealing with the trial of warrant-cases, the Magistrate may give an opportunity to the prosecution and the accused of being heard and discharge the accused for the reasons to be recorded in case the Magistrate considers the charge against the accused to be groundless. section 240 of the code dealing with framing of charge also reaffirms the consideration of the examination of an accused under Section 239 before the charge is framed.

94. Under Section 235(2), in a trial before a Court of Sessions and under Section 248(2) in the trial of warrant-cases, the accused as a matter of right, is to be given an opportunity of being heard. Unlike the above provisions which we have referred to above by way of illustration, the provisions relating to the investigation under Chapter XII do not confer any right of prior notice and hearing to the accused and on the other hand they are silent in this respect.

95. It is relevant and significant to note that a police officer, in charge of a police station, or a police officer making an investigation can make a search or cause search to be made for the reasons to be recorded without any warrant from the Court or without giving the prior notice to anyone or any opportunity of being heard. The basic objective of such a course is to preserve secrecy in the mode of investigation lest the valuable evidence to be unearthed will be either destroyed or lost. We think it unnecessary to make a detailed examination on this aspect except saying that an accused cannot claim any right of prior notice or opportunity of being heard inclusive of his arrest or search of his residence or seizure of any property in his possession connected with the crime unless otherwise provided under the law.

96. True, there are certain rights conferred on an accused to be enjoyed at certain stages under the Code of Criminal Procedure — such as Section 50 whereunder the person arrested is to be informed of the grounds of his arrest and to his right of bail and under Section 57 dealing with person arrested not to be detained for more than 24 hours and under Section 167 dealing with the procedure if the investigation cannot be completed in 24 hours — which are all in conformity with the ‘Right to Life’ and

'Personal Liberty' enshrined in **Article 21 of the Constitution** and the valuable safeguards ingrained in **Article 22 of the Constitution** for the protection of an arrestee or detenu in certain cases. But so long as the investigating agency proceeds with his action or investigation in strict compliance with the statutory provisions relating to arrest or investigation of a criminal case and according to the procedure established by law, no one can make any legitimate grievance to stifle or to impinge upon the proceedings of arrest or detention during investigation as the case may be, in accordance with the provisions of the Code of Criminal Procedure.

97. Incidentally, it may be stated that there is no question of attachment of money of the respondent or any of the accused, named or unnamed, standing to the credit of the account holders in Swiss banks linked with Bofors mystery but it was only for freezing of the accounts as per the request made by the Director, CBI by his letter dated January 23, 1990 and followed by another letter dated January 26, 1990 and thereafter pursuant to the request through letters rogatory for judicial assistance in Switzerland. But for the request made by the letter rogatory, the Swiss law obliges withdrawal of all the instructions to block the account. Therefore, we are of the view that the detailed discussion of the High Court with reference to the Criminal Law Amendment Ordinance of 1944 though is not warranted in this regard. However, we will deal with that Ordinance with relevant provisions in the later part of this judgment.

98. If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and self- defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary.

99. Reverting to the facts, it is not the case of the respondent that he is having any account in Swiss banks connected with Bofors mystery and that that account is frozen to his prejudice. When the respondent himself has not come forward with any specific case stating as to what was the quantum of the amount standing to his credit in Swiss banks and in what manner he is now aggrieved by the letter rogatory and in what way he is deprived of his properties, it is incomprehensible as to how the High Court has come to the conclusion that the respondent is deprived of his property. Similarly, any one of the other named or unnamed accused or any third party, not named in the

FIR, has not come forward with a complaint of grievance on account of the freezing of the accounts.

100. It will be relevant in this context to refer to a decision of the Constitution Bench of this Court in M.P Sharma v. Satish Chandra, District Magistrate, Delhi 1954 SCR 1077 wherein it has been held that "a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law," and that a search and seizure of a document under the **provisions of Sections 94 and 96 of the Code of Criminal Procedure (old)** is not a compelled production thereof within the meaning of Article 20(3) and hence does not offend the said Article.

101. Shri Rajinder Singh, learned senior counsel appearing for the respondent made his submission that the Special Judge had acted unilaterally in issuing the letter rogatory and without having a full dress enquiry. The learned counsel after referring to **Section 91 of the Code corresponding to Section 94 of the old Code and to Sections 4 and 5 of the Bankers' Books Evidence Act, 1891** and relying on a decision in Central Bank of India Ltd. v. P.D Shamdasani**AIR 1938 Bom 33, 35** wherein it has been held that a Magistrate making an order under section 94 of the code (old) for production of documents does not thereby commit himself to the proposition that inspection of all the documents, the production of which is ordered must necessarily follow and the party producing the documents is not precluded from objecting to their subsequent inspection, seriously contended that the banks should have been given prior notice and heard. According to him, the banks, in such a circumstance, probably might have objected to the production of the bank accounts.

102. We are unable to see any force in the above submission of Shri Rajinder Singh because, firstly there is no request for production of the documents; secondly there is no prayer in the letter rogatory for production of the entire account books and; thirdly till date no objection is taken by the Swiss banks. It is pertinent to note that the High Court has not found fault with the validity of the letter rogatory on the ground of alleged production of bank accounts or the failure of any notice to the Swiss banks.

103. It has been contended on behalf of the respondent that the Special Judge has exhibited a partiality towards the respondent by not giving any opportunity of being heard when the prosecution was given a right of audience before issuing letter rogatory.

104. Merely because the Special Judge heard counsel for the CBI before issuing letter

rogatory the respondent cannot make such a complaint that he should have also been given prior notice to present his case as we have repeatedly pointed out that the stage of investigation is only at the door. The order sought for from the Special Judge by the CBI is only for process of judicial assistance from the competent judicial authorities in the Confederation of Switzerland for investigation and collection of evidence. In such a case the accused has no right to raise the voice of opposition.

105. For the aforementioned discussion, we hold that the facts and circumstances of the case do not attract the audi alteram partem rule requiring a prior notice and an opportunity of being heard to the respondent and that the respondent has never been prejudiced and deprived of his right to property due to the alleged non-compliance of the principle of audi alteram partem.

Whether the issue of letter rogatory is vitiated by non-application of mind by the Special Judge?

106. The High Court for drawing its conclusion that the issue of letter rogatory suffers from non-application of mind and the said letter was issued in a very casual and mechanical manner prejudicial to the respondent has given the following reasons:

(a) By the letter rogatory, not only the information regarding assets owned/possessed by many persons (besides the named accused) including certain Indian citizens who are neither named in the FIR nor is there any allegation against them has been asked for but also the Swiss authorities are requested to freeze the bank accounts of all those persons.

(b) The Special Judge did not apply his mind to all the points raised by the Cantonal Court for rectification of the letter rogatory issued on 5/7th February, 1990.

(c) The Special Judge has not at all applied his mind before issuing the amended letter rogatory to the objections raised by the Cantonal Court of Geneva with regard to the pasting of a piece of paper containing certain names which were earlier mentioned in the letter dated January 26, 1990 given by Mr M.K Madhavan, CBI to the Federal Department of Justice and Police. The non-reference to the earlier letter of the CBI in the letter rogatory issued by the Special Judge on 5/7th February, 1990 and also its absence as one of the annexures to the letter rogatory show that the letter rogatory issued by the Special Judge had been tampered with.

(d) The CBI in its note of compliance clarifying the observations of the order of July 3, 1990 of the Criminal Court of Geneva not only referred to the Criminal Law

Amendment Ordinance, 1944 which empower the District Judge to pass ad interim orders attaching the money or other property but also enclosed a copy of the same for the purpose of showing the power of the Criminal Courts in India. Under **Section 4(1)** of the said Ordinance a District Judge is empowered to pass an ad interim order attaching the money or other property alleged to have been procured by means of any offence but in terms of **Section 4(2)** of the said Ordinance the District Judge was required to issue a notice to the person whose money or other property is being attached; accompanied by copies of the order, the application and affidavits and to the evidence if any recorded calling upon the person to show cause why the order of attachment should not be made absolute.

(e) When the CBI itself has relied upon the provisions of the above Ordinance, the Special Judge ought to have complied with the mandate of **Section 4(2)** by issuing a show-cause notice to the respondent.

107. Though in the writ petition, this ground has not been specifically taken in the manner in which the learned Judges have framed the questions, however, under ground No. 'z', it is pleaded:

"That the Special Judge ought to have conducted a preliminary enquiry by trying to look into the entire materials placed before him by thoroughly investigating before acting pursuant to the FIR, which in the respectful submission of the petitioner, the learned Judge failed to do so, thus causing miscarriage of justice to the petitioner …."

108. From the judgment, it is seen that certain documents which are said to have been claimed as secret and confidential documents by the ASG are taken into consideration for reaching to the conclusion that there was non-application of mind.

109. Then the puzzling question that comes up for consideration is as to how all the correspondence, namely, the copy of the order of the Canton Court of Geneva and the note of compliance of the CBI came to the knowledge of the High Court especially when these documents were not available with the respondent and not produced by the Court. The clue for answering the above question is found in the judgment itself which reads thus:

"We may point out here that pursuant to our directions copies of the original letters rogatory along with their enclosures issued on February 7, 1990 and August 22, 1990 have been made available to us."

110. In yet another part of the impugned judgment, it is stated as follows:

"From records, we, however, find that through letter rogatory, information regarding assets owned/ possessed by many persons (besides the named accused) including certain Indian citizens, who are neither named accused in the FIR, nor there is any allegation against them in the FIR has been asked for and even the Swiss Authorities were requested to freeze their bank accounts."

111. In this connection, the additional grounds filed by the appellants may be taken note of.

112. Ground No. 'N' of the additional grounds reads thus:

"It is submitted that the entire original record was offered to the High Court in confidence from which the High Court has even quoted …."

113. Ground No. 'Q' of the additional grounds, the appellants have stated thus:

"… High Court has recorded findings beyond the scope of arguments urged at the bar on behalf of respondent herein and the pleadings on record."

114. During the argument before this Court, the Additional Solicitor General reaffirms that certain secret and confidential documents at the instance of the Court — namely the letters of the CBI to the Federal Department of Justice and Police, Berne, Switzerland dated 23rd and 26th January, 1990, the order dated July 3, 1990 of the Cantonal Court, the note of compliance of the CBI, the letters of the Chief of Army Staff, the minutes of the meeting of the Negotiating Committee etc. etc. were handed over in a sealed cover with an oral request not to reveal the document to the other side or to refer them in the judgment since otherwise the Government would be claiming privilege on the said documents. In other words, oral privilege was claimed under **Section 124 (sic 123) of the Evidence Act.** The Additional Solicitor General continues to state that the High Court unfortunately despite the oral request made on behalf of the CBI has freely made use of those confidential documents inclusive of the copy of the order of the Cantonal Court. Leaving apart the submission made by the learned Additional Solicitor General before this Court, the impugned judgment itself pellucidly discloses that the High Court has considered certain documents which were not placed by the respondent before it, but evidently by the appellants and has relied upon those documents for quashing the letters rogatory on the ground of non-application of mind. In fact, Mr Prashant Bhushan in his unnumbered SLP has supported the plea of the Additional Solicitor General. No specific objection has been raised from the side of the respondent with regard to the oral request made by the CBI not to make use of those confidential documents in the judgment.

115. In these circumstances, we have no other option except to hold that the High Court has used all those confidential documents which the Court ought not to have used for the reasons, firstly those documents are stated to have been claimed as secret documents and secondly ignoring the request of the CBI said to be made and without notice to the appellants herein. Besides free use of the documents, some portion of the documents are extensively quoted. The only inescapable inference that could be drawn in those circumstances would be that the Court has made up its mind as to the expediency of quashing the letter rogatory and thereafter has conveniently made use of those documents for the end product.

116. Be that as it may, after having gone through the orders of the Special Court dated February 5, 1990 and August 21, 1990 and all the connected records placed before the Court, the Special Judges cannot be found fault with to have issued letter rogatory casually or mechanically but only after applying their mind and on being satisfied that the FIR constitutes a cognizable offence or offences and that a competent officer under the Code of Criminal Procedure has made a request for issuance of letter rogatory.

117. Hence we see absolutely no reason to sustain the conclusion of the High Court that the issue of letter rogatory suffers from non-application of mind by the Special Judge.

118. In this connection, we would like to refer to a decision of the Bombay High Court in Kekoo J. Maneckji v. Union of India**1980 Cri LJ 258 Bom HC**. In that case a request was made by the CBI to the Magistrate for issuing letter rogatory through the Ministry of External Affairs, Govt. of India, New Delhi to the District Court of the United States for the Western District of Washington for issuing directions to the Washington Mutual Savings Bank, Citadel to make available certain documents duly certified under an affidavit to the CBI, the investigating officer in that case in India. The request was granted by the learned Magistrate, which order was challenged as illegal in the High Court. It appears that the documents called for came into possession of the CBI. Having regard to the facts of the case while rejecting the challenge made by the petitioner, Chandurkar, J. (as he then was) while dismissing the writ petition observed:

"Now, assuming for a moment that the order of the learned Magistrate is wholly illegal and without jurisdiction as a result of that order these documents have already come into the possession of the investigating agency …. Once the documents are in the possession of the investigating agency, assuming that they are received by

following a procedure which is illegal in the eye of law, that would not by itself make the evidence irrelevant or inadmissible. The value to be attached to the evidence will depend on its relevancy and consequently its admissibility and whenever such documents are produced before the appropriate court, notwithstanding the manner in which those documents could come into the possession of the prosecuting agency, they would still be tendered in evidence by the prosecution after satisfying the court about their admissibility and relevancy under law."

119. Sawant, J. (as he then was) while agreeing with the dismissal of the petition added his opinion stating thus:

"… This is admittedly a stage where the prosecuting agency is still investigating the offences and collecting evidence against the accused. The petitioner, who is the accused, has therefore, no locus standi at this stage to question the manner in which the evidence should be collected. The law of this country does not give any right to the accused to control, or interfere with, the collection of evidence. The only stage at which the accused can come in the picture vis-a-vis the evidence, is the stage when the evidence is sought to be tendered against him, and he can challenge it only on the ground that the evidence is inadmissible. That is why, according to me, the petitioner cannot be said to be a person aggrieved at this stage, and hence he cannot claim any relief from this Court by filing a petition either under **Article 227 of the Constitution** or under **Section 397 or 482 of the Code of Criminal Procedure** as has been done in this case ….

That is why, even assuming that the provisions of section 91 crpc were not open to be invoked for getting the letter rogatory issued, the petitioner-accused is not the person who can complain against such issuance. Hence, this petition was liable to be dismissed in limine on the short ground that the accused had no locus standi to file the same. It matters, therefore, very little whether the documents were received or were yet to be received in this country when the petition was filed. Even if the documents were yet to be received in this country, we would have still dismissed the petition on the aforesaid grounds…. The prosecuting agency in the present case could have secured the said documents from the United States on its own and without reference to a court of law. There is nothing in law to bar the prosecuting agency from collecting evidence in that manner."

120. For all the aforesaid reasons we unhesitatingly set aside the order of the High Court quashing the letter rogatory dated 5/7th February, 1990 and the rectified letter rogatory dated 21st/22nd August, 1990 issued in pursuance of the orders passed by

the Special Judge. The respondent who is a named accused in the FIR has no locus standi at this stage to question the manner in which the evidence is to be collected. However, it is open for the respondent to challenge the admissibility and reliability of the evidence only at the stage of trial in case the investigation ends up in filing a final report under **Section 173 of the Code** indicating that an offence appears to have been committed.

Does the FIR prima facie disclose any offence against the respondent, W.N *Chadha* and is there any material prima facie connecting the respondent with the dealings of Bofors relating to the purchase of guns?

121. For answering the first part of the above question the High Court has made a lengthy discussion with reference to the various documents and examined them under various heads, namely:

(a) Whether the decision for entering into and finalising the contract was followed by the well-established procedure?

(b) Whether the contract finally entered is perfect and bona fide?

(c) Whether the allegations made in the FIR do constitute an offence/offences against the respondent W.N *Chadha* ?

(d) Whether the non-tracing of the names of the unnamed public servants or at least any one of them generally mentioned in the FIR is entirely due to indolence or remissness on the part of CBI?

122. In dealing with the question of the procedure followed by the Government of India in entering into the contract with Bofors the High Court has traced the history commencing from the proposal for procurement of 155mm guns along with certain equipments and ammunition approved in April 1984 and ending with its finalisation on March 24, 1986 mostly relying on some original records inclusive of certain confidential documents which, according to the Additional Solicitor General, were made available to the Court at its instance. The fact that original documents were made use of and relied upon by the High Court is strengthened by the following observation made in the impugned judgment itself:

"The urgency of acquisition of 155 mm gun is evident from the letter dated November 29, 1985 written by the then Chief of Army Staff to the then Raksha Rajya Mantri (A), which we have perused from the original record."

123. A scrutiny of the judgment demonstrably shows that the High Court has gone

through some original records which in the very nature of them could not have been made available by the respondent. As indicated above, the Additional Solicitor General states that the original documents were produced by the Government in a sealed cover for the Court's perusal with an oral request not to reveal the documents to the other side and to make use of them in the judgment, besides orally claiming privilege. However, the High Court has not only referred to those documents but also very much relied upon them. In fact, the High Court has reproduced a relevant portion of the letter dated November 29, 1985 of the then Chief of Army Staff and also a portion of the minutes of the meeting of the Negotiating Committee recorded on March 4, 1986. It was only on the basis of the above documents the High Court drew its final conclusion regarding the procedure followed from the very proposal of the contract till its finalisation. The relevant conclusion reads thus:

"From the facts mentioned hereinabove, it is clear that the decision regarding finalisation of the contract with Bofors was not taken by one or two persons, it was based on the recommendations of the Negotiating Committee of five Secretaries, Financial Advisor and DCAOS and these recommendations were duly examined and approved by then Secretaries of the various departments as also by the then two Ministers of State for Defence, the then Finance Minister and the then Prime Minister (as RM). Thus, the decision was taken in accordance with the well- established procedure."

(emphasis supplied)

124. After having recorded its finding with regard to the procedure followed the High Court has passed on to the second question as regards, the bona fide nature of the contract.

125. By making reference to the keen competition between the two finally shortlisted firms, namely, M/s Bofors and Sofma and the lower price quoted by Bofors than that of Sofma in addition to certain further concessions amounting to approximately Rs 10.5 crores, the Court held thus:

"All this clearly shows that the procedure adopted for finalisation of the contract with Bofors was perfect and bona fide."

(emphasis supplied)

126. The High Court, after recording the above conclusions as regards the procedure followed and the nature of the contract, has examined the vital issue as to whether the

allegations made in the FIR do constitute an offence/ offences under any of the provisions mentioned in the FIR warranting a thorough investigation against the respondent.

127. Based on the correspondence exchanged between Bofors and the authorities of the Government of India and the opinion of the then Attorney General of India contained in paras 8.6 and 8.16 of the report of the JPC the High Court has held as follows:

"The petitioner (W.N *Chadha*) who was getting 1 lakh SEK per month for administrative services e.g transportation, forwarding of letters, telex etc., cannot be called a middleman as he never represented on behalf of Bofors for the finalisation of the contract as explained hereinabove."

128. Rejecting the contention on behalf of the CBI that the principal beneficiary of payments made by Bofors to Svenska Inc. in connection with the gun deal in question is the petitioner who is owning the AGC, the High Court has observed thus:

"… that contractual obligation between M/s Bofors on the one hand and Svenska Inc. and AGC on the other had existed much before the decision of the Government of India taken in November 1984 prohibiting the involvement of agents and middlemen in relation to the gun contract."

It has been further concluded by the High Court:

"… it is clear that if at all anybody can be alleged having played any role for finalisation of the contract, it is AE Services Limited with whom association of the petitioner has not been alleged even in the FIR."

129. The High Court has also held that the averments made in the FIR against the respondent on the basis of media reports are nothing but only surmises and conjectures.

130. As regards the payment of SEK 1 lakh per month to AGC as revealed by the letter dated March 10, 1986 of Bofors (vide para 96 of the FIR) it has been held by the court below that even as per the allegations in the FIR the said amount paid to the respondent was legitimate one towards the administrative services.

131. Then quoting the opinion of the then Chief of Army Staff recorded in his letter dated November 29, 1985 the opinion of the then Attorney General contained in paragraph 8.13 of the report of the JPC, the agreement between Bofors and AGC dated October 24, 1978 and another agreement between Svenska Inc. Panama and

Bofors entered into in December 1978 the period of which was further validated in 1984 the High Court has held:

"After the Government of India's policy decision prohibiting involvement of agents, Bofors might have been required to settle their contractual obligations with their agents which is a matter purely between Bofors and their former agents. If Bofors made payments out of its own resources as alleged by the CBI to their former agents as winding up charges or commission in whatever form may be for termination of the earlier existing contract, it would not constitute any criminal offence."

132. Thereafter referring to the opinion of the then Attorney General contained in paragraphs 8.7, 8.9 and clause 26 of the agreement entered into between Government of India and Bofors it has held:

"… that unless there is a specific allegation regarding payment of any money to a public servant in India it cannot be said that the amount paid by Bofors to any of his agents outside India was a bribe meant for certain public servants."

133. According to the court below, when there is no reference to any agent or middleman in the contract and when the procedure followed for finalisation of the contract has been perfect, there can be no case of cheating under **Section 420 of the Indian Penal Code** or abetment of cheating against the respondent as well as under any of the penal provisions mentioned in the FIR. As there is no allegation of wrongful gain or loss levelled against any of the named and unnamed accused by the Bofors or their agents barring the media reports, there is no question of offences under Sections 468 and 471 having been committed. Further in the absence of any material indicating criminal breach of trust, there cannot be any offence under Section 409 IPC even on the basis of the allegations as contained in the FIR.

134. The High Court has further pointed out that the non-filing of any suit and the failure to initiate any arbitration proceeding for the recovery of the alleged commission by the Government support the conclusion that there is no breach of trust.

135. At the outset we are constrained to observe that we are terribly shocked on seeing that the High Court has gone out of its authority and overstepped its province by making use of certain original records and then on the basis of the said records proceeded to examine the entire procedure followed right from the proposal up to the finalisation of the contract between Bofors and Government of India and its genuineness and bona fides and ultimately affixed its seal of judicial approval holding

that the contract is perfect and bona fide.

136. It is to be noted that the High Court appears to have waded through the entire original records produced before it by the Government for its perusal and on the strength of those documents, the court has raised the two questions, namely, whether the proper procedure in the execution of the contract was followed and whether the contract finalised is perfect and bona fide — and answered both the questions in affirmative, that is in favour of the respondent and prejudicial to the appellants.

137. The perusal of the impugned judgment clearly discloses that the learned Judges of the High Court have freely used those documents which are said to be secret and confidential and not only referred but also quoted certain portion of those documents in extenso as stated supra. According to the learned A.S.G, the line or course taken by the High Court to its conclusions on the seriously disputed questions of law and fact taking its cue from the original records cannot be countenanced. In our view, the documents (the copies of which are produced before us claiming to be secret documents) from their very nature could have never been in possession of any third party much less with the respondent and in such a case, the High Court was not at all justified in making use of those documents for its findings especially in a case of this nature where there are serious and outrageous allegations. In these circumstances, one would be constrained to observe that the High Court has prejudged the issue and thereby laid down the foundation for its subsequent findings for quashing the entire proceedings. No doubt every court has its plenary powers to deliberate upon every issue agitated before it as well as any other issue arising on the materials placed before it in the manner known to law after giving a prior notice and affording an opportunity of being heard. This power of discharging the statutory functions whether discretionary or obligatory should be in the interest of justice and confined within the legal permissibility. In doing so, the Judge should disengage himself of any irrelevant and extraneous materials which come to his knowledge from any source other than the one presented before him in accordance with law and which are likely to influence his mind one way or the other. In this context, it may be appropriate to recall the following view expressed by Benjamin Cardozo in his treatise The Judge as a Legislator:

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to

exercise a discretion informed by tradition, methodized by analogy, disciplined by system…."

138. We feel that it is not necessary to go deep into the matter any further except saying that the High Court is not justified in affixing its seal of approval to the contract by holding it to be bona fide, on being executed following the proper procedure.

139. For all the reasons stated above we without any hesitation quash those findings with regard to the nature of the contract and the procedure followed.

140. Now let us switch over to the later part of the question and examine whether there are materials prima facie connecting the respondent with the dealings of Bofors.

141. Admittedly the respondent was earlier Bofors' representative in India appointed in the year 1978 and from January 1986 he was appointed as Bofors' Administrative Consultant. According to the respondent, in the agreement covering the period up to the end of 1985, there was a provision for the payment of commission on sales to him, but his role during this period was essentially supportive in nature and not that of a full-fledged agent who could bind Bofors in any way or enter into negotiation on their behalf.

142. The learned ASG referring to the secret part of SNAB report published by The Hindu in its issue dated October 9, 1989 and certain other relevant documents published in the issue of Indian Express and Statesman of October 13, 1989 states that an Indian who had been agent of Bofors for 10-15 years was the principal beneficiary of payment made by Bofors to Svenska Inc. in connection with the gun deal in question and that the respondent was very much connected with Svenska Inc. Of course, Mr Rajinder Singh has denied any connection of the respondent with Svenska Inc. and added that if the period of 10 or 15 years mentioned by the learned ASG is calculated backwards from 1985, it would show that the connection of the alleged agent with Bofors should have started from 1975 and, therefore, the expression 'agent' as appeared in the Press could not refer to the respondent who became the agent only in 1978. The arguments of Mr Rajinder Singh has been refuted by the ASG who relied on the statement of the respondent before the investigating agencies engaged by JPC wherein the respondent is stated to have admitted that he was a representative of M/s Aerotronics General Agency (for short 'AGA') and tried to sell some laser guns to India but was not successful and that sometime in 1975-76 this company AGA was taken over by Bofors and it was renamed as Bofors Aerotronics

and this was his first contract with Bofors. On the basis of the above statement, the ASG has submitted that the respondent was working with Bofors at least since 1975 which would unmistakably show that he was the sole beneficiary of the payment made to M/s Svenska Inc. through his first formal agreement with the Bofors in the name of Aerotronics General Corporation signed in 1978. According to him, the fact that in 1978 there was a written contract between Bofors and AGC, of which the respondent is admittedly the President — signed by the respondent on October 24, 1978 and by Bofors on December 21, 1978 validating the contract till September 30, 1981. Coinciding in point of time another agreement was signed between Svenska Inc. Panama and Bofors signed by Svenska on December 14, 1978 and Bofors on December 21, 1978 validating up to September 31, 1981. The learned ASG drew our attention to the similarities between the aforesaid agreement of Bofors with Svenska Inc. and AGC. According to him on March 11, 1981 through identical letters signed by Martin Ardbo (one of the named accused in the FIR) who is the former President of Bofors, both agreements i.e one between AGC and Bofors and the other between Svenska Inc. and Bofors were renewed for another period of three years up to September 30, 1984 and that in 1984 Bofors signed another agreement with Svenska Inc. and with AGC which are also having similarities. He continues to state that Svenska Inc. Panama belonged to the respondent and the statement made by Bofors President on December 18, 1986 before officials of the Swiss National Bank makes it clear that the principal beneficiary in Svenska Inc. is an Indian who has been an agent for Bofors for 10-15 years as alleged in para 25 of the FIR. He further states that the description of the payments as commission or as winding up cost is not correct but the payment was remitted by Bofors on May 30, 1986 to the account of Svenska Inc. with Swiss Banking Corporation was to make payments to public servants in Government of India as motivation or reward for such public servants who helped finalisation of the contract by dishonestly abusing their official position. It is further submitted by the ASG that there are sufficient materials connecting the respondent with payment of the bribe amount and therefore, the finding of the High Court that the amount paid to the respondent was a legitimate one as the same was for administrative services and the said amount could not be termed as bribe by any stretch of imagination absolutely incorrect and bereft of the incriminating documentary evidence. The above argument advanced on behalf of the appellants was stoutly resisted by the learned counsel for the respondent, according to whom there was a clear understanding between Government of India and Bofors that there should not be any middleman or agent and in fact the agreement finalised for purchase of the guns does not spell out the engagement of any middleman or agent.

143. One should not lose sight of the fact that the oral understanding has not been incorporated in the written agreement about which there is no dispute. What is stated at the Bar is that the oral understanding has been confirmed by subsequent correspondence between the parties. The High Court has extensively quoted the opinion of the then learned Attorney General and very much relied on it for its observation, reading thus:

"After the Government of India's policy decision prohibiting involvement of agents, Bofors might have been required to settle their contractual obligations with their agents which is a matter purely between Bofors and their former agents. If Bofors made payments out of its own resources as alleged by the CBI to their former agents as winding up charges or commission in whatever form may be for termination of the earlier existing contract, it would not constitute any criminal offence."

144. Be that as it may, we feel that it is not necessary to go deep into the matter in the light of our earlier finding given in Criminal Appeal No. 304 of 1991 etc. etc. the judgment of which is reported in (**1991) 3 SCC 756 and (1992) 4 SCC 305** under the caption Janata Dal v. H.S Chowdhary wherein we have stated that we were unable to share the assertion of Mr Justice M.K Chawla holding that the FIR on the face of it does not disclose any offence. Further this Court has also expressed its feeling on the statement of Justice Chawla in the following terms: (**SCC p. 362**, para 161)

"While so, it shocks our judicial conscience that Mr Justice M.K Chawla before whom no aggrieved or affected party had come challenging the FIR, has taken suo motu action and recorded such a categorical assertion that 'no offence' thereby meaning much less a cognizable offence is made out in the FIR."

(emphasis in original)

145. In fact, the High Court in its impugned judgment itself has recorded its finding that they are also of the same view as that of this Court that it may not be correct that the FIR does not disclose any offence against anyone named or unnamed accused which definitely includes the respondent also. In the background of the finding of this Court and that of the High Court it is not necessary to go deep into the matter by referring to various documents such as report of the JPC, the opinion of the then learned Attorney General, report of the Comptroller and Auditor General of India etc. lest it may affect either of the parties if the investigation ends up with the trial of the case. Though we refrain from giving any positive finding with regard to the alleged payment of the bribe amount to the respondent, the allegations made in the

FIR under **Section 154 of the Code of Criminal Procedure** prima facie constitute the offence alleged therein. Hence we set aside the finding of the High Court that no offence is made out against the respondent under various provisions of the different Statutes.

146. It has been vehemently argued by the counsel for the respondent saying that the allegations of corruption which are wrapped in a cocoon of ambiguity, falsehood and vagueness were conceived with mala fide motivation of the persons in authority at the time of the registration of the case and the criminal proceedings were initiated only with an oblique political purpose. According to the counsel, the investigation geared up by those who were in power in the then outgoing Government in order to gain mileage in the journey of their political career is highly polarised and politicised.

147. The above argument cannot be countenanced. As observed in Bhajan Lal when the entire matter is only at a preliminary stage and when the investigation has yet to go a long way to gather the requisite evidence the Court cannot come to a conclusion one way or the other on the plea of mala fide at such a stage. Further in case the investigation discloses that the entire proceeding has been initiated only with mala fides, probably the prosecution itself may throw the case overboard. Answering a similar contention, Bhagwati, C.J in Sheonandan Paswan v. State of Bihar 1987 1 SCC 288 has observed as follows: (**SCC p. 318**, para 16)

"It is a well established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant."

148. The said observations made in Bhajan Lal and Sheonandan Paswan in this regard apply with all force to the case on hand.

149. The submission that the Government has neither filed any civil suit nor has initiated any arbitration proceeding to recover the amount of alleged commission serves as one of the factors compelling the Court not to accept the case of the prosecution has to be simply mentioned only to be rejected. We are of the view that this submission is meritless.

150. The High Court appears to have taken a serious note of a piece of paper pasted by the CBI on the letter rogatory forwarded by the Special Judge to the Cantonal Court of Geneva and expressed its view stating, "Whatever explanation for this may be, we disapprove the said action of the officer of CBI who had done this as it may amount to tampering with the judicial records".

151. It has been vehemently contended on behalf of the appellants that the above observation of the High Court is unwarranted and unjustified since the said observation was made without properly understanding the circumstances under which the piece of paper containing certain names of account holders became necessary to be pasted. In relation to this observation, a Criminal Misc. Petition No. 6365 of 1992 is filed in this appeal by Shri K. Madhavan who was then the Joint Director and Special Inspector General of Police, Central Bureau of Investigation and was in charge of the investigation of the Bofors case along with some other officers and who is now stated to have voluntarily retired from the service w.e.f November 1, 1992. According to Mr Madhavan, this disparaging observation was made by the High Court without giving him any opportunity to explain the circumstances under which the piece of paper was pasted. Mr N. Natarajan, learned senior counsel for Madhavan explains the circumstances stating under **Article 18 of the Federal Act** on International Mutual Assistance for Criminal Matters, a letter of request dated January 23, 1992 was given by the Director of CBI to the Federal Department of Justice and Police, Federal Government of Switzerland, Berne requesting for their assistance in the investigation and for freezing/blocking the credit balances/amounts available in various accounts in Swiss banks. Thereafter, a supplementary request for freezing and blocking of more accounts was given to the Federal Department of Justice and Police by Shri K. Madhavan on January 26, 1990 in which he had given the particulars of the names of the account holders in respect of whose accounts the request for freezing/blocking had been made. In continuation of his submission, he has stated that a copy of the above letter was shown to Shri R.C Jain, Special Judge who had perused the same and that the then Additional Solicitor General, Shri Arun Jaitley who appeared on behalf of the CBI before the Special Judge in fact clarified to the learned Judge that the names mentioned in that letter had been furnished on the basis of information received by the CBI. But the learned Judge, Shri R.C Jain has not enclosed the copy of the letter along with other annexures to the letter rogatory dated February 7, 1990 forwarded to the Swiss authorities. It was under these circumstances, Shri Madhavan happened to paste a slip containing the names of those account holders as contained in the letter dated 26th January, 1990 and handed over the letter rogatory with the enclosures to the Swiss authorities. But when the entire letter rogatory was sent back to the Special Judge for compliance of certain procedural formalities, this disputed piece of paper was also attached to the letter rogatory. Thereafter, the entire matter came before Shri V.S Aggarwal, the then Special Judge who after going through the entire records inclusive of the slip of paper sent the amended letter rogatory. It is further stated that when Shri V.S Aggarwal,

Special Judge enquired of the then Additional Solicitor General as to whether the letter dated January 26, 1990 had been shown to his predecessor, Shri R.C Jain, the Additional Solicitor General confirmed the same stating that the said letter was shown to Shri R.C Jain and it was only thereafter the amended letter rogatory was forwarded to the Swiss authorities with the piece of paper already pasted on the letter. In other words, Shri V.S Aggarwal, Special Judge has approved the piece of paper already pasted to the letter rogatory and forwarded the same and, therefore, according to Shri Natarajan, the High Court without appreciating and understanding the circumstances under which the piece of paper was pasted has made this disparaging observation and requested that this observation may be expunged. In support of the above arguments, a letter dated November 16, 1992 of the then Additional Solicitor General, Shri Arun Jaitley is produced which letter was given by Shri Arun Jaitley to the query asked by Shri Madhavan in his letter dated November 15, 1992. In his letter, Shri Arun Jaitley has explained the entire matter which fully supports the present plea of the applicant, Shri Madhavan. We in order to satisfy ourselves perused the letter of Shri Madhavan dated January 26, and the typed piece of paper pasted on the letter rogatory and are satisfied that the piece of paper containing the names of the account holders tally with the names mentioned in the letter dated January 26, 1990 and that it is only reproduction of one paragraph in verbatim.

152. Though initially, Mr Rajinder Singh took a serious objection to the conduct of the CBI in pasting this piece of paper to the letter rogatory without the permission of the Court, when confronted by the subsequent approval of Shri V.S Aggarwal, Special Judge he had no answer to sustain the remark of the High Court. We are now fully convinced that there was no tampering of judicial letter rogatory but only additional particulars were furnished for ready reference of the names of the account holders as contained in the letter dated January 26, 1990. Even if it is to be held that the piece of paper should not have been pasted, leave apart the explanation offered that since Shri V.S Aggarwal has approved the letter rogatory with the pasted piece of paper on being satisfied of the circumstances under which it was pasted, the CBI cannot be ostracised. It must be noted by pasting that slip Shri Madhavan has not added any additional information on his own. Therefore, we expunge the remark of the High Court, as prayed for in the Cr.M.P In view of this finding, we hold that the High Court was not correct in holding that this has amounted to tampering of judicial records.

153. The High Court has taken into consideration two factors along with the

conclusions arrived at by the JPC in its report for granting the relief to the respondent despite its finding that the allegations in the FIR discloses an offence against all the accused about which we will deal in the later part of this judgment.

154. Of the two, first relates to the alleged failure on the part of the CBI to name any one of the public servants as an accused even after 31 months from the registration of the case and the second relates to the impounding of the passport of the respondent.

155. In dealing with the first question of the two, the High Court said:

"… even after the expiry of more than 31 months from the registration of the FIR, CBI has failed to name any public servant as an accused."

156. The above reasoning of the High Court is neither legally nor factually sustainable. As rightly pointed out by the Additional Solicitor General whose submissions we have already summarised in the earlier part of this judgment, it is not due to any indolence or procrastination on the part of the investigation but it is due to the obstructions put on the track of investigation for scuttling the same by approaching the judiciary firstly by Shri H.S Chowdhary as public interest litigant and secondly by the respondent through his Pairokar. However, the CBI all through is maintaining stoic silence unmindful of all the scornful criticism and vilification levelled against it, and is relentlessly and tirelessly fighting all the litigations so that it can successfully proceed with the investigation and collect all the materials to espouse the cause of justice. To say that the prosecution has failed to name any one of the public servants as an accused even after 31 months from the registration of the case, is a very uncharitable criticism. A survey of the various proceedings of this litigation reveals that the investigating agency, namely the CBI was fettered at every stage and made to spare its energy more in Court proceedings than in proceeding with the investigation. Only if the investigation is freely allowed without any hindrance, the investigating agency can collect all the requisite particulars and bring the names of those public servants on record, the secrecy of which, it is said, is deeply buried in various places and under various departments. Hence this reasoning is devoid of any merit.

157. In the penultimate paragraph of the impugned judgment, the High Court has observed:

"… It may be noted here that pursuant to the registration of the FIR against the petitioner his passport has been impounded. Non-bailable warrants for his arrest were issued and the same have been quashed by a learned Single Judge of this Court and

the matter is now pending before the Supreme Court. In these circumstances, it is a fit case where investigation cannot be allowed to continue against the petitioner."

158. We are not able to see any logic in the above reasoning. When we asked the counsel for the respondent as to whether this material of the impounding of passport was placed before the High Court, he hesitatingly stated that the order of the High Court in Cri. Misc. Petition (Main) No. 1318 of 1990 titled **Washeshwar Nath *Chadha* v. State1991 1 Del Lawyer 394** and thereby requested the Court to infer that the High Court might have taken note of that reported judgment, though the judgment spells out nothing about the source of information in this regard. At the instance of this Court, a copy of the reported judgment in Crl. Misc. case has been placed before this Court by the respondent.

159. Be that as it may, the respondent who was the petitioner in the above case filed a petition before the High Court under **Section 482 CrPC read with Article 227 of the Constitution** seeking certain reliefs, namely, to permit him to inspect the FIR which is the impugned FIR in this case, and to quash the non-bailable warrants issued against him relating to a case registered under the provisions of the Passport Act, 1967.

160. We are surprised that the High Court has taken a serious view of the impounding of the passport as being a supportive reason for its finding of annulling the proceedings. In fact that proceeding under the Passport Act cannot have any bearing in this proceeding initiated for quashing the FIR even though the impounding of the passport is to secure the presence of the respondent for the investigation purposes in connection with the case on hand. However, in passing we would like to quote a sentence from the order of that case, whatever purpose it may serve. The sentence reads "… petitioner does not want the quashing of the FIR nor is he making a request to this Court to interfere in the investigation of the case".

(emphasis supplied)

161. It may be stated that the petitioner in that case is the respondent herein and the FIR referred to above is the impugned FIR in the present case.

162. Now we shall pass on to a very important aspect of the case which renders the very conclusions of the High Court quashing the FIR as highly unsustainable.

163. Coming to the close of the judgment, the High Court itself has expressed its view stating "… [I]t may not be correct to say that the FIR on the face of it does not disclose any offence against any one, named or unnamed accused" (emphasis supplied) which we have already extracted above. Having held so, the High Court

thought that in exercise of its powers under Article 226, it could quash the FIR on its findings on the other issues. It surprises us as to how the High Court quashed the FIR after having positively found that the FIR discloses an offence/ offences against named and unnamed accused which will include the respondent also. But in the next breath, it is held that no offence is made out.

164. This Court, in its earlier proceedings, has rejected the contention that the FIR does not disclose any offence. This observation is binding on the High Court yet the High Court strangely by way of self-contradiction has held that no offence is made out against the petitioner and thereby stonewalled the CBI probe. This paradoxical finding perhaps by the High Court is sought to be justified by feebly relying on the fact that the investigating agency has failed to name any public servant as an accused, on the conclusions of the JPC and also on the circumstances of the impounding of the passport of the respondent. These aspects have been dealt by us and we have categorically held that these aspects do not in any way affect the contents of the validity of the FIR. Placing reliance on these aspects which are irrelevant at this stage, the High Court ought not to have taken the extreme step of quashing the very FIR.

165. We, therefore, are of the firm view that the self-contradictory findings of the High Court itself gives a frontal attack to the impugned judgment, rendering it unsustainable both in law and fact. To put it ironically, the impugned judgment "profusely bleeds due to its self-inflicted injury".

166. Shri Rajinder Singh, the counsel for the respondent when confronted with the above inconsistent conclusions, finding himself on a sticky wicket unhesitatingly stated that he is not accepting the finding of the High Court holding that the FIR discloses the offence which finding in his opinion is an incorrect and incoherent finding. This reply of Shri Rajinder Singh cannot be countenanced and accepted. The respondent cannot be permitted to blow hot and cold, thereby attacking one part of the judgment as erroneous and untenable and attempting to sustain the other part as being well-founded on sound reasonings.

167. It cannot be said that the Report of the JPC has acquitted the respondent and others of all the charges levelled against them on appraisal of the entire evidence. On the other hand, the Report spells out that Bofors did not co-operate and the evidence relating to the recipients of the amount was not forthcoming. Though we are not inclined to make a detailed survey of the Report, it would suffice to refer to some of the conclusions of the JPC which would serve our purpose. For proper understanding, we shall reproduce hereunder the relevant portions of some of the

conclusions, recorded under Chapter IX of the Report of JPC.

Conclusion (vi)

"… Despite persistent demands from the Government of India, Bofors declined to give details of these payments and the recipients thereof."

Conclusion No. (vii)

"Bofors have expressed inability to furnish copies of their initial as well as the termination agreements with the three companies to whom winding up costs were paid, on the plea of commercial secrecy. They have complained that such disclosure would be a breach of their confidentiality agreement with these companies."

Conclusion No. (ix)

"On the ground of commercial confidentiality, Bofors have not furnished full details of the persons to whom winding up costs were paid. Nobody has come forward with any evidence in regard to the identity of recipients of payments made by Bofors …. It has not been possible for either our investigating agencies or any other sources to find any evidence regarding the identity of recipients. The Committee have, therefore, not been able to reach any conclusion in regard to the identity of recipients."

Conclusion No. (xi)

"There is no evidence to show that any middleman was involved in the process of the acquisition of the Bofors gun. There is also no evidence to substantiate the allegations of commissions or bribes having been paid to anyone. Therefore, the question of payments to any Indian or Indian company whether resident in India or not, does not arise, especially as no evidence to the contrary is forthcoming from any quarter."

Conclusion No. (xii)

"Mere suspicion as regards existence of middleman and/or payments of commissions does not constitute sufficient ground for initiating action to terminate the contract with Bofors or to raise claims for the reimbursement to Government of payments made by Bofors to the three foreign companies."

Conclusion No. (xiii)

"There is no evidence to establish that the Bofors' payments totalling SEK 319.4 million involved a violation of any Indian law."

Conclusion No.(xiv)

"There is no evidence of any other payment having been made by Bofors for winning the Indian contract."

168. A perusal of the above conclusions shows that the JPC was not able to secure the entire evidence and that the Bofors also was not fully cooperating with the enquiry furnishing the relevant documents and that, the JPC submitted its report on the available materials collected and the legal opinion of the then learned Attorney General of India.

169. Now it is shown that the Swiss authorities are coming forward to give full cooperation and assistance in the collection of evidence at their end. Therefore, when all those are extending their helping hands though so far yet so close, there is no reason to forestall the investigation. In fact, Shri Rajiv Gandhi, the then Prime Minister of India himself wanted a complete probe and made a statement in this behalf in the Lok Sabha on April 20, 1987 which we have already extracted in our earlier part of this judgment. However, it may be recalled, in this connection also, his statement reading "… you show us evidence, we do not want proof. We will bring the proof." This assurance was affirmed and reaffirmed on more than one occasion by the Minister for Defence during the course of the discussion in the Parliament. The JPC itself has felt some suspicion as regards the existence of middleman, but what the Report says is that mere suspicion does not constitute sufficient ground for initiating action.

170. It may not be out of place to state, in this context, that there are certain provisions in the Criminal Procedure Code which authorise a police officer to register a case and investigate the matter if there is any reason to suspect the commission of an offence or reasonable suspicion of commission of any offence. Section 157(1) requires an officer in charge of a police station who 'from information received or otherwise' has reason to suspect the commission of an offence that is a cognizable offence, he can investigate the matter under Section 156. The expression "reason to suspect" as occurring in Section 157(1) is not qualified as in **Section 41 (a) and (g) of the Code,** wherein the expression 'reasonable suspicion' is used. Therefore, what Section 157(1) requires is that the police officer should have 'reason to suspect' with regard to the commission of an offence. See Bhajan Lal.

171. Therefore, the suspicion entertained by the JPC gives room for a probe especially when there is scope of getting sufficient assistance to make the probe. The opinion of

the then learned Attorney General in the JPC report was based only on the materials available on that day and at that stage, but not on the materials which are still to be unearthed and brought over the surface.

172. This Court in Bhajan Lal has already examined the principle of law in dealing with the exercise of the inherent power under Article 226 or the inherent powers under section 488 of the code in the matter of quashing the FIR and also has listed out the circumstances, by way of illustration though not exhaustively, under which the High Court can quash an FIR. We feel that it is not necessary to recapitulate the various decisions of this Court which are already cited in the decision of Bhajan Lal.

Cr.M.P Nos. 4999, 5201 and 5160 of 1992

173. All the above criminal miscellaneous petitions are filed seeking leave to file appeals challenging the judgment impugned in this case. Admittedly, none of them was a party to the proceeding in the High Court except Shri Prashant Bhushan who filed his petition before the High Court, when the matter was reserved for judgment, as a public interest litigant making a complaint that no proper submissions were made on behalf of the appellants herein with regard to the legality of the issue of letter rogatory and competence of the Special Judge in issuing letters rogatory. This petition was disposed of by the High Court as the allegations in that petition were unfounded.

174. Before this Court, Shri Shanti Bhushan appearing on behalf of Shri Prashant Bhushan stated that every crime is perpetrated only against the society and that is why the State takes up the cause on behalf of the Society and, therefore, these petitioners who evince their interest in the protection of the society should be granted leave to canvass the correctness of the impugned judgment as public interest litigants. In support of his submission, he placed reliance on the observation of this Court in Arunachalam v. P.S.R Sadhanantham **1979 2 SCC 297, para 5** and Union Carbide Corporation v. Union of India 1991 4 SCC 584.

175. In Arunachalam challenging the order of acquittal of the accused in a case of murder passed by the High Court, the brother of the deceased by name Arunachalam filed an SLP and obtained leave from this Court. A doubt was raised about the competency of the private party as distinguished from the State to invoke the jurisdiction of this Court under **Article 136 of the Constitution.** It was only in that context, Chinnappa Reddy, J. observed that (SCC p. 301, para 5)

"We do not have slightest doubt that we can entertain appeals against judgments of acquittal by the High Court at the instance of private parties also."

176. On going through the judgment, we are of the view that it will not be of any assistance for the petitioners herein since none of them was a party to the proceedings and moreover the investigating agency, namely, the CBI and the Union of India who are the affected parties have preferred the appeal.

177. In Union Carbide Corporation it has been said that any member of the society must have locus to initiate a prosecution as well as to resist withdrawal of such prosecution if initiated.

178. That proposition also, in our opinion, cannot be availed of as the prosecution was initiated by the appellants herein and they are persecuting and pursuing the matter up to this Court. The proposition that any one can initiate a criminal proceeding is not in dispute.

179. We have already considered the locus standi of a third party in a criminal case and rendered a considered finding in Janata Dal when this matter came before us in the first round of its litigation. Reference also may be made to Simranjit Singh Mann v. Union of India 1992 4 SCC 653.

180. Before the Supreme Court of United States, a similar question arose in **Whitmore v. Arkansas**495 US 149 whether a next friend can invoke the jurisdiction of the Court when a real party was not able to litigate his or her own cause. The Supreme Court dismissed the writ of certiorari for want of jurisdiction on the ground that Whitmore, an independent person lacked standing to proceed in the case. In the said case of Whitmore reliance has been placed on a decision, namely, **Gusman v. Marrero**180 US 81, 87 in which it has been held thus:

"However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this."

181. In fact when this case on hand came up before this Court arising out of the public interest litigation of Shri H.S Chowdhary, some other political parties approached this Court as public interest litigants to challenge the impugned judgment in that case, but this Court rejected all those appeals on the ground of locus standi.

182. For the above reasons stated above, all the criminal miscellaneous petitions are dismissed.

183. The investigation is only at an infant stage and it has to go a long way to collect

all the materials. Only after requisite particulars are collected by the investigating agency, the further course of action would be decided. Whatever it may be, without the battle lines being properly drawn, the Court will not be justified in making any further positive pronouncement on the merits of the serious and cloudy issues involved in this case dehors the findings recorded in this judgment. However, as we feel that there may be a battle to be waged on a later occasion by the litigants if the matter comes up for trial, we do not propose to make any further observations.

184. In the result, for the discussion made above, we set aside the impugned judgment of the High Court quashing the letters rogatory — both dated February 5/7, 1990 and August 21/22, 1990 issued by the Special Judge and the FIR registered by the CBI against the respondent under various provisions of different statutes and other proceedings and orders based on the said FIR.

185. Criminal Appeal No. 567 of 1992 is allowed accordingly. Crl. M.P No. 6365 of 1992 filed by Shri K. Madhavan to expunge the observation of the High Court is also allowed.

186. Before we part with this case, we have to observe that any views expressed or observations made by this apex Court should be borne in mind and given effect to. In the instant case, in spite of the finding of this Court in Janata Dal the High Court has grossly erred in quashing the FIR, the same has resulted in a glaring injustice, namely, that the investigation into grave and serious crime has got scotched and all the efforts so far taken by the investigating agency in digging out the requisite evidence got buried. Therefore, we find it imperative to quash the impugned judgment of the High Court.