TRANSMISSION CORPORATION OF A.P. A

v.

CH. PRABHAKAR AND ORS.

MAY 26, 2004

B

[S. RAJENDRA BABU, CJ. AND G.P. MATHUR, J.]

Indian Electricity Act, 1910 :

Ss. 39, 49-C, 49-D and 49 as amended by Indian Electricity (Andhra Pradesh Amendment) Act, 2000—Amendment Act, **inter alia**, *providing for more severe punishment, trial of offences by Special Tribunal/Special Court and transfer of pending cases to Special Tribunal/Special Court—Constitutional validity of—High Court opined that though in view of language used in sub-section (5) of s.49-C all pending cases may be transferred, but no right of appeal or revision can be taken away, nor an accused can be deprived of a better procedure in view of the provisions of Articles 20 and 21 of the Constitution, and held that sub-s, (5) of s.49-C should be read down whereunder pending cases of the nature before the Metropolitan Court cannot be transferred to Special Tribunal and writ petitioner should be tried in regular criminal court in terms of provisions of Code of Criminal Procedure—Held, since interpretation of Article 20 as to its scope and ambit is involved in these proceedings, matter is referred to larger Bench—Constitution of India Article 20.*

C D E

Constitution of India, 1950 :

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Article 20—Indian Electricity Act, 1910 as amended by Indian Electricity (Andhra Pradesh Amendment) Act, 2000—Ss. 39, 49-C, 49-D and 49-E—Constitutional validity of—Question : Whether constitutional guarantee enshrined in clause (1) of Article 20 is confined only to prohibition against conviction for any offence except for violation of law in force at the time of the commission of the act charged as an offence and subjection to a penalty greater than that which might have been inflicted under the law in force at the time of commission of offence or it also prohibits legislation which aggravates the degree of crime or makes it possible for the accused to receive greater punishment even though it is

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A *also possible for him to receive the same punishment under the new law as could have been imposed under the prior law or deprives the accused of any substantial right or immunity possessed at the time of the commission of the offence charged—Referred to larger Bench.*

B *Article 254(2), Seventh Schedule—List III—Entry 38—Indian Electricity (Andhra Pradesh Amendment) Act, 2000 amending Indian Electricity Act, 1910—Legislative competence of State Legislature—Held, Entry 38 in the concurrent List of Seventh Schedule is 'Electricity'—Andhra Pradesh Legislature had the legislative competence to make law on the subject of electricity and to make amendments to Indian Electricity* C *Act, 1910—Amending Act has also received the assent of the President of India and therefore in view of Article 254(2), it shall prevail.*

Peoples Union for Civil Liberty **v.** *Union of India,* **[1997] 1 SCC 301;** *His Holiness Keshava Nanda Bharati Sripadagalvaru* **v.** *State of Kerala* D *and Anr.,* **[1973] 4 SCC 225;** *A.D.M. Jabalpur* **v.** *Shivakant Shukla,* **[1976] 2 SCC 521;** *M/s. Good Year India Ltd.* **v.** *State of Haryana,* **AIR (1990) SC 781;** *Synthetics and Chemicals Ltd.* **v.** *State of U.P.,* **AIR (1990) SC 1927;** *State of West Bengal* **v.** *Anwar Ali Sarkar,* **AIR (1952) SC 75, referred to.**

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Calder **v.** *Bull,* **1 L.Ed. 648;** *Fletcher* **v.** *Peck,* **3 L.Ed. 162;** *Beazell* **v.** *Ohio,* **269 US 167, 70 L.Ed. 216;** *Bone* **v.** *Columbia,* **(1964) 378 US 347, 12 L.Ed, 2d. 894;** *Cummings* **v.** *Missouri,* **71 US 277, 18 L.Ed. 356;** *Lindsay* **v.** *Washington,* **(1937) 301 US 397, 81 L.Ed. 1182;** *Kring* **v.** *Missouri,* **107 US 221, 271, Ed. 506;** *Hept* **v.** *People of Utah,* **110 US 574,** F **28 L.Ed. 262;** *Mallet* **v.** *North Carolino,* **181 US 589, 45 L.Ed. 1015;** *Winston* **v.** *State,* **118 A.L.R. 719;** *Miller* **v.** *Florida,* **(1987) 482 US 423, 96 L.Ed. 2d. 351;** *Waddington* **v.** *Miah,* **(1974) 2 All E.R. 377;** *R.* **v.** *Kirk,* **(1985) 1 All E.R. 453, referred to.**

G *The Framing of Indian's Constitution "A Study" by B. Shiva Rao,* **Chapter 7, referred to.**

U.S. Constitution, Declaration of Human Rights of the United Nations; Convention for the Protection of Human Rights and Fundamental H *Feedoms; Edger Bodenheimer "The Philosophy and Method of the Law".*

(First Indian Reprint 1996), **p. 327, referred to.** A

Corpus Juris Secundum, **Paras 409, 414, 420, 16** *American Jurisprudence* **2d paras 402, 404 and 407, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6131 of 2002. B

From the Judgment and Order dated 8.6.2001 of the Andhra Pradesh High Court in W.P. No. 6752 of 2001.

Shanti Bhushan and Ashok Grover, Sanjai Pathak and Rakesh K. C Sharma for the Respondent.

Mahendra Anand, Ms. K. Sarda Devi (SCLSC), T.V. Ratnam and K. Subba Rao for the Respondents.

The following Order of the Court was delivered : D

G.P. MATHUR, J. : 1. This appeal by special leave has been preferred against the judgment and order dated 8.6.2001 of High Court of Andhra Pradesh by which the writ petition preferred by respondent nos. 1 to 3 was allowed and it was directed that the criminal case pending E against them shall not to be transferred to the Special Tribunal and their trial shall continue in the ordinary criminal courts.

2. A flour mill being run by the writ petitioners was inspected by the staff of the Electricity Department and some others on 24.6.1999 and it was discovered that theft of electrical energy was being committed. An FIR F was lodged and after investigation charge-sheet under Section 39 and 44 of Indian Electricity Act, 1910 was submitted on 6.10.1999. The learned IIIrd Metropolitan Magistrate, Hyderabad took cognizance of the offence and proceeded with the trial of the writ petitioners wherein four prosecution witnesses were examined. During the pendency of the case the State of G Andhra Pradesh introduced certain amendments to Indian Electricity Act, 1910 by Act No. 35 of 2000 which is known as Indian Electricity (Andhra Pradesh Amendment) Act, 2000 (hereinafter referred to as 'the Amending Act'). This Amending Act received the assent of the President of India and thereafter it was published in the Andhra Pradesh Gazette on 2.1.2000 H

A whereunder the case against the writ petitioners stood transferred to a Special Tribunal. It was at this stage that a writ petition was filed in the High Court praying that the amendments brought in by Andhra Pradesh Legislature to the Indian Electricity Act be declared as *ultra vires* and a direction may be issued to transfer the criminal case from the Special B Tribunal to the Court of Metropolitan Magistrate for trial in accordance with the ordinary law. The High Court disposed of the writ petition with a direction that the trial of the writ petitioner should continue before the Court of Metropolitan Magistrate. The appellant Transmission Corporation of A.P. Limited was not a party to the writ petition but it has preferred the present appeal by special leave against the judgment of the High Court. C

3. In order to appreciate the controversy raised, it is necessary to reproduce the relevant provisions of Indian Electricity (Andhra Pradesh Amendment) Act, 2000 (hereinafter referred to as 'the Amendment Act') which are as under:

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"2. In the Indian Electricity Act, 1910, as in force in the State of Andhra Pradesh (hereinafter referred to as the Principal Act) in Section 39:-

(i) for the words "imprisonment for a term which may extend E to three years, or with fine which shall not be less than one thousand rupees, or with both", the words "imprisonment for a term which may extend to five years but which shall not be less than three months and with fine which may extend to fifty thousand rupees but which shall not be less than five thousand F rupees" shall be substituted.

(ii) The following proviso shall be added namely:-

"Provided that a person on his conviction for an offence punishable under this Act shall be debarred from getting any supply of energy G for a period of two years."

49-C (1) For the purpose of providing for speedy trial, the State Government shall with the concurrence of the Chief Justice of the High Court, by notification in the official Gazette, specify for a H District or Districts, a Court of District and Sessions Judge to be

a Special Tribunal to try the offences under this Act and determine the compensation to be awarded to the Electricity utility where the compensation to be awarded is up to the value of rupees five lakhs; A

Provided that if, in the opinion of the Special Tribunal any case brought before it is a fit case to be tried by the Special Court it may, for reasons to be recorded by it, transfer the case to the Special Court for its decision in the matter. B

(2) An appeal shall lie from any judgment or order, not being interlocutory order, of the Special Tribunal, to the Special Court. Every appeal under this sub-section shall be preferred within a period of sixty days from the date of judgment or order of the special Tribunal. C

Provided..... (omitted as not relevant) D

(3) Every finding of the Special Tribunal with regard to any alleged act of theft of energy shall be conclusive proof of the fact of theft of energy and shall be binding on the person or consumer concerned. E

(4) It shall be lawful for the Special Tribunal to pass an order in any case decided by it awarding compensation in terms of money for theft of energy which shall not be less than an amount equivalent to twelve months assessed quantity of the energy committed theft of at three times of tariff rate applicable to the consumer or person as per guidelines prescribed by State Government from time to time and the amount of compensation so awarded shall be recovered as if it were a decree of a civil court: F

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Provided that the Special Tribunal shall, before passing an order under this sub-section, give to the consumer or person an opportunity of making his representation or of adducing evidence, if any, in this regard and consider every such representation and evidence. H

A (5) Any case pending before any Court or other Authority immediately before the commencement of the Indian Electricity (Andhra Pradesh Amendment) Act, 2000, as would have been within the jurisdiction of a Special Tribunal shall stand transferred to the Special Tribunal, having jurisdiction as if the cause of
B action on which such suit or proceeding is based had arisen after such commencement.

(6) .....

C (7) Notwithstanding anything contained in section 260 or section 262 of the Code of Criminal Procedure, 1973, every offence punishable under this Act, shall be tried in a summary way by the Special Tribunal and the provisions of sections 263 to 265 of the said Code shall as far as may be apply to such trial.

D *49-D.* (1) The State Government may, by notification in the Official Gazette, constitute a Special Court for the purpose of providing speedy enquiry into any alleged act of theft of energy and trial of cases and for awarding compensation to the Electricity Utility.

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(2) A special Court shall consist of a Chairman and not less than four other members to be appointed by the Government.

(3) The Chairman shall be a person who is or has been a Judge
F of a High Court and of the other four members, two shall be persons who are or have been District Judges (hereinafter referred to as Judicial Members) and the other two members, shall be persons with a Degree in Electrical Engineering and who hold or have held a post not below the rank of a Chief Engineer in a State Electricity Board or its successor entities or a post not below the
G rank of a Chief Electrical Inspector in the State Government (hereinafter referred to as Technical Members)

Provided.....(omitted as not relevant)

H (4) .....

(5) (a) Subject to the other provisions of this Act, the jurisdiction, powers and authority of the Special Court may be exercised by benches thereof, one comprising of the Chairman, a Judicial Member and a Technical Member and the other comprising of a Judicial Member and a Technical Member.

(b) Where the bench comprises of the Chairman, he shall be the Presiding Officer of such a bench and where the bench consists of two members, the Judicial Member shall be the Presiding Officer.

(c) It shall be competent for the Chairman, either suo moto or on a reference made to him to withdraw any case pending before the bench comprising of two members and dispose of the same or to transfer any case from one bench to another bench in the interest of justice.

(d) Where a case under this Act is heard by a bench consisting of two members and the members thereof are divided in opinion, the case with their opinions shall be laid before another Judicial Member or the Chairman, and that member or Chairman, as the case may be, after such hearing as he thinks fit, shall deliver his opinion, and the decision or order shall follow that opinion.

(6) .....

(7) .....

(8) .....

(9) (i) Notwithstanding anything in the Code of Civil Procedure, 1908, the Special Court may follow its own procedure which shall not be inconsistent with the principles of natural justice and fair play and subject to the other provisions of this Act while deciding the amount of compensation to be awarded to the Electricity Utility.

(ii) Notwithstanding anything contained in section 260 or section 262 of the Code of Criminal Procedure, 1973, every offence

A punishable under this Act shall be tried in a summary way by the Special Court and the provisions of the sections 263 to 265 of the said Code shall, as far as may be apply to such trial.

(10) .....

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49-E (1) The Special Court may either *suo moto* or on a complaint under section 50 of this Act, take cognizance of such cases arising out of any alleged act of theft of energy whether before or after the commencement of this Act, where the value of compensation to be awarded to the electricity utility concerned exceeds rupees five lakhs and pass such orders (including orders by way of interim directions) as it deems fit.

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Provided.....

D (2) Notwithstanding anything contained in the Code of Civil Procedure, 1908, the Code of Criminal Procedure, 1973 or the Andhra Pradesh Civil Courts Act, 1972, any case in respect of an alleged act of theft of energy under sub-section (1) shall be triable only in the special court and the decision of the Special Court shall be final.

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(3) .....

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, it shall be lawful for the Special Court to try all offences punishable under this Act.

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(5) .....

(6) .....

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(7) Every finding of the Special Court with regard to any alleged act of theft of energy shall be conclusive proof of the fact of energy and of the person or consumer who committed such theft.

H (8) .....

(9) Any case, pending before any court or other authority immediately before the constitution of a special court as would have been within the jurisdiction of such Special Court, shall stand transferred to the Special Court as if the cause of action on which such suit or proceeding is based had arisen after the constitution of the Special Court.

49-F Save as expressly provided in this Act, the provisions of the Code of Civil Procedure, 1908, the Andhra Pradesh Civil Courts Act, 1972 and the Code of Criminal Procedure, 1973 in so far as they are not inconsistent with the provisions of this Act, shall apply to the proceedings before the Special Court and for the purposes of the provisions of the said enactments, the Special Court shall be deemed to be a Civil Court, or as the case may be, a Court of Session and shall have all the powers of a Civil Court and a Court of a Session and the person conducting a prosecution before the Special Court shall be deemed to be a Public Prosecutor.

4. Two contentions were raised before the High Court. The first contention was that the Andhra Pradesh Legislature had no legislative competence to amend the Indian Electricity Act and the second contention was that the Amending Act could not have any retrospective operation, namely it could not affect the proceedings which had already commenced and were pending before the Courts. The first contention need not detain us. Entry 38 in the concurrent List of VIIth Schedule of the Constitution of India is 'Electricity'. Therefore Andhra Pradesh Legislature had the legislative competence to make law on the subject of electricity and to make amendments to Indian Electricity Act, 1910. The Amending Act has also received the assent of the President of India and therefore in view of Article 254 (2) of the Constitution, it shall prevail.

5. It is the second contention based upon retrospective operation of the Amending Act which requires serious consideration. The High Court has held that the Amending Act permits imposition of higher or more severe punishment; imposition of higher fine, direct payment of compensation and also provides for trial of the accused by a procedure which is less favourable and also deprives him of his right to file a criminal

A revision in the High Court in accordance with section 397(1) Cr. P.C. The Special Tribunal where he may be tried may transfer the case to the Special Court and in the event of conviction by the said Special Court, there is no right of appeal. The High Court accordingly held that the transfer and trial of the accused by the Special Tribunal at the stage when the Metropolitan B Magistrate had already taken cognizance of offence and recorded statement of four witnesses would offend the guarantee enshrined in Article 20(1) of the Constitution.

6. In order to examine the contentions raised at the Bar, it is necessary C to consider the real import of the guarantee enshrined in clause (1) of Article 20 of the Constitution. The inclusion of a set of Fundamental Rights in India's Constitution had its genesis in the forces that operated in the national struggle during the British rule. With the resort by the British Executive to such arbitrary acts as internments and deportations without trial and curbs on the liberty of the Press in the early decades of this D century, it became an article of faith with the leaders of the freedom movement. As the freedom struggle gathered momentum after the end of the First World War, clashes with British authorities in India became increasingly frequent and sharp and the harshness of the Executive in operating its various repressive measures strengthened the demand for a E constitutional guarantee of fundamental rights. As early as 1895, the Constitution of India Bill - described as Home Rule Bill by Miss Anie Besant - had envisaged for India a constitution, guaranteeing to every one of her free citizen freedom of expression, inviolability of one's house, right to property, equality before the law and right to personal liberty. The F Indian National Congress at its special session held in Bombay in August 1918 demanded that the new Government of India Act should include among other things, guarantees in regard to equality before the law, protection in respect of peoples life and property, freedom of speech and press, and right of association. A resolution passed at the Madras session of the Indian National Congress in 1927 categorically laid down that the G basis of the future Constitution of India must be a declaration of fundamental rights. The Nehru Committee appointed by the All Party Conference in its report (1928) incorporated a provision for the enumeration of such rights recommending their adoption as part of the future Constitution of India and one of the rights recommended by it was protection in respect of H punishment under ex-post facto laws. The Sub-committee on fundamental

rights of the constituent assembly considered the draft proposed by its members. Sri Ambedkar's draft contained a provision - No Bill of attainder or ex-post facto law shall be passed. After considering the draft of Sri K.M. Munshi and other members, the Sub-committee made its recommendation which was adopted by the constituent assembly (See The Framing of India's Constitution "A Study" by B. Shiva Rao Chapter 7). The draft proposed by Sri Ambedkar and the Constitutional advisor Sri B.N. Rao shows that the framers of our constitution while drafting Article 20 had the provisions of U.S. Constitution in their mind.

7. Section 9 of Article 1 of U.S. Constitution as adopted on July 4, 1776 provides that no Bill of attainder or ex-post facto law shall be passed and Section 10 of the same Article lays down that no State shall pass any bill of attainder or ex-post facto law. The import of this constitutional guarantee was explained two centuries ago by U.S. Supreme Court in *Calder* v. *Bull.* 1. L.Ed. 648, which has still held the field, in the following words: "(1) every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action (2) every law that aggravates a crime, or makes it greater than it was when committed (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender." Chief Justice Marshall's definition of an ex-post facto law in *Fletcher* v. *Peck,* 3 L.Ed. 162- "One which renders an act punishable in a manner in which it was not punishable when it was committed" has been followed in many cases and jurists have said that a better or more accurate definition has not been given.

8. It will be useful to briefly notice the interpretation placed on this constitutional guarantee by U.S. Supreme Court which is as under :

(1)A Statute which punishes as a crime a previous act which was innocent when committed violates constitutional guarantee. (*Calder* v. *Bull,* 3 U.S. 386, 1 L.Ed. 648; *Beazell* v. *Ohio,* 269 US 167, 70 L.Ed.216)

A (2) Legislation which aggravates the degree of the crime resulting from an act committed prior to its passage violates the Constitutional prohibition. (*Flatcher* v. *Peck,* 10 U.S. 87, 3 L.Ed. 162. *Bonie* v. *Columbia,* (1964) 378 US 347, 12 L.Ed. 2d. 894)

B (3) Law which imposes additional punishment to that prescribed when a criminal act was committed is ex post facto (*Cummings* v. *Missouri,* 71 US 277, 18 L.Ed. 356, *Lindsay* v. *Washington,* (1937) 301 US 397, 81 L.Ed 1182). The key question is whether the new law makes it possible for the accused to receive a greater C punishment, even though it is possible for him to receive the same punishment under the new law, as could have been imposed under the prior law.

(4)Legislation which in relation to that offence or its D consequences alters the situation of a party to his disadvantage or which eliminates, after the date of a criminal act, a defense available to the accused person at the time the act was committed violates constitutional guarantee (*Kring* v. *Missouri,* 107 US 221, 271. Ed. 506, *Bezell* v. *Ohio,* 269 US 167, 70 L.Ed.216).

E (5)A law which alters the legal rules of evidence so as to require less proof than the law required at the time of the commission of an offence, in order to convict the accused, can amount to an ex-post facto law within the constitutional guarantee (*Kring* v. *Missouri,* 107 US 221, 27 L.Ed. 506, *Beazell* v. *Ohio,* 269 F US 167, 70 L.Ed. 216)

(6)Constitutional prohibition does not apply to laws bringing about changes in procedure which do not alter substantial rights, even though they might in some way operate to a person's disadvantage. It does not give defendants a vested right in the G remedies and methods of procedure employed in trials for crimes, provided that any statutory procedural change does not deprive the accused of a substantial right or immunity possessed at the time of the Commission of the offence charged. (*Hept* v. *People of Utah,* 110 US 574, 28 L.Ed. 262; *Mallet* v. *North* H *Carolino,* 181 US 589, 45 L.Ed. 1015).

(7) A change in law that alters a substantial right can be ex-post facto even if the statute takes a seemingly procedural form (*Winston* v. *State,* 118 A.L.R. 719; *Miller* v. *Florida,* (1987) 482 US 423, 96 L.Ed. 2d. 351). A

The above quoted view of the legal position has also been stated in 16-A Corpus Juris Secundum Paras 409, 414, 420 and in 16 American Jurisprudence 2d paras 402, 404, 407. B

9. In United Kingdom the Parliament being the supreme, the Courts interpret the penal laws in a manner that they do not have ex post facto operation on the principle that Parliament would not pass retrospective criminal legislation. In *Waddington* v. *Miah,* [1974] 2 All E.R. 377; while examining the provisions of section 34 (1) (a) of the Immigration Act, 1971 which lays down that the Act, as from its coming into force, shall apply in relation to entrants or others arriving in the U.K. at whatever date before or after it comes into force, Lord Reid with whom all other Law Lords agreed, observed as follows: C D

"I cannot see how section 34 (1)(a) can be construed as having any reference to what any entrant may have done in this country before the Act came into force. All that it does is to subject to the provisions of the Act for the future, any one who entered in the past." E

In *R.* v. *Kirk,* [1985] 1 All E.R. 453 the Court of Justice of the European Economic Community observed as follows: F

"The principle that penal provisions may not have retrospective effect is one which is common to all the legal orders of the member states and is enshrined in Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice. G H

A Consequently the retroactivity provided for in art. 6(1) of Regulation 170/83 cannot be regarded as validating ex post facto national measures which imposed criminal penalties, at the time of the conduct at issue, if those measures were not valid.

B 10. This shows that the principle that penal provisions may not have retroactive effect is observed by member-nations of European Economic Community of which almost all the democracies of Western Europe are members.

C 11. In fact it is not a new principle but is coming down from ancient times will be clear from the following passage on the topic of legislation in "Jurisprudence — The Philosophy and Method of the Law" by Edger Bodenheimer (First Indian Reprint 1996) at page 327:

D "Another typical feature of a legislative act, as distinguished from a judicial pronouncement, was brought out in Mr. Justice Holmes's opinion in *Prentis* v. *Atlantic Coastline Co.*[1] As he pointed out in this opinion, while a "Judicial inquiry investigates, declares and enforces liabilities as they stand on present or past E facts and under laws supposed already to exist," it is an important characteristic of legislation that it "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." These passages must be understood as elucidating certain normal and typical F aspects of legislation rather than stating a *conditio sine qua non*, an essential condition, of all legislative activity. The large majority of enactments passed by legislatures take effect *ex nune*, that is, they are applied to situations and controversies that arise subsequent to the promulgation of the enactment. It is a fundamental requirement of fairness and justice that the relevant G facts underlying a legal dispute should be judged by the law which was in existence when these facts arose and not by a law which was made *post factum* (after the fact) and was therefore necessarily unknown to the parties when the transactions or events giving rise

H 1. 211 US 210, at 226

to the dispute occurred. The Greeks frowned upon *ex post facto* laws, laws which are applied retrospectively to past-fact situations[2]. The Corpus Juris Civilis of Justinian proclaimed a strong presumption against the retrospective application of laws[3]. Bracton introduced the principle into English law[4]. Coke and Blackstone gave currency to it[5], and the principle is recognised today in England as a basic rule of statutory construction. In the United States, *ex post facto* laws in criminal cases and retrospective state laws impairing the obligation of contracts are expressly forbidden by the terms of the federal Constitution; in other types of situations, a retroactive legislative infringement of vested rights may present a problem of constitutional validity under the due process clause of the Constitution."

Article 11(2) of the Declaration of Human Rights of the United Nations lays down as under:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms reads as under:

"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal

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2. See Paul Vinogradoff, Outlines of Historical Jurisprudence, II, 139-140; Elmer E. Smead, "The Rule Against Retrospective Legislation; A Basic Principle of Jurisprudence, "20 Minnesota Law Review 775 (1936)
3. Code 1, 14, 7 "It is certain that the laws and constitutions regulate future matters, and have no reference to such as are past, unless express provision is made for past time, and for matters which are pending "S.P. Scott, The Civil Law (Cincinnati, 1932)
4. Henry De Bracton, De Legibus et Consuetudinibus Angaliae, ed. G.S. Woodbine.
5. Edward Coke, The Institutes 4th ed. (London, 1671), P. 292; William Blackstone Commentaries on the Laws of England ed. WC Jones (San Francisto, 1916), Vol. 1, sec. 46.

A offence under national or international law at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of
B any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

12. India is a member of the United Nations Organization and is also
C a signatory to the aforesaid Conventions. In *Peoples Union for Civil Liberty* v. *Union of India*, [1997] 1 SCC 301 the Court recognised the principle that it is almost an accepted proposition of law that rules of customary international Law, shall be deemed to be incorporated in the domestic law. For holding this the Court relied upon the observation made by Sikri, C.J. in *Keshava Nanda Bharati* [1973] 4 SCC 225 (at page 333)
D that in view of Article 51 of the directive principles the Court must interpret the language of the constitution if not intractible in the light of the United Nation Charter and the solemn declaration subscribed to by India. The court also took notice of similar observation made by Khanna, J. in *A.D.M. Jabalpur* [1976] 2 SCC 521 (at page 754) that if two
E constructions of the Municipal Law are possible, the court should lean in favour of adopting such construction as would make the provisions of the Municipal Law to be in harmony with international law or treaty obligations. Applying this principle Article 21 of the Constitution was interpreted in conformity with the International Law. On the same analogy Article 20
F may have to be interpreted in conformity with United Nations Charter and Conventions.

13. A literal interpretation of sub-clause (1) of Article 20 would mean that the protection available is only against conviction for an act or
G omission which was not an offence under the law in force when the same was committed and against infliction of a greater penalty than what was provided under the law in force when the offence was committed. Constitution being a living organic document needs to be construed in a broad and liberal sense. A construction most beneficial to the widest
H possible amplitude of its powers may have to be adopted. Of all the

instruments, the constitution has the greatest claim to be construed broadly and liberally (See *M/s. Good Year India Ltd.* v. *State of Haryana,* AIR 1990 SC 781 at 791 and *Synthetics and Chemicals Ltd.* v. *State of U.P.,* AIR 1990 SC 1927 at 195). The following observation of Vivian Bose, J. in *State of West Bengal* v. *Anwar Ali Sarkar,* AIR 1952 SC 75 (pgs. 85 and 86) though given immediately after enforcement of the Constitution has become more relevant now.

> "I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull lifeless words static and hinebound as in some mummified manuscript, but living flames intended to give life to great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present. The constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs.....
> Doing that, what is the history of these provisions? They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of the sovereign democratic republic as seen through Indian eyes. There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in Ordinance promulgated in haste because of what was then felt to be the urgent necessities of the moment.

14. Concerned as it is with the liberty of a person a liberal construction has to be given to the language used in clause (1) of Article 20 and not a narrow one. The interpretation given to Section 9 of Article 1 of American Constitution by U.S. Supreme Court may also be kept in mind for the purpose of understanding the true content and scope of guarantee enshrined in sub-clause (1) of Article 20 of Constitution of India.

A 15. Whether constitutional guarantee enshrined in clause (1) of Article 20 is confined only to prohibition against conviction for any offence except for violation of law in force at the time of the commission of the act charged as an offence and subjection to a penalty greater than that which might have been inflicted under the law in force at the time of B commission of offence or it also prohibits legislation which aggravates the degree of crime or makes it possible for the accused to receive greater punishment even though it is also possible for him to receive the same punishment under the new law as could have been imposed under the prior law or deprives the accused of any substantial right or immunity possessed C at the time of the commission of the offence charged is a moot point to be debated.

16. The effect of the Amending Act on the right of the accused to prefer an appeal or revision against an order of conviction may be D examined first. Normally in view of Section 49-C(1) the offences under the Act where the compensation to be awarded is upto the value of Rs. Five lakhs have to be tried by the Special Tribunal which is a Court of District and Sessions Judge. The Special Tribunal may, if it is of the opinion that it is a fit case to be tried by the Special Court and for reasons to be recorded, transfer the case to the Special Court. Sub- E section (2) of Section 49-C provides for an appeal against any judgment or order, not being an interlocutory order of the Special Tribunal, to the Special Court. Sub-section (2) of section 49-E attaches finality to the decision of the Special Court where the case is of the nature mentioned in Sub-section (1). Section 49-F lays down that the provisions of Code F of Criminal Procedure, 1973, in so far as they are not inconsistent with the provisions of the Amending Act shall apply to the proceedings before the Special Court and for the purpose of provisions of the said enactment the Special Court shall be deemed to be a Court of Session and have all the powers of Court of Session. Section 374(2) of the Code gives a right to G a person convicted on a trial held by a Sessions Judge to prefer an appeal to the High Court and in view of Section 26(a)(ii) of the Code the Court of Sessions means a Sessions Judge. Therefore it follows that except for such category of cases which are covered by section 49-E(2) of the Amending Act, there would be a right of appeal to the High Court against H a conviction recorded by the Special Court. Similarly in a case where

conviction has been recorded by the Special Tribunal and the appeal has been heard by the Special Court under sub-section (2) of section 49-C, a revision would lie to the High Court under section 401 of the Code. A

17. The prescription of summary procedure for trial of offences has been seriously challenged. Sub-section (7) of Section 49-C provides that notwithstanding anything contained in sections 260 or 262 of the Code of Criminal Procedure the trial of every offence under the Act is to be done in a summary way and the provisions of sections 263 to 265 of the Code shall, as far as may be, apply to such trials. Chapter XXI of the Code of Criminal Procedure deals with summary trials. In view of the mandate of clause (i) of sub-section (1) of section 260 of the Code an offence which is punishable with a sentence exceeding two years cannot be tried in a summary way. Similarly, in view of sub-section (2) of section 262 of the Code a sentence of imprisonment for a term exceeding three months cannot be passed in a summary trial. In fact sub-section (2) of section 260 of the Code provides that when in the course of summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witness who may have already been examined and proceed to rehear the case in the manner provided by the Code. A Magistrate, while trying a case summarily, is required to record only the substance of the evidence and a brief statement of reasons for the finding has to be mentioned in the judgment in view of Section 264 of the Code. In summary trials, there is a clear departure from the procedure prescribed for trial of other category of cases as they are primarily meant for petty or small cases where a sentence exceeding three months cannot be imposed. But Section 2 of the Amending Act by which section 39 of the Electricity Act, 1910 has been amended has enhanced the sentence which may extend to five years R.I. but shall not be less than three months and a fine which may extend to Rs. 50,000 but shall not be less than Rs. 5,000. The proviso imposes a further disability upon the person convicted in the sense that he shall be debarred from getting supply of energy for a period of two years. The trial of all such cases is now mandatorily to be conducted as a summary trial and provisions of sections 263 to 265 of Code of Criminal Procedure alone have been made applicable. The provision of section 354 of the Code relating to language and content of judgment where the Court has to mention the point B C D E F G H

A or points for determination, the decision thereon and the reasons for the decision, is in sharp contrast to section 264 of the Code. If the complete statement of witnesses is not recorded in the manner deposed to by the witnesses and only a substance of the evidence is recorded the appellate court will not be in a position to weigh the evidence properly and come B to an independent conclusion. These provisions where summary trial has been provided, therefore, cause serious prejudice and substantial injury to the accused.

18. The main problem will arise where the Special Court itself tries C the case of the type described in sub-section (1) of section 49-E of the Amended Act in view of the bar created by sub-section (2) of the said section whereby finality is attached to the decision of the Special Court. The appeal is the right of entering a superior Court and invoking its aid and interposition to redress an error of the court below. Though procedure D does surround an appeal the central idea is a right. The right of appeal has been recognised by judicial decisions as a right which vests in a suitor at the time of institution of original proceedings. S.R. Das, CJ. in *Garikapati* v. *Subbiah Choudhary,* AIR (1957) SC 540, following the decision of the Privy Council in *Colonial Sugar Refining Company* v. E *Irving,* [1905] AC 369 and on a review of earlier authorities deduced the following five propositions regarding an appeal, *viz.* - (i) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding; (ii) the right of appeal is not a mere matter of procedure but is a substantive right; (iii) the institution of the suit carries F with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the carrier of the suit; (iv) the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is G pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of filing of appeal; (v) this vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise. Therefore H if the right of appeal is a substantive right which is really a step in series

of proceedings all connected by an intrinsic unity and is to be regarded as one legal proceeding and further being a vested right such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences then sub-section (2) of Section 49-E insofar as it makes the decisions of the Special Court final and also makes no provision of appeal clearly causes prejudice and substantial injury to the accused.

19. Shri Shanti Bhushan learned senior counsel for the appellant has submitted that the mere fact that a right of appeal is taken away does not mean that an accused is rendered remediless, as he can always challenge the decision of the Special Court by preferring a writ petition under Article 226 of the Constitution before the High Court. In our opinion the contention raised is wholly misconceived. In proceedings under Article 226, the High Court cannot sit as a court of appeal over the findings recorded by the Special Court to reappreciate the evidence for itself or to correct an error of fact (not going to jurisdiction) however apparent it might be on the ground that the evidence on which it was based was not satisfactory or sufficient, particularly when the finding of the Special Court is final under the Statute. The High Court cannot interfere with the findings of fact based on evidence and substitute its own independent findings. The only inquiry which the High Court can make under Article 226 is whether there was any evidence at all, which if believed, would sustain the charge before the Special Court or the finding arrived at by it or whether the Special Court acted upon irrelevant considerations neglecting to take account of relevant factors or whether the decision is so unreasonable that no reasonable person would have made such a decision. The proceedings under Article 226 are not a substitute for an appeal. More so, as under section 386 of the Code there is no embargo on the power of the appellate court. In an appeal from a conviction it may reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court of competent jurisdiction. The conferment of power of review upon the Special Court under Section 49-G is again no substitute for an appeal as such a power is circumscribed by the language used in this section and can be granted on a very limited grounds. Therefore, sub-section (2) of section 49-E of the Amending Act causes prejudice and serious injury to the accused.

A 20. The High Court in the impugned judgment has held that though in view of language used in sub-section (5) of section 49-C all pending cases may be transferred, but no right of appeal or revision can be taken away, nor an accused can be deprived of a better procedure in view of the provisions of Articles 20 and 21 of the Constitution. Accordingly it held
B that sub-section (5) of section 49-C should be read down whereunder pending cases of the nature before the Metropolitan Court cannot be transferred to the Special Tribunal and the writ petitioner should be tried in the regular criminal Courts in terms of the provisions of Code of Criminal Procedure.

C

21. However, as the interpretation of Article 20 as to its scope and ambit is involved in these proceedings, we refer the question formulated in para 15 of this order to a larger bench for consideration.

R.P. Referred to the Larger Bench.