Before Paramjeet Singh, J.

GURDARSHAN SINGH—*Petitioner*

versus

STATE OF PUNJAB AND ANOTHER—*Respondents*

Crl.W.P. No. 1971 of 2011

27th September, 2012

Constitution of India, 1950 - Art.226 - Juvenile Justice Act, 2000 - Ss. 7A, 15, 16 & 20 - Habeas Corpus - Petitioner convicted by Sessions Judge U/s 366 and 376 I.P.C.- Plea of juvenility not raised during trial - In appeal sentence reduced to 3 years - Special Leave Petition not preferred - Petitioner prayed for issuance of writ of habeas corpus claiming to be juvenile at the time of occurrence - Benefit of juvenility as per Amending Act, 2006 sought - Juvenile Justice Board reported that petitioner was juvenile on date of occurrence - Held, that as petitioner was a juvenile on the date of occurrence - U/s 7A plea of juvenility can be raised at any point-trial was unjust, unconstitutional and erroneous - Post conviction relief is a vital part of criminal justice system specifically when constitutional violation has occurred at the trial - Sentence awarded to petitioner quashed.

Held, that being a juvenile, the trial of the petitioner should have been under the Juvenile Justice (Care and Protection of Children) Act, 2000, but he was tried under the law as applicable to adult accused. The expression 'law in force' in Article 20 refers to the law factually in operation and applicable to a particular case at the time when offence was committed and expression 'penalty greater than that which might have been inflicted' in the Article 20 means a person may be subjected to only those penalties which are prescribed by the law which is in force at the time when he commits offence for which he is being punished.

(Para 17)

Further held, that the word 'law' has been used in the sense of law enacted by the legislature. Hence expression 'procedure established by

law' in this Article means the procedure prescribed by enacted law of the State. In this case petitioner has been convicted without following the enacted law i.e. "the Act" as applicable to juveniles. Hence, the criminal proceedings against the petitioner were contrary to Articles 20 and 21 of the Constitution as well as against the provisions of "the Act".

(Para 17)

Further held, that Reading of the Section 7A makes it clear that the claim of juvenility can be raised before any court at any stage, even after final disposal of the case and sets out the procedure which the court is required to adopt, when such claim of juvenility is raised. Apart from the aforesaid provisions of the Act as amended, and the Rule 98 of the Rules, in particular, has to be read along with Section 20 of the Act as amended by the Amending Act, 2006 which provides that even after disposal of cases of juveniles in conflict with law, the State Government or the Board can, either suo motu or on an application made for the purpose, review the case of juvenile, determine the juvenility and pass an appropriate order under Section 64 of the Act for immediate release of the juvenile whose period of detention has exceeded the maximum period provided in Section 15 of the Act i.e. 3 years.

(Para 22)

Further held, that In my considered opinion, in the light of the aforesaid legal position, the petitioner is liable to be and is held to be a juvenile as on the date of commission of offence for which he has been convicted and is to be governed by the provisions of the Act of 2000 as amended in 2006. So, the trial of the petitioner was against the provisions of the Act and was unjust, unconstitutional and erroneous which has caused prejudice to the rights of the petitioner.

(Para 25)

Further held, that to my mind, post-conviction relief is a vital part of criminal justice system specifically when constitutional violation has occurred at the trial for want of effective assistance of the counsel for the petitioner, failing to raise plea of juvenility, failure on part of the prosecutor and the investigating agency to point out the age of the petitioner and as such it also escaped the notice of trial Court and the appellate Court that he was of about 12 years only at the relevant point of time. The Courts administering

criminal justice cannot turn blind eye to the ground realities, if, Criminal Court is to be an effective instrument in dispensing justice then Presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in trial.

(Para 21)

Further held, that in the Code of Criminal Procedure, there is no provision under which orders could be recalled or reviewed. In this situation, habeas corpus proceedings could be an adequate and appropriate remedy after the exhaustion of ordinary criminal process. In the present case there are glaring errors of law, and violation of the constitutional provisions i.e. trial not being in accordance with the procedure established by law and there is error in proceedings of trial i.e. non following the provisions of "the Act". It is correct that post-conviction relief is not a substitute for statutory appeal or special leave to appeal etc. Since, there is no provision of review in the Code of Criminal Procedure after order is passed in appeal, revision, etc. the error if committed during the trial certainly prejudices the rights of the petitioner. As such, there is need of provision so that such error can be corrected as the trial of the petitioner was without jurisdiction and sentence imposed was not authorized by law. The conviction of the petitioner under the ordinary criminal law has potentially affected the duration of sentence as under "the Act" maximum sentence can be awarded is three years only.

(Para 28)

Further held, that the procedural irregularity and error in trial of the petitioner go to the heart of the case, so, in the interest of justice, the only post-conviction efficacious remedy can be by way of habeas corpus petition and in the opinion of this Court, if there are violation of the fundamental rights like Article 21 as is the present case then the habeas corpus petition is maintainable to rectify the error of law even after the exhaustion of the ordinary criminal justice process.

(Para 29)

Deepak Bhardwaj, Advocate, *for the petitioner.*

J.S. Bhullar, AAG, Punjab.

PARAMJEET SINGH, J.

The Prayer in Criminal Writ Petition:

(1) The instant criminal writ petition has been filed by the petitioner under Article 226 of the Constitution of India praying for issuance of an appropriate writ in the nature of habeas corpus directing the respondents to release him from District Jail, Roopnagar forthwith as the detention is contrary to the fundamental rights guaranteed under Article 21 of the Constitution of India and the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 'the Act').

The facts :

(2) The matrix of this case, bereft of unnecessary details is that petitioner along with Balkar Singh and Sewa Singh was named in FIR No 04 dated 07.01.1990 under Sections 376/354/366/34 IPC registered at Police Station Kharar.

(3) The Investigating Officer arrested the accused persons, namely, Balkar Singh, Sewa Singh and Gurdarshan Singh (petitioner herein). After trial, the learned Sessions Judge, Roopnagar, vide order dated 23.10.1990 held all the three accused to be guilty of various offences punishable under Sections 376, 366, 354 read with Section 34 IPC and sentenced each of them to suffer various types of imprisonments under different Sections. Petitioner was sentenced under Section 366 IPC for 2 years rigorous imprisonment and to pay a fine of Rs. 500/-, in default of payment of fine to further undergo RI for six months and also under Section 376 IPC to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 1000/-, in default of payment of fine to further undergo RI for one year.

(4) Against the abovesaid judgment, all the three accused filed an appeal before this Court. This Court, by judgment dated 11.01.2008, allowed the appeal qua Balkar Singh and Sewa Singh and acquitted them, however dismissed the appeal qua petitioner but reduced his sentence from 5 years to 3 years.

(5) Learned counsel for the petitioner states that no special leave petition was preferred by the petitioner in the Hon'ble Supreme Court of India. Hence, above judgment of this Court has become final.

Contentions of the Parties

(6) I have heard the learned counsel for the petitioner and the learned counsel for the State.

(7) The learned counsel for the petitioner contends that the petitioner was juvenile at the time of the alleged offence and therefore, he could have been tried according to provisions of "the Act" and consequently, only by the Juvenile Justice Board (in short 'the Board').

(8) The learned counsel for the petitioner further contends that the petitioner had not completed 18 years of age as on the date of commission of the offence and even on the date of FIR i.e. 07.01.1990, though he had completed 18 years as on 01.04.2001 i.e. the date of implementation of the Act. According to Amending Act, 2006 the benefit of juvenility should be extended to the petitioner. Further contended that the petitioner is entitled to get the benefit of the amended Act even at this stage after his conviction and when sentence order has become final. Learned counsel for the petitioner relied upon the judgments of the Hon'ble Supreme Court in the cases of **Hari Ram *versus* State of Rajasthan and Others (1),** and **Dharambir *versus* State (NCT of Delhi) and another (2),** and contended that legal position has been settled in the above said judgments, whereby Hon'ble Supreme Court gave effect to the Proviso and the Explanation to Sections 20 and 7A of the Act which were introduced by the above said Amending Act, and made the provisions of the Act applicable with retrospective effect.

(9) Learned State counsel has vehemently opposed the contentions raised by the petitioner and submitted that once the order of conviction and sentence has become final, this Court has no jurisdiction under Article 226 of the Constitution of India to modify the order of sentence. The petitioner should have filed Special Leave Petition against the order of conviction and sentence and could have raised the issue of juvenility there. As it has not been done, at this stage, petitioner cannot be treated as juvenile. It is further contended that the petitioner never raised the ground of juvenility before the Trial Court or before this Court in appeal. So, the petition deserves to be dismissed.

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(1) (2009)13 SCC 211

(2) 2010(2) RCR (Crl.) 773

(10) I have considered the rival contentions of the learned counsel for the parties.

(11) In this petition, an interesting issue of post-conviction remedy and consequent challenge to the overall legality of the criminal trial has arisen where the trial ultimately resulted into conviction and sentence of the petitioner which has become final even in appeal.

(12) In the light of the facts stated above, the following substantial questions of law arise in the present petition:

(i) Whether the trial against the petitioner was against the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 as amended upto date and as such, the conviction and sentence awarded to the petitioner is unjust, unconstitutional and erroneous?

(ii) Whether the conviction and sentence of a juvenile can be set aside in habeas corpus writ jurisdiction, more so when it has become final in the ordinary criminal justice system, and can it be treated as post-conviction remedy, if so to what extent relief can be granted ?

Q.No.1: Whether the trial against the petitioner was against the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 as amended upto date and as such, the conviction and sentence awarded to the petitioner is unjust, unconstitutional and erroneous?

(13) In this case, the petitioner was convicted and sentenced after his trial as an adult criminal and the procedure as applicable to ordinary criminal proceedings, during trial, was followed. The conviction became final after decision of appeal by this court as judgment of conviction and order of sentence was not challenged in the Hon'ble Supreme Court.

(14) Now petitioner has raised an issue that he was juvenile at the time of commission of offence. He has claimed that his date of birth is 12.05.1977. On discovering the evidence of juvenility, issue of juvenile has

been raised for the first time before this Court in collateral proceedings by way of habeas corpus, which was never raised before the Trial Court or the Appellate Court to claim the benefit of juvenility. Perusal of the matriculation certificate (Annexure P/2) shows that the petitioner was born on 12.05.1977. This Court vide order dated 02.04.2012 sought report from the "Juvenile Justice Board" regarding juvenility of the petitioner. The Principal Magistrate, Juvenile Justice Board, Roopnagar vide his report dated 25.07.2012 has submitted that offence was committed on 06.01.1990 and FIR was registered on 07.01.1990. At the time of commission of the offence, the petitioner was under 18 years and was a juvenile. The Principal Magistrate of the Board has considered the matriculation certificate for determining the age of the petitioner as per Rule 12 (3) of Juvenile Justice (Care and Protection of Children) Rules, 2007, (in short 'the Rules'). Rule 12(3) stipulates that in every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining the documents specified in clause (a) namely, the matriculation or equivalent certificates, if available. On this basis, the present criminal writ petition has been filed to set aside the sentence of the petitioner under the constitutional provisions.

(15) A perusal of report dated 25.07.2012 of the Principal Magistrate of the "Board" makes it clear that on the date of the occurrence, the age of the petitioner was 12 years 07 months and 24 days. The Act came into effect from 01.04.2001 and defines "juvenile" as "one who has not completed 18 years of age". As per the old Act of 1986, the age was 16 years which has now been substituted as 18 years.

(16) I have considered the matriculation certificate as well as the report of the Principal Magistrate of the Board. In any eventuality from the documents on record, it is clear that the petitioner was juvenile at the time of commission of offence. Therefore, the petitioner's trial should have been separated from co-accused. The petitioner could have been tried under the Act. Being juvenile in conflict with law petitioner was entitled to get the benefit of provisions of the old Act as well as, Sections 2(l), 7A, 20 and 64 of the Act. Articles 20 and 21 of the Constitution of India specifically provide for protection in respect of conviction for offences and protection

of life and personal liberty. For facility of reference, Articles 20 and 21 of the Constitution of India are reproduced as under:

> ***20. Protection in respect of conviction for offences*** *– (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.*
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> *(2) No person shall be prosecuted and punished for the same offence more than once.*
>
> *(3) No person accused of any offence shall be compelled to be a witness against himself.*
>
> ***21. Protection of life and personal liberty*** *- No person shall be deprived of his life or personal liberty except according to procedure established by law."*

(17) Being a juvenile, the trial of the petitioner should have been under the Juvenile Justice (Care and Protection of Children) Act, 2000, but he was tried under the law as applicable to adult accused. The expression 'law in force' in Article 20 refers to the law factually in operation and applicable to a particular case at the time when offence was committed and expression 'penalty greater than that which might have been inflicted' in the Article 20 means a person may be subjected to only those penalties which are prescribed by the law which is in force at the time when he commits offence for which he is being punished. In **Ravinder Singh *versus* State of Himachal Pradesh (3),** the Hon'ble Supreme Court observed that it is trite law that the sentence imposable on the date of commission of offence has to determine the sentence imposable on completion of trial. This position is clear even on bare reading of Article 20(1) of the Constitution of India. In the Article 21 words 'except according to procedure established by law' are very significant. The word 'law' has been used in the sense of law enacted by the legislature. Hence expression 'procedure established by law' in this Article means the procedure prescribed by enacted law of the State.

(3) AIR 2010 SC 199

In this case petitioner has been convicted without following the enacted law i.e. "the Act" as applicable to juveniles. Hence, the criminal proceedings against the petitioner were contrary to Articles 20 and 21 of the Constitution as well as against the provisions of "the Act".

(18) Non-pleading juvenility issue resulted in erroneous conviction of the petitioner for the offence under Sections 366 and 376 IPC and sentence to undergo RI for 5 years by the Trial Court, which was modified by this Court in appeal vide its impugned order dated 11.01.2008 to RI for 3 years. The petitioner did not raise the issue of his juvenility in appeal before this Court nor did he brought any evidence with regard to his age on the date of commission of offence. So, the benefit of the Act which should have accrued to him due to his age was not considered by the Courts. From the materials placed on this paper book, the petitioner has substantiated that he was a juvenile as per the Act and he could have been tried only by the Board. In this situation, the matter would have been referred before the "Board" for *de novo* trial. The proceedings against the petitioner started on the registration of the FIR i.e. with effect from 07.01.1990 and during the pendency of appeal before this Court, the Act was amended. The petitioner was not properly advised and was given ineffective assistance by his counsel in Trial Court, as well as in the Appellate Court. The prosecutor and investigating agency and the Court trying the petitioner failed to take note of the age of the petitioner which resulted into failure of criminal justice delivery system and led the Court to pass erroneous conviction and sentence by following the procedure established by law under the ordinary criminal process. The petitioner was entitled to get the benefit of juvenility under the Old as well as the Act. When the Act (i.e. 2000 Act) came into force w.e.f. 01.04.2001, the petitioner had already completed the age of 18 years. On that date, he was 23 years 10 months and 19 days of age. It is relevant to point out that the applicability of the Act was clarified by Amending Act 33/2006 which provided that the benefit of juvenility shall be extended even to juveniles who had completed the age of 18 years on 01.04.2001 and the amended Act shall have retrospective effect. This issue has been decided by the Hon'ble Supreme Court in ***Hari Ram's case (supra) and Dharamvir's case (supra).***

(19) The case of the petitioner is squarely covered by the law laid down in the case of **Hari Ram (supra) and Amit Singh *versus* State of Maharashtra and another (4),** whereby the Hon'ble Supreme Court has elaborately considered the question regarding applicability of the Act. The Hon'ble Supreme Court considered the decision of the Constitution Bench in the case of **Pratap Singh *versus* State of Jharkhand & Anr. (5),** wherein the Hon'ble Supreme Court formulated two points for consideration :

(a) Whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as juvenile offender or the date when he is produced in the Court/Competent Authority?

(b) Whether the Act of 2000 will be applicable in the case a proceeding is initiated under the 1986 Act and pending when the Act of 2000 was enforced with effect from 01.04.2001?

(20) The Constitution Bench of the Hon'ble Supreme Court in the above case held that the benefit of juvenility cannot be extended to the person who has completed the 18 years of age as on 01.04.2001 i.e. the date of enforcement of the Act. After the judgment of the Hon'ble Supreme Court, the Legislature amended the Act and added Proviso and Explanation to Section 20 to clarify the position with regard to the applicability of the Act to the cases pending on 01.04.2001, where a juvenile, who was below 18 years of age at the time of commission of the offence, was involved. The explanation to Section 20 added in 2006 makes it crystal clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2 of Section 20 of the Act, even if juvenile ceased to be a juvenile on or before 01.04.2001, when the Act came into force and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. Section 20 of the Act enables the Court to consider and determine the juvenility of a person even after conviction by any court and also empowers the court, while maintaining

(4) 2011(3) RCR (Criminal) 859
(5) (2005) 3 SCC 551

the conviction, to set aside the sentence imposed and forward the case to the Board concerned for passing sentence in accordance with the provisions of the Act.

(21) After the judgment of the Constitution Bench in ***Pratap Singh (supra),*** the Hon'ble Supreme Court in the case of ***Hari Ram (supra,) Dharambir (supra)*** and ***Amit Singh (supra)*** considered the above questions of law in the light of the provisions of the Amending Act No.33 of 2006. The amended Act substituted Section 2(l) to define a "juvenile in conflict with law" as a juvenile who is alleged to have committed an offence and has not completed 18 years of age as on the date of commission of such offence. By way of Amending Act No. 33/2006, Section 7A was inserted which reads as follows :-

> *"7A.* ***Procedure to be followed when claim of juvenility is raised before any court.*** *(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:*
>
> *Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.*
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> *(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."*

(22) Reading of the Section 7A makes it clear that the claim of juvenility can be raised before any court at any stage, even after final disposal of the case and sets out the procedure which the court is required to adopt, when such claim of juvenility is raised. Apart from the aforesaid provisions of the Act as amended, and the Rule 98 of the Rules, in particular, has to be read along with Section 20 of the Act as amended by the Amending Act, 2006 which provides that even after disposal of cases of juveniles in conflict with law, the State Government or the Board can, either suo motu or on an application made for the purpose, review the case of juvenile, determine the juvenility and pass an appropriate order under Section 64 of the Act for immediate release of the juvenile whose period of detention has exceeded the maximum period provided in Section 15 of the Act i.e. 3 years. All the above relevant provisions including the amended provisions of the Act and the Rules have been elaborately considered by the Hon'ble Supreme Court in ***Hari Ram (supra)*** and thereafter in ***Dharambir (supra) and Amit Singh*** (supra).

(23) In the present case, as per the report of the Principal Magistrate of the Board as well as the matriculation certificate, the age of the petitioner on 06.01.1990 i.e. the date of commission of offence was 12 years 7 months and 24 days and the correctness of the report of the Board and the certificate has not been questioned by the State. Therefore, the parties have accepted the correctness of the age determined by the Board.

(24) In ***Amit Singh (supra)***, a writ petition (criminal) under Article 32 of the Constitution of India was filed before the Hon'ble Supreme Court after the special leave petition filed by the petitioner (juvenile) therein was dismissed. The issue of juvenility was pressed for the first time before the Hon'ble Supreme Court under Article 32 of the Constitution. The Hon'ble Supreme Court considered the amended provisions of Section 7A and 20 of the Act and it was directed that since the petitioner had completed the maximum sentence, which could have been imposed upon him, he be released forthwith.

(25) In my considered opinion, in the light of the aforesaid legal position, the petitioner is liable to be and is held to be a juvenile as on the date of commission of offence for which he has been convicted and is to

be governed by the provisions of the Act of 2000 as amended in 2006. So, the trial of the petitioner was against the provisions of the Act and was unjust, unconstitutional and erroneous which has caused prejudice to the rights of the petitioner.

Q. No.2: Whether the conviction and sentence of a juvenile can be set aside in habeas corpus writ jurisdiction, more so when it has become final in the ordinary criminal justice system, and can it be treated as post-conviction remedy, if so to what extent relief can be granted?

(26) The petitioner has prayed for post-conviction relief by way of constitutional remedy of habeas corpus. Habeas Corpus is a constitutional privilege to provide prompt and efficacious remedy for whatever society and individuals deem to be intolerable restraints. Post-conviction remedy is considered as redheaded step child of the legal system. Habeas Corpus is a safeguard against unjust, unconstitutional and erroneous confinements including sentence. In the present case, equity is strongly in favour of the petitioner as his conviction and sentence is the result of extreme error in following the procedure established by law. In the earlier question, I have held that the petitioner was juvenile, he could only have been tried by "the Board" as per provisions of "the Act", but he was tried under the ordinary criminal justice procedure and convicted and sentenced. Now the vexed question is whether fundamental right can be violated by a judicial decision or order. Such a vexed question came up before a 7- Judges Bench of the Hon'ble Supreme Court in **A.R.Antulay *versus* R.S. Nayak and another (6).** Para Nos. 38, 40, 41, 43, 57, 61, 62, 80 to 83 and144 relevant in the present case are reproduced as under:-

> *"38. While applying the ratio to the facts of the present controversy, it has to be borne in mind that Section 7(l) of the 1952 Act creates a condition which is sine qua non for the trial of offenders under Section 6(l) of that Act. In this connection, the offences specified under Section 6(l) of the 1952 Act are those punishable under Sections 161, 162, 163, 164 and 165A of the Penal Code and Section 5 of the*

(6) AIR 1988 SC 1531

1947 Act. Therefore, the order of this Court transferring the cases to the High Court on 16th Feb. 1984, was not authorised by law. This Court, by its directions could not confer jurisdiction on the High Court of Bombay to try any case when it did not possess such jurisdiction under the scheme of the 1952 Act. It is true that in the first judgment in A.R. Antulay v. Ramdas Sriniwas Nayak, (1984) 2 SCR 914. The arguments, however were not advanced and it does not appear that this aspect with its ramifications was present in the mind of the Court while giving the impugned directions.

40. *The question of validity, however, is important in that the want of jurisdiction can be established solely by a superior Court and that, in practice, no decision can be impeached collaterally by any inferior Court. But the superior Court can always correct its own error brought to its notice either by way of petition or ex debito justitiae. See Rubinstein's Jurisdiction and Illegality' (supra).*

41. *In the aforesaid view of the matter and the principle reiterated, it is manifest that the appellant has not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of Article 21 of the Constitution. That is violative of Articles 14 and 19 of the Constitution also, as is evident from the observations of the 7 Judge Bench judgment in Anwar Ali Sarkar's case (supra) where this Court found that even for a criminal who was alleged to have committed an offence, a special trial would be per se illegal because it will deprive the accused of his substantial and valuable privileges of defence which, others similarly charged, were able to claim. As Justice Vivian Bose observed in the said decision at page 366 of the report (SCR) : (at P. 104 of AIR) it matters not whether it was done in good faith, whether it was done for the convenience of Government, whether the process could be scientifically classified and labelled, or whether it was an experiment for speedier trial made for the good of*

society at large. Justice Bose emphasised that it matters not how lofty and laudable the motives were. The question which must be examined is, can fair-minded, reasonable, unbiased and resolute men regard that with equanimity and call it reasonable, just and fair, regard it as equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which are obtained in India today. Judged by that view the singling out of the appellant in this case for a speedier trial by the High Court for an offence of which the High Court had no jurisdiction to try under the Act of 1952 was, in our opinion, unwarranted, unprecedented and the directions given by this Court for the said purpose, were not warranted. If that is the position, when that fact is brought to our notice we must remedy the situation. In rectifying the error, no procedural inhibitions should debar this Court because no person should suffer by reason of any mistake of the Court. The Court, as is manifest, gave its directions on 16th February, 1984. Here no rule of res judicata would apply to prevent this Court from entertaining the grievance and giving appropriate directions. In this connection, reference may be made to the decision of the Gujarat High Court in ***Soni Vrajlal Jethalal v. Soni Jadayji Govindji AIR 1972 Guj 148*** *where D. A. Desai, J. speaking for the Gujarat High Court observed that no act of the court or irregularity can come in, the way of justice being done and one of the highest and the first duty of all Courts is to take care that the act of the Court does no injury to the suitors.*

43. *The principle that the size of the Bench - whether it is comprised of two or three or more Judges - does not matter, was enunciated in Young v. Bristol Aeroplane Co. Ltd. (supra) and followed by Justice Chinnappa Reddy in* ***Javed Ahmed*** *Abdul Hamid Pawala v. State of Maharashtra, (1985) 2* ***SCR 8*** *where it has been held that a Division Bench of three Judges should not overrule a Division Bench of two Judges, has not been followed by our Courts.*

According to well-settled law and various decisions of this Court, it is also well settled that a Full Bench or a Constitution Bench decision as in Anwar Ali Sarkar's case (supra) was binding on the Constitution Bench because it was a Bench of 7 Judges.

57. *In aid of the submission that procedure for trial evolved in derogation of the right guaranteed under Article 21 of the Constitution would be bad, reliance was placed on* ***Attorney General of India v. Lachma Devi, (1985) 2 Scale 144.*** *In aid of the submission on the question of validity our attention was drawn to 'Jurisdiction and Illegality' by Amnon Rubinstein (1965 Edn.). The Parliament did not grant to the Court the jurisdiction to transfer a case to the High Court of Bombay. However, as the superior Court is deemed to have a general jurisdiction, the law presumes that the Court acted within jurisdiction. In the instant case that presumption cannot be taken, firstly because the question of jurisdiction was not agitated before the Court, secondly these directions were given per incuriam as mentioned hereinbefore and thirdly the superior Court alone can set aside an error in its directions when attention is drawn to that error. This view is warranted only because of peculiar facts and circumstances of the present case. Here the trial of a citizen in a Special Court under special jurisdiction is involved, hence, the liberty of the subject is involved. In this connection, it is instructive to refer to page 126 of Rubinstein's aforesaid book. It has to be borne in mind that as in* ***Kuchenmeister v. Home Officer, (1958) 1 QB 496*** *here form becomes substance. No doubt, that being so it must be by decisions and authorities, it appears to us patently clear that the directions given by this Court on 16th February, 1984 were clearly unwarranted by constitutional provisions and in derogation of the law enacted by the Parliament. See the observations of* ***Attorney General v. Herman James Sillem, (1864) 10 H.L.C. 704,*** *where it was reiterated that the creation of a*

right to an appeal is an act which requires legislative authority, neither an inferior Court nor the superior Court or both combined can create such a right, it being one of limitation and extension of jurisdiction. See also the observations of ***Isaacs v. Robertson, (1984) 3 All ER 140*** *where it was reiterated by Privy Council that if an order is regular it can be set aside by an Appellate Court; if the order is irregular it can be set aside by the Court that made it on the application being made to that Court either under the rules of that Court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warranted, namely, violation of the rules of natural justice or fundamental rights. In* ***Ledgard v. Bull, (1886) 13 Ind App 134****, it was held that under the old Civil Procedure Code under Section 25 the superior Court could not make an order of transfer of a case unless the Court from which the transfer was sought to be made, had jurisdiction to try. In the facts of the instant case, the criminal revision application which was pending before the High Court even if it was deemed to be transferred to this Court under Article 139A of the Constitution it would not have vested this Court with power larger than what is contained in section 407 of Criminal, Procedure Code. Under section 407 of the Criminal Procedure Code read with the Criminal Law Amendment Act, the High Court could not transfer to itself proceedings under Sections 6 and 7 of the said Act. This Court by transferring the proceedings to itself, could not have acquired larger jurisdiction. The fact that the objection was not raised before this Court giving directions on 16th February, 1984 cannot amount to any waiver. In* ***Meenakshi Naidoo v. Subramaniya Sastri, (1887) 14 Ind App 160*** *it was held that if there was inherent incompetence in a High Court to deal with all questions before it then consent could not confer on the High Court any jurisdiction which it never possessed.*

61. *In so far as Mirajkar's case (supra) which is a decision of a Bench of 9 Judges and to the extent it affirms Prem Chand Garg's case (supra), the Court has power to review either under Section 137 or suo motu the directions given by this Court. See in this connection* ***P.S.R. Sadhananatharn v. Arunachalarn (1980) 2 SCR 873*** *and* ***Suk Das v. Union Territory of Arunachal Pradesh (1986) 2 SCC 401.*** *See also the observations in* ***Asrumati Debi v. Kumar Rupendra Deb Raikot, 1953 SCR 1159, Satyadhyan Ghosal v. Smt. Deorajin Debi, (1960) 3 SCR 590, Sukhrani (dead) by L.Rs. v. Hari Shanker (1979) 3 SCR 671*** *and* ***Bejoy Gopal*** *Mukherji v. Pratul Chandra Ghose, 1953 SCR 930.*

62. *We are further of the view that in the earlier judgment the points for setting aside the decision, did not include the question of withdrawal of the case from the Court of Special Judge to Supreme Court and transfer it to the High Court. Unless a plea in question is taken it cannot operate as res judicata. See* ***Shivshankar Prasad Shah v. Baikunth Nath Singh (1969) 1 SCC 718, Bikan Mahuri v. Mst. Bibi Walian, AIR 1939 Pama 633.*** *See also* ***S. L. Kapoor v. Jagmohan, (1981) 1 SCR 746*** *on the question of violation of the principles of natural justice. Also see* ***Maneka Gandhi*** *v. Union of India (1978) 2 SCR 621 at pages 674-681. Though what is mentioned hereinbefore in the Bengal Immunity Co. Ltd. v. State of Bihar, (supra), the Court was not concerned with the earlier decision between the same parties. At page 623 it was reiterated that the Court was not bound to follow a decision of its own if it was satisfied that the decision was given per incuriam or the attention of the Court was not drawn. It is also well-settled that an elementary rule of justice is that no party should suffer by mistake of the Court. See* ***Sastri*** *Yagnapurushadji v. Muldas Bhudardas Vaishya (1966) 3* ***SCR 242, Jang Singh v. Brijlal, (1964) 2 SCR 145,*** *Bhajahari Mondal v. State of West Bengal, 1959 SCR 1276* ***at pp. 1284-1286*** *and* ***Asgarali N. Singaporawalla v. State*** *of Bombay, 1957 SCR 678 at p. 692.*

80. In giving the directions this court infringed the Constitutional safeguards granted to a citizen or to an accused and in just ice results therefrom. It is just and proper for the Court to rectify and recall that injustice, in the peculiar facts circumstances of this case.

81. This case has caused us considerable anxiety. The appellant-accused has held an important position in this country, being the Chief Minister of a premier State of the country. He has been charged with serious criminal offences. His trial in accordance with law and the procedure established by law would have to be in accordance with the 1952 Act. That could not possibly be done because of the directions of this Court dated 16th February, 1984 (reported in AIR 1984 SC 684), as indicated above. It has not yet been found whether the appellant is guilty or innocent. It is unfortunate, unfortunate for the people of the State, unfortunate for the country as a whole, unfortunate fort he future working of democracy in this country which, though is not a plant of an easy growth yet is with deep root in the Indian Polity that delay has occurred due to procedural wrangles. The appellant may be guilty of grave offences alleged against him or he may be completely or if not completely to a large extent, innocent. Values in public life and perspective of these values in public life, have undergone serious changes and erosion during the last few decades. What was unheard of before is commonplace today. A new value orientation is being undergone in our life and in our culture. We are at the threshold of the cross roads of values. It is, for the sovereign people of the country to settle those conflicts yet the Courts have vital roles to play in such matters. With the avowed object of speedier trial the case of the appellant had been transferred to the High Court but on grounds of expediency of trial he cannot be subjected to a procedure unwarranted by law, and contrary to the constitutional provisions. The appellant may or may not be an ideal politician. It is a fact, however, that the

allegations have been brought against him by a person belonging to a political party opposed to him but that is not the decisive factor. If the appellant Shri Abdul Rehman Antulay has infringed law, he must be dealt with in accordance with the law. We proclaim and pronounce that no man is above the law, but at the same time reiterate and declare that no man can be denied his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law and not in derogation of it. This Court, in its anxiety to facilitate the parties to have a speedy trial gave directions on 16th February, 1984 as mentioned hereinbefore without conscious awareness of the exclusive jurisdiction of the Special Courts under the 1952 Act and that being the only procedure established by law, there can be no deviation from the terms of Article 21 of the Constitution of India. That is the only procedure under which it should have been guided. By reason of giving the directions on 16th February, 1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court, even if there are any technicalities this Court should not feel shackled and decline to rectify that injustice or otherwise the injustice noticed will remain forever a blot on justice. It has been said long time ago that "Actus Curiae Neminem Gravabit" an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law.

82. *Lord Cairns in* ***Alexander Rodger v. The Comptoir*** *D'escompte De Paris (1869-71) LR 3 PC 465 at page 475 observed thus :*

> *"Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors,*

and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

83. *This passage was quoted in the Gujarat High Court by D. A. Desai, J. speaking for the Gujarat High Court in Vrajlal v. Jadavji (supra) as mentioned before. It appears that in giving directions on 16th February, 1984 (reported in AIR 1984 SC 684), this Court acted per incuriam inasmuch it did not bear in mind consciously the consequences and the provisions of Sections 6 and 7 of the 1952 Act and the binding nature of the larger Bench decision in Anwar Ali Sarkar's case (supra) which was not adverted to by this Court. The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the hand-maids of justice and not the mistress of the justice. Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied. This is a peculiar fact of this case which requires emphasis.*

144. *There can be - and, indeed, counsel for the respondent had - no quarrel with the initial premise of the learned counsel for the appellant that the conferment of jurisdiction on Courts is a matter for the legislature. Entry 77 of List I, Entry 3 of List II and Entries 1, 2, 11A and 46 of List III of the Seventh Schedule of the Constitution set out the respective powers of Parliament and the State Legislatures*

in that regard. It is common ground that the jurisdiction to try offences of the type with which we are concerned here is vested by the 1952 Act in Special Judges appointed by the respective State Governments. The first question that has been agitated before us is whether this Court was right in transferring the case for trial from the Court of a Special Judge, to a Judge nominated by the Chief Justice of Bombay."

By a majority of 4 to 3, the Hon'ble Supreme Court appears to have laid down following, departing from the orthodox view:

(a). A court cannot confer a jurisdiction on itself which was not provided by the Constitution or Statutory law.(Para 38,40)

(b) No court can divest a person of his right of appeal or revision established by law. (para 41)

(c) Where a court assumes a jurisdiction which it does not possess or divest a person of his constitutional or statutory right even though in excercise of its power of interpretation, it acts contrary to the ' procedure established by law ', and there is violation of Article 21. (para 43)

(d) A judicial order which violates a fundamental right or principles of natural justice is a nullity. (Para 57)

(e) A decision which violates the basic principles of natural justice and is against the statutory law , is contrary to the procedure established by law and, therefore violative of Art. 21 of the Constitution (para 61,62,80)

(f) Judicial order made without jurisdiction is nullity.(Para 81)

(27) To my mind, post-conviction relief is a vital part of criminal justice system specifically when constitutional violation has occurred at the trial for want of effective assistance of the counsel for the petitioner, failing to raise plea of juvenility, failure on part of the prosecutor and the investigating agency to point out the age of the petitioner and as such it also escaped

the notice of trial Court and the appellate Court that he was of about 12 years only at the relevant point of time. The Courts administering criminal justice cannot turn blind eye to the ground realities, if, Criminal Court is to be an effective instrument in dispensing justice then Presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in trial.

(28) It would be important to note here that Juvenile Courts contain well intentional feature and they originated as an institution which reforms, envisioned a body that would handle juvenile cases with an eye on their rehabilitation and in their best interest and for their welfare. By way of present writ petition, petitioner is seeking indulgence for correction of long festering injustice. Section 7-A of the Act is an important safeguard against unjust, unconstitutional and erroneous conviction and sentence. The petitioner has been able to show that sentence awarded to him does not conform to the fundamental requirement of law i.e. compliance of provisions of Juvenile Justice and as such, the petitioner is entitled to immediate release. In these circumstances, the question arises whether statutory provisions are in existence for addressing the constitutional and statutory violations during trial which prejudice the rights of the accused. In the Code of Criminal Procedure, there is no provision under which orders could be recalled or reviewed. In this situation, habeas corpus proceedings could be an adequate and appropriate remedy after the exhaustion of ordinary criminal process. In the present case there are glaring errors of law, and violation of the constitutional provisions i.e. trial not being in accordance with the procedure established by law and there is error in proceedings of trial i.e. non following the provisions of "the Act". It is correct that post-conviction relief is not a substitute for statutory appeal or special leave to appeal etc. Since, there is no provision of review in the Code of Criminal Procedure after order is passed in appeal, revision, etc. the error if committed during the trial certainly prejudices the rights of the petitioner. As such, there is need of provision so that such error can be corrected as the trial of the petitioner was without jurisdiction and sentence imposed was not authorized by law. The conviction of the petitioner under the ordinary criminal law has potentially affected the duration of sentence as under "the Act" maximum sentence can be awarded is three years only.

(29) Habeas corpus is not an ordinary criminal proceeding process, rather, it amounts to a collateral attack challenging the validity of conviction or sentence under ordinary procedure of law. None of the counsel was able to explain how the Court should proceed when ordinary criminal process has become final and the conviction is erroneous, what is the remedy available under law. There is no constitutional right to appeal, only statutes create the right to appeal. The habeas corpus review can be used to testing the unlawfulness of the imprisonment as an indirect challenge to the sentence. In the case of ***Amit Singh (supra)*** identical situation arose. In that case, petitioner was tried according to the procedure as is applicable to the adult criminals. In that case, trial Court convicted him, appeal was dismissed by the High Court and SLP was dismissed, thereafter, petitioner in that case approached the Hon'ble Supreme Court under Article 32 of the Constitution of India, the Hon'ble Supreme Court granted him the appropriate relief treating him as juvenile. Identical situation has arisen in the present case, there is an error affecting the substantial right, manifest injustice and miscarriage of justice as the trial of the petitioner was not in accordance with "the Act". Prejudicial atmosphere covering the whole trial and subsequent appellate jurisdiction has resulted into miscarriage of justice and manifest injustice to the petitioner. The procedural irregularity and error in trial of the petitioner go to the heart of the case, so, in the interest of justice, the only post-conviction efficacious remedy can be by way of habeas corpus petition and in the opinion of this Court, if there are violation of the fundamental rights like Article 21 as is the present case then the habeas corpus petition is maintainable to rectify the error of law even after the exhaustion of the ordinary criminal justice process.

(30) Now I have to consider about the question as to what order on sentence is to be passed against the petitioner for the offences committed by him under Sections 366 and 376 IPC, correctness whereof has not been put in issue before the Hon'ble Supreme Court as well as in the present petition. Section 15 of the Act of 2000 provides for various orders which "the Board" may pass against a juvenile when it is satisfied that the juvenile has committed an offence, which includes an order directing the juvenile to be sent to a special home for a period of three years. Section 16 of the Act of 2000 stipulates that where a juvenile who has attained the age of sixteen years has committed an offence and "the Board" is satisfied that the offence committed is so serious in nature that it would not be in his

interest or in the interest of other juveniles in a special home to send him to such special home and that none of the other measures provided under the Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government. Proviso to sub-section (2) of Section 16 of the Act of 2000 provides that the period of detention so ordered shall not exceed in any case the maximum period provided under Section 15 of the said Act, i.e., for three years. In the instant case, as per the information furnished to me, the petitioner has undergone an actual period of sentence of about 1 year and 8 months and is now aged more than thirty five years. I feel that, keeping in view the present age of the petitioner, the interest of other juveniles housed in the special home it may not be conducive to send him to special home or to refer him to the Board for passing orders for sending the petitioner to special home or for keeping him at some other place of safety for the remaining period of about 1 years and 4 months, the maximum period for which he can now be kept in either of the two places.

(31) Accordingly, while sustaining the conviction of the petitioner for the afore-stated offences, I hereby quash the sentence awarded to the petitioner and direct his release forthwith, if he is not required in any other case. The petition succeeds partly to the extent indicated above.