**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CRIMINAL APPELLATE JURISDICTION**
**Criminal Appeal No.751 of 2017**

**(@Special Leave Petition (Criminal) No.2275 of 2011)**

State (through) Central Bureau of Investigation …Appellant

Versus

Shri Kalyan Singh (former CM of UP) & Ors. …Respondents

**J U D G M E N T**

**R.F. NARIMAN, J.**

Leave granted.

1. The present appeal arises out of the demolition of Babri Masjid. We are concerned in this case with two FIRs lodged on 6th December, 1992. The first *viz.* Crime No.197 of 1992, is against lakhs of kar sewaks alleging the offences of dacoity, robbery, causing of hurt, injuring/defiling places of public worship, promoting enmity between two groups on grounds of religion, etc. The IPC offences were, therefore, under Sections 153-A, 295, 297, 332, 337, 338, 395 and 397. The second FIR *viz.* FIR No.198 of 1992 was lodged against eight persons named therein - Mr. L.K. Advani, Mr. Ashok Singhal, Mr. Vinay Katiar, Ms. Uma Bharati, Ms. Sadhvi Ritambara, Mr. Murli Manohar Joshi, Mr. Giriraj Kishore and Mr. Vishnu Hari Dalmia, two of whom are dead due to passage of time

*viz.* Mr. Ashok Singhal and Mr. Giriraj Kishore. The FIR alleges offences under Sections 153-A, 153-B and Section 505 IPC. 46 further FIRs pertaining to cognizable offences and 1 FIR pertaining to non-cognizable offences were also lodged. Initially, a Special Court set up at Lalitpur was to try these cases but subsequently notifications were issued by the State Government, after consultation with the High Court, dated 8th September, 1993 whereby these cases were to be tried by a Special Court at Lucknow. All these cases were committed to a Court of Sessions, Lucknow in which FIR No.197, but not FIR No.198, was to be tried. It may be noted that prior to the transfer of FIR No.197 of 1992 to Lucknow, by an Order dated 13th April, 1993, the Special Magistrate added Section 120-B IPC to the said FIR No.197 of 1992.

2. On 5th October, 1993, the CBI filed a consolidated chargesheet against 48 persons in all including the names of Mr. Bala Saheb Thackeray, Mr. Kalyan Singh, Mr. Moreshwar Save, Mr. Champat Rai Bansal, Mr. Satish Pradhan, Mr. Mahant Avaidyanath, Mr. Dharam Das, Mr. Mahant Nritya Gopal Das, Mr. Mahamadleshwar Jagdish Muni, Mr. Ram Bilas Vadanti, Mr. Vaikunth Lal Sharma @ Prem, Mr. Prama Hans Ram Chandra Das, and Dr. Satish Chandra

Nagar. It may be stated that owing to the passage of time, six of these are since deceased namely Mr. Bala Saheb Thackeray, Mr. Moreshwar Save, Mr. Mahant Avaidyanath and Mr. Prama Hans Ram Chandra Das, Mr. Mahamandleshwar Jagdish Muni, and Dr. Satish Nagar. So far as the charge of conspiracy is concerned, the chargesheet records:

> The aforesaid acts of Shri Bala Saheb Thackeray, Chief of Shiv Sena, Bombay, Shri L.K. Advani, MP, BJP, presently BJP President, Shri Kalyan Singh, ex-Chief Minister of Uttar Pradesh, Shri Ashok Singhal, General Secretary, VHP, Shri Vinay Katiyar, MP Bajrang Dal, Shri Moreshwar Save, MP, Shiv Sena, Shri Pawan Kumar Pandey, Ex-MLA, Shiv Sena, Shri Brij Bhushan Saran Singh, MP, BJP, Shri Jai Bhagwan Goel, North India Chief, Shiv Sena, Ms. Uma Bharati @ Gajra Singh, MP, BJP, Sadhvi Rithambara, VHP leader, Maharaj Swamy Sakshi, MP, BJP, Shri Satish Pradhan, MP, Shiv Sena, Shiv Sena, Shri Murli Manohar Joshi, Ex-President, BJP, Shri Giriraj Kishore, Joint General Secretary, VBP, Shri Vishnu Hari Dalmia, President, Ram Chandra Khatri, Vice President, Haryana, Shri Sudhir Kakkar, Organising Secretary, Shiv Sena, Punjab, Shri Amarnath Goel, Shiv Sena activist, Shri Santosh Dubey, Leader of Shiv Sena, Ayodhya, Shri Prakash Sharma, Joint Secretary, Bajrang Dal, Shri Jaibhan Singh Paweya, All India General Secretary, Bajrang Dal, Gwalior, Shri Ram Narayan Dass, ex-Pujari of Ram Janam Bhoomi, Shri Ramji Gupta, Supervisor Ram Janam Bhoomi Nyas, Shri Lallu Singh, ex-MLA, BJP, Shri Champat Rai, Joint Zonal Organising Secretary, VHP, Shri Om Prakash Pandey, Hindu activist, Shri Lakshmi Narayan Das, Mahatyagi, Activist, BJP, Shri Vinay Kumar Rai, Hindu activist, Shri Kamlesh Tripathi @ Sait Dubey, Bajrang Das, activist, Shri Gandhi Yadav, BJP activist, Shri Hargovind Singh,

Hindu activist, Shri Vijay Bahadur Singh, Chief Security Officer, Shri Krishan Temple, Mathura, UP, Shri Navin Bahi Shukla, Hindu activist, Shri Ramesh Pratap Singh, BJP activist, and Acharya Dharmender Dev, Leader, Bajrang Dal constitutes offences U/s 120-B IPC r/w 153-A, 153-B, 295, 295-A and 505 IPC and substantive offences U/s 153-A, 153-B, 295, 295-A and 505 IPC.

3. On 8th October, 1993, the State Government amended the notification dated 9th September, 1993 inserting FIR No.198 of 1992 against the eight persons aforesaid so that all 49 cases could be tried by the Special Court, Lucknow. To cut a long story short, since this amendment notification did not comply with Section 11(1) proviso of the Criminal Procedure Code, 1973 *viz.* that consultation with the High Court was lacking, this notification was ultimately struck down.

4. At this point, it is important to note that the CBI filed a supplementary chargesheet against the 8 persons mentioned hereinabove in the year 1996 at Lucknow. On 9th September, 1997, the Special Judge, Lucknow passed an order that there was a prima facie case against all the accused persons for framing charges of criminal conspiracy under Section 120-B read with various other Sections of the Penal Code. The Court held that all the offences were committed in the course of the same transaction which

warranted a joint trial and that the case was exclusively triable by the Court of the Special Judge, Lucknow. It is worth setting out parts of this order which read as follows:

> "There seems to be a prima facie case for offences u/s 147/153-A/153-B/295/295-A/505 read with u/s 149 IPC against accused Sri Lal Krishna, Ashok Singh, Vinay Katiyar, Moreshwar Save, Pawan Kumar Pandey, Ms. Sadhvi Ritambhra, Maharaj Swami Sakshi, Murli Manohar Joshi, Giri Raj Kishore and Vishnu Hari Dalmia. Against accused Pawan Kuamr Pandey, Brij Bhushan, Saran Singh, Pawaiya, Dharmendra Singh Gurjar, Ram Narain Das, Lalloo Singh, Om Prakash Pandey, Laxmi Narain Das, Maha Tyagi, Vinay Kumar Rai, Kamlesh Tripathi, Gandhi Yadav, Har Govind Singh, Vijay Bahadur Singh, Navin Bhai Shukla, offences u/s 332/338/2-01 read with Sec.149 of IPC seem to be made out. Offences under Sec.120-B of IPC read with u/s 153-A/153-B/295/295-A/505 of IPC as per evidence produced by the prosecution seem to be made out prima facie against Sri Bala Saheb Thackeray, Lal Krishna Advani, Kalyan Singh, Ashok Singhal, Vinay Katiyar, Moreshwar Save, Pawan Kumar Pandey, Brij Bhushan Saran Singh, Jai Bhagwan Goal, Maharaj Swami Sakshi, Satish Pradhan, Murli Manohar Joshi, Acharya Giriraj Kishore, Vishnu Hari Dalmia, Vinod Kumar Vats, Ram Chandra Khattri, Sudhir Singh Pawauya, Dharmedra Singh Gurjar, Ram Narain Das, Ramji Gupta, Lalloo Singh, Champat Rai Bansal, Om Prakash Pandey, Laxmi Narain Maha Tyagi, Vinay Kumar Rai, Kamlesh Tripathi, Gandhi Yadav, Har Govind Singh, Vijay Bahadur Singh, Navin Bhai Shukla, Ramesh Pratap Singh, Acharya Dharmendra Dev, Ms. Uma Bharti, Ms. Sadhvi Ritambhra."
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> So far as question of conspiracy u/s 120-B of IPC is concerned in that connection it is not necessary to have proved evidence because a conspiracy is hatched in secrecy and the knowledge of this conspiracy comes to

the remaining accused gradually, slowly and this knowledge is discernable from what becomes clear by their speeches and by actions done by them. In regard to criminal conspiracy has been propounded by the Hon'ble Supreme Court in case reported as Kehar Singh Vs. State of Delhi 1988 SCC (Criminal) 711 where under whatever works are of conspiracy is entrusted to a person he does not and a person does not have the knowledge of the work done by another person till that work is not completed. In such a conspiracy all the persons who are connected with it they are held guilty for activities unlawfully done in the cause of the conspiracy because all of them have taken a decision to act in that way as has been propounded by ruling in the following cases.

(1) Ajay Agarwal Vs. Union of India – 1993 SCC (Criminal) Page 961

(2) P.K. Narayan Vs. State of Kerala – (1995) SCC 142

(3) State of Maharashtra Vs. Som Nath Thapar – 1996 Cr.l.J.2448

According to the decisions of the Hon'ble Supreme Court as above, though Sri Kalyan Singh at the time of occurrence or accused R.N. Srivastava and Sri D.B. Rai were not present even then they are found prima facie guilty u/s 120-B of IPC because they are public servants their act shall be deemed prima facie criminal. Sri Kalyan Singh had given assurance before the National Integration Council for not demolishing the disputed structure and the Hon'ble Supreme Court had permitted for only symbolic kar sewa being performed. Sri Kalyan Singh had also said that he will fully ensure the protection of Ram Janam Bhumi/Babri Masjid structure and it will not be felled down, but he acted in opposition to his assurances. Order was not given by Sri Kalyan Singh for utilizing the Central Force. From this it seems that prima facie was a necessary participant in the criminal conspiracy.

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In the above cases the Hon'ble Justice has clearly propounded that if in one course of occurrence different offences are committed by different accused then their examination can be done conjointly. In the present case keeping in mind the criminal conspiracy which was in regard in the felling of Ram Janam Bhumi/Babri Masjid structure and in that context whatever acts have been done shall be deemed to have been in the course of one occurrence. Section 395, IPC was also about the criminal conspiracy for felling down of Babri Masjid. It was done under Sec.395 IPC which is in the course of one event and in that connection there is evidence of PW-37 Sanjay Khare, PW-112 Mohan Sahai, PW-16 Om Mehta, PW-42 Pravin Jain and the news item published in newspaper by the journalists like the statement of PW-38 Shard Chandra Pradhan, that when upto1.30 pm the kar sewaks could not demolish the dome from above, they were demolishing the walls from below and Vinay Katiyar and Lal Krishna Advani, Murli Manohar Joshi and Ashok Singhal made exhortations many a time that all persons should get down from the dome as it was on the point of falling down. It is the statement of PW-145 Ms. Latika Gupta that Sri Advani had made this declaration that the C.RP.F. could come any time and hence all should go and block the road to prevent it from coming. Smt. Vijai Raje Scindia also asked the kar sewaks to come down when the dome was being felled and on the stage there was distribution of sweets.

From the above discussion this conclusion is drawn that in the present case the criminal conspiracy of felling down of the disputed structure of Ram Janam Bhumi/Babri Masjid was commenced by the accused from 1990 and it was completed on 06.12.1992 Sri Lal Krishan Advani and others at different times and at different places made schemes of criminal conspiracy of demolishing the above disputed structure. Hence I find prima facie basis on the strength of evidence to charge accused S/Sri Bala Saheb Thackeray, Lal Krishna

Advani, Kalyan Singh, Ashok Singhal, Vinay Katiyar, Moreshwar Save, Pawan Kumar Pandey, Brij Bhushan Saran Singh, Jai Bhagwan Goe, Ms. Uma Bharti, Ms. Sadhwi Ritambhra, Maharaj Sami Sakshi, Murli Manohar Joshi, Giri Raj Kishore Vishnu Hari Dalmia, Champat Rai Bansal, Om Prakash Pandey, Satish Pradhan Mahant Avaidh Nath, Dharam Das, Mahant Nritya Gopal Das, Maha Mandaleshwar Jagdish Muni, Dr. Ram Vilas Vedanti, Baikunth Lal Sharma @ Prem Param Hans Ram Chandra Das, Smt. Vijay Raje Scindia, and Dr. Satish Kumar Nagar for offences u/s 147/153-A/153-B/295-A/505 of IPC read with Sec. 120-B of IPC."

5. Criminal Revision Petitions were filed against the order dated 9th September, 1997. By a Judgment dated 12th February, 2001, delivered by the High Court of Allahabad, Lucknow Bench, it was held:

(1) Notification dated 8th October, 1993 amending the notification dated 9th September, 1993 was invalid as there was no consultation with the High Court before issuing the said notification. It is important to mention that the Court held that this was a curable legal infirmity.

(2) Consequently the Special Court at Lucknow has no jurisdiction to inquire into and to commit to the Court of Sessions FIR No.198 of 1992 against the aforesaid eight accused for the three offences stated therein.

(3) The impugned order dated 9th September, 1997 for framing charges under Sections 153-A, 153-B and 505 IPC was without jurisdiction and liable to be set aside to this extent.

(4) No illegality was committed by the Court below while taking cognizance of a joint chargesheet on the ground that all the offences were committed in the course of the same transaction and to accomplish a criminal conspiracy. The evidence for all the offences is almost the same and, therefore, these cannot be separated from each other irrespective of the fact that 49 different FIRs were lodged.

(5) The offences regarding criminal conspiracy and common object of an unlawful assembly are prima facie made out and since these offences are alleged to have been committed in the course of the same transaction, the Special Court rightly took cognizance of the same and committed the same to the Court of Session.

(6) In all other respects, the impugned order dated 9th September, 1997 for the framing of charges, so far as 48 out of 49 cases are concerned, for the offences of criminal conspiracy read with other IPC offences, *save and except* the three IPC

offences against the eight accused persons aforesaid, was upheld.

6. The CBI accepted the aforesaid Judgment and requested the Chief Secretary, Government of UP to rectify the defect in the notification dated 8th October, 1993 on 16th June, 2001. The State Government rejected the said request for curing the defect on 28th September, 2002. This rejection was not challenged by the C.B.I.

7. Meanwhile an SLP was filed by one Mohd. Aslam *alias* Bhure, a public interest petitioner, challenging the order dated 12th February, 2001. This was dismissed by this Court on 29th November, 2002. A review against this order was dismissed by a speaking Order dated 22nd March, 2007. A curative petition was also dismissed thereafter on 12th February, 2008.

8. From this it can be seen that the order dated 12th February, 2001 is final and can be regarded as *res judicata.* Given that the State Government rejected the request for curing the defect in the notification dated 8th October, 1993, the CBI, instead of challenging the rejection, filed a supplementary charge sheet against the 8 accused persons for offences under Sections 153A, 153B, 505 read with Sections 147 and 149 IPC before the Judicial Magistrate at Rae

Bareilly. Charges were framed under these Sections against the said accused persons. Insofar as the other group of 13 persons is involved, again, for reasons best known to the CBI, the CBI did not proceed against them at all.

9. By an order dated 4th May, 2001, the Special Court dropped proceedings against 21 persons; namely, eight accused persons being Mr. L.K. Advani, Mr. Ashok Singhal (deceased), Mr. Vinay Katiar, Ms. Uma Bharati, Ms. Sadhvi Ritambara, Mr. Murli Manohar Joshi, Mr. Giriraj Kishore (deceased), Mr. Vishnu Hari Dalmia, and 13 accused persons being Mr. Bala Saheb Thackeray (deceased), Mr. Kalyan Singh, Mr. Moreshwar Save (deceased), Mr. Champat Rai Bansal, Mr. Satish Pradhan, Mr. Mahant Avaidhyanath (deceased), Mr. Dharam Das, Mr. Mahant Nritya Gopal Das, Mr. Mahamadleshwar Jagdish Muni, Mr. Ram Bilas Vadanti, Mr. Vakunth Lal Sharma @ Prem, Mr. Prama Hans Ram Chandra Das (deceased) and Dr. Satish Chandra Nagar, taking the view that there were two sets of accused - one, the Kar Sewaks who actually demolished the Masjid, and others who were the instigators. The Court thought that it was faced with two alternatives, and chose the lesser alternative of dropping the proceedings against these 21

persons so that the proceedings against the Kar Sewaks could carry on. A revision was filed against the order dated 4th May, 2001 before the High Court which led to the passing of the impugned Judgment dated 22nd May, 2010. This Judgment upheld the Judgment dated 4th May, 2001 holding that there were two classes of accused, namely, leaders who were on the dais exhorting the Kar Sewaks at 200 meters from the Masjid, and the Kar Sewaks themselves. The nature of the accusations against both was different and their involvement was for different criminal offences. The submission on behalf of the CBI that the Lower Court could not have discharged 21 accused persons as it would amount to reviewing the order dated 9th September, 1997, was turned down. The CBI also raised a plea that the embargo against prosecution was only against 8 persons insofar as 3 offences and 3 offences alone concerning Sections 153A, 153B and 505 IPC. It was held that the entire crime recorded in FIR No.198 of 1992 would encompass Sections other than the 3 Sections mentioned and this plea was also, therefore, turned down. Criminal conspiracy, according to the impugned judgment, was never made out against the aforesaid 8 or 13 persons as otherwise the supplementary charge sheet filed by the CBI at Rae Bareilly

would have included Section 120B which it did not. Turning down the CBI's plea that the judgment dated 12th February, 2001 had laid down that a joint charge sheet on the ground that different offences were committed in the course of the same transaction, and a plea that a prima facie case had been made out of conspiracy, together with the fact that order dated 9th September, 1997 continues to survive qua all the other accused was also turned down by the impugned judgment, holding :

> "Otherwise also the accusation/charge of conspiracy (under Section 120-B IPC) in respect of Sections 153-A, 153-B and 505 IPC against accused of Crime No.198 of 1992 does not appear to be of any significant consequence when Sections 147 and 149 IPC have already been added.
> Similarly if the accusation regarding criminal conspiracy punishable under Section 120-B IPC has not been invoked against the eight main leaders then how it can be invoked against rest 13-1=12 leaders. The accusations against these remaining 13 accused who have also been found to be within the ambit of Crime No.198 of 1992, have also to be same because they were also sharing the same dais at Ram Katha Kunj with those 8 persons. Finally, therefore, this submission also lacks merit."

10. It was further held that if the CBI had any evidence of conspiracy it can file a supplementary charge sheet before the Court at Rae Bareilly which was seized of Crime No.198 of 1992. Holding that from the very beginning two separate FIRs were filed because

of two different places of occurrence and different nature of accusations, the judgment then went on to impugn the CBI's preparing a joint charge-sheet for all 49 FIRs and ultimately found that there is no illegality or impropriety in the impugned order dated 4th May, 2001. The High Court, therefore, by the impugned order, dismissed the revision filed against the said order.

11. Shri Neeraj Kaul, learned Addl. Solicitor General, appearing on behalf of the CBI has argued before us that the impugned judgment has completely misinterpreted the judgment dated 12th February, 2001 and confirmed the dropping of proceedings against 21 accused persons which could not be done. According to Shri Kaul, an artificial distinction was made by the impugned judgment between different kinds of offences and offenders when, in point of fact, the 2001 judgment expressly upheld the filing of a joint charge sheet by CBI. He went on to contend that the offence of conspiracy was already contained in the charges made in FIR No.197 of 1992 before the Special Court, Lucknow and that it was for this reason that the Section 120B charge was not added in the supplementary charge sheet filed against the aforesaid 8 accused persons at Rae Bareilly. This was completely missed by the impugned judgment, which

mistakenly held that it was possible for the CBI to add the charge of Section 120B at Rae Bareilly. According to Shri Kaul, if this was done then two different Special Courts would have to decide on the same criminal conspiracy and might come to different conclusions regarding the same, which is the basic infirmity in the impugned judgment. He added that none of the aforesaid 21 accused persons should have been dropped, and the CBI had filed a supplementary charge sheet at Rae Bareilly against the 8 accused persons only because it wished to conclude the trial against them expeditiously, which could only have happened if they were proceeded against at Rae Bareilly, since the State Government refused to cure the defect in the notification dated 8th October, 1993.

12. Shri K.K. Venugopal, learned senior counsel on behalf of Respondent Nos.4 and 5, has argued that the judgment dated 12th February, 2001 cannot be reopened at this stage as the Supreme Court has dismissed an appeal filed against it and has further dismissed a review petition and a curative petition. The CBI cannot be allowed to re-agitate what has been closed by the aforesaid judgment. Moreover, since the order dated 4th May, 2001 merely implements the judgment and order dated 12th February, 2001 and

the impugned judgment upheld the said judgment dated 4th May, 2001, CBI's appeal ought to be dismissed. Since the trial against the 8 accused is proceeding at Rae Bareilly, no question of a joint trial before the Special Court at Lucknow can arise at this stage in view of the final and binding decision of this Court dismissing the appeal against the judgment dated 12th February, 2001. According to learned senior counsel, Article 142 of the Constitution cannot be used by this Court to transfer proceedings against the aforesaid 8 accused persons from Rae Bareilly to Lucknow in view of the fact that the fundamental rights guaranteed to the aforesaid 8 accused persons under Article 21 of the Constitution would otherwise be infringed inasmuch as a right of appeal from the learned Magistrate, Rae Bareilly to the Sessions Court would be taken away. The learned senior counsel also referred to Section 407 (1) of the Cr.P.C. by which it was clear that an order of transfer from one Special Judge to another within the same State would be covered by the aforesaid provision and could only be done by the High Court of the concerned State in which both the lower Courts are situated. Since Article 142 cannot be used against substantive provisions of law, this would be a violation of Section 407 (1) which permits only the High

Court to transfer such a case. The learned senior counsel referred to a number of judgments setting out that the powers of the Supreme Court under Article 142 cannot be used against a mandatory substantive provision of law.

13. Shri Kapil Sibal, learned senior counsel appearing for the Appellants in SLP (Crl.) No.2705 of 2015 was permitted by us to argue treating the SLP Petitioner as an intervenor. Consequently, he addressed us only on questions of law. According to learned senior counsel, this Court ought to transfer the case pending at Rae Bareilly to Lucknow as a joint charge sheet has been filed clubbing all the 49 FIRs, including FIR No.198 of 1992. Nothing prevented this Court from using this extremely wide power under Article 142 to do complete justice. He further pointed out that any reliance on the judgment in **A.R. Antulay** v. **R.S. Nayak & Another,** (1988) 2 SCC 602, would be incorrect as the said judgment was wholly distinguishable. According to him, on a reading of Sections 216 and 223 of the Code, it is clear that the trial need not begin *de novo* but that the witnesses already examined, both in Rae Bareilly and in Lucknow, could be recalled for the limited purpose of cross-examination on charges that are now to be added.

14. We have heard the learned counsel for the parties. We are of the view that the judgment dated 12th February, 2001, clearly and unequivocally held that a joint charge sheet had been filed by the CBI on the ground that all the offences were committed in the course of the same transaction to accomplish the conspiracy alleged. The evidence for all these offences is almost the same and these offences, therefore, cannot be separated from each other, irrespective of the fact that 49 different FIRs were lodged. It is clear that in holding to the contrary, the impugned judgment, which upheld the judgment dated 4th May, 2001, is clearly erroneous. Also, we agree with Mr. Neeraj Kaul that the offence of criminal conspiracy is already there in the joint charge sheet filed by the CBI against all the named accused, which includes the 21 accused who have been discharged. That being the case, it is clear that the said accused could not possibly have been discharged, as they were already arrayed as accused insofar as the charge of criminal conspiracy was concerned, which would be gone into by the Special Judge, Lucknow, while dealing with the offences made out in FIR No.197 of 1992. In this regard also, we are of the view that the impugned judgment in holding to the contrary is not correct.

15. The impugned judgment also artificially divided offences and offenders into two groups which did not follow from the judgment dated 12th February, 2001. On the contrary, the said judgment having upheld the joint charge sheet and having prima facie found a case of criminal conspiracy being made out, this could not have been held contrary to the said judgment. Further, the impugned judgment contradicts itself when it says that the 21 accused persons form one group in several places, whereas the very same judgment in paragraph 31 thereof clearly made a distinction between the 8 accused and the other group of 13 accused. It went on to say:

> "Another submission on behalf of the CBI is that in respect of S/Sri Bala Saheb Thackerey, Kalyan Singh and Satish Pradhan, the learned lower court has dealt with very concisely and has not given sufficient reasons for treating them to be within the ambit of Crime No.198 of 1992. The discussion made by the learned lower court in respect of these accused may be precise but the conclusion arrived at is correct because these leaders were not even physically present on the said dias (sic) along with other leaders."

16. The aforesaid conclusion militates against what was repeatedly said by the impugned judgment in several places, and it is clear that 13 persons were not physically present on the dais along with the other 8 accused persons. It is clear from a reading of the judgment dated 12th February, 2001, that the High Court expected that the

defect noticed in the notification would be cured soon after the delivery of the judgment in which case a joint trial would have proceeded. This, however, did not happen, because the CBI did not challenge the rejection of the request to cure this technical defect. Instead the course taken by the CBI has caused great confusion. The filing of the supplementary charge sheet against 8 accused persons which is going on separately at Rae Bareilly and the dropping altogether of charges against the 13 accused persons, after the Judgment dated 12th February, 2001 has completely derailed the joint trial envisaged and has resulted in a fractured prosecution going on in two places simultaneously based on a joint charge sheet filed by the CBI itself. In order to remedy what ought to have been done by the State Government in 2001 by curing the technical defect pointed out by the High of Allahabad in the judgment dated 12th February, 2001, we are of the view that the best course in the present case would be to transfer the proceedings going on at Rae Bareilly to the Court of Sessions at Lucknow so that a joint trial of all the offences mentioned in the joint charge sheet filed by the CBI against the persons named could proceed. In our view, since the charge of criminal conspiracy against all 21 accused is already in

the joint charge sheet filed by the CBI at Lucknow, this charge could be added to the charges already framed against the survivors of the group of 8 accused. As against the survivors of the group of 13, Penal Code offences mentioned in the joint charge sheet also need to be added. In our opinion, there is no need for a *de novo* trial inasmuch as the aforesaid charges against all 21 accused persons can conveniently be added under Section 216 of the Code of Criminal Procedure in the ongoing trial. No prejudice will be caused to the accused as they have the right to recall witnesses already examined either in Rae Bareilly or in Lucknow for the purpose of cross-examination. The Court of Sessions at Lucknow will have due regard to Section 217(a) of the Code of Criminal Procedure so that the right to recall is not so exercised as to unduly protract the trial.

17. It remains to deal with some of the arguments by Shri K.K. Venugopal, learned senior counsel. According to learned senior counsel, our powers under Article 142 cannot be used to supplant the law. Article 142 is set out hereunder:

> **"142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.**—(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter

pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

18. A number of judgments have been cited including the celebrated Supreme Court judgment in **Supreme Court Bar Association v. Union of India & Another**, 1998 (4) SCC 409, in which a Constitution Bench of this Court held that Article 142 cannot authorize the Court to ignore the substantive rights of a litigant while dealing with the cause pending before it and cannot be used to supplant the substantive law applicable to the cause before this Court. A large number of other judgments following this judgment were also cited. It is necessary only to refer to a recent judgment in **State of Punjab** v. **Rafiq Masih,** (2014) 8 SCC 883, in which this Court held:

"Article 142 of the Constitution of India is supplementary in nature and cannot supplant the substantive provisions, though they are not limited by the substantive provisions in the statute. It is a power that gives preference to equity over law. It is a justice-oriented approach as against the strict rigours of the law. The directions issued by the Court can normally be categorised into one, in the nature of moulding of relief and the other, as the declaration of law. "Declaration of law" as contemplated in Article 141 of the Constitution: is the speech express or necessarily implied by the highest court of the land. This Court in *Indian Bank* v. *ABS Marine Products (P) Ltd.* [(2006) 5 SCC 72] , *Ram Pravesh Singh* v. *State of Bihar* [(2006) 8 SCC 381 : 2006 SCC (L&S) 1986] and in *State of U.P.* v. *Neeraj Awasthi* [(2006) 1 SCC 667 : 2006 SCC (L&S) 190] has expounded the principle and extolled the power of Article 142 of the Constitution of India to new heights by laying down that the directions issued under Article 142 do not constitute a binding precedent unlike Article 141 of the Constitution of India. They are direction (sic) issued to do proper justice and exercise of such power, cannot be considered as law laid down by the Supreme Court under Article 141 of the Constitution of India. The Court has compartmentalised and differentiated the relief in the operative portion of the judgment by exercise of powers under Article 142 of the Constitution as against the law declared. The directions of the Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case in hand from the rigour of the law in view of the peculiar facts and circumstances do not comprise the ratio decidendi and therefore lose its basic premise of making it a binding precedent. This Court on the qui vive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case." [para 12]

19. Article 142(1) of the Constitution of India had no counterpart in the Government of India Act, 1935 and to the best of our knowledge, does not have any counterpart in any other Constitution world over. The Latin maxim *fiat justitia ruat cælum* is what first comes to mind on a reading of Article 142 – Let justice be done though the heavens fall.[1] This Article gives a very wide power to do complete justice to the parties before the Court, a power which exists in the Supreme Court because the judgment delivered by it will finally end the litigation between the parties. It is important to notice that Article 142 follows upon Article 141 of the Constitution, in which it is stated that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Thus, every judgment delivered by the Supreme Court has two components – the law declared which binds Courts in future litigation between persons, and the doing of complete justice in any cause or matter which is pending before it. It is, in fact, an Article that turns one of the maxims of equity on its head, namely, that equity follows the law. By Article 142, as has been held in the **State of Punjab judgment**, equity has been given

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This maxim was quoted by Lord Mansfield in **R. v. Wilkes**, (1770) 4 Burr 2527: (1558-1774) All ER Rep. 570. The passage in which it is quoted makes interesting reading, and among the many other things stated by that great Judge, it is stated : 'I wish POPULARITY: but it is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means.'

precedence over law. But it is not the kind of equity which can disregard mandatory substantive provisions of law when the Court issues directions under Article 142. While moulding relief, the Court can go to the extent of relaxing the application of law to the parties or exempting altogether the parties from the rigours of the law in view of the peculiar facts and circumstances of the case. This being so, it is clear that this Court has the power, nay, the duty to do complete justice in a case when found necessary. In the present case, crimes which shake the secular fabric of the Constitution of India have allegedly been committed almost 25 years ago. The accused persons have not been brought to book largely because of the conduct of the CBI in not pursuing the prosecution of the aforesaid alleged offenders in a joint trial, and because of technical defects which were easily curable, but which were not cured by the State Government. Almost 25 years have gone and yet we are solemnly reminded that Respondent Nos.4 and 5's fundamental rights should not be curtailed by any order passed under Article 142. When asked what these rights were, we were referred to the judgment in **Antulay's case** (supra) for the proposition that if transfer of the case against Respondent Nos.4 and 5 is made from

Rae Bareilly to Lucknow, one right of appeal would be taken away inasmuch as the transfer would be from a Magistrate to a Court of Sessions.

20. This contention would not have been available if, shortly after the judgment dated 12th February, 2001, the State Government had cured the defect by issuing another notification after consulting the High Court. Equally, if the refusal of the State Government to cure this technical defect had been challenged by the CBI in the High Court, and set aside with a direction to issue a notification curing the defect, a joint trial at Lucknow would have been well on its way and may even have been concluded by now. No selective supplementary charge sheet filed by the CBI at Rae Bareilly splitting the trial would then have been necessary. What is being done by us today is only to remedy what was expected by the Allahabad High Court to have been done shortly after its Judgment dated 12th February, 2001.

21. In the **Antulay judgment**, Section 7(1) of the Criminal Law Amendment Act, 1952, was under consideration. Section 7(1) is reproduced herein below:

> "7. **Cases triable by Special Judges.**— (1) Notwithstanding anything contained in the Code of

> Criminal Procedure, 1898 (5 of 1898), or in any other law the offences specified in sub-section (1) of Section 6 shall be triable by Special Judges only."

22. The majority judgment of Mukharji, J., in paragraph 24, adverts to this section and emphasises the fact that only Special Judges are to try certain offences, notwithstanding anything contained in the Criminal Procedure Code. There is no such provision in the facts of the present case. In point of fact, Section 11(1) proviso of the Code of Criminal Procedure only states that the State Government may establish for any local area one or more Special Courts, and where such Special Court is established, no other court in the local area shall have jurisdiction to try the case or classes of case triable by it. Conspicuous by its absence is a non obstante clause in Section 11.

23. In paragraph 34, Mukharji, J. stated that Sections 406 and 407 were covered by the non-obstante clause in Section 7(1). This would mean that the High Court under Section 407 could not transfer a case to itself as provided under Section 407(1). It is in this context that it is stated that the right of appeal to the High Court from the Special Court is taken away, violating the procedure established by law under Article 21. Also, for this reason, in paragraph 38 of the said judgment it is stated that the order of the Supreme Court

transferring cases from the Special Judge to the High Court is not authorised by law. Also, the further right to move the High Court by way of revision or first appeal under Section 9 of the said Act was therefore taken away. In the present case, assuming that the High Court were to exercise the power of transfer under Section 407, the High Court could have transferred the case pending at Rae Bareilly and/or at Lucknow to itself under Section 407 (1) and (8). The absence of a non-obstante clause under Section 11(1) proviso of the Criminal Procedure Code thus makes it clear that Article 21 in the facts of the present case cannot be said to have been infringed, as even a transfer from a subordinate court to the High Court, which would undoubtedly take away the right of appeal, is itself envisaged as the 'procedure established by law' under Section 407 of the Criminal Procedure Code.

24. In the present case, the power of transfer is being exercised to transfer a case from one Special Judge to another Special Judge, and not to the High Court. The fact that one Special Judge happens to be a Magistrate, whereas the other Special Judge has committed the case to a Court of Sessions would not make any difference as, as has been stated hereinabove, even a right of appeal from a

Magistrate to the Sessions Court, and from the Sessions Court to the High Court could be taken away under the procedure established by law, i.e., by virtue of Section 407 (1) and (8) if the case is required to be transferred from the Magistrate at Rae Bareilly to the High Court itself. Hence, under Section 407, even if 2 tiers of appeal are done away with, there is no infraction of Article 21 as such taking away of the right of appeal is expressly contemplated by Section 407(1)(iv) read with Section 407(8). In the circumstances, **Antulay's judgment** which dealt with the right of a substantive appeal from a Special Judge to the High Court being taken away by an order of transfer contrary to the non obstante clause in Section 7(1) of the Criminal Law Amendment Act, 1952 would not apply in the facts and circumstances before us.

25. That Article 142 can be used for a procedural purpose, namely, to transfer a proceeding from one Court to another does not require much argument. However, Shri Venugopal relied upon Sections 406 and 407 of the Criminal Procedure Code, which are set out hereinbelow:

> **"406. Power of Supreme Court to transfer cases and appeals.—** (1) Whenever it is made to appear to the Supreme Court that an order under this section is

expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

(3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case.

**407. Power of High Court to transfer cases and appeals.**— (1) Whenever it is made to appear to the High Court—

*(a)* that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

*(b)* that some question of law of unusual difficulty is likely to arise, or

*(c)* that an order under this section is required by any provision of this Code, or will tend to the general

convenience of the parties or witnesses, or is expedient for the ends of justice,

it may order—

*(i)* that any offence be inquired into or tried by any Court not qualified under Sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

*(ii)* that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

*(iii)* that any particular case be committed for trial to a Court of Session; or

*(iv)* that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be

supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:

Provided that such stay shall not affect the subordinate Court's power of remand under Section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under Section 197."

26. According to Shri Venugopal, the Supreme Court's power under Section 406 is circumscribed by transfer taking place only from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court. Clearly Section 406 does not apply to the facts of the present case as the transfer is from one Criminal Court to another Criminal Court, both subordinate to the same High Court. This being the case, nothing prevents us from utilizing our power under Article 142 to transfer a proceeding from one Criminal Court to another Criminal Court under the same High Court as Section 406 does not apply at all. Learned senior counsel went on to add that such a power is exercisable only under Section 407 by the High Court and not this Court. Again, the fact that the High Court has been given a certain power of transfer under the Code of Criminal Procedure does not detract from the Supreme Court using a constitutional power under Article 142 to achieve the same end to do

complete justice in the matter before it. In the present case, there is no substantive mandatory provision which is infracted by using Article 142. This being the case, both grounds taken by Shri Venugopal are without substance.

27. We have been shown a judgment of the High Court dated 8th December, 2011, in which the matter proceeding at Rae Bareilly was to be proceeded with on a day-to-day basis until it is concluded. We have been told that this has only been followed in the breach as less than a hundred witnesses have yet been examined. Any number of adjournments been taken by the CBI as well as the other persons. One other disturbing feature is the fact that the Special Judge designated by the notification to carry on the trial at Rae Bareilly has been transferred a number of times, as a result of which the matter could not be taken up on the dates fixed. This being the case, while allowing the appeal of the CBI and setting aside the impugned judgment, we issue the following directions:

i. The proceedings viz. Crime No. 198/92, RC.1(S)/92/SIC-IV/ND in the Court of the Special Judicial Magistrate at Rae Bareilly will stand transferred to the Court of Additional Sessions Judge (Ayodhya Matters) at Lucknow.
ii. The Court of Sessions will frame an additional charge under

Section 120-B against Mr. L.K. Advani, Mr. Vinay Katiar, Ms. Uma Bharati, Ms. Sadhvi Ritambara, Mr. Murli Manohar Joshi and Mr. Vishnu Hari Dalmia. The Court of Sessions will frame additional charges under Section 120-B and the other provisions of the Penal Code mentioned in the joint charge sheet filed by the CBI against Mr. Champat Rai Bansal, Mr. Satish Pradhan, Mr. Dharam Das, Mr. Mahant Nritya Gopal Das, Mr. Ram Bilas Vadanti and Mr. Vaikunth Lal Sharma @ Prem. Mr. Kalyan Singh, being the Governor of Rajasthan, is entitled to immunity under Article 361 of the Constitution as long as he remains Governor of Rajasthan. The Court of Sessions will frame charges and move against him as soon as he ceases to be Governor.

iii. The Court of Sessions will, after transfer of the proceedings from Rae Bareilly to Lucknow and framing of additional charges, within four weeks, take up all the matters on a day-to-day basis from the stage at which the trial proceedings, both at Rae Bareilly and at Lucknow, are continuing, until conclusion of the trial. There shall be no de novo trial. There shall be no transfer of the Judge conducting the trial until the entire trial concludes. The case shall not be adjourned on any

ground except when the Sessions Court finds it impossible to carry on the trial for that particular date. In such an event, on grant of adjournment to the next day or a closely proximate date, reasons for the same shall be recorded in writing.

iv. The CBI shall ensure that on every date fixed for evidence, some prosecution witnesses must remain present, so that for want of witnesses the matter be not adjourned.

v. The Sessions Court will complete the trial and deliver the judgment within a period of 2 years from the date of receipt of this judgment.

vi. We make it clear that liberty is given to any of the parties before the Sessions Court to approach us in the event of these directions not being carried out, both in letter and in spirit.

28. The appeal is disposed of accordingly.

**……..J.**
**(PINAKI CHANDRA GHOSE )**

**…… J.**
**(R.F. NARIMAN)**

**New Delhi;**
**April 19, 2017.**