by following the method adopted by the High Court. For the said purpose, the matter is remitted to the Land Acquisition Officer.

125. These appeals are disposed of with the aforementioned observations and directions. In the facts and circumstances of the case, there shall be no order as to costs.

(SBS) *Order accordingly.*

* * *

SPECIAL CRIMINAL APPLICATION

Before the Hon'ble Ms. Justice H. N. Devani

ESSAR OIL LTD. & ORS. v. CENTRAL BUREAU OF INVESTIGATION & ANR.*

Criminal Procedure Code, 1973 (2 of 1974) — Secs. 173(8) & 173(2) — Further investigation under sub-sec. (8) of Sec. 173, held, is permissible even where final report (closure report) is submitted by investigating agency and accepted by the Magistrate — There is no necessity to recall or review the order of Magistrate accepting final report — On facts, since order by Special Judge accepting final report was based on decision of 'C.E.G.A.T.' decision by Supreme Court reversing 'C.E.G.A.T.' decision can be said to be "fresh material" so as to call for further investigation in the alleged offence.

ક્રિમિનલ પ્રોસીજર કોડ, ૧૯૭૩ — કલમ ૧૭૩(૮) અને ૧૭૩(૨) — જ્યારે તપાસ એજન્સીએ અંતિમ અહેવાલ (કલોઝર અહેવાલ) મૅજિસ્ટ્રેટને સોંપ્યો હોય અને મૅજિસ્ટ્રેટે તેનો સ્વીકાર કર્યો હોય ત્યારે કલમ ૧૭૩(૮) હેઠળ વધુ તપાસ માન્ય છે એમ ઠરાવવામાં આવ્યું — મૅજિસ્ટ્રેટે સ્વીકારેલા અંતિમ હુકમને પરત મંગાવવાની કે તેની સમીક્ષા કરવાની જરૂરિયાત નથી — હકીકતો જોતાં, સેન્ટ્રલ એકસાઈઝ ઍન્ડ ગોલ્ડ એપેલેટ ટ્રીબ્યુનલના નિર્ણય ઉપર આધારિત અંતિમ અહેવાલ ખાસ ન્યાયાધીશે સ્વીકાર્યો હોય ત્યારે સેન્ટ્રલ એકસાઈઝ ઍન્ડ ગોલ્ડ એપેલેટ ટ્રીબ્યુનલના નિર્ણયને ઉલટાવી નાખતો સુપ્રિમ કોર્ટનો નિર્ણય કથિત ગુનામાં નવી વિગતો ગણાશે જે વધુ તપાસની માગણી કરશે.

For summary of conclusions. (*See* Para 77)

Referring to decisions by Supreme Court in *U.P.S.C. v. S. Papaiah,* 1997 (7) SCC 614; *N. P. Jharia v. State of M.P.*, 2007 (7) SCC 358 and *Kari Choudhary v. Mst. Sita Devi,* 2002 (1) SCC 714, the Court observed as under :

Perusing the aforesaid decisions rendered in cases where final reports had been submitted and accepted, it is apparent that even after final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. In other words, there is no bar against conducting further investigation under Sec. 173(8) of Cr.P.C. after the final report submitted under Sec. 173(2) has been accepted. It is also evident, prior to carrying out further investigation under Sec. 173(8) of Cr.P.C. it is

*Decided on 29-7-2009. Special Criminal Application No. 1442 of 2009.

not necessary for the Magistrate to review or recall the order accepting the final report. In the circumstances, no infirmity can be found in the observations made by the learned Special Judge clarifying that the dismissal of the application shall not preclude the C.B.I. from carrying out further investigation and submitting further report against the accused in accordance with law. (Para 67)

Referring to facts, the Court observed as under :

Since, the order of the learned Special Judge was also based upon the decision of C.E.G.A.T., in the opinion of this Court, the decision of the Supreme Court can be said to be fresh material so as to call for further investigation in connection with the offence in question. Besides, as held by the Apex Court in the decisions cited hereinabove, acceptance of closure report would not preclude the C.B.I. from carrying out further investigation under Sec. 173(8) of Cr.P.C. (Para 72)

Cases Relied on :

(1) *Union Public Service Commission v. S. Papaiah,* 1997 (7) SCC 614
(2) *N. P. Jharia v. State of M.P.*, 2007 (7) SCC 358
(3) *Kari Choudhary v. Mst. Sita Devi,* 2002 (1) SCC 714

Cases Referred to :

(1) *Ramchandran v. R. Udhayakumar,* 2008 (5) SCC 414
(2) *Deepak Dwarkadas Patel v. State of Gujarat,* 1980 Cri.LJ 29
(3) *Manjit Singh v. State of H.P.,* 1997 Cri.LJ 4430
(4) *State of Gujarat v. Shah Lakhamshi Umarshi,* AIR 1966 Guj. 283
(5) *K. Ramasubbu v. State*, 1988 Cri.LJ 214
(6) *Abhinandan Jha v. Dinesh Mishra,* AIR 1968 SC 117
(7) *Mithabhai Pashabhai Patel v. State of Gujarat,* 2009 (3) GLR 2460 (SC) : 2009 (6) SCC 332
(8) *K. Chandrasekhar v. State of Kerala*, 1998 (5) SCC 223
(9) *Ram Lal Narang v. State (Delhi Administration),* AIR 1979 SC 1791 : 1979 (2) SCC 322
(10) *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj v. State of Andhra Pradesh,* AIR 1999 SC 2332
(11) *Hira Lal Hari Lal Bhagwati v. C.B.I., New Delhi,* 2003 (5) SCC 257
(12) *Sushila Rani (Smt.) v. Commissioner of Income Tax,* 2002 (2) SCC 697
(13) *Nirmal Singh Kahlon v. State of Punjab,* 2009 (1) SCC 441
(14) *T. T. Antony v. State of Kerala,* AIR 2001 SC 2637
(15) *King-Emperor v. Khwaja Nazir Ahmad,* 71 IA 203
(16) *Hasanbhai Valibhai Qureshi v. State of Gujarat,* 2004 (2) GLR 1634 (SC) : 2004 (5) SCC 347
(17) *State of Andhra Pradesh v. A. S. Peter*, 2008 (2) SCC 383
(18) *Kamlapati Trivedi v. State of West Bengal,* 1990 (2) SCC 91

K. S. Nanavati, Sr. Advocate with *Keyur Gandhi,* for Nanavati Associates, for the Petitioners.
Y. N. Ravani, for Respondent No. 1.
D. C. Sejpal, Addl.P.P., for Respondent No. 2.

MS. H. N. DEVANI, J. Rule. Mr. Y. N. Ravani, learned Central Government Standing Counsel waives service of notice of rule on behalf of the respondent No. 1-Central Bureau of Investigation and Mr. D. C. Sejpal, learned Additional Public Prosecutor waives service of notice of rule on behalf of the respondent No. 2-State of Gujarat.

2. Having regard to the facts of the case and with the consent of the learned Advocates for the parties, the matter is taken up for final hearing.

3. By this petition under Art. 226 of the Constitution of India read with Sec. 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.), the petitioners seek the following substantive reliefs :

> "[A] Your Lordships may be pleased to issue appropriate writ, order or direction to quash and set aside the impugned order dated 22-9-2008 passed by the learned Special Judge, C.B.I., Court No. 3, at Mirzapur, Ahmedabad in Misc. Criminal Application No. 63 of 2008 insofar as it states as follows :
>
> > "It is however clarified that the dismissal of this application shall not preclude the C.B.I. from carrying out further investigation and submit further report against the accused in accordance with law."
>
> [B] Your Lordships may be pleased to issue appropriate writ, order or direction to the respondent No. 1 not to re-open the case and/or to further investigate or to re-investigate the Case No. R.C. 36(A)/2000-GNR.
>
> [C] Your Lordships may be pleased to issue appropriate writ, order or direction to quash and set aside the impugned notices, being notices dated 10-7-2009 and 15-7-2009 issued by respondent No. 1 to the Petitioners."

4. Considering the issue involved in the present case, it may be necessary to refer to the facts of the case in some detail. An offence came to be registered by the Central Bureau of Investigation, Gandhinagar as Case No. R.C. 36(A)/2000-GNR on 29th December, 2000 against one Shri M. K. Bhada, Commissioner of Central Excise and Customs and seven others for the offences punishable under Sec. 120B read with Sec. 420 of the Indian Penal Code and Sec. 13(2) read with Sec. 13(1)(d) of the Prevention of Corruption Act, 1988. The allegations in the first information report were *inter alia* to the effect that the officers of M/s. Essar Oil Limited (E.O.L.) hatched a criminal conspiracy with the officers of the Customs and Central Excise and the State Bank of Saurashtra during the year 1999 and submitted false declaration and cheque in a manner, which caused pecuniary advantage of about Rs. 36.23 crores to the E.O.L. and corresponding loss to the Central Government, in the matter of clearance of capital goods imported by the

E.O.L. It appears that during the course of investigation, the relevant documents were collected and concerned witnesses were examined by the Investigating Officer. It was found that in order to get the benefit of the Budget for the financial year 1999-2000, which was scheduled to be placed in the Parliament on 27-2-1999, the officers of the E.O.L. manipulated certain papers and made false declarations in collusion with the officers of the Customs and Central Excise, as the rates of customs duty prevalent before the presentation of the Budget on the machineries and equipments required for setting up refinery by the E.O.L. was nil rate of basic customs duty and 10% countervailing duty and any variation in the basic duty in the Budget would have caused adverse impact on the refinery related import by way of additional duty liability on the goods that were pending for clearance. Since the Union Budget was to be presented in the Parliament on 27-2-1999, no *ex-bond* clearance was permissible in the normal course on 27-2-1999 in view of special pre-budget restrictions notified by the trade notice commencing from 24-2-1999 upto 2-3-1999. The special period with reference to the Budget was declared by the Commissioner, Central Excise and Customs, Rajkot. During the special period, movement of goods into *in-bond* and *ex-bond* with reference to warehousing was to be granted by the Superintendent, Central Excise and Customs in charge of bonded warehouse and no clearance was to be allowed after 5-00 p.m. on 26-2-1999 and 27-2-1999 whole day. On 25-2-1999, M/s. E.O.L. approached the Commissionerate of Central Excise, Rajkot for depositing cheques issued by them towards customs duty of the goods warehoused in the Customs Bonded Warehouses in the E.O.L. Refinery premises at Vadinar, for an amount of Rs. 60,03,65,860/- on the plea that they were unable to pay the Customs duty on the Warehoused goods on account of the Bank strike on 25-2-1999 and 26-2-1999. The request was allowed and the cheques for duty were deposited on 25-2-1999 with the Assistant Chief Accounts Officer, Central Excise & Customs, Rajkot *vide* cheques for Rs. 60,03,65,860/- drawn by them on State Bank of Saurashtra, Jamnagar along with another cheque for Rs. 12,00,786/- being Bank collection charges. M/s. E.O.L. in their covering letter dated 25-2-1999, specifically declared to the A.C.E.O. that E.O.L. had sufficient balance in the account to cover the amount of the cheques. Thereafter, Shri P. R. Ashok, General Manager of the E.O.L., wrote a letter to the Superintendent of Central Excise, Bonded Warehouse, Jamnagar, requesting him for ordering Customs "out of charge" for the goods lying in the Open Bonded Warehouse and applied for cancellation of the Bonded Warehouse licence. A.C.C.E., Jamnagar cancelled the said Private Bonded Warehouse Licence of E.O.L., since no duties and dues were pending as payable by E.O.L. as reported by the said Superintendent in his detailed report dated 25-2-1999. In the Union Budget presented on

27-2-1999, the duty structure on the Project Imports was changed with effect from 28-2-1999, thereby the duty leviable for the refinery projects became 5% basic + 10% of the Basic as Surcharge + 10% C.V.D. as against only 10% C.V.D. earlier. Thus, there was an increase in effective duty from 10% to 16.05% of the assessable value. Enquiries with the S.B.S. Jamnagar, revealed that as on 24-2-1999, M/s. E.O.L. had a credit balance of Rs. 12,20,596-44 only (in their Bank Account C.A. No. 3333) in the said Bank. Even though, the said cheques were received at S.B.S. Jamnagar on 27-2-1999 from their Rajkot Gymkhana Branch and no funds were available in the E.O.L. Account with the Jamnagar Bank to cover the said cheque(s), yet the Chief Manager of the Bank of Jamnagar retained the cheques issued by M/s. E.O.L. in Jamnagar as per various requests in this regard made by M/s. E.O.L., Jamnagar/Mumbai, until 16-3-1999 when the E.O.L. account in the Bank at Jamnagar was funded and after debiting the E.O.L. account advice was sent to the Rajkot Branch on 16-3-1999. Investigations revealed that the duty could not be credited on the TR-6 challans by the Bank on the basis of the cheques issued by E.O.L. for want of funds in the account, and therefore, the duties were not paid on the goods stored in the Private Bonded Warehouse before cancellation of the warehousing licence on 25-2-1999. Later on 17-3-1999 E.O.L. paid Rs. 65,70,568/- to Central Excise, Jamnagar as interest on the duty unpaid for 20 days (25-2-1999 to 16-3-1999) at the rate of 20%. Thus, the duty appeared to have been actually paid on TR-6 challan at Rajkot on 17-3-1999.

5. It appears that thereafter, the Customs Department initiated investigation under the provisions of the Customs Act, 1962 on the accusations that there was deliberate misdeclaration to ensure evasion of customs duty from rate changes and the cancellation of warehousing licence was obtained by the E.O.L. by exercising fraud as the duty had not been deposited on 25-2-1999 when the warehouse licence was treated as cancelled. The Commissioner of Customs House, Kandla, by detailed order dated 27th March, 2002, confirmed the demand of duty of Rs. 96 crores, and directed the confiscation of goods valued at about Rs. 600 crores, and imposed the penalty of Rs. 10 crores on the E.O.L. and also imposed various other penalties on the officers of the E.O.L. and on the officers of the Central Excise.

6. The order of the Commissioner of Customs was challenged by the E.O.L. and others before the Central Excise & Gold Appellate Tribunal, Mumbai (C.E.G.A.T.). *Vide* its order dated 27th March, 2003, C.E.G.A.T. set aside the order of the Commissioner of Customs, *inter alia*, holding that the duty shall be treated to have been paid on 25-2-1999, and there was no evasion of duty or willful mis-declaration.

7. This order of the C.E.G.A.T. was challenged by the Commissioner of Customs, Kandla by way of Appeals (Civil) Nos. 4299 to 4305 of 2003 before the Supreme Court.

8. It appears that, during the pendency of the appeals before the Supreme Court, the Investigating Officer, on 8th September 2004, submitted a final report (closure report) under Sec. 173 of the Code before the learned Special Judge, C.B.I. Court No. 3, Ahmedabad, who by order dated 29th October, 2004, accepted the said closure report.

9. It appears that between the time the closure report was submitted before the Special Court and the time when it came to be accepted, the Supreme Court *vide* judgment and order dated 7th October 2004, set aside the order of C.E.G.A.T., Mumbai and restored the order passed by the Commissioner of Customs, Kandla.

10. After the order was passed by the Supreme Court, on 20th June, 2008, the C.B.I. moved an application before the learned Special Judge, C.B.I. Court, seeking further investigation under Sec. 173(8) of the Cr.P.C. The learned Special Judge, by an order dated 22nd September, 2008, dismissed the application with costs. However, while dismissing the application, the learned Judge observed as follows :

> "It is however clarified that the dismissal of this application shall not preclude the C.B.I. from carrying out further investigation and submit further report against the accused in accordance with law."

11. Since, in the order dated 22nd September, 2008 passed by the learned Special Judge, various remarks were made against the officers of the C.B.I., C.B.I. filed a writ petition before this Court being Special Criminal Application No. 2342 of 2008 seeking expunction of the observations and adverse remarks made against them in the order dated 22nd September, 2008. By an order dated 13th January, 2009, the Court found that the observations in the remarks made by the learned Special Judge are clearly supported by the facts on record and are found to be correct and justified in the facts and circumstances of the case, and accordingly, summarily dismissed the said petition.

12. It appears that pursuant to the observations made by the learned Special Judge, the C.B.I. has started further investigation in connection with the offence in question, pursuant to which the impugned notice dated 10th July, 2009 came to be issued by the respondent No. 1 calling upon the petitioner to produce the documents mentioned therein on or before 13th July, 2009.

13. Pursuant to the notice dated 10th July, 2009, the petitioner addressed a communication dated 13th July, 2009 to the respondent No. 1, contending that ordinarily it is not for the High Court to re-open the investigation in

a case where the investigation has been completed by the police and the report thereon has been forwarded by the police to the Court and the Court has accepted the same. It was stated therein that an application has been made for recalling the order dated 13th January, 2009.

14. In reply to the said communication dated 13th July, 2009, the Inspector of Police, C.B.I. *vide* communication dated 15th July, 2009 informed the petitioners that the case has been re-opened in the light of the judgment of Hon'ble Supreme Court in Civil Appeal Nos. 4299 to 3205 of 2003.

15. It appears that the petitioners had filed an application being Misc. Criminal Application No. 8227 of 2009, *inter alia*, seeking recall of the previous order dated 13th January, 2009 passed in Special Criminal Application No. 2342 of 2008. This Court *vide* order dated 16th July, 2009 dismissed the application with a clarification that none of the observations made in the order dated 13th January, 2009 shall affect or impinge upon the right of the applicant to voice their grievance in appropriate proceedings as against any alleged illegality or excess, in the course of investigation or further investigation.

16. Thereafter, the petitioners have moved the present petition praying for the reliefs noted hereinabove.

17. Mr. K. S. Nanavati, learned Senior Advocate with Mr. Keyur Gandhi, learned Advocate for the petitioners submitted that the main question which arises for consideration before this Court is whether once upon conclusion of investigation, the investigating agency has submitted a closure report which has been accepted by the Magistrate (in the present case by the Special Judge, C.B.I. Court) by way of a judicial order, the proceedings can be re-opened and further investigation can be carried out in connection with the same offence. It was submitted that in the facts of the present case, admittedly, the C.B.I. have submitted their report *i.e.* closure report on 8th September, 2009 after completing their investigation and the Magistrate has accepted the same and closed the case by dropping further proceedings against the accused mentioned in the first information report, including the petitioners herein. That in view of this admitted position, further investigation of the case by the C.B.I. amounts to re-investigation of the matter by re-opening the case, which is not permissible under the provisions of Sec. 173(8) of the Cr.P.C. It was submitted that once the C.B.I. had carried out investigation and upon being satisfied that there is no evidence against the accused, submitted the final report, which has been accepted by the learned Special Judge by virtue of a judicial order, the proceedings stood terminated. That, thereafter, the investigating agency has no authority to make a fresh investigation or re-investigation under Sec. 173(8) of the Cr.P.C.

18. It was submitted that on 21st August, 2008, the respondent C.B.I. moved an application seeking permission to conduct further investigation under Sec. 173(8) Cr.P.C. before the learned Special Judge which came to be rejected by order dated 22nd September, 2008. Therefore, in the first instance the proceedings initiated pursuant to the first information report came to be closed by a judicial order, secondly, the application for further investigation also came to be rejected by a judicial order. It was accordingly contended that, it was not permissible for the C.B.I. to carry out further investigation in connection with the offence in question. Referring to the order dated 13th January, 2009 of this Court made in the application filed by the C.B.I. for expunging the remarks made by the learned Special Judge while rejecting the application for further investigation, it was submitted that the order passed by the learned Special Judge has been confirmed by this Court, hence, in view of the said judicial order, it was not permissible for the C.B.I. to carry out further investigation.

19. It was submitted that had the final report submitted by the C.B.I. against the petitioners been pending before the learned Magistrate, and during the pendency of the report if the C.B.I. were to hold a further detailed inquiry and collect other particulars in connection with the offence alleged to have been committed by the petitioners and then submit a further report, it could be said that further investigation by the respondent C.B.I. is not barred, when the cognizance of the offence is yet to be taken by the Magistrate. But, once pursuant to the final report the Magistrate passes an order accepting the closure report submitted by the C.B.I., it is a judicial order as the Magistrate has passed the order after applying his mind on the report submitted by the C.B.I. and the proceedings stand terminated. Consequently, unless the said order is recalled, reviewed or set aside by a higher forum, the investigating agency cannot re-open the case and carry out further investigation in connection with the said offence.

20. Attention was invited to the notice under Sec. 91 Cr.P.C. dated 10th July, 2009 of the Inspector of Police, C.B.I., issued in connection with Case No. RC 36(A)/2000-Gandhinagar, to submit that by judicial orders the closure report has been accepted and the application for further investigation has been rejected, neither of which have been challenged, before the higher forum, accordingly, both the orders under Sec. 190(1) and Sec. 173 Cr.P.C. have become final, hence, it is not permissible to re-open the case and that there can be no further investigation under Sec. 173(8) or re-investigation. In support of his submissions, the learned Senior Advocate placed reliance upon a decision of the Himachal Pradesh High Court in *Manjit Singh v. State of H. P.,* 1997 Cri.LJ 4430 and more particularly to the following observations made by the Court :

"There may not be any dispute about the filing of supplementary report in a case where report under Sec. 173(2) of the Criminal Procedure Code is filed in the Court being permissible under Sec. 173(8) of the Code, but no provision was brought to our notice which permitted the police to reopen a case and investigate the same when once it has been closed at its request and the Court has also passed a final order of closure at its behest that no case was made out against the accused. There is a marked difference between "report" for the trial of the accused on the basis of material pointing out the commission of offence and "cancellation report" for the cancellation of the case against him for the reason that on material collected by the Investigating Officer, no offence appeared to have been committed by him. The police may have power to make further investigation and file supplementary report in the former case, but it has no power to do so in the later case, since it had already obtained final order from the Court for closure of the case. This, part the Court had no power to revise/review the order competently passed on July 8, 1985, therefore, on this account as well, further action of the police is not sustainable."

21. Next, it was submitted that the order passed by the learned Special Judge accepting the closure report was an order under Sec. 190(1)(d) and as such was a judicial order. In support of the said contention, reliance was placed upon the decision of a Full Bench of this Court in *State of Gujarat v. Shah Lakhamshi Umarshi,* AIR 1966 Guj. 283, wherein this Court has held that :

"It is, therefore, clear both on a consideration of the language of Sec. 190(1)(b) and the implication of the provision enacted in Sec. 169 that a Magistrate receiving a final report has to deal with the final report judicially and in doing so, he is not bound by the opinion of the police and if he takes the view that the facts appearing in the final report constitute an offence and there is reasonable ground for putting up the accused on trial, he not only can but must take cognizance of the offence under Sec. 190(1)(b) and the order passed by him would be a judicial order and not an administrative order."

22. The learned Senior Advocate also placed reliance upon a decision of the Madras High Court in *K. Ramasubbu v. State,* 1988 Cri.LJ 214, wherein on the basis of a complaint registered against the petitioner therein, the complaint was investigated by a Sub-Inspector, who had filed a final report under Sec. 173 Cr.P.C. before the Court to the effect that no case was made out against the said petitioner and the case was referred to as 'mistake of fact'. The Sub-Divisional Magistrate, on receipt of the final report and after perusing the connected records, accepted the final report sent by the Sub-Inspector and passed the order as follows. Recorded as *'mistake of fact'*. Subsequently, the Inspector of Police as per directions of the Superintendent of Police reopened the investigation and filed charge-

sheet. The Magistrate returned the charge-sheet inquiring whether permission had been obtained to reopen, whereupon the respondent resubmitted the charge-sheet, stating the circumstances under which it was reopened and seeking permission to investigate the case. The learned Magistrate passed an order granting permission to investigate the case, took cognizance of the case, and issued summons to the accused. On receipt of the summons, the accused approached the High Court. The High Court placing reliance upon various judicial precedents held thus :

> "Thus, in view of the ratio laid down in the above decision, it is clear that the order passed by the Magistrate on the basis of the first report submitted by the Sub-Inspector is a judicial order. The second revised report contemplated under Sec. 173(8) of the Code is only in case where the charge-sheet is filed and subsequently revised or additional charge-sheet is contemplated on the further materials available, and not in a case where the case was already referred as *mistake of fact* and accepted by Court."

It was, accordingly, submitted that once an order accepting closure report is passed, the investigation stands terminated as the same culminates into a judicial final order and that investigation pursuant to the very same case registered by the police is not permissible, as there is no power to reopen, namely to reinvestigate a case which is closed by a judicial order.

23. Referring to the order of the Supreme Court in the proceedings wherein the order of C.E.G.A.T. was under challenge, it was pointed out that the Supreme Court has not noted that a criminal case has been filed under the Indian Penal Code and the Prevention of Corruption Act or that closure report had been submitted by the investigating agency. It was submitted that in the present case, it is the case of the C.B.I. that the case has been reopened in the light of the judgment of the Supreme Court, whereas the observations in the said judgment in connection with the roles played by the respondents therein including the petitioners, were only to justify its finding that levy of penalty is clearly warranted, and therefore, the said judgment does not entitle the C.B.I. to reopen and further investigate or re-investigate the case. It was contended that whatever be the observations of the Supreme Court, the question is whether there is any power to open a case closed by a judicial order. So long as the judicial order stands, investigation cannot be reopened. It was submitted that such permission to reopen the investigation could not have been granted and in fact, has not been granted by the C.B.I. Court. It was submitted that the clear view taken by two High Courts in the decisions referred to hereinabove is that the power under Sec. 173(8) Cr.P.C. is not available once closure report is accepted.

24. Referring to the closure report, it was submitted that complete investigation report with all documents, statements of witnesses etc. was

submitted before the learned Special Judge, who after examination of the material on record, passed a judicial order accepting the closure report. That such power is exercised under Sec. 19(1)(b) Cr.P.C. and it is in the exercise of a judicial function. That once there is a judicial verdict, it cannot be disregarded. Referring to the decision of the Supreme Court in *Abhinandan Jha v. Dinesh Mishra,* AIR 1968 SC 117 and more particularly Paragraph 14 thereof, it was submitted that once the Magistrate accepts the final report, the proceedings are closed and such proceedings cannot be reopened except by a judicial order.

25. Next it was contended that in any case, assuming that there is a power to carry out further investigation, there is no additional material with the investigating agency for the purpose of carrying out further investigation. That before the Supreme Court, the issue involved was in respect of the show-cause notice for confiscation of goods and levy of penalty and the said proceedings were not concerned with the offence in question. It was submitted that, as such, the decision of the Supreme Court cannot be termed as a new material to re-open the case or for the purpose of further investigation into the offence, hence, even otherwise, there is no justification for carrying out further investigation. That there would be justification if there were additional material which would have evidentiary value. However, in the present case, no further statements or documents have come on record, hence; this is a reinvestigation in the form of further investigation and not a continuation of the pending investigation.

26. Reliance was placed upon the decision of the Supreme Court in *Mithabhai Pashabhai Patel v. State of Gujarat,* 2009 (6) SCC 332 : 2009 (3) GLR 2460 (SC) wherein it has been held that in view of the provisions of sub-sec. (2) and sub-sec. (8) of Sec. 173, even after submission of the police report under sub-sec. (2) on completion of the investigation, the police has a right to 'further' investigation under sub-sec. (8) of Sec. 173, but not 'fresh investigation' or 'reinvestigation'. That the meaning of 'further' is additional, more or supplemental. 'Further' investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started *ab initio* wiping out the earlier investigation altogether. Reliance was also placed upon the decision of the Supreme Court in *K. Chandrasekhar v. State of Kerala,* 1998 (5) SCC 223 for a similar proposition of law.

27. The next contention raised by the learned Senior Advocate was that before carrying out further investigation or reinvestigation as the case may be, the principles of natural justice require that the petitioners be given an opportunity of hearing inasmuch as there was a judicial determination in their favour, hence, before such permission was granted or clarification was

given, the petitioners were entitled to be given an opportunity of hearing. It was, accordingly, submitted that the observations made by the learned Special Judge while rejecting the application seeking permission for further investigation under Sec. 173(8) Cr.P.C., cause immense prejudice to the petitioners in whose favour there is a judicial determination, and as such, the same is vitiated as being violative of the principles of natural justice. It was, accordingly, submitted that the proceedings of carrying out further investigation under Sec. 173(8) Cr.P.C. are, thus, without jurisdiction and contrary to the provisions of law, and as such, cannot be permitted to continue and are required to be quashed.

28. The petition was strongly resisted by Mr. Y. N. Ravani, learned Standing Counsel for the respondent - C.B.I. Attention was invited to the judgment dated 22nd September, 2008 rendered by the learned Special Judge and more particularly to the contents of Paragraph 9 thereof, wherein it is observed thus : "*From a bare reading of Sec. 173(8) of the Cr.P.C., it clearly transpires that the said provision permits further investigation and even de hors any direction from the Court, as such, it is open to the police to conduct the proper investigation."* to submit that it is well within the powers of the investigating agency to carry out further investigation, even in case a closure report has been submitted.

29. Reliance was placed upon a decision of the Supreme Court in *Ram Lal Narang v. State (Delhi Administration),* AIR 1979 SC 1791 : 1979 (2) SCC 322, for the proposition that further investigation is not altogether ruled out merely because cognizance of the case has been taken by the Court. Defective investigation coming to light during the course of trial may be cured by a further investigation if circumstances permit. It was submitted that it is the duty of the investigating agency to investigate and submit a report to the Magistrate upon involvement of any accused, and that it was always open for the police to carry out further investigation under Sec. 173(8) Cr.P.C. if they so deem fit.

30. Reliance was placed upon the following observation made by the learned Special Judge in order dated 22nd September, 2008 : *"All Courts whether civil or criminal, possess all such powers as are necessary to do right and undo a wrong"* as well as on the view expressed by the learned Judge that it was not necessary for the C.B.I. to seek permission from the Court to further investigate the case.

31. Next, it was contended that at the stage prior to issuance of process, the accused have no *locus standi*, hence, the present petition itself is not maintainable as no process has been issued against the petitioners. Reliance was placed upon the decision of the Supreme Court in *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj v. State of Andhra*

Pradesh, AIR 1999 SC 2332, wherein the Court held that "*the power of police to conduct further investigation, after laying final report, is recognized under Sec. 173(8) of the Code of Criminal Procedure. Even after the Court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. The only rider is that it would be desirable that the police should inform the Court and seek formal permission to make further investigation. There is nothing in Sec. 173(8) to suggest that the Court is obliged to hear the accused before any such direction is made.*" It was, accordingly, submitted that the provisions of Sec. 173(8) Cr.P.C. do not contemplate giving the accused an opportunity of hearing before carrying out further investigation. It was, accordingly, submitted that the petition is not maintainable on the ground that the petitioners have no *locus standi* to challenge the proceedings for further investigation.

32. It was further submitted that the contention that upon acceptance of the closure report, the proceedings stand terminated is misconceived, for the reason that it is the final report filed in connection with the offence registered *vide* Case No. RC 36(A)/2000-GNR before the Gandhinagar Court that has been accepted and the Court had not taken cognizance of the offence, however, the first information report itself has not been quashed and set aside and is still in existence. It was submitted that there was no prayer to quash or cancel the complaint. In the circumstances, the offence still stands and it is well within the statutory powers of the investigating agency to further investigate into the offence and file another report upon conclusion of the further investigation.

33. As regards the closure report submitted by the C.B.I., it was submitted that it is a settled practice that when a Special Tribunal passes a decision, it would also be applicable to criminal proceedings. Hence, the closure report had been submitted in the light of the decision of C.E.G.A.T. At the relevant time, when the closure report was given, the same was done keeping in mind the law laid down by the Supreme Court in *Hira Lal Hari Lal Bhagwati v. C.B.I., New Delhi,* 2003 (5) SCC 257 and in *Sushila Rani (Smt.) v. Commissioner of Income Tax,* 2002 (2) SCC 697. It was urged that in view of the fact that the closure report was filed in the light of the decision of C.E.G.A.T., pursuant to the order of the Supreme Court setting aside the order of C.E.G.A.T., rightly a decision had been taken to carry out further investigation in the case. It was submitted that further investigation into the offence would not cause any prejudice to the accused and that it would equitable to do so. If upon conclusion of the investigation, no offence is made out; the report would be submitted accordingly. Reliance was placed upon the decision of the Supreme Court in *Nirmal Singh Kahlon v. State of Punjab,* 2009 (1) SCC 441, for the proposition that there is no

prohibition against filing further report after conclusion of investigation. Reliance was also placed upon the decision of the Supreme Court in *Union Public Service Commission v. S. Papaiah,* 1997 (7) SCC 614 for the proposition that when shortcomings necessitating reinvestigation were brought to the notice of the Magistrate after submission of closure report, he was not required to review the earlier order, but was required to order further investigation into the case which he was competent to do under Sec. 173(8) Cr.P.C.

34. In rejoinder, Mr. Mihir Joshi, learned Senior Advocate appearing for the petitioners submitted that extensive investigation had been undertaken in the first stage and that senior officials of the Company had been detained. That the respondents cannot subject the accused to investigation twice over and that there has to be finality to investigation. It was accordingly submitted that the contention that the accused have no *locus standi* prior to issuance of process or that no prejudice would be caused to them if further investigation is carried out, is far from the truth. Reliance was placed upon the decision of the Supreme Court in *T. T. Antony v. State of Kerala,* AIR 2001 SC 2637 and more particularly to the contents of Paragraph 27 thereof, wherein it has been held that "*sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive first information reports whether before or after filing the final report under Sec. 173(2) Cr.P.C., it would be clearly beyond the purview of Secs. 154 and 156 Cr.P.C. nay, a case of abuse of the statutory power of investigation in a given case*." It was submitted that on the same set of facts, detailed investigation was carried out and closure report was submitted and in the circumstances, subjecting the petitioners to investigation once again would cause immense prejudice to them.

35. Next, it was submitted that the order of the Supreme Court is dated 7th October 2004, whereas permission of the C.B.I. Court was sought for as late as on 20th June, 2008 after a delay of almost 4 years, hence, there was an inordinate delay in again initiating the proceedings and as such further investigation is bad even on the count of gross delay.

36. On the question of *locus standi*, it was submitted that if a citizen has a right to complain against being prosecuted for the same offence twice over, a citizen also has a right to make a grievance against being subjected to investigation on the same set of facts. It was contended that the decision of the Supreme Court will not be fresh material so as to call for further investigation in the matter. That except for the judgment of the Supreme Court, no fresh material has been indicated by the C.B.I., hence, further

investigation is clearly not warranted. That this was a case of reopening and reinvestigating the case and as such it was not permissible to do so unless the earlier order accepting the closure report was set aside. It was urged that a converse situation may be envisaged wherein the Court has taken cognizance of the offence pursuant to the decision of C.E.G.A.T.; in that case would the cognizance be rendered invalid if the order passed by C.E.G.A.T. were set aside by the Supreme Court.

37. Mr. Y. N. Ravani, learned Counsel for the C.B.I. submitted that, at the stage of investigation, the principle of double jeopardy would not be applicable. In support of the said contention reliance was placed upon the decision of the Supreme Court in *Nirmal Singh Kahlon v. State of Punjab*, 2009 (1) SCC 441.

38. Before considering the questions of law arising in the present case, it may be pertinent to refer to certain facts in detail. Pursuant to the alleged illegalities and irregularities noticed by the D.R.I. officers, the Commissioner of Customs, Kandla had initiated proceedings under the Customs Act and by an Order-in-Original dated 27-3-2002 *inter alia*, ordered confiscation of the goods (seized under seizure memo dated 13-4-1999) under Sec. 111(j) of the Customs Act, 1962, confirmed the total duty amount and imposed penalty on M/s. E.O.L. and its officers as well as on officers of the Central Excise Department named therein. In the said order, the Commissioner recorded findings of serious irregularities and illegalities on the part of the officers of M/s. E.O.L. as well as the officers of the Department. In appeal against the order dated 27th March, 2002 of the Commissioner Customs., C.E.G.A.T. *vide* its order dated 27th March, 2003 set aside the order holding that the date of presentation of cheques by M/s. E.O.L., *i.e.*, 25-2-1999 was the date of payment of Customs duty on the goods in question; the date of determination of rate of duty was 25-2-1999 which was the date of removal from the warehouse applying the provisions of Sec. 15(1)(b) of the Customs Act, 1962 and that the warehousing licence has been properly cancelled; the charge of evasion of duty was not established; confiscation of goods under Sec. 111(j) of the Act was not sustainable; penalty imposed on M/s. E.O.L., was unsustainable and was set aside; and penalty on the officers of M/s. E.O.L. and officers of Department could not be sustained and were therefore, set aside.

39. The Revenue carried the aforesaid order of C.E.G.A.T. in appeal before the Supreme Court. During the pendency of the said appeal, on 24-2-2004 the Investigating Officer, *viz.* the Police Inspector, C.B.I., Gandhinagar submitted a final report under Sec. 173(2) Cr.P.C. On a close reading of the said report it can be seen that the Investigating Officer has narrated the facts of the case, without so much as referring to the

irregularities and illegalities alleged against the accused. After referring to the facts, it is stated thus :

"Investigation has thus revealed that the Custom duty payable on the import was Rs. 60,03,13,424/- (Rs. 60.30 crores appx) prior to 1st March, 1999 and Post-budget duty on the import would have been about Rs. 96 crores. M/s. Essar Oil Limited had deposited the differential amount of Rs. 36,23,78,287/- (Rs. 36.23 crores) in three instalments during the period April, 1999 to July, 1999. Thus, M/s. Essar Oil Limited had deposited a total sum of Rs. 96 crores *i.e.* total dues payable to the Custom Department, hence, no wrongful loss has been caused to the Government of India or any corresponding wrongful gain has been caused to M/s. Essar Oil Limited. Thus, no criminal act could be attributed either towards M/s. Essar Oil Limited or towards the Customs Officials or towards Bank officials.

Customs Department also initiated investigation under the provisions of Customs Act, 1962 on the same set of allegations. The matter was decided by the Customs, Excise & Gold Appellate Tribunal (C.E.G.A.T.), W.Z.B., Mumbai on 27-3-2000. It was held that the date of presentation of the cheques by E.O.L. *i.e.* 25-2-1999 is the date of payment of the Customs duty on the goods in question. It was also held that the date of determination of the Custom duty is 25-2-1999 which is the date of the removal of the goods from the warehouse and that the licence had been properly cancelled. The orders passed by the Customs Department had been set aside by the Customs, Excise & Gold Appellate Tribunal (C.E.G.A.T.), W.Z.B., Mumbai *vide* orders dated 27-3-2003.

Thus, the charges against the accused persons could not be proved, hence, this closure report is submitted before the Hon'ble Court with a request to accept it and pass the orders for releasing the documents/Arts. seized during the course of investigation to the concerned department/persons from whom it were seized."

40. After submission of the final report, as the stage when the proceedings were still pending before the C.B.I. Court, the Supreme Court *vide* its judgment and order dated 7th October, 2004 allowed the appeals filed by the Revenue against the order of C.E.G.A.T.. The Court referred to the findings recorded by the Commissioner, and thereafter, observed as follows :

"C.E.G.A.T. did not consider the aberrations highlighted by the Commissioner and in a very cryptic manner dealt with the issues. No plausible reason has been indicated as to why the allegations which are quite serious in nature and the conclusions in relation thereto recorded by the Commissioner were not to be maintained. Only an abrupt conclusion was reached that Sri Thakur and Sri Choudhary had absolutely no connection with the acceptance of cheques. There was not even any reference to the allegations regarding accepted, backdating or acting contrary to specific directions. Sri Sharma

was given a clean chit in view of the finding recorded about the date on which the receipt of payment has to be taken. Here again, the allegations were not considered in the proper perspective. The findings regarding deemed removal are really inconsequential in the present dispute as the very foundation for removal was based on established fraud. Therefore, it is not necessary in the present dispute to go into the question regarding effect of deemed removal.

The manipulative roles of respondents 2 to 7 have been clearly established. They were clearly active participants in the well-planned deception and fraudulent acts leading to evasion of duty. They had played major roles in the whole game of fraud and deception. There was clearly willful disregard and deliberate defiance of statutory provisions. Levy of penalty is clearly warranted. Impugned order of C.E.G.A.T. is set aside and order of Commissioner is restored."

41. The record indicates that the final report which was submitted on 8-9-2004 was fixed for hearing on 21-9-2004. The case was then listed on Board on 26-10-2004. Prior thereto, the aforesaid decision was rendered on 7th October, 2004. On 26-10-2004, the learned Public Prosecutor requested to adjourn the case for production of documents, and accordingly, the case was adjourned to 27-10-2004. On 27-10-2004 the learned Senior Public Prosecutor produced certain Xerox copies of the documents with list and the Investigating Officer was also present along with original documents. The learned Senior Public Prosecutor and the Investigating Officer made oral submissions reiterating the averments made in the report and the learned Senior Public Prosecutor also submitted at length regarding the various procedure to be followed and care to be taken by the C.B.I. officials prior to filing of the closure report. However, it appears, that prior to and after filing the closure report, the Investigating Officer has not bothered to find out the status of the appeal pending before the Supreme Court and the fact that the decision of C.E.G.A.T. has been set aside was not brought to the notice of the C.B.I. Court. Besides, as noted hereinabove, the final report is totally silent as regards the charges against the accused and also does not refer to any of the alleged illegalities and irregularities. The report seems to be based on the judgment of C.E.G.A.T., which also appears to have been heavily relied upon while making submissions on the Final Report. The learned Special Judge in his order dated 29-10-2004 has observed thus :

"3. It appears from the averments made in the report on the basis of information that M/s. E.O.L. Refinery, Project Division, Vadinar (Dist. Jamnagar) cleared certain imported goods from the customs bounded ware-house in an irregular manner resulting in evasion of custom duty and inquiries in the matter was initiated. The learned Senior P.P. Mr. Sharma has drawn my attention on the document at Serial No. 13 and submitted that the customs department had initiated investigation under the provisions of Customs Act,

1962 on the said set of allegations and issued show-cause notice dated August 22, 1999 by Directorate of Revenue Intelligence which was adjudicated by Commissioner of Customs, Kandla and it had passed order dated 27-3-2002 in No. KDL/Commr/12/2002. In the said order, the Commissioner of Customs, Custom House, Kandla had upheld the charges raised in the above-referred show-cause notice and confiscated goods under seizure with option to redeem the same on payment of fine of Rs. 20 crores, confirmed a duty demand of Rs. 96,26,92,711/- under the proviso to Sec. 28(1) of Customs Act, 1962 and imposed penalties against M/s. E.O.L. and the officers of the company and the officers of the Customs. The learned Senior P.P. Mr. Sharma and the I.O. have then drawn my attention on the document at Serial No. 14 and submitted that the said above-referred order at Serial No. 13 had been challenged before the Customs Excise and Gold Control Appellate Tribunal, West Regional Branch at Mumbai *vide* Appeal No. C/793 to 796 and 700, 701 and 71‘2/2002 Bombay. The C.E.G.A.T., had heard the learned Advocate of the appellants and the learned consultant of the respondent Commissioner of Customs, Kandla and the date of last hearing was 23-1-2002 and then decided the said appeals *vide* order dated 27-3-2003. I have carefully perused the said order at Serial No. 14. The six issues were raised by the C.E.G.A.T. and their findings are as under :

Issue No. (1) : Whether the duty could be treated to have been paid on the 25th February, 1999 (date of presentation of the cheques by M/s. E.O.L.) in the facts and circumstances of the case.

Issue No. (2) : The date for determination of rate of duty, and whether the warehouse licence could be treated as cancelled as detailed in the impugned show-cause notice.

Issue No. (3) : Whether the charge of evasion of duty by *mala fide* intention with willful misdeclaration and suppression of facts with an intent to evade payment of duty as held in the show-cause notice is established.

Issue No. (4) : Whether the goods are liable to confiscation under Sec. 111(j) of the Customs Act, 1962?

Issue No. (5) : To determine the appropriate penal clause invokable whether penalty against E.O.L., is leviable under Sec. 114A or Sec. 112(a)(b) of the Customs Act, 1962.

Issue No. (6) : The extent of involvement of the individual person *vis-a-vis* evidence on record to sustain the charge of collusion on the part of the employees of E.O.L., and officers of the department as detailed in show-cause notice.

The findings narrated in Paragraph No. 42 of the document at Serial No. 14 pertaining to the above issues read as under :

(1) The date of presentation of cheques by E.O.L. *i.e.* 25-2-1999 is the date of payment of customs duty on the goods in question.

(2) The date for determination of rate of duty is 25-2-1999 which is the date of removal from the warehouse applying the provisions of Sec.

15(1)(b) of the Customs Act, 1962 and that the warehousing licence has been properly cancelled;

(3) The charge of evasion of duty is not established;

(4) Confiscation of goods under Sec. 111(j) of the Act is not sustainable.

(5) Penalty imposed on M/s. E.O.L. is unsustainable and is hence set aside, and

(6) Penalties on the officers of M/s. E.O.L. and officers of the Department cannot sustain, and are therefore, set aside.

Thus, considering the above-referred document at Serial No. 14, it is clearly held that the date of presentation of the cheques by M/s. E.O.L. *i.e.* 25-2-1999 is the date of payment of customs duty on the goods in question and it was also held that the date of determination of customs duty is 25-2-1999 which is the date of removal of the goods from the warehouse and the licence had been properly cancelled. Thus, it is clear that the order passed by the Commissioner of Customs, Customs House, Kandla had been set aside by the Customs, Excise and Gold Control Appellate Tribunal (C.E.G.A.T.) *vide* their order at Serial No. 14 dated 27-2-2003.

4. In view of the above evidence on record, I find myself in agreement with the submissions of the learned Senior P.P. Mr. Sharma that the investigation reveals that no *prima facie* case is made out against the accused more particularly when the C.E.G.A.T. had given its final verdict referred above and no evidence had been forth coming to establish that the accused have committed the offence under Sec. 13(2) read with Sec. 13(1)(d) of the Prevention of Corruption Act, 1988, and therefore, in my view, this report requires to be allowed."

42. Almost immediately after the judgment of the Supreme Court was delivered, the Director (Review) Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, Judicial Cell addressed a communication dated 3rd November 2004 to the Director General, Vigilance bringing the said decision to his notice. Subsequently by a communication dated 24-12-2004 the Director, Government of India, Central Vigilance Commission advised the C.B.I. to re-open the case in the light of the Supreme Court order. However, it was as late as on 20-6-2008 that the C.B.I. actually moved filed an application for further investigation. In this regard, it may be pertinent to refer to the observations made by the learned Special Judge while rejecting the said application, which have also been confirmed by this Court :

"11. Having regard to the submissions and record of the case, it clearly transpires that the Court has been made instrumental in achieving the desired results by the C.B.I. from time to time, and there was a deliberate attempt on the part of the C.B.I. in not taking timely action against the accused, in utter disregard to the observations of the Hon'ble Supreme Court and

direction of the C.V.C. It is needless to say that the liability of the accused under the Customs Act was absolutely different from the criminal liability under the Indian Penal Code and the Prevention of Corruption Act. However, the C.B.I. ignoring the order of the Commissioner of Customs, hastened to file closure report in the Court under the guise of the order of C.E.G.A.T. Thereafter, also despite the serious observations of the Hon'ble Supreme Court, holding the accused liable of well-planned deception and fraudulent acts leading to evasion of duty running into crores of rupees, the then Director, C.B.I. on the opinion of the D.L.A. Shri Sharma, took the decision not to reopen the case. It was only when the C.V.C. having issued office memorandum dated 5-1-2006, the matter was again taken up within the C.B.I. hierarchy and the Director, C.B.I. passed the order to initiate prosecution against the accused. Thereafter also, some time was whiled away and the present application, as a last resort, was filed in June, 2008, seeking permission of the Court for further investigation, though was not required to be sought, inasmuch as there was no proceeding pending in the Court.

12. Under the circumstances, the Court has found that there is a deliberate misuse of process of law at the hands of the C.B.I. in filing the closure report before my learned predecessor under the guise of the order passed by the C.E.G.A.T., though the appeals preferred by the Customs Department against the order of C.E.G.A.T. were pending before the Hon'ble Supreme Court and in obtaining the order for accepting the closure report without making inquiry about the results of the said appeals. It was sought to be argued that the C.B.I. was not party to the said proceedings before the Hon'ble Supreme Court and the Investigating Officer came to know about the order dated 7-10-2004 passed by the Hon'ble Supreme Court in the said appeals only through letter dated 17-1-2005 from the C.B.I., Gandhinagar, forwarding the C.V.C.'s directions to reopen the case in the light of the Supreme Court's order. Though, such an argument pleading ignorance about pendency and disposal of appeals by the Hon'ble Supreme Court, is not palatable, it is pertinent to note that even after coming to know about the same, in utter disregard to the serious observations made by the Hon'ble Supreme Court while setting aside the order of the C.E.G.A.T. and restoring the order of the Commissioner of Customs, the Deputy Legal Advisor of the C.B.I. Shri Sharma gave the opinion not to initiate any action against the accused, and the then Director, C.B.I. accepted the said opinion, defying the directions of the C.V.C. to re-look into the matter in view of the observations made by the Hon'ble Supreme Court. The Director, C.B.I. took the decision to reopen the case only when second time office memorandum was issued by the C.V.C., and then the Investigating Officer Shri Sharma filed the present application, so that the time gap, which elapsed between the order passed by the Hon'ble Supreme Court till filing of the application could be wrapped up. There being clear misuse of process of law, such an approach of the C.B.I. deserves to be strongly deprecated and seriously viewed."

43. Aggrieved by the observations and adverse remarks made by the learned Special Judge, the C.B.I. filed a writ petition before this Court under Arts. 226 and 227 of the Constitution of India and Sec. 482 Cr.P.C. for expunging the said observations and adverse remarks being Special Criminal Application No. 2342 of 2008. The said petition came to be summarily dismissed by a judgment and order dated 13-1-2009. It may be pertinent to refer to the following observations made by the Court while dismissing the petition :

> "2. Even as the Court is in full agreement with the reasoning adopted and the conclusions drawn by learned Special Judge in the impugned judgment, it was vehemently argued by learned Counsel, Mr. Ravani that delay of about four years even after order of the Supreme Court could be justified and explained, even though no averments on oath were made in that regard in the body of the petition, and wide gaps of time were left unexplained or vague pleas were advanced without being substantiated by facts. After hearing at length the arguments of learned Counsel, Mr. Ravani, on the factual and legal aspect of the matter, it clearly appears that the present petition is also one more attempt at abusing the process of law and wasting time of the High Court as well for the purpose of covering up the lethargy and lapses on the part of the petitioner. Even the earlier closure of investigation was itself contrary to the relevant damning observations made by the Supreme Court on 7-10-2004 while approval of closure was obtained from the Court on 29-10-2004 keeping the Court in dark and under the pretext of the petitioner being ignorant about them for a long time. It was only at the instance of Central Vigilance Commission that the wheels had turned at all, ever so slowly. Significantly, the petitioner is stated to have started on 7-2-2008 the process of re-collecting relevant documents and material which were disposed of after acceptance of closure report, even before seeking the permission to reopen the investigation, but it was more than after four years of the advice of Central Vigilance Commission and order of the Apex Court. The petitioner has shown itself in very poor light in the whole process.
>
> 3. Therefore, it is necessary for the Director, Central Bureau of Investigation, New Delhi, to consider whether it would be appropriate to hand over the investigation at least now onwards to some more sincere and dedicated team of officers and closely monitor the progress and report of the investigation, in view of the high stakes involved and the history already created. Since, the observations and remarks made by learned Special Judge are clearly supported by the facts on record and are found to be correct and justified in the facts and circumstances of the case, present petition against them is summarily dismissed."

44. After the dismissal of the aforesaid petition, notice came to be issued to the petitioners on 10-7-2009 under Sec. 91 Cr.P.C. for production of documents/Articles mentioned therein. After correspondence with the C.B.I.,

the petitioners learnt about the aforesaid order passed by this Court and moved an application for recalling the said order dated 13-1-2009. By an order dated 16-7-2009 the application came to be dismissed with the following observations :

"2. As far as the observations made in the aforesaid order dated 13-1-2009 are concerned, it was fairly conceded by learned Counsel Mr. Ravani, appearing for the C.B.I., that in the previous proceeding, being Special Criminal Application No. 2342 of 2008, the present applicant company was neither a party nor a necessary party since the petition was primarily against the strictures passed, observations made and the cost imposed by learned Special Judge, C.B.I, Ahmedabad in its judgment and order dated 22-9-2008. While rejecting the petition of C.B.I., this Court has made some additional observations against the C.B.I., but no observation could have been made or read into the order as far as the present applicant company is concerned. Therefore, the grievances made by the applicant against the observations made in the aforesaid order against the C.B.I. are misplaced and misconceived.

3. Under the circumstances, the present application is dismissed with the clarification that none of the observations made in the aforesaid order dated 13-1-2009 shall affect or impinge upon the right of the applicant to voice their grievance in appropriate proceedings as against any alleged illegality or excess, in the course of investigation or further investigation."

45. This is where the matter stood when the present petition came to be filed.

46. In the background of the facts noted hereinabove, as well as the rival submissions advanced by the learned Advocates for the parties, it is apparent that the main issue which arises for determination is as to whether it is permissible for the investigating agency to carry out further investigation under Sec. 173(8) Cr.P.C. after the final report under Sec. 173(2) has been submitted before the Court and has been accepted.

47. Section 173 Cr.P.C. as is relevant for the purpose of the present case, reads as under :

"173. *Report of police officer on completion of investigation :* - (1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2)(i) As soon as it is completed, the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating -

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the person who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond, and if so, whether with or without sureties;

(g) whether he has been forwarded in custody under Sec. 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given.

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) xxx xxx xxx

(6) xxx xxx xxx

(7) xxx xxx xxx

(8) Nothing in this Section shall be deemed to preclude further investigation in respect of an offence after a report under sub-sec. (2) has been forwarded to the Magistrate, and whereupon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-secs. (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-sec. (2)."

48. Section 173 Cr.P.C. provides that upon completion of investigation under Chapter XII of the Cr.P.C., the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government. Sub-section (8) thereof provides that, nothing in the Section shall be deemed to preclude further investigation in respect of an offence after a report under sub-sec. (2) has been forwarded to the Magistrate, and whereupon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-secs. (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-sec. (2).

49. On a plain reading of sub-sec. (8) of Sec. 173 which provides that nothing in the Section shall be deemed to preclude further investigation in respect of an offence after a report under sub-sec. (2) has been forwarded to the Magistrate, it is apparent that there is no bar against further investigation even after the report forwarded to the Magistrate under sub-

sec. (2) is accepted by the Magistrate. If the intention of the legislature was otherwise, it would have expressly been provided in the said provision.

50. In *King Emperor v. Khwaja Nazir Ahmad,* 71 IA 203 the Privy Council delineated the powers of the police to investigate. It was held thus :

> "Just as it is essential that every one accused of a crime should have free access to a Court of justice, so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rules by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Courts to intervene in an appropriate case when moved under Sec. 491 of the Criminal Procedure Code to give directions in the nature of *habeas corpus.*"

51. As noted by the Apex Court in *Ram Lal Narang* (supra) there was no provision in the 1898 Code prescribing the procedure to be followed by the police, where, after submission of a report under Sec. 173(1) Cr.P.C. and after the Magistrate had taken cognizance of the offence, fresh facts came to light which required further investigation. There was, of course, no express provision prohibiting the police from launching upon an investigation into the fresh facts coming to light after submission of the report under Sec. 173(1) or after the Magistrate had taken cognizance of the offence. It was generally thought by many High Courts, though doubted by a few, that the police were not barred from further investigation by the circumstance that a report under Sec. 173(1) had already been submitted and the Magistrate had already taken cognizance of the offence. The Law Commission in its 41st report recognized the position and recommended the right of the police to make further investigation should be statutorily affirmed. The Law Commission said :

> "14.23. A report under Sec. 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under Sec. 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Sec. 173

has been sent, the police cannot touch the case again and cannot reopen the investigation. This view places a hindrance in the way of the investigating agency which can be very unfair to the prosecution, and for that matter, even to the accused. It should be made clear in Sec. 173 that the competent police officer can examine such evidence and sent a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused."

Accordingly, in the Code of Criminal Procedure, 1973 a new provision, Sec. 173(8) was introduced.

52. Thus, it is with a view to take care of situations like the present case, wherein some fresh material comes to light, that the provision of sub-sec. (8) of Sec. 173 appears to have been enacted. This also appears to be the intention of the legislature while introducing the said provision.

53. Insofar as further investigation under Sec. 173(8) after cognizance has been taken upon the report under sub-sec. (2) of Sec. 173, and the proceedings are pending before the learned Magistrate, the Supreme Court in *Hasanbhai Valibhai Qureshi v. State of Gujarat*, 2004 (5) SCC 347 : 2004 (2) GLR 1634 (SC), held thus :

"12. Sub-section (8) of Sec. 173 of the Code permits further investigation, and even *de hors* any direction from the Court as such, it is open to the police to conduct proper investigation, even after the Court took cognisance of any offence on the strength of a police report earlier submitted. All the more so, if as in this case, the Head of the Police Department was not satisfied of the propriety or manner and nature of investigation already conducted.

13. In *Ram Lal Narang v. State (Delhi Admn.),* AIR 1979 SC 1791, it was observed by this Court that further investigation is not altogether ruled out merely because cognizance has been taken by the Court. When defective investigation comes to light during the course of trial, it may be cured by further investigation, if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant and desirable and necessary as an expeditious disposal of the matter by the Courts. In view of the aforesaid position in law, if there is necessity of further investigation, the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the Court in arriving at the truth and do real and substantial as well as effective justice."

54. In *Ram Lal Narang v. State (Delhi Administration),* AIR 1979 SC 1791 : 1979 (2) SCC 322 after referring to various decisions of the Supreme Court as well as High Courts, the Supreme Court held thus :

"22. As observed by us earlier, there was no provision in the Code of Criminal Procedure, 1898 which, expressly or by necessary implication, barred the right of the police to further investigate after cognizance of the case had been taken by the Magistrate. Neither Sec. 173 nor Sec. 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigation on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Sec. 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation."

55. In *State of Andhra Pradesh v. A. S. Peter,* 2008 (2) SCC 383, the Supreme Court held thus :

"Indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing charge-sheet is a statutory right of the police. A distinction also exists between further investigation and reinvestigation. Whereas reinvestigation without prior permission is necessarily forbidden, further investigation is not."

56. In *Nirmal Singh Kahlon v. State of Punjab*, 2009 (1) SCC 441, the Supreme Court held as follows :

"68. An order of further investigation in terms of Sec. 173(8) of the Code by the State in exercise of jurisdiction under Sec. 36 thereof stands on a different footing. The power of the Investigating Officer to make further investigation in exercise of its statutory jurisdiction under Sec. 173(8) of the Code at the instance of the State having regard to Sec. 36 thereof read with Sec. 3 of the Police Act, 1861 should be considered in different contexts. Sec. 173(8) of the Code is an enabling provision. Only when cognizance of an offence is taken, the learned Magistrate may have some say. But, the restriction imposed by judicial legislation is merely for the purpose of upholding the independence and impartiality of the judiciary. It is one thing to say that the Court will have supervisory jurisdiction to ensure a fair investigation, as had been observed by a Bench of this Court in *Sakiri Vasu v. State of U.P.*, correctness whereof is open to question, but it is another thing to say that the Investigating Officer will have no jurisdiction whatsoever to make any further investigation without the express permission of the Magistrate."

57. Thus, in view of the law laid down by the Supreme Court in the decisions cited hereinabove, it is well settled that sub-sec. (8) of Sec. 173 of the Code permits further investigation, and even *de hors* any direction from the Court, it is open to the police to conduct proper investigation, even

after the Court takes cognizance of any offence on the strength of a police report earlier submitted.

58. The question before this Court is whether sub-sec. (8) of Sec. 173 permits further investigation after the Magistrate has accepted a final report (closure report) under sub-sec. (2) of Sec. 173 of the Code. The contention raised on behalf of the petitioners is that acceptance of a closure report would terminate the proceedings finally so as to bar the investigating agency from carrying out any further investigation in connection with the offence.

59. Insofar as the submissions advanced on behalf of the petitioners that an order accepting the closure report under Sec. 190(1)(c) Cr.P.C. is a judicial order is concerned, the same is a settled position of law, and the learned Standing Counsel for the C.B.I. has also not joined issue as regards the same. As held by the Full Bench of this Court in *Shah Lakhamshi Umarshi* (supra), an order passed by a Magistrate under Sec. 190(1)(b) Cr.P.C. would be a judicial order and not an administrative order. The Supreme Court in *Kamlapati Trivedi v. State of West Bengal*, 1990 (2) SCC 91, has held that when a final report of the police is submitted to the Magistrate and the Magistrate passes an order (a) agreeing with the report of the police and filing proceedings; or (b) not agreeing with the police report and holding that the evidence is sufficient to justify the forwarding of the accused to the Magistrate and takes cognizance of the offence complained of, such order is a judicial order.

60. What is required to be examined is as to whether an order passed under Sec. 190(1) accepting a final report being a judicial order, would bar further investigation by the police in exercise of the statutory powers under Chapter XII of the Cr.P.C.

61. In this regard, it may be pertinent to refer to certain decisions of the Supreme Court.

62. The Supreme Court in *K. Chandrasekhar* (supra) was considering a case where on the complaint of a Police Inspector, a case was registered by the Kerala Police against M and F (appellants therein) for offences punishable under Secs. 3 and 4 of the Official Secrets Act, 1923 read with Sec. 34 I.P.C. on the allegation that in collusion with some Indians and foreigners they had committed acts prejudicial to the safety and sovereignty of India. During the investigation, certain other persons (appellants in accompanying appeals) were arrested. Thereafter, a D.I.G. of Police, who was the head of the team conducting the investigation, recommended the case for being investigated by the C.B.I. Pursuant to that recommendation, the Government of Kerala by a notification dated 2-12-1994 accorded its consent under Sec. 6 of the Delhi Special Police Establishment Act for further investigation of the case by the C.B.I. Accordingly, the C.B.I. took up the

investigation. After completion of the investigation, on 16-4-1996, the C.B.I. filed its report in final form under Sec. 173(2) Cr.P.C. stating that the charges were not proved and were false. Accepting the report, the Magistrate discharged the accused-appellants. Thereafter, on 27-6-1996, the Government of Kerala issued a notification withdrawing the consent earlier given to the C.B.I. to investigate the said case. The object of the said notification was to enable a reinvestigation of the case by team of State Police Officers. By an amendatory notification dated 8-7-1996, the words "reinvestigation of the case" were substituted by the words "further investigation of the case". The State Government notification dated 27-6-1996 (as amended) was upheld by the High Court. The Supreme Court held that, from a plain reading of Sec. 173 Cr.P.C., it is evident that even after submission of police report under sub-sec. (2) on completion of investigation, the police has a right of "further" investigation under sub-sec. (8), but not "fresh investigation" or "reinvestigation". The dictionary meaning of "further" (when used as an adjective) is "additional; more; supplemental". "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started *ab-initio* wiping out the earlier investigation altogether. The Court drew inspiration from the fact that sub-sec. (8) clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report or reports - and not fresh report or reports - regarding the "further" evidence obtained during such investigation. The Court held that once it is accepted that an investigation undertaken by C.B.I. pursuant to a consent granted under Sec. 6 of the Act, is to be completed, notwithstanding withdrawal of the consent, and that "further investigation" is a continuation of such investigation which culminates in a further police report under Sec. 173(8), it necessarily means that withdrawal of consent in the said case would not entitle the State Police to further investigate into the case. However, the Court further observed thus : *"To put it differently, if any further investigation is to be made, it is the C.B.I. alone which can do so, for it was entrusted to investigate into the case by the State Government*. (Emphasis supplied). Thus, what was held by the Court was that after submission of report under Sec. 173(2) Cr.P.C. reinvestigation or fresh investigation is not permissible. However, it has been expressly observed that if any further investigation is to be made, it is the C.B.I. alone which can do so. In other words, further investigation could be carried out, but that the same could be done by the C.B.I. alone as it was entrusted to investigate into the case by the State Government and had carried out the investigation and submitted final report in connection therewith.

63. In *Union Public Service Commission v. S. Papaiah*, 1997 (7) SCC 614, on a complaint made by the U.P.S.C., investigation had been carried

out by the C.B.I. and final report was submitted under Sec. 173 Cr.P.C. before the Metropolitan Magistrate, before whom first information report had been lodged, seeking closure of the case. The C.B.I. in spite of the request made to it by the U.P.S.C. did not inform it about the filing of the final report seeking closure of the case. The report was returned by the learned Metropolitan Magistrate as notice had not been issued to the complainant by the C.B.I. though the C.B.I. had asserted that it had informed the U.P.S.C. regarding the filing of the closure report. The final report was resubmitted by the C.B.I. to the Court of the Metropolitan Magistrate along with a copy of the notice sent by the C.B.I. to the U.P.S.C. It appears that the report was again returned by the Metropolitan Magistrate seeking proof of service of notice on the *de facto* complainant. While the proceedings of submission of the final report was pending, the U.P.S.C. addressed a letter to the Director of Central Bureau of Investigation pointing out that the investigation had not been carried out properly and that the filing of the closure report was not justified. While the U.P.S.C. was awaiting further communication from the C.B.I. in that behalf, the C.B.I. it appears resubmitted the closure report and the learned Metropolitan Magistrate accepted the final report submitted by the C.B.I. and closed the file without any opportunity being provided to the U.P.S.C. to have its say. Upon receipt of communication of the order of the Court accepting closure report, the U.P.S.C. filed a petition before the learned Metropolitan Magistrate submitting that the complaint had not been properly investigated and that it had no notice about the acceptance of the final report. The Court rejected the petition of the U.P.S.C. observing that it had accepted the final report filed by the C.B.I. on 16-3-1995, since the U.P.S.C. had not filed its objections to the acceptance of the final report, and as such, it could not complain. The Court also opined that since an order accepting final report was a judicial order and not an administrative order, therefore, it had no power to review such an order passed by it "rightly or wrongly" and that the U.P.S.C. could file a revision petition seeking appropriate orders against the acceptance of the final report from the revisional Court. The revision petition filed by the U.P.S.C. was dismissed by the revisional Court. In appeal before the Supreme Court, it was held thus :

> "13. The appellant brought the contents of communication dated 23-1-1995 to the notice of the learned Metropolitan Magistrate through its Miscellaneous Petition No. 2040 of 1995 seeking "reinvestigation", but the learned Magistrate, rejected the petition *vide* order dated 4-11-1995, observing that "rightly or wrongly that Court had passed an order and it had no power to review the earlier order". Here, again the learned Magistrate fell into an error. He was not required to "review" his order. He could have ordered "further investigation" into the case. It appears that

the learned Metropolitan Magistrate overlooked the provisions of Sec. 173(8) which have been enacted to take care of such like situations also."

After referring to the provisions of Sec. 173(8), the Court observed that the Magistrate could, thus, in exercise of the powers under Sec. 173(8) Cr.P.C. direct the C.B.I. to "further investigate" the case and collect further evidence keeping in view the objections raised by the U.P.S.C. to the investigation and the "new" report to be submitted by the Investigating Officer would be governed by sub-secs. (2) to (6) of Sec. 173 Cr.P.C. The Court held that the learned Magistrate failed to exercise the jurisdiction vested in him by law and his order dated 4-11-1995 cannot be sustained.

64. In the light of the aforesaid decision of the Supreme Court, it appears that though the order passed by the learned Magistrate accepting a final report under Sec. 173 is a judicial order, there is no requirement for recalling, reviewing or quashing the said order for carrying out further investigation under Sec. 173(8) Cr.P.C. As held by the Apex Court in the said decision, the provisions of Sec. 173(8) have been enacted to take care of such like situations also.

65. In *N. P. Jharia v. State of M.P.*, 2007 (7) SCC 358 proceedings had been initiated against the appellant therein in connection with possession of pecuniary resources disproportionate to his known sources of income. After investigation the Special Police Establishment (S.P.E.) submitted a "final report" on 1-3-1990 informing the Court that no offence is made out against the appellant. The final report was accepted by the Special Judge on 17-4-1990. But on 1-7-1992 S.P.E. submitted an application before the Special Judge for permission for further investigation. The Special Judge permitted further investigation. Thereafter, the sanction for prosecution was obtained from the State Government on 1-3-1995. The charge-sheet was filed in the Court on 24-7-1995. On behalf of the appellant, it was urged that once the final report was submitted there is no scope for further investigation. The Court held that so far as further investigation is concerned in the background of Sec. 173(8) of the Code of Criminal Procedure, 1973 the plea is clearly untenable.

66. In *Kari Choudhary v. Mst. Sita Devi*, 2002 (1) SCC 714, F.I.R. No. 135 was registered on the basis of a complaint lodged by Sita Devi and investigation was commenced thereafter. During investigation, the police found that the murder of the victim Sugnia Devi was committed pursuant to a conspiracy hatched by her mother-in-law Sita Devi and her other daughters-in-law besides others. So the police sent a report to the Court on 30-11-1998 stating that the allegations in F.I.R. No. 135 were false. The police continued with the investigation after informing the Court that they have registered another F.I.R. as F.I.R. No. 208 of 1998. The Supreme Court, *inter alia*, held thus :

"Learned Counsel adopted an alternative contention that once the proceedings initiated under F.I.R. No. 135 ended in a final report the police had no authority to register a second F.I.R. and number it as F.I.R. No. 208. Of course, the legal position is that there cannot be two F.I.Rs. against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different F.I.Rs. and investigation would be carried on under both of them by the same investigating agency. Even that apart, the report submitted to the Court styling it as F.I.R. No. 208 of 1998 need be considered as an information submitted to the Court regarding the new discovery made by the police during the investigation that persons not named in F.I.R. No. 135 are the real culprits. To quash the proceedings merely on the ground that final report had been laid in F.I.R. No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed it.

12. Even otherwise, the investigating agency is not precluded from further investigation in respect of an offence in spite of forwarding a report under sub-sec. (2) of Sec. 173 of a previous occasion. This is clear from Sec. 173(8) of the Code."

67. Thus, from the aforesaid decisions rendered in cases where final reports had been submitted and accepted, it is apparent that even after final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. In other words, there is no bar against conducting further investigation under Sec. 173(8) Cr.P.C. after the final report submitted under Sec. 173(2) has been accepted. It is also evident, prior to carrying out further investigation under Sec. 173(8) Cr.P.C. it is not necessary for the Magistrate to review or recall the order accepting the final report. In the circumstances, no infirmity can be found in the observations made by the learned Special Judge clarifying that the dismissal of the application shall not preclude the C.B.I. from carrying out further investigation and submitting further report against the accused in accordance with law.

68. On behalf of the petitioners, it has been contended that the investigation by the C.B.I. would not be further investigation under Sec. 173(8) Cr.P.C. inasmuch as no investigation is pending so as to call for any further investigation. Placing reliance upon the decision of the Supreme Court in *Mithabhai Pashabhai Patel* (supra), it was contended that reinvestigation or reopening of the investigation is not permissible. From the order of the learned Special Judge, it is apparent that the C.B.I. is not precluded from carrying out further investigation and submitting a further report. Hence, evidently the question of fresh investigation or reinvestigation does not arise. In the present case, it appears that in view of the decision of

C.E.G.A.T., the investigation does not appear to have been carried on any further and final report was filed mainly based upon the decision of C.E.G.A.T. Upon the decision of C.E.G.A.T. being set aside by the Supreme Court, what would be carried out would be further investigation in the matter and not fresh investigation or re-investigation as is sought to be suggested on behalf of the petitioners inasmuch as this is not a case where a fresh investigation or reinvestigation is to be started *ab initio* wiping out the earlier investigation altogether. Hence, the said decision would not come to the aid of the petitioners.

69. In *Ramchandran v. R. Udhayakumar*, 2008 (5) SCC 414, where the High Court had directed the C.B.I. to investigate the matter afresh, and thereafter, file a final report, the Supreme Court held thus :

> "7. At this juncture, it would be necessary to take note of Sec. 173 of the Code. From a plain reading of the above Section, it is evident that even after completion of investigation under sub-sec. (2) of Sec. 173 of the Code, the police has right to further investigate under sub-sec. (8), but not fresh investigation or reinvestigation. This was highlighted by this Court in *K. Chandrasekhar v. State of Kerala*. It was, *inter alia*, observed as follows :
>
> > "24. The dictionary meaning of 'further' (when used as an adjective) is 'additional; more; supplemental'. 'Further' investigation therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started *ab initio* wiping out the earlier investigation altogether. In drawing this conclusion, we have also drawn inspiration from the fact that sub-sec. (8) clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a 'further' report or reports - and not fresh report or reports - regarding the 'further evidence obtained during such investigation.
>
> 8. In view of the position of law as indicated above, the directions of the High Court for reinvestigation or fresh investigation are clearly indefensible. We, therefore, direct that instead of fresh investigation, there can be further investigation if required under Sec. 173(8) of the Code. The same can be done by C.B. C.I.D. as directed by the High Court."

70. The decision of the Supreme Court in *Abhinandan Jha v. Dinesh Mishra* (supra) also will not come to the aid of the petitioners inasmuch as the main issue involved in the said case was as to whether there is any power conferred, under the Code, on a Magistrate to call upon the police to submit a charge-sheet. The said decision does not lay down any proposition of law; that upon acceptance of final report, no further investigation can be carried out under Sec. 173(8) Cr.P.C. The decision of this Court in *Kirit M. Brahmbhatt v. State of Gujarat* (supra) also does not carry the case of the petitioners any further inasmuch as the question which had fallen for determination before the Court was whether the power exercised by the

Special Inspector General of Police directing reinvestigation of the offence, when the original complainant had no objection against granting C summary as prayed for by the investigating officer and that too after a period of one year and three months after granting of the C Summary, was in accordance with law?

71. As has been noted hereinabove, on the day when the order accepting the closure report was passed, the Supreme Court had already decided the appeal against the order of C.E.G.A.T. It cannot be gainsaid that, had the decision of the Supreme Court been brought to the notice of the learned Special Judge, in all probability he would not have accepted the final report. In this regard, it may be pertinent to refer to the following observations made by the Apex Court in *U.P.S.C. v. S. Papaiah* (supra) :

> "12. xxxx The withholding of vital information from the learned Metropolitan Magistrate while resubmitting the final report along with various documents on 24-2-1995, for reasons best known to the Investigating Officer, has created a doubt in our minds about the fairness on the part of the Investigating Officer while undertaking the investigations. Had the contents of the communication of the appellant dated 23-1-1995 been brought to the notice of the learned Magistrate, the possibility that he may not have agreed to drop the proceedings cannot be ruled out. This "lapse" deliberate or inadvertent, also renders the order of 16-3-1995 bad."

72. Since, the order of the learned Special Judge was also based upon the decision of C.E.G.A.T., in the opinion of this Court, the decision of the Supreme Court can be said to be fresh material so as to call for further investigation in connection with the offence in question. Besides, as held by the Apex Court in the decisions cited hereinabove, acceptance of closure report would not preclude the C.B.I. from carrying out further investigation under Sec. 173(8) Cr.P.C.

73. As regards the contention that the order of the Supreme Court would not constitute a fresh material so as to call for further investigation under Sec. 173(8) Cr.P.C. it would be relevant to refer to a decision of this Court in *Deepak Dwarkadas Patel v. State of Gujarat,* 1980 Cri.LJ 29, wherein the contention raised before the Court was that an additional charge-sheet could be submitted by a Police Station Officer if and only if there was further investigation in the course of which some further evidence, oral or documentary, was available which necessitated the involvement of some more person or persons. The Court held that the legislature had enacted sub-sec. (8) to Sec. 173 to set at rest the earlier controversy that once a charge-sheet was filed, the police officer has become *functus officio*. An enabling provision in the form of Sec. 173(8) is, therefore, inserted. Ordinarily, conceivable occasion for an additional charge-sheet would be the disclosure of some new material and so, while acknowledging

and recognizing the police officer's right to submit a fresh charge-sheet those conceivable circumstances are put on the statute. However, those circumstances are enumerative and not exhaustive in character. If the very material is misunderstood by the Police Station Officer and if he has received proper light from his superiors, he can certainly file an additional charge-sheet though there may not be strictly speaking the further investigation and collection of new material. In such a case, instead of new material, there is new light that is received by him. The Court was of the view that sub-sec. (8) is inserted as a new provision so that it may not be contended that on the submission of a charge-sheet investigation came to a standstill and the hands of the Police Officers are tied down. It was also contended on behalf of the petitioner therein that if this wider interpretation is placed on sub-sec. (8), Police Officers may go on harassing the citizens. The Court was of the view that the apprehension was not well-founded. That if the Police Officers are out to harass, this is not the only conceivable weapon with them. Moreover, there cannot be a presumption that this statutory power which is recognized by sub-sec. (8) would be in all probabilities abused.

74. In the facts of the present case, the respondent C.B.I. stands on a stronger footing, inasmuch as there is fresh material in the form of the decision of the Supreme Court setting aside the judgment of C.E.G.A.T. which formed the basis of the final report as well the order of the learned Special Judge in accepting the report. Accordingly, the further report would be based on fresh material and not on the same material as was submitted at the time when the final report was filed.

75. As regards the contention that the accused cannot be subjected to face investigation in connection with the same offence, twice over, the learned Counsel for the C.B.I. has rightly contended that the principle of double jeopardy would not be applicable at the stage of investigation. If the said contention were to be accepted, the provision of Sec. 173(8) would become redundant inasmuch as in all cases where further investigation is carried out, the accused would plead that they cannot be subjected to investigation twice over on the principle of double jeopardy. Merely because the investigating agency carries out further investigation, it cannot be said that the accused are subjected to face investigation twice over, because it is merely a continuation of the earlier investigation. Moreover, investigation cannot be put *at par* with prosecution and punishment so as to fall within the ambit of clause (2) of Art. 20 of the Constitution.

76. The contention that the petitioners were required to be given an opportunity of hearing on the application for further investigation made by the respondent C.B.I. also does not merit acceptance. It is settled law as

held by the Apex Court in *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj* (supra), that there is nothing in Sec. 173(8) Cr.P.C. to suggest that the Court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. Besides, it is settled legal position that it is only after the Magistrate takes cognizance of an offence that the accused would come into the picture. Prior thereto, the accused would have no *locus standi* insofar as the proceedings *qua* investigation and further investigation under Sec. 173(8) Cr.P.C. are concerned.

77. To summarize :

(i) Even after the final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. In other words, there is no bar against conducting further investigation under Sec. 173(8) Cr.P.C. after the final report submitted under Sec. 173(2) has been accepted.

(ii) Prior to carrying out further investigation under Sec. 173(8) Cr.P.C. it is not necessary that the order accepting the final report should be reviewed, recalled or quashed.

(iii) The decision of the Supreme Court setting aside the judgment of C.E.G.A.T. which formed the basis of the final report as well as the basis of the order of the learned Special Judge while accepting the report, would form fresh material so as to call for further investigation in the case.

(iv) Further investigation is merely a continuation of the earlier investigation, hence, it cannot be said that the accused are being subjected to investigation twice over. Moreover, investigation cannot be put *at par* with prosecution and punishment so as to fall within the ambit of clause (2) of Art. 20 of the Constitution. The principle of double jeopardy would, therefore, not be applicable to further investigation.

(v) There is nothing in the Code of Criminal Procedure, 1973, to suggest that the Court is obliged to hear the accused while considering an application for further investigation under Sec. 173(8) of the Act.

(vi) In the above view of the matter, no infirmity can be found in the observation made by the learned Special Judge in clarifying that the dismissal of the application shall not preclude the C.B.I. from carrying out further investigation and submit further report against the accused in accordance with law.

78. In the result, the petition fails, and is accordingly, dismissed. Rule is discharged.

(HSS) *Petition dismissed.*

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COMPANY PETITION

Before the Hon'ble Mr. Justice K. A. Puj

GALLOPS REALTY PVT. LTD., *IN RE.**

Companies Act, 1956 (1 of 1956) — Secs. 391, 394, 78 & 100 — Sanction to composite scheme of demerger resulting in reconstruction of share capital of demerged Company — Objection by Dy. Registrar of Companies to clause of Scheme that "capital profit on demerger shall be transferred to general reserve of demerged Company" as contrary to Accounting Standard 14 — Scheme approved by equity shareholders and creditors unanimously — On facts found, "Scheme fair, reasonable and in interest of shareholders" — The Court according sanction with said clause — Held, "Accounting Standard 14 is applicable only in case of amalgamation and not in case of demerger".

કંપની અધિનિયમ, ૧૯૫૬ — કલમ ૩૯૧, ૩૯૪, ૭૮ અને ૧૦૦ — કંપનીની સંમિશ્રિત યોજનાની મંજૂરી અલગ થયેલી કંપનીની શેરમૂડીની નવરચનામાં પરિણમી — નાયબ રજિસ્ટ્રારે યોજનાના ખંડ બાબત એવો વાંધો ઉઠાવ્યો કે, અલગ થતી મૂડી ઉપરનો નફો એકાઉન્ટિંગ પ્રમાણ ૧૪ વિરુદ્ધ અલગ થતી કંપનીના જનરલ રિઝર્વમાં તબદીલ થશે — ઈક્વિટી શેરધારકો અને લેણદારોએ યોજનાને એકમતે વધાવી — હકીકતો ઉપર જણાયું કે, ''યોજના ન્યાયી, વાજબી અને શેરધારકોના હિતમાં છે'' — અદાલતે પણ આ ખંડને મંજૂરી આપી — ઠરાવવામાં આવ્યું કે, એકાઉન્ટિંગ પ્રમાણ ૧૪ માત્ર એકત્રીકરણના કેસમાં જ લાગુ થાય, અલગ પડવાના કેસમાં નહિ.

Reference is also made to the decision of Rajasthan High Court in the case of *Sutlej Industries Ltd., In Re.,* 2007 (135) Comp. Cases 394 (Raj.) wherein similar objection was raised by the Regional Director. The objection was raised to the effect that since surplus arising out of the scheme of arrangement *i.e.* arrangement/amalgamation reserve is of capital nature and cannot be considered as general reserve as the same (general reserve) is free for distribution to the shareholders of a Company in the form of dividend/bonus shares, whereas 'arrangement/amalgamation reserve' cannot be utilised for distribution to the shareholders. While dealing with this contention, the Court held that such a clause in the scheme was not objected to by the shareholders and the meeting of shareholders unanimously approved the scheme of arrangement. The Court did not see any good reason to exclude such a clause from the scheme and broadly found the scheme to be fair, reasonable, according to law and in the interest of shareholders. There is no reason to make any departure from this view. (Para 11)

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*Decided on 8-5-2009. Company Petition No. 59 of 2009 in Company Application No. 30 of 2009 with Company Petition No. 60 of 2009 in Company Appli. No. 31 of 2009.