REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. OF 2008
(Arising out of S.L.P. (Crl.) Nos. 753-756 of 2004)

State of Maharashtra .... Appellant

Versus

Bharat Shanti Lal Shah & Ors. .... Respondents

JUDGMENT

Dr. Mukundakam Sharma, J.

1. Leave granted.

2. In all these appeals the issue that falls for our consideration is the constitutional validity of the Maharashtra Control of Organised Crime Act, 1999 (for short the 'MCOCA' or the 'Act') on the ground that the State Legislature did not have the legislative competence to enact such a

law and also that the aforesaid law is unreasonable and is violative of the provisions of Article 14 of the Constitution of India.

3. Respondent Nos. 2 and 3 were arrested under the provisions of the MCOCA and cases were registered against them. Being aggrieved by the aforesaid arrest and registration of cases both of them filed separate writ petitions being Criminal Writ Petition No. 1738/2002 and Criminal Writ Petition No. 110/2003 respectively in the Bombay High Court challenging the constitutional validity of the MCOCA, particularly the provisions of Section 2(d), (e) and (f) and that of Sections 3, 4 and 13 to 16 and Section 21(5) of the MCOCA. Respondent no. 1 also filed a writ petition of similar nature being Criminal Writ Petition No. 27/2003.

The Bombay High Court heard the above mentioned writ petitions together and passed a common judgment and order on 05.03.2003 whereby it upheld the constitutional validity of Section 2(d), (e) and (f) and also the provisions of Sections 3 and 4 but struck down Sections 13 to 16 as unconstitutional as being beyond the legislative competence of the State Legislature. The High Court held that the Parliament alone has the power to make law in that regard as provided for under Entry 31 of List I of

Seventh Schedule to the Constitution and that already the Indian Telegraph Act, 1885, a Central Act was holding the field. The High Court also struck down sub-section (5) of Section 21 of the MCOCA holding that the same was violative of provisions of Article 14 of the Constitution of India. Being aggrieved by the aforesaid common order the State of Maharashtra has filed the present appeals.

4. Learned senior counsel appearing for the parties advanced elaborate arguments on the aforesaid issues, but before we deal with and discuss the same, it would be necessary for us to refer to the relevant provisions of the concerned Central and the State Legislations.

5. The Indian Telegraph Act, 1885 (for short the 'Telegraph Act') was passed as a Central Act in 1885 and the said Act came into force on 1st October, 1885. The word 'telegraph' in the said Act is defined to mean any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other elector-magnetic emissions. By enacting Section 4 in the said Act the Central

Government has been given exclusive privilege in establishing, maintaining and working telegraphs. The power to grant a licence on such conditions and in considerations of such payments as it thinks fit, to any person to establish, maintain or work a telegraph in any part within India is also vested with the Central Government. Section 5 of the said Act gives power to the Central Government as well as to the State Government or any officer specifically authorized in that behalf by the Central or the State Government to take temporary possession of any telegraph established, maintained or worked by any person, licensed under the Act, provided there is an occurrence of any public emergency or there is a case of public safety and when such authority is satisfied that one such pre-condition arises and that it is necessary to act in a case of public emergency or maintaining of public safety. Section 5(2) of the Act provides that on the occurrence of any public emergency, or in the interest of public safety the Central or the State Government or any officer specially authorized in that behalf by the Central or the State Government may, if satisfied that it is necessary or expedient to do so in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for

preventing incitement to the commission of offence and for the reasons to be recorded in writing by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraphs, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order.

6. The Telegraph Act is an existing law (as defined in Article 366 (10) of the Constitution) with respect to the matters enumerated in Entry 31 of List I of the Seventh Schedule to the Constitution. Entry 31 empowers the Central Legislature to enact a law in respect of posts and telegraph, telephones, wireless, broadcasting and other like forms of communication. The Telegraph Act, which is an enactment passed before the commencement of the Constitution, deals with the aforesaid subjects enumerated in Entry 31 of List I.

7. The Maharashtra State Legislature enacted a State legislation under the name of Maharashtra Control of Organised Crime Act, 1999 which

came into force on 24th February, 1999. The Statement of Objects and Reasons for enacting the said Act reads as under:

> "Organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnapping for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. There is reason to believe that organised criminal gangs are operating in the State and thus, there is immediate need to curb their activities.
>
> It is also noticed that the organised criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.
>
> 2. The existing legal framework i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime."

According to its preamble, the said Act was enacted to make specific provisions for prevention and control of, and for coping with, criminal activity by organised crime syndicate or gang and for matters connected therewith or incidental thereto.

8. Section 2 of the MCOCA contains the definitions. The word "abet" is defined in clause (a) of sub-Section (1) to mean and include the communication or association with any person with the actual knowledge or having reason to believe that such person is engaged in assisting in any manner, an organized crime syndicate, the passing on or publication of, without any lawful authority any information likely to assist the organized crime syndicate and the passing on or publication of or distribution of any document or matter obtained from the organized crime syndicate and also rendering of any assistance whether financial or otherwise, to the organised crime syndicate. Clause (d) of sub-Section (1) defines the expression "continuing unlawful activity" to mean an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years of more, undertaken either singly or jointly, as a member of an organized crime

syndicate or on behalf of such syndicate in respect of which more than one charge sheets have been filed before a competent court within the preceding period of ten years and that court has taken cognizance of such offence. Clause (e) of sub-Section (1) defines the expression "organised crime" to mean any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency. The term "organised crime syndicate" is defined under clause (f) of sub-Section (1) to mean a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime.

9. Section 3 provides the punishment for organised crime. It states that (i) whoever commits an offence of organised crime, (ii) whoever conspires or attempts to commit or advocates, abets or knowingly facilitate the commission of an organised crime or any act preparatory to organised

crime, (iii) whoever harbours or conceals or attempts to harbour or conceal any member of an organised crime syndicate, (iv) any person who is a member of an organised crime syndicate and (v) whoever holds any property derived or obtained from commission of an organised crime, shall be punished as provided in the said section. Section 4 provides punishment for possessing unaccountable wealth on behalf of a member of organised crime syndicate.

10. Section 13 of the MCOCA deals with the power of the State Government to appoint the competent authority. As per the said section the State Government may appoint any of its officer, in Home Department, not below the rank of Secretary to the Government, to be the competent authority for the purposes of Section 14. Section 14 empowers a police officer not below the rank of the Superintendent of Police supervising the investigation of an organised crime under the aforesaid Act to submit an application in writing to the competent authority for an order authorizing or approving the interception of wire, electronic or oral communication by the investigating officer, when such interception may provide or has provided evidence of any offence involving an organised

crime. Sub-Sections (2) to (13) of Section 14 lay down the detailed procedure therefore as also the requirements to be fulfilled before approval is granted. Section 14, therefore, authorizes the interception of wire, electronic or oral communication, subject to certain conditions and safeguards laid down therein. Section 15 requires constitution of a review committee to review every order passed by the competent authority under Section 14. Section 16 imposes certain restrictions regarding interception and disclosure of wire, electronic or oral communication. It prohibits the interception and also disclosure of wire, electronic or oral communication by any police officer except as otherwise specifically provided, and makes any violation of the provision punishable.

11. There is a power of forfeiture and attachment of property of the person convicted under MCOCA under Section 20. Sub-section (1) of Section 21 of the MCOCA lays down that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (for short "the Code") or in any other law, every offence punishable under MCOCA shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of

the Code and "cognizable case" as defined in that clause would be construed accordingly. Sub-section (2) of Section 21 provides that Section 167 of the Code shall apply in relation to a case involving an offence punishable under the Act subject to certain modifications. Sub-section (5) of Section 21 provides that notwithstanding anything contained in the Code, the accused would not be granted bail if it is noticed by the Court that he was on bail in an offence under the Act, or under any other Act, on the date of the offence in question.

12. Mr. Shekhar Nafade, learned senior counsel appearing for the appellant -State of Maharashtra drew our attention to the abovementioned provisions of the Telegraph Act as also to the abovementioned provisions of the MCOCA in support of his submission that all the provisions of MCOCA, the constitutional validity of which is challenged are valid. It was submitted by him that the aforesaid provisions, namely, Section 2(d), (e) and (f) and Sections 13 to 16 and sub-Section (5) of Section 21 constitutional validity of which was challenged are legal and valid as they are covered by Entry 1 and 2 of List II of the Seventh

Schedule and also under Entry 1, 2 and 3 of List III of the Seventh Schedule, which read as under:

> Entry 1 List II: Public order (but not including the use of any naval, military or air force or any other armed force of the Union of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).
>
> Entry 2 List II: Police (including railway and village police) subject to the provisions of entry 2A of List I.
>
> Entry 1 List III: Criminal Law, including all matters included in the Indian Penal code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.
>
> Entry 2 List III: Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.
>
> Entry 12 List III: Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

13. It was submitted by him that the provisions of MCOCA create and define a new offence of organised crime under Section 2(1) (e) which is made punishable under Section 3 of the MCOCA and that to aid detection and investigation of such an offence and to provide evidence of any offence involving organised crime, interception of wire, electronic and oral

communication is necessary. He submitted that the provisions of Sections 13 to 16, facilitate the detection and investigation of the offence of organised crime, and the State's legislative competence to enact such provisions was traceable to Entry 1 and 2 in List II and Entry 1, 2 and 12 in List III of Seventh Schedule of the Constitution. He pointed out that the duty of police officers is to collect intelligence regarding commission of cognizable offences or plans/designs to commit such offences, to prevent the commission of offences, and to detect and apprehend offenders (See Section 23 of Police Act, 1861 and Section 64 of Bombay Police Act, 1951). He also submitted that the grounds for interception of the communication under the State Law are different from the grounds covered by Section 5(2) of the Telegraph Act, inasmuch as the State law authorizes the interception as it is intended to prevent the commission of an organised crime or to collect the evidence of such an organised crime. He, therefore, contented that the constitutional validity cannot be questioned on the ground of want of legislative competence of the State Legislature to enact such a provision.

14. It was further submitted that Entries in List I, II and III must receive a broad and liberal construction. Reference to the doctrine of pith and substance was also made.

15. It was also contended that the findings recorded by the High Court with regard to the repugnancy of provisions of Sections 13 to 16 of the MCOCA have been arrived at by misconstruing the provisions of the Central Act as also the State Act. The learned counsel for appellant drew our attention to the findings recorded in paragraph 48 of the impugned judgment of the High Court which contains a comparative chart on the basis of which the High Court has come to the conclusion that there was repugnancy. It was pointed out that the chart does not give a clear picture of the relevant statutory provisions and contained several flaws.

16. Mr. Dushyant A. Dave, learned senior counsel appearing for Respondent No.1 and Mr. Manoj Goel, learned counsel appearing for Respondent No.3, however, refuted the aforesaid submissions while contending that the aforesaid provisions, namely Sections 13 to 16 and sub-Section (5) of Section 21 are ultra vires Article 246 of the

Constitution of India. It was submitted by them that the subject and the area which is dealt by the MCOCA, enacted by the State Legislature are governed and covered exclusively by Entry 31 of List I in regard to which parliament alone has exclusive competence, and that being so, the said provisions enacted by a state legislature are ultra vires the Constitution. It was also submitted that the said provisions are not only beyond the legislative competence of the state legislature but they also infringe upon the fundamental rights guaranteed under Part III of the Constitution as the said provisions are violative of Articles 14 and 21 of the Constitution and, therefore, the said provisions are to be declared ultra vires the Constitution on both the counts.

17. In addition, Mr. Manoj Goel Counsel for the Respondent No. 3 submitted that Section 2 (d), (e) and (f) and Sections 3 and 4 of the MCOCA are constitutionally invalid as they are ultra virus being violative of the provisions of Article 14 of the Constitution.

18. But we find that no cross appeal was filed by any of the respondents against the order of the High Court upholding the

constitutional validity of provisions of section 2(d), (e) and (f) and also that of Sections 3 and 4 of the MCOCA. During the course of hearing, Mr. Goel, the counsel appearing for one of the respondents herein tried to contend that the aforesaid provisions of Section 2(d), (e) and (f) of the MCOCA are unconstitutional on the ground that they violate the requirement of Article 13 (2) of the Constitution and that they make serious inroads into the fundamental rights by treating unequals as equals and are unsustainably vague. Since such issues were not specifically raised by filing an appeal and since only a passing reference is made on the said issue in the short three page affidavit filed by the respondent No. 3, it is not necessary for us to examine the said issue as it was sought to be raised more specifically in the argument stage only.

19. Even otherwise when the said definitions as existing in Section 2 (d), (e) and (f) of the MCOCA are read and understood with the object and purpose of the Act which is to make special provisions for prevention and control of organised crime it is clear that they are worded to subserve and achieve the said object and purpose of the Act. There is no vagueness as the definitions defined with clarity what it meant by

continuing unlawful activity, organised crime and also organised crime syndicate. As the provisions treat all those covered by it in a like manner and does not suffer from the vice of class legislation they cannot be said to be violative of Article 14 of the Constitution. With respect to Section 3 of MCOCA, even before the High Court the attack was in particular in respect of the provisions of Section 3 (3) and (5) on the ground that the requirement of *mens rea* is done away with, thus automatically rendering a person without any intention or knowledge liable for punishment. It is a well settled position of law insofar as criminal law is concerned that in such provisions *mens rea* is always presumed as integral part of penal offence or section unless it is specifically and expressly or by necessary intendment excluded by the legislature. No such exclusion is found in sub-sections (3) and (5) of Section 3. As held by the High Court, if the provisions are read in the following manner no injury, as alleged, would be caused:

> "3(3). Whoever (intentionally) harbours or conceals or attempts to harbor or conceal any member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs."

> "3(5). Whoever (knowingly) holds any property derived or obtained from commission of an organized crime or which has been acquired through the organized crime syndicate funds shall be punishable with a term which shall not be less than three years but which may extent to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs."

As far as section 4 of MCOCA is concerned the challenge was made before the High Court on the ground that the words "at any time" in Section 4 makes an act which was not a crime prior to coming into force of the MCOCA, a crime, thus, making the provision retrospective, being violative of Article 20 of the Constitution. A Perusal of the enactment along with the object and purpose reveals that it is only prospective and not retrospective and as held by the High Court the words "at any time" should be read to mean at any time after coming into force of MCOCA, the section should be read as under:

> "4. **Punishment for possessing unaccountable wealth on behalf of member of organized syndicate.--**If any person on behalf of a member of an organized crime syndicate is, or, at any time (after coming into force of this Act) has been, in possession of movable or immovable property which he can not satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years which may extent to ten years and shall also be liable to fine, subject to a minimum fine of rupees one lac and such

property shall also be liable for attachment and forfeiture, as provided by Section 20."

20. After examining the impugned judgment in depth on the issue of constitutional validity of Section 2 (d), (e) and (f) and also Section 3 and 4 of MCOCA we are in accord with the findings arrived at by the High Court that the aforesaid provisions cannot be said to be ultra vires the Constitution and we do not find any reason to take a different view that what is taken by the High Court while upholding the validity of the aforesaid provisions.

21. In the light of the aforesaid, we are required to answer the issues which are specifically raised before us, relating to the constitutional validity of Sections 13 to 16 as also Section 21 (5) of MCOCA, on the ground of lack of legislative competence and also being violative of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision.

22. Before we proceed to record our findings and conclusions in relation to the contentions raised before us it would be necessary to survey and

notice some of the provisions of Constitution and well established doctrine and principle which are relevant for the purpose of our decision.

23. Chapter 1 of part XI of the Constitution deals with the subject of distribution of legislative powers of the Parliament and the legislature of the States. Article 245 of the Constitution provides that the Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 246 of the Constitution relates to the subject matter of laws made by the Parliament and State Legislatures. It declares that the Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. The Legislature of any State would have powers to make laws with respect to any of the matters mentioned in List II, subject to the power of the parliament in regard to List I matters and the power of the Parliament and the State Legislature in respect of List III matters. List III enumerates the matters in respect of which both Parliament and State Legislatures have power to enact laws.

24. It is a well established rule of interpretation that the entries in the list being fields of legislation must receive liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. Each general word should extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended within it. In **Navinchandra Mafatlal** v. **CIT** reported in AIR 1955 SC 58 this Court observed as under:

> "6.……As pointed out by *Gwyer, C.J.* in *United Provinces v. Atiqa Begum* (1940) FC R 110 at p. 134 none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It is, therefore, clear — and it is acknowledged by Chief Justice Chagla — that in construing an entry in a List conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein……The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

Similar were the observations of a five Judges' Bench of this Court in **Godfrey Phillips India Ltd.** v. **State of U.P.,** reported in (2005) 2 SCC 515, which are as follows:

> **"49**……Where there is the possibility of legislative overlap, courts have resolved the issue according to settled principles of construction of entries in the legislative lists.
>
> **50.** The first of such settled principles is that legislative entries should be liberally interpreted, that none of the items in the list is to be read in a narrow or restricted sense and that each general word should be held to extend to ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it (*United Provinces* v. *Atiqa Begam* (1940) FCR 110, *Western India Theatres Ltd.* v. *Cantonment Board* 1959 Supp (2) SCR 63, SCR at p. 69 and *Elel Hotels & Investments Ltd.* v. *Union of India* (1989) 3 SCC 698)."

25. It is also a cardinal rule of interpretation that there shall always be a presumption of constitutionality in favour of a statue and while construing such statue every legally permissible effort should be made to keep the statue within the competence of State legislature. In **M/s Burrakur Coal Co. Ltd.** v. **The Union of India and others** reported in 1962 (1) SCR 44 this Court held the same in the following manner:

> "**24**…….Where the validity of a law made by a competent authority is challenged in a Court of law that court is bound to presume in favour of its validty. Further while considering the validity of the law the court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained……."

26. In **CST** v. **Radhakrishnan** (1979) 2 SCC 249 this Court while dealing with the question of constitutional validity of a statute held that the presumption is always on the constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. It was held in that decision that for sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all other facts which are relevant and that it must always be presumed that the legislature understands and correctly appreciate the need of its own people and that discrimination, if any, is based on adequate grounds and considerations.

27. In this regard we may also refer to a three Judges' Bench decision of this Court titled **Greater Bombay Cooperative Bank Ltd**. v. **United Yarn Tex (P) Ltd. & Others** reported in (2007) 6 SCC 236. In the said decision one of the issues that was raised was "whether the State Legislature is competent to enact legislation in respect of cooperative societies incidentally transacting business of banking, in the light of Entry 32, List II of the Seventh Schedule of the Constitution." While

deciding the said issue reference was made and reliance was placed on the following passage contained in the earlier decision of this Court in **State of Bihar** v. **Bihar Distillaries Limited** reported in (1997) 2 SCC 453, about the nature of approach which the court should adopt while examining the constitutional validity of a provision (vide para 85) :

> "The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/ constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application……."

> "The court must recognise the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognises and gives effect to the concept of equality between the three wings of the State and the concept of 'checks and balances' inherent in such scheme."

28. One of the proven methods of examining the legislative competence of an enactment is by the application of doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the respective Legislature under the constitutional scheme. The said doctrine has come to be established in India and is recognized in various pronouncements of this Court as also of the High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on topics in the Union List, the State Act would not

become invalid merely because there is incidental encroachment on any of the topics in the Union List.

29. A five Judges' Bench of this court in the case of **A.S. Krishna** v. **State of Madras**, reported in 1957 SCR 399, held as under:

> **"8**…….But then, it must be remembered that we are construing a federal Constitution. It is of the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces. The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable. The British North America Act, 1867, which established a federal Constitution for Canada, enumerated in Sections 91 and 92 the topics on which the Dominion and the Provinces could respectively legislate. Notwithstanding that the lists were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two sections overlapped, and the Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was intra vires, regard must be had to its pith and substance. That is to say, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires, even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within it competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment."

Again a five Judges' bench of this court while discussing the said doctrine in **Kartar Singh** v. **State of Punjab** (1994) 3 SCC 569 observed as under:

> **"60.** This doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden."

30. Though it is true that the State Legislature would not have power to legislate upon any of the matters enumerated in the Union List but as per the doctrine of Pith and Substance there could not be any dispute with regard to the fact that if it could be shown that the area and subject of the legislation is also covered within the purview of the entry of the State List and the Concurrent List, in that event incidental encroachment to an entry in the Union List will not make a law invalid and such an

incidental encroachment will not make the legislation ultra vires the Constitution.

31. In **Bharat Hydro Power Corpn. Ltd.** v. **State of Assam** (2004) 2 SCC 553 the Doctrine of pith and substance came to be considered, when after referring to the catena of decisions of this Court on the doctrine it is laid down as under:

> "**18.** It is likely to happen from time to time that enactment though purporting to deal with a subject in one list touches also on a subject in another list and prima facie looks as if one legislature is impinging on the legislative field of another legislature. This may result in a large number of statutes being declared unconstitutional because the legislature enacting law may appear to have legislated in a field reserved for the other legislature. To examine whether a legislation has impinged on the field of other legislatures, in fact or in substance, or is incidental, keeping in view the true nature of the enactment, the courts have evolved the doctrine of "pith and substance" for the purpose of determining whether it is legislation with respect to matters in one list or the other. Where the question for determination is whether a particular law relates to a particular subject mentioned in one list or the other, the courts look into the substance of the enactment. Thus, if the substance of the enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid. This principle came to be established by the Privy Council when it determined appeals from Canada or Australia involving the question of legislative competence of the federation or the States in those countries. This doctrine came to be established in India and derives its genesis from the approach adopted by the courts including the Privy Council in

> dealing with controversies arising in other federations. For applying the principle of "pith and substance" regard is to be had (*i*) to the enactment as a whole, (*ii*) to its main objects, and (*iii*) to the scope and effect of its provisions. For this see *Southern Pharmaceuticals & Chemicals* v. *State of Kerala* (1981) 4 SCC 391, *State of Rajasthan* v. *G. Chawla* AIR 1959 SC 544, *Thakur Amar Singhji* v. *State of Rajasthan* AIR 1955 SC 504, *Delhi Cloth and General Mills Co. Ltd.* v. *Union of India* (1983) 4 SCC 166 and *Vijay Kumar Sharma* v. *State of Karnataka* (1990) 2 SCC 562. In the last-mentioned case it was held: (SCC p. 576, para 15)
>
> > "*15*. (*3*) Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.""

32. Article 254 of the Constitution succinctly deals with the law relating to inconsistency between the laws made by the Parliament and the State Legislature. The question of repugnancy under Article 254 will arise when a law made by Parliament and a law made by State Legislature occupies the same field with respect to one of the matters enumerated in Concurrent List and there is a direct conflict in two laws. In other words, the question of repugnancy arises only in connection with subjects enumerated in Concurrent List. In such situation the provisions enacted by Parliament and State Legislature cannot unitedly stand and

the State law will have to make the way for the Union Law. Once it is proved and established that the State law is repugnant to the Union law, the State law would become void but only to the extent of repugnancy. At the same time it is to be noted that mere possibility of repugnancy will not make a State law invalid, for repugnancy has to exist in fact and it must be shown clearly and sufficiently that State law is repugnant to Union law.

33. In the background of the aforesaid legal position we may now proceed to examine the question of competence of the State Legislature to enact a law of the nature of MCOCA.

34. A perusal of the relevant provisions of MCOCA would indicate that the said law authorizes the interception of wire, electronic and oral communication only if it is intended to prevent the commission of an organised crime or if it is intended to collect the evidence to the commission of such an organized crime. Interception of wire, electronic and oral communication with the said intent in case of urgency is also permitted under the State Act in which case it is to be approved by an

officer not below the rank of Additional Director General of Police within 48 hours of occurrence of interception.

35. The provisions of the MCOCA when read with the Statement of Objects and Reasons, which are already dealt with and referred to hereinbefore, would make it apparent and establish that the grounds for interception of the communication under MCOCA are distinct and different from the ground covered by Section 5(2) of the Telegraph Act. A comparative reading of the provisions of the Telegraph Act as also of the MCOCA would establish that both the Acts deal with the subjects and areas which cannot be said to be identical and common.

36. In paragraph 48 of the impugned judgment, the High Court has reproduced a comparative chart, which was filed before the High court by the respondents herein, to show that MCOCA had made inroads on the legislative power of the Parliament. Our attention was also drawn to the said chart and we find that the conclusion of the High Court that there is repugnancy in view of the statutory provisions contained therein do not appear to be sound. The High Court has recorded that under the

Central Law the communication can be intercepted only if there was public emergency and interest of public safety was involved. The High Court did not find any such provision in MCOCA because the grounds for interception in the State law are totally different from the grounds covered under the Telegraph Act. State law authorizes interception only if it is intended to prevent the commission of an organized crime and/or if it is intended to collect evidence of such organized crime. The High Court thereafter proceeded to compare Rule 419A (1) and (5) of the Telegraph Rules with Section 14(4), (8) and (10) of MCOCA. On the basis of the aforesaid comparison it cannot be held that MCOCA had encroached upon the legislative power of the Parliament. The proviso to Rule 419A(1) deals with cases of emergency and provides that in cases of emergency the communication may be intercepted without the prior approval of the competent authority and the approval may be obtained within a period of 15 days. It was held by the High Court that no time limit is provided under Section 14(4) of the Act. But, the said finding appears to be erroneous as Section 14(10) and (11) deal with emergency situations and provide appropriate safeguards.

37. It is now well settled that though the Statement of Objects and Reasons accompanying a legislative Bill cannot be used to determine the true meaning and effect of the substantive provisions of a statute, but it is permissible to refer to the Statement of Objects and Reasons accompanying a Bill for the purpose of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy. In this regard we may refer to the majority view (6:1) in the case of **Gujarat** v. **Mirzapur Moti Kureshi Kassab Jamat,** reported in (2005) 8 SCC 534, wherein it was observed as under:

> ***"Question 4. Statement of Objects and Reasons — Significance and role thereof***
>
> **69**. Reference to the Statement of Objects and Reasons is permissible for understanding the background, antecedent state of affairs in relation to the statute, and the evil which the statute has sought to remedy. (See *Principles of Statutory Interpretation* by Justice G.P. Singh, 9th Edn., 2004, at p. 218). In *State of W.B.* v. *Subodh Gopal Bose* AIR 1954 SC 92 the Constitution Bench was testing the constitutional validity of the legislation impugned therein. The Statement of Objects and Reasons was used by S.R. Das, J. for ascertaining the conditions prevalent at that time which led to the introduction of the Bill and the extent and urgency of the evil which was sought to be remedied, in addition to testing the reasonableness of the restrictions imposed by the impugned provision. In his opinion, it was indeed very unfortunate that the Statement of Objects and Reasons was not placed before the High Court

which would have assisted the High Court in arriving at the right conclusion as to the reasonableness of the restriction imposed. *State of W.B.* v. *Union of India* (1964) 1 SCR 371, SCR at pp. 431-32 approved the use of Statement of Objects and Reasons for the purpose of understanding the background and the antecedent state of affairs leading up to the legislation.

70. In *Quareshi-I* 1959 SCR 629 itself, which has been very strongly relied upon by the learned counsel for the respondents before us, Chief Justice S.R. Das has held: (SCR pp. 652 & 661)

"The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. *The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds*. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. (AIR para 15)

* * *

… 'The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence…'. This should be the proper approach for the court but the ultimate responsibility for determining the validity of the law must rest with the court…. (AIR para 21, also see the several decisions referred to therein.)"

71. The facts stated in the preamble and the Statement of Objects and Reasons appended to any legislation are evidence

> of the legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore, constitute important factors which amongst others will be taken into consideration by the court in judging the reasonableness of any restriction imposed on the fundamental rights of the individuals. The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved."

38. The objects and reasons read with the contents of the Act would indicate that the subject matter of the Act is maintaining public order and prevention by police of commission of serious offences affecting public order and, therefore as submitted, it will be relatable to Entry 1 and 2 of List II. After enacting MCOCA, assent of the President was also obtained and received on 24.04.1999. That being the position if the subject matter and the field of legislation are found to be covered under any of the entries of the Concurrent List also, the constitutional validity will have to be upheld. Thus, Entry 1, 2 and 12 of the Concurrent List would and could also be brought into operation and aid can be taken from said entries also, for the Act deals with subject matters which are relatable as well to Entries 1, 2 and 12 of the Concurrent List.

39. We are of the considered opinion that source of power to legislate the aforesaid Act can be derived by the State from the aforesaid entries of the State List and the Concurrent List and while enacting the aforesaid State Act the assent of the President was also taken. Therefore, the Act cannot be said to be beyond the legislative competence of the State Legislature. The content of the said Act might have encroached upon the scope of Entry 31 of List I but the same is only an incidental encroachment. As the main purpose of the Act is within the parameter of Entry 1 and 2 of the State Legislature we find no reason to hold that the provisions of Sections 13 to 16 are constitutionally invalid because of legislative competence.

40. Another ground on which challenge was made was that Section 13 to 16 violates the mandate of Article 21 of the constitution. It was submitted that provisions contained under Section 13 to 16 of the impugned act authorizing interception of communication violates the Right to Privacy, which is part of right to 'life' and 'personal liberty' enriched under Article 21. Article 21 of the Constitution reads as under:

"Protection to Life and Personal Liberty

21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

41. The Right to Privacy has been developed by the Supreme Court over a period of time and with the expansive interpretation of the phrase 'personal liberty', this right has been read into Article 21. It was stated in the case of **Gobind** v. **State of M.P.** reported in (1975) 2 SCC 148 that Right to Privacy is a 'right to be let alone' and a citizen has a right 'to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters'. The term privacy has not been defined and it was held in the case of **People's Union for Civil Liberties (PUCL)** v. **Union of India**, reported in (1997) 1 SCC 301 that as a concept it may be too broad and moralistic to define it judicially and whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case.

42. The question whether interception of telephonic message/tapping of telephonic conversation constitutes a serious invasion of an individual right to privacy was considered by this court on two occasions. One in

the year 1972 in the case of **R.M. Malkani** v. **State of Maharashtra,** reported in (1973) 1 SCC 471**,** wherein it was held as under:

> **"31.**……..Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or highhanded interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods. In the present case there is no unlawful or even irregular method in obtaining the tape-recording of the conversation."

43. The question posed above was considered again in detail by this Court in the case of **People's Union** (supra), wherein it was held as under:

> **"17.** We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".
>
> **18.** The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy".

> Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."

44. The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law. Thus what the Court is required to see is that the procedure itself must be fair, just and reasonable and non arbitrary, fanciful or oppressive.

45. The object of the MCOCA is to prevent the organised crime and a perusal of the provisions of Act under challenge would indicate that the said law authorizes the interception of wire, electronic or oral communication only if it is intended to prevent the commission of an organised crime or if it is intended to collect the evidence to the commission of such an organized crime. The procedures authorizing such interception are also provided therein with enough procedural safe

guards, some of which are indicated and discussed hereinbefore. In addition under Section 16 of the MCOCA, provision for prohibiting and punishing the unauthorized user of information acquired by interception of wire, electronic or oral communication has been made. Thus as the Act under challenge contains sufficient safeguards and also satisfies the aforementioned mandate the contention of the respondents that provisions of Section 13 to 16 are violative of the Article 21 of the Constitution cannot also be accepted.

46. Having recorded our finding in the aforesaid manner, we now proceed to decide the issue as to whether a person accused of an offence under MCOCA should be denied bail if on the date of the offence he is on bail for an offence under MCOCA or any other Act. Section 21 (5) of MCOCA reads as under:

> "Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question"

47. As discussed above the object of the MCOCA is to prevent the organised crime and, therefore, there could be reason to deny consideration of grant

of bail if one has committed a similar offence once again after being released on bail but the same consideration cannot be extended to a person who commits an offence under some other Act, for commission of an offence under some other act would not be in any case in consonance with the object of the act which is enacted in order to prevent only organised crime.

48. We consider that a person who is on bail after being arrested for violation of law unconnected with MCOCA, should not be denied his right to seek bail if he is arrested under the MCOCA, for it cannot be said that he is a habitual offender. The provision of denying his right to seek bail, if he was arrested earlier and was on bail for commission of an offence under any other Act, suffers from the vice of unreasonable classification by placing in the same class, offences which may have nothing in common with those under MCOCA, for the purpose of denying consideration of bail. The aforesaid expression and restriction on the right of seeking bail is not even in consonance with the object sought to be achieved by the Act and, therefore, on the face of the provisions this is an excessive restriction.

49. The High Court found that the expression "or under any other Act" appearing in the section is arbitrary and discriminatory and accordingly struck down the said words from sub-Section (5) of Section 21 as being violative of Article 14 and 21 of the Constitution. We uphold the order of the High Court to the extent that the words "or under any other Act" should be struck down from Sub section (5) of Section 21.

50. In view of the aforesaid discussions, we allow the appeals of the State Government, insofar as the constitutional validity of Sections 13 to 16 of MCOCA is concerned. We uphold the validity of the said provisions. The decision of the High Court striking down the words "or under any other Act" from sub-Section (5) of Section 21 of the Act is however upheld. The parties to bear their own cost.

51. Consequential orders, if any, in terms of the observations and directions passed in these appeals, may be passed by the concerned Court(s) where any proceeding under MCOCA is pending.

……CJI
(K.G. Balakrishnan)

……..J.
(R.V. Raveendran)

……..J.
(Dr. Mukundakam Sharma)

New Delhi,
September 1, 2008