IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.431 of 2019

Arising Out of PS. Case No.-261 Year-2018 Thana- BISFI District- Madhubani

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Ram Vinay Yadav, son of Upendra Yadav Resident of Village - Godhaul, PO- Sadullahpur, Head PO- Kamtaul, Gorhaul, District-Madhubani.

... ... Appellant.

Versus

The State of Bihar **... ... Respondent.**

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Appearance :

For the Appellant/s	:	Mr. Y.V. Giri, Sr. Adv. Mr. P.K. Shahi, Sr. Adv. Mr. Ansul, Amicus Curiae Mr. Rajesh Ranjan, Amicus Curiae Mr. Dr. Anshuman, Amicus Curiae Mr. Prabhat Ranjan, Amicus Curiae Mr. Ajay Kumar Thakur, Adv. Mr. Bindhyachal Singh, Adv. Smt. Soni Srivastava, Adv. Mr. Madhusudan Kumar, Adv.
For the U.O.I	:	Mr. S.D. Sanjay, ASG Mr. Mohit Agrawal, Adv.
For the State	:	Mr. Lalit Kishore, A.G. Mr. Prabhu Narayan Sharma, AC to A.G. Ms. Prachi Pallavi, AC to A.G.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
and
HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
and
HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date : 17 -05-2019

1. This Full Bench has been constituted to dispel the existing confusion relating to entertainment, consideration and disposal of anticipatory bail purported to be under Section 438 of the Cr.P.C relating to an offence punishable under Bihar Prohibition and Excise Act, 2016, (amended, effective from 2nd October, 2016) by the Chief Justice purported to be in accordance

with Chapter-II, Rule-11 of the Patna High Court Rules, being master of the roster. Before coming to terms of reference, which this Full Bench has to answer, it looks obligatory to flash the existing controversy in order to appreciate the legality, propriety of the reference.

2. Since before existing Excise Act 1915 (Bihar & Orissa Act 11 of 1915) has been redrafted and introduced in the background of Article 47 duly couched by Article 19(1)(g) as well as Article 246 of the Constitution of India proclaiming complete prohibition having nomenclature Bihar Prohibition and Excise Act 2016 which has been subject to challenge under so many writs and vide order dated 30.09.2016 passed in connection with C.W.J.C. No.6675/2016 and other allied writs (**Confederation of Indian Alcoholic Beverage Companies vs. State of Bihar and Ors. along with others**) as reported in **2016 (4) PLJR 369**, the same was declared *ultra vires* against which, State has preferred SLP before the Apex Court bearing S.L.P. (C) No.29749/2016 and vide order dated 07.10.2016 notices have been issued during midst thereof, operation of the order impugned has been stayed. The aforesaid SLP is still pending.

3. During the intervening period, again there happens to be an amendment in the Bihar Prohibition and Excise Act, 2016

which has been introduced since 2nd October, 2016 which has also been challenged under C.W.J.C. No.8640/2016 (Abay Kumar Mishra vs. The State of Bihar & Ors.) C.W.J.C. No.73098/2016 (Dr. Rai Murari vs. The State of Bihar & Ors.) whereupon, the State preferred transfer petition before the Apex Court and during consideration thereof, notices have been issued and further directing to tag with the original SLP(c) Nos.27949-29763/2016 further proceeding has been stayed.

4. By such amendment 2016, apart from others Section 76 has been introduced curtaining the right of an accused to ask for pre-arrest bail, that means to say, Anticipatory Bail. For better appreciation, the same is quoted below:

> "**Section 76 –** Offences to be cognizable and Non-Bailable-
> (1) All offences under this Act shall be cognizable and non-bailable and provisions of code of criminal procedure, 1973 (Act 2 of 1974) shall apply.
> (2) Notwithstanding anything mentioned in sub-section (1) above, nothing in Section 360 of Code of Criminal Procedure 1973 (Act 2 of 1974). Section 438 of Code of Criminal Procedure 1973 (2 of 1974) and Probation of Offenders Act, 1958 (20 of 1958) shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

5. This sub-clause (2) is the root cause of controversy. As sub-section(2) begins with non-obstante clause, forbidding application of Section 438 Cr.P.C. (as under controversy) apart from others hence, became subject matter of consideration by

different Benches (as per roaster). In Cr. Misc. No.26109/2017 (Ashoka Sahani vs. The State of Bihar), the Bench was of the view that on literal interpretation of Section 76(2) of the Bihar Prohibition and Excise Act, 2016 (amended Act) there happens to be complete de-recognition of prayer for anticipatory bail either before High Court or before lower court whereupon observed that no petition for anticipatory bail would be entertainable. In the aforesaid background, the registry was directed not to accept any petition purported to be under Section 438 of the Cr.P.C, levelling defect over maintainability.

6. Subsequently thereof, the matter has come up before another Bench in **Manish Kumar @ Lokesh Kumar Vs. The State of Bihar** Cr. Misc. No. 21578 of 2017 wherein the above referred order was placed and the learned Bench held that presence of Section 76 of the Excise Act (State list) happens to be repugnant to Section 438 of Cr.P.C., (concurrent list) on account thereof, there was requirement of assent at the end of the President as provided under Article 254(2) of the Constitution of India and, being deficient thereupon, the amendment enforceable from 2nd October, 2016 was not at all valid one. The Bench also observed that in the background of aforesaid infirmity, the barrier so prescribed under Section 76 of the Excise Act would not be

legally acknowledgeable and thus, while granting anticipatory bail to the petitioner, the matter was referred to the Division Bench, more particularly in the background of shutter having affixed over the registry by the earlier bench in accepting petitions and further, to adjudicate upon the propriety of the Section 76(2) of the Act. During course of analyzing the ambit and scope in cursory way, the order so passed under Ashok Sahani has been stamped as "per-incurium". Before the matter was to be listed before the Division Bench, a new interpretation came out from another Bench while considering the prayer in Cr. Misc. No.42985/2017 (Barun Kumar vs. The State of Bihar) whereunder, referring standing order no.3/1994 in connection with the Rule-12 of Chapter-XXI-C of the Patna High Court Rules, it has been held that the single Bench while considering Manish case was not at all competent enough to penetrate over vires, as the sphere belongs to Division Bench. And also substantiated the same by referring Ranchi Timber Traders Association & Ors. vs. State and Ors. Reported in 1997(1) PLJR 133. In the aforesaid background, observed that Ashok Sahani still commands the field whereupon petition for anticipatory bail would not be maintainable. The Division Bench while considering the same observed that as the vires of the act is subjudice before the Apex Court on account thereof, forbidded to lay hands over

the same, however, the hurdle having been led by the earlier bench directing the registry not to accept any petition relating to seeking relief of anticipatory bail under Excise Act, removed by strucking it down Apart from this, it is also evident therefrom that while adjudicating upon the aforesaid issue, the learned Division Bench took into cognizance the principle decided by the Apex Court in **Vilas Pandurang Pawar vs. State of Maharastra** reported in **(2012) 8 SCC 795** relating to SC ST (POA) Act, having similar kind of provisions and for better appreciation the relevant para is quoted below:

> "(8) Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.
> (9) The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence."

7. Even thereafter, respective Benches having at variance caused anxiety to the Chief Justice and thus, constitution of the instant Full Bench.

8. The Chief Justice formulated following issues for consideration as well as adjudication of Full Bench which are as follows:

> (1) Whether the provisions of Section 438 Cr.P.C continue to apply in spite of the bar created under Section 76(2) of the Bihar Prohibition and Excise Act, 2016 and as to whether such an application under Section 438 Cr.P.C. for anticipatory bail is maintainable?
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> (2) Whether the law laid down in the case of **Ashok Sahani** (supra) and as further explained in the case of **Barun Kumar** (supra) lays down the law correctly or whether the conflicting view in the case of **Manish Kumar** (supra) reflects the correct position of Law?
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> (3) Whether the learned Single Judge in the case of **Manish Kumar** (supra) vide an order dated 10.08.2017 while referring the matter for decision by a Larger Bench in deference to the judgment in the case of **Ashok Sahani** (supra) was justified in declaring it per incurium keeping in view the fact that the judgment was by a Co-ordinate Bench in view of the law laid down by the Apex Court in the case of **State of Bihar vs. Kalika Kuer** reported in **(2003) 9**

SCC 448 and the law laid down the in case of **Rana Pratap Singh vs. State of U.P. (FB)** reported in **1996 Criminal Law Journal 665,** and further keeping in view the opinion expressed in the case of **Barun Kumar** (supra) that such an issue of vires under the High Court Rules could have been decided by a Division Bench only?

(4) Whether the Division Bench in the case of **Manish Kumar** (supra) vide order dated 06.11.2017 was justified in not resolving the dispute on the ground of the pendency of the two writ petitions before the Apex Court relating to the challenge raised to the vires of the Bihar Prohibition and Excise Act, 2016?

(5) Whether even if the matter was pending before the Apex Court the Division Bench in the case of Manish Kumar (supra) was denuded by any disability either on the ground of legality or propriety not to proceed to answer the reference made to it more particularly when there is no pronouncement by the Apex Court on the issue sought to be resolved, and when the matter did require an immediate resolution keeping in view the conflicting views of this Court?

9. Considering the importance of the terms of reference as well as legal jugglery imbibed therein, apart from hearing the learned counsel for the petitioner as well as learned Advocate

general, learned Additional Solicitor General, also been invited and allowed participation of large number of learned counsels as an amicus curiae who actively participated and adorned the Bench with their legal accumane with illuside submissions, and those are Sri Y.V. Giri, Sr. Adv., Sri P.K. Shahi, Sr. Adv., Sri Ajay Kumar Thakur, Adv, Sri Bindhayachal Singh, Adv., Smt. Soni Srivastava, Adv, Sri Prasant Kumar, Adv., Sri Ansul, Adv., Sri Rajesh Ranjan, Adv. Dr. Anshuman, Adv.

10. Before coming to submissions having raised on behalf of learned respective counsels, they all are unanimous that in the background of pendency of SLP before the Apex Court and further, staying the further proceeding of two subsequent writs having been so filed challenging the amended provision which also encompasses Section 76, the High Court could not indulge in scrutiny of reference no.4 and 5, as it will tantamount to interference within arena of superior court being in seisin of the matter. In likewise manner, it has also been submitted that in the background of pendency of aforesaid SLP, the remaining points also found waddled as, disability of checker, will Grading over shadow. Hence, the issue in hand, till pendency of SLP would not attract nor this court in the aforesaid circumstances could lay its verdict in finality. That means to say, only stop gap arrangement

has to be found out, and for that purpose constitution of Full Bench is not at all justifiable as, Division Bench in Manish Kumar had already resolved the issue by laying down correct procedure to be followed during intervening period, till finalization of the issue by the Apex Court. It has also been canvased that the full bench, for the present could not answer contrary to Manish Kumar decided by the Division Bench. Furthermore, it has also been urged that after verdict of Division Bench in Manish Kumar, no more controversy subsists, more particularly relating to Question no.1,2. So far Question no.3 is concerned, the finding of the Division Bench made the issue redundant.

11. However, the following points have also been raised in order to properly assist the Bench.

12. It has been argued at the end of the learned Senior Counsel Sri Y.V. Giri that Article 47 duly acknowledges activity of the State (directive principle of State) which should be read in conjunction with Article 246 of the Constitution of India and under guise thereof, the seventh schedule stood acknowledges three categories of charter part first union list, part two the State list and part third the concurrent list having under each others dominion. It is evident therefrom that the excise is found under State list and that being so, the State happens to be within

exclusive domain to prescribe procedure, relating to offences in violation thereof as well as sentence. Now, coming to present theme, as is evident, it encompasses eventualities. The first one, whether the State is competent enough to expand over the area occupied by the centre, and more particularly, the Cr.P.C, falling under concurrent list could the State without following the procedure engrafted under Article 254(2) of the Constitution of India, that means to say without having assent of President of India, decadences certain provisions thereof, in spite of presence of Section 4(2) as well as Section 5 Cr.P.C. duly acknowledging the procedure so sketched with regard to special law. However, as the learned counsel has submitted, the aforesaid activity would be recognizable only when the act has got validity over its germane. Has there been, then in that circumstance, its procedure even barricading the provisions for anticipatory bail as provided under Section 76 of the Act would survive otherwise not. Being deficient thereupon, there happens to be repugnancy in between whereupon , the central act would prevail, governing the subject in terms of Article 254(1) of the Constitution of India and that being so, petition for anticipatory bail in accordance with Section 438 of the Cr.P.C. would be entertainable.

In an alternative it has also been submitted that as per Article 21 read with Article 14 of the Constitution of India, duly recognizes the personal liberty of a citizen. Further, Article 21 has some sort of rigidity while shielding personal liberty of a citizen, but having an exception gain saying under due process of law. Though, bail could not be a fundamental right but it happens to be a legal right. When this happens to be a legal right then, in that circumstance, its deprivation should be within the ambit of the law. Because of the fact that there happens to be ambiguity over the present enactment due to absence of assent of the President, on account thereof, it could not be enforceable, whereupon visibility of any kind of embargo would not be perceptible.

13. In its continuity, the learned Senior Counsel also raised the doctrine of classification but cautiously. Also referred **AIR 1995 SC 1198, (2012) 8 SCC 795, (2014) 3 SCC 1, (2017) 3 SCC 545, (2016) 10 SCC 165, (2018) 6 SCC 454.**

14. The learned Senior Counsel Sri P.K. Shahi during course of his submission has raised other issues also including that of whatever been argued at the end of learned Senior Counsel Sri Y.V. Giri. The first and foremost argument having been made at his end relates with the Canadian theory of pith and substance and submitted that to some extent encroachment was permissible in

the background of Article 246 of the Constitution of India relating to the subject falling under concurrent list but, for that the assent of President was necessary in tune of requirement so prescribed under Article 254(2) of the Constitution of India and that being so, the aforesaid theory was not at all applicable. In an alternative, it has also been submitted that even if State is found within its domain to legislate such enactment, even then, it has got no legislative power to sterile the Central Act that too in absence of assent of the President. Further urged that due acknowledgment of State Act within its jurisdiction, relating to concurrent list is subject to assent, and for want thereof, is repudiatable.

15. Furthermore, it has also been argued that the barrier having so prescribed under Section 76(2) of the Excise Act is not at all found legally entertainable because of the fact that unless and until there happens to be proper consideration by a Court of Law whether the allegations whatever been alleged did attract application of Excise Act. Mere leveling thereof in the format of the FIR would not constitute an offence punishable under the Excise Act. That being so, irrespective of barrier the power of court still survives in order to trace out whether a case of excise Act is made out or not. If not, then certainly, an accused would be

entitled for anticipatory bail otherwise, the same would be non-maintainable.

16. In order to buttress his plea, it has further been submitted that in corresponding enactment such as Money Laundering Act, Scheduled Caste Scheduled Tribe (POA) Act, TADA Act etc. not only the provision of Section 438 Cr.P.C. has been eclipsed rather some sort of barrier has also been inflicted relating to regular bail which, repeatedly been subject to consideration before the Hon'ble Apex Court and repeatedly, it has been observed that all the enactments are subject to judicial scrutiny and that being so, irrespective of bar so inflicted by way of special provision having under the relevant act, been considered and diluted with regard to appropriate cases. In support thereof, the learned Senior Counsel has also relied upon **(1994) 3 SCC 569 (Kartar Singh vs. State of Punjab** (Constitution Bench), **AIR 1997 SC 1125 (D.K. Basu v. State of West Bengal), AIR 1990 SC 2072 (Vijay Kumar Sharma & Ors. Vs. State of Karnataka & Ors.), (2001) 7 SCC 469 (Ratansingh v. Vijay Singh).**

17. The learned counsel Shri Ajay Kumar Thakur has submitted that constitution of Full Bench is not at all required in the background of the fact that as per terms of reference itself, it is evident that the matter of controversy is found duly answered by

the Division Bench in Manish Kumar case. Furthermore, it has also been urged that as per judicial norms, the judgment of the Division Bench is to be followed by the Single Bench which the respective Single Bench ought to have. Because of the fact that the respective Single Judge failed to adhere the finding recorded by the Division Bench, whereupon such acrimonious situation has arisen.

18. The learned counsel Shri Bindhayachal Singh while supporting the above view has submitted that as there happens to be no controversy on account thereof, nothing remains to be answered by the Full Bench in the background of finding so recorded by the Division Bench with regard to Manish Kumar case.

19. Shri Ansul, Shri Rajesh Ranjan, Dr. Anshuman have challenged the propriety of Section 76(2) of the Bihar Prohibition and Excise Act and on that very score, it has been submitted that by way of introduction of 76(2) of the Act, the State has transgressed its legislative power by way of annulling the applicability of Section 438 of the Cr.P.C. a central enactment falling under concurrent list as per third list so prescribed under Article 246 of the Constitution whereupon, the enactment required assent of President and being deficient on that score, would not

found valid and that being so, rightly been declared *ultra vires* by the Single Judge in Manish Kumar. The learned respective counsels also referred different citations. It has also been submitted that by way of introduction of Section 76, virtually power of the High Court has been infringed and then, in that circumstances, as required under Article 200 of the Constitution of India the assent of President was necessary in accordance with Article 201 of the Constitution of India and so, on this score also the present Act could not be considered to be the intra vires.

20. Learned counsel Shri Prabhat Ranjan during course of his submission, first of all challenged the constitution of the Full Bench. In order to justify his submission, it has been submitted that as per Chapter-V, Rule-I of the Patna High Court Rules the direct constitution of Full Bench would not have occurred because of the fact that the same would have been only after having been referred by the Division Bench that too, when conflicting Division Bench views were prevailing since before and further, the finding thereof has been doubted, by the said Bench. Therefore, irrespective of the fact that Chief Justice happens to be master of the roster, may constitute a Full Bench but would not have referred the matter as, like present one. Further, elaborating the issue it has been argued that constitution of Bench is other

matter, for which Chief Justice has been found to be master, appropriated by several judicial pronouncement, but directly referring the matter to the full bench, while judgment of Division Bench (Manish Kumar) was already surviving over the issue, happens to be out of jurisdictional avenue, as, the same could be only be by fulfilling the criteria so prescribed therefor. In its continuity, it has been submitted that Chief Justice while discharging its function as single judge, would not usurp over Division Bench. Then, it has been argued that the mater is found properly answered by the Division Bench (Manish Kumar) in the background of existing scenario. Whatever controversy arose, that is only due to non-following of the finding of the Division Bench which, the Single Judge was very much under obligation to abide. Apart from this, it has also been submitted that according to terms of reference itself, being volatile, made the reference intangible. Question No.5 is indicative of the fact that the vires of the Act happens to be under sub-jugation before Apex Court and that being so, the Full Bench was not at all competent enough to comment over the propriety of Section 76(2) of the Act which, the Division bench in Manish Kumar case has duly acknowledged. Apart from this, it has also been submitted that after going through the judgment of the Manish Kumar case, it is apparent that the

Division Bench have invented the stop gap arrangement in order to ward of the stalemate after considering the principle laid down by the Hon'ble Apex Court in connection with SC ST (POA) Act pointing similar kind of barrier (pari materia) in **Vilas Pandurang Pawar & Anr. Vs. State of Maharashtra & Ors.** reported in **(2012) 8 SCC 795** and the said view has been reiterated by the Hon'ble Apex Court in **Subhash Kashinath Mahajan v. State of Maharashtra** reported in **(2018) 6 SCC 454.** Also submitted that recently in **Debjyoti Bhattacharyya vs. The State of West Bengal C.R.M. 8302/2018** the Calcutta High Court has observed that mere registration of case under particular section would not disentitled the accused to seek an anticipatory bail rather, for the aforesaid purpose the allegation on its face has to be seen as observed in **Vilas Pandurang Pawar & Anr. Vs. State of Maharashtra & Ors.** reported in **(2012) 8 SCC 795**. It has also been submitted that Division Bench of this Court in **Bisheshwar Mishra vs. The State of Bihar** reported in **2016(4) PLJR 1058** has observed that for the purpose of adjudicating upon maintainability of an anticipatory bail relating to SC/ST (POA) Act, the allegation on its face has to be seen and if the court comes to a conclusion that no case is made out then in that circumstance, the court is fully empowered to grant anticipatory bail to the

accused relying upon Vilas Pandurang Pawar (Supra) case. So, it has been submitted that the reference so made by the Chief Justice is not at all found in tune with Patna High Court Rules. If it is held that the reference is in accordance with law then, in that event, be answered accordingly.

21. The learned Advocate General as well as learned Additional Solicitor General argued in sameness on account thereof, their argument is not at all discussed separately, individually, independently save and except so required at an appropriate juncture. The learned Advocate General has submitted that vires of the original act 2016 was challenged in **Confederation of Indian Alcoholic Beverage Companies vs. State of Bihar and Ors.** wherein the same has been declared ultra vires which happens to be the subject matter of **Special Leave to Appeal (C) Nos.29749/2016** before the Apex Court. It has further been submitted that after introduction of new amended act, two writs **CWJC No.8640/2016 (Abhay Kumar Mishra vs. The Union of India and Others) and CWJC Diary No.73098 of 2016 (Dr. Rai Murari vs. The State of Bihar & Ors.)** have been filed raising the germen of the amended enactment whereupon, the State of Bihar moved transfer petition before the Apex Court so that vires of the amended act be properly adjudicated upon along

with S.L.P (c) No.29749/2016 whereupon cognizance has been taken by the Apex Court directing tagging of the same with **Special Leave to Appeal (C) Nos.29749/2016**, meanwhile further proceeding has also been stayed that tantamounts to inclination of the Apex Court to consider the issue even in its original jurisdiction with regard to vires of the amended act along with SLP(C) No.29749/2016. In the aforesaid background, citing **1995 Suppl. (3) SCC 434 (Chhavi Mehrotra vs. Director General Health Services & Ors. as well as State of Maharashtra vs. Farook Mohammed Kasim Mapkar & Ors.** reported in **(2010) 8 SCC 582** , it has been submitted that it would not be prudent to the High Court to deliberate the issue more particularly putting the vires of the Act to litmus test. Then, it has been submitted that there happens to be no controversy with regard to stop gap arrangement invented by the Division Bench following the principle laid down by the Apex Court in connection with **Vilas Pandurang Pawar & Anr. Vs. State of Maharashtra & Ors.** reported in **(2012) 8 SCC 795**. So submitted that in the aforesaid background, as no controversy subsist therefore, there was/is no occasion for constitution of the Full Bench in order to answer the reference, nor it could be.

22. Before coming to the main issue, that means to say over answering the terms of reference, certain salient features are to be seen. From the order of the reference, it is evident that the Bihar Prohibition and Excise Act, 2016 was declared ultra vires in **Confederation of Indian Alcoholic Beverage Companies vs. State of Bihar and Ors.** vide judgment dated 30.09.2016 reported in **2016(4) PLJR 369**. It is further evident that aforesaid order is under challenge in **Special Leave to Appeal (C) Nos.29749/2016** wherein notices have already been issued against the respondent and till their appearance, by an interim order, the operation of the judgment has been stayed. It is further evident that while the aforesaid matter remains pending, there has been another set of amendment in the Act enforceable since 02.10.2016 whereby the present controversial section 76(2) has been introduced apart from others which also been challenged under **CWJC No.8640/2016 (Abhay Kumar Mishra vs. The Union of India and Others) and CWJC Diary No.73098 of 2016 (Dr. Rai Murari vs. The State of Bihar & Ors.)** and aggrieved thereby, the State of Bihar filed transfer petition before the Apex Court as **Transfer Petition (Civil) Nos.2089-2090/2016** wherein the Apex Court passed the following order:

"Issue notice, fixing a returnable date within four weeks.

Tag with S.L.P. (C) Nos.27949-29763 of 2016.

There shall be stay of further proceedings in C.W.J.C No.8640 of 2016, titled "Abhay Kumar Mishra vs. The Union of India and Others" and C.W.J.C Diary No.73098 of 2016 "Dr. Rai Murari vs. The State of Bihar & Others". Pending before the Patna High Court."

23. That is sufficient to show inclination of the Apex Court that the matter relating to virus of the main Act along with amended act to be adjudicate upon analogously. That means to say the vires of the amended act is also before the Apex Court. That being so, whether it would be plausible for the High Court to delve over the same issue. If so, whether it will amount usurping the arena of the Apex Court which ought not be.

24. How, such approach of the High Court has been perceived by the Apex Court, at an earlier occasion could be seen in **Chhavi Mehrotra vs. Director General Health Services & Ors.** reported in **1995 Suppl. (3) SCC 434** wherein it has been observed:

> "Despite the whole matter being seized of by the court, the petitioner moved-and what is disturbing us is that the learned Single Judge of the High Court entertained an independent Writ Petition No.1508(M/S) of 1993 before the Lucknow bench of the High Court and obtained certain directions which would not only be consistent with the consequences of the implementation of this court's order but would

also interfere and detract from it. Learned counsel would say that it was a direct interference with the proceedings before this Court. It is a clear case where the High Court ought not to have exercised jurisdiction under Article 226 where the matter was clearly seized of by this court in a petition under Art.32. The petitioner was eo nominee a party to the proceedings before this court. It is an unhappy situation that the learned Judge of the High permitted himself to issue certain directions which, if implemented, would detract from the plenitude of the orders of this court. The learned Single Judge's perception of justice of the matter might have been different and the abstinence that the observance of judicial propriety, counsels might be unsatisfactory, but judicial discipline would require that in a hierarchical system it is imperative that such conflicting exercise of jurisdiction should strictly be avoided. We restrain ourselves from saying anything more. "

25. In **State of Maharashtra vs. Farook Mohammed Kasim Mapkar & Ors.** reported in **(2010) 8 SCC 582:-**

"14. There is no dispute about the proposition and this Court reiterated that judicial discipline would require that in a hierarchical system, such conflicting exercise of jurisdiction should be avoided. However, the dictum laid down in that case is not applicable to the case on hand, because in Chhavi Mehrotra (supra), the same petitioner after filing writ petition under Article 32 and getting certain directions approached the High Court under Article 226 and the High Court had issued more directions. When this was brought to the notice of this Court, after pointing out the practice and procedure, this Court dissatisfied with the High Court's move."

26. That being so, the position so called out from the aforesaid pronouncement is, instead of taking the issue in hand having proper acknowledgment of the fact that matter is pending since before the Supreme Court. So, any effort to crystallize the issue relating to Section 76(2) of the Act, would not be prudent, as taigling over the same, ultimately drag the issue of legislative empowerment, competence, paving the way towards the destination having been pre-occupied by the Apex Court.

27. So many enactments are prevalent wherein privilege of anticipatory bail has been wiped out. Not only this, in the State of U.P. though assent of President happens to be but Section 438 Cr.P.C. has been deleted by way of state amendment. Specifically in **Jagat Prasad vs. State of U.P.** reported in **(1998) 8 SCC 632,** the constituting of event has been put under challenged which has been referred to larger Bench, and the ultimate result is not known, However, it has consistently been held that bail is not fundamental right of an accused as held by the Constitution Bench in **Kartar Singh vs. State of Punjab** reported in **(1994) 3 SCC 569.** Apart thereof, the U.P., amendment act has also been tested therein, upholding the same. Not only this, the provision of POA has also been subject to consideration in **State of Gujrat vs.**

Salimbhai Abdulgaffar Shaikh reported in **(2003) 8 SCC 50**, wherein it has been held:-

> "12. Shri Amarendera Sharan, learned senior counsel for the respondents has submitted that the power of the High Court to grant bail under Section 439 Cr.P.C. has not been taken away by POTA and consequently the learned Single Judge had the jurisdiction to grant bail to the respondents in exercise of the power conferred by the aforesaid provision. Learned counsel has laid great emphasis upon Section 49 of POTA, especially Sub-section (5) thereof and has submitted that in view of the language used in this section, the power conferred upon the Court of Sessions and the High Court under Section 439 will remain intact. It has been urged that if the intention of the legislature was to make the provisions of Section 439 of the Code inapplicable in relation to offences under POTA, it would have made a provision similar to Sub-section (5) of Section 49 which expressly excludes the applicability of Section 438 Cr.P.C. We are unable to accept the contention raised by the learned counsel for the respondents. It is well settled principle that the intention of the legislature must be found by reading the Statute as a whole. Every clause of Statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole Statute. It is also the duty of the Court to find out the true intention of the legislature and to ascertain the purpose of Statute and give full meaning to the same. The different provisions in the Statute should not be interpreted in abstract but should be construed keeping in mind the whole enactment and the dominant purpose that it may express. Section 49 cannot be read in isolation, but must be read keeping in mind the scope of Section 34 whereunder an accused can obtain bail from the High Court by preferring an appeal against the order of the Special Court refusing bail. In view of this specific provision, it will not be proper to interpret Section 49 in the manner suggested by learned counsel for the respondents. In A.R. Antulay v. Ramdas Srinivas Nayak & Anr. 1984 (2) SCC 500, the scope of special Act making provision for creation of a Special Court for dealing with offences thereunder and the application of Code of Criminal Procedure in such circumstances has been considered and it has been held that the procedure in Cr.P.C. gets modified by reason of a special provision in a special enactment."

28. On the anvil of Article 14 of the Constitution, the vires of the SC ST (POA) Act, more particularly relating to ceasing of provision of anticipatory bail, has been the subject matter of consideration in **State of M.P. vs. Ram Krishna Balothia** reported in **(1995) 3 SCC 221** wherein it has been held:-

> "6. It is undoubtedly true that Section 438 of the Code of Criminal Procedure, which is available to an accused in respect of offences under the Penal Code, is not available in respect of offences under the said Act. But can this be considered as violative of Article 14? The offences enu- merated under the said Act fall into a separate and special class. Article 17 of the Constitution expressly deals with abolition of "Untouchability" and forbids its practice in any form. It also provides that enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordancewith law. The offences, therefore, which are enumerated under Section 3(1) arise out of the practice of "Untouchability". It is in this context that certain special provisions have been made in the said Act, including the impugned provision under Section 18 which is before us. The exclusion of Section 438 of the Code of Criminal Procedure in connection with offences under the said Act has to be viewed in the context of the prevailing social conditions which give rise to such offences, and the apprehen-Scheduled Castes persons eat inedible sub- sion that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail. In this connection we may refer to the Statement of Objects and Reasons accompanying the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Bill, 1989, when it was introduced in Parliament. It sets out the circumstances surrounding the enactment of the said Act and points to the evil which the statute sought to remedy. In the Statement of Objects and Reasons it is stated:-
>
> > "Despite various measures to improve the socioeconomic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities,

> humliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.
>
> 2..... When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the government allotted land by the Scheduled Castes and Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible sub-stances like human excreta. and attacks on and mass killings of helpless Scheduled Castes and Schedules Tribes and rape of women belonging to the Scheduled Castes and the Schedules Tribes..... A special legislation to check and deter crimes against them committed by non-Schedules Castes and non Schedules Tribes has, therefore, become necessary.

The above statement graphically describes the social conditions which motivated the said legislation. It is pointed out in the above Statement of Objects and Reasons that when members of the Schedules Castes and Schedules Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and cannot be compared with other offences.

29. However, subsequently the Apex Court while considering the aforesaid issue, expanded the arm by staling the rigidity as observed in Balothia case, and laid down the following principle relating to **Vilas Pandurang Pawar & Anr. Vs. State of Maharashtra & Ors.** reported in **(2012) 8 SCC 795:-**

> "8) Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.
> 9) The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.
> 10) Learned counsel appearing for the petitioners, relying on the decisions of the Delhi High Court in Dr. R.K. Sangwan & Anr. vs. State, 2009 (112) DRJ 473 (DB) and in Crl. M.C. No. 3866/2008 and Crl. M.C. No. 1222/2009 titled M.A. Rashid vs. Gopal Chandra decided on 23.03.2012 and a decision of the Orissa High Court in Ramesh Prasad Bhanja & Ors. vs. State of Orissa, 1996 Cri. L.J. 2743, submitted that in spite of the specific bar under Section 438 of the Code, the Courts have granted anticipatory bail to the accused who were charged under Section 3(1) of the SC/ST Act.

> 11) In view of the specific statutory bar provided under Section 18 of the SC/ST Act, the above decisions relied on by the petitioners cannot be taken as a precedent and as discussed above, it depends upon the nature of the averments made in the complaint."

30. It is further evident that aforesaid view has also been followed by the Division Bench in **Bisheshwar Mishra vs. The State of Bihar** reported in **2016(4) PLJR 1058.** It is further evident that same view has also been reiterated by the Apex Court in **Subhash Kashinath Mahajan v. State of Maharashtra** reported in **(2018) 6 SCC 454** with more splendourly.

31. While the matter has come up before the Division Bench (Manish Kumar) as reported in 2017 (4) BBCJ 301(HC), the sole question of reference was:-

> "If the provision i.e. Section 76(2) of the Bihar Prohibition and Excise Act 2016 (for short the Act) is void in view of requirement of Article 254 of the Constitution of India, the registry can be restrained to entertain anticipatory bail petition in compliance of the order of the co-ordinate bench i.e. order dated 07.07.2017 passed in Cr. Misc. No.26109/2017."

32. During course of consideration the Division Bench constrained itself preferred to keep the issue on the other hand in abeyance in the background of pendency of matter before the Apex Court, but searched out another way and for that relevant paras are quoted below:-

> **"9.** The scope of reference in the instant proceedings is limited. This Court is also conscious of the fact that we are not exercising appellate jurisdiction over the order dated 10.08.2017 passed in Cr. Misc. No. 21578 of 2017. It is also an admitted position that the issue of vires/validity/repugnancy of the provisions of the Act including Section 76(2) is sub judice and yet to be decided by the Apex Court in the pending proceedings discussed above, though the same apparently was not brought to the notice of the learned Single Judge while passing the order of reference dated 10.08.2017. We, therefore, shall not go into the aspect of repugnancy.
>
> **10.** The order of reference calls upon this Court to examine and settle as to whether if the provision i.e. Section 76(2) of the Act is void in view of requirement under Article254(2) of the Constitution of India, the Registry of the Court, in the facts of the case, can be restrained to entertain anticipatory bail petition in compliance of the order dated 07.07.2017 passed in Cr. Misc. No. 26109 of 2017. The submission of Mr. Y.C.Verma is that the vires of the provisions of the Act is not required to be gone into by this Court as there is no pleading to this effect. The order of reference also does not require this Court to delve into this aspect of the matter. He has argued that his alternative submission be examined by this Court in light of the order of reference. Learned Advocate General has not advanced much submission on the issue whether the Registry of the Court or the Stamp Reporter can be restrained from accepting filing of the petition under Section 438 of the Code in respect of any offence under the Act."

33. In the background of finding so recorded under para-10, the Division Bench took sincere effort to search out and propagate an alternative arrangement, for the time being, which could be gathered from the following paras-

> **"11.** Having detailed the narrow confines of our consideration we would consider to examine the submission made by the counsel for the petitioner. It has been argued repeatedly by Mr. Verma that whether the Court would exercise its jurisdiction under Section 438 of the Code be left to the judicial consideration/discretion of the High Court keeping in view the legal position arising from the relevant

provisions of the Act under which the petitioner is accused. In a given case, merely Sections of the Act may be added by the police without there being any foundational fact/ allegation. In such cases the offence under the Act may not be made out at all. It has been argued that remedy as provided under section 438 of the Code, in view of the bar provided under Section 76 of the Act, would be barred only for the offences committed under the Act and not in cases where the ingredients of the offences under the Act are not made out.

12. Having considered the various submissions we observe that the present one is not a solitary case where the statute has barred remedy under Section 438 of the Code. A Bench of this Court in the case of Bisheshwar Mishra vs. The State of Bihar [2016(4) PLJR 1058] considered in great length issue regarding grant or refusal of the pre-arrest bail by this Court in relation to offence under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'SC/ST Act') wherein also remedy of Section 438 of the Code has been barred. The Division Bench relying upon the judgment of the Hon'ble Apex Court in the case of Vilas Pandurang Pawar v. State of Maharashtra [(2012) 8 SCC 795] has ruled as under:-

> "25. It is clear from a close reading of the decision of the Supreme Court, in Vilas Pandurang Pawar (supra), that though Section 18 of the Act creates a bar in invoking Section 438 of the Code, a duty is cast on the Court to verify the averments in the Complaint/First Information Report to find out whether an offence, under Section 3 of the Act has been prima facie made out against the accused seeking pre-arrest bail or not. In case, a prima facie case, under the Act, is made out against the accused, the bar, under Section 18 of the Act, would, immediately, come into play.
>
> 26. On a careful consideration of the provisions prescribed under Section 18 of the Act, the law laid down by the Patna High Court Cr. Misc. No. 25276 of 2016 Supreme Court, in State of M.P. vs. Ram Kishna Balothia (supra) and Vilas Pandurang Pawar (supra) and by the Full-Bench of the Rajasthan High Court, in Virendra Singh (supra), and othe other decisions of the different High Courts noticed hereinabove the answer to the first three questions framed by us becomes abundantly clear.
>
> 27. In view of specific embargo of Section 18 of the Act and the binding precedents of the

> Supreme Court noticed above, we hold that pre-arrest bail, under Section 438 of the Code, is not available to persons committing offences under the Act. We further hold that Section 18 of the Act totally bars a court from either making a judicial scrutiny of the case or granting pre-arrest bail to the accused of committing offence under the provisions of the Act. However, from the law laid down by the Supreme Court in Vilas Pandurang Pawar (supra), it becomes clear that notwithstanding the embargo created by Section 18 of the Act against grant of pre-arrest bail, a duty is cast upon the Court, hearing an application under section 438 of the Code, to determine, on the basis of the statements, made in the complaint/First Information Report, if the ingredients of any offence, under the Act, are made out or not. If the ingredients of the offence are attracted against a person seeking pre-arrest bail, the embargo of Section 18 of the Act would, Patna High Court Cr. Misc. No. 25276 of 2016 immediately, come into play against such person; but merely because a criminal case is instituted against a person under the Act without there being any allegation against him of having committed an offence under the Act, the Court can very well entertain an application under Section 438 of the Code and under such circumstance, the embargo, created under Section 18 of the Act, would not come into play inasmuch as the legislative intent is to exclude the power of the Court to grant pre-arrest bail to a person apprehending arrest, who is alleged to have committed an offence under the Act and not a person, whose name finds place in the column of the accused either in Complaint or in the First Information Report without there being any accusation against him of having committed an offence under the Act."

34. Similar situation has come up before the Apex Court in **P. Surendran vs. State of Inspector of Police** reported in **2019 (2) PLJR (SC) 291** and for that posed a question, "we are only concerned with the question whether Registry could have

questioned the maintainability of the Petition" and answered the same exemplifying the same in following manner:

> **"9.** The nature of judicial function is well settled under our legal system. Judicial function is the duty to act judicially, which invests with that character. The distinguishing factor which separates administrative and judicial function is the duty and authority to act judicially. Judicial function may thus be defined as the process of considering the proposal, opposition and then arriving at a decision upon the same on consideration of facts and circumstances according to the rules of reason and justice. A Constitution Bench of five judges in **Jaswant Sugar Mills Ltd., Meerut vs. Lakshmichand and Ors., AIR 1963 SC 677,** formulated the following criteria to ascertain whether a decision or an act is judicial function or not, in the following manner:-
>
> (1) it is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of preexisting legal rule;
>
> (2) it declares rights or imposes upon parties obligations affecting their civil rights; and
>
> (3) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact.
>
> (emphasis added)

The act of numbering a petition is purely administrative. The objections taken by the Madras High Court Registry on the aspect of maintainability requires judicial application of mind by utilizing appropriate judicial standard. Moreover, the wordings of Section 18A of the SC/ST Act itself indicates at application of judicial mind. In this context, we accept the statement of the Attorney General, that the determination in this case is a judicial function and the High Court Registry could not have rejected the numbering.

10. Therefore, we hold that the High Court Registry could not have exercised such judicial power

> to answer the maintainability of the petition, when the same was in the realm of the Court. As the power of judicial function cannot be delegated to the Registry, we cannot sustain the order, rejecting the numbering/registration of the Petition, by the Madras High Court Registry. Accordingly, the Madras High Court Registry is directed to number the petition and place it before an appropriate bench."

35. However, it is evident that during consideration of aforesaid eventuality, the inherent power of the High Court in terms of Section 482 Cr.P.C as well as under Article 226, 227 of the Constitution of India have not properly been taken into consideration. Although times without number, it has been settled at rest that the aforesaid powers are imbibed in the High Court by way of its constitution as observed by the Constitution Bench in connection with **L. Chandra Kumar vs. U.O.I.** reported in **AIR 1997 SC 1125** as well as **Asian Resurfacing of Road Agency Private Ltd. & Anr. Vs. Central Bureau of Investigation** reported in **(2018) 16 SCC 299**. Moreover, the above powers are not at all found eclipsed by the Act itself as no saving clause is there.

36. In the aforesaid backdrop now the terms of references are being answered in following terms:-

Questionnaire No.1,2,4, 5, -The Division Bench in the case of **Manish Kumar @ Lokesh Kumar vs. The State of Bihar** reported in **2017(4) PLJR 369** has rightly shrinked itself in answering the terms of reference as, it would tantamounts to

intrusion within the sphere of the Apex Court in the background of order passed in **Special Leave to Appeal (C) Nos.29749/2016** inconsonance with **Transfer Petition (Civil) Nos.2089-2090/2016.** That means to say, till the vires is tested by the Apex Court, it will not be prudent for the full Bench to delve over the issue and record its finding.

Questionnaire No. 3-Before answering the same first of all the matter is to be seen. In Ashoka Sahani case none of the parties referred, about pendency of appeal before the Apex Court at the instance of State against an order of this Court declaring the Act *ultra vires*, and in likewise manner, with regard to other writ petitions challenging the vires of amendment Act followed with subsequent order of the Apex Court staying. In likewise manner, on the issue of absence of assent at the end of President in compliance with Article 254(2) of the Constitution also being subject to consideration hence, the High Court, (Single Bench) would not have taken recourse in a manner, as adopted. In likewise manner, when the judgment of **Manish Kumar** (Single Bench) **2017(4) PLJR 369** has been gone through. Two important quotations recorded at different stages need to be recorded.

> "11. In view of the facts and circumstances particularly constitutional provision the court is of the considered opinion that there is no restriction either for the Registry to accept such petition or to any person apprehending his/her arrest relating to a offence under

> the Act to approach this court for grant of anticipatory bail under Section 438 of the Cr.P.C. Accordingly the objection raised by learned State counsel stands over-ruled and it is held that anticipatory bail even in case relating to allegation under the Bihar Prohibition and Excise Act, 2016 is maintainable and Registry is required to entertain anticipatory bail petition. On perusal of the of the judgment of the co-ordinate bench i.e. judgment dated 07.07.2017 passed in Cr. Misc. No. 26109 of 2017 it is evident that the point regarding the legislative competence was not argued before him however since there is already co-ordinate Bench judgment of this court it would be appropriate for this court to refer the matter to the division bench to settle as to whether if the provision i.e. Section 76(2) of the Act is void in view of requirement of Article 254 of the constitution of India, the Registry can be restrained to entertain anticipatory bail petition in compliance with the order of co-ordinate bench i.e. order dated 07.07.2017 in Cr. Misc. No. 26109 of 2017 . Accordingly this matter is directed to be placed before the Hon'ble the Chief Justice so that this issue may be finally be adjudicated by a larger Bench.
>
> 12. It is made clear that since I am of the opinion that judgment of the single Bench is per incuriam as well as section 76 (2) of the Act is void in view of Article 254 of the Constitution of India there is sufficient reason to entertain the present petition on merit. On merit it is evident that petitioner name has come only on confessional statement of co-accused and as such it is a fit case for grant of privilege of anticipatory bail."

37. From perusal of the Manish Kumar (Single Bench-2017 (4) PLJR 369), it is evident that the Bench was not at all appraised with subsequent development after pronouncement of 2016(4) PLJR 369 having under challenge before the Apex Court wherein operation of the judgment has been stayed. Not only this, the stay of further proceeding of two writ petitions by the Apex Court concerning the issue in hand, (subsequent amendment in the Act) also not been brought up before the Bench. Had there been, then in that circumstances, no such finding would have. Be

that as it may, as is evident in both the petitions, the subsequent development relating thereto (vires of the Act) has not been urged, hence the observation so made under para-12 of Manish Kumar (Single Bench) could not have been. Moreover, as per Patna High Court Rules, the Division Bench identified proper forum to decide the validity, legality of the Act. Apart from the fact that both the issue was beyond the subject. Moreover, recording of Single Judge in Manish Kumar, as per-incurium is also found duly covered with the lis so pending before the Apex Court as the same happens to be based in terms of non-adoption of procedure in accordance with Article 254(2) which, unless disproved by the Apex Court would not be.

38. Though there was no reference to the Division Bench (Manish Kumar) but the way it followed in order to search out the solution, relating to the existing controversy, is being approved keeping the power of the High Court under Article 226 of the Constitution as well as Section 482 Cr.P.C immuned.

39. At last, we must pay gratitude to the learned counsels or the valuable suggestions, arguments in order to resolve the terms of reference having their end.

(Aditya Kumar Trivedi, J.)

(Per: Hon'ble Mr. Justice Ashutosh Kumar, J.)

I have had the advantage of going through the opinion of my esteemed brother Aditya Kumar Trivedi, J. on the terms of reference placed before the Full Bench with regard to the questions relating to (i) maintainability of an anticipatory bail petition under Section 438 Code of Criminal Procedure, 1973 *(hereinafter referred to as the Cr.P.C.)* for an offence under the Bihar Prohibition and Excise Act, 2016; *(hereinafter referred to as the Act of 2016)* notwithstanding the existence of Section 76 (2) of the Act of 2016; (ii) whether the decision rendered in *Ashok Sahani Vs. The State of Bihar* (Cr. Misc. No. 26109 of 2017) and as explained in *Barun Kumar Vs. The State of Bihar* (Cr. Misc. No. 42985 of 2017) reflect the correct position of law; (iv) whether the Division Bench in *Manish Kumar @ Lokesh Kumar Vs. The State of Bihar* (Cr. Misc. No. 21578) was justified in refusing to answer the question referred to it on the ground of pendency of two writ petitions, *viz.*, *Abhay Kumar Mishra Vs. The Union of*

India & Ors. (C.W.J.C. No. 8640 of 2016) and *Dr. Rai Murari Vs. The State of Bihar & Ors.* (C.W.J.C. No. 17277 of 2016) in the Supreme Court; and (v) whether the pendency of the matter relating to the vires of the Act of 2016 before the Supreme Court, without any authoritative pronouncement by the Apex Court, denudes the High Court of its power/responsibility to resolve the controversy even when it relates to individual freedom and liberty of persons.

2. Brother Trivedi, J. has approved of the judgement of the Division Bench in *Manish Kumar* (supra) and has himself, likewise, restrained from giving any opinion on such issues as it would be, in his estimation, an intrusion into the decision making process of the Supreme Court, especially in view of the order of stay of proceedings in two of the writ petitions which were filed before this Court, in which the vires of the Act of 2016 and has been questioned and which petitions have been tagged along with another case, *viz.*, Special Leave to

Appeal (C) Nos. 29749-29763 of 2016 [arising out of the judgement of this Court in Confederation of Indian Alcoholic Beverage Company Vs. State of Bihar & Ors.; 2016 (4) PLJR 269].

3. With respect to the Question No. (iii), *viz.*, the competence and propriety of a learned Single Judge in holding a judgement of Co-eval strength to be *per incuriam*, more so when the provision contained in Section 76 (2) of the Act of 2016 was held to be repugnant to Section 438 of the Code of Criminal Procedure, 1973, which is a Central legislation, the subject matter of which falls in the concurrent list of the Seventh Schedule of the Constitution of India, in the light of the judgments of the Supreme Court in *State of Bihar Vs. Kalika Kuer; (2003) 9 SCC 448* and *Ram Pratap Singh Vs. State of U.P. (FB); (1996 Criminal Law Journal 665)*, Brother Trivedi, J. has disapproved of the Single Judge holding the opinion of another Single Judge to be *per incuriam*, for the reason that the issue of repugnancy between the State law and

the Union law could only have been adjudicated by a Division Bench of the High Court in view of the Standing Order No. 3 of 1994 in Rule 12 of Chapter-XXI C of the Patna High Court Rules and the judgement delivered in *Ranchi Timber Traders Association and Ors. Vs. State and Ors.; 1997 (1) PLJR 133*.

4. After having gone through the opinion of my esteemed brother Trivedi, J., I, for my own reasons, would like to answer the reference *ab ovo.*

5. The Bihar Prohibition and Excise Act, 2016 has been promulgated for enforcing, implementing and promoting complete prohibition of liquor and intoxicants in the territory of State of Bihar and for matters connected therewith or incidental thereto. The legislation was enacted to provide a uniform law relating to prohibition of liquor and intoxicant, levy of duties thereon and punishment for the violation of law in the State of Bihar.

6. The Act of 2016 contains exclusive chapters, *viz.,* Chapter-VI comprising Sections 30 to 65, relating to

offences and penalty; Chapter-VII (externment and internment) comprising Sections 66 to 72 and finally Chapter-VIII (detection, investigation and trial of offences) containing Sections 73 to 91 and a separate Chapter-IX, for appeals and revisions.

7. From the scheme of the Act of 2016, therefore, it becomes very obvious that the orientation of the Act is geared towards implementing complete ban / prohibition of alcoholic drinks in the State of Bihar and treating the violation of the same seriously, by providing stringent punishment for specific offences and charting out a full-fledged mechanism for detection, investigation and trial of such offences. Juxtaposed to this was the Bihar Excise Act, 1915, which had been principally promulgated to control the import, export, transport, manufacture, possession and sale of certain kinds of liquor and intoxicating drugs. It may also be noted here that in the State of Bihar, though Bihar Prohibition Act, 1938 had been enacted, but it was never enforced and only the

provisions of Bihar Excise Act, 1915 was in operation, which was nothing more than regulatory in nature, except for Section 19(4) thereof, which inhered in it the seeds of prohibition.

8. In the year 2015, the excise policy was introduced by the State Government under the name of the New Excise Policy of 2015, but it did not prescribe complete and immediate ban on the consumption of alcohol, but suggested the aim to be achieved in a phased manner.

9. The aforesaid facts have been noted to highlight the *animus dedicandi* of the Act of 2016 for the purposes of answering the reference. What I wish to indicate is that Chapters-VI to IX of the Act of 2016 deal with offences, their detection, trial and remedial measures. This orientation, therefore, presupposes that there shall be arrests, trials and convictions. In this background, importance of such procedure, which would serve as a safeguard against any arbitrary action by the investigating

agency or the authority implementing the Act, is required to be deliberated upon.

10. In this context, it would be relevant to have a look at Section 76 of the Act of 2016, which is the fulcrum of all the debates in this reference. Section 76 of the Act of 2016 is extracted here in below for the sake of completeness :

> *"**76.** Offences to be Congizable and Non-Bailable. - (1) All offences under this Act shall be Cognizable and Non-Bailable and provisions of Code of Criminal Procedure, 1973 (Act 2 of 1974) shall apply.*
>
> *(2) Notwithstanding anything mentioned in sub-section (1) above, nothing in Section 360 of Code of Criminal Procedure, 1973 (Act 2 of 1974), Section 438 of the Code of Criminal Procedure, 1973 (Act 2 of 1974) and Probation of Offenders Act 1958 (20 of 1958) shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."*

11. The offences under the Act of 2016 have been made cognizable and non-bailable [section 76 (1)], which part of the legislation does not give rise to any controversy at all. What is under dispute is the correctness /

justification of the declaration that for offences under the Act of 2016, the provision of Section 438 Cr.P.C., which deals with the powers of the Courts to grant anticipatory bail, and the Probation of Offenders Act, 1958 shall not apply in relation to any case involving the arrest or accusation of any person for an offence under the Act of 2016.

12. *Abundans cautela non nocet,* I have been consistently reminding myself from the time when I began answering reference and at all times thereafter, that if the vires of the Act of 2016 is under challenge before the Supreme Court of India, any discussion on the issue of correctness or justification of Section 76 (2) of the Act of 2016 would, in some way, amount to treading into an area which the superior Court is in *seisin* of. Nonetheless, till the time there is an authoritative pronouncement by the Supreme Court on the vires of the Act of 2016, which definitely would include the decision with regard to the vires of Section 76 thereof, eschewing from answering the

reference on the touchstone of decided case laws by the Supreme Court, but without touching upon the issue of vires, would amount to abdicating one's responsibilities and duties. The Supreme Court has always cautioned that mere filing/pendency of a petition in the Supreme Court does not prohibit the competent Courts in deciding the issues. In the present case, the writ petitions, challenging the vires of the Act of 2016, have been tagged with a pending case before the Supreme Court and an order of stay to proceed in such matters has been passed. This definitely precludes the High Court in commenting upon the vires of the Act of 2016.

13. What would then, in the meanwhile, be the correct approach in deciding the course of action in case of whimsical arrests or any preposterous methods of implementing the law which might shock the senses of many.

14. In my opinion, a purposive interpretation, without questioning the competence of the State

legislature or the vires of the Act (Section 76 in particular) is required to be made by taking help of the settled principles of law which have been adumbrated by the Supreme Court in many of the cases and at the same time, not violating the order of stay granted by the Supreme Court in Special Leave to Appeal (C) Nos. 29749-29763 of 2016, to avoid injustice and harassment to people.

15. *Ad avizandum*, then, the issue would be the importance of bail / anticipatory bail in the event of faulty implementation of the Act of 2016.

16. *"Bail is a security given for the due appearance of a prisoner in order to obtain his release from imprisonment; a temporary release of a prisoner upon security; one who provides bail"*. This is how *"bail"* has been defined in the *Webster's 7th New Judicial Dictionary*. Similar is the explanation of *"bail"* in *Stroud's Judicial Dictionary*, which defines a *"baile"*, who, on his arrest and his offering surety to those who have the authority to bail

him, is released for his appearance before the Justices at the next Session.

17. Etymologically, the word *"bail"* is said to be derived from an old French verb *"bailor"*, which means *"to give or to deliver"*. There is another opinion regarding the etymological origins of the word "bail" which is *"bajulare"*, which means to *"bear a burden"* in Latin.

18. The Supreme Court, therefore, has held it to be a technique evolved for effecting a synthesis of two basic concepts of human value, *viz.*, the right of an accused to enjoy his personal freedom and the public interest on which a person's release is conditioned on the surety to produce the accused person in Court to stand the trial.

19. The concept of *"bail"* in England can be traced back to the system of *"frank pledges"*, adopted in England after the *Norman* conquest. Under the aforesaid system, the community as a whole was required to pledge its property as a security for the appearance of an accused at

the trial. The community responsibility was later replaced by a third party responsibility, which was subsequently further improvised and replaced by the issuance of forfeiture bonds of surety and imposition of penalty upon the surety for failure to bring the accused to trial on the appointed date. With the British rule in India and the import of the common law rule, system of "bail" was introduced, which now is statutorily recognized under the Code of Criminal Procedure, 1973.

20. The Law Commission of India, in its 41st report on the Code of Criminal Procedure sought to streamline the law of bail in the changed context of independent India, guaranteeing personal freedom as one of the fundamental rights of all citizens of India. The recommendations are, therefore, geared towards maintaining a constitutional equilibrium between the freedom of person and interest of social/public order. *"Anticipatory bail"* was also recommended by the Law Commission of India in the aforesaid report, which led to

introduction of Section 438 in the Code of Criminal Procedure in 1973 *(in short Cr.P.C.)*, making provision for *"bail"* in *"anticipation of arrest"*.

21. Article 21 of the Constitution of India mandates that *"no person shall be deprived of his life and personal liberty except according to the procedure established by law"*.

22. In *Gudikanti Narasimhulu & Ors. Vs. Public Prosecutor, High Court of Andhra Pradesh; AIR 1978 SC 429*, the Supreme Court of India succinctly observed as follows:-

> *"Personal liberty, deprived when bail is refused, is too precious a value in our constitutional system recognised under Article 21 of the Constitution that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. The significance and sweep of Article 21 of the Constitution make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good, and State necessity spelt out in Article 19. Reasonableness*

postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of the justice to the individual involved and the society affected."

23. While advocating introduction of the provision for *"anticipatory bail"* in Code of Criminal Procedure, the Law Commission recognized that the necessity for granting anticipatory bail arose mainly because of the false implication of the rivals of influential persons for the purposes of disgracing them, which had become rampant with the growth in the political rivalry. The other reason which led to the recommendation for introduction of *"anticipatory bail"* was the acceptance of the fact that if a person who is not likely to abscond or misuse his liberty while on bail, there would be no justification of requiring him to, first submit to custody, remain in prison for some days, and then apply for bail.

24. While testing the constitutional validity of Section 45 of the Prevention of Money Laundering Act of

2002, which imposed two conditions for grant of bail, *viz.*, (i) the Public Prosecutor to be compulsorily given an opportunity to oppose any application for release of bail and (ii) the satisfaction of the Court about the accused not being guilty of such offence and simultaneously not likely to commit any offence while on bail, the Supreme Court in *Nikesh Tarachand Shah & Anr. Vs. Union of India & Anr.; (2018) 11 SCC 1*, recounted that the provision for bail goes back to *Magna Carta* and quoted the translation of Clause 39 thereof from Latin:-

> *"No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."*

25. The Supreme Court has categorically laid down over the period of years that the object of Article 21 of the Constitution of India is to prevent encroachment upon the personal liberty by the executive save in accordance

with law and in conformity with the provisions thereof. Whenever, the liberty of a subject is restricted, *the Courts are to satisfy themselves that the safeguards provided by law have been scrupulously observed*. *(emphasis provided)*

26. The importance of bail has been set out in detail in *Gurucharan Singh & Ors. Vs. State (Delhi Administration); (1978) 1 SCC 118* and *Shri Gurbaksh Singh Sibbia & Ors. Vs. State of Punjab; (1980) 2 SCC 565*.

27. Some of the offences listed in the Act of 2016 do not partake of the nature of heinous offences; nonetheless stringent punishments have been provided for the same. It cannot be said with certainty that there are no false implications in this country. Saying so would defeat the very purpose of introducing the provisions of anticipatory bail in the Cr.P.C. It would also be apposite to refer to Sections 41 and 41-A of the Code of Criminal Procedure, 1973, which lay down the circumstances under

which a person can be arrested without warrant and the duties of the police before effecting arrests. Huge importance has been accorded to *"credible information"* and *"reasonable suspicion"* before exercising the powers of arrest. The expression *"reasons to believe"* in Section 41 Cr.P.C. has to be read in conjunction with Section 26 of the Indian Penal Code, which, *inter alia*, states that a person is said to have reasons to believe a thing, if he has sufficient cause to believe that thing, but not otherwise.

28. For balancing the right of liberty of an accused, guaranteed under Article 21 of the Constitution of India, which could be taken away only by a reasonable procedure and to check any abuse of power by police and injustice to a citizen, exercise of right of arrest is necessarily to be viewed with utmost care and circumspection. It is in this context that the necessity arises for a wise and not carthusian exercise of judicial power, which would go a long way in inevitably curtailing the evil consequences which are likely to flow from such absolute provisions in

the Act, which takes away, in actuality, the right to liberty by prohibiting the application of the provisions of Section 438 Cr.P.C.

29. A parallel here need be drawn with the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989, as there is a similar provision in the aforementioned Act, proscribing the grant of anticipatory bail in cases relating to offences under the Act. Section 18 of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989 reads as follows:

> ***18. Section 438 of the Code not to apply to persons committing an offence under the Act****.- Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.*

30. The vires of the aforesaid Section was put to test in *State of Madhya Pradesh & Anr. Vs. Ram Kishna Balothia & Anr.; (1995) 3 SCC 221*, wherein it was held that the provision is not violative of Articles 14 and 21 of the Constitution of India. It was held by the Supreme

Court in the aforesaid case that the offence under the Act had to be viewed in the context of prevailing social conditions and the apprehensions that perpetrator of such atrocities are likely to threaten and intimidate the victims and prevent or obstruct them in the prosecution of those offenders, if they are granted anticipatory bail. The Supreme Court delved into the statement of objects and reasons and found that the members of Scheduled Castes and Scheduled Tribes are vulnerable and are very likely to be subjected to humiliation and harassment.

31. However, in *Vilas Pandurang Pawar & Anr. Vs. State of Maharashtra & Ors.; (2012) 8 SCC 795* and *Shakuntla Devi Vs. Balijinder Singh; (2014) 15 SCC 521*, the Supreme Court did not construe Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to be an absolute bar for grant of anticipatory bail if no *prima facie* case was made out, in spite of the validity of Section 18 of the Act having been upheld. However, in *Vilas Pandurang Pawar* (supra), the

Supreme Court specifically stated that the order, in that case, cannot be taken as a precedent and it would depend upon the nature of the averments made against the accused in each case. At the same time, it was held that Courts are not expected to indulge in critical analysis of the evidence on record and the provision of the said Act cannot be easily brushed aside by elaborately discussing the evidence. Similar refrain has been expressed in *Shakuntla Devi* (supra).

32. A somewhat different opinion has been expressed in *Bachu Das Vs. the State of Bihar & Ors. (2014) 3 SCC 471* and *Manju Devi Vs. Onkarjit Singh Ahluwalia @ Omkarjeet Singh & Ors.; (2017) 13 SCC 439*, wherein, after taking note of the judgement of the Supreme Court in *Vilas Pandurang Pawar* (supra), *Bachu Das* (supra) and *Nirmal Jeet Kaur Vs. State of Madhya Pradesh (2004) 7 SCC 558*, the Supreme Court has held that the bar to invoke Section 438 Cr.P.C. has to be strictly interpreted in as much as a victim of molestation

and indignation is akin to an injured witness, whose testimony should receive the maximum weight/importance. This interpretation is also based on the theory of *absoluta sententia expositore non indiget* (when you have plain words capable of only one interpretation, no explanation of them is required).

33. The Supreme Court, but, has, in a number of cases, held that it may not be appropriate to adopt a passive or negative role and remain a bystander of violation of rights by taking shelter of procedural technicalities. Such technicalities ought not to stand in the way of enforcement of rights of an individual, which principle is based on the theory *"verba intentioni, non e contra debente inservire"* (words ought not to be made subservient to the intent and not the other way about).

34. In *Rajesh Kumar Vs. State through Government of NCT of Delhi; (2011) 13 SCC 706*, the Supreme Court has been categorical in stating that until the decision of the Supreme Court in *Maneka Gandhi Vs. Union of India;*

1978(1) SCC 248, Article 21 only embodied the rule of law without which personal liberty of a person could not be taken away by executive action; meaning thereby that if there was any procedure / law, it would have been sufficient to deprive a person of his liberty but post *Maneka Gandhi*, protection is granted to a person not only against an executive action, but also against legislation, which deprives a person of his life and personal liberty unless such law is reasonable, just and fair.

35. In *Joginder Kumar Vs. State of U.P.; (1994) 4 SCC 260*, the Supreme Court took note of the ever expanding horizon of human rights and in the wake of such developments, there came about a *litany* of complaints of violation of human rights because of indiscriminate arrests. Taking into account the aforesaid increase in faulty execution of laws and whimsical arrests, the Supreme Court in *Som Mittal Vs. Government of Karnataka; (2008) 3 SCC 753* reminded itself of Charles Dicken's novel *"A Tale of Two Cities"*, in which Dr.

Alexandre Manette was incarcerated in the Bastille for 18 years on a mere *lettre de cachet* of a French Aristocrat, although he was innocent.

36. Even in the scriptures like *"Gita"*, the value of self respect has been propounded and death is stated to be preferable to dishonour.

37. Similarly, in *Arnesh Kumar Vs. State of Bihar (2014) 8 SCC 273*, the Supreme Court had the occasion to look at the ever-burgeoning dockets of matrimonial disputes and it was found that the arrests in relation to such offences only brought humiliation, harassment and oppression of accused persons which further reduced the possibility of any rapprochement between the warring spouses. The Supreme Court also viewed in it, *viz.*, the power of arrest, a potent and lucrative source of corruption. In that background, after noting the amendments in Section 41 of the Cr.P.C. in the light of the recommendations of the Law Commission which directed for arrests only in face of *"credible information"*

and *"reasonable suspicion"* and only if arrests were necessary, several directions were issued to check such reckless arrests. Long before that, the Supreme Court in *D. K. Basu Vs. State of West Bengal; (1997) 1 SCC 416* had suggested ways and means of curtailing the whimsical and reckless police powers by directing the observance of certain preventive measures. The importance of the personal liberty of human beings and the necessity to control the erratic use of the power to arrest further, led the Supreme Court to declare that any wrongful arrest violates Article 21 of the Constitution of India and the victim of arrest is entitled to compensation *(refer Dr. Rini Johar and Anr. Vs. State of M.P. and Ors.; (2016) 11 SCC 703)*.

38. The afore-noted aspects shall be dealt with later while answering the first question of the reference, *viz.*, whether provisions of Section 438 Cr.P.C. could be invoked, notwithstanding the bar of the grant of

anticipatory bail under Section 76(2) of the Bihar Prohibition and Excise Act, 2016.

39. The other issue which needs to be expatiated here is as to under what circumstances can a judgement / decision of a Court be held to be *per incuriam*.

40. In *Mamleshwar Prasad Vs. Kanhaiya Lal; (1975) 2 SCC 232*, the Supreme Court has held as follows:

> "***7. Certainty of the law, consistency of rulings and comity of courts*** *– all flowering from the same principle – converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight, a judgement fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgement per incuriam.*
>
> ***8.*** *Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a*

decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind."

41. *Lord Goddard* in *Moore Vs. Hewitt; (1947) 2 All England Reports 270 (KBD)* and *Penny Vs. Nicholas; (1950) 2 All England Reports 89 (KBD)* explained that *per incuriam* are those decisions which are given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong *(Refer to A. R. Antulay Vs. R. S. Nayak; (1988) 2 SCC 602)*.

42. Etymologically *"Incuria"* means *"carelessness"*. In the *State of Bihar Vs. Kalika Kuer* (supra), the Supreme Court has quoted from the case of *Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.; (2001) 6 SCC 356* as follows :

"A prior decision of the Supreme Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional instance, where by

obvious inadvertence or oversight a judgement fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgement 'per incuriam'. It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of per incuriam."

43. The Supreme Court also took note of the decisions rendered in *Vijay Laxmi Sadho (Dr.) Vs. Jagdish; (2001) 2 SCC 247* and *Pradip Chandra Parija Vs. Pramod Chandra Patnaik; (2002) 1 SCC 1*, in which it was held that to maintain proper judicial discipline, a Bench should always refer the matter to a larger Bench rather than to take a different view. It is well settled that if a Bench of Coordinate jurisdiction disagrees with another Bench of Coordinate jurisdiction, whether on the basis of different arguments or otherwise, on a question of law, it is appropriate that the matter be referred to a Larger Bench for resolution of the issue rather than to leave two

conflicting judgements to operate, creating confusion. It is not proper to sacrifice certainty of law. The Supreme Court had gone on to say that *"judicial decorum, not less than legal propriety, forms the basis of judicial procedure and it must be respected at all costs"*.

44. This brings me to the next important issue of repugnancy which has been raised in one of the decisions referred to in the reference in the context of holding Section 76 (2) of the Bihar Prohibition and Excise Act, 2016 to be repugnant with the provisions contained in Section 438 of the Code of Criminal Procedure, 1973, which is a law made by the Parliament over a subject matter of Concurrent List.

45. For ready reference, I deem it appropriate to extract Article 246 and 254 of the Constitution of India in its entirety, which read thus:

> "***246. Subject matter of laws made by Parliament and by the Legislatures of States-****(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in*

the Seventh Schedule (in this Constitution referred to as the Union List).

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List).

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List."

*"**254. Inconsistency between laws made by Parliament and laws made by the legislatures of States.** - (1) If any provision of a law made by the legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, thereafter subject to the provisions of clause (2), the law made by Parliament, whther passed before or after the law made by the legislature of such State, or as the case may be, the*

existing law, shall prevail and the law made by the legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to amending, varying or repealing the law so made by the legislature of the State."

46. Under the scheme of the Constitution, the Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List-1 of Seventh Schedule (Union List). Both, the Parliament as well as the State Legislatures, have powers to make laws with respect to any matter enumerated in List-3 of the Seventh Schedule (Concurrent List). The State Legislature has exclusive powers to make laws for such State or any part

thereof with respect to any of the matters enumerated in List-2 of the Seventh Schedule, which is the State List and the Parliament has the power to make laws with respect to any matter for any part of the territory of India not included in a State; notwithstanding that such matter is a matter enumerated in the State List *(refer to Article 246 of the Constitution of India)*.

47. The power of a Legislature to enact legislation within its legislative competence is plenary and the competent legislature can enact laws on subject assigned to it without any limitation of any legislative practice or legitimate expectations. Such legislation by the respective legislatures could be both prospective and retrospective and each of the legislatures has the authority to make validating laws as well. A plain reading of Article 246, especially the *non obstante* clause, makes it very obvious that if the legislative powers of Union and State Legislature in Lists-I and II of the Seventh Schedule cannot fairly be reconciled, the later must give way to the

former. To explain, if a subject is included both in Lists-I and II, the Union Legislature alone will be competent to legislate on that subject. Similarly, in case of any overlapping between Lists-I and III, it is List-I that shall prevail.

48. The entries in the lists are required to be harmoniously construed for avoidance of any conflict. In case of overlapping legislative powers of the two legislatures, the width / ambit of such entry in relation to the competence of the respective legislatures is measured and concluded by assessing its true import and character, which is commonly called *"pith and substance"*. The power to legislate on the topic of legislation carries with it the power to legislate on an ancillary matter, which can be said to be reasonably included in the power given and such legislation would be ancillary legislation, which would be within the competence of the respective legislation. There ought not to be any transgression in the respective field of the legislature, be it patent, manifest or direct

transgression or disguised, covered and indirect one, in which case, it shall not be sustained on the ground of suffering from the vice of colourable legislation.

49. Thus, what I wish to convey is that the substance of an enactment would be material and not merely the form or outward appearance of it and if the subject matter, in substance, is beyond the powers of a particular legislature to legislate upon, it will be condemned even if it is caparisoned in such a manner as to give an appearance of falling withing the area of competence. The legislature, therefore, cannot indirectly legislate on a topic which is not competent to legislate upon directly.

50. Some controversies / disputes with respect to the competence of the Union and the State legislatures may arise as both the legislatures have been given the powers to legislate on matters falling in Concurrent List. It is for resolution of conflict in such a situation that Article 254 has been provided in the Constitution of India. The

provisions contained in Article 254 of the Constitution is more or less similar to Section 107 of the Government of India Act, 1935.

51. Clause 1 of Article 254 of the Constitution enunciates the normal rule that in the event of a conflict between the Union and the State law, the Union law shall prevail.

52. In the aforesaid context, the law of the Parliament on any matter in List-I is not within the scope of this provision of the Constitution.

53. The question of repugnancy under Article 254(1) of Constitution between a law made by the Parliament and the law made by the State Legislature arises only in cases when both the legislation occupy the same field with respect to the matters enumerated in the Concurrent List and there is a direct conflict between the two laws. It has no application to cases of repugnancy due to overlapping found between List-II, on one hand, and Lists-I and III, on the other. If such overlapping exceeds

in any particular case, the State law will be ultra vires because of the *non obstante* Clause in Article 246 (1) read with the opening words *"Subject to in Article 246(3)"*. In such a case, the State law will fail not because of repugnancy to Union law but due to want of legislative competence.

54. Clause 2 of Article 254 of the Constitution enacts an exception to the Rule laid down in Clause-1, where a State law on any matter in Concurrent List contains any provision which is repugnant to the earlier provisions made by the Parliament or an existing law with respect to that matter, than the law so made by the legislature of the State shall, if it has been reserved for the consideration of the President, and has received his assent, prevail in the State. The proviso to Clause-2 gives the power to the Parliament to again supersede State legislature which has been assented to by the President under Clause-2 by making a law on the same matter.

55. Now the question arises as to what would constitute *"repugnancy"*?

56. The conflict between the Statutes must be direct and the laws made by the two legislatures must operate in the same field. Another instance of repugnancy, in the absence of any direct conflict between the two provisions or in the occupied filed arises if the State law is in conflict with the intention of the dominant law to cover the whole field.

57. The effect of repugnancy, therefore, is that if a law made by the State legislature is void because of repugnancy to the law made by the Parliament or an existing law, it is void only to the extent of repugnancy with that law. The repugnancy or identity of the field may relate to the "pith and substance" of the subject matter and also the period of its operation. When both coincide, repugnancy is complete and whole of the State law becomes void.

58. In *Innoventive Industries Limited Vs. ICICI Bank & Anr.; (2018) 1 SCC 407*, the Supreme Court, while testing the correctness of the NCLAT judgment in *Innoventive Industries Ltd. Vs. ICICI Bank Ltd.; 2017 SCC OnLine NCLAT 70,* holding that there was no repugnancy between the Insolvency and Bankruptcy Code of 2016 *(which enactment is later than Maharashtra Relief Undertakings)* and the Maharashtra Relief Undertakings (Special Provisions) Act, 1958 (MRU), as they both operate in different fields, had the occasion to deal with the constitutional position of repugnancy.

59. Reference was made to various cases which were decided by the Supreme Court in 1950's and 1960's, wherein liberal reference was made to the Australian judgments, as Commonwealth of Australia Constitution Act of 1900, enacted by the British Parliament, also had a scheme by which Parliament had the power to make laws with respect to 39 subjects of the Concurrent List and Section 109 of the Act of 1900, referred to above,

indicated that when a law of State was inconsistent with the law of Commonwealth, the later shall prevail and the former shall, to the extent of inconsistency, be invalid.

60. In *Zaverbhai Amaides Vs. State of Bombay; AIR 1954 SC 752*, the Supreme Court, after referring to Section 107 of the Government of India Act and Article 254 of the Constitution of India, found that the Bobmay Act of 1947 with respect to essential supplies was repugnant to the Parliamentary enactment of 1946, amended in 1950, inasmuch as the Bombay Act provided for higher punishment for the same offence as compared to the Parliamentary enactment.*[Also refer to Ch. Tika Ramji & Ors., etc. Vs. The State of Uttar Pradesh & Ors.; AIR 1956 SC 676* and *G.P. Stewart VS. Brojendra Kishore Roy Chaudhury; AIR 1939 Calcutta 628].*

61. In *Deep Chand Vs. The State of U.P. & Ors.; AIR 1959 SC 648*, the Supreme Court, after referring to *Zaverbhai Amaides* and *Ch. Tika Ramji* (supra), held that

repugnancy between two statutes can be ascertained on the following three principles :

(A) Whether there is direct conflict between the two provisions;

(B) Whether Parliament intended to lay down an exhaustive Code in respect of the subject matter, replacing the Act of the State Legislature; and

(C) Whether the law made by Parliament and law made by the State Legislature occupied the same field.

62. In *M. Karunanidhi Vs. Union of India & Anr.; (1979) 3 SCC 431*, the Constitution Bench of the Supreme Court held as follows :

> *"1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.*
> *2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.*
> *3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes, operating in the same field without coming into collision with each other, no repugnancy results.*

> *4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."*

(Also refer to *Hoechst Pharmaceuticals Ltd. Vs. State of Bihar; (1983) 4 SCC 45*; in *Vijay Kumar Sharma Vs. State of Karnataka; (1990) 2 SCC 562*; and *Rajiv Sarin Vs. State of Uttrakhand; (2011) 8 SCC 708)*.

63. The case laws, referred to above, was summed up in *Innovative Industries Ltd.* (supra) as follows:

> *"51. The case law referred to above, therefore, yields the following propositions:*
>
> *51.1 Repugnancy under Article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the Seventh Schedule to the Constitution of India. (emphasis provided)*
>
> *51.2 In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the*

Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.

51.3 The question is what is the subject-matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation; also, the language of Article 254 speaks of repugnancy not merely of a statute as a whole but also "any provision" thereof.

51.4 Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy – care should be taken to see whether the two do not really operate in different fields qua different subject-matters.

51.5 Repugnancy must exist in fact and not depend upon a mere possibility.

51.6 Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is

impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.

51.7. Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject-matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject-matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.

51.8. A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject-matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases

is based on the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the State legislation or part thereof is identical with that of the parliamentary legislation, so that they cannot both stand together, then State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject-matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

51.9 Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.

51.10 The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within Article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State. Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by the Legislature of the State, by virtue of the operation of Article 254(2) proviso."

64. The other issue which would be relevant for answering the reference is of judicial discipline and avoidance of any judicial over-reach.

65. In this context, I deem it appropriate to refer to two cases, *viz.*, *Chhavi Mehrotra Vs. D. G. Health Services; 1995 Supp (3) SCC 434* and *State of Maharashtra Vs. Farook Mohammed Kasim Mapkar and Ors.; (2010) 18 SCC 582*.

66. In *Chhavi Mehrotra* (supra), the petitioner had moved the Supreme Court under Article 32 of the Constitution of India for her admission to M.B.B.S. course against 15 % all India quota of 1992. The aforesaid writ petition was heard along with other cases and a comprehensive direction was issued with respect to admission of students in the waiting list to various colleges in the country. In defiance of an obedience to the aforesaid direction by the Supreme Court, the Director General of Health Services, by a notification, called the candidates to indicate their willingness for admission under

the scheme evolved by the Supreme Court. While all this was being done, Ms. Chhavi Mehrotra approached the Lucknow Bench of the Allahabad High Court and a learned Single Judge of the Court took up the matter and issued certain directions which was in a way interference and detraction from the directions issued by the Supreme Court. The Supreme Court, taking into account that Ms. Chhavi Mehrotra was *eo nomine* a party in the proceeding before the Supreme Court, judicial discipline required that in a hierarchical system, there should be no conflicting exercise of jurisdiction and it must be avoided at all costs.

67. In *State of Maharashtra Vs. Farook Mohammed Kasim Mapkar* (supra), the same principle was reiterated, but in the facts of the case, the Supreme Court did not apply the said principle as in the aforesaid case, writ petition was filed in the High Court much prior to the filing of the writ petition under Article 32 of the Supreme Court and that too by a different person. There was no order by the Supreme Court prohibiting the High Court from

entertaining the writ petition or proceeding further in the case.

68. At this stage, it would be relevant to refer to the strands of arguments advanced by the learned Advocates. But for two of them, all other advocates realized that there could not be any discussion on the vires and justification of introduction of Section 76 (2) of the Act of 2016. However, the learned Advocates, in a *cassandra* like approach forebode the possibility of severe misuse of the Act. With respect to the issue of repugnancy, unfortunately, the arguments were not focused and majority of the learned Advocates harped on the fact that the Act of 2016 had not received the assent of the President, which aspect was not at all necessary to be taken note of in the event of the Act of 2016 being within the legislative competence on a subject which clearly fell in List-II of the Seventh Schedule of the Constitution of India.

69. One of the learned Advocates argued that Section 4 (2) of Cr.P.C. dealt with any other law, the offences under which would be investigated, inquired into, tried and otherwise be dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. It was thus urged that any other law could be investigated, inquired or tried according to such law if any provision was made therein, but such *lee-way* was not provided for making any provision for grant or refusal of bail. Perhaps, the learned Advocate, advancing such argument, did not take into account the savings clause in Section 5 of the Act. This argument was, thus, only a burlesque, to say the least.

70. Another argument veered around the competence of Hon'ble the Chief Justice to make the instant reference to the Full Bench. A brief discussion here, on that aspect, will be necessary.

71. Rule 1 of Chapter-V of the Patna High Court Rules, reads as hereunder:

Reference to a Full Bench

"1. Whenever a Division Bench desires and the Chief Justice consents that any case shall be referred to a Full Bench, or whenever in any case a Division Bench differs from any other Division Bench upon a point of law or usage having the force of law such case shall be referred for decision by a Full Bench."

72. It was urged that the Division Bench in *Manish Kumar* (supra) did not ask for any further reference in the matter nor was there any difference of opinion between the two Division Benches over an issue of law which required resolution by a larger Bench.

73. The aforesaid argument lacks substance and merit for the reason that Rule 11 of Chapter – II specifies that notwithstanding anything to the contrary in the Rules, Hon'ble the Chief Justice may direct for any application, petition, suit, appeal or reference to be heard by a Full Bench. This is an overriding, independent and discretionary power of the Chief Justice, which can be

exercised even if there be no conflict of orders or otherwise. *(refer to Narendra Mishra Vs. State of Bihar; 2015 (1) PLJR 650)*.

74. The rest of the arguments were tautological in as much the effort was as only to draw parallels with Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 with special reference to *Vilas Pandurang Pawar and Shakuntala Devi* (supra). The details of the arguments advanced on behalf of the counsels have already been noted by Brother Trivedi, J. Recounting those arguments again would serve no useful purpose.

75. Thus, the *terminus a quo* and *terminus ad quem* of the entire discussion was limited to the liberty of an individual.

76. Now to the beefy exercise of answering the reference.

77. Re. Question No. (1) - *Whether the provisions of Section 438 Cr.P.C. continue to apply in spite of the bar created*

under Section 76 (2) of the Bihar Prohibition and Excise Act, 2016 and as to whether such an application under Section 438 Cr.P.C. for anticipatory bail is maintainable?

78. In *Ashok Sahani* (supra), a learned Single Judge concluded that there could be no anticipatory bail for an offence under the Act of 2016 and in view of Section 76 (2) of the Act of 2016, had directed the Registry to instruct the Stamp Reporters not to place applications filed under Section 438 of the Cr.P.C. arising out of the aforesaid Act before the Bench as "defect free" cases. This observation was given on the learned Single Judge finding that many other Benches of the Court were entertaining anticipatory bail applications in cases arising out of the Act. The purpose, therefore, it appears, was to let the particular Bench know and be reminded of the bar to grant anticipatory bail under Section 76 (2) of the Act of 2016.

79. In *Manish Kumar* (supra), another learned Single Judge of this Court held that the dictum in *Ashok*

Sahani (supra) was *per incuriam* on the ground that Section 76 (2) of the Act of 2016 ran repugnant to Section 438 Cr.P.C. and, therefore, violative of Article 254 of the Constitution of India. The additional ground of there being no assent of the President of India was also relied upon for holding that Section 76 (2) of the Act of 2016 could not be enforced against the provisions of Section 438 Cr.P.C. The upshot of the aforesaid decision was that even with respect to the offences under the Act of 2016, anticipatory bail applications were maintainable. The learned Single Judge, on finding that the issue with respect to repugnancy between Section 76 (2) of the Act of 2016 and Section 438 of the Cr.P.C. was not made known to the learned Single Judge in *Ashok Sahani* (supra), he directed the matter to be placed before the Hon'ble Chief Justice for constitution of a larger Bench for finally deciding the issue.

80. Close to the heels of the decisions in the aforesaid two cases, another learned Single Judge in

Barun Kumar Vs. The State of Bihar (Cr. Misc. No. 42985 of 2017), held that since the decision in *Manish Kumar* (supra) was rendered after *Ashok Sahani* (supra), both by the learned Single Judges of this Court, the order in the former could not have been held to be *per incuriam*. It was also held that in *Manish Kumar* (supra), the learned Single Judge ought not to have proceeded to test the vires of the provision of the State Legislature enactment in view of the Standing Order No. 3 of 1994 in Rule-12 of Chapter-XXI-C of the Patna High Court Rules, which mandates that such an issue could be adjudicated only by a Division Bench. The said order reads as hereunder:

Standing Order No. 3 of 1994

[(i) It is hereby ordered that until further orders all applications under Articles 226 and 227 of the Constitution of India shall be placed for admission and hearing before a single Judge except for issuance of writs of habeas corpus and for issuance of writs in cases of, externment from one State to another; deportation; validity of statutes and public interest litigation, which shall be placed for admission and hearing before a Division Bench:

Provided that the Chief Justice may direct any writ application to be posted before a Bench of two or more Judges.

(ii) Unless otherwise directed by Bench, all applications shall be placed for hearing before a single Judge, except cases which are admitted to hearing before a Division Bench or referred to hearing before a Division Bench by a Single Judge at the time of admission or hearing which shall be placed before a Division Bench for hearing.

It will come into effect from 2.1.95.

[Also refer to *Ranchi Timbers Traders Association* (supra)].

81. The learned Single Judge in *Barun Kumar* (supra) thus agreed with the findings in *Ashok Sahani* (supra).

82. It may also be noted here that a learned Single Judge of this Court in *Sushil Kumar Mishra and Anr. Vs. The State of Bihar* (Cr. Misc. No. 36582 of 2017) referred the matter to the Hon'ble Chief Justice for constitution of a larger Bench over another issue, *viz.*, whether any bail application under Section 439 of the Cr.P.C. could be preferred before the High Court in view

of the provision of appeal under Section 89 of the Act of 2016. Section 89 of the Act of 2016 reads as hereunder:

> ***89. Appeal.***– *Any person aggrieved by any order of the Special Court may, within forty five days from the date of order, prefer an appeal in the High Court.*

83. The reference over the aforesaid issue was answered by a Division Bench of this Court on 17.08.2017, holding that the provisions of Sections 439 and 440 of the Code of Criminal Procedure shall apply to the applications for bail under the Act of 2016 before the High Court and words "any order" appearing in Section 89 of the Act of 2016 will not apply in cases where bail is sought for in a proceeding under Section 439 Cr.P.C.

84. Since no reference in the present instance has been made on the aforesaid issue, I would rest it at that.

85. The reference in the case of *Manish Kumar* (supra) was heard by a Division Bench of this Court, whereby *vide* order dated 06.11.2017, it was held that since two writ petitions filed in this Court bearing C.W.J.C.

No. 8640 of 2016 *(Abhay Kumar Mishra Vs. The Union of India and Ors.)* and C.W.J.C. No. 17277 of 2016 *(Dr. Rai Murari Vs. the State of Bihar and Ors.)* and a Transfer Petition (Civil) Nos. 2089-2090 of 2016, in which the aforesaid two writ petitions were tagged along with SLP (C) Nos. 29749-29763 of 2016 and the High Court was restrained from proceeding in the aforesaid two writ petitions, the question of vires of Section 76 could not have been answered. However, the direction given in *Ashok Sahani* (supra) by the learned Single Judge to the Registry for not listing the anticipatory bail applications "defect free" before the respective Benches, was set aside. Though it must be noted here that the learned Single Judge in *Ashok Sahani* (supra) never directed the Registry for not listing the cases of anticipatory bail before the respective Benches, but had only directed for not listing such cases as "defect free" cases. It appears that perhaps such direction was wrongly construed as a total ban on listing of such cases before the respective Benches. It is in

this context that perhaps the Division Bench in *Manish Kumar* (supra) set aside the aforesaid direction.

86. With respect to the application of mind of the judges about the applicability of the Act to the facts of each case, the Division Bench strongly relied upon *Bisheshwar Mishra Versus the State of Bihar*; 2016 (4) PLJR 1058, which, in turn, had relied upon *Vilas Pandurang Pawar* (supra) and held that a duty is cast upon the Court considering such pre-arrest bail petition of an accused to look into the allegations made in the F.I.R. / complaint to find out whether the ingredients of the offence prima facie is made out or not before exercising its judicial discretion under Section 438 Cr.P.C.

87. There are other citations also in the reference, *viz*., *Vikash Kumar Vs. the State of Bihar* (Cr. Misc. No. 5891 of 2018); *Sikandar Miya @ Sikandar Ansari Vs. the State of Bihar* (Cr. Misc. No. 9085 of 2019); *Ravi Kumar Vs. the State of Bihar* (Cr. Misc. No. 9083 of 2019); and *Shambhu Sahani Vs. State of Bihar* (Cr. Misc. No. 12962

of 2019), which has resulted in *collatio bonorum* and uncertainty about the position of law with respect to maintainability / grant of anticipatory bail in an offence relatable to the Act of 2016, providing the *causa-causans* for the present reference.

88. Without being periphrastic, the question no. 1 is answered as follows:

Till the time, the vires of the Act of 2016 is tested / adjudicated by the Supreme Court of India, which would include a decision on the correctness / justification of a State Legislature in providing / legislating a complete bar to the grant of anticipatory bail to accused persons of offences under the Act, anticipatory bail petitions shall otherwise not be maintainable, unless from the facts of the case, it would *prima facie* appear that none of the ingredients of the offences under the Act of 2016 are made out for attracting the bar of Section 76 (2) of the Act. For coming to the aforesaid conclusion as to whether

the offence can be said to be made out from the facts of the case, no detailed / roving enquiry is to be made.

89. While saying so, I have relied on the principles enunciated in *Shri Gurbaksh Singh Sibbia; Nikesh Tarachand Shah*; *Joginder Kumar*; *Arnesh Kumar*; *Vilas Pandurang Pawar;* and *Shakuntala Devi* (supra).

90. With profit and as a prop to the aforenoted opinion, I may also refer to the Constitution Bench judgment in *Kedar Nath Singh Vs. State of Bihar; AIR 1962 SC 955*, wherein it was observed as follows:

> "***26.*** *It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress [vide (1) Bengal Immunity Co. Ltd. v. State of Bihar and R.M.D. Chamarbaugwalla v. Union of India]. Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence.*

27. *We may also consider the legal position, as it should emerge, assuming that the main Section 124-A is capable of being construed in the literal sense in which the Judicial Committee of the Privy Council has construed it in the cases referred to above. On that assumption, is it not open to this Court to construe the section in such a way as to avoid the alleged unconstitutionality by limiting the application of the section in the way in which the Federal Court intended to apply it? In our opinion, there are decisions of this Court which amply justify our taking that view of the legal position. This Court, in R.M.D. Chamarbaugwalla v. Union of India has examined in detail the several decisions of this Court, as also of the Courts in America and Australia. After examining those decisions, this Court came to the conclusion that if the impugned provisions of a law come within the constitutional powers of the legislature by adopting one view of the words of the impugned section or Act, the Court will take that view of the matter and limit its application accordingly, in preference to the view which would make it unconstitutional on another view of the interpretation of the words in question. In that case, the Court had to choose between a definition of the expression "Prize Competitions" as limited to those competitions which were of a gambling character and those which were not. The Court chose the former interpretation which made the rest of the provisions of the Act, Prize Competitions Act (XLII of 1955), with*

> *particular reference to Sections 4 and 5 of the Act and Rules 11 and 12 framed thereunder, valid. The Court held that the penalty attached only to those competitions which involved the element of gambling and those competitions in which success depended to a substantial degree on skill were held to be out of the purview of the Act. The ratio decidendi in that case, in our opinion, applied to the case in hand in so far as we propose to limit its operation only to such activities as come within the ambit of the observations of the Federal Court, that is to say, activities involving incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace."*

(Also refer to *Pankaj D. Suthar Vs. State of Gujarat; (1992) 1 Gujarat LR 405 and Dr. Subhash Kashinath Mahajan Vs. State of Maharashtra and Ors.; (2018) 6 SCC 454*).

91. Re. Question No. (2) - *Whether the law laid down in the case of Ashok Sahani (supra) and as further explained in the case of Barun Kumar (supra) lays down the law correctly or whether the conflicting view in the case of Manish Kumar (supra) reflects the correct position of law?*

92. The principles laid down in *Ashok Sahani* and *Barun Kumar* (supra) are, I say so with deepest respect to the learned Judges, only partially correct. The reasons for

coming to the aforesaid conclusion is binary: (i) existence of Section 76 (2) of the Act of 2016 and the (ii) legal interpretation by the Supreme Court in not treating such a provision like 76 (2) to be a complete bar for grant of anticipatory bail, which bar would apply only under the circumstances that the offence under the Act is *prima facie* made out and the implication of the accused is not for any oblique purposes. In other words, if the ingredients of the offence are not made out, anticipatory bail can be granted to an accused person.

93. The Principles laid down in *Manish Kumar* (supra, S.J.), it is, respectfully stated is not correct.

94. Re. Question No. (3) - *Whether the learned Single Judge in the case of Manish Kumar (supra) vide an order dated 10.08.2017 while referring the matter for decision by a Larger Bench in deference to the judgment in the case of Ashok Sahani (supra) was justified in declaring it per incurium keeping in view the fact that the judgment was by a Co-ordinate Bench in view of the law laid down by the Apex Court in the case of State of Bihar Vs. Kalika Kuer reported in (2003) 9 SCC 448 and the law laid*

down in the case of Rana Pratap Singh Vs. State of U.P. (FB) reported in 1996 Criminal Law Journal 665, and further keeping in view the opinion expressed in the case of Barun Kumar (supra) that such an issue of vires under the High Court Rules could have been decided by a Division Bench Only?

95. With all the reverence at my command, it is stated that the exposition of law by the learned Single Judge in *Manish Kumar* (supra) in holding Section 76 (2) of the Act of 2016 to be repugnant to Section 438 Cr.P.C., is erroneous. The reason for saying so are as follows:

The Code of Criminal Procedure is in the Concurrent List, whereas the Act of 2016 is relatable to Entries 8, 51, 54 and 64 of the State List. Since the two legislations are not in the same field, no question of repugnancy under Article 254 arises. Apart from this, under Section 4 Cr.P.C., all the offences under any law, other than I.P.C., could be investigated, inquired into and tried or otherwise dealt with according to the same provisions, but subject to any enactment for the time

being in force, regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. Section 5 Cr.P.C., which is in the nature of savings, further declares that nothing contained in the Cr.P.C. shall, in the absence of specific provisions to the contrary, affect any special or local law for the time being in force or any special jurisdiction or power conferred or any special forum of procedure prescribed, by any other law for the time being in force.

96. In view of the judgement of the Supreme Court in *State of Bihar Vs. Kalika Kuer* (supra), the learned Single Judge in *Manish Kumar* (supra) could not have held an earlier judgement rendered by another learned Single Judge to be *per incuriam*. There was also no justification of, thereafter, referring the matter to a larger Bench. The other aspect of the matter is that the learned Single Judge in *Manish Kumar* (supra), in view of the provisions contained in Patna High Court Rules, could

not have decided the vires / validity of an Act or a Section.

97. The question, therefore, is answered accordingly.

98. Re. Question No. (4) – *Whether the Division Bench in the case of Manish Kumar (supra) vide order dated 06.11.2017 was justified in not resolving the dispute on the ground of the pendency of the two petitions before the Apex Court relating to the challenge raised to the vires of the Bihar Prohibition and Excise Act, 2016?*

99. The Division Bench in *Manish Kumar* (supra) has rightly recused from testing the vires of Section 76(2) of the Act of 2016 as the two writ petitions which have been transferred from this Court to the Supreme Court would entail a thorough discussion for any authoritative pronouncement on the vires of the entire Act of 2016 including Section 76(2) thereof. Thus, the decision of the Division Bench in *Manish Kumar* (supra) in eschewing from commenting upon the vires of Section 76 of the Act of 2016 is justified. However, in my respectful opinion, the

Division Bench in Manish Kumar (supra) was not prevented from testing the correctness/legality of the opinion of the learned Single Judge in Manish Kumar (supra) in holding the provision of 76 (2) of the Act of 2016 to be ultra vires, on the touchstone of repugnancy with a Central law on a subject falling in Concurrent List and the Act of 2016 being a legislation on the subjects exclusively falling in List-II of the 7th Schedule of the Constitution.

100. This takes me to the last question, *viz.*, Question No. 5, *i.e.*, *Whether even if the matter was pending before the Apex Court, the Division Bench in the case of Manish Kumar (supra) was denuded by any disability either on the ground of legality or propriety to not proceed to answer the reference made to it more particularly when there is no pronouncement by the Apex Court in the issue sought to be resolved, and when the matter did require an immediate resolution keeping in view the conflicting views of this Court?*

101. Even if the issue relates to grant / refusal of anticipatory bail, which is of extreme importance as it

deals with the liberty of a person, it would still be a judicial overreach to decide an issue which is pending adjudication before the Supreme Court. The arrangement which has been suggested in *Vilas Pandurang Pawar; Shakuntla Devi;* and *Biseshwar Mishra* (supra), even after the vires of Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, has been upheld, does provide a *cornucopia* for the respective rights and freedom of a person to be protected by looking into substratum of the allegation in the complaint/F.I.R and the Division Bench in Manish Kumar (supra) has taken note of such pronouncements of the Supreme Court.

102. Even at the risk of repetition, I must clarify that the opinion rendered by me on the terms of reference would be subject to the outcome of the decision of the Supreme Court of India on the vires of the Act of 2016, particularly of Section 76 (2) thereof.

103. The reference is answered accordingly.

104. Before parting, I must candidly lay bare my heart that all through the process of answering the reference, I have only tried to adhere to *cause celebre* principle of *salus populi est suprema lex* (welfare of people is the paramount law).

(Ashutosh Kumar, J.)

(Per:Hon'ble Mr. Justice Hemant Kumar Srivastava, J.)

The judgments of my esteemed Brothers, Shri Aditya Kumar Trivedi, J. and Shri Ashutosh Kumar, J. which I have the benefit of very patiently, minutely and carefully reading and analysing, answer the questions which have been referred to this Full Bench. However, I would like to pen down few more words in addition to the views expressed by my Brothers Aditya Kumar Trivedi, J. and Ashutosh Kumar, J.

2. Issues referred by the Hon'ble Chief Justice for consideration as well as adjudication have already been referred by Brother Trivedi, J. at para 8 of the judgment and, therefore, there is no need to repeat the issues as referred by the Hon'ble Chief Justice for consideration and adjudication by this Full Bench. However, I think it proper to repeat the factual background in which the Hon'ble Chief Justice formulated the issues for

consideration and adjudication and referred the issues to this Full Bench.

3. The State Government enacted Bihar Prohibition and Excise Act, 2016 (hereinafter referred to as " Act 2016") which was published in Bihar Gazette on 02.10.2016 and accordingly, the said Act came into force on the day of publication in the Bihar Gazette. The purpose of aforesaid Act was to enforce, implement and promote complete prohibition of liquor and intoxicants in the territory of State of Bihar and for matters connected therewith or incidental thereto and also to provide for a uniform law relating to prohibition and regulation of liquor and intoxicants, the levy of duties thereon and punishment for the violation of law in the State of Bihar. In the aforesaid Act 2016, Section 76 was introduced and according to that section, all the offences under the above stated Act 2016 have been made cognizable and non-bailable and furthermore, the provisions of Code of Criminal Procedure, 1973 has also been made applicable. However, sub clause 2 of Section 76 of Act 2016 bars the application of Section 360 of Code of Criminal Procedure, 1973, Section 438 of Code of Criminal Procedure, 1973 and Probation of Offenders Act, 1958. It would be proper to refer sub-section 2 of Section 76 of Act 2016 which runs as follows:-

> *Notwithstanding anything mentioned in sub-section (1) above, nothing in Section 360 of Code of Criminal Procedure, 1973 (Act 2 of 1974), Section 438 of Code of Criminal Procedure, 1973 (Act 2 of 1974) and Probation of Offenders Act, 1958 (20 of 1958) shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.*

4. The perusal of issues referred to us go to show that in the present matter we are not concerned with Section 360 of the Cr.P.C. and Probation of Offenders Act, 1958 and this Full Bench has been assigned to give answer regarding the applicability as well as maintainability of Section 438 of the Cr.P.C. for the offences committed under the Act 2016, particularly, in view of the bar created under Section 76(2) of the Act 2016. The aforesaid question arose when a learned Single Judge in the case of **Ashok Sahani vs The State of Bihar** reported in 2017(3) PLJR 632 held that in view of the specific embargo of Section 76(2) of the Act 2016, privilege of pre-arrest bail under Section 438 of the Criminal Procedure Code is not available to the persons on accusation of having committed an offence under the Act 2016 and also restrained the Registry of this court from entertaining the petition filed under Section 438 of the Cr.P.C. However, another learned Single Judge in the case of **Manish Kumar @ Lokesh Kumar vs The State of Bihar** reported in 2017(4) PLJR 369 held

the judgment of **Ashok Sahani** (Supra) per incuriam on the ground that Section 76(2) of 2016 Act was repugnant to Section 438 of the Cr.P.C. and further held the above stated provision void under Article 254 of the Constitution of India as the Act 2016 did not have the assent of the President of India and, therefore, the application filed under Section 438 of the Code of Criminal Procedure for pre-arrest bail for the offences punishable under the Act 2016 would be maintainable. Again a learned Single Judge in the case of **Barun Kumar vs. The State of Bihar** vide order dated 03.10.2017 passed in Cr. Misc. No. 42985 of 2017 having perused both the above stated decisions came to conclusion that learned Single Judge who decided the case of **Manish Kumar @ Lokesh Kumar** (Supra) could not have entered into the issues of vires of the Provision of Section 76(2) of Act 2016 because the vires of the Act could have been adjudicated only by a Division Bench of the High Court as per Rule 12 of Chapter 21 C of Patna High Court Rules and furthermore, the learned Single Judge came to conclusion that view expressed in **Ashok Sahani** case (Supra) would prevail and, therefore, petition under Section 438 of the Cr.P.C. is not maintainable in cases arising out of offences punishable under the provisions of Act 2016. Furthermore, it is to be noted that some Benches of this court entertained the petitions

filed under Section 438 of the Cr.P.C. in the cases arising out of Act 2016 whereas some Benches refused to entertain petitions filed under Section 438 of the Cr.P.C. in the cases arising out of Act 2016 and not only this, some Benches held that an appeal under Section 89 of the Act 2016 is maintainable against the refusal of prayer of anticipatory bail as well as regular bail by the Sessions Judge. It is also to be noted here that in the case of **Sushil Kumar Mishra and Another vs. The State of Bihar** reported in 2017(4) PLJR 567 a Division Bench vide judgment dated 17.08.2017 held that the provisions of Section 439 and 440 of the Criminal Procedure Code would apply to applications for bail filed under Act 2016 before this Court and Section 89 of Act 2016 will not apply in cases where bail is sought for in a proceeding under Section 439 of the Cr.P.C. However, the aforesaid Division Bench did not give any finding regarding the filing of appeal against the refusal of anticipatory bail by the Sessions Court. It is also to be noted that learned Single Judge in **Manish Kumar** case (Supra) while holding Section 76(2) of the Act, 2016 as void and while declaring the order passed in **Ashok Sahani** case (Supra) as per incuriam referred the matter to the Division Bench to finally adjudicate as to whether Registry of this

Court can be restrained to entertain anticipatory bail petition in compliance with the order passed in **Ashok Sahani** case (Supra).

5. In pursuant to the above stated reference made by learned Single Judge, a Division Bench was constituted and accordingly, vide order dated 06.11.2017 the Division Bench held that the Registry of this Court could not be restrained to entertain anticipatory bail petition filed in the offences arising out of offences of Act 2016 but recused to answer as to whether the petition filed under Section 438 of the Cr.P.C. would be maintainable in the offences arising out of Act 2016 or not on the ground that vires/validity/repugnancy of the Act 2016 including Section 76(2) is sub judice and yet to be decided by the Hon'ble Apex Court. In the aforesaid backdrop, the Hon'ble Chief Justice formulated the issues as stated by brother Trivedi Justice at para 8 of the judgment and referred the issues for adjudication before this Full Bench.

6. It is not in dispute that Section 76(2) of the Act 2016 clearly bars the application of Section 438 of the Criminal Procedure Code in the offences arising out of Act 2016 but from perusal of sub-section (2) of Section 76 of Act 2016, it would appear that above stated bar is applicable only if an offence under the Act 2016 is made out because in sub-section (2) of Section 76

of the Act 2016 the sentence " on an accusation of having committed an offence under this Act" has been used and, therefore, it is explicit clear that if a person commits an offence punishable under the Act 2016, in that event petition filed under Section 438 of the Cr.P.C. cannot be entertained but if a person does not commit any offence punishable under the Act 2016, then in that event, the said person has right to file a petition under Section 438 of the Cr.P.C. and the bar imposed under sub-section (2) of Section 76 of the Act 2016 shall not come in his way. Therefore, even if a person has been made accused in a case registered under the provisions of Act 2016 but from bare perusal of the accusation levelled against him does not disclose any offence of the Act 2016, the said person has right to file petition under Section 438 of the Cr.P.C. in spite of bar imposed under Section 76 (2) of the Act, 2016 because if the offence under the provisions of Act 2016 is not made out from the very face of the accusation, the bar imposed under Section 76(2) of the Act 2016 shall not come in picture. In **Vilas Pandurang Pawar & Anr. vs. State of Maharashtra & Ors.** reported in (2012) 8 SCC 795 and in **Bisheshwar Mishra & Anr. vs. The State of Bihar** reported in 2016 (4) PLJR 1058, the Hon'ble Apex Court as well as Hon'ble Division Bench of this court respectively while dealing with the

cases registered for the offences of SC/ST (Prevention of Atrocities) Act, 1989 held that the court has power to look into the allegations made in the FIR/ complaint to find out whether ingredients of the offence under the SC/ST (Prevention of Atrocities) Act, 1989 are prima facie made out or not before exercising its judicial discretion under Section 438 of the Cr.P.C. The perusal of above stated decisions of Hon'ble Apex Court as well as Division Bench of this Court go to show that in spite of bar imposed under Section 18 of SC/ST (Prevention of Atrocities) Act, 1989 to entertain petition under Section 438 of the Cr.P.C. in the offences arising out of SC/ST (Prevention of Atrocities) Act 1989, the Hon'ble Apex Court as well as Hon'ble Division Bench of this Court held that court can examine prima facie case from the very face of FIR/ complaint and if the court finds that no case under the provisions of SC/ST (Prevention of Atrocities) Act, 1989 is made out from perusal of FIR/complaint, the court can entertain petition filed under Section 438 of the Cr.P.C. even in the cases registered for the offences punishable under SC/ST (Prevention of Atrocities) Act, 1989. Almost, similar position is in respect of Act 2016 and I am of the considered view that if accusation made against a person does not make out any offence under the provisions of Act 2016 from the perusal of

FIR/complaint itself, the court can entertain petition under Section 438 of the Cr.P.C. even if the case has been registered for the offences of Act 2016. The learned Division Bench in **Manish Kumar @ Lokesh Kumar** case (Supra) also dealt with the above stated position at para 13 of the judgment and, therefore, it is obvious that the learned Division Bench in **Manish Kumar @ Lokesh Kumar** case (Supra) has already answered the question regarding the maintainability of the petition filed under Section 438 of the Cr.P.C. in the offences arising out of Act 2016.

7. **Re. Question nos. 1 and 4-** Brother Shri Aditya Kumar Trivedi, J. as well as Brother Shri Ashutosh Kumar, J. while dealing with the reference (question no. 1) as well as reference (question no. 4) are unanimous on this point that the learned Division Bench in the case of **Manish Kumar** (Supra) rightly recused from giving any finding on the vires of Section 76(2) of the Act, 2016 till the vires is tested by the Hon'ble Apex Court in Special Leave to Appeal (C) Nos. 29749/2016 as well as Transfer Petition (Civil) Nos. 2089-2090/2016. Brother Trivedi, J. as well as Brother Ashutosh, J. are of the view that till final adjudication by the Hon'ble Apex Court in respect of vires of Section 76(2) of the Act 2016, the time gap arrangement as suggested by the learned Division Bench in **Manish Kumar** (Supra) case should

continue because adjudication by this court on the aforesaid point shall amount to intrusion within the spheric of the Apex Court and judicial propriety demands from this court not to adjudicate vires of Section 76(2) of the Act 2016 till final adjudication by the Hon'ble Apex Court in respect of vires of Section 76(2) of the Act as it is bounded duty of this court to maintain its decorum and dignity. Therefore, in the aforesaid circumstance, I also endorse the views of Brother Aditya Kumar Trivedi, J. as well as Brother Ashutosh Kumar, J. on the aforesaid point.

8. **Reference (question nos. 2 and 3)-** The aforesaid questions have been dealt with by Brother Justice Trivedi and Brother Justice Ashutosh at length. Brother Trivedi, J. and Brother Ashutosh, J. are of the view that the learned Single Judge in **Mansih Kumar** (Supra) could not have held the judgment delivered in **Ashok Sahani** (Supra) case as per incuriam in the view of decision of **State of Bihar vs. Kalika Kuer** reported in (2003) 9 SCC 448 and the law laid down in case of **Rana Pratap Singh vs. State of Uttar Pradesh (Full Bench)** reported in 1996 Criminal Law Journal 665 and also in the light of the relevant rules of Patna High Court and accordingly, reference (question nos. 2 and 3) have been answered. I do not have any different opinion on the aforesaid issues and I endorse the views taken by

the Brother Aditya Kumar Trivedi, J. as well as Brother Ashutosh Kumar, J. but I would like to mention here that Brother Ashutosh Kumar, J. while answering the reference (question no. 2) held that principles laid down in **Ashok Sahani** and **Barun Kumar** (Supra) cases are partly correct whereas Brother Aditya Kumar Trivedi, J. has not given any answer in respect of reference (question no. 2) perhaps keeping in mind that the testing of vires of Section 76(2) of the Act 2016 is still pending before the Apex Court. I am of the opinion that Brother Aditya Kumar Trivedi J. rightly recused himself from expressing any opinion regarding the principles laid down in **Ashok Sahani** and **Barun Kumar** (Supra) cases because the testing of vires of Section 76(2) of the Act 2016 is still pending before the Hon'ble Apex Court and it would not be proper to hold for the present that principles laid down in **Ashok Sahani** and **Barun Kumar** (Supra) cases in respect of maintainability of petition filed under Section 438 of the Cr.P.C. in the cases registered under the provisions of Act 2016 are correct view. The fate of principles laid down in **Ashok Sahani** and **Barun Kumar** (Supra) cases depends upon the testing of vires of Section 76(2) of the Act 2016 which is still pending before the Apex Court. Therefore, in my view, Brother Aditya Kumar Trivedi, J. rightly restrained himself from giving any finding on

the principles laid down in **Ashok Sahani** and **Barun Kumar** (Supra) cases and recused himself from giving answer to the reference (question no. 2). I fully endorse the view of Brother Aditya Kumar Trivedi, J. and I am of the view that till final adjudication by the Hon'ble Apex Court regarding the vires of Section 76(2) of the Act, there is no need to give any answer to the reference (question no. 2).

9. Admittedly, the Division Bench in the case of **Mansih Kumar** (Supra) recused itself to give answer to the reference on the ground of pendency of vires of Act 2016 as well as amended Act 2016 before the Hon'ble Apex Court keeping in mind the principle of judicial propriety. It is an admitted position that Act 2016 was challenged before this court and the same was declared ultra vires in the case of **Confederation of Indian Alcoholic Beverage Companies & Anr. vs. The State of Bihar and others** reported in 2016 (4) PLJR 369. It is also an admitted position that the State preferred S.L.P. (C) No. 29749 of 2016 before the Hon'ble Apex Court against the judgment pronounced in **Confederation of Indian Alcoholic Beverage Companies** (Supra) and the Apex Court stayed the impugned order passed in **Confederation of Indian Alcoholic Beverage Companies** (Supra). However, it is also an admitted position that during

pendency of S.L.P. (C) No. 29749 of 2016, the State brought an amendment in Act 2016 on 02.10.2016 and the aforesaid amendment was also challenged before this court vide C.W.J.C. No. 8640 of 2016 and C.W.J.C. Diary No. 73098 of 2016 but on the prayer of State in a transfer petition filed before the Apex Court, the Apex Court directed to tag the above stated writ petitions with S.L.P. (C) Nos. 27949-29763/2016 and also stayed the further proceeding. Admittedly, the above stated S.L.P. (C) Nos. 27949-29763/2016 as well as writ petitions were pending before the Supreme Court when Division Bench decided the case of **Manish Kumar** (Supra). Brother Aditya Kumar Trivedi, J. as well as Brother Ashutosh Kumar, J. dealt with the reference (question no. 5) in their respective judgments and came to conclusion that the Division Bench rightly recused to give answer to the reference. No doubt, the matter of vires of Section 76(2) of the Act is not separately pending before the Apex Court but admittedly, the vires of entire Act of 2016 as well as amended Act 2016 have been challenged before the Hon'ble Apex Court in the aforesaid special leave petitions and writ petitions. No doubt, the Division Bench in the case of **Manish Kumar** (Supra) was not denuded to give answer the reference made to it only because of pendency of above stated special leave petitions and writ petitions

but when the vires of entire Act of 2016 as well as amended Act 2016 has to be tested by the Apex Court in above stated special leave petitions and writ petitions, in my view, the Division Bench in **Manish Kumar** (Supra) case rightly recused to give answer to the reference made to it and, therefore, I endorse the views of my esteemed Brothers Aditya Kumar Trivedi, J. and Ashutosh Kumar, J. The reference (question no. 5) is answered accordingly.

10. Since in respect of other aspects my esteemed brothers have taken much pain to discuss all the relevant provisions as well as decisions cited at the bar, I do not think it useful to repeat the same and, therefore, in the aforesaid manner, all the questions under reference are answered accordingly.

(Hemant Kumar Srivastava, J.)

(Per:Hon'ble Mr. Justice Aditya Kumar Trivedi, J.)

I have had the occasion to visit the judgments authored by my esteemed Brothers Hon'ble Mr. Justice Hemant Kumar Srivastava and Hon'ble Mr. Justice Ashutosh Kumar.

After going through the same, it is evident that there is unanimity of opinion with respect to question Nos.1,3, 4 and 5. The answers to the aforesaid questions under reference is thus

construed accordingly. So far as the view expressed on question No.2 of the reference is concerned, there is slight variance in the opinion of Hon'ble Mr. Justice Ashutosh Kumar with the opinions rendered by me and Hon'ble Mr. Justice Hemant Kumar Srivastava. Thus, the majority opinion on question No.2 of the reference is the opinion rendered by me and Hon'ble Mr. Justice Hemant Kumar Srivastava.

Office is, accordingly, directed to place the records of this case before Hon'ble the Chief Justice for the needful.

(Aditya Kumar Trivedi, J.)

Prakash Narayan /
S.K.M/
Praveen/Shahzad

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