IN THE GAUHATI HIGH COURT AT GUWAHATI
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

W. A. No. 119 OF 2008
IN
W. P. (C) No. 6877 OF 2005

Sh Navendra Kumar,
Son of Late Sh. Ram Mohan Lal,
R/O 108 Vidya Vihar Apartment,
Plot No. 48, Sector-9, Rohini,
Delhi – 110085. **----- Appellant**

Versus

Union of India & Another **----- Respondents**

BEFORE
THE HON'BLE MR. JUSTICE IA ANSARI
THE HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH

For the appellant: **Dr. LS Choudhury,**
Mr. DS Choudhury, Mr. RP Singh,
Advocates

For the respondents: **Mr. PP Malhotra, Addl. SGI.**
Date of Hearing : **08.10.2013**
Date of judgment : **06.11.2013**

JUDGMENT AND ORDER

(*IA Ansari, J*)

"When the people fear the government, there is tyranny. When the government fears the people, there is liberty."

Thomas Jefferson, the principal author of the Declaration of Independence (1776) and the third President of the United States (1801–1809)

2. Article 21 is one of the most cherished provisions in our Constitution, which prohibits the State from depriving a person of his life and liberty except according to the procedure established by

law. However, what happens if by the State's action, which has been neither sanctioned by a legislation nor has been taken in valid exercise of its executive powers, the ineffaceable mandate of Article 21 gets smudged. This is precisely the issue, which the appellant has been, for almost a decade of litigation, urging the court to decide. Having been unsuccessful in his attempt to convince the Court in his writ petition of the correctness and righteousness of his contentions, the appellant is, now, before us, seeking a revisit to his submissions.

2a. Some of the prominent questions, which have arisen for determination, in this appeal, are:

(i) Whether '*Central Bureau of Investigation*', popularly called CBI, is a constitutionally valid *police force* empowered to '*investigate*' crimes?

(ii) Could a '*police force*', empowered to '*investigate*' crimes, have been created and constituted by a mere Resolution of Ministry of Home Affairs, Government of India, in purported exercise of its executive powers?

(iii) Could a '*police force*', constituted by a Home Ministry Resolution, arrest a person accused of committing an offence, conduct search and seizure, submit *charge-sheet* and/or prosecute alleged offender?

(iv) Whether CBI is a '*police force*' constituted under the Union's Legislative powers conferred by List I Entry 8?

(v) Do Entry 1 and 2 of the Concurrent List empower the Union Government to raise a '*police force*' and that, too, by way of Executive instructions of Union Home Ministry?

(vi) Whether Delhi Special Police Establishment Act, 1946, empowers the Union Home Ministry to establish a '*police force*' in the name of CBI?

(vii) Above all, is it permissible for the Executive to create a '*police force*' with power to '*investigate*' crimes in exercise of its executive powers, when exercise of such a power adversely affects or infringes *fundamental rights* embodied in Part III of the Constitution, particularly, Article 21?

3. The present appeal has arisen out of the judgment and order, dated 30-11-2007, passed, in Writ Petition (Civil) No. 6877 of 2005, by a learned Single Judge of this Court dismissing the writ petition, whereby the writ petitioner had sought for, *inter alia,* (**i**) quashing of the impugned Resolution No. 4/31/61-T, dated 01-04-1963, whereunder the Central Bureau of Investigation stands established, as *ultra vires* the Constitution of India and (**ii**) quashing of the criminal proceeding/prosecution, which originated from the FIR/RC No. 39(A)/2001/CBI/SIL and is presently pending against the petitioner, in the Court of Special Judge (C.B.I), Assam, at Guwahati.

4. The material facts, which have given rise to the present appeal, may, in brief, be set out as under:

(**i**) A criminal case being RC No. 39(A)/2001/CBI/SIL was registered, on 31-07-2001, under Sections 120B IPC/420 IPC and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988, in the office of the Superintendent of Police, Central Bureau of Investigation (hereinafter referred to as '**CBI**'), Silchar, Assam, against

the petitioner, who is an employee of Mahanagar Telephone Nigam Limited, New Delhi. Having investigated the case, the **CBI** laid a *charge sheet,* dated 25-11-2004, in the Court of the learned Special Judge, **CBI**, Assam, Kamrup, Guwahati.

(**ii**) With the help of the writ petition, bearing WP(C) No. 6877 of 2005 aforementioned, the constitutional validity of the very formation of the **CBI** and its powers to carry out the functions of *police*, namely, registration of First Information Report (in short, 'FIR') under Section 154 of the Code of Criminal Procedure (hereinafter referred to as the 'Cr.P.C'), arrest of a person, as an accused, investigation of offences, filing of *charge-sheets* against alleged offenders and to prosecute them were put to challenge.

(**iii**) The two substantive prayers, made by the petitioner-appellant, were as follows:

> *"(i) quash the impugned Resolution No. 4/31/61-T, dated 01-04-1963, as ultra vires the Constitution of India, by way of an appropriate writ, order or direction in the nature of certiorari and*
> *(ii) quash the criminal proceeding/prosecution originated from the FIR/RC No. 39(A)/2001/CBI/SIL pending against the petitioner in the court of Special Judge (C.B.I) for Assam at Guwahati, by way of an appropriate writ, order or direction in the nature of certiorari."*

(iv). The constitutional validity of the formation of the **CBI** and its powers to investigate and function as a *police force* and/or its powers to *prosecute* an offender were challenged, in the writ petition, by contending that the **CBI** is not a statutory body, the same having been constituted not under any Statute, but under an Executive Order/Resolution No. 4/31/61-T, dated 01-04-1963, of the Ministry of

Home Affairs, Government of India, though *police* is a State subject within the scheme of the Constitution of India inasmuch as it is only a State Legislature, which, in terms of Entry No. 2 of List-II (State List) of the Seventh Schedule to the Constitution of India, is competent to legislate on the subject of *police* and, therefore, the Central Government could not have taken away the power, which so belongs to State legislatures, and create or establish an investigating agency, in the name of **CBI**, adversely affecting or offending the fundamental rights, guaranteed under Part III of the Constitution of India.

(v). To substantiate the above contention, reliance was placed on the Constituent Assembly debates, dated 29-08-1949, wherein Dr. BR Ambedkar had clarified that the word *'investigation'*, appearing in Entry 8 of List I (Union List) of the Seventh Schedule, which read, "*Central Bureau of Intelligence and Investigation*", would not permit making of an *'investigation'* into a crime by the Central Government inasmuch as *'investigation'* would be constitutionally possible only by a police officer under the Cr.P.C., *police* being exclusively a State subject and the word '*investigation'*, appearing in Entry 8 of List I (Union List), would, in effect, mean making of merely an *'enquiry'* and not '*investigation'* into a crime as is done by a police officer under the Code of Criminal Procedure. The word `*investigation'* is, therefore, according to the Constituent Assembly Debates, intended to cover general enquiry for the purpose of finding out what is going on and such an *investigation* is not an *investigation* preparatory to the filing of a *charge-*

sheet against an offender, because it is only a police officer, under the Criminal Procedure Code, who can conduct '*investigation*'.

(vi). In the writ petition, the Union of India did not file any response; but the **CBI**, as respondent No. 2, filed an affidavit, wherein it claimed that it had been exercising functions and powers of police under the Delhi Special Police Establishment Act, 1946. In its affidavit, filed in the writ petition, the **CBI** further submitted that the **CBI** has had been functioning for more than four decades, but its constitutional validity has never been challenged by any one and, hence, this settled position may not be unsettled.

(vii). By the impugned judgment and order, dated 30-11-2007, a learned Single Judge of this Court dismissed the writ petition holding thus, "..... *not only the Delhi Special Police Establishment Act is a valid piece of legislation, as originally enacted, but the same has been validly continued after coming into force of the Constitution and is in harmony with the provisions thereof and, therefore, the said legislation validly continues to hold the field*"

5. Aggrieved by the order, dated 30-11-2007, aforementioned, the writ petitioner has preferred the present writ appeal.

6. We have heard Dr. LS Choudhury, learned counsel for the appellant, and Mr. PP Malhotra, learned Additional Solicitor General of India, appearing on behalf of the respondents. We have also heard Mr. N Dutta, learned Senior counsel, who has appeared as *Amicus Curiae.*

SUBMISSIONS ON BEHALF OF THE PETITIONER:

7. It is submitted by Dr. LS Choudhury, learned counsel for the appellant, that the **CBI** is a non-statutory body inasmuch as it has been constituted by way of an Executive Order/Resolution, dated 01.04.1963, issued by the Ministry of Home Affairs, Government of India, and not by making any legislation.

8. According to Dr. Choudhury, learned counsel for the appellant, in the absence of any law laying the birth of the **CBI**, the exercise of powers of police, by the said organization, such as, registration of First Information Reports, arrests of persons, '*investigation*' of crimes, filing of *charge sheets* and *prosecution* of the offenders cannot be permitted, for, allowing the **CBI** to do so would offend the fundamental rights guaranteed under Article 21 of the Constitution of India, which expressly provides that no person shall be deprived of his life and liberty except according to the procedure established by law.

9. The word *'law'*, within the meaning of Article 21, would, according to the learned counsel for the appellant, mean *legislation* and not *executive instructions* or *executive fiat*, such as, the one, whereunder the **CBI** has been created and established inasmuch as no *executive instructions* can be acted upon if any such instructions violate or offend the *fundamental rights* guaranteed under Part III of the Constitution of India.

10. It is the submission of the learned counsel for the appellant that at best, the **CBI** may be treated to have been constituted by the Central

Government under Entry 8 of the List-I (Union List); but there is no co-relation between the Entry 8 of List I and Entry 2 of List II inasmuch as Entry 8 of List I does not, in the light of the Constituent Assembly Debates, permit '*investigation*' of a crime in the manner as is, ordinarily, done by the police; whereas Entry 2 of List II permits enactment of laws relating to police. According to the learned counsel for petitioner, both these entries are separate and distinct from each other and that the framers of the Constitution were well aware of the fact that they were enabling the Centre and State to create two separate authorities, one, which would be covered by Entry 8 of List I, and the other, which would be covered by Entry 2 of List II, and while '*investigation*', under Entry 2 of List II, would mean an '*investigation*' preparatory to the filing of a *police report*, commonly called *charge-sheet* or *final report*, under Section 173 (2) (i) of the Cr.PC, the other '*investigation*' would be in the form of merely an *enquiry* and not an *investigation*, which is conducted by a police officer under the Cr.PC. Support for these submissions, as mentioned hereinbefore, is sought to be derived by Mr. Choudhury from the debates of the Constituent Assembly.

11. In short, what is contended, on behalf of the appellant, by Dr. LS Choudhury, learned counsel, is that though Parliament is competent to make law on the Central Bureau of Intelligence and Investigation, the **CBI**, which is constituted under the Resolution No.4/31/61-T, dated 01.04.1963, cannot carry out functions of police inasmuch as the Constitutional scheme does not permit the Central Government to

carry out functions of police and the police functions, according to Dr. LS Choudhury, lies within the exclusive domain of the State Government concerned.

12. Yet another leg of argument of Dr. Choudhury, learned counsel for the petitioner, is that even Delhi Special Police Establishment Act, 1946 (in short, 'the DSPE Act, 1946') is *ultra vires* the Constitution, for, it offends, according to Mr. Choudhury, Article 372 of the Constitution inasmuch as Parliament is not competent to make law on police for whole of India and it is only a State legislature, reiterates Mr. Choudhury, which can make, or could have made, law, on *police* by taking resort to Entry No.2 in the State List (List II). Thus, the DSPE Act, 1946, submits Dr. Choudhury, cannot continue anymore inasmuch as its continuance violates the basic Constitutional scheme.

13. Reverting to the Constitution, Dr. LS Choudhury submits that though Parliament, too, is competent to make law on any of the subjects/entries mentioned in List-II, yet, such laws can be made only for Union Territories inasmuch as these territories do not have their own legislature and according to Article 239 of the Constitution of India, the laws, enacted by Parliament for Union Territories, are to be administered through an administrator. It is submitted by Mr. Choudhury, learned counsel, that the power to make laws is one thing and the administration of those laws is quite another and it is not *vice versa*. Though Parliament may make law, for Union Territories, on the State subjects, the fact remains that the administration of these laws,

reiterates Dr. Choudhury, has to be through an administrator appointed under Article 239 and not by the Central Government.

14. Learned counsel for the petitioner, while drawing an analogy with the police administration in Delhi, submits that Section 3 of Delhi Police Act, 1978, which is an Act of the Parliament, provides that there shall be *'one'* police force for whole of Delhi and, thus, according to Dr. LS Choudhury, there cannot be more than one police force functioning in Delhi, particularly, when, points out Dr. Choudhury, the police forces, functioning in Delhi, immediately before commencement of this Act (i.e., Delhi Police Act, 1978), shall, in the light of the provisions of Section 150 of Delhi Police Act, 1978, be deemed to have come under the Delhi Police Act, 1978; whereas the **CBI** is, admittedly, not a *'force'* functioning under the Delhi Police Act, 1978. At least, since after coming into force of Delhi Police Act, 1978, the **CBI** cannot, in the light of the provisions of Section 150 of Delhi Police Act, 1978, legally function as a *police force* and conduct any *'investigation'* preparatory to filing of *charge sheets* as envisaged by the Code of Criminal Procedure.

15. Dr. Choudhury points out that in terms of Section 4 of Delhi Police Act, 1978, the Administrator is the executive Head of police in Delhi and the laws, relating to police, are required to be administered through him. The Central Government has, therefore, according to Mr. Choudhury, no role to play in the day to day functioning of the police in Delhi.

16. Seeking to derive strength from the debates of the Constituent Assembly, as reflected above, it is the submission of Dr. Choudhury, learned counsel for the petitioner, that even if the **CBI** is considered to be a validly constituted body, it cannot function in the manner as is done by the police under the scheme of the Code of Criminal Procedure and the **CBI,** so constituted, can, at best, collect information by making '*enquiries*' to assist any *investigation* carried out by a local police.

SUBMISSIONS OF THE CBI

17. Resisting the writ petition, what the learned ASG, appearing on behalf of the **CBI**, submits, may be summarized as follows:

A) That the **CBI** derives its power to '*investigate*', like a *police force*, as contemplated by the Cr.PC, from the DSPE Act, 1946;

B) That the **CBI** is only a change of the name of the DSPE and the **CBI** is, therefore, not an organization independent of the DSPE;

C) That as per Section 5 of the DSPE Act, the Central Government may extend the powers and jurisdiction of the members of Delhi Police Establishment to *investigate* an offence beyond the territorial limits of Delhi and as per Section 6 of the DSPE Act, 1946, the members of the Delhi Police Establishment can exercise powers and jurisdiction in any area of any other State with the consent of the Government of that State;

D) That the creation of **CBI** may also be taken to have been covered by Entry 80 of List I (Union List) of the Seventh Schedule to the

Constitution of India inasmuch as the expression, *"Central Bureau of Intelligence and Investigation"*, occurring in Entry 8 of List I (Union List), may be read to mean two different agencies, namely, *Central Bureau of Intelligence* and *Central Bureau of Investigation* and, for this purpose, the word *"and"*, appearing in the expression, *"Central Bureau of Intelligence and Investigation"*, may be read as "or".

E) Under Article 73 of the Constitution of India, the executive powers of the Union extends to matters with respect to which Parliament has the power to make laws and the resolution, dated 01.04.1963, whereunder **CBI** has been constituted, can be treated to have been issued by virtue of Union of India's executive powers as embodied in Article 73;

F) That the Central Government can also be treated to have constituted the **CBI** by taking recourse to its powers as specified in Entry 1 and 2 of List –III (Concurrent List) of the Seventh Schedule to the Constitution of India;

G) That the Constitutional validity of Delhi Police Establishment Act, 1946, has already been upheld by the Supreme Court in ***Advance Insurance Co. vs. Gurudasmal,*** reported in **(1970) 1 SCC 633,** and the history of formation of the **CBI** has been highlighted by the Constitution Bench, in ***State of West Bengal & Ors. Vs. Committee for Protection of Democratic Rights, West Bengal & Ors.*** reported in **(2010) 3 SCC 571,** and also by a three Judge Bench in **M.C. Mehta (Taj**

Corridor Scam) Vs. Union of India and others, reported in **(2007) 1 SCC 110**;

H) That since the **CBI** has been functioning for the last 50 years under the DSPE Act, 1946, it may not be sound or proper exercise of discretion to unsettle the settled law and thereby create turmoil '*unnecessarily*';

(I) Repelling the plea of the respondents that the **CBI** is constituted under Delhi Special Police Establishment Act, 1946, Dr. LS Choudhury, learned counsel for the petitioner, submits that the plea is not tenable for the following reasons:

i) *First, there is no co-relation between the DSPE Act, 1946, and **CBI**. In DSPE Act, the word '**CBI**' is, nowhere, mentioned, even though the DSPE Act has undergone several amendments. This apart, even the Executive Order, dated 1st April, 1963, does not disclose that the **CBI** has been constituted under DSPE Act. Had it been so, the impugned Resolution would have so mentioned.*

*ii) Secondly, the plea, that the **CBI** is merely a change of name of the DSPE, cannot stand scrutiny of law inasmuch as the DSPE Act, 1946, specifically mentions, under Section 2, that the police force, constituted under the DSPE Act, shall be called "Delhi Special Police Establishment". Hence, when the DSPE Act itself defines the name of the force, which the DSPE Act, has created and established, the argument that the **CBI** is merely a change of name of the DSPE cannot hold water. Had it been so, the name of the DSPE ought to have been changed in the DSPE Act itself; more so, when several amendments have, otherwise, been introduced into the DSPE Act.*

iii) Thirdly, though Union of India's executive powers may, in the light of Article 73, be co-extensive with its legislative powers, the fact remains that the executive powers cannot be exercised offending fundamental rights, guaranteed by Part III, unless the exercise of such executive powers is backed by appropriate legislation; but, in the cast at hand, the resolution, dated 01-04-1963, whereunder CBI has been constituted, is not backed by any legislation.

SUBMISSIONS OF THE AMICUS CURIAE

18. Mr. N. Dutta, learned *Amicus Curiae,* has submitted that the impugned Resolution, dated 01.04.1963, clearly shows that the **CBI** has been constituted for achieving six specified purposes as have been mentioned in the Resolution itself and till date, no statute has been enacted by Parliament establishing a body called **CBI.** Since there is no legislation constituting the **CBI,** the **CBI**'s constitutional validity, according to the learned *Amicus Curiae,* has to be tested in the light of the provisions embodied in the Constitution of India.

19. It is also submitted by the learned *Amicus Curiae* that the **CBI** and the **DSPE** are not one and the same thing, but everybody appears to have proceeded on the basis that the **CBI** and **DSPE** are one and the same thing. Whereas **DSPE** has been established under the **DSPE Act, 1946,** the **CBI,** points out learned *Amicus Curiae,* has been constituted by a mere *executive fiat*.

20. It has been further submitted by the learned *Amicus Curiae* that though the **CBI** has been empowered under the impugned Resolution, dated 01.04.1963, to '*investigate*' crimes, no power has been specifically provided for '*prosecution*' of offenders by the **CBI**. In fact, points out the learned *Amicus Curiae,* even under the DSPE Act, 1946, DSPE can merely '*investigate*' a case and lay *charge-sheet* and, hence, the **CBI**'s role shall come to an end once *'investigation'* is complete.

21. Referring to the case of **Vineet Narayan**, Mr. Dutta, learned *Amicus Curiae,* points out that in **Vineet Narayan's case** (supra), the Supreme Court has recommended establishment of an independent

directorate of prosecution for the **CBI** and till such time, a directorate is so established, the Supreme Court has directed that the Attorney General of India shall nominate a panel of advocates to conduct the prosecution. However, notwithstanding the directions, so given, prosecution, contends the learned *Amicus Curiae,* is being conducted by the **CBI**, through its appointed advocates, though it lacks jurisdiction to do so.

22. It has been pointed out by the learned *Amicus Curiae* that in terms of Section 36 of the Cr.PC, police officers, superior in rank to an officer-in-charge of a police station, may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. It has also been pointed out by the learned *Amicus Curiae* that under Section 2(c) of the DSPE Act, 1946, a member of the DSPE may, subject to any order, which the Central Government may make in this behalf, exercise any power of the Officer-in-Charge of a police station in the area, which he is, for the time being, posted to, and, when so exercising the powers, he shall be subject to any such orders, which may be made by the Central Government and be deemed to be an Officer-in-Charge of a police station discharging the function of an officer within the limits of his station. If the expression, "*Officer-in-Charge of a police station*", appearing in Section 2(c) of the DSPE Act, 1946, is read together with Section 36 of the Cr.P.C, then, it would become clear, according to learned *Amicus Curiae,* that an officer of the DSPE, while functioning in

any State, shall be subordinate to the superior officers of the State police; whereas, in the case of **CBI,** while investigating a case, in any State, purportedly, by virtue of its powers under Section 5 read with Section 6 of the DSPE Act, 1946, the **CBI** investigators reports to their own hierarchy of officers and not to the superior police officers of the police station within whose local jurisdiction he, as a **CBI** officer, may be investigating a case.

QUERIES RAISED BY THE COURT

23. After hearing the parties as well as the learned *Amicus Curiae* this court raised the following queries:

> 1) *If a Pre-constitutional law was made on a subject, which is, now, covered by State List, whether the law will be valid after the Constitution has come into force bearing in mind Article 372?*
> 2) *Whether a law can be made by Parliament, on a subject covered by the State List, in respect of a Union Territory, after the Constitution has come into force?*
> 3) *The Executive power of the State is co-extensive with its legislative power.* ***Is it, therefore, possible to constitute an investigating agency by a State taking recourse to State's executive Power*** *?*
> 4) *Delhi was a Part-C State under the Govt. of India Act. On coming into force of the Constitution, it was made a Union Territory and it has, now, the status of a State, but some of its powers, under the State List, are exercised by Parliament. The Court wants to know details of the legislative history of the present status of Delhi, as a State, and its legislation making process.*
>
> (Emphasis added)

24. In response to the queries raised by the Court, the appellant as well as the **CBI** have filed their respective written replies/submissions. The **CBI** has also filed an additional affidavit stating, at para 6 thereof,

that vide resolution, dated 01.04.1963, the DSPE has been made an integral part of the **CBI**. The said para 6 is reproduced hereinbelow:

> *"6. That in exercise of its executive powers vide Resolution NO.4/31/61-T dated 1st April, 1963 of Ministry of Home Affairs, the Government of India set up an organization named Central Bureau of Investigation consisting of 6 (six) Divisions. One of the division of the organization is Investigation and Anti-Corruption Division (Delhi Special Police Establishment). Thus, the DSPE by way of this resolution has been made an integral part of **CBI** in its original form as established under the DSPE Act, 1946."*

25. As this Court noticed that the Central Bureau of Investigation was claimed to have been created by a Resolution, dated 01.04.1963, of the Government of India, Ministry of Home Affairs, but it was not, however, clear if the impugned Resolution had received the assent of the President of India, this Court, vide its order, dated 20.01.2013, directed the respondents to produce the records relating to the creation of the **CBI**. Though the relevant records have not been produced, in original, a copy thereof has been produced by the learned Additional Solicitor General and has been perused by the Court and the parties concerned inasmuch as the learned Additional Solicitor General had made it clear to this Court that the said records were no longer classified documents, the same having been obtained from the National Archives and could, therefore, be perused by the parties concerned.

26. Before proceeding further, it is pertinent to note that in response to a specific query put by this Court as to whether the issue, raised in the petition, with regard to the Constitutional validity of the **CBI**, can

be found to have been raised in any decision of any Court, the learned ASG as well the learned *Amicus Curiae*, with commendable fairness, have admitted that in the light of the reported decisions, this issue has never been raised, in any case, in any other High Court or the Supreme Court.

27. The points, which, now, falls for determination, is: whether CBI is established under the DSPE Act, 1946, or is an organ of the Delhi Special Police Establishment Act and, if not, whether a force, with the object of investigation of crimes preparatory to filing of *charge-sheet* for prosecution of offender, can be created by the Central Government by way of an Executive order/Resolution and whether the CBI can be said to be validly created by the Central Government by was of an Executive order/Resolution.

28. Let us consider the first question, namely, whether CBI is established under the DSPE Act, 1946, or is an organ of the Delhi Special Police Establishment Act.

WHETHER CBI IS A NON-STATUTORY BODY ?

29. A statutory body, as the name suggests, is a body, which has a legislative sanction. In other words, a body or agency can be termed as statutory only when it is created by a statute to carry out certain functions.

30. The petitioner submits that the **CBI** has not been constituted under any law; rather, the same has been created by the Central Government by way of Executive Order/ Resolution No. 4/31/61-T,

dated 01.04.1963. It is further submitted by the petitioner that the Central Government cannot create **CBI** by way of an Executive Order and such an agency cannot carry out police functions, i.e., to register FIR under Section 154 Cr.P.C., arrest the persons, raid their premises, investigate crimes and file *charge-sheets* against the offenders and/or to prosecute them in the Court without being supported by legislation.

31. The learned ASG, appearing on behalf of **CBI**, has, on the other hand, submitted that though the **CBI** has been constituted by way of Resolution No. 4/31/61-T, dated 01.04.1963, it derives its powers from the Delhi Special Police Establishment Act, 1946, and the impugned Resolution merely gives a new name, namely, **CBI**, DSPE, inasmuch as the **CBI** is an organ or part of the DSPE in terms of the DSPE Act, 1946.

32. The learned Amicus Curiae has fairly submitted that the Government of India by an executive order, dated 01.04.1963, has constituted a body called "**CBI**" for six specific purposes as mentioned in the said executive order; but till date, there is no statute to give legal sanction to the body called "**CBI**" and, hence, validity of the executive order has to be tested under Article 246 and 252 of the Constitution of India.

33. Considering the fact that it has not been in dispute that the **CBI** came into existence by the Resolution No. 4/31/61-T, dated 01.04.1963., issued by the Government of India, Ministry of Home Affairs, the impugned Resolution, being relevant, is reproduced below:

"No. 4/31/61-T

GOVERNMENT OF INDIA
MINISTRY OF HOME AFFAIRS
New Delhi, the 1st April, 1963

RESOLUTION

The Government of India have had under consideration the establishment of a Central Bureau of Investigation for the investigation of crimes ***at present handled by the Delhi Special Police Establishment,*** *including specially important cases under the Defence of India Act and Rules particularly of hoarding, black-marketing and profiteering in essential commodities, which may have repercussions and ramifications in several States; the collection of intelligence relating to certain types of crimes; participation in the work of the National Central Bureau connected with the International Criminal Police Organization; the maintenance of crime statistics and dissemination of information relating to crime and criminals; the study of specialized crime of particular interest to the Government of India or crimes having all-India or interstate ramifications or of particular importance from the social point of view; the conduct of Police research, and the coordination of laws relating to crime.* ***As a first step in that direction****, the Government of India have decided to set up with effect from 1st April, 1963 a Central Bureau of Investigation at Delhi with the following six Divisions, namely:-*

(i) *INVESTIGATION AND ANTI-CORRUPTION DIVISION. (DELHI SPECIAL POLICE ESTABLISHMENT).*

(ii) *TECHNICAL DIVISION.*

(iii) *CRIME RECORDS AND STATISTICS DIVISON.*

(iv) *RESEARCH DIVISION.*

(v) *LEGAL DIVISON & GENERAL DIVISION.*

(vi) *ADMINISTRATION DIVISION.*

The Charter of function of the above-said Divisions will be as given in the Annexure. The assistance of the Central Bureau of Investigation will also be available to the State Police Forces on request for investigating and assisting in the investigation of interstate crime and other difficult criminal cases.

Sd/- (V. VISWANATHAN)
Secretary to the Government of India"

34. The expression "***As a first step in that direction***", appearing in the impugned Resolution, dated 01-04-1963, goes to show that the **CBI** was constituted as an *ad hoc* measure to deal with certain exigencies. This measure, taken by the Union Government, was not in the form of any Ordinance; rather, constitution of the **CBI** was an executive decision and that too, without citing, or referring to, the source of power.

35. We have read and read many a times the impugned Resolution, dated 01.04.1963.

36. On a careful reading of the contents of the impugned Resolution, what becomes evident is that the Resolution does not refer to, as already indicated above, any provisions of the DSPE Act, 1946, as the source of its power. In other words, deriving strength from the DSPE Act, 1946, the CBI has not been constituted. One cannot, therefore, treat the CBI as an organ or part of the DSPE either.

37. A cautious reading of the provisions, embodied in the DSPE Act, 1946, as a whole, clearly reveals that this Act empowers the Central Government to constitute a separate *police force* to be called as Delhi Special Police Establishment for investigation of offences, which may be notified under Section 3 thereof. Thus, the police force, which may be constituted by the Central Government deriving power from the DSPE Act, 1946, is, in the light of the provisions of the DSPE Act, 1946, can be called Delhi Special Police Establishment, which we have been referring to as the DSPE.

38. The learned ASG has completely failed to show that the CBI can be said to have been established or constituted as an organ or part of the DSPE or is a special force, which has been constituted by taking recourse to Section 2 of the DSPE Act, 1946. We have, therefore, no hesitation in concluding that CBI is not established under the DSPE Act, 1946, or is an organ of the Delhi Special Police Establishment .

39. While considering the question, framed above, it is worth noticing that there is no dispute that CBI came into existence with the issuance of Resolution, dated 01.04.63. If CBI is an integral part of the DSPE, then, such a resolution ought to have been issued by the Central Government in exercise of powers vested in the Central Government by the DSPE Act, 1946. In other words, had the CBI been constituted under the DSPE Act, 1946, by the Central Government, the CBI could have been treated as having been created by way of delegated legislation. There is, however, nothing, either in the DSPE Act, 1946, or in the impugned Resolution, dated 01.04.1963, to show that the CBI is a creation of a delegated piece of legislation. In order to exercise powers under delegated legislation, it is necessary that the Statute itself empowers the Executive to issue notification/resolution to meet the exigencies of time; whereas no such power is vested in the Central Government by the DSPE Act, 1946.

40. On a reading of the various provisions of the DSPE Act, 1946, the executive powers, as endowed by the DSPE Act, 1946, can be pointed as follows:

> *Section 2:- Central Government may constitute special police force called DSPE for Union Territory of Delhi.*
>
> *Section 3:- Central Government may notify the offences, which may be investigated by the DSPE*
>
> *Section 5:- Central Government may notify the areas, where DSPE can exercise jurisdiction meaning thereby that if Central Government has not extended the operation of DSPE to the State of Assam, then even if the State of Assam consents to an investigation by the DSPE, the DSPE would not be in a position to investigate.*

41. The following aspects may be culled out on an analysis of the scheme of the DSPE Act, 1946:

42. In essence, the DSPE was established only to exercise unrestricted power of investigation in the Union Territory of Delhi. It can investigate offences in a State, other than Delhi, provided that the State Government consents thereto and the relevant notification, under Section 5, has been issued by the Central Government.

43. Secondly, the name of the establishment, created by the DSPE Act, 1946, is Delhi Special Police Establishment and not CBI; whereas it is the impugned Resolution, which has created the CBI as a police force for investigation of offences preparatory to filing of charge-sheets. If a statute gives a specific name to an organization, created by the statute,

it is not permissible to confer a new name on the organization by any executive instructions. Subject to the validity of the DSPE Act, 1946, only Delhi Special Police Establishment can be termed as statutory body created by the DSPE Act, 1946, and not the CBI.

44. Thirdly, if CBI were part of the DSPE, the Resolution, dated 1.4.63, would have made a mention to the effect that Central Government is issuing the impugned Resolution in exercise of powers vested in it by the DSPE Act, 1946. However, a reading of the Resolution would make it evident that it does not reflect the source of executive power. Since it is found that the Resolution, which created the CBI, is not an act of delegated legislation, the Resolution cannot become a part of the DSPE Act, 1946.

45. This Court, vide order, dated 20.01.2013, has directed the respondents to produce the records relating to creation of the CBI. It is relevant to note that despite directions, the respondents did not file the original records; rather they produced a certified copy of the records received from the National Archives.

46. However, even perusal of the entire records makes it clear that the Resolution was neither produced before the President of India nor did it ever receive the assent of the President of India. Hence, strictly speaking, the Resolution, in question, cannot even be termed as the decision of the Government of India. That apart, it is apparent from the records that the CBI is a newly constituted body and not the same as

DSPE. The very subject of the file reads as ***Setting up of Central Bureau of Investigation and creation of various posts.*** We would like to point out certain notings, at page 11, 20, 21, 23, 25, 26, 103, 104 and 105, which read as follows:

> *"The setting up of a Central Bureau of Investigation seems to be necessary for the following reasons:*
>
> *1. Inter-State Crime Investigation has become most important. In India there is, at present, no Inter-State Agency."*

47. At Page 20, there is a letter dated 20.8.1962, of the Director General of Special Police Establishment, which reads as follows:

> *"I forward herewith, for what it may be worth, a note giving certain suggestions of implementing the decision of the Home Minister* ***to constitute and set up a Central Bureau of Investigation"***

At page 21:

> *I think there was some discussion previously whether the setting up of this Bureau of Investigation required the consent of the States or not. Now under the Defence of India Regulations, the Centre can perhaps set up this bureau as an emergency measure.*

At page 23:-

> *In the `summary' placed below, the previous history of the proposal for the re-organisation of the Central Intelligence Bureau into the Central Bureau of Intelligence and Investigation has been briefly brought out. This question was examined in 1949-51 and a suitable provision enabling the Parliament to legislate for the establishment of a Central Bureau of Intelligence and Investigation was made in the draft Constitution. Thereafter, it was proposed to undertake legislation for this purpose and State Governments were consulted on the scope and functions of the Bureau. There was a large measure of agreement among the State that offences pertaining to Central Acts, affecting the interest of the Central Government and inter-state crime may be handled by Central Bureau, and investigation of other crimes may also be taken up by it at the request of the State Government concerned. The proposal was not pursued beyond this stage.*

At page 25 the following notings were made to give legal basis to the CBI:

State Government may be informed of this and also of our intention to sponsor legislation in due course to give legal basis to the Bureau and to bring within its purview other crimes originally envisaged.

48. It is strange, as discernible from the notings at page 26, that the Central Government did not want the States to know its intention of expanding the scope of the *Bureau* in due time, which is apparent from the following notings:

…..But it is for consideration whether, while communicating the scheme to the State Governments, we should not also tell them of our intentions of expanding its scope in due course to its original conception and that this would require suitable legislation by Parliament which would be undertaken at the appropriate stage.
Again at Page 98

Now that a decision has been taken to constitute and set up a Central Bureau of Investigation it has to be considered how best to implement this and to give it a shape. The points that arise for consideration are:-

(i) Whether it is necessary to consult the States before setting up the Central Bureau of Investigation?

(ii) Whether it is necessary to have a new comprehensive Act to define the functions and the powers of the Central Bureau of Investigation and to give it the legal authority for conducting enquiries and investigations all over India?

(iii) What items of work should be allotted to the Central Bureau of Investigation?

2. ***If States are to be consulted and if a new comprehensive Act has to be passed by Parliament before the setting up of the Central Bureau of Investigation, this proposal is likely to be unduly held up. Objections might be raised or doubts might be expressed by some States and the process of resolving them will necessarily take time. Some difficulties might also arise from the standpoint of the spheres of responsibility of the Centre and the States.***

3. When these questions are examined in the light of existing arrangements between the Centre and the States and of the legal provisions that are already available, ***it does not appear to be necessary to have consultation with the States and to promulgate a new comprehensive Act before constituting the Central Bureau of Investigation.***

4. There is already a provision in the Constitution for setting up a Central Bureau of Investigation. The States and their Chief Ministers would have been consulted and all aspects of the matter would have been examined and taken into consideration by the framers of the Constitution before this provision was incorporated. It would, therefore, be perfectly legal and within the ambit of the Constitution to constitute and set up a Central Bureau of Investigation. Moreover, it is understood that even after the Constitution was passed the States were consulted on this issue and there was general agreement on the need for setting up a Central Bureau of Investigation.

5. If the functions and the items to be allotted to the C.B.I. are only those which are already being attended to by one Agency or another under the Central government, there should be no need for fresh consultation with the States. Such consultation might be necessary if new items of work are to be given to the C.B.I. but that need not be done at present.

At Page 103

It would appear from the above discussion that it is possible to give effect to the decision of the Home Minister and ***to set up a Central Bureau of Investigation without having prior consultation with the States and without going to Parliament for fresh legislation****. Even within the ambit of the existing legal provisions and of the accepted arrangements with the States it is possible to allot the essential and important items of work to the C.B.I. and to enable it to function effectively and usefully.*

9. Later, other functions could be added to the Central Bureau of Investigations with the consent of the States and the scope of its activities enlarged. At that stage the questions of framing a new comprehensive Act could also be considered. Even otherwise it would be better to frame a new Act after the C.B.I. has been in existence for some time and when its difficulties and requirements as brought out by actual experience are known. At that time it would also be far easier to obtain the consent of the States for fresh legislation.

At Page 104:

10. *In this connection a point worthy of note is that fresh legislation on the lines contemplated is not free from difficulties.* ***Very great care will have to be taken to frame the proposed Act in such a way as not to infringe on the provisions of the Constitution. Even with all the care in drafting and preparing the Act it is likely to be questioned in courts and it is difficult to anticipate what the decision of the courts would be on the validity of the new Act or on legal points arising from it. On the other hand, it might be mentioned that the Delhi Special Police Establishment Act has already gone through this process. Its provisions have been debated in courts from all possible angles and it has withstood onslaughts from all directions. Even the highest courts have upheld the validity of the provisions of this Act. It is a matter for consideration whether it would be worthwhile framing a new Act just at present with all the delay and difficulty that this involves and with the risk that it is likely to entail.***

At Page 105:

12. From a consideration of the points mentioned in the foregoing paragraphs it would appear that all that is necessary to implement this proposal is to issue administrative orders –

(i) ***constituting and setting up a Central Bureau of Investigation as provided for in the Constitution****;*

(ii) declaring the S.P.E. to be a wing of the C.B.I. and an integral part of it and under its administrative control;

49. At page 126, various posts and pay scales are mentioned.

50. It is apparent from the notings, which we have referred to above, that the Central Government had set up altogether a new body known as CBI by the impugned Resolution. It is further found that the Union Home Ministry was working on the assumption that there is already provision in the Constitution for creation of the CBI. Admittedly, at that time, no legislation was made to set up the CBI and the source of

power were being traced to Entry 8 of Part I (Union List), which reads, "*Central Bureau of Intelligence and Investigation.*".

51. Coming, now, to the argument of learned ASG that the **CBI** may be found to be treated to have been created by way of an executive instruction, the source of power being traceable to Entry 8 of List I (Union List), it may noted that Entry 8 of List I (Union List) reads, *'Central Bureau of Intelligence and Investigation'*. It is the submission of the appellant that the word, *'investigation'*, which appears in the expression, *'Central Bureau of Intelligence and Investigation'* under Entry 8 of List I of the Union List, does not mean *'investigation'*, which is, ordinarily, carried out by a police force under the CrPC, preparatory to the filing of charge-sheet, against an offender.

52. Support for the above submission is sought to be derived by the appellant referring to the debates of the Constituent Assembly, which took place on 29.08.1949, wherein the functions of the *Central Bureau of Intelligence and Investigation* had been discussed in the Constituent Assembly and explained by Dr. B. R. Ambedkar. The meaning and importance of the word, *'investigation'*, which appears within the expression *'Central Bureau of Intelligence and Investigation'*, were explained by Dr. Ambedkar as under:

> ***Dr. B. R. Ambedkar**: The idea is this that at the Union office there should be a sort of bureau which will collect information with regard to any kind of crime that is being committed by people throughout the territory of India and also make an investigation as to whether the information that has been supplied to them is correct or not and thereby be able to inform the Provincial Governments as to what is going on in the different parts of India so that they might themselves be*

in a 'position to exercise their Police powers in a much better manner than they might be able to do otherwise and in the absence of such information.

53. One of the members, Mr. Nazimuddin Ahmed could visualize a conflict of interest between the States, on the one hand, and the Union Government, on the other, and raised, in the Constituent Assembly, question about the implications and the use of the word, *'investigation'*, appearing within the expression *'Central Bureau of Intelligence and Investigation'*, in the following words:

*"**Mr. Nazimuddin Ahmad:** Mr. President, Sir I beg to move:*

"That in amendment No.1 for List I (Sixth Week) in the proposed entry 2 of List I, the words 'and investigation' be deleted."

Then I move my next amendment which is an alternative to the first:

"That in amendment No.1 of List I (Sixth Week) in the proposed entry 2 of List I for the word 'investigation' the words 'Central Bureau of Investigation' be substituted."

The original entry was "Central Intelligence Bureau". The redrafted entry is "Central Bureau of Intelligence and Investigation. The words "and Investigation" seem to me to appear to give an ambiguous effect. I submit that the duty of the Union Government would be to maintain a Central Intelligence Bureau. That is all right. Then we have the words "and Investigation" and we do not know what these words really imply. Do these words "and investigation" mean that the Bureau of Investigation was merely to carry out the investigation? They will mean entirely different things. If it is to enlarge the scope of the Central Intelligence Bureau as well as the Bureau of Investigation, that would have been a different matter but Dr. Ambedkar in answer to a question put by Mr. Mahavir Tyagi has said that the Central Government may think it necessary to carry on investigation. Sir, I submit the effect of this amendment, if that is the kind of interpretation to be given to it, would be extremely difficult to accept. We know that investigation of crime is a provincial subject and we have, already conceded that. If we now allow the Central Government also to investigate, the result would be that for a single crime there must be two parallel investigations, one by the Union Government and other by the State Government. The

> *result of this would be that there will be a clash and nobody will know whose charge-sheet or final report will be acceptable. The Union Government may submit a final report and the Provincial Government may submit a charge-sheet, and there may be a lot of conflict between these two concurrent authorities. If it is to carry on investigation, then it will not be easy to accept it. It was this suspicion that induced me to submit this amendment, though without any hope of being accepted, at least to explain to the House my misgivings and these misgivings are really substantiated by Dr. Ambedkar himself. I would, like to know whether it is possible at once to accept this implication, to give the Central Government power to investigate crimes. My first amendment is intended to remove the words "and investigation". If you keep the investigation within this entry it should be the Central-Bureau of Intelligence, as well as Bureau of Investigation. If there are two Bureaus only there, could be no difficult and there will be no clash and let us have as many Bureaus as you like but if you want investigation, it will be inviting conflict. Rather it is another attempt to encroach on the provincial sphere. I find there is no limit to the hunger of the Central Government to take more and more powers to themselves and the more they eat, the greater is the hunger for taking more powers. I oppose the amendment of Dr. Ambedkar. I appeal to the House not to act on the spur of the moment; it is easy for them to accept it as it is easy for them to oppose it and the entry does not seem to be what it looks."*

54. Dr. Ambedkar, in response to the doubts, expressed by Mr. Nizamuddin, had clarified and assured the House, in no uncertain words, that the Central Government cannot and will not have the powers to carry out *investigation* into a crime, which only a police officer, under Cr.P.C., can do. The response of Dr. Ambedkar is extracted below:

> ***The Honourable Dr. B. R. Ambedkar: The point of the matter is, the word "investigation" here does not permit and will not permit the making of an investigation into a crime because that matter under the Criminal Procedure Code is left exclusively to a police officer. Police is exclusively a State subject; it has no place in the Union List. The word "investigation" therefore is intended to cover general enquiry for the purpose of finding out what is going on. This investigation is not investigation preparatory to the filing of a charge against an offender which only a police officer under the Criminal Procedure Code can do.***

55. The learned ASG, on the other hand, argues, that if the language of an Act is unambiguous and clear, no reliance can be placed on the Parliamentary debates and one may look to the Statement & Objects and Reasons and not to the Parliamentary debates.

56. In support of the above contention, the learned ASG has relied upon the decision, in ***Anandji Haridas & Co. (P) Ltd. Vs. Engineering Mazdoor Sangh*** (1975) 3 SCC 862, wherein the relevant observations, appearing at para 9, reads,

> **"***9. We are afraid what the Finance Minister said in his speech cannot be imported into this case and used for the construction clause (e) of section 7. The language of that provision is manifestly clear and unequivocal. It has to be construed as it stands, according to its plain grammatical sense without addition or deletion of any words.*
> *10. As a general principle of interpretation, where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external evidence such as parliamentary debates, reports of the Committees of the Legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question."*

57. It is necessary to point out here that the intent of embodying the Constituent Assembly debates is to gather an idea behind the general law making process. In any view of the matter, the debates quoted above, becomes relevant and unavoidable when it is contended, on behalf of the respondents, that the creation of the **CBI** can be traced to the Central Government's power embodied in Entry 8 of List I of the

Union List, which provides for creation of *'Central Bureau of Intelligence and Investigation'*.

58. It is an admitted position that no independent law exists on Central Bureau of Intelligence and/or Investigation; rather, it is the DSPE Act, 1946, only which, as argued by the ASG, is the law, which, according to the respondents, has created the CBI. But then, Entry 8 List I (Union List) definitely empowers the Parliament to enact a law in the form of *'Central Bureau of Intelligence and Investigation'*. Such a legislative competence is preserved under Art. 246 (1), which reads, *"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").*

59. Having enacted a law, under Entry 8 of List I (Union List), if the Central Govt, decides to extend its operation in other States, then, it is necessary that the said law be amended in terms of Entry 8 of list I (Union List) so as to enable the Central Government to extend the operation of the law with the consent of the Government concerned.

60. Coupled with the above, if the debates, in the Constituent Assembly, are borne in mind, the word, *'investigation'*, became a subject matter of debate, primarily, for the reason that it would amount to encroachment into the realm of the subject matter of State List. The word, *'investigation'*, appearing within the expression, *'Central Bureau of Intelligence and Investigation'*, was sought to be justified, in the Constituent Assembly, contending that Police is exclusively a State

subject and it has no place in the Union List. The word *'investigation'* was, therefore, according to the Constituent Assembly, intended to cover general *'enquiry'* for the purpose of finding out what is going on and this *'investigation'* is not an *'investigation'* preparatory to the filing of a *charge-sheet* against an offender, which only a police officer, under the Criminal Procedure Code, can do.

61. Learned ASG further argues that the expression *Intelligence* appearing in Entry 8 may be read in the Central Bureau of Investigation even though in general the expression in not used in its designation.

62. It is necessary to point out here that the intent of embodying the Constituent Assembly debates is to gather an idea behind the Constitution making process relating to Entry 8 of List I (Union List) providing for creation of '*Central Bureau of Intelligence and Investigation'* and the meaning of the term *'investigation'*, appearing within the expression '*Central Bureau of Intelligence and Investigation'* as had been construed by the Constitution-makers.

63. In the above view of the matter, the debates, quoted above, become relevant and unavoidable, when it is contended, on behalf of the respondents, that the creation of the **CBI** can be traced to the Union Government's power embodied in Entry 8 of List I (Union List), which provides for creation of *'Central Bureau of Intelligence and Investigation'*.

64. It is an admitted position that no independent law exists on Central Bureau of Intelligence and/or Investigation, though it is the

alternative contention of the learned ASG that authority to constitute **CBI** may be traced to Entry 8 of List I (Union List).

65. We may, however, point out that Entry 8 of List I (Union List), indeed, empowers Parliament to enact a law on the subject of '*Central Bureau of Intelligence and Investigation*'. Such a legislative competence is preserved under Art. 246 (1), which reads, *"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".*

66. Coupled with the above, if the debates are borne in mind, it becomes abundantly clear that the word, *'investigation'*, appearing within the expression "*Central Bureau of Intelligence and Investigation"* became a heated subject matter of debates, in the Constituent Assembly, primarily, for the reason that empowering the Parliament to enact law, on '*investigation'* conducted into an offence by police, would amount to encroachment into the realm of the subject matter of State List, though '*police'* is a subject, which falls in the State List.

67. The inclusion of the word, *'investigation'*, appearing within the expression, *'Central Bureau of Intelligence and Investigation'*, was sought to be justified, in the Constituent Assembly, by contending that *police* remains exclusively a State subject and it has no place in the Union List. The word '*investigation'* was, therefore, according to the Constituent Assembly debates, intended to cover general '*enquiry'* for the purpose of finding out what was going on and this '*investigation'*,

which amounts to a mere '*enquiry*', is not an '*investigation*' preparatory to the filing of *charge sheet* against an offender, for, such an '*investigation*' can be carried on by only a police officer, under the Criminal Procedure Code, and none else. This apart, it is State legislature, which is entitled to constitute a '*police force*' for the purpose of conducting '*investigation*' into crime.

68. From the above discussion, which took place in the Constituent Assembly, it becomes crystal clear that the Parliament cannot, by taking resort to Entry 8 of List I (Union List), make any law empowering a police officer to make '*investigation*' in the same manner as is done, under the Criminal Procedure Code, by a police officer, while conducting an *'investigation'* into an offence for the purpose of bringing to book an offender.

69. In the above view of the matter, the impugned Resolution, dated 01.04.1963, constituting the **CBI,** as an investigating agency, in order to carry out '*investigation*' into commission of offences in the manner as is done by a police officer under the Criminal Procedure Code, cannot be traced to Entry 8 of List I (Union List).

70. In other words, the source of power to create **CBI** as an investigating agency cannot be traced to, or be said to be located in, Entry 8 of List I (Union List). This apart, from the fact that while the law existing, prior to the coming into force of the Constitution of India, is protected in terms of the mechanism introduced by Article 372 and Article 372A of the Constitution of India, no amendment to any such

law, if made after the Constitution of India has already come into force, be saved or protected by taking resort to Article 372 and 372A if the provisions, embodied in the Constitution, run counter to the scheme of our Constitution.

71. It is also necessary, in the above context, to take note of the preamble of the DSPE Act, 1946, which reads as follows:

> *"An Act to make provision for the constitution of a special police force [in Delhi for the investigation of certain offences in [the Union territories]], for the superintendence and administration of the said force and for the extension to other [***] of the powers and jurisdiction of members of the said force in regard to the investigation of the said offences.*
>
> *WHEREAS it is necessary to constitute a special police force [in Delhi for the investigation of certain offences in [the Union territories]] and to make provision for the superintendence and administration of the said force and for the extension to other areas [***] of the powers and jurisdiction of the members of the said force in regard to the investigation of the said offences;*
>
> *Section 1 - Short title and extent*
>
> *(1) This Act may be called the Delhi Special Police Establishment Act, 1946.*
>
> *(2) It extends to [the whole of India], [***]."*

72. A careful reading of the preamble to the DSPE Act, 1946, would make it evident that the DSPE Act, 1946, has been made for the '*Union Territories*'. This legislative power cannot be exercised by the Parliament except under Art 246 (4), which enables Parliament to enact

laws on subjects, covered by List II (State List), in respect of *Union Territories*.

73. Thus, though *police* is a State subject, Parliament is competent to make laws, on the subject of *police*, for the *Union Territories* only inasmuch as *Union Territories* do not have any legislative assembly of their own.

74. Again, a reading of Sec. 1 of the DSPE Act, 1946, would show that the DSPE Act, 1946, extends to whole of India meaning thereby that it is an embodiment of Entry 80 of List I (Union List), which enables Parliament to make law permitting extension of the operation of a *police force* to another State. It is in this light that Sections 5 and 6 of the DSPE Act, 1946, need to be read together inasmuch as a combined reading of Sections 5 and 6 of the DSPE Act, 1946, makes it clear that the Central Government is empowered to extend the activities of the DSPE to any other State with, of course, the consent of the State concerned.

75. Apprehending that his argument that **CBI** can be said to have been constituted, in exercise of power under Entry 8 of List I (Union List), may not, in the light of the Constituent Assembly debates, cut much ice with this Court, the learned ASG has submitted, perhaps, as a precautionary measure, that if constitution of the **CBI** cannot be traced to the Parliament's power under Entry 8 of List I (Union List), **CBI** may be validly safeguarded by virtue of Entry 80 of List I (Union List)

inasmuch as **CBI** can be said to have been constituted in exercise of power under Entry 80 of List I (Union List).

76. Let us, now, examine, in the light of the provisions embodied in Entry 80 of List I (Union List), the correctness of the above submissions. Entry 80 of List I (Union List), we notice, reads as follows:

> *"Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State."*

77. It will be seen that Entry 80 of List I (Union List) merely enables the Parliament to extend the operation of *police force* of one State to another. However, Entry 80 of List I does not empower the Parliament, far less the Central Government, to enact a law creating a separate *police force* for the purpose of '*investigation*' into a crime preparatory to the filing of *charge sheets*. What Entry 80 of List I permits is only making of provisions of '*extension*' of a valid law governing activities of police of one State to have jurisdiction in any other State with, of course, the consent of the other State concerned.

78. Thus, if the DSPE Act, 1946, were treated to be a valid piece of legislation, then, by virtue of Entry 80 of List I (Union List), the Parliament could have incorporated, in the DSPE Act, 1946, that the

operation of DSPE Act, 1946, may be extended to other States if the latter State gives consents thereto.

79. In the backdrop of what have been discussed above, Section 5, subject to Section 6 of the DSPE Act, 1946, can be regarded as an embodiment of Entry 80 List I (Union List). Such a provision could be made in the DSPE Act, 1946, because such a power was available with the Governor General-in-Council under Entry 39 of List I of Seventh Schedule to the Government of India Act, 1935, which corresponds to Entry 80 of List I (Union List).

80. Therefore, as regards the reliance placed on Entry 80 of List I (Union List) by the learned ASG, we hold that there must, at first, be a validly constituted *police force* and only thereafter, the question of '*extension*' of its jurisdiction to other areas by taking resort to Entry 80 of the List I (Union List) will arise.

81. We must remember that various Entries, in the Lists of Seventh Schedule, do not give any power to legislate; rather, the Entries demarcate the fields of legislation between the States and the Centre. In this regard, following observations, appearing in ***State of West Bengal & Ors. Vs. Committee for Protection of Democratic Rights, West Bengal & Ors.*** **(2010) 3 SCC 571,** being relevant, are extracted:

> *"27.Though, undoubtedly, the Constitution exhibits supremacy of Parliament over the State Legislatures, yet the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the*

> *entries in the Union and the State Lists. Thus, there is no quarrel with the broad proposition that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them.* ***It may also be borne in mind that the function of the lists is not to confer powers; they merely demarcate the legislative field...***"
>
> (Emphasis supplied)

82. Learned ASG, while placing reliance on the case of **Advance Insurance Co. vs. Gurudasmal**, reported in **(1970) 1 SCC 633**, argues that that it is because of Entry 80 List I that the constitutional validity of the DSPE Act, 1946, had been upheld by Supreme Court.

83. So far as the case of **Advance Insurance Co. Ltd. (supra)** is concerned, the argument, before the Supreme Court, was that Delhi Special Police Establishment Act, 1946, is not constitutionally valid and that DSPE has no jurisdiction to investigate cases in other States. The basis, for the argument, was that Entry 80 of List I speaks of *police force* of a State; whereas DSPE, 1946, was a *police force* of a Union Territory, namely, Union Territory of Delhi.

84. The argument, so raised, in **Advance Insurance Co. Ltd.** (supra), by the appellant, was overruled by the Supreme Court in the context of Entry 39 of List I (Union List) under the Government of India Act, 1935, corresponding to Entry 80 of List I (Union List) of the Constitution of India. Relying on the definition of '*State*', as given in Section 3 (58) of the General Clauses Act, the Supreme Court held that '*State*' also meant a *'Union Territory'* and so far as Entry 80 was

concerned, since the substitution of term '*Union Territory*', for the term '*State*,' is not repugnant to the context thereto, the term '*State*' would also mean a *Union Territory*. The Supreme Court further observed, in **Advance Insurance Co. Ltd. (supra),** that since Entry 80 of List I (Union List) under the Government of India Act, 1935, corresponding to Entry 39 of List I of the Seventh Schedule, enables the *police force* of one State to function and carry out '*investigation*' into an offence in another State if the latter State consents to such '*investigation*', an '*investigation*' by the DSPE into a case, in Maharashtra, is permissible. To put it a little differently, the members of the DSPE, the DSPE being a valid establishment under the DSPE Act, 1946, may be empowered to *'investigate'* an offence in a State, outside Delhi, provided that the State concerned given consent to the same. This is precisely what has been done by virtue of Sections 5 and 6 of the DSPE Act, 1946, and the same is in tune with Entry 39 of List I (Union List) under the Government of India Act, 1935, corresponding to Entry 80 of List I (Union List) of the Constitution of India.

85. It is, thus, apparent that the case of **Advance Insurance Co. Ltd (supra)** is a *precedent* on the point that DSPE is a *police force* functioning in the Union Territory of Delhi. However, by no stretch of imagination, the case of **Advance Insurance Co. Ltd.** (supra) be regarded as a *precedent* on the point that **CBI** is a body constituted under the DSPE Act, 1946, nor is the case of **Advance Insurance Company Limited** (supra) be regarded as a *precedent* to justify **CBI** as a validly constituted

'*police force*' empowered to '*investigate*' offences preparatory to filing of *charge-sheets.*

86. The case of **Advance Insurance Co. Ltd.** (supra), thus, does not advance, or come to the assistance of, the respondents' case that the **CBI** is borne out of the DSPE Act, 1946, or that the CBI can be regarded as a '*police force*' constituted by the Central Government by taking resort to Entry 80 of List I (Union List).

87. Consequently, it would not be a correct proposition of law to contend that Entry 80 of List I (Union List) validates the impugned Resolution, dated 01.04.1963, as an executive instruction of the Union Government, because Entry 80 of List I (Union List) presupposes existence of a valid '*police force'* before the area of jurisdiction of such a '*police force'* is extended from one State to another State with the consent of the latter State. In the present case, the **CBI**, which is claimed to be a *police force*, has itself been brought into existence with the help of the impugned Resolution, dated 01.04.1963, and not on the strength of any *legislation*.

88. In an attempt to bring home his argument that **CBI** is a statutorily established agency, learned ASG also took recourse to Entry 1 and Entry 2 of List III (Concurrent List), which provide as follows:

> "1. *Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List*

II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution."

89. Article 246 (2), dealing with Concurrent List, provides that 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.

90. Thus, both, Union and State, can enact a criminal or penal law. However, such a penal law should not be on any of the subjects mentioned in List I or II and should not be laws on use of naval, military or air forces or any other armed forces of the Union in aid of the civil power. Again, as empowered by Entry 2, both, Union and State, can introduce changes in the Code of Criminal Procedure.

91. Article 246, in essence, lays down the principle of federal supremacy and in the event of inevitable conflict between the exercise of power by the Union and a State, it is the power, exercised by the Union, which would prevail over the State's powers and, in the case of overlapping of a legislation made by a State *vis-à-vis* a legislation made by the Parliament on a subject covered by List III (Concurrent List), it is not the former legislation, but the later one, which shall prevail.

92. Thus, both, the Union and the State, can frame law on IPC and Cr.PC provided that the laws do not overlap. In the event of laws overlapping, the law, made by the Parliament, shall prevail.

93. For instance, let us take Section 354 IPC. Even before the enactment of Criminal Law (Amendment) Act, 2013, which introduced amendments in Indian Penal Code, CrPC, Evidence Act, etc., there were some States, which had already amended some of the features of Section 354 IPC.

94. Thus, in the State of Andhra Pradesh, Sec. 354 IPC Andhra Pradesh Act 6 of 1991 read as follows:

> *"**354. Assault or criminal force to woman with intent to outrage her modesty.-**Whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine:*
>
> *Provided that the court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term which may be less than five years but which shall not be less than two years."*

95. The State of Orissa had also, by virtue of Orissa Act 6 of 1995, (w.e.f. 10-3-1995), introduced amendments in Section 354, which made the offence a non-bailable offence, though in the State of Assam, where

no such amendments were made, the offence remained a *bailable offence*.

96. So far as constitution of *police force* is concerned, Union and the State, both have legislative competence to enact laws on *'police'*. However, so far as law, enacted by Parliament, is concerned, it can operate only in the *'Union territories'* and not in any *'State'*, because '*police*' is a subject falling under State List.

97. For instance, for the State of Assam, the Assam Police Act, 2007, has been enacted by the State Legislature. It, however, needs to be mentioned here that Police Act, 2007, governs the administrative aspects of police. So far as '*investigation*', a matter falling within the realm of Cr.PC, is concerned, only those police officers, who are recognized as Investigating Officers, under CrPC, have the power to investigate an offence. In other words, under the Assam Police Act, 2007, there may be several police officers; but not all of them have the power to register a case, investigate an offence and/or submit a *charge-sheet*.

98. An example may be given by referring to Sec. 30 and Sec. 55 of Assam Police Act, 2007, which read as under:

> ***"Sec. 30 District Armed Reserve**: The District Armed Reserve, which will function under control, direction and supervision of the District Superintendent of Police shall be the armed wing of the District Police to deal with an emergent law and order problem or any violent situation in the district, and*

for providing security guards or escort of violent prisoners, or such other duties as may be prescribed".

***Sec. 55 Investigation by special crime investigation unit**:- The state government shall ensure that in all metropolitan Police Stations having a population of 10 (ten) lakhs or more, a Special Crime Investigation Unit, headed by an officer not below the rank of Inspector of Police, is created with an appropriate strength of officers and staff, for investigating organized, economic, and heinous crimes. The personnel posted to this unit shall not be diverted to any others duty, except under very special circumstances with the written permission of the Director General of Police. The State Government may, however, gradually extend this scheme to other urban Police Stations.*

99. It will be seen that Officers of the Armed Reserve, as conceived under Section 30, have not been entrusted with the responsibility of '*investigation*' even though they are Police Officers. On the other hand, Special Crime Investigative Unit has been conceived as an investigation organ in cities having population of more than 10 lakhs.

100. The arguments of learned ASG, with reference to Entry I and 2 of List III, do not come to the rescue of the respondents for the simple reason that under List III, laws, on criminal procedure and penal laws, can be framed on any of the subjects, which are not covered by List I and List II. Since Entry 8 of List I (Union List) makes Parliament specifically competent to enact a law on '*Central Bureau of Intelligence and Investigation*', it would be a destructive submission to say that if not

under Entry 8 of List I, then, under Entry 1 and 2 of List III, CBI's existence can be validated, particularly, when Entry 2 of List III (Concurrent List) deals with '*procedure*' of '*investigation*' and '*trial*' of offences and not with the '*constitution*' of a '*police force*'.

101. ***The question, now, is: whether the impugned Resolution, dated 01.04.1963, is an executive action and, therefore 'law' within the meaning of Article 13 (3)(a) and/or Article 21 of the Constitution of India?***

102. Before entering into the discussion whether the impugned Resolution, dated 01.04.1963, is a valid executive action, It is necessary that the extent of executive powers of the Union and the State, as have been provided in Article 73 and Art. 162, respectively, be examined. Since both these provisions, embodied in the Constitution, define the limits of the law making capacity, discussion, on any one of the provisions, would suffice.

103. The extent of executive powers of the Central Government has been prescribed by Article 73 of the Constitution, which is reproduced below:

> "*73.* ***Extent of executive power of the Union*** *– (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend –*
>
> *(a) To the matters with respect to which Parliament has power to make laws; and*
>
> *(b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement;*

> *Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.*
>
> *(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution."*

104. A bare reading of Article 73 makes it evident that the executive powers of the Union extends to all the matters with respect to which the Parliament has power to make laws; but, there are three fetters on exercise of the executive powers. First, this exercise is subject to provisions of the Constitution and, secondly, this exercise of executive power shall not, save as expressly provided in the Constitution or in any law made by Parliament, extend, in any State, to matters with respect to which the Legislature of the State also has power to make laws. Thirdly, as we would show, the exercise of executive power cannot be stretched to the extent of infringing *fundamental rights*.

105. What is, now, of great importance to note is that Article 73 cannot be read in isolation and it becomes necessary to understand its co-relation with Article 245 and Article 246 of the Constitution, which embody the concept of federal structure of our Constitution. Though within the powers vested in the Union and the States, each of these entities possesses plenary powers, their powers are, among others, limited by two important barriers, namely, *(i) the distribution of powers by the Seventh Schedule and (ii) the Fundamental Rights included in Part III*.

106. A combined reading of Article 245 and Article 246 shows that Parliament and State Legislatures have Constitutional competence to make laws. However, the subject matter of the laws to be made have been delineated in the form of three lists, namely, Union List, State list and the Concurrent list. This apart, 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 a matter is a matter enumerated in the State List. In other words, it is within the legislative competence of Parliament to make law, on subjects covered by State List, for those territories, which do not fall within any of the States.

107. For instance, '*police*' is a subject falling under Entry 2 of List II (State List). In view of Article 246 (3), therefore, only State has exclusive power to make laws on *'police'* by taking recourse to Entry 2 of List II (State List). However, Union Territories are not States within the meaning of Article 246 and, hence, Parliament can make laws, on *police,* for the Union Territories.

108. The Delhi Police Act, 1978, can be cited as one such example. The Delhi Police Act, 1978, was enacted by the Parliament for the Union Territory of Delhi even though '*police*' is a subject falling under State List.

109. Explaining the concept of the extent of executive powers, the Supreme Court held, **in *Dr. D.C.Wadhwa & Ors. Vs. State of Bihar & Ors*** (AIR 1987 SC 579), that the executive cannot take away the

functions of the legislature. The relevant observations, made in this regard, read as under:

> *"….**The law making function is entrusted by the Constitution to the legislature consisting of the representatives of the people and if the executive were permitted to continue the provisions of an ordinance in force by adopting the methodology of re-promulgation without submitting it to the voice of legislature, it would be nothing short of usurpations by the executive of the law making function of the legislature. The executive cannot by taking resort to an emergency power exercising by it only when the legislature is not in session, take over the law making function of the legislature. That would be clearly subverting the democratic process which lies at the core of our Constitutional Scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution, but, by the laws made by the executive**. The government cannot bypass the legislature and without enacting the provisions of the Ordinance into Act of legislature, re-promulgate the Ordinance as soon as the legislature is prorogued…..*
>
> *…..It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adopting of any subterfuge. That would be clearly a fraud on the Constitution….."*
>
> (Emphasis is supplied)

110. Thus, there remains no doubt that though the executive powers are co-extensive with legislative powers of the Union or of the States, as the case may be, this power is to be exercised within the limits prescribed by the Constitution or any law for the time being in force. That apart, once a legislation occupies a field, neither any of the States nor the Union can exercise its executive powers on the same field inasmuch as the legislation is the primary work of the Legislature and not of the Executive.

111. So far as the operational effectiveness of executive action is concerned, the Supreme Court, in the case of **Ram Jawaya Kapur vs State of Punjab (AIR 1955 SC 549)**, while dealing with an argument of violation of *fundamental rights*, observed that ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

112. Elucidating further, the Supreme Court, in **Ram Jawaya Kapur vs State of Punjab (AIR 1955 SC 549)**, observes that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another and that Executive can, indeed, exercise the powers of departmental or subordinate legislation, when such powers are delegated to it by the Legislature.

113. The Supreme Court, however, without mincing any words, held, in **Ram Jawaya Kapur (Supra)**, that specific legislation may, indeed, be necessary if the Government requires certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus, when it is necessary to **encroach upon private rights in order to enable the Government to carry on their business, a specific legislation, sanctioning such a course, would have to be passed**.

114. The Supreme Court, in **Ram Jawaya Kapur** (supra), cautioned that if, by **the notifications and acts of the executive Government, the**

fundamental rights, if any, of the petitioners have been violated, then, such executive actions have to be termed as unconstitutional.

115. The case law, most appropriate to the above aspect of the Constitutional limitations, imposed on the exercise of the executive power, can be found in **D. Bhuvan Mohan Patnaik vs State of AP (AIR 1974 SC 2092)**, wherein some prisoners had challenged the installation of live electric wire on the top of jail wall as being violative of personal liberty enshrined in Article 21 of the Constitution. The Supreme Court, having questioned the legal authority justifying such installation of live wires, rejected the argument that installing of the live high-voltage wire, on the walls of jail, was solely for the purpose of preventing the escape of prisoners and was, therefore, a *reasonable restriction* on the *fundamental rights* of the prisoners.

116. Observed the Supreme Court, in **D. Bhuvan Mohan Patnaik vs State of AP AIR 1974 SC 2092 (Supra)**, that if the petitioners succeed in establishing that the particular measure, taken by the jail authorities, violated any of the *fundamental rights* available to them under the Constitution, the justification of the measure must be sought in some '*law*' within the meaning of Article 13(3) (a) of the Constitution. The Supreme Court also observed, in **D. Bhuvan Mohan Patnaik (Supra), that the installation of the live high-voltage wire lacks statutory basis and seemed to have been devised on the strength of departmental instructions, though such instructions were neither '*law*' within the meaning of Article 13(3) (a) nor do these instructions**

constitute *"procedure established by law"* within the meaning of Article 21 of the Constitution. Therefore, if the petitioners are right in their contention that the mechanism, in question, constitutes an infringement of any of the *fundamental rights* available to them, they would be entitled to the relief sought for by them that the mechanism shall be dismantled.

117. The State, in **D. Bhuvan Mohan Patnaik (Supra)**, which had acted on executive instructions in installing live high-voltage wire on the walls of the jail, could not justify installation of this mechanism on the basis of a *'law'* or *'procedure established by law'* inasmuch as the executive instructions, which had been acted upon, were held by the Supreme Court to be not a *'law'* within the meaning of Article 13(3)(a) nor could these instructions, according to the Supreme Court, fall within the expression, *"procedure established by law',* as envisaged by Article 21. The relevant observations, appearing in this regard, in **D Bhuban Patnaik (supra),** read as follows;

> *14. **But before examining the petitioners' contention, it is necessary to make a clarification**. Learned counsel for the respondents harped on the reasonableness of the step taken by the jail authorities in installing the high-voltage live- wire on the jail walls. He contended that the mechanism was installed solely for the purpose of preventing the escape of prisoners and was therefore a reasonable restriction on the fundamental rights of the prisoners. This, in our opinion, is a wrong approach to the issue under consideration. **If the petitioners succeed in establishing that the particular***

> ***measure taken by the jail authorities violates any of the fundamental rights available to them under the Constitution, the justification of the measure must be sought in some "law", within the meaning of Article 13(3) (a) of the Constitution. The installation of the high voltage wires lacks a statutory basis and seems to have been devised on the strength of departmental instructions. Such instructions are neither "law" within the meaning of Article 13(3) (a) nor are they "procedure established by law" within the meaning of Article 21 of the Constitution. Therefore, if the petitioners. are right in their contention that the mechanism constitutes an infringement of any of the funda- mental rights available to them, they would be entitled to the relief sought by them that the mechanism to be dismantled.*** *The State has not justified the installation of the mechanism on the basis of a law or procedure established by law"*
>
> (Emphasis is supplied)

118. Moreover, a Constitution Bench of the Supreme Court, in the case of ***State of M.P. v. Thakur Bharat Singh*** (1967 SCR 454), has held that the executive action cannot infringe rights of a citizen without lawful authority.

119. Again, in the case of ***Bishambhar Dayal Chandra Mohan v. State of UP***, reported (**1982**) **1 SCC 39**, it has been held that though the executive powers of the State are co-extensive with the legislative powers of the State, no executive action can interfere with the rights of the citizens unless backed by an existing statutory provision.

120. It will not be out of place to mention here that the executive powers of the State are to fill up the gaps and not to act as an independent law making agency inasmuch as the function of enacting law, under our Constitution, lies with the Legislature and the Executive has to implement the policies/laws made by the Legislature and if the State is permitted to take recourse to its executive powers to make laws, then, we would be governed by the laws not made by the Legislature, but by the Executive. As held by the Supreme Court, in the case of ***Chief Settlement Commissioner v. Om Prakash*** (AIR 1969 SC 33), the notion of inherent and autonomous law making power, in the executive administration, is a notion that must be emphatically rejected.

121. In one of the recent cases, namely, **State of Jharkhand vs Jitendra Kumar Srivasatava, Civil Appeal 6770/2013 dated 14.8.13**, the question confronting the Supreme Court, was whether, in the absence of any provision in the Pension Rules, the State Government can withhold a part of pension and/or gratuity during pendency of departmental/ criminal proceedings?

122. The Supreme Court, while answering the query, so posed, held that pension is a property within the meaning of Article 300A and since the executive instructions, withholding pension, are not having statutory character, it cannot be termed as '*law*' within the meaning of Article 300A. The Supreme Court further held, in **Jitendra Kumar Srivasatava** (supra), that on the basis of a circular, which is not having

force of law, not even a part of pension or gratuity can be withheld. The relevant observations made, in this regard, in **Jitendra Kumar Srivasatava** (supra), read as follows:

> *15. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of aforesaid Article 300A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold - even a part of pension or gratuity. As we noticed above, so far as statutory rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these rules, the position would have been different.*

123. The *'ratio'*, as can be gathered from the case of **Jitendra Kumar Srivasatava** (supra), is that if a legal right of a person is sought to be curtailed, it has to be done only by Statutory Rules and not by an executive instructions.

124. It is, thus, seen that CBI has been investigating offences and prosecuting alleged offenders in the garb of being an organization under the DSPE Act, 1946. In fact, we have already indicated above that the impugned Resolution, dated 01.04.1963, is not, strictly speaking, an executive action of the Union within the meaning of Article 73 inasmuch as the executive instructions, embodied in the impugned Resolution, were not the decision of the Union Cabinet nor were these executive instructions assented to by the President. Therefore, the impugned Resolution, dated 01.04.1963, can, at best, be regarded as **departmental instructions, which cannot be termed as *'law'* within the meaning of Article 13(3) (a) nor can the executive instructions, embodied in the impugned Resolution, dated**

01.04.1963, be regarded to fall within the expression, *"procedure established by law"*, as envisaged by Article 21 of the Constitution.

125. Situated thus, the actions of the **CBI**, in registering a case, arresting a person as an offender, conducting search and seizure, prosecuting an accused, etc., offend Article 21 of the Constitution and are, therefore, liable to be struck down as unconstitutional.

WHETHER THE DSPE ACT, 1946, IS ULTRA VIRES THE CONSTITUTION ?

126. This Court had framed a query, i.e., *"If a Pre-constitutional law was made on a subject, which is, now, covered by State List, whether the law will be valid after the Constitution has come into force bearing in mind Article 372?"*

127. It is submitted, on behalf of the appellant, that the DSPE Act, 1946, is *ultra vires* the Constitution of India. There are three reasons for this submission, the first reason being that an *existing law*, or a law, which had been in force, immediately preceding the commencement of the Constitution of India, would be inoperative and invalid if it, otherwise, violates any of the *fundamental rights*, particularly, *life* and *liberty* of a person.

128. Support, for the above submission, is sought to be derived by Dr. L. S. Choudhury, learned counsel for the appellant, by drawing attention of this Court to the expression, *"subject to the other provisions of this Constitution'*, which appears in Article 372. The second reason, according to Dr. L. S. Choudhury, is that the Parliament does not have

legislative competence to enact law on *'police'* inasmuch as *'police'* is a State subject, covered by Entry No.2 of List II (State list), and it is, therefore, the State Legislature alone, which is competent to enact law on *'police'*. Yet another ground, assailing the validity of the DSPE Act, 1946, is that it extends, in terms of Section 1 of the DSPE Act, 1946, to the whole of India; whereas, no law, made on *'police'*, can extend to the whole of India.

129. To buttress his argument, with respect to the phrase, *"subject to other provisions of this Constitution"*, reliance has been placed, on behalf of the appellant, on a Constitution Bench decision, in ***Union of India v. The City Municipal Council, Bellary*** (AIR 1978 SC 1803), wherein the Constitution Bench of the Apex Court, while dealing with the expression, *"subject to the other provisions of this Constitution"*, has held as follows:

> *"**But the continuance in force of such an existing law is `subject to the other provisions of this Constitution'. In other words if the said law contravenes or is repugnant to any other provisions of the Constitution then it has to give way to such provision of the Constitution and its continuance in force after the commencement of the Constitution is affected to the extent it contravenes or is repugnant to the said provision**. The Act of 1941 creating the liability of the Railways to taxation by local authorities was passed by the then Central Legislature which was a Federal Legislature of India. The present Central Legislature namely, the Parliament has not enacted any law after coming into force of the Constitution making any provision affecting the exemption of the property of the Union from all taxes imposed by a State or by any*

authority within a State. The 1941 Act is repugnant to clause (1) of Article 285. It is neither a law made by Parliament nor a law made by the Central Legislature after the advent of the Constitution. In either view of the matter it is not a law covered by the phrase `save in so far as Parliament may by law otherwise provide' occurring in clause (1) of Article 285. There is an additional reason for rejecting the argument of Mr. Ramamurthi in this regard. If the contention as made were to hold good it will make clause (2) of Article 285 almost nugatory. We, therefore, hold that the property in question is exempt from all taxes claimed by the Bellary Municipal Council under clause (1) of Article 285 unless the claim can be supported and sustained within the four corners of clause (2)."

(Emphasis is supplied)

130. The learned ASG has submitted that the DSPE Act, 1946, has been validly enacted and adopted by the Government of India. The Adaptation of Laws Orders Part II has been placed on record, in this regard, by the Learned ASG. The Learned ASG has also submitted, in this regard, that the Constitutional validity of the DSPE Act, 1946, has already been upheld by the Supreme Court, in **Management of Advance Insurance Co. Ltd. Vs. Gurudasmal**, reported in (**1970**) **1 SCC 633**.

131. The Learned ASG has further submitted that the pre-constitutional laws are not to be regard as unconstitutional and the burden is not upon the State to establish its validity; rather, the burden is upon the person, who challenges the constitutional validity of a pre-constitutional law to show that the pre-constitutional law is invalid. To support his contention, the learned ASG has placed reliance on the

decision of the Supreme Court, in ***Deena v. Union of India***, reported in (**1983**) **4 SCC 645,** wherein the Court has observed, at para 11, as under:

> *" …Pre-Constitution laws are not to be regarded as unconstitutional. We do not start with the presumption that, being a pre-constitution law, the burden is upon the State to establish its validity. All existing laws are continued till this court declares them to be in conflict with a fundamental right and, therefore, void. The burden must be placed on those who contend that a particular law has become void after the coming into force the Constitution by reason of Article 13(1), read with any of the guaranteed freedoms…*
>
> *….a quotation extracted by Krishna Iyer, J. in B. Banerjee v. Anita Pan – It may a repetition to say that according to the learned Chief Justice, "there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles" and that, "it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds."*

132. In **Advance Insurance Co. Ltd** (supra), the question, before the Supreme Court, was whether Delhi Special Police Establishment is constitutionally valid and whether Delhi Special Police Establishment has jurisdiction to investigate cases in other States.

133. The Supreme Court had the occasion to deal with the history of the DSPE Act, 1946, and it observed as follows:

> *"On July 12, 1943 the Governor General enacted an ordinance (XXII of 1943) in exercise of his powers conferred by Section 72 of the Government of India Act which was continued in the Ninth Schedule to the Government of India Act, 1935. An emergency had been declared owing to World War II and the powers were exercisable by the Governor General. The ordinance was called the Special Police Establishment (War Department) Ordinance, 1943. It extended to the whole of British India and came into force at once. By Section 2(4) the Special Police Establishment (War Department) was constituted to exercise throughout British India the power and*

jurisdiction exercisable in a province by the members of the police force of that province possessing all their powers, duties, privileges and liabilities. under Section 4 the superintendence of the Special Police Establishment (War Department) was vested in the Central Government. It was, however, provided by Section 3 as follows :
Offences to be investigated by Special Police Establishment :-

> *The Central Government may by general or special order specify the offences or classes of offences committed in connection with Departments of the Central Government which are to be investigated by the Special Police Establishment (War Department), or may direct any particular offence committed in connection with a Department of the Central Government.*

This ordinance would have lapsed on September 30, 1946. Before that on September 25, 1946 another ordinance of the same name (No. XXII of 1946) was promulgated. This constituted a special police force for the Chief Commissioner's province of Delhi for investigation of certain offences committed in connection with matters concerning departments of the Central Government. The scheme of this ordinance was slightly different. under Section 2 Special Police Establishment was constituted for the Chief Commissioner's Province of Delhi for the investigation in that province of offences notified in Section 3. This was notwithstanding the provisions of the Police Act of 1861. The Police Establishment had throughout the Chief Commissioner's Province of Delhi in relation to those offences the powers, duties, privileges and liabilities of the regular police officers subject, however, to any orders which the Central Government might make in this behalf. Section 3 of the new ordinance was almost the same as Section 3 of the previous ordinance. The only changes were that the offences had to be notified and the power to refer any particular case was not repeated. In the ordinance Section 5 provided that the consent of the Government of the Governor's Province or of the Chief Commissioner should be obtained to the extension before the powers would be exercised.

Ordinance No. XXII of 1946 was repealed by the Delhi Police Establishment Act 1946 (XXV of 1946) which re-enacted the provisions of the Ordinance. This Act was adapted and amended on more than one occasion. First came the Adaptation of Laws Order

1950, enacted under Clause 2 of Article 372 of the Constitution on January 26, 1950. It made two changes. The first was throughout the Act for the words "Chief Commissioner's Province of Delhi" the words "State of Delhi" were substituted and for the word "Provinces" the words "Part A and C States" were substituted. This was merely to give effect to the establishment of "States" in place of provinces under the scheme of our Constitution.

Next came the changes introduced by Part B States (Laws) Act, 1951 (Act III of 1951). They were indicated in the schedule to that Act. Those changes removed the words 'in the States' in the long title and the preamble. The purpose of this was to remove reference to the States in the phrases "for the extension to other areas in the States". The more significant changes came in 1952 by the Delhi Special Police Establishment (Amendment) Act 1952 (XXVI of 1952). In the long title (after the "Adaptation of Laws Orders 1950) the words were:

> *An Act to make provision for the Constitution of a special police force for the State of Delhi for the investigation of certain offences committed in connection with matters concerning Departments of the Central Government etc.*
>
> *After the amendment the words read :*
>
> *An Act to make provision for the Constitution of a special police force in Delhi for the investigation of certain offences in Part C States.*

Similar changes were also made in the preamble and in Section 3 the reference to Departments of Government was also deleted. The change from 'for the State of Delhi' to 'in Delhi' was the subject of comment in the High Court. To that we shall refer later.

In 1956 the Constitution (Seventh Amendment) Act, 1956 was enacted. Previously the Constitution specified the States as Parts A, B and C States and some territories were specified in Part D in the First Schedule. By the amendment the distinction between Parts A and B was abolished. All States (previously Part A and B States) were shown in the First Schedule under the heading 'The States' and Part C States and Part D territories were all described as Union Territories. Thereupon an Adaptation of Laws Order, 1956 was passed and in the Delhi Special Police Establishment Act 1946 all references to 'Part C States' were replaced by the expression 'union

> *territory'. Another significant change made by the Amending Act was to remove from Section 2 the words 'for the State of Delhi', and all references to offences by the words 'committed in connection with matters concerning Departments of the Central Government' were deleted.*
> *After the passing of the 1946 Act a number of notifications succeeded which notified the offences which the Special Police Establishment could investigate".*

134. Having traced out the history of the DSPE Act, 1946, the Supreme Court recorded, in **Advance Insurance Co. Ltd** (supra), the appellant's argument that Delhi was not a State within the meaning of Entry 80 of List I (Union List) and, hence, Delhi being a Union Territory, its laws cannot be extended to any other State inasmuch as Entry 80 of List I of the Union List speaks of a *police force* of a State and not of Union Territory. Referring to Section 3 (58) of the General Clauses Act, the Supreme Court pointed out, in **Advance Insurance Co. Ltd** (supra), that after independence, the General Clauses Act had been adopted by giving a new definition of the State and, hence, the word, *'State'*, appearing in Entry 80 of List I (Union List), would include a Union Territory as well.

135. Concluded, therefore, the Supreme Court, in **Advance Insurance Co. Ltd** (supra), that the scheme of the Constitution is that the *Union Territories* are centrally administered and if the words *'belonging to'*, appearing in Entry 80, mean belonging to a part of India, the expression is equal to a *police force* constituted to function in an area. In this way, Delhi Police Establishment means a *police force* constituted and functioning in the Union Territory of Delhi and, previously, the

same force functioned, in the Chief Commissioner's Province of Delhi, then, in Part C State of Delhi and, now, it functions in the Union territory of Delhi. The relevant observations, made in this regard, in **Advance Insurance Co. Ltd** (supra), read as under:

> *29. Now the scheme of the Constitution is that the Union territories are centrally administered and if the words 'belonging to' mean belonging to a part of India, the expression is equal to a police force constituted to function in an area.* ***In this way the Delhi Police Establishment means a police force constituted and functioning in the Union territory of Delhi. Previously the same force functioned in the Chief Commissioner's Province of Delhi, then in Part C State of Delhi and now it functions in the Union territory of Delhi****.*
>
> (Emphasis is supplied)

136. It will, thus, be seen that there is a clear finding, in **Advance Insurance Co. Ltd** (supra), that DSPE means a *police force*, constituted and functioning in the Union Territory and, hence, it would not be appropriate, now, for us to enter into the question of *vires* of the DSPE Act, 1946, particularly, when we have already held that **CBI** is not an organ or part of the DSPE, under the DSPE Act, 1946, and we are, therefore, not required to determine the constitutional validity of the DSPE Act, 1946.

137. In other words, irrespective of the fact as to whether the DSPE Act, 1946, is valid or not, the clear conclusion of this Court is that the **CBI** is not an organ or part of the DSPE and that the **CBI** has not been constituted under the DSPE Act, 1946. In the face of these

conclusions, it would be merely an academic exercise if we try to determine whether the DSPE Act, 1946, is or is not a valid piece of legislation.

138. Consequent to the discussion, held above, it is crystal clear that the fundamental question, raised in the appeal, is: ***Whether the CBI is an organ of the DSPE under the DSPE Act, 1946*** **?** Merely because arguments and counter-arguments have been advanced before us, on the validity of the DSPE Act, 1946, the arguments and the counter-arguments do not warrant a decision on this issue inasmuch as no decision, on this issue, is warranted when we have already held that the **CBI** is not a part or organ of the DSPE, under the DSPE Act, 1946.

139. We, however, consider it necessary to look into those decisions, which have been relied upon by the learned ASG, to contend that **CBI** is an organ or part of the DSPE, under the DSPE Act, 1946.

140. With regard to the above, the learned ASG has relied upon the decision, in **Kazi Lhendup Dorji vs. Central Bureau of investigation & Ors**. 1994 Supp (2) SCC 116. The relevant observations read as under:

> *"2. The Act was enacted to make provision for the constitution of a special police force in Delhi for the investigation of certain offences in the Union Territories, for the superintendence and administration of the said force and for the extension to other areas of the powers and*

jurisdiction of members of the said force in regard to the investigation of the said offences. ***DSPE constituted under the said Act is now known as the Central Bureau of Investigation (CBI)….”***

(Emphasis is supplied)

141. The learned ASG has also referred to a Constitution Bench decision, in **State of West Bengal &Ors. Vs. Committee for Protection of Democratic Rights, West Bengal & Ors**. reported in (**2010**) **3 SCC 571**, wherein the observations of the Constitution Bench, which the learned ASG has relied upon, read thus:

*“**The issue which has been referred for the opinion of the Constitution Bench is** whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the Central Bureau of Investigation (for short “CBI”), established under the Delhi Special Police Establishment Act,1946 (for short “The Delhi Special Police Act”) to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government”*

(Emphasis is supplied)

142. The learned ASG, relying upon the above observations, has submitted that the Supreme Court has held that the CBI is constituted and functioning under Delhi Special Police Establishment Act, 1946.

143. The learned ASG has also referred to the case of **M. C. Mehta (Taj Corridor Scam) vs. Union of India and ors**, reported in (**2007**) **1 SCC 110**, wherein S.B. Sinha, J, concurring with the directions, which were decided to be issued to the **CBI**, as regards its investigation, observed as under:

> *"**S.B. Sinha, J.** (concurring) – **This Court entrusted investigation to the Central Bureau of Investigation (CBI) which was constituted under the Delhi Special Police Establishment Act, 1946 (for short, "the Act). It was enacted to make provision for the constitution of a special police force in Delhi for investigation of certain offences in the Union Territories, for the superintendence and administration of the said force and for extension to the other areas of the powers and jurisdiction of members of the said force in regard to the investigation of the said offences.**"*

144. Referring to the decisions, in **Kazi Lhendup Dorji** (supra), **Committee for Protection of Democratic Rights, West Bengal & Ors**. (supra), and **M. C. Mehta (Taj Corridor scam)** (supra), the learned ASG has submitted that in terms of the decisions, in the said three cases, the **CBI** has been established, under the DSPE Act, 1946, and, hence, the *'ratio'*, which has been laid down in the said three cases, may not be disturbed.

145. Reacting to the above submissions, which have been made by the learned ASG, it has been contended, on behalf of the appellant, that the decision, in **Kazi Lhendup Dorji** (supra), **Committee for Protection of Democratic Rights, West Bengal & Ors** (supra), and **M. C. Mehta (Taj Corridor Scam)** (supra), which have been referred to, and relied upon, by the learned ASG, are not applicable to the issues, which have been raised in the writ petition and the present appeal inasmuch as the principal issue, in the writ petition and the writ appeal, is as to whether the **CBI** is a constitutionally *valid police force*

and, in none of the decisions, which have been referred to, and relied upon, by the learned ASG, the issue, in question, fell for determination.

146. It has also been submitted, on behalf of the appellant, that the Hon'ble Supreme Court's observations, appearing in **Kazi Lhendup Dorji** (supra), **Committee for Protection of Democratic Rights, West Bengal & Ors** (supra), and **M. C. Mehta (Taj Corridor Scam)** (supra), to the effect that DSPE is, now, called the **CBI**, or that the **CBI** has been constituted under the DSPE Act, 1946, are as a measure of narration of facts and not the *ratio* of the case inasmuch as it has always been the claim of the Union of India that **CBI** has been constituted under the DSPE Act, 1946, and the correctness of this contention was never questioned or fell for determination, or discussed and/or answered, by the Supreme Court.

147. When the issue, in question, was never raised in any of the cases, which have been relied upon by the learned ASG, the observations, which have appeared, in **Kazi Lhendup Dorji** (supra), **Committee for Protection of Democratic Rights, West Bengal & Ors** (supra), and **M. C. Mehta (Taj Corridor scam)** (supra), to the effect that **CBI** is constituted under the DSPE Act, 1946, cannot be regarded as *ratio decidendi* or even *obiter dictum*.

148. We have already recorded above that, in the present appeal, we raised a pointed query, namely, whether the constitutional validity of the **CBI** was ever challenged, discussed and/or answered in any of the reported decisions of the Supreme Court ? To the query, so raised,

learned counsel for the parties concerned and the learned *amicus curiae* have agreed that this issue was not raised, discussed and answered in any of the reported decisions of the Supreme Court.

149. Bearing in mind what we have pointed out above, let us, now, turn to the issues, which fell for determination, in **Kazi Lhendup Dorji** (supra), **Committee for Protection of Democratic Rights, West Bengal & Ors** (supra), and **M. C. Mehta (Taj Corridor Scam)** (supra).

150. In the case of **Kazi Lhendup Dorji** (supra), the issue was entirely different inasmuch as the Supreme Court, in **Kazi Lhendup Dorji** (supra), observed as under:

> ***"This Writ Petition filed under Article 32 of the Constitution raises the question whether it is permissible to withdraw the consent given by the State Government under Section 6 of the Delhi Special Police Establishment Act, 1946 (hereinafter referred to as the `Act') whereby a member of the Delhi Special Police Establishment (DSPE) was enabled to exercise powers and jurisdiction for the investigation of the specified offences in any area in the State and, if so, what is the effect of such withdrawal of consent on matters pending investigation on the basis of such consent on the date of withdrawal".***
>
> (Emphasis is supplied)

151. Thus, the real issue, in **Kazi Lhendup Dorji** (supra), was whether the '*consent*', once given by a State, can be recalled by the State as regards extension of investigation by the **CBI** and, if so, what will be the effect on the pending investigations?

152. It is transparent that the issue, as regards the constitutional validity of the **CBI**, had not fallen for determination in **Kazi Lhendup Dorji** (supra). Hence, the decision, in **Kazi Lhendup Dorji** (supra), cannot be held to be applicable to the present case.

153. Similarly, in the case of **Committee for Protection of Democratic Rights, West Bengal & Ors** (supra), the issue, which really fell for determination, was, in the words of the Constitution Bench, as follows:

> ***"The issue which has been referred for the opinion of the Constitution Bench is whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the Central Bureau of Investigation (for short "CBI"), established under the Delhi Special Police Establishment Act,1946 (for short "The Delhi Special Police Act") to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government."***
>
> (Emphasis is supplied)

154. Thus, the only issue, which arose for determination, in **Committee for Protection of Democratic Rights, West Bengal & Ors** (supra), was whether the High Court, under Article 226 of the Constitution of India, can direct the **CBI** to investigate even when the State concerned does not given its consent thereto ? The issue, so raised, in **Committee for Protection of Democratic Rights, West Bengal & Ors** (supra), is not the same as the one, which we have at

hand, namely, whether the **CBI** is a constitutionally valid *'police force'* or not?

155. Turning to the case of **M. C. Mehta (Taj Corridor Scam)** (supra), we notice that the relevant observations, which the learned ASG relies upon, read as under:

> *"***2.** *A purported vertical difference of opinion in the administrative hierarchy in CBI between the team of investigating officers and the law officers on one hand and the Director of Prosecution on the other hand on the question as to whether there exists adequate evidence for judicial scrutiny in the case of criminal misconduct concerning the Taj Heritage Corridor Project involving 12 accused including a former Chief Minister has resulted in the legal stalemate which warrants interpretation of Section 173(2) CrPC.*
>
> *** *** ***
>
> *** *** ***
>
> ***Background facts***
>
> ***19. The key issue which arises for determination in this case is: whether on the facts and the circumstance of this case, the Director, CBI, who has not given his own independent opinion, was right in referring the matter for opinion to the Attorney General for India, particularly when the entire investigation and law officers' team was ad idem in its opinion on filing of the charge-sheet and only on the dissenting opinion of the Director of Prosecution, whose opinion is also based on the interpretation of the legal evidence, which stage has not even arrived****. The opinion of the Director, CBI is based solely on the opinion of the Attorney General after the reference.*
>
> *** *** ***
>
> *** *** ***

S.B. SINHA, J. *(concurring)— This Court entrusted investigation to the Central Bureau of Investigation (CBI) which was constituted under the Delhi Special Police Establishment Act, 1946 (for short "the Act"). It was enacted to make provision for the constitution of a special police force in Delhi for investigation of certain offences in the Union Territories, for the superintendence and administration of the said force and for extension to other areas of the powers and jurisdiction of members of the said force in regard to the investigation of the said offences.*

38. *Section 2 empowers the Central Government to constitute a special force. Indisputably, the first respondent has been constituted in terms thereof. Sub-section (2) of Section 2 provides that subject to any orders which the Central Government may make in this behalf, members of the said police establishment shall have throughout any Union Territory, in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers of that Union Territory have in connection with the investigation of offences committed therein. The said Act indisputably applies in regard to charges of corruption made against the public servants."*

156. From a bare reading of what have been observed above, it becomes clear that the issue, which we have at hand, namely, whether the **CBI** is a constitutionally *valid police force* or not, was not a question for determination in the case of **M. C. Mehta (Taj Corridor Scam)** (supra). In fact, it was never contended, in **M. C. Mehta (Taj Corridor Scam)** (supra), that **CBI** is not a constitutionally valid *police force*.

157. When the question, which we confront, in the present appeal, was not the question raised in any of the cases, which the learned ASG has cited, it is clear that the *ratio decidendi* of none of the cases, relied

upon by the respondents, can be of any assistance to the respondents' contention that the **CBI** is a constitutionally valid *police force*. Factually speaking, it is the general impression that DSPE is, now, called **CBI**, or **CBI** is established under the DSPE Act, 1946. It has never been questioned if **CBI** is, legalistically speaking, another name for the DSPE or if **CBI** has been validly constituted under the DSPE Act, 1946 ? When such is the situation, what shall be the duty of this Court?

158. On the above aspect of the law, we may refer to the case of **Oriental Insurance Company Limited vs. Smt. Raj Kumari & ors. (AIR 2008 SC 403)**, wherein the Supreme Court has pointed out that the reason or principle, on which a question before a Court has been decided, is alone binding as a *precedent*. A case is *precedent* and binding for what it explicitly decides and no more and that the words of the judges, in their judgements, are not to be read as if they are words in an Act. The relevant observations, appearing in **Smt. Raj Kumari** (supra), in this regard, read as under:

> *"11. Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. The only thing in a Judges decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi.* ***According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material factors, direct and inferential. An inferential finding of facts is***

> ***the inference which the judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent****. (See: State of Orissa v. Sudhansu Sekhar Misra and Ors. (AIR 1968 SC 647) and Union of India and Ors. Vs. Bhanwanti Devi and Ors. (1996 (6) SCC 44.: 1996 AIR SCW 4020).* ***A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament****. In Quinn v. Leathern (1901) AC 495 (H.L.) Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.*
>
> (Emphasis is supplied)

159. Striking a word of caution for Courts, the Supreme Court held, in **Smt. Raj Kumari & Ors.** (supra), that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute and that too, taken out of their context. The

observations must be read in the context in which they appear to have been made. The relevant observations, made in **Oriental Insurance Company Limited** (supra), are reproduced hereunder:

> *"12.* ***Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated****. Judgments of Courts are not to be construed as statutes.*
>
> (Emphasis is supplied)

160. Again, in **Dadu Dayalu Mahasabha, Jaipur (Trust) vs. Mahant Ram Niwas & Anr. (AIR 2008 SC 2187)**, the Supreme Court, while dealing with the doctrine of *precedent*, has held as under:

> *"19.* ***The judgment of a Court, it is trite, should not be interpreted as a statute. The meaning of the words used in a judgment must be found out on the backdrop of the fact of each case. The Court while passing a judgment cannot take away the right of the successful party indirectly which it cannot do directly. An observation made by a superior court is not binding. What would be binding is the ratio of the decision. Such a decision must be arrived at upon entering into the merit of the issues involved in the case****."*
>
> (Emphasis is supplied)

161. The above observations, made in **Dadu Dayalu Mahasabha, Jaipur (Trust)** (supra), clearly show that a judgement of a Court shall not be interpreted as a statute and that the meaning of the words, used

in the judgement, must be found on the backdrop of the facts of each case and that an observation, made by a superior Court, is not binding inasmuch as what would be binding is the *ratio* of the decision and such a decision has to be reached upon entering into merit of the issues involved in the case.

162. We may, at this stage, deal with the concept of '***obiter dictum.***'

163. In Salmond on Jurisprudence (Twelfth Edition), rules, determining *ratio decidendi,* have been indicated. It can, broadly speaking, be said that what is not a *ratio decidendi* is an *obiter dictum* and it is the *ratio decidendi*, which is binding on the Courts.

164. In Chapter X of Keeton's Elementary Principles of Jurisprudence (Second Edition), *"obiter dictum"* is described as *"statements of law made by a judge in the course of a decision, arising out of the circumstances of the case, but not necessary for the decision."*…

165. In **Mohandas Issardas v. A. N. Sattanathan** (**AIR 1955 Bom 113**), the point, under consideration, was whether an *obiter dictum* of the Supreme Court was as much binding upon the High Courts as an express decision given by the Supreme Court. However, the allied question, as to what is an *obiter dictum*, which has a binding effect upon a Court, was also commented upon. *Obiter dictum* was regarded as an expression of opinion on a point, which was not necessary to the decision of the case. The observations are as follows:

> *"….6. But the question still remains as to what is an 'obiter dictum' given expression to by the Supreme Court which is binding upon the Courts in India. Now, an 'obiter dictum' is an expression of opinion on a point which is not necessary for the decision of a case. This very definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of the case. But in both cases points must arise for the determination of the tribunal. Two questions may arise before a Court for its determination. The Court may determine both although only one of them may be necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be the 'ratio decidendi'; the opinion of the tribunal on the question which was not necessary to decide the case would be only an 'obiter dictum'.*

166. Reference was, then, made, in **Mohandas Issardas** (supra), to the definition of *'obiter dictum'* as found in Stroud's Judicial Dictionary, which is based upon the case of **Flower v. Ebbw Vale Steel Iron and Coal Co**., 1934-2 KB 132, and the following passage, at page 154, from the judgment of Talbot, J, in **Dew v. United British Steamship Co. Ltd**., **1928-139 LT 628**, was quoted, which read as follows:

> *".....It is of course perfectly familiar doctrine that obiter dictum though they may have great weight as such are not conclusive authority. Obiter dictum in this context means what the words literally signify namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case that of course has not the binding weight of the decision of the case and the reasons for the decision."*

167. Thereafter, the statement of the law, in Halsbury, Volume XIX, at page 251, was quoted, in **Mohandas Issardas** (supra), which read as follows:

> *"It may be laid down as general rule that that part alone of a decision of a Court of law is binding upon courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the 'ratio decidendi'. Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose at hand (usually termed dicta) have no binding authority on another Court, though they may have some merely persuasive efficacy."*

168. Having considered the earlier Full Bench decision of Bombay High Court, in **Shivaji Ganpati Vs. Murlidhar (AIR 1954 Bom 386)**, which was based on the decision of the Privy Council, in **Lal Bahadur vs. Ambika Prasad (AIR 1923 PC 264 (J),** in respect of *`obiter dictum'*, the Bombay High Court, in the case of **Mohandas Issardas** (supra)**,** observed as under:

> *"The reason why we refused to be bound by this opinion was that we failed to see any observation which the Privy Council had made on the rights of after-born sons with regard to alienations of joint family property. Although this observation was made by the Privy Council, the point was not determined by the Privy Council, and it is clear from that judgment that no arguments were advanced and the Privy Council contented itself with deciding the question on the nature of the alienation, namely, that legal necessity justified the alienation.*

169. The Bombay High Court, in **Mohandas Issardas** (supra), also considered the decision in **Venkanna Narsinha v. Laxmi Sannappa** (**AIR 1951 Bom 57**) and, while holding that *`obiter dictum'* is not binding, has observed thus:

> *"Therefore, implicit in the Judgment of Mr. Justice Bhagwati is the position that* ***it is only when a point arises for determination and the point is determined that an opinion expressed on that point becomes an 'obiter dictum' which is binding upon the Courts in India****."*
>
> (Emphasis is supplied)

170. The Bombay High Court, in **Mohandas Issardas *(supra)***, having considered various judgments of the Privy Council, Supreme Court and other High Courts, came to the conclusion as follows;--

> *"Now, an 'obiter dictum' is an expression of opinion on a point, which is not necessary for the decision of a case. This very definition draws a clear distinction between a point, which is necessary for the determination of a case and a point which is not necessary for the determination of the case. But in both cases points must arise for the determination of the tribunal****. Two questions may arise before a Court for its determination. The Court may determine both although only one of them may be necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be the 'ratio decidendi'; the opinion of the tribunal on the question which was not necessary to decide the case would be only an 'obiter dictum'****."*
>
> (Emphasis is supplied)

171. In the light of the observations made above, in **Mohandas Issardas** (supra), it becomes clear that, according to the Bombay High

Court, in **Mohandas Issardas** (supra), two questions may arise before a Court for its determination. The Court may determine both, although only one of them may be necessary for the ultimate decision of the case. The question, which was necessary for the determination of the case would be the *'ratio decidendi'*, but the opinion of the tribunal on the question, which was not necessary to decide the case, would be only an *'obiter dictum'*.

172. The Full Bench of the Allahabad High Court, in the case of **Indian Ceramic House Agra vs. Sales Tax Officer (AIR 1971 All 251),** has also considered and determined *`obiter dictum'* as follows:

> *"The well-recognized principle of interpretation accepted by the Courts in England, therefore, is:*
>
> *"Any judgment of any Court is authoritative only as to that part of it, called the ratio decidendi, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true 'ratio decidendi' was..... Judicial opinions upon such matters, whether they be merely casual, or wholly gratuitous or (as is far more usual) of what may be called collateral relevance, are known as 'obiter dictum' or simply 'dicta', and it is extremely difficult to establish any standard of their relative weight." (Alien in his Law in the Making).*

173. A Constitution Bench of eleven judges of the Supreme Court, in **H. H. Maharajadhiraja Madhav Rao vs Union of India (1971 AIR 530)**, had the occasion to consider the scope of *'obiter dictum'* and observed as under:

> ***"Every observation of this Court is no doubt, entitled to weight but an obiter, cannot take the place of the ratio. Judges are not oracles. In the very nature of things, it is not possible to give the same attention to incidental matters as is given to the actual issues arising for decision. Further much depends on the way the case is presented to them."***
>
> *In the* ***State of Orissa v. Sudhansu Sekhar Misra and Ors.*** *1968 AIR 647: 1968 SCR (2) 154 dealing with the question as to the importance to be attached to the observations found in the judgments of this Court. This is what this Court observed*
>
> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."*
>
> (Emphasis is supplied)

174. The Supreme Court, in **Arun Kumar Aggarwal vs State Of M.P. & Ors. (AIR 2011 SC 3056)**, has considered the concept of *'obiter dictum'* in the following words:

> *"21. At this stage, it is pertinent to consider the nature and scope of a mere observation or obiter dictum in the Order of the Court. The expression obiter dictum or dicta has been discussed in American Jurisprudence 2d, Vol. 20, at pg. 437 as thus:*
>
> ***'Dicta'***
>
> *Ordinarily, a court will decide only the questions necessary for determining the particular case presented. But once a court acquires jurisdiction, all material questions are open for its decision; it may properly decide all questions so involved, even though it is not absolutely essential to the result that all should be decided. It may, for instance, determine the question of the constitutionality of a statute, although it is not absolutely necessary to the disposition of the case, if the issue of constitutionality is involved in the suit and its settlement is of public importance. An expression in an opinion which is not necessary to support the decision reached by the court is dictum or obiter dictum.*

'Dictum' or 'obiter dictum' is distinguished from the 'holding of the court in that the so- called law of the case'; does not extend to mere dicta, and mere dicta are not binding under the doctrine of stare decisis,

As applied to a particular opinion, the question of whether or not a certain part thereof is or is not a mere dictum is sometimes a matter of argument. And while the terms 'dictum' and 'obiter dictum' are generally used synonymously with regard to expressions in an opinion which are not necessary to support the decision, in connection with the doctrine of stare decisis, a distinction has been drawn between mere obiter and 'judicial dicta' the latter being an expression of opinion on a point deliberately passed upon by the court. (Emphasis supplied).

Further at pg. 525 and 526, the effect of dictum has been discussed:

"190. Decision on legal point; effect of dictum ... In applying the doctrine of stare decisis, a distinction is made between a holding and a dictum. Generally stare decisis does not attach to such parts of an opinion of a court which are mere dicta. The reason for distinguishing a dictum from a holding has been said to be that a question actually before the court and decided by it is investigated with care and considered in its full extent, whereas other principles, although considered in their relation to the case decided, are seldom completely investigated as to their possible bearing on other cases. Nevertheless courts have sometimes given dicta the same effect as holdings, particularly where 'judicial dicta' as distinguished from 'obiter dictum' are involved"

22. According to P. Ramanatha Aiyar, Advanced Law Lexicon (3rd ed. 2005), the expression 'observation' means a view, reflection; remark; statement; observed truth or facts; remarks in speech or writing in reference to something observed.

23. The Wharton's Law Lexicon (14th Ed. 1993) defines term `obiter dictum' as an opinion not necessary to a judgment; an observation as to the law made by a judge in the course of a case, but not necessary to its decision, and therefore of no binding effect; often called as obiter dictum, ; a remark by the way.

24. The Blacks Law Dictionary, (9th ed, 2009) defines term `obiter dictum' as a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). -- Often shortened to dictum or, less commonly, obiter. Strictly speaking an `obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause, `by the way' -- that is, incidentally or collaterally, and not directly upon the question before the court; or it is

any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as `dicta,' or`obiter dictum,' these two terms being used interchangeably.

25 The Word and Phrases, Permanent Edition, Vol. 29 defines the expression `obiter dictum' or `dicta' thus:

'Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the point, are not the professed deliberate determinations of the judge himself; obiter dictum are opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects; It is mere observation by a judge on a legal question suggested by the case before him, but not arising in such a manner as to require decision by him; 'Obiter dictum' is made as argument or illustration, as pertinent to other cases as to the one on hand, and which may enlighten or convince, but which in no sense are a part of the judgment in the particular issue, ***not binding as a precedent, but entitled to receive the respect due to the opinion of the judge who utters them****; Discussion in an opinion of principles of law which are not pertinent, relevant, or essential to determination of issues before court is 'obiter dictum'.*

26. The concept of 'Dicta' has also been considered in Corpus Juris Secundum, Vol. 21, at pg. 309-12 as thus:

Dicta, In General

A Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; an opinion expressed by a judge on a point not necessarily arising in the case; a statement or holding in an opinion not responsive to any issue and not necessary to the decision of the case; an opinion expressed on a point in which the judicial mind is not directed to the precise question necessary to be determined to fix the rights of the parties; or an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point, not the professed deliberate determination of the judge himself. The term 'dictum' is generally used as an abbreviation of 'obiter dictum' which means a remark or opinion uttered by the way. Such an expression or opinion, as a general rule, is not binding as authority or precedent within the stare decisis rule, even on courts inferior to the court from which such expression emanated, no matter how often it

may be repeated. This general rule is particularly applicable where there are prior decisions to the contrary of the statement regarded as dictum; where the statement is declared, on rehearing, to be dictum; where the dictum is on a question which the court expressly states that it does not decide; or where it is contrary to statute and would produce an inequitable result. It has also been held that a dictum is not the 'law of the case' nor 'resjudicata'

27. The concept of 'Dicta' has been discussed in Halsbury's Laws of England, Fourth Edition (Reissue), Vol. 26, para. 574 as thus:

"574. Dicta. Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that it is unnecessary for the purpose at hand are generally termed 'dicta'. They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a judge are known as 'obiter dictum', whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed 'judicial dicta'. A third type of dictum may consist in a statement by a judge as to what has been done in other cases which have not been reported.

... Practice notes, being directions given without argument, do not have binding judicial effect. Interlocutory observations by members of a court during argument, while of persuasive weight, are not judicial pronouncements and do not decide anything"

28. ***In Municipal Corporation of Delhi v. Gurnam Kaur,*** *(1989) 1 SCC 101 and* ***Divisional Controller, KSRTC v. Mahadeva Shetty,*** *(2003) 7 SCC 197, this Court has observed that "Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority"*

29. ***In State of Haryana v. Ranbir,*** *(2006) 5 SCC 167, this Court has discussed the concept of the obiter dictum thus: "A decision, it is well settled, is an authority for what it decides and not what can logically be deduced there from. The distinction between a dicta and obiter is well known. Obiter dictum is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. See* ***ADM, Jabalpur v. Shivakant Shukla****. It is also well settled that the statements which are not part of the ratio decidendi constitute obiter dictum and are not authoritative.* ***(See Divisional Controller, KSRTC v. Mahadeva Shetty)****"*

30. ***In Girnar Traders v. State of Maharashtra****, (2007) 7 SCC 555, this Court has held:*

"Thus, observations of the Court did not relate to any of the legal questions arising in the case and, accordingly, cannot be considered as the part of ratio decidendi. Hence, in light of the aforementioned judicial pronouncements, which have well settled the proposition that only the ratio decidendi can act as the binding or authoritative precedent, it is clear that the reliance placed on mere general observations or casual expressions of the Court, is not of much avail to the respondents."

31. ***In view of above, it is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue at hand does not form the part of the judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment."***

175. The elaborate discussions on the concepts of *ratio decidendi* and *obiter dicta*, made in the cases pointed above, can be summarized as follows:

(a) A decision is an authority for what it actually decides. What is the essence, in a decision, is its *ratio* and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or the principles on which a question before a Court has been decided, is alone binding as a precedent.

(b) In a given case, two questions may arise before a Court for its determination. The Court may determine both, although only one of them may be necessary for the ultimate decision of the case. The question, which was necessary for the determination of the case would be the *'ratio decidendi'*. However, the opinion of

the tribunal on the question, which was not necessary to decide the case would be only an *'obiter dictum'*.

(c) *'Obiter dictum'* is made as argument or illustration, as pertinent to other cases as to the one on hand, and which may enlighten or convince, but which in no sense are a part of the judgment in the particular issue, not binding as a precedent, but entitled to receive the respect due to the opinion of the judge who utters them.

176. Now, coming to the decisions, relied upon by the learned ASG, it appears that the observations, upon which the learned ASG is heavily relying, are not even *`obiter dictum'* inasmuch as the issue, with regard to the constitutional validity of **CBI**, was neither raised nor argued nor even the same has been discussed and decided by the Supreme Court. The issue, with regard to the constitutional validity of the **CBI**, was not even ancillary to the issues involved in those cases.

177. Situated thus, we are clearly of the view that the observations, made in the cases of **Kazi Lhendup Dorji** (supra), **Committee for Protection of Democratic Rights, West Bengal & Ors** (supra), and **M. C. Mehta (Taj Corridor Scam)** (supra), which the learned ASG has relied upon, neither dealt with the issues, which we confront, nor decided the same. The decisions, therefore, which the learned ASG has referred to, and relied upon, are not applicable to the facts of the present case.

178. Because of what have been discussed and pointed out above, we are satisfied that the appellant has been able to make out a case calling for interference with the impugned Resolution, dated 01.04.1963, and also with the impugned prosecution of the appellant on the basis of the *charge-sheet,* which has been laid by the **CBI**, in the Court of the learned Special Judge, Assam, Kamrup, and, as a sequel to the conclusions, which we have so reached, the impugned judgment and order, dated 30.11.2007, passed, in WP(C) No.6877/2005, need to be set aside.

179. In the result and for the reasons discussed above, this appeal partly succeeds. We hereby set aside the impugned judgment and order, dated 30.11.2007, passed, in WP(C) No. 6877/2005, and while we decline to hold and declare that the DSPE Act, 1946, is not a valid piece of legislation, we do hold that the **CBI** is neither an organ nor a part of the DSPE and the **CBI** cannot be treated as a *'police force'* constituted under the DSPE Act, 1946.

180. We hereby also set aside and quash the impugned Resolution, dated 01.04.1963, whereby **CBI** has been constituted. We further set aside and quash the impugned *charge-sheet,* submitted by the **CBI,** against the appellant and, consequently, the trial, which rests on the impugned *charge-sheet,* shall stand set aside and quashed.

181. We would, however, make it clear that quashing of the proceedings, pending in the CBI Court, would not be a bar to any further investigation by police having jurisdiction over the subject-matter.

182. With the above observations and directions, this appeal shall stand disposed of.

183. No order as to costs.

JUDGE JUDGE

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