IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4361 OF 2018
WITH
CRIMINAL APPLICATION NO.403 OF 2018
IN
CRIMINAL WRIT PETITION NO.4361 OF 2018

1. Gagan Harsh Sharma
R/at : 1001/02, Y-Wing,
Callalily, Nahar Amrit Shakti,
Chandivali, Saki Vihar Road,
Andheri East, Mumbai-400072

2. Shagun Sharma
S/o Shiv Kumar Sharma
R/at B-49, Old Roshanpura,
Najafgarh, New Delhi-110043 **...Petitioners**

V/s.

1. The State of Maharashtra
Through Sr. Police Inspector,
Shahupuri Police Station,
Kolhapur, Maharashtra

2. Shadab Abdul Shaikh
Administration and Human Resource Head
Manorama Infosolutions Pvt. Ltd.
B/1A/12, Flat No.F-1,4,5
5th Floor, DC Plaza, Nagala Park,
Kolhapur Maharashtra-416003 **...Respondents**

Mr.Vikram Choudhari, Senior Counsel a/w Dr.Sujay Kantawala, Neha Ahuja, Aishwarya Kantawala, Sangeeta Narayanan i/b Sebin Michael Joseph for the Petitioners in WP No.4361 of 2018.

Mr.S.D. Shinde, APP for the Respondent-State in WP No.4361 of 2018.

Mr.Shirish Gupte, Senior Counsel a/w N.S. Mundargi, Pandit Kasar, Rohit Mangsule, Harish Khedkar i/b Mr.Vis Legis Law Practice for Respondent No.2 in WP No.4361 of 2018.

CORAM : RANJIT MORE &
SMT.BHARATI H. DANGRE, JJ.

RESERVED ON : 19th OCTOBER 2018

PRONOUNCED ON : 26th OCTOBER 2018

JUDGMENT : (Per Smt.Bharati H. Dangre,J)

1. The principle question that arise in the present Criminal Writ Petition is whether the invocation and application of the provisions of the Indian Penal Code can be sustained in the facts and circumstances of the case when the offences committed by the petitioners are also sought to be brought within the purview of the Information Technology Act, 2000, in light of the judgment of the Hon'ble Apex Court in the case of Sharat Babu Digumarti V/s. Government (NCT of Delhi)[1]

In order to appreciate the controversy involved in the petition it would be necessary to refer to the basic facts involved in the matter. The petitioners before us are two brothers. The petitioner No.1 is an Electronic Engineer employed as Vice President-Strategy and Business Development of M/s.Bliss GVS

1 (2017) 2 SCC 18.

Pharma Ltd., India, a Pharmaceuticals Company engaged in the business of manufacturing, distribution and marketing of pharmaceuticals products across the globe. The petitioner No.2 is a Graduate in Information Technology and a software developer undertaking activity of software development for use in the healthcare industry. The two petitioners are arraigned as accused in Crime No.0346 of 2017 registered with Shahupuri Police Station on 27.08.2017. The First Information Report alleges that they have indulged themselves in offences punishable under Sections 408, 420 of the Indian Penal Code and also offences under Sections 43, 65 and 66 of the Information Technology Act, 2000. The FIR is registered on a complaint filed by one Shadab Abdul Shaikh, an employee of M/s.Manorama Infosolutions Pvt. Ltd., Kolhapur in the capacity as Human Resources Head. It is alleged in the said complaint that M/s.Manorama Infosolutions Pvt. Ltd., Kolhapur, is a company engaged in the activity of developing healthcare softwares for Hospital management and is involved in development and distribution of the said software. It is alleged that the company has engaged 171 employees. Every employee at the time of his recruitment is duty bound to submit an undertaking/bond to the company that he will not disclose any details of the work of the company, source code or any information about software to any

other company while in service or after service in relation to the health care software development. The complainant who is entrusted with the supervision of the employees work is duty bound to ensure that there is no violation of the bond/undertaking given by the employees and it is alleged that while he was scrutinizing the profile of one Suraj Mahajan, it is revealed that he has developed his own software and also distributed the same. The complainant suspected theft of data and software of the company and checked the details of Suraj Mahajan and also informed the Director that Suraj Mahajan was involved in stealing software namely Cleave Track with the help of Gururaj Janardhan Nimbargi who is the Head of the company. On inquiry, it is revealed that the software was developed by the company and not by Suraj Mahajan in his personal capacity and the server access of the company was given to Suraj Mahajan as an employee of the company.

2. On the basis of the said complaint the FIR was registered and Suraj Mahajan came to be arrested. Thereafter, one Anand Sanmani was also arraigned as accused No.2 and came to be arrested in relation to the said crime. During the course of the investigation, it is revealed that M/s.Manorama Infosolutions Pvt. Ltd. had entered a deal with M/s.Bliss, in Kenya, ERP software for

healthcare division operating in Kenya and it developed the said software. The demonstration in relation to the said software was given by various employees which included Anand Sanmani. The investigation further reveal that this Anand Sanmani was manipulated and he joined the petitioners who intended to sell the said software in the Continent of Africa. It is also revealed that the employees of M/s.Manorama Infosolutions Pvt. Ltd. were directed to use the knowledge bank, resourses and the source code of M/s.Manorama Infosolutions Pvt. Ltd., resultantly all necessary financial aid and the company data of the company was transferred to the petitioners and their new company namely RiteSource Pharma Solutions Pvt. Ltd.

3. In the backdrop of these facts the petitioners have approached this Court through the present petition praying for the relief sought in the petition.

The learned Senior Counsel Shri.Vikram Chaudhary arguing on behalf of the petitioners would rely on a judgment of the Hon'ble Apex Court in the case of ***Sharat Babu Digumarti V/s. Government (NCT of Delhi) (Supra)*** and it is his submission that the criminal proceedings against the petitioners are misconceived. He would submit that Section 43 of the Information Technology Act,

2000 read with Section 66 is sufficient to take care of the acts alleged against the present petitioners. It is the submission of the learned Senior Counsel Shri.Chaudhary that the offences under the Information Technology Act are compoundable and bailable. He would invite our attention to Section 77A and 77B of the Act of 2000. His precise submission is that by invoking and applying the provisions of the Indian Penal Code, attempt is made to deprive them of benefit of bail and compounding, which is available under the I.T. Act, 2000. The learned senior counsel would submit that in light of the binding precedent laid down by the Hon'ble Apex Court in the aforesaid judgment (Supra), the provisions of the Information Technology Act has been given an overriding effect to cover criminal acts contained in the Indian Penal Code and this law which is a special law must prevail over the general law and therefore invocation of provisions of Indian Penal Code against the petitioners in the facts of the case is ex facie, erroneous and without jurisdiction. As per Shri.Chaudhary, the continuation of the proceedings against the petitioner under the provisions of the Indian Penal Code is nothing but abuse of process of law and therefore he would pray for quashing of the criminal proceedings in the impugned C.R. 0346 of 2017 qua the petitioners only to the extent of invocation and application of the offences punishable under the

Indian Penal Code.

4. We have heard the learned APP appearing for the Respondent-State and Shri.Shirish Gupte, learned Senior Counsel representing the respondent No.2. According to Shri.Gupte, the petitioners are the main accused and the master mind behind the offence with which they are charged and in connivance and by inducing the co-accused, the employees of the M/s.Manorama Infosolutions Pvt. Ltd., they have committed the offence and caused financial loss to the company. Submission of Shri.Gupte, is that the company had developed software namely Lifeline E Clinic Enterprises and Lifeline E Claims for M/s.Bliss GVS Healthcare and a team was constituted in October 2015 to visit Kenya. The petitioner No.1 was introduced to the remaining team of the company and he was the key person in this project as the team of the said company would submit the daily report to the petitioner No.1. It is the specific submission of the learned Senior Counsel that the petitioner No.1 called for E-Claims source code and Database company from Mr.Sanmani and directed him to transfer the source code to him and to his team at Delhi. It is further alleged that Mr.Sanmani assisted the petitioner to redefine the existing functionality E-claims for future sale of E-claims application and on instructions of the

petitioner No.1, Mr.Sanmani asked Mr.Suraj Mahajan to transfer the Code of E-Claims and E-Claims Database from the companies' server to the petitioner No.1,2 and their team. It is in this backdrop according to the learned Senior Counsel the judgment of the Hon'ble Apex Court would have to be read. Shri.Gupte relied on the latest judgment of the Hon'ble Apex Court in Criminal Appeal No.1195 of 2018 in case of ***The State of Maharashtra and Anr. V/s. Sayyed Hassan Sayyad Subhan and Ors*** delivered on 20th September 2018. His submission is that the Hon'ble Apex Court has held that there is no bar in prosecuting the persons under the Penal Code where the offences committed are cognizable offences and merely because the provisions in the Food Safety and Security Act constitute an offence, there is no bar to prosecute them under the Indian Penal Code. In backdrop of the said judgment he would pray for dismissal of the Writ Petition.

5. During the course of the hearing of the matter, the learned counsel for the petitioner has placed on record, copy of the order passed by the Hon'ble Apex Court on 03.10.2018 in Special Leave to Appeal (CRL) 8274 of 2018 in case of the petitioner No.1 who had approached it being aggrieved by the rejection of his Anticipatory Bail. We have perused the said order. The Hon'ble

Apex Court, in the backdrop of the factum of Writ Petition No.4361 of 2018 being filed by the petitioners before the Bombay High Court for quashing the provisions of the Indian Penal Code, has observed that since the matter was examined by the High Court whether the case is primarily under the Information Technology Act and whether Sections 408 and 420 of Indian Penal Code can be applied, made the following observations :-

> *"Having regard to the aforesaid development, since the matter is now being examined by the High Court in the aforesaid context namely, whether the case is primarily under Sections 43,65 and 66 and no case can be filed under Sections 408 and 420 of the IPC and also the petitioner has been given interim protection therein, it is not necessary to deal with the subject matter of this petition. We may record that this petition is filed against the order of the High Court rejecting the anticipatory bail of the petitioner. Suffice is to state that in the aforesaid criminal proceedings the High Court shall examine the matter without being influenced by any observations made by the High Court in the impugned order. We may also clarify that this Court has not expressed any opinion on the merits of the case."*

6. In light of the facts referred to above we have heard the respective Senior Counsels and perused the material placed before

us.

The Information Technology Act, 2000 is a legislation to provide legal recognition for transactions carried out by means of electronic data inter change and other means of electronic communication, commonly referred to as “electronic commerce” which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government Agencies and further to amend the Indian Penal Code, the Indian Finance Act, 1872 etc. The said Act has been brought into force from 17th October 2000. The introduction of new communication system and digital technology has necessitated the said enactment with a view to facilitate Electronic Governance. With proliferation of information technology enabled services such as e-governance, e-commerce and e-transactions, protection of personal data and information and implementations of security practices and procedures relating to these applications of electronic communications have assumed great importance and the Enactment was necessitated in the backdrop of the security of the nation, economy, public health and safety.

7. Perusal of the said provisions of the I.T. Act, 2000 would reveal that it provides complete mechanism for protection of

data in a computer system or a computer network. The computer system is intended to cover a device or collection of devices, including input and output support devices capable of being used in conjunction with external files, containing computer programs, electronic instructions, input and output data, data storage and retrieval. The said enactment is a complete code which deals with electronic governance and confers a legal recognition on electronic records and the manner in which such records can be secured. The said Act of 2000 makes certain acts punishable in Chapter-IX and Chapter-XI of the said act which enumerates the offences related to the computer including the source documents. Thus, the said enactment is a complete Code in itself and deals with various aspects of electronic data and computer system.

Section 43 of Information Technology Act, 2000 prescribes penalty and compensation for damage to computer and computer system needs a reproduction:-

> ***43 [Penalty and compensation] for damage to computer, computer system, etc.*** *-If any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network,-*
>
> (a) *accesses or secures access to such computer, computer system or computer network [or computer resource];*

(b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

(c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;

(d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;

(e) disrupts or causes disruption of any computer, computer system or computer network;

(f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;

(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;

(h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,

(i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;]

(j) steal, conceals, destroys or alters or causes any person

to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;]

[he shall be liable to pay damages by way of compensation to the person so affected].

Explanation.- For the purposes of this section,-

(i) "computer contaminant" means any set of computer instructions that are designed-

(a) to modify, destroy, record, transmit data or programme residing within a computer, computer system or computer network; or

(b) by any means to usurp the normal operation of the computer, computer system, or computer network;

(ii) "computer database" means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network;

(iii) "computer virus" means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, data or instruction is executed or some other event takes place in that computer resource;

(iv) "*damage*" *means to destroy, alter, delete, add, modify or rearrange any computer resource by any means;*

(v) "*computer source code*" *means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.]*

It is apposite to refer Section 65 and 66 which reads thus :-

"65. Tampering with computer source documents:- *Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend upto two lakh rupees, or with both.*

Explanation-For the purposes of this section, computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form."

66. ***Computer related offences:-*** *If any person, dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakhs rupees or with both.*

Explanation-For the purposes of this section-

(a) the word "dishonestly" shall have the meaning assigned to it in Section 24 of the Indian Penal Code (45 of 1860).

(b) the word "fraudulently" shall have the meaning assigned to it in Section 25 of the Indian Penal Code (45 of 1860)".

8. The distinction between Section 43 and 66 is very succinct. All the acts which are covered within the purview of Section 43 if committed dishonestly and fraudulently are made punishable under Section 66 with an imprisonment for a term which may extend to three years or with fine. It is relevant to note that the word "dishonestly" and "fraudulently" is assigned the same meaning as in Section 24 and 25 of the Indian Penal Code respectively. The offences under the Information Technology Act, 2000 are compoundable and the offences which are punishable with imprisonment of three years and above are bailable and cognizable. Another important provision contained in the said enactment is Section 81 which reads thus :-

"81. Act to have overriding effect :-*The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force:*

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970).”

9. In the backdrop of the scheme of the enactment the claim of the rival parties will have to be examined.

10. The Hon'ble Apex Court in case of ***Sharat Babu Digumarti (Supra)*** had in great detail dealt with the offences punishable under the Information Technology Act and at the same time punishable under the relevant provisions of the Indian Penal Code. In the said case, an FIR was filed against the appellant and on investigation, chargesheet came to be filed before the Magistrate who took cognizance of the offences punishable under Section 292 and 294 of the Indian Penal Code and also Section 67 of the Information Technology Act. In a petition before the High Court seeking quashment, he was discharged of the offences under Section 292 and 294 but the prosecution under Section 67 of the Information Technology Act continued. The appellant approached the Apex Court and on the ground that the company was not arraigned as a party and the Director could not have been liable of the offences punishable under Section 85 of the Information

Technology Act and the proceeding came to be quashed. Subsequently an application came to be filed before the Trial Court to drop the proceedings and the Trial Court refused to drop the proceedings under Section 292 of Indian Penal Code and framed the charge. With this issue he approached the Apex Court and the question for consideration before the Hon'ble Apex Court was whether the appellant who has been discharged under Section 67 of the Information Technology Act could be proceeded under Section 292 of the Indian Penal Code. The Hon'ble Apex Court also examined whether an activity emanating from electronic form which may be obscene would be punishable under Section 292 of the Indian Penal Code or 67 of the Information Technology Act or both or any other provision of the Information Technology Act. In the backdrop of the said facts the Hon'ble Apex Court observed thus :-

> ***30.*** *In this regard, we may reproduce Section 81 of the IT Act, which is as follows:-*
>
> > *"81. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*
> >
> > *Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright_Act 1957 or the Patents Act 1970."*
>
> *The proviso has been inserted by Act 10 of 2009 w.e.f.*

27.10.2009.

31. *Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Section 67-A and 67-B is a complete code relating to the offences that are covered under the IT Act. Section 79, as has been interpreted, is an exemption provision conferring protection to the individuals. However, the said protection has been expanded in the dictum of Sherya Singhal and we concur with the same.*

32. *Section 81 of the IT Act also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply.*

> ***37.*** *The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC.*
>
> ***39.*** *In view of the aforesaid analysis and the authorities referred to hereinabove, we are of the considered opinion that the High Court has fallen into error that though charge has not been made out under Section 67 of the IT Act, yet the appellant could be proceeded under Section 292 IPC.*

11. Reading of the said judgment, makes is clear that the Hon'ble Apex Court had considered the effect of the overriding provisions contained in the Information Technology Act and has observed that all the provisions in the enactment are of significance

particularly if the alleged offences pertains to electronic record. By observing that the Information Technology Act is a special enactment and it contain special provision, the Hon'ble Apex Court has also considered the effect of Section 79 contained in the Information Technology Act which is enacted for a specific purpose and has observed that the mandate behind Section 81 of the Information Technology Act needs to be understood in its proper perspective. It referred to the earlier precedents on the point where a special statute is pitted against a General enactment and thereafter has concluded by making reference Section 79 and 81 that once the special provisions are accorded overriding effect to cover a criminal Act, the offender gets out of the net of the Indian Penal Code and in the case in hand of Section 292.

12. It is well known principle of law that a prior general Act may be effected by a subsequent particular or a special Act. In the principles of statutory interpretation by justice G.P. Singh 13th Edition 2012 the aforesaid principle is culled out in the following manner:-

> *"A prior general Act may be effected by a subsequent particular or a Special Act, if the special matter of particular Act prior to its enforcement was being*

> *governed by the general provision of the earlier Act. In such a case the operation of the particular Act may have the effected of parallel rebelling the general Act or curtailing its operation or added conditions to its operation for the particular cases.*
>
> *A general Act operation may be curtailed by a latter special Act even if the general Act contained a non-obstante clause. The curtailment of the general Act will be more readily inferred with the latter special Act also containing an overriding non-obstante provision.*

13. The well know principle of 'generalia specialibus general non-derogant' which is to be invoked in case of conflict between a specific provision and general provision and which gives the specific provision an overriding effect over the general provision has been described in Craies on statute law at page 206, Sixth Edition Rommaly, MR referred the rule as “The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense would override, particular enactment must be inactive and the general enactment must be taken to effect only the over parts of the statute to which it may properly apply. In case of ***Belsund Sugar Co. Ltd. V/s. The State of Bihar[2],*** the Hon'ble Apex Court was required to deal with one such special statute by Section 4 of the

2 AIR 1999 SC 3125

Bihar Finance Act (Act 5 of 1981), provision was made for levy of purchase tax on goods in general. Provision was also made for levy of purchase tax on sugarcane later by section 49 of the Bihar Sugarcane (Regulation of Supply and Purchase) Act (Act 37 of 1982) which was a special Act for the control of the activities of production, supply and regulation of sugarcane including the levy of purchase tax. In so far as the activity of levy of purchase tax on sugarcane was concerned both the Acts operated in the same field. As the Sugarcane Act was a special Act the rule that 'general provision should yield to special provision' was applied and it was held that purchase tax on sugarcane could be levied only under the sugarcane Act and not under the Finance Act. On the same principle it was also held in another case that dealings in sugarcane were exclusively regulated by the Sugarcane Act and its provisions excluded the operation of the Bihar Agricultural Produce Markets Act, 1980 which was a general Act for regulating sale and purchase of all types of agricultural produce.

14. In case of ***Ratanlal Adukia V/s. Union of India AIR-1990-SCC-104***, where the facts involved reveal that Section 80 of the Railways Act 1890 substituted in 1961 provides for forum where a suit for compensation for loss of life, or personal injury too, a

passenger or for loss, destruction, damage, deterioration and non delivery of the animals or goods against the railway administration may be brought. It was held that the said section was a self contained code and that impliedly repealed the provision in respect of suits covered by Section 20 of the Code of Civil Procedure, 1908. The principle which is deducible in the aforesaid judgment is to the effect that the subsequent legislation which is a Code in itself exclude the general law on the subject.

15. In case of ***Allahabad Bank V/s. Canara bank AIR-2000-SCC-1535***, provisions of the recovery of debts due to Banks and Financial Institutions Act, 1993 ('RDB' Act) was given an overriding effect over the provisions of the Companies Act 1956. The RDB Act constitutes a tribunal and by Section 17 and 18 confers upon the tribunal exclusive jurisdiction to entertain and decide applications from the banks and the financial institutions for recovery of debts. The Act also laid down procedure of recovery of debt as per certificate issued by the tribunal. The said enactment being a special enactment, would prevail over Section 442, 446, 537 and other section of the Companies Act which is a general Act, more so because Section 34 of the RDB Act gives overriding effect to that Act by providing that the provisions of this Act shall have effect

notwithstanding anything inconsistent therein containing in other law for the time being in force.

16. Further in case of ***Yakub Abdul Razak Memon V/s. State of Maharashtra***[3] the Hon'ble Apex Court while dealing with an 'overriding effect' clause in the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short 'TADA'), while examining its effect on the Juvenile Justice Act, 2000 made the following observations:-

> ***1517.*** *Where two statutes provide for overriding effect on the other law for the time being in force and the court has to examine which one of them must prevail, the court has to examine the issue considering the following two basic principles of statutory interpretation:*
>
> *1. Leges posteriores priores contrarias abrogant (later laws abrogate earlier contrary laws).*
>
> *2. Generalia specialibus non derogant (a general provision does not derogate from a special one.)*
>
> ***1518.*** *The principle that the latter Act would prevail the earlier Act has consistently been held to be subject to the exception that a general provision does not derogate from a special one. It means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in the earlier Act, it would be*

3 ***(2013) 13-SCC-1***

presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one.

1519. *The basic rule that a general provisions should yield to the specific provisions is based on the principle that if two directions are issued by the competent authority, one covering a large number of matters in general and another to only some of them, his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier directions must be given effect to.*

1520. *It is a settled legal proposition that while passing a special Act, the legislature devotes its entire consideration to a peculiar subject. Therefore, when a general Act is subsequently passed, it is logical to presume that the legislature has not repealed or modified the former special Act unless an inference may be drawn from the language of the special Act itself.*

1521. *In order to determine whether a statute is special or general one, the court has to take into consideration the principal subject-matter of the statute and the particular perspective for the reason that for certain purposes an Act may be general and for certain other purposes it may be special and such a distinction cannot be blurred.*

> ***1522.*** *Thus, where there is inconsistency between the provisions of two statutes and both can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment of the legislature conveyed by the language of the relevant provisions therein. (Vide Ram Narain v. Simla Banking and Industrial Co. Ltd.[AIR 1956 SC 614] ,J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P. [AIR 1961 SC 1170] ,Kumaon Motor Owners' Union Ltd. v. State of U.P.[AIR 1966 SC 785], Sarwan Singh v. Kasturi Lal [(1977) 1 SCC 750], U.P. SEB v. Hari Shankar Jain [(1978) 4 SCC 16 : 1978 SCC (L&S) 481], LIC v. D.J. Bahadur [(1981) 1 SCC 315 : 1981 SCC (L&S) 111], Ashoka Mktg. Ltd. v. Punjab National Bank [(1990) 4 SCC 406 : AIR 1991 SC 855] and T.M.A. Pai Foundation v. State of Karnataka [(2002) 8 SCC 481] .)*

17. Further, in case of ***Jeevan Kumar Raut and Another V/s. Central Bureau of Investigation***[4], on which reliance has been placed by the Hon'ble Apex Court in case of ***Sharat Babu Digumarti (Supra),*** the Court was called upon to deal with a special act namely the Transplantation of the Human Organs Act, 1994. The FIR registered disclosed not only commission of offence under TOHO but also the Indian Penal Code. The officer in-charge

4 2009-7-SCC-526,

of the Police Station being not authorized to deal with the matter in relation to TOHO, the investigation of the complaint was handed over to CBI. When the question arose about the procedure to be followed while investigating the said offence under the special enactment, the Hon'ble Apex Court observed thus :-

> *"**19**. TOHO is a special Act. It deals with the subjects mentioned therein, viz. offences relating to removal of human organs, etc. Having regard to the importance of the subject only, enactment of the said regulatory statute was imperative.*
>
> ***20.** TOHO provides for appointment of an appropriate authority to deal with the matters specified in sub-section (3) of Section 13 thereof. By reason of the aforementioned provision, an appropriate authority has specifically been authorised inter alia to investigate any complaint of the breach of any of the provisions of TOHO or any of the rules made thereunder and take appropriate action. The appropriate authority, subject to exceptions provided for in TOHO, thus, is only authorised to investigate cases of breach of any of the provisions thereof, whether penal or otherwise.*
>
> ***22.** TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other*

provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences.

26. *It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorisation under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; sub-section (2) of Section 167 of the Code may not be applicable.*

27. *The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to*

> *time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO."*

18. In a recent judgment in case of ***Independent Thought V/s. Union of India***[5], where the question posed before the Apex Court was about the exception 2 to Section 375 and as to whether a man committing sexual intercourse or acts with his wife aged between 15 and 18 years is exempted from offence of rape, their lordships also decided whether the provisions of Juvenile Justice Act would prevail against the POSCO Act, the Hon'ble Apex Court construed that both the enactment are traceable to Article 15(3) of the Constitution which enable Parliament to make a special provision for the benefit of the children. As regards whether the statute would be construed as general or special one, the Apex Court observed thus :-

> ***95.*** *Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over IPC as provided for in Sections 5 and 41 IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes*

5 2017-10-SCC-800

concerning the rights of children are special laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3) of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

100. *Prima facie it might appear that since rape is an offence under IPC (subject to Exception 2 to Section 375) while penetrative sexual assault or aggravated penetrative sexual assault is an offence under the POCSO Act and both are distinct and separate statutes, therefore there is no inconsistency between the provisions of IPC and the provisions of the POCSO Act. However the fact is that there is no real distinction between the definition of "rape" under IPC and the definition of "penetrative sexual assault" under the POCSO Act. There is also no real distinction between the rape of a married girl child and*

> *aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Additionally, the punishment for the respective offences is the same, except that the marital rape of a girl child between 15 and 18 years of age is not rape in view of Exception 2 to Section 375 IPC. In sum, marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction.*

19. In light of the aforesaid authorative pronouncements it can very will be seen that the statute and its provisions must be construed by keeping in mind the object behind the enactment of such a statute. The Hon'ble Apex Court in case of ***RBI V/s. Peerless General Insurance Finance and Investment Company Ltd.***[6] has made observations to the following effect :-

> *"33. If a statue is looked at, in the context of the enactment, with the glasses of the statute makes and provided by such context, its scene, the sections, clauses,*

6 2014-8-SCC-319

phrases and words may take colour and appear different that when the statute is looked at without the glasses provided by the context. With these glasses we must look at the set as a whole and discover what each section, each clause, each phrase, each word is meant and designed to say as to fit into the scheme of the entire Act."

20. It is also a settled principle of statutory interpretation that a clause or a Section beginning with 'notwithstanding anything contained in this Act or some particular provision in the Act or in any law for the time being in force', 'is sometimes appended in a Section or is included in an enactment which would give the provision or the Act an overriding effect over the provision or the Act mentioned in the non-obstante clause. The non-obstante clause may be used as legislative device to modify the ambit of the provision or law mentioned in the non-obstante laws or to override in specified circumstances. The phrase 'notwithstanding anything in' is used in contradiction to the phrase 'subject to', the latter conveying the idea of the provision yielding placed to another provision or other provisions to which it is made subject to.

21. Keeping the aforesaid authoritative pronouncements in mind, if the scheme of the Information Technology Act will have to

be examined and given effect too. The said Act which is a special enactment so as to give fillip to the growth of electronic based transactions, and to provide legal recognition for E-commerce and, to facilitate E-Governance and to Ensure Security Practice and Procedures in the context of the use of Information Technology Worldwide. The said enactment contains a full fledge mechanism for penalising certain acts which are committed without permission of the owner or any other persons who is in charge of a computer, computer system, or computer network and those acts are enumerated in Section 43. The said enactment also makes certain acts punishable and Chapter-XI of the Information Technology Act 2000 enumerates such acts. The same acts which are enumerated in Section 43 of the enactment which would invite penalty and compensation for accessing or securing any information as contemplated in Section 43, would amount to an offence under Section 66 if any person, dishonestly, fraudulently commits such an act. The said Section has an explanation appended to it to the effect that the word “dishonestly” and “fraudulently” used in the said Section will be assigned the same meaning as under the Indian Penal Code. In such circumstances when the Information Technology Act, 2000 specifically provides a mechanism for dealing with an act covered in Section 43(a) and (j):-

> *"Section 43(a) Accesses or secures access to such computer, computer system or computer network (or computer resource);*
>
> *43(j) Steel, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage."*

and if this is done with a fraudulent or dishonest intention, it becomes an offence under Section 66 of the Information Technology Act. Since, the Information Technology Act deals with the use of means of electronic communication and has evolved a complete mechanism in itself to deal with the offences in the use of electronic transactions, and in the backdrop of the specific facts of the case in hand, Section 66 would be attracted and in view of the mechanism contained in the said section, the invocation of the provisions of the Indian Penal Code is highly unwarranted. This view has already been authored by their lordships in case of ***Sharat Babu Digumarti (Supra).***

22. The reliance placed by the learned counsel Shri.Gupte judgment in case of ***The State of Maharashtra & Anr. V/s. Sayyad Hassan Sayyed Subhan & Ors***[7]***,*** in our view it is not applicable to the present case in light of the direct pronouncement of the Hon'ble

7 Criminal Appeal No.1195 of 2018 of SCC delivered on 20-09-2018

Apex Court in case of ***Sharat Babu Digumarti (Supra).*** In the case relied upon by the learned Senior Counsel the issue involved was whether an act or omission can constitute an offence under the Indian Penal Code and at the same time under any other law and in the said case under the Food and Safety Standards Act, 2006.

The facts involved revealed that a notification was issued on 18.07.2013 by the Commissioner Food Safety and Drug Administration, Government of Maharashtra under Section 30 prohibiting manufacture, storage, distribution or sale of tobacco Areca nut and gutka/panmasala etc. The facts of the said case would reveal that First Information was registered for transportation and sale of gutka and panmasala and thereby invoking offences punishable under Section 26 and 30 of the FSS Act and also Section 188, 272, 273, 328 of Indian Penal Code. A Criminal Writ Petition was filed for quashing of the FIR's and the High Court framed two questions for consideration, namely :- a) Whether food Safety Officer can lodged complaint for offences punishable under Section IPC. b) Whether Acts complaint amounted to offence punishable under IPC. The High Court quashed the proceedings on the ground that the Food Safety Officers can proceed against the accused under the provisions of Chapter-X of the FSS Act. The High Court noted that the notification issued by the Commissioner is not an order

contemplated under Chapter-X of the Indian Penal Code and there was a specific provision contained in Section 55 of the FSS Act which is a special enactment and therefore it had held that Section 188 of the Indian Penal Code is not applicable. Being aggrieved, the State of Maharashtra approached the Hon'ble Apex Court.

23. In the backdrop of this peculiar facts the Hon'ble Apex Court had disagreed with the conclusion of the High Court and was pleased to observed that the High Court has erred in holding that the action can be initiated against the defaulters only under Section 55 of the FSS Act and to the exclusion of Section 188. The Hon'ble Apex Court observed that Section 188 of Indian Penal Code is wider in scope and did not cover only breach of law and order but it was also attracted in cases where the act complained of causes or tends to cause danger to human life, healthy or safety as well. By comparatively anyalizing the scope of Section 53 of the FSS Act and Section 188 of the Indian Penal Code, the Hon'ble Apex Court held as under:-

> *"7. There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be*

prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time, an offence under any law."

24. The aforesaid judgment of the Hon'ble Apex Court is therefore clearly distinguishable on facts but even the said judgment of the Hon'ble Apex Court reiterates the settled position of law that where an act or an omission constitutes for an offence under two enactments the offender may be punished under either or both enactment but was not liable to be punished twice for the same offence. It is always possible that the same set of facts can constitute offence under two different laws but a person cannot be punished twice for the said act which would constitute an offence.

25. The rule against double jeopardy is a significant basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence. The manifestation of the said rule no doubt finds place in Section 26 of the general clauses Act, 1897 which reads thus :-

"Provision as to offences punishable under two or more

> *enactments-where an act of omission constitutes of offences under two or more enactments, offender shall be liable to be prosecuted and punish under either or any of these enactments that he shall not be liable to be punished twice in the said enactment*'.

Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. To attract the applicability of the Article 20(2) there may be second prosecution and punishment of the same offence for which the accused has been prosecuted and punish previously. A subsequent trial or prosecution and the punishment however is not barred if the ingredients of the two offences are distinct.

26. In order to attract Section 26, what is required is to ascertain whether the ingredients of offence have been same or distinct. In case of ***State (NCT) of Delhi V/s. Sanjay***[8]***,*** the Hon'ble Apex Court while dealing with the phrase 'same offence' was called upon to decide the question as to whether illegal mining of sand from river beds under Mines and Minerals (Development and Regulations) Act of 1957 would oust the invocation and application of provisions of Section 378 read with 379 of Indian Penal Code, observed that the mining of sand from riverbed without licenses or

8 2014-9-SCC-772

permit is prohibited under the MMDR Act. However, it would also constitute an offence under the provisions of the Indian Penal Code as natural resources belongs to the public and State being its trustee, the police is empowered and duty bound to lodged a FIR in Indian Penal Code and to investigate and file chargesheet irrespective of the procedure under the MMDR Act. However, the Hon'ble Apex Court observed that this is permissible and would not have hit by the principle of double jeopardy in view of the fact that ingredients of both offence are distinct and different. The following observations by the Hon'ble Apex Court are relevant paragraphs :-

> *26. Broadly speaking, a protection against a second or multiple punishment for the same offence, technical complexities aside, includes a protection against re-prosecution after acquittal, a protection against re-prosecution after conviction and a protection against double or multiple punishment for the same offence. These protections have since received constitutional guarantee under Article 20(2). But difficulties arise in the application of the principle in the context of what is meant by 'same offence'. The principle in American law is stated thus:*
>
> > *'The proliferation of technically different offences encompassed in a single instance of crime behaviour has increased the*

importance of defining the scope of the offence that controls for purposes of the double jeopardy guarantee.

Distinct statutory provisions will be treated as involving separate offences for double jeopardy purposes only if "each provision requires proof of an additional fact which the other does not" (Blockburger v. United States [76 L Ed 306 : 284 US 299 (1932)]). Where the same evidence suffices to prove both crimes, they are the same for double jeopardy purposes, and the clause forbids successive trials and cumulative punishments for the two crimes. The offences must be joined in one indictment and tried together unless the defendant requests that they be tried separately. (Jeffers v. United States [53 L Ed 2d 168 : 432 US 137 (1977)] .)'

27. The expressions 'the same offence', 'substantially the same offence', 'in effect the same offence' or 'practically the same', have not done much to lessen the difficulty in applying the tests to identify the legal common denominators of 'same offence'. Friedland in Double Jeopardy (Oxford 1969) says at p. 108:

'The trouble with this approach is that it is vague and hazy and conceals the thought

> *processes of the court. Such an inexact test must depend upon the individual impressions of the Judges and can give little guidance for future decisions. A more serious consequence is the fact that a decision in one case that two offences are "substantially the same" may compel the same result in another case involving the same two offences where the circumstances may be such that a second prosecution should be permissible.…'*

Further in case of in State of Rajasthan v. Hat Singh [(2003) 2 SCC 152 : 2003 SCC (Cri) 451] , a person was prosecuted for violation of prohibitory order issued by the Collector under Sections 5 and 6 of the Rajasthan Sati (Prevention) Ordinance, 1987. Against the said Ordinance, mass rally took place which led to the registration of FIRs against various persons for violation of prohibitory order under Sections 5 and 6 of the Act. Persons, who were arrested, moved a petition challenging the vires of the Ordinance and the Act. The High Court upholding the vires of the Ordinance/Act held that the provisions of Sections 5 and 6 overlapped each other and that a person could be found guilty only of the offence of contravening a prohibitory order under either Section 6(1) or Section 6(2) of the Act.

The Apex Court held as under:-

> *"14. We are, therefore, of the opinion that in a given case, same set of facts may give rise to an offence punishable under Section 5 and Section 6(3) both. There is nothing unconstitutional or illegal about it. So also an act which is alleged to be an offence under Section 6(3) of the Act and if for any reason prosecution under Section 6(3) does not end in conviction, if the ingredients of offence under Section 5 are made out, may still be liable to be punished under Section 5 of the Act. We, therefore, do not agree with the High Court to the extent to which it has been held that once a prohibitory order under sub-section (1) or (2) has been issued, then a criminal act done after the promulgation of the prohibitory order can be punished only under Section 6(3) and in spite of prosecution under Section 6(3) failing, on the same set of facts the person proceeded against cannot be held punishable under Section 5 of the Act although the ingredients of Section 5 are fully made out."*

27. Applying the aforesaid principles to the facts involved in the case, perusal of the complaint would reveal that the allegations relate to the use of the data code by the employees of the complainant company by accessing the Code and stealing the said

data by using the computer source code. The Act of accessing or securing access to computer/computer system or computer network or computer resources by any person without permission of the owner or any person who is in charge of the computer, computer system, computer network or downloading of any such data or information from computer in a similar manner falls within the purview of Section 43 of the Information Technology Act,2000. When such Act is done dishonestly and fraudulently it would attract the punishment under Section 66 of the Information Technology Act, such Act being held to be an offence. The ingredients of dishonesty and fraudulently are the same which are present if the person is charged with Section 420 of the Indian Penal Code. The offence of Section 379 in terms of technology is also covered under Section 43. Further, as far as Section 408 is concerned which relates to criminal breach of trust, by a clerk or servant who is entrusted in such capacity with the property or with any dominion over property, would also fall within the purview of Section 43 would intents to cover any act of accessing a computer by a person without permission of the owner or a person in charge of computer and/or stealing of any data, computer data base or any information from such computer or a computer system including information or data held or stored in any removable storage medium and if it is

done with fraudulent and dishonest intention then it amounts to an offence. The ingredients of an offences under which are attracted by invoking and applying the Section 420, 408, 379 of the Indian Penal Code are covered by Section 66 of the Information Technology Act, 2000 and prosecuting the petitioners under the both Indian Penal Code and Information Technology Act would be a brazen violation of protection against double jeopardy.

28. In such circumstances if the special enactment in form of the Information Technology Act contains a special mechanism to deal with the offences falling within the purview of Information Technology Act, then the invocation and application of the provisions of the Indian Penal Code being applicable to the same set of facts is totally uncalled for. Though the learned APP as well as Shri.Gupte has vehemently argued that the prosecution under the provisions of the Indian Penal Code can be continued and at the time of taking cognizance the Competent Court can determine the provisions of which enactments are attracted and it is too premature to exclude the investigation in the offences constituted under the Indian Penal Code, we are not ready to accept the said contention of the learned Senior Counsel, specifically in the light of the observations of the Hon'ble Apex Court in the case of ***Sharat Babu Digumarti***

(Supra). We are of the specific opinion that it is not permissible to merely undergo the rigmarole of investigation although it is not open for the Investigating Officer to invoke and apply the provisions of the Indian Penal Code, in light of the specific provisions contained in the Information Technology Act, 2000 and leave it to the discretion of the Police Authorities to decide in which direction the investigation is to be proceeded. The Information Technology Act, 2000 being a special enactment, it requires an able investigation keeping in mind the purpose of the enactment and to nab the new venturing of crimes with the assistance of the Technology.

29. In such circumstances we are inclined to allow the Writ Petition in terms of prayer clause (a) and quash and set aside the subject FIR insofar as the investigation into the offences punishable under the Indian Penal Code.

30. In light of the aforesaid decision, the Criminal Application No. 403 of 2018 does not survive and stands disposed of.

(SMT.BHARATI H. DANGRE, J.) **(RANJIT MORE, J.)**