



LL.B. III Term

LB-301 - Constitutional Law - I

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Paper: LB – 301: Constitutional Law – I

[*Principles of Federalism, Distribution of Legislative Powers between the Centre and the States, Union and State Executive; Freedom of Trade, Commerce and Intercourse; Parliament and State Legislatures, Judiciary and Emergency provisions*]

Prescribed Text: The Constitution of India, 1950

Prescribed Books:

1. H.M. Seervai, *Constitutional Law of India* (4th ed., Vol 1 (1991), Vol. 2 (1993), Vol. 3 (2019 Rep.))
2. M.P. Jain, *Indian Constitutional Law* (8th ed., 2018)
3. M. P. Singh, *V. N. Shukla's Constitution of India* (13th ed., 2019)
4. D.D. Basu, *Shorter Constitution of India* (15th ed., 2018)

Recommended Books:

1. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (1966)
2. Granville Austin, *Working a Democratic Constitution - A History of the Indian Experience* (1999)
3. B. Shiva Rao, *The Framing of India's Constitution– Select Documents* (1967)
4. *Report of the Commission on Centre – State Relations (Sarkaria Commission)* (1987)
5. *Report of the National Commission to Review the Working of the Constitution* (2002)

Objectives

The Constitution contains the fundamental law of the land. It is the source of all powers of, and limitations on, the three organs of the State, viz. the executive, legislature and judiciary. No action of the State would be valid unless it is permissible under the Constitution. Therefore, it is imperative to have a clear understanding of the nature and working of the Constitution. This course is designed to orient the students towards said understanding and develop an analytical approach through case law.

Topic 1 – General (6 Classes)

Constitution – Fundamental Law of the Land: Making of the Indian Constitution; Aims and Objectives; Essential Features of Constitution; Theory of Basic Structure; Principles of Federalism; Nature of the Indian Constitution – Federal, Unitary, Quasi-federal; Cooperative and Competitive Federalism; Scheduled and Tribal Areas

1.	<i>Kesavananda Bharati v. State of Kerala</i>	1973 (4) SCC 225	01
2.	<i>S. R. Bommai v. Union of India</i>	1994 (3) SCC 1	08
3.	<i>State of West Bengal v. Union of India</i>	AIR 1963 SC 1241	25
4.	<i>Rai Sahib Ram Jawaya Kapur v. State of Punjab</i>	AIR 1955 SC 549	40
5.	<i>Kuldip Nayar v. Union of India</i>	2006 (7) SCC 1	
6.	<i>State of Haryana v. State of Punjab</i>	2002 (2) SCC 507	
7.	<i>I.R. Coelho v. State of Tamil Nadu</i>	2007(2) SCC 1	

Topic 2 – The Union and its Territory (4 Classes)

Power to cede Indian territory to a Foreign Nation; Power to create/extinguish a state; Alteration of name, area and boundary of existing states – Procedure (Articles 1 – 4)

8.	<i>In re Berubari Union & Exchg. of Enclaves</i>	AIR 1960 SC 845	48
9.	<i>Ram Kishore Sen v. Union of India</i>	AIR 1966 SC 644	
10.	<i>Union of India v. Sukumar Sengupta</i>	1990 Supp SCC 545	
11.	<i>N. M. Sahib v. Chief Comnr. Pondicherry</i>	AIR 1962 SC 797	
12.	<i>R. C. Poudyal v. Union of India</i>	1994 Supp (1) SCC 324	
13.	<i>Babulal Parate v. State of Bombay</i>	AIR 1960 SC 51	

Topic 3 – The Union and the State Executives (5 Classes)

- a) The President and Vice President – Qualifications, Election, Term of Office, Powers, Impeachment (Articles 52-72); Governor – Appointment - Term of Office – Removal and Powers (Articles 153 – 161)
- b) Nature, Scope and Extent of Executive Powers of the Union and States (Article 73, 162)
- c) Union Council of Ministers – Powers and Position of the President (Articles 74-75); State Council of Ministers (Articles 163-164); Relationship of the President/Governor with the Council of Ministers; Scope and Extent of Judicial Review of Executive Actions (Articles 74, 75,77,78,111,102, 103(2), 217(3), 163)

14.	<i>B.P. Singhal v. Union of India</i>	(2010) 6 SCC 331	
15.	<i>U. N. R. Rao v. Indira Gandhi</i>	(1971) 2 SCC 63	66
16.	<i>S.P. Anand v. H.D. Deve Gowda</i>	(1996) 6 SCC 734	69
17.	<i>Samsher Singh v. State of Punjab</i>	(1974) 2 SCC 831	75
18.	<i>M.P. Spl. Police Estab. v. State of M.P</i>	(2004) 8 SCC 788	89
19.	<i>State (NCT of Delhi) v. Union of India</i>	(2018) 8 SCC 501	99
20.	<i>Epuru Sudhakar v. Govt. of A.P</i>	(2006) 8 SCC 321	

Topic 4 – Parliament and State Legislatures (5 Classes)

Composition of Parliament and State legislatures; Qualification/Disqualification of Members; Legislative Procedure, Legislative Privilege (Articles 79 – 122, 168 – 212)

21.	<i>S.P. Anand v. H.D. Deve Gowda,</i>	(1996) 6 SCC 734	69
22.	<i>B. R. Kapur v. State of Tamil Nadu</i>	(2001) 7 SCC 231	106
23.	<i>Lily Thomas v. Union of India</i>	(2013) 7 SCC 653.	117
24.	<i>Lok Prahari (through General Secretary SN Shukla) v. Election Commission of India</i>	(2018)18 SCC 114	

25.	<i>Special Reference No. 1 of 2002 (Re Gujarat Assembly Election Matter)</i>	(2002) 8 SCC 237	127
26.	<i>Anil Kumar Jha v. Union of India</i>	(2005) 3 SCC 150	
27.	<i>Jaya Bachchan v. Union of India</i>	(2006) 5 SCC 266	
28.	<i>Consumer Education and Research Society v. Union of India & Ors.</i>	(2009) 9 SCC 648	
29.	<i>In re Keshav Singh</i>	AIR 1965 SC 745	
30.	<i>Raja Ram Pal v. Hon'ble Speaker, Lok Sabha</i>	(2007) 3 SCC 184	139

Topic 5 - Legislative Power of the Executive (Ordinances) (3 Classes)

Essential conditions for promulgation of an Ordinance: 'Ordinance' under Article 13; Judicial Review; Validity of successive promulgation of the same Ordinance (Articles 123, 213)

31.	<i>D. C. Wadhwa v. State of Bihar</i>	(1987) 1 SCC 378	159
32.	<i>A. K. Roy v. Union of India</i>	(1982) 1 SCC 271	
33.	<i>Krishna Kumar Singh v. State of Bihar</i>	(2017) 3 SCC 1	165

Topic 6 – Union and State Judiciary (7 Classes)

Part-I Composition, Appointment, Removal and Jurisdiction

a) The Union Judiciary: the Supreme Court of India (Articles 124-147); Composition, Appointment and Removal of Judges (Articles 124-130); Procedure (Article 145); the High Courts in the States (Articles 214-231)

34.	<i>Union of India v. Sankalchand Himatlal Sheth</i>	(1997) 4 SCC 193	
35.	<i>S. P. Gupta v. President of India</i>	(1981) Supp SCC 87	176
36.	<i>SC Advocates on Record Association v. UOI</i>	(1993) 4 SCC 441	
37.	<i>In re Special Reference No. 1 of 1998</i>	(1998) 7 SCC 739	193

38.	<i>SC Adv. on Record Association v. Union of India</i>	2016 (5) SCC 1	213
39.	<i>Shanti Bhushan v. Supreme Court of India through its Registrar</i>	(2018) 8 SCC 396	
40.	National Judicial Appointment Commission		243

b) Jurisdiction of Supreme Court: Original Exclusive (Articles 71, 131), Original Concurrent Jurisdiction of Supreme Court and High Courts (Articles 32, 226).

c) Appellate Jurisdiction of Supreme Court: Civil, Criminal and in other matters (Articles.132-135); Enlargement of Jurisdiction (Article 138); Binding nature of the law declared by the Supreme Court, enforcement of decrees and orders, (Articles 141 and 142)

d) Special Leave to Appeal (Article 136)

e) Power of Review (Article 137)

41.	<i>L. Chandra Kumar v. Union of India</i>	(1997) 3 SCC 261	245
42.	<i>Madras Bar Association v. Union of India</i>	(2014) 10 SCC 1	
43.	<i>Mohd. Arif v. The Reg. Supreme Court of India</i>	(2014) 9 SCC 737	

f) Advisory Jurisdiction (Article 143)

g) Curative Petition

44	<i>Rupa Ashok Hurra v. Ashok Hurra</i>	(2002) 4 SCC 388	
45	<i>Zakarius Lakra v. Union of India</i>	(2005) 3 SCC 161	

h) Writs – *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*

Part-II Procedural requirements and innovations

- a) Judicial Activism and overreach/self-restraint, *Locus Standi*, Laches, Res Judicata, Exhaustion of Alternative Remedies and Public Interest Litigation – PIL (Concept of pro bono public)

46	<i>Daryao v. State of UP</i>	AIR 1961 SC 1457	
47	<i>Trilokchand Motichand v. H.B. Munshi</i>	(1969)1 SCC 110	
48	<i>Bandhua Mukti Morcha v. Union of India</i>	(1984) 3 SCC 161	

- b) Power to issue appropriate orders and directions; Power to award Compensation

49	<i>Rudul Sah v. State of Bihar</i>	AIR 1983 SC 1086	
50	<i>M.C. Mehta v. Union of India</i>	AIR 1987 SC 1086	

Topic 7 – Distribution of Legislative Powers (14 Classes)

Articles 245 – 255, Schedule VII

- a) Doctrine of Territorial Nexus (Article 245)

51.	<i>Tata Iron & Steel Co. Ltd. v. State of Bihar</i>	AIR 1958 SC 452	
52.	<i>State of Bombay v. R. M. D. C.</i>	AIR 1957 SC 699	
53.	<i>State of Bihar v. Charusila Dasi</i>	AIR1959 SC 1002	252
54.	<i>G.V.K. Industries v. Income Tax Officer</i>	(2011) 4 SCC 36	258

- b) Subject-matter of laws made by Parliament/Legislatures of States; Position of Union Territories (Article 246)

- c) Interpretation of legislative lists:

- Plenary and Ancillary Power of Legislation
- Effect of *Non Obstante Clause*
- Doctrine of Harmonious Construction

55.	<i>In Re C P & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938</i>	AIR 1939 FC 1	271
56.	<i>Gujarat University v. Krishna Ranganath Mudholkar</i>	AIR 1963 SC 703	284

- Doctrine of Pith and Substance

57.	<i>Prafulla Kumar v. Bank of Commerce, Khulna</i>	AIR 1947 PC 60	293
58.	<i>State of Rajasthan v. G. Chawla</i>	AIR 1959 SC 544	300
59.	<i>State of Karnataka v. Drive-in Enterprises</i>	(2001) 4 SCC 60	304

- Colourable Exercise of Legislative Power

60.	<i>K.C. Gajapati Narayan Deo v. State of Orissa</i>	AIR 1953 SC 375	309
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d) Residuary Power of Legislation (Article 248)

61.	<i>Union of India v. H. S. Dhillon</i>	(1971) 2 SCC 779	324
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e) Parliament's Power to Legislate in List II (State List) – (Articles 246 (4), 247, 249-253, 352, 356)

f) Doctrine of Repugnancy (Article 254)

62.	<i>Zaverbhai v. State of Bombay</i>	AIR 1954 SC 752	336
63.	<i>Hoechst Pharmaceuticals Ltd. v. State of Bihar</i>	(1983) 4 SCC 45	342
64.	<i>Vijay Kr Sharma v. State of Karnataka</i>	(1990) 2 SCC 562	
65.	<i>State of Kerala v. Mar Appraem Kuri Company Ltd.</i>	(2012) 7 SCC 106	

Topic 8 – Freedom of Trade, Commerce and Intercourse (7 Classes)

Concept of trade and commerce; scope of freedom of trade, commerce and intercourse; fiscal measures; direct and immediate restrictions; regulatory measures; compensatory taxes; restrictions on trade, commerce and intercourse among states, power of Parliament and state legislatures; state monopoly (Articles 301-307)

66.	<i>G.K. Krishnan v. State of Tamil Nadu</i>	(1975) 1 SCC 375	
67.	<i>Shree Mahavir Oil Mills v. State of J. & K.</i>	(1996) 11 SCC 39	357
68.	<i>Jindal Stainless Ltd. v. State of Haryana</i>	(2017) 12 SCC 1	368

Topic 9 – Emergency Provisions (6 Classes)

- a) Proclamation of Emergency on grounds of war, external aggression and armed rebellion (Articles 352, 358, 359)
- b) Power of Union Executive to issue directions (e.g. Articles 256, 257) and the effect of non-compliance (Article 365); Duty of the Union to protect the States against external aggression and internal disturbance (Article 355)
- c) Imposition of President's Rule in States – Grounds, Limitations, Parliamentary Control, Judicial Review (Articles 356-357)
- d) Financial Emergency (Article 360)

69.	<i>State of Rajasthan v. Union of India,</i>	(1977) 3 SCC 592	
70.	<i>S. R. Bommai v. Union of India,</i>	(1994) 3 SCC 1	
71.	<i>Rameshwar Prasad v. Union of India,</i>	(2006) 2 SCC 1	379

Kesavananda Bharati v. State of Kerala

AIR 1973 SC 1461

(SM Sikri, C.J., J.M.Shelat,K.S.Hegde, A.N.Grover,A.N.Ray, P.Jaganmohan Reddy, D.G.Palekar, H.R.Khanna, K.K.Mathew, m.H.Beg, S.N. Dwivedi, A.K.Mukherjea and Y.V. Chandrachud, JJ.)

[The Supreme Court laid down the Theory of Basic Structure in this case. According to this theory, some of the provisions of the Constitution of India form its basic structure which are not amendable by Parliament by exercise of its constituent power under Article 368. See also Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299; Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789; Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., AIR 1983 SC 239; L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.]

In this case, the validity of 24th, 25th and 29th amendments to the Constitution of India was challenged. The main question was related to the nature, extent and scope of amending power of the Parliament under the Constitution. The views of the majority were as follows:

(1) ***I.C. Golak Nath v. State of Punjab***, AIR 1967 SC 1643 (which had held that fundamental rights were beyond the amending powers of Parliament) was overruled;

(2) The Constitution (Twenty-fourth Amendment) Act, 1971 (giving power to Parliament to amend any part of the Constitution) was valid;

(3) Article 368, as amended, was valid but it did not confer power on the Parliament to alter the basic structure or framework of the Constitution; The court, however, did not spell out in any exhaustive manner as to what the basic structure/framework was except that some judges gave a few examples.

(4) The amendment of Article 368(4) excluding judicial review of a constitutional amendment was unconstitutional.

(5) The amendment of Article 31C containing the words “and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy” was held invalid;

S.M. SIKRI C.J.: 90. This Preamble, and indeed the Constitution, was drafted in the light and direction of the Objectives Resolution adopted on January 22, 1947, which runs as follows:

(1) THIS CONSTITUENT ASSEMBLY declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;

(2) wherein the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States, as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

(3) wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilized nations; and

(8) this ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind.

91. While moving the resolution for acceptance of the Objectives Resolution, Pandit Jawaharlal Nehru said:

It seeks very feebly to tell the world of what we have thought or dreamt for so long, and what we now hope to achieve in the near future. It is in that spirit that I venture to place this Resolution before the House and it is in that spirit that I trust the House will receive it and ultimately pass it. And may I, Sir, also with all respect, suggest to you and to the House that, when the time comes for the passing of this Resolution let it be not done in the formal way by the raising of hands, but much more solemnly, by all of us standing up and thus taking this pledge a new.

135. The fundamental rights were considered of such importance that right was given to an aggrieved person to move the highest court of the land, i.e. the Supreme Court, by appropriate proceedings for the enforcement of the rights conferred by this part, and this was *guaranteed*. Article 32 (2) confers very wide powers on the Supreme Court, to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. Article 32(4) further provides that “the right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution”.

302. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that

every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said

- (1) Supremacy of the Constitution;
- (2) Republican and Democratic forms of Government;
- (3) Secular character of the Constitution;
- (4) Separation of powers between the legislature, the executive and the judiciary;
- (5) Federal character of the Constitution.

303. The above structure is built on the basic foundation, i. e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.

J.M. SHELAT & A.N. GROVER, JJ.:499. These petitions which have been argued for a very long time raise momentous issues of great constitutional importance. Our Constitution is unique, apart from being the longest in the world. It is meant for the second largest population with diverse people speaking different languages and professing varying religions. It was chiselled and shaped by great political leaders and legal luminaries, most of whom had taken an active part in the struggle for freedom from the British yoke and who knew what domination of a foreign rule meant in the way of deprivation of basic freedoms and from the point of view of exploitation of the millions of Indians. The Constitution is an organic document which must grow and it must take stock of the vast socio-economic problems, particularly of improving the lot of the common man consistent with his dignity and the unity of the nation.

503. Before the scheme of the Constitution is examined in some detail it is necessary to give the pattern which was followed in framing it. The Constituent Assembly was unfettered by any previous commitment in evolving a constitutional pattern "suitable to the genius and requirements of the Indian people as a whole". The Assembly had before it the experience of the working of the Government of India Act, 1935, several features of which could be accepted for the new Constitution. Our Constitution borrowed a great deal from the Constitutions of other countries, e. g. United Kingdom, Canada, Australia, Ireland, United States of America and Switzerland. The Constitution being supreme all the organs and bodies owe their existence to it. None can claim superiority over the other and each of them has to function within the four corners of the constitutional provisions. The Preamble embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the State which was to come into existence, i.e. a Sovereign Democratic Republic. Parts III and IV which embody the fundamental rights and directive principles of State policy have been described as the conscience of the Constitution. The legislative power distributed between the Union Parliament and the State Legislatures cannot be so exercised as to take away or abridge the fundamental rights contained in Part III. Powers of the Union and the States are further curtailed by conferring the right to enforce fundamental rights contained in Part III by moving the Supreme Court for a suitable relief, Article 32 itself has been constituted a fundamental right. Part IV containing the directive principles of State policy was inspired largely by similar provisions in the Constitution of the Eire Republic (1937). This part, according to B. N. Rao, is like an instrument of Instructions from the ultimate sovereign,

namely, the people of India. The Constitution has all the essential elements of a federal structure as was the case in the Government of India Act, 1935, the essence of federalism being the distribution of powers between the federation or the Union and the States or the provinces. All the Legislatures have plenary powers but these are controlled by the basic concepts of the Constitution itself and they function within the limits laid down in it. All the functionaries, be they legislators, members of the executive or the judiciary take oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions. The Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights. It is a written and controlled Constitution. It can be amended only to the extent of and in accordance with the provisions contained therein, the principal provision being Article 368. Although our Constitution is federal in its structure it provides a system modeled on the British parliamentary system. It is the executive that has the main responsibility for formulating the governmental policy by "transmitting it into law" whenever necessary. "The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State". With regard to the civil services and the position of the judiciary, the British model has been adopted in as much as the appointment of judges both of the Supreme Court of India and of the High Courts of the States is kept free from political controversies. Their independence has been assured. But the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections.

K.S. HEGDE & MUKHERJEA, JJ.:667. We find it difficult to accept the contention that our Constitution-makers after making immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of those ideals. There is no doubt as men of experience and sound political knowledge, they must have known that social, economic and political changes are bound to come with the passage of time and the Constitution must be capable of being so adjusted as to be able to respond to those new demands. Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. In other words, one cannot legally use the Constitution to destroy itself. Under Article 368 the amended Constitution must remain 'the Constitution' which means the original Constitution. When we speak of the 'abrogation' or 'repeal' of the Constitution, we do not refer to any form but to substance. If one or more of the basic features of the Constitution are taken away to that extent the Constitution is abrogated or repealed. If all the basic features of the Constitution are repealed and some other provisions inconsistent

with those features are incorporated, it cannot still remain the Constitution referred to in Article 368. The personality of the Constitution must remain unchanged.

PALEKAR, J.—1229. Since fundamental questions with regard to the Constitution have been raised, it will be necessary to make a few prefatory remarks with regard to the Constitution. The Constitution is not an indigenous product. Those who framed it were thoroughly acquainted with the Constitutions and constitutional problems of the more important countries in the world, especially, the English-speaking countries. They knew the Unitary and Federal types of Constitutions and the Parliamentary and Presidential systems of Government. They knew what constitutions were regarded as “flexible” constitution and what constitutions were regarded as “rigid” constitutions. They further knew that in all modern written constitutions special provision is made for the amendment of the Constitution. Besides, after the Government of India Act, 1935, this country had become better acquainted at first hand, both with the Parliamentary system of Government and the frame of a Federal constitution with distribution of powers between the Centre and the States. All this knowledge and experience went into the making of our Constitution which is broadly speaking a quasi- Federal constitution which adopted the Parliamentary system of Government based on adult franchise both at the Centre and in the States.

1220. The two words mentioned above ‘flexible’ and ‘rigid’ were first coined by Lord Bryce to describe the English constitution and the American constitution respectively. The words were made popular by Dicey in his *Law of the Constitution* first published in 1885. Many generations of lawyers, thereafter, who looked upon Dicey as one of the greatest expositors of the law of the constitution became familiar with these words. A ‘flexible’ constitution is one under which every law of every description (including one relating to the constitution) can legally be *changed* with the same ease and in the same manner by one and the same body. A ‘rigid’ constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. It will be noted that the emphasis is on the word ‘change’ in denoting the distinction between the two types of constitutions. Lord Birkenhead in delivering the judgment of the Judicial Committee of the Privy Council in *Mc Cawley v. The King* [1920 AC 691], used the words ‘uncontrolled’ and ‘controlled’ for the words ‘flexible’ and ‘rigid’ respectively which were current then. He had to examine the type of constitution Queensland possessed, whether it was a ‘flexible’ constitution or a ‘rigid’ one in order to decide the point in controversy. He observed at page 703 ‘The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality and in some cases by a specially convened assembly’. He had to do that because the distinction between the two types of constitutions was vital to the decision of the controversy before the Privy Council. At page 704 he further said ‘Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a ‘controlled’ and the other an ‘uncontrolled’ constitution as by any other nomenclature’. Perhaps this was an apology for not using the words ‘rigid’ and ‘flexible’

which were current when he delivered the judgment. In fact, Sir John Simon in the course of his arguments in that case had used the words 'rigid' and 'flexible' and he had specifically referred to Dicey's, *Law of the Constitution*. Strong in his text-book on *Modern Political Constitutions*, Seventh revised edition, 1966 says at p. 153 "The sole criterion of a rigid constitution is whether the Constituent Assembly which drew up the Constitution left any special directions as to how it was to be changed. If in the Constitution there are no such directions, or if the directions explicitly leave the Legislature a free hand, then the Constitution is 'flexible'."

H.R. KHANNA, J.:1448. The approach while determining the validity of an amendment of the Constitution, in my opinion, has necessarily to be different from the approach to the question relating to the legality of amendment of pleadings. A Constitution is essentially different from pleadings filed in court of litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State, viz., the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of people. Besides laying down the norms for the functioning of different organs a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration. A Constitution, it needs to be ~~emphasised~~ emphasized, is not a document for fastidious dialectics but the means of ordering the life of a people. It had (*sic*) its roots in the past, its continuity is reflected in the present and it is intended for the unknown future. The words of Holmes while dealing with the U.S. Constitution have equal relevance for our Constitution. Said the great Judge:

(T)he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

It is necessary to keep in view Marshall's great premises that "It is a Constitution we are expounding". To quote the words of Felix Frankfurter in his tribute to Holmes:

Whether the Constitution is treated primarily as a text for interpretation or as an instrument of government may make all the difference in the word. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society.

K.K. MATHEW, J.:1563. Every well-drawn Constitution will therefore provide for its own amendment in such a way as to forestall as is humanly possible all revolutionary upheavals. That the Constitution is a framework of great governmental powers to be exercised

for great public ends in the future, is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power. No existing Constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth. Human societies keep changing; needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it, may burst forth with an intensity that exacts more than reasonable satisfaction. As Wilson said, a living Constitution must be Darwinian in structure and practice. The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment". If the experiment fails, there must be provision for making another. Jefferson said that there is nothing sanctimonious about a Constitution and that nobody should regard it as the Ark of the Covenant, too sacred to be touched. Nor need we ascribe to men of preceding age, a wisdom more than human and suppose that what they did should be beyond amendment. A Constitution is not an end in itself, rather a means for ordering the life of a nation. The generation of yesterday might not know the needs of today, and, 'if yesterday is not to paralyse today', it seems best to permit each generation to take care of itself. The sentiment expressed by Jefferson in this behalf was echoed by Dr Ambedkar. If there is one sure conclusion which I can draw from this speech of Dr Ambedkar, it is this: He could not have conceived of any limitation upon the amending power. How could he have said that what Jefferson said is "not merely true but absolutely true", unless he subscribed to the view of Jefferson that "each generation is a distinct nation with a right, by the will of the majority to bind themselves but none 'to bind the succeeding generations more than the inhabitants of another country", and its corollary which follows as 'the night the day' that each generation should have the power to determine the structure of the Constitution under which they live. And how could this be done unless the power of amendment is plenary, for it would be absurd to think that Dr Ambedkar contemplated a resolution in every generation for changing the Constitution to suit its needs and aspirations. I should have thought that if there is any implied limitation upon any power, that limitation is that the amending body should not limit the power of amendment of the future generation by exercising its power to amend the amending power. Mr Palkhivala said that if the power of amendment of the amending power is plenary, one generation can, by exercising that power, take away the power of amendment of the Constitution from the future generations and foreclose them from ever exercising it. I think the argument is too speculative to be countenanced. It is just like the argument that if men and women are given the freedom to choose their vocations in life, they would all jump into a monastery or a nunnery, as the case may be, and prevent the birth of a new generation; or the argument of some political thinkers that if freedom of speech is allowed to those who do not believe in it, they would themselves deny it to others when they get power and, therefore, they should be denied that freedom today, in order that they might not deny it to others tomorrow.

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S. R. Bommai. Union of India

1994 (3) SCC 1

(S.Ratnavel Pandian, A.M.Ahmadi, Kuldip Singh, J.S.Verma, P.B.Sawant, K.Ramaswamy, S.C.Agrawal, Yogeshwar Dayal and B.P.Jeevan Reddy, JJ.)

[*President's Rule in States under Article 356 – grounds and scope of judicial review*]

In this case, the court examined issues such as the nature of Indian Constitution, certain aspects of the centre-state relations, circumstances under which imposition of President's rule in the states could be justified, scope of judicial review of President's satisfaction in imposing President's rule in a State, dissolution of the State Assembly and the effect of dissolution on disapproval of the proclamation by Parliament, power of the Supreme Court to invalidate the proclamation and its effect on the dissolution of the Assembly.

FACTS IN S.R. BOMMAI'S APPEAL

On March 5, 1985 elections were held to the Karnataka State Legislative Assembly. The Janata Dal won 139 seats out of 225 seats and the Congress Party was the next largest party securing 66 seats. Shri R.K. Hegde was elected as the leader of Janata Dal and became the Chief Minister. Due to his resignation on August 12, 1988, Shri S.R. Bommai, was elected as leader of the party and became the Chief Minister. As on February 1, 1989, the strength of Janata Dal was 111; the Congress 65 and Janata Party 27, apart from others. On April 15, 1989, the expansion of the Ministry caused dissatisfaction to some of the aspirants. One Kalyan Molakery and others defected from Janata Dal and he wrote letters on April 17 and 18, 1989 to the Governor enclosing the letters of 19 others expressing want of confidence in Shri Bommai. On April 19, 1989, the Governor of Karnataka sent a report to the President. On April 20, 1989, 7 out of 19 MLAs that supported Kalyan Molakery, wrote to the Governor that their signatures were obtained by misrepresentation and reaffirmed their support to Shri Bommai. On the same day, the Cabinet also decided to convene the Assembly session on April 27, 1989 at 3.30 p.m. to obtain vote of confidence. Shri Bommai met the Governor and requested him to allow floor-test to prove his majority and he was prepared even to advance the date of the session. In this scenario, the Governor sent his second report to the President and exercising the power under Article 356, the President issued Proclamation, dismissed Bommai government and dissolved the Assembly on April 21, 1989 and assumed the administration of the State of Karnataka. When a writ petition was filed on April 26, 1989, a special bench of three Judges of the High Court of Karnataka dismissed the writ petition [***S.R. Bommai. Union of India***, AIR 1990 Kant. 5].

SRI RAM JANMABHOOMI-BABRI MASJID ISSUE

In the elections held in February, 1990, the Bhartiya Janata Party [BJP] emerged as majority party in the Legislative Assemblies of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh and formed the Governments in the respective States. One of the programmes of the BJP was to construct a temple for Lord Sri Rama at his birthplace Ayodhya. That was made an issue in its manifesto for the

elections to the Legislative Assemblies. On December 6, 1992, Ram Janmabhoomi-Babri Masjid structure (there is a dispute that after destroying Lord Sri Rama temple Babur, the Moghul invader, built Babri Masjid at the birthplace of Lord Sri Rama. It is an acutely disputed question as to its correctness.) However, Ram Janmabhoomi- Babri Masjid structure was demolished by the *karsevaks* gathered at Ayodhya, as a result of sustained momentum generated by BJP, Vishwa Hindu Parishad [VHP] RashtriyaSwayamsevakSangh [RSS] Bajrang Dal [BD] Shiv Sena [SS] and other organisations. Preceding thereto when the dispute was brought to this Court, the Government of India was made to act on behalf of the Supreme Court and from time to time directions were issued to the State Government which gave an assurance of full protection to Sri Ram Janmabhoomi-Babri Masjid structure. On its demolition, though the Government of Uttar Pradesh resigned, the President of India by Proclamation issued under Article 356 dissolved the State Legislature on December 6, 1992. The disastrous fall out of the demolition was in the nature of loss of precious lives of innocents, and property throughout the country and in the neighboring countries. The President, therefore, exercised the power under Article 356 and by the Proclamations of December 15, 1992, dismissed the State Governments and dissolved the Legislative Assemblies of Rajasthan, Madhya Pradesh and Himachal Pradesh and assumed administration of the respective States.

A.M. AHMADI, J.: 13. India, as the Preamble proclaims, is a Sovereign, Socialist, Secular, Democratic Republic. It promises liberty of thought, expression, belief, faith and worship, besides equality of status and opportunity. What is paramount is the unity and integrity of the nation. In order to maintain the unity and integrity of the nation our Founding Fathers appear to have leaned in favour of a strong Centre while distributing the powers and functions between the Centre and the States. This becomes obvious from even a cursory examination of the provisions of the Constitution. There was considerable argument at the Bar on the question whether our Constitution could be said to be 'Federal' in character.

14. In order to understand whether our Constitution is truly federal, it is essential to know the true concept of federalism. Dicey calls it a political contrivance for a body of States which desire Union but not unity. Federalism is, therefore, a concept which unites separate States into a Union without sacrificing their own fundamental political integrity. Separate States, therefore, desire to unite so that all the member-States may share in formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies. Thus the essence of a federation is the existence of the Union and the States and the distribution of powers between them. Federalism, therefore, essentially implies demarcation of powers in a federal compact.

15. The oldest federal model in the modern world can be said to be the Constitution of the United States of America. The American Federation can be described as the outcome of the process of evolution, in that, the separate States first formed into a Confederation (1781) and then into a Federation (1789). Although the States may have their own Constitutions, the Federal Constitution is the *suprema lex* and is made binding on the States. That is because under the American Constitution, amendments to the Constitution are required to be ratified

by three-fourths of the States. Besides under that Constitution there is a single legislative list enumerating the powers of the Union and, therefore, automatically the other subjects are left to the States. This is evident from the Tenth Amendment. Of course, the responsibility to protect the States against invasion is of the Federal Government. The States are, therefore, prohibited from entering into any treaty, alliance, etc., with any foreign power. The principle of dual sovereignty is carried in the judicial set-up as well since disputes under federal laws are to be adjudicated by federal courts, while those under State laws are to be adjudicated by State courts, subject of course to an appeal to the Supreme Court of the United States. The interpretation of the Constitution is by the United States Supreme Court.

16. We may now read some of the provisions of our Constitution. Article 1 of the Constitution says : “India, that is Bharat, shall be a Union of States.” Article 2 empowers Parliament to admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Under Article 3, Parliament can by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; increasing the area of any State; diminishing the area of any State; altering the boundaries of any State; or altering the name of any State. The proviso to that article requires that the Bill for the purpose shall not be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon. On a conjoint reading of these articles, it becomes clear that Parliament has the right to form new States, alter the areas of existing States, or the name of any existing State. Thus the Constitution permits changes in the territorial limits of the States and does not guarantee their territorial integrity. Even names can be changed. Under Article 2 it is left to Parliament to determine the terms and conditions on which it may admit any area into the Union or establish new States. In doing so, it has not to seek the concurrence of the State whose area, boundary or name is likely to be affected by the proposal. All that the proviso to Article 3 requires is that in such cases the President shall refer the Bill to the Legislatures of the States concerned likely to be affected “to express their views”. Once the views of the States are known, it is left to Parliament to decide on the proposed changes. Parliament can, therefore, without the concurrence of the State or States concerned change the boundaries of the State or increase or diminish its area or change its name. These provisions show that in the matter of constitution of States, Parliament is paramount. This scheme substantially differs from the federal set-up established in the United States of America. The American States were independent sovereign States and the territorial boundaries of those independent States cannot be touched by the Federal Government. It is these independent sovereign units which together decided to form into a federation unlike in India where the States were not independent sovereign units but they were formed by Article 1 of the Constitution and their areas and boundaries could, therefore, be altered, without their concurrence, by Parliament. It is well-known that since independence, new States have been created, boundaries of existing States have been altered, States have been renamed and individual States have been extinguished by parliamentary legislation.

17. Our Founding Fathers did not deem it wise to shake the basic structure of Government and in distributing the legislative functions they, by and large, followed the pattern of the Government of India Act, 1935. Some of the subjects of common interest were, however, transferred to the Union List, thereby enlarging the powers of the Union to enable speedy and planned economic development of the nation. The scheme for the distribution of powers between the Union and the States was largely maintained except that some of the subjects of common interest were transferred from the Provincial List to the Union List thereby strengthening the administrative control of the Union. It is in this context that this Court in *State of W.B. v. Union of India* [AIR 1963 SC 1241] observed:

The exercise of powers, legislative and executive, in the allotted fields is hedged in by the numerous restrictions, so that the powers of the States are not co-ordinate with the Union and are not in many respects independent.

18. In *Union of India v. H.S. Dhillon* [(1971) 2 SCC 779] another feature in regard to the distribution of legislative power was pointed out, in that, under the Government of India Act, 1935, the residuary power was not given either to the Union Legislature or to the provincial legislatures, but under our Constitution, by virtue of Article 248, read with Entry 97 in List I of the VII Schedule, the residuary power has been conferred on the Union. This arrangement substantially differs from the scheme of distribution of powers in the United States of America where the residual powers are with the States.

19. The Preamble of our Constitution shows that the people of India had resolved to constitute India into a Sovereign Secular Democratic Republic and promised to secure to all its citizens Justice, Liberty and Equality and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. In the people of India, therefore, vests the legal sovereignty while the political sovereignty is distributed between the Union and the States. Article 73 extends the executive power of the Union to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. The executive power which is made co-extensive with Parliament's power to make laws shall not, save as expressly provided by 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. Article 162 stipulates that the executive power of a State shall extend to matters with respect to which the Legislature of the State has power to make laws provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. It may also be noticed that the executive power of every State must be so exercised as not to impede or prejudice the exercise of the executive power by the Union. The executive power of the Union also extends to giving such directions to a State as may appear to the Government of India to be necessary for those purposes and as to the construction, maintenance of means of communication declared to be of national or military importance and for protection of railways. The States have to depend largely on financial assistance from the Union. Under the scheme of Articles 268 to 273, States are in certain cases allowed to collect and retain duties imposed by the Union; in other

cases taxes levied and collected by the Union are assigned to the States and in yet other cases taxes levied and collected by the Union are shared with States. Article 275 also provides for the giving of grants by the Union to certain States. There is, therefore, no doubt that States depend for financial assistance upon the Union since their power to raise resources is limited. As economic planning is a concurrent subject, every major project must receive the sanction of the Central Government for its financial assistance since discretionary power under Article 282 to make grants for public purposes is vested in the Union or a State, notwithstanding that the purpose is one in respect to which Parliament or State Legislature can make laws. It is only after a project is finally sanctioned by the Central Government that the State Government can execute the same which demonstrates the control that the Union can exercise even in regard to a matter on which the State can legislate. In addition to these controls Article 368 confers powers on Parliament to amend the Constitution, *albeit* by a specified majority. The power extends to amending matters pertaining to the executive as well as legislative powers of the States if the amendments are ratified by the legislatures of not less than one-half of the States. This provision empowers Parliament to so amend the Constitution as to curtail the powers of the States. A strong Central Government may not find it difficult to secure the requisite majority as well as ratification by one-half of the legislatures if one goes by past experience. These limitations taken together indicate that the Constitution of India cannot be said to be truly federal in character as understood by lawyers in the United States of America.

20. In *State of Rajasthan v. Union of India* [AIR 1977 SC 1361], Beg, C.J., observed as under:

A conspectus of the provisions of our Constitution will indicate that, whatever appearance of a federal structure our Constitution may have, its operations are certainly, judged both by the contents of power which a number of its provisions carry with them and the use that has been made of them, more unitary than federal.

Further, the learned Chief Justice proceeded to add:

In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government.

Pointing out that national planning involves disbursement of vast amount of money collected as taxes from citizens spread over all the States and placed at the disposal of the Central Government for the benefit of the States, the learned Chief Justice proceeds to observe:

If then our Constitution creates a Central Government which is 'amphibian', in the sense that it can move either on the federal or unitary plane, according to the needs of the situation and circumstances of a case, the question which we are driven back to consider is whether an assessment of the 'situation' in which the Union Government should move either on the federal or unitary plane are matters for the Union Government itself or for this Court to consider and determine.

When the Union Government issued a notification dated May 23, 1977 constituting a Commission of Inquiry in exercise of its power under Section 3 of the Commissions of Inquiry Act, 1952, to inquire into certain allegations made against the Chief Minister of the State, the State of Karnataka instituted a suit under Article 131 of the Constitution challenging the legality and validity of the notification as unjustifiable trespass upon the domain of State powers. While dealing with the issues arising in that suit [*State of Karnataka v. Union of India*, AIR 1978 SC 68], Beg, C.J., once again examined the relevant provisions of the Constitution and the Commissions of Inquiry Act, 1952, and observed in (AIR) paragraph 33 as under:

In our country, there is, at the top, a Central or the Union Government responsible to Parliament, and there are, below it, State Governments, responsible to the State Legislatures, each functioning within the sphere of its own powers which are divided into two categories, the exclusive and the concurrent. Within the exclusive sphere of the powers of the State Legislature is local government. And, in all States there is a system of local government in both urban and rural areas, functioning under State enactments. Thus, we can speak of a three tier system of Government in our country in which the Central or the Union Government comes at the apex.....

It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of governmental powers of State and Central Governments, is overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central Government the executive power of appointing certain constitutional functionaries including High Court and Supreme Court Judges and issuing appropriate directions to the State Governments and even displacing the State Legislatures and the Governments in emergency situations, vide Articles 352 to 360 of the Constitution.

21. It is common knowledge that shortly after we constituted ourselves into a Republic, the Princely States gradually disappeared leading to the unification of India into a single polity with duality of governmental agencies for effective and efficient administration of the country under central direction and, if I may say so, supervision. The duality of governmental organs on the Central and State levels reflect demarcation of functions in a manner as would ensure the sovereignty and integrity of our country. The experience of partition of the country and its aftermath had taught lessons which were too fresh to be forgotten by our Constitution-makers. It was perhaps for that reason that our Founding Fathers thought that a strong Centre was essential to ward off separatist tendencies and consolidate the unity and integrity of the country.

22. A Division Bench of the Madras High Court in *M. Karunanidhi v. Union of India* [AIR 1977 Mad. 192], while dealing with the contention that the Constitution is a federal one and that the States are autonomous having definite powers and independent rights to govern, and the Central Government has no right to interfere in the governance of the State, observed as under:

[T]here may be a federation of independent States, as it is in the case of United States of America. As the name itself denotes, it is a Union of States, either by treaty or by

legislation by the concerned States. In those cases, the federating units gave certain powers to the federal Government and retained some. To apply the meaning to the word 'federation' or 'autonomy' used in the context of the American Constitution, to our Constitution will be totally misleading.

After tracing the history of the governance of the country under the British rule till the framing of our Constitution, the Court proceeded to add as follows:

The feature of the Indian Constitution is the establishment of a Government for governing the entire country. In doing so, the Constitution prescribes the powers of the Central Government and the powers of the State Governments and the relations between the two. In a sense, if the word 'federation' can be used at all, it is a federation of various States which were designated under the Constitution for the purpose of efficient administration and governance of the country. The powers of the Centre and States are demarcated under the Constitution. It is futile to suggest that the States are independent, sovereign or autonomous units which had joined the federation under certain conditions. No such State ever existed or acceded to the Union.

23. Under our Constitution the State as such has no inherent sovereign power or autonomous power which cannot be encroached upon by the Centre. The very fact that under our Constitution, Article 3, Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, etc., militates against the view that the States are sovereign or autonomous bodies having definite independent rights of governance. In fact, as pointed out earlier in certain circumstances the Central Government can issue directions to States and in emergency conditions assume far-reaching powers affecting the States as well, and the fact that the President has powers to take over the administration of States demolishes the theory of an independent or autonomous existence of a State. It must also be realised that unlike the Constitution of the United States of America which recognises dual citizenship [Section 1(1), 14th Amendment], the Constitution of India, Article 5, does not recognise the concept of dual citizenship. Under the American Constitution all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside whereas under Article 5 of the Indian Constitution at its commencement, every person domiciled in the territory of India and (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a citizen of India. Article 9 makes it clear that if any person voluntarily acquires the citizenship of any foreign country, he will cease to be a citizen of India. These provisions clearly negative the concept of dual citizenship, a concept expressly recognised under the American Constitution. The concept of citizenship assumes some importance in a federation because in a country which recognises dual citizenship, the individual would owe allegiance both to the Federal Government as well as the State Government but a country recognising a single citizenship does not face complications arising from dual citizenship and by necessary implication negatives the concept of State sovereignty.

24. Thus the significant absence of the expressions like 'federal' or 'federation' in the constitutional vocabulary, Parliament's powers under Articles 2 and 3 elaborated earlier, the extraordinary powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VIIth Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set-up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation 'federal' to the Indian Constitution.

Thus in the United States, the sovereign States enjoy their own separate existence which cannot be impaired; indestructible States having constituted an indestructible Union. In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc., and even curtail the power, both executive and legislative, by amending the Constitution. That is why the Constitution of India is differently described, more appropriately as 'quasi-federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions.

P.B. SAWANT, J. (*on behalf of Kuldip Singh, J. and himself*):— 97. We may in this connection, refer to the principles of federalism and democracy which are embedded in our Constitution. Article 1 of the Constitution states that India shall be a Union of States. Thus the States are constitutionally recognised units and not mere convenient administrative divisions. Both the Union and the States have sprung from the provisions of the Constitution. The learned author, H.M. Seervai, in his commentary *Constitutional Law of India* (p. 166, 3rd Edn.) has summed up the federal nature of our Constitution by observing that the federal principle is dominant in our Constitution and the principle of federalism has not been watered down for the following reasons:

(a) It is no objection to our Constitution being federal that the States were not independent States before they became parts of a Federation. A federal situation existed, first, when the British Parliament adopted a federal solution in the G.I. Act, 1935, and secondly, when the Constituent Assembly adopted a federal solution in our Constitution;

(b) Parliament's power to alter the boundaries of States without their consent is a breach of the federal principle, but in fact it is not Parliament which has, on its own, altered the boundaries of States. By extra-constitutional agitation, the States have forced Parliament to alter the boundaries of States. In practice, therefore, the federal principle has not been violated;

(c) The allocation of the residuary power of legislation to Parliament (i.e. the Federation) is irrelevant for determining the federal nature of a Constitution. The U.S. and the Australian Constitutions do not confer the residuary power on the Federation but on the States, yet those Constitutions are indisputably federal;

(d) External sovereignty is not relevant to the federal nature of a Constitution, for such sovereignty must belong to the country as a whole. But the division of internal sovereignty by a distribution of legislative powers is an essential feature of federalism, and our Constitution possesses that feature. With limited exceptions, the Australian Constitution confers overlapping legislative powers on the States and the Commonwealth, whereas List II, Schedule VII of our Constitution confers exclusive powers of legislation on the States, thus emphasising the federal nature of our Constitution;

(e) The enactment in Article 352 of the emergency power arising from war or external aggression which threatens the security of India merely recognises *de jure* what happens *de facto* in great federal countries like the U.S., Canada and Australia in times of war, or imminent threat of war, because in war, these federal countries act as though they were unitary. The presence in our Constitution of exclusive legislative powers conferred on the States makes it reasonable to provide that during the emergency created by war or external aggression, the Union should have power to legislate on topics exclusively assigned to the States and to take corresponding executive action. The Emergency Provisions, therefore, do not dilute the principle of Federalism, although the abuse of those provisions by continuing the emergency when the occasion which caused it had ceased to exist does detract from the principle of Federal Government. The amendments introduced in Article 352 by the 44th Amendment have, to a considerable extent, reduced the chances of such abuse. And by deleting the clauses which made the declaration and the continuance of emergency by the President conclusive, the 44th Amendment has provided opportunity for judicial review which, it is submitted, the courts should not lightly decline when as a matter of common knowledge, the emergency has ceased to exist. This deletion of the conclusive satisfaction of the President has been prompted not only by the abuse of the Proclamation of emergency arising out of war or external aggression, but, even more, by the wholly unjustified Proclamation of emergency issued in 1975 to protect the personal position of the Prime Minister;

(f) The power to proclaim an emergency originally on the ground of internal disturbance, but now only on the ground of armed rebellion, does not detract from the principle of federalism because such a power, as we have seen exists in indisputably federal constitutions. *Deb Sadhan Roy v. State of W.B.* [AIR 1972 SC 1924] has established that internal violence would ordinarily interfere with the powers of the federal Government to enforce its own laws and to take necessary executive action. Consequently, such interference can be put down with the total force of the United States, and the same position obtains in Australia;

(g) The provisions of Article 355 imposing a duty on the Union to protect a State against external aggression and internal disorder are not inconsistent with the federal principle. The war power belongs to the Union in all Federal Governments, and therefore the defence of a State against external aggression is essential in any Federal Government. As to internal disturbance, the position reached in *Deb* case shows that the absence of an application by the State does not materially affect the federal

principle. Such application has lost its importance in the United States and in Australia;

(h) Since it is of the essence of the federal principle that both federal and State laws operate on the same individual, it must follow that in case of conflict of a valid federal law and a valid State law, the federal law must prevail and our Constitution so provides in Article 254, with an exception noted earlier which does not affect the present discussion;

(i) It follows from what is stated in (g) above, that federal laws must be implemented in the States and that the federal executive must have power to take appropriate executive action under federal laws in the State, including the enforcement of those laws. Whether this is done by setting up in each State a parallel federal machinery of law enforcement, or by using the existing State machinery, is a matter governed by practical expediency which does not affect the federal principle. In the United States, a defiance of Federal law can be, and, as we have seen, has been put down by the use of Armed Forces of the U.S. and the National Militia of the States. This is not inconsistent with the federal principle in the United States. Our Constitution has adopted the method of empowering the Union Government to give directions to the States to give effect to the Union law and to prevent obstruction in the working of the Union law. Such a power, though different in form, is in substance the same as the power of the Federal Government in the U.S. to enforce its laws, if necessary by force. Therefore, the power to give directions to the State Governments does not violate the federal principle;

(j) Article 356 (read with Article 355) which provides for the failure of constitutional machinery was based on Article 4, Section 4 of the U.S. Constitution and Article 356, like Article 4, Section 4, is not inconsistent with the federal principle. As stated earlier, these provisions were meant to be the last resort, but have been gravely abused and can therefore be said to affect the working of the Constitution as a Federal Government. But the recent amendment of Article 356 by the 44th Amendment, and the submission to be made hereafter that the doctrine of the political question does not apply in India, show that the courts can now take a more active part in preventing a mala fide or improper exercise of the power to impose a President's rule, unfettered by the American doctrine of the political question;

(k) The view that unimportant matters were assigned to the States cannot be sustained in face of the very important subjects assigned to the States in List II, and the same applies to taxing powers of the States, which are made mutually exclusive of the taxing powers of the Union so that ordinarily the States have independent source of revenue of their own. The legislative entries relating to taxes in List II show that the sources of revenue available to the States are substantial and would increasingly become more substantial. In addition to the exclusive taxing powers of the States, the States become entitled either to appropriate taxes collected by the Union or to a share in the taxes collected by the Union.

98. In this connection, we may also refer to what Dr. Ambedkar had to say while answering the debate in the Constituent Assembly in the context of the very Articles 355, 356 and 357. The relevant portion of his speech has already been reproduced above. He has emphasised there that notwithstanding the fact that there are many provisions in the Constitution whereunder the Centre has been given powers to override the States, our Constitution is a federal Constitution. It means that the States are sovereign in the field which is left to them. They have a plenary authority to make any law for the peace, order and good Government of the State.

99. The above discussion thus shows that the States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union. They are neither satellites nor agents of the Centre. The fact that during emergency and in certain other eventualities their powers are overridden or invaded by the Centre is not destructive of the essential federal nature of our Constitution. The invasion of power in such circumstances is not a normal feature of the Constitution. They are exceptions and have to be resorted to only occasionally to meet the exigencies of the special situations. The exceptions are not a rule.

100. For our purpose, further it is really not necessary to determine whether, in spite of the provisions of the Constitution referred to above, our Constitution is federal, quasi-federal or unitary in nature. It is not the theoretical label given to the Constitution but the practical implications of the provisions of the Constitution which are of importance to decide the question that arises in the present context, viz., whether the powers under Article 356(1) can be exercised by the President arbitrarily and unmindful of its consequences to the governance in the State concerned. So long as the States are not mere administrative units but in their own right constitutional potentates with the same paraphernalia as the Union, and with independent Legislature and the Executive constituted by the same process as the Union, whatever the bias in favour of the Centre, it cannot be argued that merely because (and assuming it is correct) the Constitution is labelled unitary or quasi-federal or a mixture of federal and unitary structure, the President has unrestricted power of issuing Proclamation under Article 356(1). If the Presidential powers under the said provision are subject to judicial review within the limits discussed above, those limitations will have to be applied strictly while scrutinising the concerned material.

K. RAMASWAMI, J.: 165. Federalism implies mutuality and common purpose for the aforesaid process of change with continuity between the Centre and the States which are the structural units operating on balancing wheel of concurrence and promises to resolve problems and promote social, economic and cultural advancement of its people and to create fraternity among the people. Article 1 is a recognition of the history that Union of India's territorial limits are unalterable and the States are creatures of the Constitution and they are territorially alterable constituents with single citizenship of all the people by birth or residence with no right to cessation. Under Articles 2 and 4 the significant feature is that while the territorial integrity of India is fully ensured and maintained, there is a significant absence of the territorial integrity of the constituent States under Article 3. Parliament may by law form anew State by separation of territory from any State or by uniting two or more States or part of

States or uniting any territory to a part of any State or by increasing the area of any State or diminishing the area of any State, or alter the boundary of any State.

166. In *Berubari Union and Exchange of Enclaves Reference under Article 143(1) of the Constitution of India, in re* [AIR 1960 SC 845], Gajendragadkar, J. speaking for eight-judge Bench held that:

Unlike other federations, the Federation embodied in the said Act was not the result of a pact or union between separate and independent communities of States who came together for certain common purposes and surrendered a part of their sovereignty. The constituent units of the federation were deliberately created and it is significant that they, unlike the units of other federations, had no organic roots in the past. Hence, in the Indian Constitution, by contrast with other Federal Constitutions, the emphasis on the preservation of the territorial integrity of the constituent States is absent. The makers of the Constitution were aware of the peculiar conditions under which, and the reasons for which, the States (originally Provinces) were formed and their boundaries were defined, and so they deliberately adopted the provisions in Article 3 with a view to meet the possibility of the redistribution of the said territories after the integration of the Indian States. In fact it is well-known that as a result of the States Reorganisation Act, 1956 (Act XXXVII of 1956), in the place of the original 27 States and one Area which were mentioned in Part D in the First Schedule to the Constitution, there are now only 14 States and 6 other Areas which constitute the Union Territory mentioned in the First Schedule. The changes thus made clearly illustrate the working of the peculiar and striking feature of the Indian Constitution.

167. *Union and States Relations under the Constitution* (Tagore Law Lectures) by M.C. Setalvad at p. 10 stated that :

(O)ne notable departure from the accepted ideas underlying a federation when the power in the Central Government to redraw the boundaries of States or even to destroy them.

168. The Constitution decentralises the governance of the States by a four tier administration i.e. Central Government, State Government, Union Territories, Municipalities and Panchayats. *See* the Constitution for Municipalities and Panchayats: Part IX (Panchayats) and Part IX-A (Municipalities) introduced through the Constitution 73rd Amendment Act, making the peoples' participation in the democratic process from grass-root level a reality. Participation of the people in governance of the State is *sine qua non* of functional democracy. Their surrender of rights to be governed is to have direct encounter in electoral process to choose their representatives for resolution of common problems and social welfare. Needless interference in self-governance is betrayal of their faith to fulfill self-governance and their democratic aspirations. The constitutional culture and political morality based on healthy conventions are the fruitful soil to nurture and for sustained growth of the federal institutions set down by the Constitution. In the context of the Indian Constitution federalism is not based on any agreement between federating units but one of integrated whole as pleaded with vision by Dr. B.R. Ambedkar on the floor of the Constituent Assembly at the very inception of the deliberations and the Constituent Assembly unanimously approved the

resolution of federal structure. He poignantly projected the pitfalls flowing from the word “federation”.

169. The federal State is a political convenience intended to reconcile national unity and integrity and power with maintenance of the State’s right. The end aim of the essential character of the Indian federalism is to place the nation as a whole under control of a national Government, while the States are allowed to exercise their sovereign power within their legislative and coextensive executive and administrative sphere. The common interest is shared by the Centre and the local interests are controlled by the States. The distribution of the legislative and executive power within limits and coordinate authority of different organs are delineated in the organic law of the land, namely the Constitution itself. The essence of federalism, therefore, is distribution of the power of the State among its coordinate bodies. Each is organised and controlled by the Constitution. The division of power between the Union and the States is made in such a way that whatever has been the power distributed, legislative and executive, be exercised by the respective units making each a sovereign in its sphere and the rule of law requires that there should be a responsible Government. Thus the State is a federal status. The State qua the Centre has quasi-federal unit. In the language of Prof. K.C. Wheare in his *Federal Government*, 1963 Edn. at page 12 to ascertain the federal character, the important point is, “whether the powers of the Government are divided between coordinate independent authorities or not”, and at page 33 he stated that “the systems of Government embody predominantly on division of powers between Centre and regional authority each of which in its own sphere is coordinating with the other independent as of them, and if so is that Government federal?”

170. Salmond in his *Jurisprudence*, 9th Edn. brought out the distinction between unitary type of Government and federal form of Government. According to him a unitary or a simple State is one which is not made up of territorial divisions which are States themselves. A composite State on the other hand is one which is itself an aggregate or group of constituent States. Such composite States can be called as imperial, federal or confederate. The Constitution of India itself provided the amendments to territorial limits from which we discern that the federal structure is not obliterated but regrouped with distribution of legislative powers and their scope as well as the coextensive executive and administrative powers of the Union and the States. Articles 245 to 255 of the Constitution deal with relative power of the Union and the State Legislature read with Schedule VII of the Constitution and the entries in List I preserved exclusively to Parliament to make law and List II confined solely to the State Legislature and List III Concurrent List in which both Parliament as well the State Legislature have concurrent jurisdiction to make law in the occupied field, with predominance to the law made by Parliament, by operation of proviso to clause (2) of Article

254. Article 248, gives residuary legislative powers exclusively to Parliament to make any law with respect to any matters not enumerated in the Concurrent List or the State List including making any law imposing a tax not mentioned in either of those lists. The relative importance of entries in the respective lists to the VIIth Schedule assigned to Parliament or a State Legislature are is neither relevant nor decisive though contended by Shri K. Parasaran. Indian federalism is in contradistinction to the federalism prevalent in USA, Australia and Canada.

171. In regard to distribution of executive powers the Constitution itself made demarcation between the Union and the States. Article 73(1) read with proviso and Article 162 read with proviso bring out this demarcation. The executive power of the Union and the State are coextensive with their legislative powers. However, during the period of emergency Articles 352 and 250 envisage certain contingencies in which the executive power of the State concerned would be divested and taken over by the Union of India which would last up to a period of 6 months, after that emergency in that area is so lifted or ceased.

172. The administrative relations are regulated by Articles 256 and 258-A for effective working of the Union Executive without in any way impeding or impairing the exclusive and permissible jurisdiction of the State within the territory. Articles 268 and 269 enjoin the Union to render financial assistance to the States. The Constitution also made the Union to depend on the States to enforce the Union law within States concerned. The composition of Rajya Sabha as laid down by Article 80 makes the Legislature of the State to play its part including the one for ratifying the constitutional amendments made by Article 368. The election of the President through the elected representatives of the State Legislatures under Article 54 makes the legislatures of federal units an electoral college. The legislature of the State has exclusive power to make laws for such State or any part thereto with respect to any of the matters enumerated in List II of the VIIIth Schedule by operation of Article 246(3) of the Constitution.

173. The Union of India by operation of Articles 240 and 245, subject to the provisions of the Constitution, has power to make laws for the whole or any part of the territory of India and the said law does not eclipse, nor become invalid on the ground of extraterritorial operation. In the national interest it has power to make law in respect of entries mentioned in List II, State List, in the penal field, as indicated in Article 249. With the consent of the State, it has power to make law under Article 252. The Union Judiciary, the Supreme Court of India, has power to interpret the Constitution and decide the disputes between Union and the States and the States inter se. The law laid down by the Supreme Court is the law of the land under Article 141. The High Court has judicial power over territorial jurisdiction over the area over which it exercises power including control over lower judiciary. Article 261 provides full faith and credit to the proceedings or public acts or judicial proceedings of the Union and of the States throughout the territory of India as its fulcrum. Indian Judiciary is unitary in structure and operation. Articles 339, 344, 346, 347, 353, 358, 360, 365 and 371-C(2) give power to the Union to issue directions to the States. Under Article 339(2) the Union has power to issue directions relating to tribal welfare and the State is enjoined to implement the same. In an emergency arising out of war or aggression or armed rebellion, contemplated under Article 352 or emergency due to failure of the constitutional machinery in a State envisaged under Article 356, or emergency in the event of threat to the financial stability or credit of India, Article 360 gives dominant power to the Union. During the operation of emergency Article 19 of the Constitution would become inoperative and the Centre assumes the legislative power of a State unit. Existence of All India Services under Article 312 and establishment of inter-State councils under Article 263 and existence of financial relations in Part XII of the Constitution also indicates the scheme of distribution of the revenue and the primacy to the Union to play its role. Establishment of Finance Commission for

recommendations to the President under Article 280 for the distribution of revenue between the Union and the States and allocation of the respective shares of such inter-State trade and commerce envisaged in Part XIII of the Constitution and primacy to the law made therein bring out, though strongly in favour of unitary character, but suggestively for balancing operational federal character between the Union and the States make the Constitution a quasi- federal.

174. As earlier stated, the organic federalism designed by the Founding Fathers is to suit the parliamentary form of Government to suit the Indian conditions with the objective of promoting mutuality and common purpose rendering social, economic and political justice, equality of status and opportunity; dignity of person to all its citizens transcending regional, religious, sectional or linguistic barriers as complimentary units in working the Constitution without confrontation. Institutional mechanism aimed to avoid friction to promote harmony, to set constitutional culture on firm foothold for successful functioning of the democratic institutions, to bring about matching political culture adjustment and distribution of the roles in the operational mechanism are necessary for national integration and transformation of stagnant social order into vibrant egalitarian social order with change and continuity economically, socially and culturally. In the *State of W.B. v. Union of India*, this Court laid emphasis that the basis of distribution of powers between Union and the States is that only those powers and authorities which are concerned with the regulation of local problems are vested in the State and those which tend to maintain the economic nature and commerce, unity of the nation are left with the Union. In *Shamsher Singh v. Union of India* [(1974) 2 SCC 831] this Court held that parliamentary system of quasi-federalism was accepted rejecting the substance of Presidential style of Executive. Dr. Ambedkar stated on the floor of the Constituent Assembly that the Constitution is, “both unitary as well as federal according to the requirement of time and circumstances”. He also further stated that the Centre would work for common good and for general interest of the country as a whole while the States work for local interest. He also refuted the plea for exclusive autonomy of the States. It would thus appear that the overwhelming opinion of the Founding Fathers and the law of the land is to preserve the unity and territorial integrity of the nation and entrusted the common wheel (*sic weal*) to the Union insulating from future divisive forces or local zealots with disintegrating India. It neither leaned heavily in favour of wider powers in favour of the Union while maintaining to preserve the federal character of the States which are an integral part of the Union. The Constitution being permanent and not self-destructive, the Union of India is indestructible. The democratic form of Government should nurture and work within the constitutional parameters provided by the system of law and balancing wheel has been entrusted in the hands of the Union Judiciary to harmonise the conflicts and adopt constitutional construction to subserve the purpose envisioned by the Constitution.

B.P. JEEVAN REDDY, J.:274. The expression “federation” or “federal form of Government” has no fixed meaning. It broadly indicates a division of powers between a Central (federal) Government and the units (States) comprised therein. No two federal constitutions are alike. Each of them, be it of USA, Canada, Australia or of any other country, has its own distinct character. Each of them is the culmination of certain historical process. So

is our Constitution. It is, therefore, futile to try to ascertain and fit our Constitution into any particular mould. It must be understood in the light of our own historical process and the constitutional evolution. One thing is clear — it was not a case of independent States coming together to form a Federation as in the case of USA.

275. A review of the provisions of the Constitution shows unmistakably that while creating a federation, the Founding Fathers wished to establish a strong Centre. In the light of the past history of this sub-continent, this was probably a natural and necessary decision. In a land as varied as India is, a strong Centre is perhaps a necessity. This bias towards Centre is reflected in the distribution of legislative heads between the Centre and States. All the more important heads of legislation are placed in List I. Even among the legislative heads mentioned in List II, several of them, e.g., Entries 2, 13, 17, 23, 24, 26, 27, 32, 33, 50, 57 and 63 are either limited by or made subject to certain entries in List I to some or the other extent. Even in the Concurrent List (List III), the parliamentary enactment is given the primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. Residuary powers are with the Centre. By the 42nd Amendment, quite a few of the entries in List II were omitted and/or transferred to other lists. Above all, Article 3 empowers Parliament to form new States out of existing States either by merger or division as also to increase, diminish or alter the boundaries of the States. In the process, existing States may disappear and new ones may come into existence. As a result of the Re-organisation of States Act, 1956, fourteen States and six Union Territories came into existence in the place of twenty-seven States and one area. Even the names of the States can be changed by Parliament unilaterally. The only requirement, in all this process, being the one prescribed in the proviso to Article 3, viz., ascertainment of the views of the legislatures of the affected States. There is single citizenship, unlike USA. The judicial organ, one of the three organs of the State, is one and single for the entire country - again unlike USA, where you have the federal judiciary and State judiciary separately. Articles 249 to 252 further demonstrate the primacy of Parliament. If the Rajya Sabha passes a resolution by 2/3rd majority that in the national interest, Parliament should make laws with respect to any matter in List II, Parliament can do so (Article 249), no doubt, for a limited period. During the operation of a Proclamation of emergency, Parliament can make laws with respect to any matter in List II (Article 250). Similarly, Parliament has power to make laws for giving effect to International Agreements (Article 253). So far as the finances are concerned, the States again appear to have been placed in a less favourable position, an aspect which has attracted a good amount of criticism at the hands of the States and the proponents of the States' autonomy. Several taxes are collected by the Centre and made over, either partly or fully, to the States. Suffice it to say that Centre has been made far more powerful vis-a-vis the States. Correspondingly, several obligations too are placed upon the Centre including the one in Article 355 - the duty to protect every State against external aggression and internal disturbance. Indeed, this very article confers greater power upon the Centre in the name of casting an obligation upon it, viz., "to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power.

276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-a-vis the States does not mean that States are mere appendages of the Centre.

Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Governments - be it the result of advances in technological/scientific fields or otherwise, and that even in USA the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle - the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Shri M.C. Setalvad in his Tagore Law Lectures "*Union and State Relations under the Indian Constitution*" (1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible - nor is it necessary - for the present purposes to refer to them. It is enough to note that our Constitution has certainly a bias towards Centre vis-a-vis the States

State of West Bengal v. Union of India

AIR 1963 SC 1241

(B.P.Sinha, C.J. and S.J.Imam, K.Subba Rao, J.C.Shah, Rajagopala Ayyangar and J.R.Mudholkar, JJ.)

[Nature of the Indian Constitution – (a) Federal [(i) Compact or agreement between independent and sovereign Units to surrender partially their authority in favour of the Union; (ii) Supremacy of the Constitution; (iii) Distribution of Powers between the Union and the Units; and (iv) Supreme authority of the courts to interpret the Constitution], (b) Unitary, (c) Quasi-federal; Power of Union to acquire the property of States.]

The State of West Bengal filed a suit under Article 131 of the Constitution against the Union of India for a declaration that Parliament was not competent to make law authorizing the Union of India to acquire any land or any right in or over land belonging to a state and therefore the Coal Bearing Areas (Acquisition and Development) Act, 1957 (the Act) enacted by the Parliament for the acquisition of coal bearing areas in the whole of the country was unconstitutional. Consequently, two notifications dated September 21, 1959 and January 8, 1960 issued by the Central Government taking over coal bearing areas lying within the State of West Bengal were also unconstitutional. The suit raised the question as to whether the states enjoyed sovereign authority under the Constitution.

On the basis of the pleadings, the following issues were decided in the suit:

- (1) Whether Parliament had legislative competence to enact a law for compulsory acquisition by the Union of land and other properties vested in or owned by the State?
- (2) Whether the State of West Bengal was a sovereign authority?
- (3) Whether assuming that the State of West Bengal was a sovereign authority, Parliament was entitled to enact a law for compulsory acquisition of its lands and properties?
- (4) Whether the Act or any of its provisions were ultra vires the legislative competence of Parliament?
- (5) Whether the plaintiff was entitled to any relief and, if so, what relief ?

B.P. SINHA, C.J.: 8. The issues joined between the parties are mainly two, (1) whether on a true construction of the provisions of the Act; they apply to lands vested in or owned by the Plaintiff; and (2) If this is answered in the affirmative, whether there was legislative competence in Parliament to enact the impugned statute. The scope and effect of the Act is the most important question for determination, in the first instance, because the determination of that question will affect the ambit of the discussion on the second question. As already indicated, when the case was opened for the first time by the learned Advocate-General of Bengal, he proceeded on the basis that the Act purported to acquire the interests of the State, and made his further submission to the effect that Parliament had no competence to pass an Act which had the effect of affecting or acquiring the interests of the State. But later he also took up the alternative position that the Act, on its true construction, did not affect the interests or property of the State. The other States which have entered appearance, through

their respective counsel, have supported this stand of the plaintiff and have laid particular emphasis on those provisions of the Act which, they contend support their contention that the Act did not intend to acquire or in any way affect the interests of the States.

10. With the acquisition of zamindari rights by the State Governments, the rights in minerals are now vested in all areas in the State Governments, and it is not appropriate to use the Land Acquisition Act, 1894, for the acquisition of mineral rights particularly because the Central Government does not intend to acquire the proprietary rights vested in the States. There is no other existing Central or State Legislation under which the Government has powers to acquire immediately the lessee's rights over the coal bearing areas required by Government for the additional coal production. It is accordingly considered necessary to take powers by fresh legislation to acquire the lessees' rights over unworked coal-bearing areas on payment of reasonable compensation to the lessees, and without affecting the State Governments' rights as owner of the minerals or the royalty payable to the State Government on minerals.

12. The Bill provides for payment of reasonable compensation for the acquisition of the rights of prospecting licensees and mining lessees.

13. Besides setting out the policy of the State in the matter of coal mining industry and the actual state of affairs in relation thereto, the Statement of Objects and Reasons contains the crucial words on which particular reliance was placed on behalf of the States, "because the Central Government does not intend to acquire the proprietary rights vested in the States" and, "without effecting the State Governments' rights as owners". It is however well-settled that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, cannot be used to determine the true meaning and effect of the substantive provisions of the statute. They cannot be used except for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. But we cannot use this statement as an aid to the construction of the enactment or to show that the legislature did not intend to acquire the proprietary rights vested in the State or in any way to affect the State Governments' rights as owners of minerals. A statute, as passed by Parliament, is the expression of the collective intention of the legislature as a whole, and any statement made by an individual, albeit a Minister, of the intention and objects of the Act cannot be used to cut down the generality of the words used in the statute.

14. It was then contended that the preamble of the Act was the key to the understanding of the scope and provisions of the statute. The preamble is in these words:

An act to establish in the economic interest of India greater public control over the coal mining industry and its development by providing for the acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land, for the extinguishment or modification of such rights accruing by virtue of any agreement, lease, licence or otherwise, and for matter connected therewith.

Particular stress was laid on the last two lines of the preamble, showing that only rights "accruing by virtue of any agreement, lease, licence or otherwise" were being sought to be extinguished or modified by the provisions of the Act. But this argument omits to take note of

the words of the previous clause in the preamble which has reference to the fact that the Act also was meant for “acquisition by the State of unworked lands containing or likely to contain coal deposits.” Before proceeding to deal with the main arguments, it is necessary to advert to a submission of the learned Advocate-General of Bengal that the reference to the “State” in the words acquisition by the State occurring in the preamble was a reference to the “States” as distinguished from the Union. This contention has only to be mentioned to be rejected as entire object and purpose of the impugned Act was to vest powers in the Union Government to work coal mines and in that context the word “State” could obviously refer only to Union Government.

20. Starting with the position that on a true construction of the relevant provisions of the Act, the rights and interests of a State Government in coal bearing land had not been excluded from the operation of the Act, either in express terms or by necessary implication, the next question that arises for consideration is the first issue which covers issues 3 and 4 also. The competence of Parliament to enact the Act has to be determined with reference to specific provisions of the Constitution, with particular reference to the entries in the Seventh Schedule - List I and List III.

21. By Entry 42 in List III of the Seventh Schedule to the Constitution read with Article 246(2) power to legislate in respect of acquisition and requisition of property is conferred upon the Parliament as well as the State legislatures. Prima facie, this power may be exercised by the Parliament in respect of all property, privately owned or State owned. But on behalf of the State of West Bengal and some of the intervening States it was submitted that the very nature of the right in property vested in the State for governmental purposes imposed a limitation upon the exercise of the power of the Union Parliament, affecting state owned property. On behalf of the State of Punjab - one of the intervening States - it was urged that if acquisition of property was necessarily incidental to the effective exercise of power by Parliament in respect of any of the entries in Lists I and III, the Parliament may legislate so as to affect title of the State to property vested in it provided it does not interfere with the legislative power of the State.

22. Diverse reasons were suggested at the Bar in support of the plea that the State property was not subject to the exercise of legislative powers of the Parliament. They may be grouped under the following heads:

(1) The Constitution having adopted the federal principle of government the States share the sovereignty of the nation with the Union; and therefore power of the Parliament does not extend to enacting legislation for depriving the States of property vested in them as sovereign authorities. Entrustment of power to legislate must therefore be so read as to imply a restriction upon the Parliament under Entry 42 of List III when it is sought to be exercised in respect of the property owned by a State.

(2) Property vested in the States by virtue of Article 294(1) cannot be diverted to Union purposes by compulsion of Parliamentary legislation.

(3) The Government of India Act, 1935 provided special machinery for acquisition of property of the State by negotiations, and not by compulsion in exercise of legislative power. That provision recognised that the Central legislature of the Government of India had no power to acquire property of the State by exercise of

legislative power, and even though no provision similar to Section 127 of the Government of India Act, 1935 has been enacted in the Constitution, the recognition implicit in that provision of the immunity of the property of the units must also be deemed to be superimposed upon the exercise of legislative power vested in the Parliament under the Constitution.

(4) Absence of power expressly conferred such as is to be found in the Australian Constitution, to legislate for acquisition of the property of the States indicates that it was not the intention of the Constitution makers to confer that power upon the Union Parliament, under the general legislative heads.

(5) If power be exercised by the Union to acquire State property under Entry 42 of the Concurrent List, similar power may also be exercised by the States in respect of Union property and even to re-acquire the property from the Union by exercise of the State's legislative power. The power under Entry 42 can therefore never be effectively exercised by the Parliament.

(6) It could not have been the intention of the Constitution makers to confer authority upon the Parliament to legislate for acquiring property of the States and thereby to make the right of the State to property owned by it even more precarious than the right which individuals or Corporations have under the Constitution to their property. Individuals and Corporations have the guarantee under Article 31(2) of the Constitution that acquisition of their property will be for public purposes and compensation will be awarded for acquiring property. Entry 42 must be read subject to Article 31, and in as much as Fundamental rights are conferred upon individuals and Corporations against executive or legislative actions, and States are not invested with any fundamental rights exercisable against the Union or other States, the right to legislate for compulsory acquisition of State property cannot be exercised.

(7) Unless a law expressly or by necessary implication so provides, a State is not bound thereby. This well recognised rule applies to the interpretation of the Constitution. Therefore in the absence of any provision express or necessarily implying that the property of the State could be acquired by the Union, the rights claimed by the Union to legislate for acquisition of State property must be negated.

23. All these arguments, except the purely interpretational, are ultimately founded upon the plea that the States have within their allotted field full attributes of sovereignty and exercise of authority by the Union agencies, legislative or executive, which trenches upon that sovereignty is void.

24. **Re. (1):** Ever since the assumption of authority by the British Crown under Statute 21 & 22, Vict. (1858) Chapter 106, the administration of British India was unitary and highly centralized. The Governor-General was invested with autocratic powers to administer the entire territory. Even though the territory was divided into administrative units, the authority of the respective Governors of the provinces was derived from the Governor-General and the Governor-General was responsible to the British Parliament. There was, therefore, a chain of responsibility; the Provincial Governments were subject to the control of the Central Government and the Central Government to the Secretary of State. Some process of devolution took place under the Government of India Act, 1919, but that was only for the

purpose of decentralization of the Governmental power; but on that account the Government did not cease to be unitary. The aim of the Government of India Act, 1935 was to unite the Provinces and Indian States into a federation, but that could be achieved only if a substantial number of the Indian States agreed to join the Provinces in the federation. For diverse reasons the Indian States never joined the proposed federation and the part dealing with federation, never became effective. The Central Government as it was originally constituted under the Government of India Act, 1919 with some modification continued to function. But in the Provinces certain alterations were made: Certain departments were administered with the aid of Ministers, who were popularly elected, and who were in a sense responsible to the electorate. The Governor was still authorised to act in his discretion without consulting his Ministers in respect of certain matters. He derived his authority from the British Crown, and was subject to the directions which the Central Government gave to carry into execution Acts of the Central legislature in the Concurrent List and for the maintenance of means of communication, and in respect of all matters for preventing grave menace to the peace or tranquility of India or part thereof. The administration continued to function as an agent of the British Parliament.

25. By the Indian Independence Act, 1947 a separate dominion of India was carved out and by Section 6 thereof the legislature was for the first time authorised to make laws for the dominion. Such laws were not to be void or inoperative on the ground that they were repugnant to the laws of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the legislature of the dominion included the power to repeal or amend any such Act, order, rule or regulation. The British Parliament ceased to have responsibility as respects governance of the territories which were immediately before that date included in British India, and suzerainty of the Crown over the Indian States lapsed and with it all treaties and agreements in force on the date of the passing of the Act between the Crown and the rulers of Indian States. The bond of agency which bound the administration in India to function as agent of the British Parliament was dissolved, and the Indian Dominion to that extent became sovereign. Then the Constitution came into existence. The territory was evidently too large for a democratic set-up with wholly centralised form of Government. Imposition of a centralised form might also have meant a reversal of political trends which had led to decentralisation of the administration and to distribution of power. The Constitution had, therefore, to be in a form in which authority was decentralised. In the era immediately prior to the enactment of the Indian Independence Act, there were partially autonomous units such as the Provinces. There were Indian States which were in a sense sovereign but their sovereignty was extinguished by the various merger agreements which the rulers of those States entered into with the Government of India before the Constitution. By virtue of the process of integration of the various States there emerged a Centralised form of administration in which the Governor-General was the fountain head of executive authority. The Constitution of India was erected on the foundations of the Government of India Act, 1935: the basic structure was not altered in many important matters, and a large number of provisions were incorporated verbatim from the earlier Constitution.

26. In some respects a greater degree of economic unity was sought to be secured by transferring subjects having impact on matters of common interest into the Union List. A comparison of the Lists in Schedule 7 to the Constitution with the Schedule 7 to the Government of India Act, 1935 discloses that the powers of the Union have been enlarged particularly in the field of economic unity, and this was done as it was felt that there should be centralised control and administration in certain fields if rapid economic and industrial progress had to be achieved by the nation. To illustrate this it is sufficient to refer to National Highways (Entry 24), inter-State Trade and Commerce (Entry 42) - to mention only a few being transferred from list II of the Government of India Act to List I in the Constitution, to the new entry regarding inter-State rivers (Entry 56), to the new Entry 33 in the Concurrent List to which it is transferred from List II, and to the comprehensive provisions of Part XIII - which seek to make India a single economic unit for purposes of trade and commerce under the overall control of the Union Parliament and the Union executive. The result was a Constitution which was not true to any traditional pattern of federation. There is no warrant for the assumption that the Provinces were sovereign, autonomous units which had parted with such power as they considered reasonable or proper for enabling the Central Government to function for the common good. The legal theory on which the Constitution was based was the withdrawal or resumption of all the powers of sovereignty into the people of this country and the distribution of these powers - save those withheld from both the Union and the States by reason of the provisions of Part III - between the Union and the States.

(a) A truly federal form of Government envisages a compact or agreement between independent and sovereign units to surrender partially their authority in their common interest and vesting it in a Union and retaining the residue of the authority in the constituent units. Ordinarily each constituent unit has its separate Constitution by which it is governed in all matters except those surrendered to the Union, and the Constitution of the Union primarily operates upon the administration of the units. Our Constitution was not the result of any such compact or agreement: Units constituting a unitary State which were non-sovereign were transformed by abdication of power into a Union,

(b) Supremacy of the Constitution which cannot be altered except by the component units. Our Constitution is undoubtedly supreme, but it is liable to be altered by the Union Parliament alone and the units have no power to alter it.

(c) Distribution of powers between the Union and the regional units each in its sphere coordinate and independent of the other. The basis of such distribution of power is that in matters of national importance in which a uniform policy is desirable in the interest of the units authority is entrusted to the Union, and matters of local concern remain with the States.

(d) Supreme authority of the courts to interpret the Constitution and to invalidate action violative of the Constitution. A federal Constitution, by its very nature, consists of checks and balances and must contain provisions for resolving conflicts between the executive and legislative authority of the Union and the regional units.

In our Constitution characteristic (d) is to be found in full force (a) and (b) are absent. There is undoubtedly distribution of powers between the Union and the States in matters legislative

and executive, but distribution of powers is not always an index of political sovereignty. The exercise of powers legislative and executive in the allotted fields is hedged in by numerous restrictions so that the powers of the States are not coordinate with the Union and are in many respects independent.

27. Legal sovereignty of the Indian nation is vested in the people of India who as stated by the preamble have solemnly resolved to constitute India into a Sovereign Democratic Republic for the objects specified therein. The Political sovereignty is distributed between the Union of India and the States with greater weightage in favour of the Union. Article 300 invests the Government of India and the States with the character of quasi-Corporations entitled to sue and liable to be sued in relation to their respective affairs by Article 299 contracts may be entered into by the Union and the States in exercise of their respective executive powers, and Article 298 authorises in exercise of their respective executive powers the Union and the States to carry on trade or business and to acquire, hold and dispose of property and to make contracts. These provisions and the entrustment of powers to legislate on certain matters exclusive, and concurrently in certain other matters, and entrustment of executive authority co-extensive with the legislative power form the foundation of the division of authority.

28. In India judicial power is exercised by a single set of courts, civil, criminal and Revenue whether they deal with disputes in respect of legislation which is either State legislation or Union legislation. The exercise of executive authority by the Union or by the State and rights and obligations arising out of the executive authority are subject to the jurisdiction of the courts which have territorial jurisdiction in respect of the cause of action. The High Courts have been invested with certain powers under Article 226 to issue writs addressed to any person or authority, including in appropriate cases any Government, for the enforcement of any of the rights conferred by Part II and for any other purpose and under Article 227 the High Court has superintendence over all courts in relation to which it exercises jurisdiction. The Supreme Court is at the apex of the hierarchy of courts, Civil, Criminal, Revenue, and of quasi-judicial Tribunals. There are in India not two sets of courts, Federal and State, as are found functioning under the Constitution of the United States of America. By Article 247 power is reserved to the Parliament by law to provide for establishment of courts for better administration of laws made by the Parliament or of any existing laws with regard to the matters enumerated in the Union List, but no such courts have been constituted.

29. Sovereignty in executive matters of the Union is declared by Article 73 which enacts that subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament may make laws, and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. But this executive power may 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 has also power to make laws. By Article 77 all executive actions of the Government of India have to be expressed to be taken in the name of the President. Executive power of the State is vested by Article 154 in the Governor and is exercisable by him directly or through officers subordinate to him in accordance with the

Constitution. The appointment of the Governor is made by the President and it is open to the President to make such provision as he thinks fit for the discharge of the function of a Governor of the State in any contingency not provided for in Chapter II of Part 6 By Article 162 subject to the provisions of the Constitution, executive power of the State extends to matters with respect to which the legislature of the State has power to make laws, subject to the restriction that in matters in the Concurrent List of the Seventh Schedule, exercise of executive power of the State is also subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. Exercise of executive authority of the States is largely restricted by diverse Constitutional provisions. The executive power of every State has to be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and not to impede or prejudice the executive power of the Union. The executive power of the Union extends to the giving of such directions to a State as may appear to the Government of India to be necessary for those purposes and as to the construction and maintenance of means of communication declared to be of national or military importance and for protection of railways. The Parliament has power to declare highways or waterways to be of national importance, and the Union may execute those powers, and also construct and maintain means of communication as part of its function with respect to naval, military and air force works. The President may also, with the consent of the Government of a State, entrust to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends; Article 258(1). Again the Union Parliament may by law made in exercise of authority in respect of matters exclusively within its competence confer powers and duties or authorise the conferment of powers and imposition of duties upon the State, or officers or authorities thereof: Article 258(2). Article 365 authorises the President to hold that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution, if the State fails to comply with or give effect to any directions given in exercise of the executive power of the Union.

30. These are the restrictions on the exercise of the executive power by the States, in normal times; in times of emergency power to override the exercise of executive power of the state is entrusted to the Union. Again the field of exercise of legislative power being co- extensive with the exercise of the legislative power of the States, the restrictions imposed upon the legislative power also apply to the exercise of executive power.

31. Distribution of legislative powers is effected by Article 246. In respect of matters set out in List I of the Seventh Schedule Parliament has exclusive power to make laws: in respect of matters set out in List II the State has exclusive power to legislate and in respect of matters set out in List III Parliament and the State legislature have concurrent power to legislate. The residuary power, including the power to tax, by Article 248 and Item 97 of List I is vested in the Parliament. The basis of distribution of powers between the Union and States is that only those powers and authorities which are concerned with the regulation of local problems are vested in the States, and the residue especially those, which tend to maintain the economic, industrial and commercial unity of the nation are left with the Union. By Article 123 the President is invested with the power to promulgate Ordinances on matters on which the Parliament is competent to legislate, during recess of Parliament. Similarly under Article 213

power is conferred upon the Governor of a state, to promulgate Ordinances on matters on which the State legislature is competent to legislate during recess of the legislature. But upon the distribution of legislative powers thus made and entrustment of power to the State legislature, restrictions are imposed even in normal times, Article 249 authorises the Parliament to legislate with respect to any matter in the State List if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution. By Article 252 power is conferred upon Parliament to legislate for two or more States by consent even though the Parliament may have no power under Article 246 to make laws for the State except as provided in Articles 249 and 250. Such a law may be adopted by a legislature of any other State, By Article 253 Parliament has the power notwithstanding anything contained in Article 246 to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international, conference, association or other body. In case of inconsistency between the laws made by Parliament and laws made by the legislatures of the States, the laws made by the Parliament whether passed before or after the State law in matters enumerated in the Concurrent List to the extent of repugnancy prevail over the State laws. It is only a law made by the legislature of a State which had been reserved for the consideration of the President and has received his assent, on a matter relating to a Concurrent List containing any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, prevails in the State.

36. The normal corporate existence of States entitles them to enter into contracts and invests them with power to carry on trade or business and the States have the right to hold property. But having regard to certain basic features of the Constitution, the restrictions on the exercise of their powers executive and legislative and on the powers of taxation, and dependence for finances upon the Union Government it would not be correct to maintain that absolute sovereignty remains vested in the States. This is illustrated by certain striking features of our constitutional set-up. There is no dual citizenship in India: all citizens are citizens of India and not of the various States in which they are domiciled. There are no independent Constitutions of the States, apart from the national Constitution of the Union of India: Chapter II, Part VI from Articles 152 to 237 deals with the States, the powers of the legislatures of the States, the powers of the executive and judiciary. What appears to militate against the theory regarding the sovereignty of the States is the wide power with which the Parliament is invested to alter the boundaries of States, and even to extinguish the existence of a State. There is no constitutional guarantee against alteration of the boundaries of the States. By Article 2 of the Constitution the Parliament may admit into the Union or establish new States on such terms and conditions as it thinks fit, and by Article 3 the Parliament is by law authorised to form a new State by redistribution of the territory of a State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, increase the area of any State, diminish the area of any State, alter the boundaries of any State, and alter the name of any State. Legislation which so vitally affects the very existence of the States may be moved on the recommendation of the President which in practice means the recommendation of the Union Ministry, and if the proposal in the Bill affects the area,

boundaries or name of any of the States, the President has to refer the Bill to the legislature of that State for merely *expressing its views thereon*. Parliament is therefore by law invested with authority to alter the boundaries of any State and to diminish its area so as even to destroy a state with all its powers and authority. That being the extent of the power of the Parliament it would be difficult to hold that the Parliament which is competent to destroy a State is on account of some assumption as to absolute sovereignty of the State incompetent effectively to acquire by legislation designed for that purpose the property owned by the State for governmental purpose.

37. The Parliamentary power of legislation to acquire property is, subject to the express provisions of the Constitution, unrestricted. To imply limitations on that power on the assumption of that degree of political sovereignty which makes the States coordinate with and independent of the union, is to envisage a Constitutional scheme which does not exist in law or in practice. On a review of the diverse provisions of the Constitution the inference is inevitable that the distribution of powers - both legislative and executive does not support the theory of full sovereignty in the States so as to render it immune from the exercise of legislative power of the Union Parliament particularly in relation to acquisition of property of the States. That the Parliament may in the ordinary course not seek to obstruct the normal exercise of the powers which the States have, both legislative and executive in the field allotted to them will not be a ground for holding that the Parliament has no such power if it desires, in exercise of the powers which we have summarised to do so. It was urged that to hold that property vested in the State could be acquired by the Union, would mean, as was picturesquely expressed by the learned Advocate-General of Bengal, that the Union could acquire and take possession of writer's buildings where the Secretariat of the State Government is functioning and thus stop all State Governmental activity. There could be no doubt that if the "Union did so, it would not be using but abusing its power of acquisition, but the fact that a power is capable of being abused has never been in law a reason for denying its existence for its existence has to be determined on very different considerations.

39. It is pertinent also to note that under several entries of List I it is open to the Union Parliament to legislate directly upon properties which are situate in the States including properties which are vested in the States, for instance, Railways (Entry 22), Highways declared by or under law made by Parliament to be national highways (Entry 23), Shipping and Navigation on inland waterways, declared by Parliament by law to be national waterways (Entry 24), Lighthouses including lightships etc. (Entry 26), Ports declared by or under law made by Parliament or existing law to be major ports (Entry 27), Airways, aircraft and air navigation, provision of aerodromes etc. (Entry 29), Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels (Entry 30), property of the Union and the revenue therefrom, but as regards property situated in a State subject to legislation by the State, save insofar as Parliament by law otherwise provides (Entry 32), Industries, the control which by the Union is declared by Parliament by law to be expedient in the public interest (Entry 52), Regulation and development of oilfields and mineral oil resources, petroleum and petroleum products other liquids and substances declared by Parliament by law to be dangerously inflammable (Entry 53), Regulation of mines and, in mineral development (Entry 54). Regulation and development of inter-State rivers and river-

valleys (Entry 56), Ancient and historical monuments and records and archaeological sites and remains declared to be of national importance (Entry 67). These are some of the matters in legislating upon which the Parliament may directly legislate in respect of property in the States. To deny to the Parliament while granting these extensive powers of legislative authority to legislate in respect of property situate in the State, and even of the State, would be to render the Constitutional machinery practically unworkable. It may be noticed that in the United States of America the authority of Congress to legislate on a majority of these matters was derived from the "Commerce clause". The commerce clause is not regarded as so exclusive as to preclude the exercise of State legislative authority in matters which are local, in their nature or operation, or are mere aids to commerce Our Constitution recognises no such distinction between the operation of a State law in matters which are local, and which are inter State, If an enactment falls within the Union List, whether its operation is local or otherwise State legislation inconsistent therewith, will subject to Article 254(2) be struck down.

40. The question may be approached from another angle. Even under Constitutions which are truly federal and full sovereignty of the States is recognised in the residuary field both executive and legislative, power to utilise or as it is said "Condemn" property of the State for Union purposes is not denied.

41. The power to acquire land sought to be exercised by the Union, which is challenged by the State of West Bengal, is power to acquire in exercise of authority conferred by Sections 6, 7 and 9 of the Coal Bearing Areas (Acquisition and Development) Act, 1957, The Act was enacted for establishing in the economic interest of India greater public control over the coal mining in industry and its development by providing for the acquisition by the State of land containing or likely to contain coal deposits or of rights in or over such land for the extinguishment or modification of such rights accruing by virtue of any agreement, lease, licence or otherwise, and for matters connected therewith. By Entries 52 and 54 of List I the Parliament is given power to legislate in respect of:

(52) Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

(54) Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

In exercise of powers under Entry 36 of the Government of India Act, 1935 which corresponds with Entry 52 of the Constitution the Central legislature enacted the Minerals & Mining (Regulation & Development) Act, 53 of 1948. By Section 2 of the Act it was declared that it was expedient in the public interest that the Central Government should take under its control the regulation of mines and oil fields and development of minerals in the extent specified in the Act. 'Mine' was defined under the Act as meaning any excavation for the purpose of searching for or obtaining minerals and includes an oil well. No mining lease could be given after the commencement of the Act, otherwise than in accordance with the rules made under the Act. By Section 13 the provisions of the Act were to be binding on the Government, whether in the right of the dominion or of State. By the declaration by Section 2 the minerals became immobilized. The Act is in the Statute Book, and the declaration, in the

future application of the Act since the Constitution must also remain in force, as if it were made under entry 52 of the Constitution.

42. After the Constitution, the Industries (Development & Regulation) Act, 65 of 1951 was enacted by the Parliament. By Section 2 it was declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. In the Schedule item (3) "Coal, including Coke; and other 'derivatives' was included as one of such industries. The legislature then enacted the Mines & Minerals (Regulation & Development) Act 67 of 1957. By Section 2 a declaration in terms similar to the declaration in Act 53 of 1948 was made. The Act deals with all minerals except oil, and enacts certain amendments in Act 53 of 1948. There being a declaration in terms of Item 52 the Parliament acquired exclusive authority to legislate in respect of Coal industry set out in the schedule to Act 65 of 1951 and the State Government had no authority in that behalf.

46. Therefore the power of the Union to legislate in respect of property situate in the States even if the States are regarded *qua* the Union as Sovereign, remains unrestricted, and the State property is not immune from its operation. Exercising powers under the diverse entries which have been referred to earlier, the Union Parliament could legislate so as to trench upon the rights of the States in the property vested in them. If exclusion of a State property from the purview of Union legislation is regarded as implicit in those entries in List I, it would be difficult if not impossible for the Union Government to carry out its obligations in respect of matters of national importance. If the entries which we have referred to earlier are not subject to any such restriction as suggested, there would be no reason to suppose that Entry 42 of List III is subject to the limitation that the property which is referred to in that item is of individuals or corporations and not of the State. In its ultimate analysis the question is one of legislative competence. Is the power conferred by Entry 42 List III as accessory to the effectuation of the power under Entries 52 & 54 incapable of being exercised in respect of property of the States? No positive interdict against its exercise is perceptible in the Constitution: and the implication of such an interdict assumes a degree of sovereignty in the States of such plenitude as transcends the express legislative power of the Union. The Constitution which makes a division of legislative and executive powers between the Union and the States is not founded on such a postulate, and the concept of superiority of the Union over the States in the manifold aspects already examined negatives it.

47. **Re. (2).** By Article 294(a) all property and assets which immediately before the commencement of the Constitution were vested in the British Crown for the Dominion of India, became vested in the Union, and property vested for the purposes of the Government of the Provinces, became vested in the corresponding States. Under the Government of India Act all property for governmental purposes was vested in the British Crown, and by virtue of the Constitution that property became vested in the Union and the Provinces. By virtue of clause (b) the rights, liabilities and obligations of the Government of India and the Provinces, devolved upon the Union and the corresponding Provinces.

48. A considerable point was made of the fact that Article 294 had vested certain property in the State and it was submitted that subject to the right of the State by agreement to convey that property under Article 298, the Constitution intended that the State should continue to be the owner of that property and that this vesting must be held to negative the Union's right to

acquire any property vested in the State without its consent. It was pointed out by the learned Attorney-General that so far as the plaintiff - the State of West Bengal was concerned it did not own the coal-bearing lands on the date of the Constitution and that it got title there to only after they vested in the State by virtue of the provisions of the Bengal Acquisition of Estates Act of 1954 (Act 1 of 1954) and that the property thus acquired subsequently was not within the scope of Article 294. We have no doubt that this would be an answer to the claim of the plaintiff in this suit and particularly in the context of the challenge to the validity of the notification now impugned but we do not desire to rest our decision on any such narrow ground.

49. The argument was that the Constitution intended and enacted that property allotted to or vested in a State under the provisions of Article 294 or 296 shall continue to belong to that State unless and until by virtue of the power conferred on the State by Article 298 it chose to part with it, and that without a Constitutional amendment of these Articles such property cannot be divested from the State. We consider that this submission proceeds on a misconception of the function of Articles 294 and 298 in the scheme of the Constitution. To start with, it has to be pointed out that when Article 298 confers on States the power to acquire or dispose of property, the reference is to the executive power of the State to acquire or dispose of property which would apply without distinction to property vested under Article 294 or under 296 by escheat or lapse or as *bona vacantia*, or property acquired otherwise. Besides, Article 298 is merely an enabling Article conferring on the State as owner of the property, the power of disposal. That cannot on any reasonable interpretation be construed as negating the possibility of the State's title to property being lost by the operation of other provisions of the Constitution. Article 298 has therefore no relevance on the proper construction of Article 294.

50. Article 294 was modeled on Section 172 of the Government of India Act, 1935. Section 172 which effected this distribution ran:

172. (1) All lands and buildings which immediately before the commencement of Part III of this Act were vested in His Majesty for the purposes of the Government of India shall as from that date (a) in the case of lands and buildings which are situate in a Province, vest in His Majesty for the purposes of the government of that Province unless they were then used, otherwise than under a tenancy agreement between the Governor-General in Council and the Government of that Province, for purposes which thereafter will be purposes of the Federal Government or of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, or unless they are lands and buildings formerly used for such purposes as aforesaid, or intended or formerly intended to be so used and are certified by the Governor-General in Council or, as the case may be. His Majesty's Representative to have been retained for future use for such purposes, or to have been retained temporarily for the purpose of more advantageous disposal by sale or otherwise;...

Just like Section 172 being the forerunner of Article 294, Sections 174 and 175 are phrased in terms similar and correspond to Articles 296 and 298.

51. The right of the States to property which devolved upon them by Article 294(a) was therefore no different from the right they had in the after acquired property: the Constitution does not warrant a distinction between the property acquired at the inception of the Constitution, and in exercise of executive authority. Article 294 does not contain any prohibition against transfer of property of the State and if the property is capable of being transferred by the State it is capable of being compulsorily acquired.

58. **Re. (3)** Power to acquire land was vested under the Government of India Act, 1935 by Entry 9 in List II of the Seventh Schedule, exclusively in the Provinces. For any purpose connected with a matter in respect of which the Central legislature was competent to enact laws, the Central Executive could require the Province to acquire land, on behalf of and at the expense of the Union. This however did not mean that incidental to the exercise of the right to legislate in respect of Railways, Ports, Lighthouses, power to affect the right of the citizens and corporations and of Provinces in land was not exercisable. As already observed, even under Constitutions where a larger slice of sovereignty remains effectively vested in the competent units such as the United States of America power to legislate vested in the Central or national subjects includes the power to legislate so as to extinguish rights in State property.

Under the Government of India Act, 1935 the Central Government could *require* the Province to *acquire* land on behalf of the Union if it was private land, and to *transfer* it to the Union if it was the State land. The Provincial Government had manifestly no option to refuse to comply with the direction. Provision for fixation of compensation did not affect the nature of the right which the Central Government could exercise.

59. In broad outline the governmental structure under the Constitution vis-a-vis the Union and the States is based on the relationship which existed between the Central Government and the Provinces under the Government of India Act, 1935, and that in this respect the Constitution has borrowed largely from the earlier constitutional document. But even with the Provinces being autonomous within the spheres allotted to them and these being a distribution of property and assets between the Central Government and the Provinces under Part III of Chapter VII in almost the same terms as is found in the corresponding Articles 294 and 298, it was not considered an infraction of the autonomy of the Provinces to vest such a power in the Central Government, for Section 127 of the Government of India Act enacted:

127. The Federation may, if it deems it necessary to acquire any land situate in a Province for any purpose connected with a matter with respect to which the Federal legislature has power to make laws, require the Province to acquire the land on behalf, and at the expense, of the Federation or, if the land belongs to the Province, to transfer it to the Federation on such terms as may be agreed to, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India.

and thus property vested in a Province under Section 172 could be required to be transferred to the Central Government if it was needed for a central purpose.

60. It would therefore be manifest that the right of the centre to require the Province to part with property for the effective performance of central functions was not considered as detracting from provincial autonomy.

61. What however is of relevance is the presence of Section 127 in that enactment which empowered the Central Government to require the Provinces to part with property owned by them if the same was needed for the purposes of the Government of India. It was however suggested that the compulsory acquisition of provincial property by the Central Government was there specifically provided for, and that the absence of such a provision made all the difference. But this, in our opinion, proceeds on merely a superficial view of the matter. A closer examination of the scheme of distribution of legislative power in regard to compulsory acquisition of property under the Government of India Act discloses that though the power to compulsorily acquire property was exclusively vested in the Provinces, the Central Government could satisfy its requirements of property for Central purposes by utilising provincial machinery, and that it was in that context that a specific provision referring to the Provinces having at the direction of the Central Government to transfer provincial property was needed. It is therefore difficult to appreciate the ground on which the existence of a provision in the Government of India Act for assessment of compensation for land which the Provinces were bound to transfer on being so required by the Central Government and the deletion of that provision in enacting the Constitution may affect the exercise of the power vested in the Union Parliament.

62. **Re.(4):** The Australian Constitution contains an express power authorising legislation by the Parliament of Australia for acquisition of State property. But the Constitutions of the United States of America and Canada contain no such express provision. The power of the Union Parliament to enact legislation affecting title of the constituent States to property vested in them, is on that account not excluded. If the other provisions of our Constitution in terms of sufficient amplitude confer power for enacting legislation for acquiring State property, authority to exercise that power cannot be defeated because the express power to acquire property, generally does not specifically and in terms refer to State property.

63. **Re.(5):** In the Constitution of India as originally enacted there was an elaborate division of powers by providing three entries relating to acquisition and requisition of property, List I Entry 33 “Acquisition or requisitioning property for purposes of the Union”; List II Entry 36 “Acquisition or requisitioning of property, except for the purpose of the Union, subject to the provisions of Entry 42 of List III”; List III Entry 42 “Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given”. By the Constitution (Seventh Amendment) Act, 1956 the three Entries were repealed, and a single Entry 42 in the Concurrent List “Acquisition and Requisition of property” was substituted.

69. The following findings will accordingly be recorded on the issues:

- Issue 1 . . . in the affirmative.
2 . . . not such as to disentitle the Union Parliament to exercise its legislative power under Entry 42 List III.
3 . . . answer covered by answer on Issue 2.
4 . . . in the negative.
5 . . . in the negative.

Finding on additional issue, in the affirmative. The suit will therefore stand dismissed.

Rai Sahib Ram Jawaya Kapur v. State of Punjab

AIR 1955 SC 549

(B.K.Mukherjea,C.J. and Vivian Bose, B.Jagannadhadas, T.L.Venkatarama
Ayyar and Syed Jafer Iman, JJ.)

*[Theory of Separation of Power; Articles 73 and 162 of the Constitution of India;
in the absence of law, the state cannot monopolise any trade or business to the
total or partial exclusion of citizens under Article 19(6) of the Constitution.]*

Writ petition under Article 32 of the Constitution was filed by six persons who carried on the business of preparing, printing, publishing and selling text books for different classes in the schools of Punjab, particularly for the primary and middle classes, under the name and style “Uttar Chand Kapur & Sons”. It was alleged that the Education Department of the Punjab Government pursuant to their “so-called policy of nationalisation of text books”, issued a series of notifications since 1950 regarding the printing, publication and sale of these books which not only placed unwarranted restrictions upon the rights of the petitioners to carry on their business but also practically ousted them and other traders from the business altogether and this was a violation of their fundamental right under Article 19(1)(g). It was contended that the restrictions were being imposed without the authority of law and therefore not saved by clause (6) of Article 19.

B.K. MUKHERJEA, C.J.: 5. The contentions raised by Mr Pathak, who appeared in support of the petitioners, are of a three-fold character. It is contended in the first place that the executive Government of a State is wholly incompetent, without any legislative sanction, to engage in any trade or business activity and that the acts of the Government in carrying out their policy of establishing monopoly in the business of printing and publishing text books for school students is wholly without jurisdiction and illegal.

His second contention is, that assuming that the State could create a monopoly in its favour in respect of a particular trade or business that could be done not by any executive act but by means of a proper legislation which should conform to the requirements of Article 19(6) of the Constitution. Lastly, it is argued that it was not open to the Government to deprive the petitioners of their interest in any business or undertaking which amounts to property without authority of law and without payment of compensation as is required under Article 31 of the Constitution.

6. The first point raised by Mr Pathak, in substance, amounts to this, that the Government has no power in law to carry on the business of printing or selling text books for the use of school students in competition with private agencies without the sanction of the legislature. It is not argued that the functions of a modern State like the police States of old are confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community. What Mr Pathak says, however, is, that as our Constitution clearly recognises a division of governmental functions into three categories viz. the legislative, the judicial and the executive, the function of the executive cannot but be to execute the laws passed by the legislature or to supervise the

enforcement of the same. The legislature must first enact a measure which the executive can then carry out. The learned counsel has, in support of this contention, placed considerable reliance upon Articles 73 and 162 of our Constitution and also upon certain decided authorities of the Australian High Court to which we shall presently refer.

7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in Article 162. The provisions of these articles are analogous to those of Sections 8 and 49(2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following, the same analogy as is provided in regard to the distribution of legislative powers between them.

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.

Neither of these articles contains any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr Pathak seems to suggest, that it is only when Parliament or the State Legislature has legislated on certain items appertaining to their respective lists that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 172 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr Pathak's contention.

8. The Australian cases upon which reliance has been placed by the learned counsel do not, in our opinion, appear to be of much help either. In the first [*Commonwealth and the Central Wool Committee v. Colonial Combing, Spinning and Weaving Co Ltd.*, 31 CLR 421] of these cases, the executive Government of the Commonwealth, during the continuance of the war, entered into a number of agreements with a company which was engaged in the manufacture and sale of wool-tops. The agreements were of different types.

By one class of agreements, the Commonwealth Government gave consent to the sale of wool-tops by the company in return for a share of the profits of the transactions (called by the parties "a licence fee"). Another class provided that the business of manufacturing wool-tops should be carried on by the company as agents for the Commonwealth in consideration of the

company receiving an annual sum from the Commonwealth. The rest of the agreements were a combination of these two varieties.

It was held by a Full Bench of the High Court that apart from any authority conferred by an Act of Parliament or by regulations there under the executive Government of the Commonwealth had no power to make or ratify any of these agreements. The decision, it may be noticed, was based substantially upon the provision of Section 61 of the Australian Constitution which is worded as follows:

The executive power of the Commonwealth is vested in the Queen and is exercised by the Governor-General as the Queen's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth.

In addition to this, the King could assign other functions and powers to the Governor-General under Section 2 but in this particular case no assignment of any additional powers was alleged or proved. The court held that the agreements were not directly authorised by Parliament or under the provisions of any statute and as they were not for the execution and maintenance of the Constitution they must be held to be void.

Isacs, J., in his judgment, dealt elaborately with the two types of agreements and held that the agreements, so far as they purported to bind the company to pay to the government money, as the price of consents, amounted to the imposition of a tax and were void without the authority of Parliament. The other kind of agreements which purported to bind the Government to pay to the company a remuneration for manufacturing wool-tops was held to be an appropriation of public revenue and being without legislative authority was also void.

9. It will be apparent that none of the principles indicated above could have any application to the circumstances of the present case. There is no provision in our Constitution corresponding to Section 61 of the Australian Act. The Government has not imposed anything like taxation or licence fee in the present case nor have we been told that the appropriation of public revenue involved in the so-called business in text books carried on by the Government has not been sanctioned by the legislature by proper Appropriation Acts.

10. The other case [*Attorney-General for Victoria v. Commonwealth*, 52 CLR 533] is of an altogether different character and arose in the following way. The Commonwealth Government had established a clothing factory in Melbourne for the purpose of making naval and military uniforms for the defence forces and postal employees. In times of peace the operations of the factory included the supply of uniforms for other departments of the Commonwealth and for employees in various public utility services. The Governor-General deemed such peace time operations of the factory necessary for the efficient defence of the Commonwealth inasmuch as the maintenance intact of the trained complement of the factory would assist in meeting wartime demands.

A question arose as to whether operations of the factory for such purposes in peace-time were authorised by the Defence Act. The majority of the court answered the question in the affirmative. Starke, J. delivered a dissenting opinion upon which Mr Pathak mainly relied. The learned Judge laid stress on Section 61 of the Constitution Act according to which the executive power of the Commonwealth extended to the maintenance of the Constitution and of the laws of the Commonwealth and held that there was nothing in the Constitution or any

law of the Commonwealth which enabled the Commonwealth to establish and maintain clothing factories for other than Commonwealth purposes.

11. A question very similar to that in the present case did arise for consideration before a Full Bench of the Allahabad High Court in *Motilal v. Government of the State of Uttar Pradesh* [AIR 1951 All. 257]. The point canvassed there was whether the Government of a State has power under the Constitution to carry on the trade or business of running a bus service in the absence of a legislative enactment authorising the State Government to do so. Different views were expressed by different Judges on this question.

Chief Justice Malik was of opinion that in a written Constitution like ours the executive power may be such as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing the laws. According to the Chief Justice the State has a right to hold and manage its own property and carry on such trade or business as a citizen has the right to carry on, so long as such activity does not encroach upon the rights of others or is not contrary to law. The running of a transport business therefore was not per se outside the ambit of the executive authority of the State.

Sapru, J. held that the power to run a Government bus service was incidental to the power of acquiring property which was expressly conferred by Article 298 of the Constitution. Mootham and Wanchoo, JJ., who delivered a common judgment, were also of the opinion that there was no need for a specific legislative enactment to enable a State Government to run a bus service. In the opinion of these learned Judges an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public.

Agarwala, J. dissented from the majority view and held that the State Government had no power to run a bus service in the absence of an Act of the legislature authorising the State to do so. The opinion of Agarwala, J. undoubtedly supports the contention of Mr Pathak but it appears to us to be too narrow and unsupportable.

12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function

there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws.

13. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modeled on the British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State.

The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

14. In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.

The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, “a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part”.

The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

15. Suppose now that the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start a trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon? We cannot say that such legislation is always necessary. If the trade or business involves expenditure of funds, it is certainly required that Parliament should authorise such expenditure either directly or under the provisions of a statute.

What is generally done in such cases is, that the sums required for carrying on the business are entered in the annual financial statement which the Ministry has to lay before the house or houses of legislature in respect of every financial year under Article 202 of the Constitution. So much of the estimates as relate to expenditure other than those charged on the consolidated fund are submitted in the form of demands for grants to the legislature and

the legislature has the power to assent or refuse to assent to any such demand or assent to a demand subject to reduction of the amount (Article 203).

After the grant is sanctioned, an appropriation bill is introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the assembly (Article 204). As soon as the appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under Article 266(3) of the Constitution.

16. It may be, as Mr Pathak contends, that the appropriation Acts are no substitute for specific legislation and that they validate only the expenses out of the consolidated funds for the particular years for which they are passed; but nothing more than that may be necessary for carrying on of the trade or business. Under Article 266(3) of the Constitution no moneys out of the consolidated funds of India or the consolidated fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

The expression "law" here obviously includes the appropriation Acts. It is true that the appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised.

Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the appropriation Acts would afford a complete answer.

17. Specific legislation may indeed be necessary if the Government require 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 course would have to be passed.

18. In the present case it is not disputed that the entire expenses necessary for carrying on the business of printing and publishing the text books for recognised schools in Punjab were estimated and shown in the annual financial statement and that the demands for grants, which were made under different heads, were sanctioned by the State Legislature and due appropriation Acts were passed.

For the purpose of carrying on the business, the Government does not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with authors and other people. This power of contract is expressly vested in the Government under Article 298 of the Constitution. In these circumstances, we are unable to agree with Mr Pathak that the carrying on of the business of printing and publishing textbooks was beyond the competence of the executive Government without a specific legislation sanctioning such course.

19. These discussions however are to some extent academic and are not sufficient by themselves to dispose of the petitioners' case. As we have already said, the executive Government is bound to conform not only to the law of the land but also to the provisions of the Constitution. The Indian Constitution is a written Constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently, even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights of the petitioners guaranteed under Part III of the Constitution.

On the other hand, even if the acts of the executive are illegal in the sense that they are not warranted by law, but no fundamental rights of the petitioners have been infringed thereby, the latter would obviously have no right to complain under Article 32 of the Constitution though they may have remedies elsewhere if other heads of rights are infringed. The material question for consideration therefore is: What fundamental rights of the petitioners, if any, have been violated by the notifications and acts of the executive Government of Punjab undertaken by them in furtherance of their policy of nationalisation of the text books for the school students?

20. The petitioners claim fundamental right under Article 19(1)(g) of the Constitution which guarantees, inter alia, to all persons the right to carry on any trade or business. The business which the petitioners have been carrying on is that of printing and publishing books for sale including text books used in the primary and middle classes of the schools in Punjab. Ordinarily it is for the school authorities to prescribe the text books that are to be used by the students and if these text books are available in the market the pupils can purchase them from any book-seller they like.

There is no fundamental right in the publishers that any of the books printed and published by them should be prescribed as text books by the school authorities or if they are once accepted as text books they cannot be stopped or discontinued in future. With regard to the schools which are recognised by the Government the position of the publishers is still worse. The recognised schools receive aids of various kinds from the Government including grants for the maintenance of the institutions, for equipment, furniture, scholarships and other things and the pupils of the recognised schools are admitted to the school final examinations at lower rates of fees than those demanded from the students of non-recognised schools.

Under the school code, one of the main conditions upon which recognition is granted by Government is that the school authorities must use as text books only those which are prescribed or authorised by the Government.

So far therefore as the recognised schools are concerned - and we are concerned only with these schools in the present case the choice of text books rests entirely with the Government and it is for the Government to decide in which way the selection of these text books is to be made. The procedure hitherto followed was that the Government used to invite publishers and authors to submit their books for examination and approval by the Education Department and after selection was made by the Government, the size, contents as well as the prices of the books were fixed and it was left to the publishers or authors to print and publish them and offer them for sale to the pupils. So long as this system was in vogue the only right which

publishers like the petitioners had, was to offer their books for inspection and approval by the Government. They had no right to insist on any of their books being accepted as text books.

So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. A trader might be lucky in securing a particular market for his goods but if he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers for ever.

On the one hand, therefore, there was nothing but a chance or prospect which the publishers had of having their books approved by the Government, on the other hand the Government had the undisputed right to adopt any method of selection they liked and if they ultimately decided that after approving the text books they would purchase the copyright in them from the authors and others provided the latter were willing to transfer the same to the Government on certain terms, we fail to see what right of the publishers to carry on their trade or business is affected by it.

Nobody is taking away the publishers' right to print and publish any books they like and to offer them for sale but if they have no right that their books should be approved as text books by the Government it is immaterial so far as they are concerned whether the Government approves of text books submitted by other persons who are willing to sell their copyrights in the books to them, or choose to engage authors for the purpose of preparing the text books which they take up on themselves to print and publish.

We are unable to appreciate the argument of Mr Pathak that the Government while exercising their undoubted right of approval cannot attach to it a condition which has no bearing on the purpose for which the approval is made. We fail to see how the petitioners' position is in any way improved thereby. The action of the Government may be good or bad. It may be criticised and condemned in the houses of the legislature or outside but this does not amount to an infraction of the fundamental right guaranteed by Article 19(1)(g) of the Constitution.

21. As in our view the petitioners have no fundamental right in the present case which can be said to have been infringed by the action of the Government, the petition is bound to fail on that ground. This being the position, the other two points raised by Mr Pathak do not require consideration at all. As the petitioners have no fundamental right under Article 19(1)(g) of the Constitution, the question whether the Government could establish a monopoly without any legislation under Article 19(6) of the Constitution is altogether immaterial.

Again a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest in an undertaking within the meaning of Article 31(2) of the Constitution and no question of payment of compensation can arise because the petitioners have been deprived of the same. The result is that the petition is dismissed.

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THE UNION AND ITS TERRITORY

In Re Berubari Union and Exchange of Enclaves

AIR 1960 SC 845

(B.P. Sinha, C.J., S.K. Das, P.B. Gajendragadkar, A.K. Sarkar, K. Subba Rao, M. Hidayatullah, K.C. Das Gupta and J.C. Shah, JJ.)

[Power to cede away Indian territory in favour of a foreign country – whether permissible; Procedure]

With a view to removing causes of tension between India and Pakistan on account of boundary dispute, the Prime Ministers of both the countries entered into an agreement (known as the Indo-Pakistan agreement) settling the boundary dispute. Subsequently, a doubt arose as to 'whether the implementation of the Agreement relating to Berubari Union required any legislative action either by way of a suitable law of Parliament relating to Article 3 of the Constitution or by way of a suitable amendment of the Constitution in accordance with the provisions of Article 368 of the Constitution or both and that a similar doubt has arisen about the implementation of the Agreement relating to the exchange of Enclaves'. The President of India, in exercise of the powers under Article 143(1) of the Constitution, referred three questions to the Supreme Court for its advice:

- (1) Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union?
- (2) If so, is a law of Parliament relating to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary, in addition or in the alternative?
- (3) Is a law of Parliament relating to Article 3 of the Constitution sufficient for implementation of the agreement relating to Exchange of Enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose, in addition or in the alternative?

The Court was concerned with two items of the agreement; Item 3 in para 2 of the agreement:

“(3) Berubari Union 12:

This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The Division of Berubari Union 12 will be horizontal, starting from the north east corner of Debiganj Thana. The division should be made in such a manner that the Cooch-Bihar Enclaves between Pachagar Thana of East Pakistan and Berubari Union 12 of Jalpaiguri Thana of West Bengal will remain connected as at present with Indian territory and will remain with India. The Cooch-Bihar Enclaves lower down between Boda Thana of East Pakistan and Berubari Union 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan.”

and Item 10 of the Agreement:

“(10) Exchange of old Cooch-Bihar Enclaves in Pakistan and Pakistan Enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to”.

P.B. GAJENDRAGADKAR, J.– 4. On February 20, 1947, the British Government announced its intention to transfer power in British India to Indian hands by June 1948. On 3-6-1947, the said Government issued a statement as to the method by which the transfer of

power would be effected. On July 18, 1947, the British Parliament passed the Indian Independence Act, 1947. This Act was to come into force from August 15, 1947, which was the appointed day. As from the appointed day two independent Dominions, it was declared, would be set up in India to be known respectively as India and Pakistan. Section 2 of the Act provided that subject to the provisions of sub-sections (3) and (4) of Section 2 the territories of India shall be the territories under the sovereignty of His Majesty which immediately before the appointed day were included in British India except the territories which under sub-section (2) of Section 2 were to be the territories of Pakistan. Section 3, sub-section (1), provided, inter alia, that as from the appointed day the Province of Bengal as constituted under the Government of India Act, 1935, shall cease to exist and there shall be constituted in lieu thereof two new Provinces to be known respectively as East Bengal and West Bengal. Sub-section (3) of Section 3 provided, inter alia, that the boundaries of the new Provinces aforesaid shall be such as may be determined whether before or after the appointed day by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until boundaries are so determined, (a) the Bengal District specified in the First Schedule of this Act ... shall be treated as the territories which are to be comprised as the new Province of East Bengal; (b) the remainder of the territories comprised at the date of the passing of this Act in the Province of Bengal shall be treated as the territories which are to be comprised in the new Province of West Bengal. Section 3, sub-s. (4), provided that the expression "award" means, in relation to a boundary commission, the decision of the Chairman of the commission contained in his report to the Governor-General at the conclusion of the commission's proceedings. The Province of West Bengal is now known as the State of West Bengal and is a part of India, whereas the Province of East Bengal has become a part of Pakistan and is now known as East Pakistan.

5. Berubari Union 12, with which we are concerned, has an area of 8.75 sq. miles and a population of ten to twelve thousand residents. It is situated in the Police Station Jalpaiguri in the District of Jalpaiguri, which was at the relevant time a part of Rajshahi Division. It has, however, not been specified in the First Schedule of the Independence Act, and if the matter had to be considered in the light of the said Schedule, it would be a part of West Bengal. But, as we shall presently point out, the First Schedule to the Independence Act did not really come into operation at all.

6. On June 30, 1947, the Governor-General made an announcement that it had been decided that the Province of Bengal and Punjab shall be partitioned. Accordingly, a boundary commission was appointed, inter alia, for Bengal consisting of four judges of High Courts and a Chairman to be appointed later. Sir Cyril Radcliffe was subsequently appointed as Chairman. So far as Bengal was concerned the material terms of reference provided that the boundary commission should demarcate the boundaries of the two parts of Bengal on the basis of ascertaining the contiguous areas of Muslims and non-Muslims; in doing so it had also to take into account other factors. The Commission then held its enquiry and made an award on 12-8-1947, which is known as the Radcliffe Award (hereinafter called "the award"). It would be noticed that this award was made three days before the appointed day under the Independence Act. The report shows that the Chairman framed seven basic questions on the

decision of which the demarcation of a boundary line between East-West Bengal depended. Question 6 is relevant for our purpose; it was framed in this way:

6. Which State's claim ought to prevail in respect of the districts of Darjeeling and Jalpaiguri in which the muslim population amounted to 2.42% of the whole in the case of Darjeeling and 23.08% of the whole in the case of Jalpaiguri but which constituted an area not in any natural sense contiguous to another non-muslim area of Bengal?

It appears that the members of the Commission were unable to arrive at an agreed view on any of the major issues, and the Chairman had no alternative but to proceed to give his own decision. Accordingly the Chairman gave his decision on the relevant issues in these words:

The demarcation of the boundary line is described in detail in the Schedule which forms annexure A to the award and in the map attached thereto, annexure B. The map is annexed for the purposes of illustration, and if there should be any divergence between the boundary as described in annexure A and as delineated on the map in annexure B the description in annexure A is to prevail.

Para 1 in annexure A is material. It provided that "a line shall be drawn along the boundary between the Thana of Phansidewa in the District of Darjeeling and the Thana Tetulia in the District of Jalpaiguri from the point where that boundary meets the Province of Bihar and then along the boundary between the Thanas of Tetulia and Rajganj, the Thanas of Pachagar and Rajganj and the Thanas of Pachagar and Jalpaiguri, and shall then continue along with northern corner of Thana of Debiganj to the boundary of the State of Cooch-Bihar. The district of Darjeeling and so much of the district of Jalpaiguri as lies north of this line shall belong to West Bengal, but the Thana of Patgram and any other portion of Jalpaiguri District which lies to the east or south shall belong to East Bengal". Since the award came into operation three days before the day appointed under the Independence Act the territorial extent of the Province of West Bengal never came to be determined under Schedule I to the said Independence Act but was determined by the award. There is no dispute that since the date of the award Berubari Union 12 has in fact formed part of the State of West Bengal and has been governed as such.

7. Meanwhile the Constituent Assembly which began its deliberations on 9-12-1946, reassembled as the Sovereign Constituent Assembly for India after midnight of 14-8-1947, and it began its historic task of drafting the Constitution for India. A Drafting Committee was appointed by the Constituent Assembly and the draft prepared by it was presented to the Assembly on 4-11-1948. After due deliberations the draft passed through three readings and as finalised it was signed by the President of the Assembly and declared as passed on 26-11-1949. On that date it became the Constitution of India; but, as provided by Article 394, only specified articles came into force as from that date and the remaining provisions as from January 26, 1950, which day is referred to in the Constitution as the commencement of the Constitution.... West Bengal was shown as one of the States in Part A; and it was provided that the territory of the State of West Bengal shall comprise the territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal. In the light of the award Berubari Union 12 was treated as a part of the Province of West Bengal and as such has been treated governed on that basis.

8. Subsequently, certain boundary disputes arose between India and Pakistan and it was agreed between them at the Inter-Dominion Conference held in New Delhi on 14-12-1948, that a tribunal should be set up without delay and in any case not later than 31-1-1949, for the adjudication and final decision of the said disputes. This Tribunal is known as Indo-Pakistan Boundaries Disputes Tribunal, and it was presided over by the Hon'ble Lord Justice Algot Bagge. This Tribunal had to consider two categories of disputes in regard to East-West Bengal but on this occasion no issue was raised about the Berubari Union. In fact no reference was made to the District of Jalpaiguri at all in the proceedings before the Tribunal. The Bagge Award was made on 26-1-1950.

9. It was two years later that the question of Berubari Union was raised by the Government of Pakistan for the first time in 1952. During the whole of this period the Berubari Union continued to be in the possession of the Indian Union and was governed as a part of West Bengal. In 1952 Pakistan alleged that under the award Berubari Union should really have formed part of East Bengal and it had been wrongly treated as a part of West Bengal. Apparently correspondence took place between the Prime Ministers of India and Pakistan on this subject from time to time and the dispute remained alive until 1958. It was under these circumstances that the present Agreement was reached between the two Prime Ministers on 10-9-1958. That is the background of the present dispute in regard to Berubari Union 12.

10. At this stage we may also refer briefly to the background of events which ultimately led to the proposed exchange of Cooch-Bihar Enclaves between India and Pakistan. Section 290 of the Government of India Act, 1935 had provided that His Majesty may by Order-in-Council increase or diminish the area of any Province or alter the boundary of any Province provided the procedure prescribed was observed. It is common ground that the Government of India was authorised by the Extra-Provincial Jurisdiction Act of 1947 to exercise necessary powers in that behalf. Subsequently on 12-1-1949, the Government of India Act, 1935 was amended and Section 290-A and Section 290-B were added to it. Section 290-A reads thus:

290-A. Administration of certain Acceding States as a Chief Commissioner's Province or as part of a Governor's or Chief Commissioner's Province. — (1) Where full and exclusive authority, jurisdiction and powers for and in relation to governance of any Indian State or any group of such States are for the time being exercisable by the Dominion Government, the Governor-General may by order direct—

- (a) that the State or the group of States shall be administered in all respects as if the State or the group of States were a Chief Commissioner's Province; or
- (b) that the State or the group of States shall be administered in all respects as if the State or the group of States formed part of a Governor's or a Chief Commissioner's Province specified in the Order;

11. Section 290-B(1) provides that the Governor-General may by order direct for the administration of areas included within the Governor's Province or a Chief Commissioner's Province by an Acceding State, and it prescribes that the acceding area shall be administered in all respects by a neighbouring acceding State as if such area formed part of such State, and thereupon the provisions of the Government of India Act shall apply accordingly.

12. After these two sections were thus added several steps were taken by the Government of India for the merger of Indian States with the Union of India. With that object the States

Merger (Governors' Provinces) Order, 1949, was passed on 27-7-1949. The effect of this order was that the States which had merged with the Provinces were to be administered in Enclaves in all respects as if they formed part of the absorbing Provinces. This order was amended from time to time. On 28-8-1949, an agreement of merger was entered into between the Government of India and the Ruler of the State of Cooch-Bihar and in pursuance of this agreement the Government of India took over the administration of Cooch-Bihar on 12-9-1949; Cooch-Bihar thus became a part of the territory of India and was accordingly included in the list of Part C States as Serial No. 4 in the First Schedule to the Constitution. Thereafter, on December 31, 1949, the States Merger (West Bengal) Order, 1949 was passed. It provided that whereas full and exclusive authority, jurisdiction and power for and in relation to the governance of the Indian State of Cooch-Bihar were exercisable by the Dominion Government, it was expedient to provide by the order made under Section 290-A for the administration of the said State in all respects as if it formed part of the Province of West Bengal. In consequence, on 1-1-1950 the erstwhile State of Cooch-Bihar was merged with West Bengal and began to be governed as if it was part of West Bengal. As a result of this merger Cooch-Bihar was taken out of the list of Part C States in the First Schedule to the Constitution and added to West Bengal in the same Schedule, and the territorial description of West Bengal as prescribed in the First Schedule was amended by the addition of the clause which referred to the territories which were being administered as if they formed part of that Province. In other words, after the merger of Cooch-Bihar the territories of West Bengal included those which immediately before the commencement of the Constitution were comprised in the Province of West Bengal as well as those which were being administered as if they formed part of that Province. Subsequently a further addition has been made to the territories of West Bengal by the inclusion of Chandernagore but it is not necessary to refer to the said addition at this stage.

13. It appears that certain areas which formed part of the territories of the former Indian State of Cooch-Bihar and which had subsequently become a part of the territories of India and then of West Bengal became after the partition enclaves in Pakistan. Similarly certain Pakistan enclaves were found in India. The problem arising from the existence of these enclaves in Pakistan and in India along with other border problems was being considered by the Governments of India and of Pakistan for a long time. The existence of these enclaves of India in Pakistan and of Pakistan in India worked as a constant source of tension and conflict between the two countries. With a view to removing these causes of tension and conflict the two Prime Ministers decided to solve the problem of the said enclaves and establish peaceful conditions along the said areas. It is with this object that the exchange of enclaves was agreed upon by them and the said adjustment is described in Item 10 of para 3 of the Agreement. That in brief is the historical and constitutional background of the exchange of enclaves.

14. On behalf of the Union of India the learned Attorney-General has contended that no legislative action is necessary for the implementation of the Agreement relating to Berubari Union as well as the exchange of enclaves. In regard to the Berubari Union he argues that what the Agreement has purported to do is to ascertain or to delineate the exact boundary about which a dispute existed between the two countries by reason of different interpretations put by them on the relevant description contained in the award; the said Agreement is merely

the recognition or ascertainment of the boundary which had already been fixed and in no sense is it a substitution of a new boundary or the alteration of the boundary implying any alteration of the territorial limits of India. He emphasises that the ascertainment or the settlement of the boundary in the light of the award by which both Governments were bound, is not an alienation or cession of the territory of India, and according to him, if, as a result of the ascertainment of the true boundary in the light of the award, possession of some land has had to be yielded to Pakistan it does not amount to cession of territory; it is merely a mode of settling the boundary. The award had already settled the boundary; but since a dispute arose between the two Governments in respect of the location of the said boundary the dispute was resolved in the light of the directions given by the award and in the light of the maps attached to it. Where a dispute about a boundary thus arises between two States and it is resolved in the light of an award binding on them the agreement which embodies the settlement of such a dispute must be treated as no more than the ascertainment of the real boundary between them and it cannot be treated as cession or alienation of territory by one in favour of the other. According to this argument there was neither real alteration of the boundary nor real diminution of territory, and there would be no occasion to make any alteration or change in the description of the territories of West Bengal in the First Schedule to the Constitution.

15. It is also faintly suggested by the learned Attorney-General that the exchange of Cooch-Behar Enclaves is a part of the general and broader agreement about the Berubari Union and in fact it is incidental to it. Therefore, viewed in the said context, even this exchange cannot be said to involve cession of any territory.

16. On this assumption the learned Attorney-General has further contended that the settlement and recognition of the true boundary can be effected by executive action alone, and so the Agreement which has been reached between the two Prime Ministers can be implemented without any legislative action. In support of this argument the learned Attorney-General has relied upon certain provisions of the Constitution and we may at this stage briefly refer to them.

17. Entry 14 in List 1 of the Seventh Schedule reads thus: "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." Article 253 occurs in Part XI which deals with relations between the Union and the States. It provides that "notwithstanding anything in the foregoing provisions of the said Chapter Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body". This power is conferred on Parliament by reference to Entry 14. Besides there are three other articles in the same part which are relevant. Article 245(1) empowers Parliament to make laws for the whole or any part of the territory of India; Article 245(2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation; Article 246 prescribes the subject-matter of laws which Parliament can make; and Article 248 provides for the residuary powers of legislation in Parliament. Article 248 lays down that Parliament has power to make any law with respect to any matter not enumerated in the Concurrent List or State List. There is thus no doubt about

the legislative competence of Parliament to legislate about any treaty, agreement or convention with any other country and to give effect to such agreement or convention.

18. It is, however, urged that in regard to the making of treaties and implementing them the executive powers of the Central Government are co-extensive and co-incidental with the powers of Parliament itself. This argument is sought to be based on the provisions of certain articles to which reference may be made. Article 53(1) provides that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 73 on which strong reliance is placed prescribes the extent of the executive power of the Union. Article 73(1) says “that 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 the power to make laws”; and Article 74 provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions; and Article 74(2) lays down that the question whether any, and if so what, advice was tendered by the Ministers to the President shall not be inquired into in any court. According to the learned Attorney-General the powers conferred on the Union executive under Article 73(1)(a) have reference to the powers exercisable by reference to Entry 14, List I, in the Seventh Schedule, whereas the powers conferred by Article 73(1)(b) are analogous to the powers conferred on the Parliament by Article 253 of the Constitution. Indeed the learned Attorney-General contended that this position is concluded by a decision of this Court in *Rai Sahib Ram Jawaya Kapur v. State of Punjab* [AIR 1955 SC549]. Dealing with the question about the limits within which the executive Government can function under the Indian Constitution Chief Justice Mukherjea, who delivered the unanimous decision of the Court, has observed that “the said limits can be ascertained without much difficulty by reference to the form of executive which our Constitution has set up”, and has added, “that the executive function comprised both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State”. It is on this observation that the learned Attorney-General has founded his argument.

19. Let us then first consider what the agreement in fact has done. Has it really purported to determine the boundaries in the light of the award, or has it sought to settle the dispute amicably on an ad hoc basis by dividing the disputed territory half and half? Reading the relevant portion of the agreement it is difficult to escape the conclusion that the parties to it came to the conclusion that the most expedient and reasonable way to resolve the dispute would be to divide the area in question half and half. There is no trace in the Agreement of any attempt to interpret the award or to determine what the award really meant. The agreement begins with the statement the decision that the area in dispute will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. In

other words, the agreement says that, though the whole of the area of Berubari Union 12 was within India, India was prepared to give half of it to Pakistan in a spirit of give and take in order to ensure friendly relations between the parties and remove causes of tension between them. Having come to this decision the Agreement describes how the decision has to be carried out. It provides that the division of the area will be horizontal starting from the north- east corner of Debiganj Thana. It also provides that the division should be made in such manner that the Cooch-Bihar Enclaves between Pachagar Thana of East Pakistan and Berubari Union 12 of Jalpaiguri Thana of West Bengal will remain with India. This again is a provision for carrying out the decision of dividing the area half and half. Yet, another provision is made as to the division of Cooch-Bihar Enclaves lower down between Boda Thana of East Pakistan and Berubari Union 12 and it is provided that they shall be exchanged along with the general exchange of enclaves and will go to Pakistan. In our opinion, every one of the clauses in this Agreement clearly and unambiguously shows that, apart from, and independently of, the award, it was agreed to divide the area half and half and the method of effecting this division was specifically indicated by making four material provisions in that behalf. If that be so, it is difficult to accept the argument that this part of the Agreement amounts to no more than ascertainment and delineation of the boundaries in the light of the award.

20. It is no doubt suggested by the learned Attorney-General that an examination of the description in Annexure A in the Schedule to the award in relation to police station boundaries revealed a lacuna in it, inasmuch as there was no mention in it of the boundary between Police Station Boda and Police Station Jalpaiguri; and the argument is that the result of this description was that the two points were specified, one western boundary of the Berubari Union (the extremity of the boundary between the Thanas of Pachagar and Jalpaiguri) and the other on its eastern boundary (the northern corner of the Thana of Debiganj where it meets Cooch-Bihar State) without giving an indication as to how these boundaries were to be connected. It is also pointed out that the line as drawn in the map, Annexure B, in the Schedule to the award would, if followed independently of the description given in Schedule A in the annexure to the said award, mean that almost the whole of the Berubari Union would have fallen in the territory of East Bengal and that was the claim made by the Government of Pakistan, and it is that claim which was settled in the light of the award.

21. In this connection it is relevant to remember the direction specifically given by the Chairman in his award that the map is annexed for the purpose of illustration and that in case of any divergence between the map, Annexure B, and the boundary as described in Annexure A, the description in Annexure A has to prevail, and so no claim could reasonably or validly be made for the inclusion of almost the whole of Berubari Union in East Bengal on the strength of the line drawn in the map. Besides, the lacuna to which the learned Attorney- General refers could have been cured by taking into account the general method adopted by the award in fixing the boundaries. Para 3 in Annexure A shows that the line which was fixed by the award generally proceeded along the boundaries between the Thanas, and this general outline of the award would have assisted the decision of the dispute if it was intended to resolve the dispute in the light of the award. The line which was directed to be drawn in para

1 of Annexure A has “to continue” along the northern corner of Thana Debiganj to the boundary of the State of Cooch-Bihar, and this in the context may suggest that it had to continue by reference to the boundaries of the respective Thanas. It is principally because of these considerations that the territory in question was in the possession of India for some years after the date of the award and no dispute was raised until 1952.

22. We have referred to these facts in order to emphasize that the agreement does not appear to have been reached after taking into account these facts and is not based on any conclusions based on the interpretation of the award and its effect. In fact the second clause of the agreement which directs that the division of Berubari Union 12 will be horizontal starting from the north-east corner of Debiganj Thana is not very happily worded. The use of the word “horizontal” appears to be slightly inappropriate; but, apart from it, the direction as to this horizontal method of division as well as the other directions contained in the agreement flow from the conclusion with which the Agreement begins that it had been decided that India should give half the area to Pakistan. We have carefully considered all the clauses in the Agreement and we are satisfied that it does not purport to be, and has not been, reached as a result of any interpretation of the award and its terms; it has been reached independently of the award and for reasons and considerations which appeared to the parties to be wise and expedient. Therefore, we cannot accede to the argument urged by the learned Attorney-General that it does no more than ascertain and determine the boundaries in the light of the award. It is an Agreement by which a part of the territory of India has been ceded to Pakistan and the question referred to us in respect of this Agreement must, therefore, be considered on the basis that it involves cession or alienation of a part of India’s territory.

23. What is true about the Agreement in respect of Berubari Union 12 is still more emphatically true about the exchange of Cooch-Bihar Enclaves. Indeed the learned Attorney-General’s argument that no legislation is necessary to give effect to the Agreement in respect of this exchange was based on the assumption that this exchange is a part of a larger and broader settlement and so it partakes of its character. Since we have held that the agreement in respect of Berubari Union 12 itself involves the cession of Enclaves the territory of India *a fortiori* the Agreement in respect of exchange of Cooch-Bihar Enclaves does involve the cession of Indian territory. That is why the question about this exchange must also be considered on the footing that a part of the territory of India has been ceded to Pakistan; besides it is clear that unlike Questions 1 and 2 the third question which has reference to this exchange postulates the necessity of legislation.

24. In this connection we may also deal with another argument urged by the learned Attorney-General. He contended that the implementation of the Agreement in respect of Berubari Union would not necessitate any change in the First Schedule to the Constitution because, according to him, Berubari Union was never legally included in the territorial description of West Bengal contained in the said Schedule. We are not impressed by this argument either. As we have already indicated, since the award was announced Berubari Union has remained in possession of India and has been always treated as a part of West Bengal and governed as such. In view of this factual position there should be no difficulty in holding that it falls within the territories which immediately before the commencement of the Constitution were comprised in the Province of West Bengal. Therefore, as a result of the

implementation of this Agreement the boundaries of West Bengal would be altered and the content of Entry 13 in the First Schedule to the Constitution would be affected.

26. In view of our conclusion that the agreement amounts to cession or alienation of a part of Indian territory and is not a mere ascertainment or determination of the boundary in the light of, and by reference to, the award, it is not necessary to consider the other contention raised by the learned Attorney-General that it was within the competence of the Union executive to enter into such an Agreement, and that the Agreement can be implemented without any legislation. It has been fairly conceded by him that this argument proceeds on the assumption that the Agreement is in substance and fact no more than the ascertainment or the determination of the disputed boundary already fixed by the award. We need not, therefore, consider the merits of the argument about the character and extent of the executive functions and powers nor need we examine the question whether the observations made by Mukherjea, C.J., in the case of *Rai Sahib Ram Jawaya Kapur* [AIR 1955 SC 549] in fact lend support to the said argument, and if they do, whether the question should not be reconsidered.

27. At this stage it is necessary to consider the merits of the rival contention raised by Mr Chatterjee before us. He urges that even Parliament has no power to cede any part of the territory of India in favour of a foreign State either by ordinary legislation or even by the amendment of the Constitution; and so, according to him, the only opinion we can give on the Reference is that the Agreement is void and cannot be made effective even by any legislative process. This extreme contention is based on two grounds. It is suggested that the preamble to the Constitution clearly postulates that like the democratic republican form of government the entire territory of India is beyond the reach of Parliament and cannot be affected either by ordinary legislation or even by constitutional amendment. The makers of the Constitution were painfully conscious of the tragic partition of the country into two parts, and so when they framed the Constitution they were determined to keep the entire territory of India as inviolable and sacred. The very first sentence in the preamble, which declares that "We, the people of India, having solemnly resolved to constitute India into a sovereign democratic republic", says Mr Chatterjee, irrevocably postulates that India geographically and territorially must always continue to be democratic and republican. The other ground on which this contention is raised is founded on Article 1(3) (c) of the Constitution which contemplates that "the territory of India shall comprise such other territories as may be acquired", and it is argued that whereas the Constitution has expressly given to the country the power to acquire other territories it has made no provision for ceding any part of its territory; and in such a case the rule of construction viz. *expressio unius est exclusio alterius* must apply. In our opinion, there is no substance in these contentions.

28. There is no doubt that the declaration made by the people of India in exercise of their sovereign will in the preamble to the Constitution is, in the words of Story, "a key to open the mind of the makers" which may show the general purposes for which they made the several provisions in the Constitution; but nevertheless the preamble is not a part of the Constitution, and, as Willoughby has observed about the preamble to the American Constitution, "it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted".

29. What is true about the powers is equally true about the prohibitions and limitations. Besides, it is not easy to accept the assumption that the first part of the preamble postulates a very serious limitation on one of the very important attributes of sovereignty itself. As we will point out later, it is universally recognised that one of the attributes of sovereignty is the power to cede parts of national territory if necessary. At the highest it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the preamble. Therefore, Mr Chatterjee is not right in contending that the preamble imports any limitation on the exercise of what is generally regarded as anecessary and essential attribute of sovereignty.

30. Then, as regards the argument that the inclusion of the power to acquire must necessarily exclude the power to cede or alienate, there are two obvious answers. Article 1(3)(c) does not confer power or authority on India to acquire territories as Mr Chatterjee assumes. There can be no doubt that under international law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favour of a foreign State. What Article 1(3) (c) purports to do is to make a formal provision for absorption and integration of any foreign territories which may be acquired by India by virtue of its inherent right to do so. It may be that this provision has found a place in the Constitution not in pursuance of any expansionist political philosophy but mainly for providing for the integration and absorption of Indian territories which, at the date of the Constitution, continued to be under the dominion of foreign States; but that is not the whole scope of Article 1(3)(c). It refers broadly to all foreign territories which may be acquired by India and provides that as soon as they are acquired they would form part of the territory of India. Thus, on a true construction of Article 1(3) (c) it is erroneous to assume that it confers specific powers to acquire foreign territories. The other answer to the contention is provided by Article 368 of the Constitution. That article provides for the procedure for the amendment of the Constitution and expressly confers power on Parliament in that behalf. The power to amend Constitution must inevitably include the power to amend Article 1, and that logically would include the power to cede national territory in favour of a foreign State; and if that is so, it would be unreasonable to contend that there is no power in the sovereign State of India to cede its territory and that the power to cede national territory which is an essential attribute of sovereignty is lacking in the case of India. We must, therefore, reject Mr Chatterjee's contention that no legislative process can validate the agreement in question.

31. What then is the nature of the treaty-making power of a sovereign State? That is the next problem which we must consider before addressing ourselves to the questions referred to us for our opinion. As we have already pointed out it is an essential attribute of sovereignty that a sovereign State can acquire foreign territory and can, in case of necessity, cede a part of its territory in favour of a foreign State, and this can be done in exercise of its treaty-making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner State in favour of another State. There can be no doubt that such cession is possible and indeed history presents several examples of such transfer of sovereignty. It is true as Oppenheim has observed that "hardship is involved in the fact that in all cases of cession the inhabitants of the territory, who remain, lose their old citizenship and

are handed over to a new sovereign whether they like it or not” [Oppenheim’s *International Law* by Lauterpacht, Vol I, p. 551 8th Edn.] ; and he has pointed out that “it may be possible to mitigate this hardship by stipulating an option to emigrate within a certain period in favour of the inhabitants of ceded territory as means of averting the charge that the inhabitants are handed over to a new sovereign against their will” [p. 553]. But though from the human point of view great hardship is inevitably involved in cession of territory by one country to the other there can be no doubt that a sovereign State can exercise its right to cede a part of its territory to a foreign State. This power, it may be added, is of course subject to the limitations which the Constitution of the State may either expressly or by necessary implication impose in that behalf; in other words, the question as to how treaties can be made by a sovereign State in regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country. Stated broadly the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by constitutional amendment will naturally depend on the provisions of the Constitution itself. We must, therefore, now turn to that aspect of the problem and consider the position under our Constitution.

32. In dealing with this aspect we are proceeding on the assumption that some legislation is necessary to implement the Agreement in question. It is urged on behalf of the Union of India that if any legislative action is held to be necessary for the implementation of the Agreement a law of Parliament relating to Article 3 of the Constitution would be sufficient for the purpose; and if that be so, there would be no occasion to take any action under Article 368 of the Constitution. The decision of this question will inevitably depend upon the construction of Article 3 itself. The learned Attorney-General has asked us to bear in mind the special features of the basic structure of the Constitution in construing the relevant provisions of Article 3. He contends that the basic structure of the Constitution is the same as that of the Government of India Act, 1935, which had for the first time introduced a federal polity in India. Unlike other federations, the Federation embodied in the said Act was not the result of a pact or union between separate and independent communities of States who came together for certain common purposes and surrendered a part of their sovereignty. The constituent units of the federation were deliberately created and it is significant that they, unlike the units of other federations, had no organic roots in the past. Hence, in the Indian Constitution, by contrast with other Federal Constitutions, the emphasis on the preservation of the territorial integrity of the constituent States is absent. The makers of the Constitution were aware of the peculiar conditions under which, and the reasons for which, the States (originally Provinces) were formed and their boundaries were defined, and so they deliberately adopted the provisions in Article 3 with a view to meet the possibility of the redistribution of the said territories after the integration of the Indian States. In fact it is well known that as a result of the States Reorganization Act, 1956 (Act 37 of 1956), in the place of the original 27 States and one Area which were mentioned in Part D in the First Schedule to the Constitution, there are now only 14 States and 6 other areas which constitute the Union Territory mentioned in the First Schedule. The changes thus made clearly illustrate the working of the peculiar and striking feature of the Indian Constitution. There may be some force in this contention. It may, therefore, be assumed that in construing Article 3 we should take into account the fact

that the Constitution contemplated changes of the territorial limits of the constituent States and there was no guarantee about their territorial integrity.

33. Part I of the Constitution deals with the Union and its territories, and in a sense its provisions set out a self-contained code in respect of the said topic. Just as Part II deals with the topic of citizenship, Part I deals with the territory of India. Article 1 deals with the name and territory of India. Article 1 as it now stands is the result of amendments made by the Constitution (Seventh Amendment) Act, 1956. Before its amendment Article 1 referred to the territory of India as comprising the territories of the States specified in Parts A, B and C as well as the territories specified in Part D of the Schedule and such of the territories as might be acquired. Then a separate provision had been made by Article 243 in Part IX for the administration of the territories specified in Part D and other territories such as newly acquired territories which were not comprised in the First Schedule. The Constitution Amendments of 1956 made some important changes in Article 1. The distinction between Parts A, B and C and territories specified in Part D was abolished and in its place came the distinction between the territories of States and the Union territories specified in the First Schedule. In consequence Article 243 in Part IX was deleted. That is how under the present article the territory of India consists of the territories of the States, the Union territories and such other territories as may be acquired. We have already referred to Article 1(3) (c) and we have observed that it does not purport to confer power on India to acquire territories; it merely provides for and recognises automatic absorption or assimilation into the territory of India of territories which may be acquired by India by virtue of its inherent right as a sovereign State to acquire foreign territory. Thus Article 1 describes India as a Union of States and specifies its territories.

34. Article 2 provides that Parliament may by law admit into the Union or establish, new States on such terms and conditions as it thinks fit. This Article shows that foreign territories which after acquisition would become a part of the territory of India under Article 1(3) (c) can by law be admitted into the Union under Article 2. Such territories may be admitted into the Union or may be constituted into new States on such terms and conditions as Parliament may think fit; and as we shall presently point out such territories can also be dealt with by law under Article 3(a) or (b). The expression "by law" used in Articles 2 and 3 in this connection is significant. The acquisition of foreign territory by India in exercise of its inherent right as a sovereign State automatically makes the said territory a part of the territory of India. After such territory is thus acquired and factually made a part of the territory of India the process of law may assimilate it either under Article 2 or under Article 3(a) or (b).

35. As an illustration of the procedure which can be adopted by Parliament in making a law for absorbing newly acquired territory we may refer to the Chandernagore Merger Act, 1954 (Act 37 of 1954) which was passed on 29-9-1954, and came into force as from October 2, 1954. Chandernagore, which was a French possession, was declared a free city, and in June 1946 the French Government, in agreement with the Government of India, stated that it intended to leave the people of the French establishments in India a right to pronounce on their future fate and future status. In pursuance of this declaration a referendum was held in Chandernagore in 1949, and in this referendum the citizens of Chandernagore voted in favour of the merger of the territory with India. Consequently, on 2-5-1950, the President of the

French Republic effected a de facto transfer of the administration of Chandernagore to India, and as from that date the Government of India assumed control and jurisdiction over Chandernagore under Section 4 of the Foreign Jurisdiction Act, 1947 (Act 47 of 1947). Relevant notification was issued by the Government of India under the said section as a result of which certain Indian laws were made applicable to it. The said notification also provided that the corresponding french laws would cease to apply with effect from 2-5-1960. This was followed by the treaty of cession signed at Paris and in due course on 9-6-1952, Chandernagore was transferred *de jure* to the Government of India on the ratification of the said treaty. The result was Chandernagore ceased to be a French territory and became a part of the territory of India; and the Foreign Jurisdiction Act was no longer applicable to it. Article 243(1) which was then in operation applied to Chandernagore as from 9-6-1952, and in exercise of the powers conferred under Article 243(2) the President promulgated a regulation for the administration of Chandernagore which came into force from 30-6-1952. The Government of India then ascertained the wishes of the citizens of Chandernagore by appointing a Commission of enquiry, and on receiving the Commission's report that the people of Chandernagore were almost unanimously in favour of merging with West Bengal, the Government introduced in Parliament the Chandernagore Merger Act in question. After this Act was passed Chandernagore merged with the State of West Bengal as from October 2, 1954. This Act was passed by Parliament under Article 3 of the Constitution. As a result of this Act the boundaries of West Bengal were altered under Article 3(d) and by Section 4 the First Schedule to the Constitution was modified. We have thus briefly referred to the history of the acquisition and absorption of Chandernagore and its merger with West Bengal because it significantly illustrates the operation of Article 1(3)(c) as well as Article 3(b) and (d) of the Constitution.

36. That takes us to Article 3 which deals with the topic of formation of new States and alteration of areas, boundaries or names of existing States. The effect of Article 4 is that the laws relating to Article 2 or Article 3 are not to be treated as constitutional amendments for the purpose of Article 368, which means that if legislation is competent under Article 3 in respect of the agreement, it would be unnecessary to invoke Article 368. On the other hand, it is equally clear that if legislation in respect of the relevant topic is not competent under Article 3, Article 368 would inevitably apply. The crux of the problem, therefore, is: Can Parliament legislate in regard to the agreement under Article 3?

38. Prima facie Article 3 may appear to deal with the problems which would arise on the reorganisation of the constituent States of India on linguistic or any other basis; but that is not the entire scope of Article 3. Broadly stated it deals with the internal adjustment inter se of the territories of the constituent States of India. Article 3(a) enables Parliament to form a new State and this can be done either by the separation of the territory from any State, or by uniting two or more States or parts of States, or by uniting any territory to a part of any State. There can be no doubt that foreign territory which after acquisition becomes a part of the territory of India under Article 1(3) (c) is included in the last clause of Article 3(a) and that such territory may, after its acquisition, be absorbed in the new State which may be formed under Article 3(a). Thus Article 3(a) deals with the problem of the formation of a new State and indicates the modes by which a new State can be formed.

39. Article 3(b) provides that a law may be passed to increase the area of any State. This increase may be incidental to the reorganisation of States in which case what is added to one State under Article 3(b) may have been taken out from the area of another State. The increase in the area of any State contemplated by Article 3(b) may also be the result of adding to any State any part of the territory specified in Article 1(3)(c). Article 3(d) refers to the alteration of the boundaries of any State and such alteration would be the consequence of any of the adjustments specified in Article 3(a), (b) or (c). Article 3(e) which refers to the alteration of the name of any State presents no difficulty, and in fact has no material bearing on the questions with which we are concerned. We have yet to consider Article 3(c) the construction of which will provide the answers to the questions under reference; but before we interpret Article 3(c) we would like to refer to one aspect relating to the said article considered as a whole.

40. It is significant that Article 3 in terms does not refer to the Union territories and so, whether or not they are included in the last clause of Article 3(a) there is no doubt that they are outside the purview of Article 3(b), (c), (d) and (e). In other words, if an increase or diminution in the areas of the Union territories is contemplated or the alteration of their boundaries or names is proposed, it cannot be effected by law relating to Article 3. This position would be of considerable assistance in interpreting Article 3(c).

41. Article 3(c) deals with the problem of the diminution of the area of any State. Such diminution may occur, where the part of the area of a State is taken out and added to another State, and in that sense Articles 3(b) and 3(c) may in some cases be said to be correlated; but does Article 3(c) refer to a case where a part of the area of a State is taken out of that State and is not added to any other State but is handed over to a foreign State? The learned Attorney-General contends that the words used in Article 3(c) are wide enough to include the case of the cession of national territory in favour of a foreign country which causes the diminution of the area of the State in question. We are not impressed by this argument. Prima facie it appears unreasonable to suggest that the makers of the Constitution wanted to provide for the cession of national territory under Article 3(c). If the power to acquire foreign territory which is an essential attribute of sovereignty is not expressly conferred by the Constitution there is no reason why the power to cede a part of the national territory which is also an essential attribute of sovereignty should have been provided for by the Constitution. Both of these essential attributes of sovereignty are outside the Constitution and can be exercised by India as a sovereign State. Therefore, even if Article 3(c) receives the widest interpretation it would be difficult to accept the argument that it covers a case of cession of a part of national territory in favour of a foreign State. The diminution of the area of any State to which it refers postulates that the area diminished from the State in question should and must continue to be a part of the territory of India; it may increase the area of any other State or may be dealt with in any other manner authorised either by Article 3 or other relevant provisions of the Constitution, but it would not cease to be a part of the territory of India. It would be unduly straining the language of Article 3(c) to hold that by implication it provides for cases of cession of a part of national territory. Therefore, we feel no hesitation in holding that the power to cede national territory cannot be read in Article 3(c) by implication.

42. There is another consideration which is of considerable importance in construing Article 3(c). As we have indicated Article 3 does not in terms refer to the Union territories, and there can be no doubt that Article 3(c) does not cover them; and so, if a part of the Union territories has to be ceded to a foreign State no law relating to Article 3 would be competent in respect of such cession. If that be the true position cession of a part of the Union territories would inevitably have to be implemented by legislation relating to Article 368; and that, in our opinion, strongly supports the construction which we are inclined to place on Article 3(c) even in respect of cession of the area of any State in favour of a foreign State. It would be unreasonable, illogical and anomalous to suggest that, whereas the cession of a part of the Union territories has to be implemented by legislation relating to Article 368, cession of a part of the State territories can be implemented by legislation under Article 3. We cannot, therefore, accept the argument of the learned Attorney-General that an agreement which involves a cession of a part of the territory of India in favour of a foreign State can be implemented by Parliament by passing a law under Art 3 of the Constitution. We think that this conclusion follows on a fair and reasonable construction of Article 3 and its validity cannot be impaired by what the learned Attorney-General has described as the special features of the federal Constitution of India.

43. In this connection the learned Attorney-General has drawn our attention to the provisions of Act 47 of 1951 by which the boundaries of the State of Assam were altered consequent on the cession of a strip of territory comprised in that State to the Government of Bhutan. Section 2 of this Act provides that on and from the commencement of the Act the territories of the State of Assam shall cease to comprise the strip of territory specified in the Schedule which shall be ceded to the Government of Bhutan, and the boundaries of the State of Assam shall be deemed to have been altered accordingly. Section 3 provides for the consequential amendment of the first paragraph in Part A of the First Schedule to the Constitution relating to the territory of Assam. The argument is that when Parliament was dealing with the cession of a strip of territory which was a part of the State of Assam in favour of the Government of Bhutan it has purported to pass this Act under Article 3 of the Constitution. It appears that the strip of territory which was thus ceded consisted of about 32 sq. miles of the territory in the Dewangiri Hill Block being a part of Dewangiri on the extreme northern boundary of Kamrup District. This strip of territory was largely covered by forests and only sparsely inhabited by Bhotias. The learned Attorney-General has not relied on this single statute as showing legislative practice. He has only cited this as an instance where Parliament has given effect to the cession of a part of the territory of Assam in favour of the Government of Bhutan by enacting a law relating to Article 3 of the Constitution. We do not think that this instance can be of any assistance in construing the scope and effect of the provisions of Article 3.

44. Therefore our conclusion is that it would not be competent to Parliament to make a law relating to Article 3 of the Constitution for the purpose of implementing the Agreement. It is conceded by the learned Attorney-General that this conclusion must inevitably mean that the law necessary to implement the Agreement has to be passed under Article 368.

46. We have already held that the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the

alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Article 368. This position is not in dispute and has not been challenged before us; so it follows that acting under Article 368 Parliament may make a law to give effect to, and implement, the agreement in question covering the cession of a part of Berubari Union 12 as well as some of the Cooch-Bihar Enclaves which by exchange are given to Pakistan. Parliament may, however, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Article 3 to implement the agreement in question. On the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the agreement.

47. It would not be out of place to mention one more point before we formulate our opinion on the questions referred to us. We have already noticed that under the proviso to Article 3 of the Constitution it is prescribed that where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has to be referred by the President to the legislature of that State for its views thereon within such period as is therein prescribed. It has been urged before us by the learned Attorney-General that if it is held that Parliament must act under Article 368 and not under Article 3 to implement the Agreement, it would in effect deprive the legislature of West Bengal of an opportunity to express its views on the cession of the territory in question. That no doubt is true; but, if on its fair and reasonable construction Article 3 is inapplicable this incidental consequence cannot be avoided. On the other hand, it is clear that if the law in regard to the implementation of the Agreement is to be passed under Article 368 it has to satisfy the requirements prescribed by the said article; the Bill has to be passed in each House by a majority of the total membership of the House and by a majority of not less than two-thirds of the House present and voting; that is to say, it should obtain the concurrence of a substantial section of the House which may normally mean the consent of the major parties of the House, and that is a safeguard provided by the Article in matters of this kind.

48. In this connection it may incidentally be pointed out that the amendment of Article 1 of the Constitution consequent upon the cession of any part of the territory of India in favour of a foreign State does not attract the safeguard prescribed by the proviso to Article 368 because neither Article 1 nor Article 3 is included in the list of entrenched provisions of the Constitution enumerated in the proviso. It is not for us to enquire or consider whether it would not be appropriate to include the said two articles under the proviso. That is a matter for the Parliament to consider and decide.

49. We would accordingly answer the three questions referred to us as follows:

Q. 1. Yes

Q. 2. (a) A law of Parliament relating to Art. 3 of the Constitution would be incompetent;

(b) A law of Parliament relating to Art. 368 of the Constitution is competent and necessary;

(c) A law of Parliament relating to both Art. 368 and Art. 3 would be necessary only if Parliament chooses first to pass a law amending Art. 3 as indicated above; in that case Parliament may have to pass a law on those lines under Art. 368 and then follow it up with a law relating to the amended Art. 3 to implement the agreement.

Q. 3. Same as answers (a), (b) and (c) to Question 2.

Additional Readings:

After receipt of the Advisory Opinion of the Supreme Court in *Re The Berubari Union and Exchange of Enclaves* [AIR 1960 SC 845], the Parliament passed the Constitution (Ninth Amendment) Act, 1960 to give effect to the Indo-Pak Agreement. The validity of the amendment was challenged alleging that the language of the Amendment Act in question insofar as it related to Berubari Union No. 12 was confusing and incapable of implementation. It was also contended that the transfer of Berubari Union would result in deprivation of citizenship and property without compensation. P.B. Gejendragadkar, C.J., speaking for the court, dismissed the appeal holding that its advisory opinion in the above case was binding: *Ram Kishore Sen v. Union of India*, AIR 1966 SC 644.

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Transfer of *Tin Bigha* area to Bangla Desh on the basis of a perpetual lease deed did not require a constitutional amendment since the impugned action did not involve cessation of Indian territory: *Union of India v. Sukumar Sengupta*, AIR 1990 SC 1692.

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Under *Article 2*, Parliament has power to admit into the Union or establish new States on such terms and conditions as it thinks fit. The terms and conditions must be consistent with the basic structure of the Constitution. The admission of Sikkim by Constitution (Thirty-sixth Amendment) Act, 1975 was unsuccessfully challenged in *R. C. Poudyal v. Union of India*, AIR 1993 SC 1804.

* * * * *

A Bill referred by the President for expression of opinion by the State Legislature under the proviso to Article 3 of the Constitution need not be referred again to the concerned Legislature if changes are made by Parliament in the original Bill: *Babulal Parate v. State of Bombay*, AIR 1960 SC 51.

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THE CONSTITUTION (ONE HUNDREDTH AMENDMENT) ACT, 2015

This Amendment of the First Schedule to the Constitution with effect from 1 August 2015 for exchange of certain enclave territories with Bangladesh and conferment of citizenship rights to residents of enclaves was consequent to the signing of the Land Boundary Agreement (LBA) Treaty between India and Bangladesh.

The LBA envisages a notional transfer of 111 Indian enclaves to Bangladesh in return of 51 enclaves to India.

U.N.R. Rao v. Indira Gandhi

AIR 1971 SC 1002

(S.M.Sikri, C.J. and G.K.Mitter, K.S.Hegde, A.N.Grover and P.Jaganmohan Reddy, JJ.)

[It is essential to have a Council of Ministers under Article 74(1) even at a time when the House of the People has been dissolved or when its term has expired.]

A writ of *quo warranto* was prayed in this appeal against the continuation of Mrs. Indira Gandhi as the Prime Minister since the House of the People had been dissolved.

The appellant contended that under the Constitution, as soon as the House of the People was dissolved under Article 85(2), the Council of Ministers, i.e. the Prime Minister and the other Ministers, ceased to hold office. This argument was based upon the wordings of Article 75(3), which prescribes that: “the Council of Ministers shall be collectively responsible to the House of the People”. The question is, “how can the Council of Ministers be collectively responsible to the House of the People when it has already been dissolved under Article 85(2)?” It was contended that while carrying out its functions, no void would be created because the President can exercise the executive power of the Union either directly, or through officers subordinate to him, in accordance with Article 53(1) of the Constitution.

S.M. SIKRI, C.J.: 3. It seems to us that a very narrow point arises on the facts of the present case. The House of the People was dissolved by the President on December 27, 1970. The respondent was the Prime Minister before the dissolution. Is there anything in the Constitution, and in particular in Article 75(3), which renders her carrying on as Prime Minister, contrary to the Constitution? It was said that we must interpret Article 75(3) according to its own terms, regardless of the conventions that prevail in the United Kingdom. If the words of an Article are clear, notwithstanding any relevant convention, effect will, no doubt, be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed.

[The Court quoted Paras. 13 and 14 of Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549.]

In *A. Sanjeevi Naidu v. State of Madras* [AIR 1970 SC 1102], it was urged on behalf of the appellants in that case that “the Parliament has conferred power under Section 68(C) of the Motor Vehicles Act, 1939 to a designated authority. That power can be exercised only by that authority and by no one else. The authority concerned in the present case is the State Government. The Government could not have delegated its statutory functions to anyone else. The Government means the Governor aided and advised by his Ministers. Therefore the required opinion should have been formed by the Minister to whom the business had been allocated by ‘the Rules’. It was further urged that if the functions of the Government can be discharged by anyone else then the doctrine of ministerial responsibility which is the very

essence of the cabinet form of Government disappears; such a situation is impermissible under our Constitution.”

5. Speaking on behalf of the Court, Hegde, J., repelled the contentions in the following words:

“We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 166 to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters, excepting those in which Governor is required to act in his discretion, have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers. The Cabinet is responsible to the Legislature for every action taken in any of the ministries. That is the essence of joint responsibility.”

6. Let us now look at the relevant Articles of the Constitution in the context of which we must interpret Article 75(3) of the Constitution. Chapter I of Part V of the Constitution deals with the Executive. Article 52 provides that there shall be a President of India and Article 53(1) vests the executive power of the Union in the President and provides that it shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. The last five words are important inasmuch as they control the President's action under Article 53(1). Any exercise of the executive power not in accordance with the Constitution will be liable to be set aside. There is no doubt that the President of India is a person who has to be elected in accordance with the relevant provisions of the Constitution but even so he is bound by the provisions of the Constitution. Article 60 prescribes the oath or affirmation which the President has to take. It reads:

“I, A. B., do swear in the name of God/solemnly affirm that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India.”

7. It will be noticed that Article 74(1) is mandatory in form. We are unable to agree with the appellant that in the context the word ‘shall’ should be read as ‘may’. Article 52 is mandatory. In other words “there shall be a President of India”. So is Article 74(1). The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to this contention of the appellant we would be changing the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there would be no ‘Council of Ministers’, nobody would

be responsible to the House of the People. With the aid of advisers he would be able to rule the country at least till he is impeached under Article 61.

8. It seems to us that we must read the word 'shall' as meaning 'shall' and not 'may'. If Article 74(1) is read in this manner the rest of the provisions dealing with the Executive must be read in harmony with. Indeed they fall into place. Under Article 75(1), the President appoints the Prime Minister and appoints the other Ministers on the advice of the Prime Minister, and under Article 75(2) they hold office during the pleasure of the President. The President has not said that it is his pleasure that the respondent shall not hold office.

9. Now comes the crucial clause three of Article 75. The appellant urges that the House of People having been dissolved this clause cannot be complied with. According to him it follows from the provisions of this clause that it is was contemplated that on the dissolution of the House of People the Prime Minister and the other ministers must resign or be dismissed by the President and the President must carry on the Government as best as he can with the aid of the Services. As we have shown above, Article 74(1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. We must then harmonise the provisions of Article 75(3) with Article 74(1) and Article 75(2). Article 75(3) brings into existence what is usually called "Responsible Government". In other words the Council of Ministers must enjoy the confidence of the House of People. While the House of People is not dissolved under Article 85(2)(a), Article 75(3) has full operation. But when it is dissolved the Council of Ministers cannot naturally enjoy the confidence of the House of People. Nobody has said that the Council of Ministers does not enjoy the confidence of the House of People when it is prorogued. In the context, therefore, this clause *must* be read as meaning that Article 75(3) only applies when the House of People does not stand dissolved or prorogued. We are not concerned with the case where dissolution of the House of People takes place under Article 83(2) on the expiration of the period of five years prescribed therein, for Parliament has provided for that contingency in Section 14 of the Representation of Peoples Act, 1951.

10. On our interpretation other articles of the Constitution also have full play, *e.g.* Article 77(3), which contemplates allocation of business among Ministers, and Article 78, which prescribes certain duties of Prime Minister.

12. In the result the appeal fails and is dismissed.

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S.P. Anand v. H.D. Deve Gowda

(1996) 6 SCC 734

(A.M.Ahmadi,C.J. and Sujata V. Manohar, J.)

[A person who is not a member of either House of Parliament can be appointed as the Prime Minister of India.]

Shri H.D. Deve Gowda, not being a member of either House of Parliament, was appointed as the Prime Minister of India. The petitioner contended that he was not eligible to be appointed as the Prime Minister of India, and that the President of India had committed a grave and serious Constitutional error in swearing him in as the Prime Minister. This action of the President, according to the petitioner, was violative of Articles 14, 21 and 75 of the Constitution and, therefore, void *ab initio* and deserved to be quashed by an appropriate writ, which may be issued under Article 32 of the Constitution.

A.M. AHMADI, C.J.: 2. A Constitution Bench of this Court had occasion to consider whether a person who is not a member of either House of the State Legislature could be appointed a Minister of State and this question was answered in the affirmative on a true interpretation of Articles 163 and 164 of the Constitution which, in material particulars, correspond to Articles 74 and 75 bearing on the question of appointment of the Prime Minister. In that case, Shri T.N. Singh was appointed the Chief Minister of Uttar Pradesh even though he was not a member of either House of the State Legislature on the date of his appointment. His appointment was challenged in the High Court by way of a writ petition filed under Article 226 of the Constitution. The High Court dismissed the writ petition but granted a certificate under Article 132 of the Constitution. That is how the matter reached this Court.

3. Now, Article 164(4) provides that a Minister who for any period of six consecutive months is not a member of the legislature of the State shall at the expiration of that period, cease to be a Minister. It was, however, urged that on the plain language of the said provision, it is obvious that it speaks of appointment of a Minister who is a member of the State Legislature but who loses his seat at a later date in which case he can continue as a Minister for a period of six months during which he must be re-elected or otherwise, must vacate office. Interpreting the said clause in the context of Article 163 and other clauses of Article 164, this Court held that clause 4 of Article 164 had an ancient lineage and there was no reason to whittle down the plain thrust of the said provision by confining it to cases where a person being a member of the legislature and a Minister, for some reason, loses his seat in the State. Accordingly, the decision of the High Court was affirmed. [See *Har Sharan Verma v. Tribhuvan Narain Singh, Chief Minister, U.P.* and Another, (1971) 1 SCC 616].

4. The same petitioner again raised the issue when Shri K.P. Tiwari was appointed in November 1984 as a Minister of the U.P. Government even though he was not a member of either House of the State Legislature. He contended that the decision rendered by this Court in

the case of *Shri T.N. Singh* was not good law since the Court had overlooked the amendment of Article 173(a) effected by the Constitution (Sixteenth) Amendment Act, 1963. [The corresponding provision in regard to Parliament is Article 84(a).] Dealing with this contention this Court pointed out that the object of introducing the amendment in clause (a) of Article 173 of the Constitution was to provide that not only before taking his seat shall a member of legislature take the oath prescribed by the Third Schedule as required by Article 188 of the Constitution but that even before standing for election a candidate must take the same oath. This was to ensure that only a person having allegiance to India shall be eligible for membership of the legislature. The Court further pointed out that clause (4) of Article 164 of the Constitution provides that a Minister (which includes a Chief Minister also) who, for any period of six consecutive months, is not a member of the legislature of a State shall, at the expiration of that period cease to be a Minister. In other words, the Court held that a person who was not a member of either House of the State Legislature could also be appointed by the Governor as the Minister (which includes the Chief Minister) for a period not exceeding six consecutive months. The Court, therefore, did not see any material change brought about in the legal position by reason of the amendment of Article 173(a) of the Constitution from that as explained in the earlier decision in *Shri T.N. Singh's* case. This decision is reported as *Harsharan Verma v. State of U.P.* [(1985) 2 SCC 48].

5. Not content with these two decisions rendered by this Court, the very same petitioner once again questioned the appointment of Shri Sita Ram Kesri as a Minister of State of the Central Cabinet since he was not a member of either House of Parliament at the date of the appointment. Spurning the challenge, this Court held that to appoint a non-member of Parliament as a Minister did not militate against the constitutional mechanism nor did it militate against the democratic principles embodied in the Constitution. The Court, therefore, upheld the appointment under Article 75(5) of the Constitution read with Article 88 thereof, which article, inter alia, conferred on every Minister the right to speak in, and otherwise to take part in the proceedings of, either House, in joint sitting of the Houses, and in a Committee of Parliament of which he may be named a member, though not entitled to vote. The Court, therefore, on a combined reading of the aforesaid two provisions held that a person not being a member of either House of Parliament can be appointed a Minister up to a period of six months. This case came to be reported as *Harsharan Verma v. Union of India and Another*, [1987 Supp. SCC 310].

6. We may now refer to two decisions rendered by the High Courts of Delhi and Calcutta in which the appointment of the present Prime Minister Shri H.D. Deve Gowda was challenged on more or less the same ground. One Dr Janak Raj Jai filed a Writ Petition No. 2408 of 1996 in which he questioned the appointment since the present Prime Minister was not a member of either House of Parliament on the date he was sworn in by the President of India as the Prime Minister of India. He contended that while under Article 75(5) a person can be appointed a Minister, he cannot be and should not be appointed a Prime Minister. Dealing with this submission the High Court, after referring to Articles 74 and 75 of the Constitution, held that "when Article 75(5) speaks of a 'Minister' it takes within its embrace that Minister also who is described in the Constitution as Prime Minister". In other words that High Court

found that the Constitution did not make any distinction between the Prime Minister and other Ministers. The High Court dismissed the petition.

7. In the Calcutta High Court C.O No. 1336(w) of 1996 was filed by one Ashok Sen Gupta, a Senior Advocate, challenging the appointment of Shri H.D. Deve Gowda as the Prime Minister of India on the ground that he was not eligible for appointment as he was not a member of either House of Parliament. The learned Single Judge of the High Court in a well- considered judgment held that Article 75(5) of the Constitution permits the President of India to appoint a person who is not a member of either House of Parliament as a Minister, including a Prime Minister subject to the possibility of his commanding the support of the majority of members of the *Lok Sabha*. On this line of reasoning the petition was dismissed in limine.

8. From the aforesaid three decisions of this Court and the High Courts it becomes clear that a person who is not a member of either House of Parliament or of either House of a State Legislature can be appointed a Minister in the Central Cabinet (which would include a Prime Minister) or a Minister in the State Cabinet (which would include a Chief Minister), as the case may be. But the petitioner herein remains not satisfied.

9. The petitioner who argued the case in person with great passion, zeal and emotion, claiming to be concerned about the survival of the democratic process and the pristine glory of our constitutional scheme, submitted that if a person who is not the elected representative of the people of the country and in whom the people have not placed confidence, is allowed to occupy the high office of the Prime Minister on whom would rest the responsibility of governing the nation during peace and war (God forbid), it would be taking a great risk which the country can ill afford to take and, therefore, we should so construe the relevant provisions of the Constitution as would relieve the country of such a risk. When his attention was drawn to the case law aforementioned he stated that those decisions were old and needed to be reconsidered in the changed circumstances. He submitted his submissions in writing which are by and large a repetition of the averments in the petition.

11. In order to appreciate the contention raised in this petition, and to determine if the aforesaid decision on which the learned Attorney General relied has any bearing on the point at issue in the present petition, it would be advantageous to read Articles 74 and 75 in juxtaposition with Articles 163 and 164 of the Constitution:

<p>74. Council of Ministers to aid and advise President - (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:</p>	<p>163. Council of Ministers to aid and advise Governor - (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except insofar as he is by or under this Constitution required to exercise his functions or any of them in his discretion.</p>
<p>[Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered</p>	<p>(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything</p>

after such reconsideration.]	done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.
(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.	(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.
75. Other provisions as to Ministers - (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. (2) The Ministers shall hold office during the pleasure of the President.	164. Other provisions as to Ministers - (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:
(3) The Council of Ministers shall be collectively responsible to the House of the people.	(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.
(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.	(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.
(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.	(4) A Minister who for any period of six consecutive months is not a member of the legislature of the State shall at the expiration of that period cease to be a Minister.
(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.	(5) The salaries and allowances of Ministers shall be such as the legislature of the State may from time to time by law determine and, until the legislature of the State so determines, shall be as specified in the Second Schedule.

12. When we compare Articles 74 and 75 with Articles 163 and 164, the first point of difference is that while the former deal with the President and the Prime Minister, the latter deal with the Governor and the Chief Minister. Article 74(1) and Article 163(1) are substantially the same except that the sentence beginning with 'except' and ending with 'discretion', special to the Governor's function, is not to be found in Article 74(1). The proviso to Article 74(1) which grants a special privilege to the President is not to be found in Article 163(1) whereas clause (2) of Article 163 is not to be found in Article 74. Clause (2) to Article 163 is a corollary to the exception clause in Article 163(1) and has no relevance to the issue on hand. Article 74(2) and Article 163(3) are verbatim.

13. Articles 75(1) and 75(2) are identical to Article 164(1) except that in the case of the latter, the two clauses have been combined into one. The proviso to Article 164(1) which is

special to States, is not to be found in Article 75. The rest of the clauses of the two articles are identical except for consequential changes.

14. On a plain reading of Article 75(5) it is obvious that the Constitution-makers desired to permit a person who was not a member of either House of Parliament to be appointed a Minister for a period of six consecutive months and if during the said period he was not elected to either House of Parliament, he would cease to be a Minister. This becomes clear if one were to read the debates of the Constituent Assembly (the draft Articles were 62 and 144 for the present Articles 75 and 164). Precisely on the ground that permitting such persons to be appointed Ministers at the Union or State levels would “cut at the very root of democracy”, an amendment was moved to provide: “No person should be appointed a Minister unless at the time of his appointment, he is elected member of the House:” which amendment was spurned by Dr Ambedkar.

15. The petitioner then invited our attention to *Halsbury's Laws of England* (3rd Edn.) p 347 wherein at para 745 it is stated: “By conventional usage the Prime Minister is invariably a member of either House of Commons or House of Lords”; footnote (i) proceeds to add that the person selected is preferably to be a member of the House of Commons. The petitioner further urged that even if the Constitution is construed to permit a person who is not a member of either House of Parliament to be appointed a Minister for six months, there is nothing in Article 75(5) to suggest that he can be appointed the Prime Minister of the country. He urged that the status of the Prime Minister is distinct from that of a Minister and, therefore, it is essential that a person who occupies the high position of a Prime Minister should be an elected representative of the people. This submission overlooks the fact that the person who is appointed the Prime Minister is chosen by the elected representatives of the people and can occupy the position only if he enjoys the confidence of the majority of the elected representatives in the *Lok Sabha*. Secondly, we must bear in mind the scheme of our Constitution and if our Constitution permits such appointment, that should put an end to the controversy.

16. Now Article 75(1) envisages a Council of Ministers with the Prime Minister at the head to aid and advise the President, and the latter is expected to act in accordance with such advice but if he has any reservations he may require the Council of Ministers to reconsider such advice. Thus, the President has to act in accordance with the advice of the Council of Ministers as a body and not go by the advice of any single individual. Only a person who, the President thinks, commands the confidence of the *Lok Sabha* would be appointed the Prime Minister who in turn would choose the other Ministers. The Council of Ministers is made collectively responsible to the House of the People. The form of the oath prescribed in the Third Schedule under Article 75(4) is the same for the Prime Minister as well as a Minister. In other words, the Constitution does not draw any distinction between the Prime Minister and any other Minister in this behalf. This is not to say that the Prime Minister does not enjoy a special status; he does as the head of the Council of Ministers but the responsibility of the Council of Ministers to the House of the People is collective. Besides, the caption of Article 75 as a whole is “Other provisions as to Ministers”. No separate provision is to be found dealing with the appointment of the Prime Minister as such. Therefore, even though the Prime Minister is appointed by the President after he is chosen by such number of members of the

House of the People as would ensure that he has the confidence of the House and would be able to command the support of the majority, and the Ministers are appointed on the advice of the Prime Minister, the entire Council of Ministers is made collectively responsible to the House and that ensures the smooth functioning of the democratic machinery. If any Minister does not agree with the majority decision of the Council of Ministers, his option is to resign or accept the majority decision. If he does not, the Prime Minister would drop him from his Cabinet and thus ensure collective responsibility. Therefore, even though a Prime Minister is not a member of either House of Parliament, once he is appointed he becomes answerable to the House and so also his Ministers and the principle of collective responsibility governs the democratic process. Even if a person is not a member of the House, if he has the support and confidence of the House, he can be chosen to head the Council of Ministers without violating the norms of democracy and the requirement of being accountable to the House would ensure the smooth functioning of the democratic process. We, therefore, find it difficult to subscribe to the petitioner's contention that if a person who is not a member of the House is chosen as Prime Minister, national interest would be jeopardised or that we would be running a great risk. The English convention that the Prime Minister should be a member of either House, preferably House of Commons, is not our constitutional scheme since our Constitution clearly permits a non-member to be appointed a Chief Minister or a Prime Minister for a short duration of six months. That is why in such cases when there is any doubt in the mind of the President, he normally asks the person appointed to seek a vote of confidence of the House of the People within a few days of his appointment. By parity of reasoning if a person who is not a member of the State Legislature can be appointed a Chief Minister of a State under Article 164(4) for six months, a person who is not a member of either House of Parliament can be appointed Prime Minister for the same duration. We must also bear in mind the fact that conventions grow from long standing accepted practices or by agreement in areas where the law is silent and such a convention would not breach the law but fill the gap. If we go by that principle, the practice in India has been just the opposite. In the past, persons who were not elected to State Legislatures have become Chief Ministers and those not elected to either House of Parliament have been appointed Prime Ministers. We are, therefore, of the view that the British convention to which the petitioner has referred is neither in tune with our constitutional scheme nor has it been a recognised practice in our country.

19. With these observations we dismiss the petition. The interim order staying proceedings pending elsewhere shall stand vacated with a direction that they shall be disposed of in the light hereof.

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Samsher Singh v. State of Punjab

AIR 1974 SC 2192

(A.N.Ray, C.J. and D.G.Palekar, K.K.Mathew, Y.V.Chandrachud, A.Alagiriswami, P.N.Bhagwati and V.R.Krishna Iyer, JJ.)

[The appellants had joined the Punjab Civil Service (Judicial Branch). Both of them were on probation. By an order dated April 27, 1967, the services of the appellant Samsher Singh were terminated by the following order:

“The Governor of Punjab is pleased to terminate the services of Shri Samsher Singh, Subordinate Judge, on probation under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 with immediate effect. It is requested that these orders may please be conveyed to the officer concerned under intimation to the Government.”

By an order dated December 15, 1969 the services of the appellant Ishwar Chand Agarwal were terminated by the following order:

“On the recommendation of the High Court of Punjab and Haryana, the Governor of Punjab is pleased to dispense with the services of Shri Ishwar Chand Agarwal, P.C.S. (Judicial Branch), with immediate effect, under Rule 7(3) in Part ‘D’ of the Punjab Civil Services (Judicial Branch) Rules, 1951, as amended from time to time.”

A.N. RAY, C.J. (for himself, Palekar, Mathew, Chandrachud and Alagiriswami, JJ.) -

5. The appellants contend that the Governor as the constitutional or the formal head of the State can exercise powers and functions of appointment and removal of members of the Subordinate Judicial Service only personally. The State contends that the Governor exercises powers of appointment and removal conferred on him by or under the Constitution like executive powers of the State Government only on the aid and advice of his Council of Ministers and not personally.

6. The appellants rely on the decision of this Court in *Sardari Lal v. Union of India* [(1971) 3 SCR 461] where it has been held that where the President or the Governor, as the case may be, if satisfied, makes an order under Article 311(2) proviso (c) that in the interest of the security of the State it is not expedient to hold an enquiry for dismissal or removal or reduction in rank of an officer, the satisfaction of the President or the Governor is his personal satisfaction. The appellants on the authority of this ruling contend that under Article 234 of the Constitution the appointment as well as the termination of services of Subordinate Judges is to be made by the Governor personally.

7. These two appeals were placed before a larger Bench to consider whether the decision in *Sardari Lal* case correctly lays down the law that where the President or the Governor is to be satisfied it is his personal satisfaction.

8. The appellants contend that the power of the Governor under Article 234 of the Constitution is to be exercised by him personally for these reasons.

9. First, there are several constitutional functions, powers and duties of the Governor. These are conferred on him *eo nomine* the Governor. The Governor, is, by and under the

Constitution, required to act in his discretion in several matters. These constitutional functions and powers of the Governor *eo nomine* as well as these in the discretion of the Governor are not executive powers of the State within the meaning of Article 154 read with Article 162.

10. Second, the Governor under Article 163 of the Constitution can take aid and advice of his Council of Ministers when he is exercising executive power of the State. The Governor can exercise powers and functions without the aid and advice of his Council of Ministers when he is required by or under the Constitution to act in his discretion, where he is required to exercise his constitutional functions conferred on him *eo nomine* as the Governor.

11. Third, the aid and advice of the Council of Ministers under Article 163 is different from the allocation of business of the government of the State by the Governor to the Council of Ministers under Article 166(3) of the Constitution. The allocation of business of government under Article 166(3) is an instance of exercise of executive power by the Governor through his Council by allocating or delegating his functions. The aid and advice is a constitutional restriction on the exercise of executive powers of the State by the Governor. The Governor will not be constitutionally competent to exercise these executive powers of the State without the aid and advice of the Council of Ministers.

12. Fourth, the executive powers of the State are vested in the Governor under Article 154(1). The powers of appointment and removal of Subordinate Judges under Article 234 have not been allocated to the Ministers under the Rules of Business of the State of Punjab. Rule 18 of the Rules of Business states that except as otherwise provided by any other rule cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge who may, by means of Standing Orders, give such directions as he thinks fit for the disposal of cases in his department. Rule 7(2) in Part D of the Punjab Civil Service Rules which states that the Governor of Punjab may on the recommendation of the High Court remove from service without assigning any cause any Subordinate Judge or revert him to his substantive post during the period of probation is incapable of allocation to a Minister. Rule 18 of the Rules of Business is subject to exceptions and Rule 7(2) of the Service Rules is such an exception. Therefore, the appellants contend that the power of the Governor to remove Subordinate Judges under Article 234 read with the aforesaid Rule 7(2) of the Service Rules cannot be allocated to a Minister.

13. The Attorney General for the Union, the Additional Solicitor General for the State of Punjab and counsel for the State of Haryana contended that the President is the constitutional head of the Union and the Governor is the constitutional head of the State and the President as well as the Governor exercises all powers and functions conferred on them by or under the Constitution on the aid and advice of the Council of Ministers.

14. In all the Articles which speak of powers and functions of the President, the expressions used in relation thereto are 'is satisfied', 'is of opinion', 'as he thinks fit' and 'if it appears to'. In the case of Governor, the expressions used in respect of his powers and functions are 'is satisfied', 'if of opinion' and 'as he thinks fit'.

15. Article 163(1) states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution, required to exercise his functions or any of them in his

discretion. Article 163 (2) states that if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. Extracting the words “in his discretion” in relation to exercise of functions, the appellants contend that the Council of Ministers may aid and advise the Governor in executive functions but the Governor individually and personally in his discretion will exercise the constitutional functions of appointment and removal of officers in State Judicial Service and other State Services.

16. It is noticeable that though in Article 74 it is stated that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions, there is no provision in Article 74 comparable to Article 163 that the aid and advice is except in so far as he is required to exercise his functions or any of them in his discretion.

17. It is necessary to find out as to why the words ‘in his discretion’ are used in relation to some powers of the Governor and not in the case of the President.

20. Articles where the expression “acts in his discretion” is used in relation to the powers and functions of the Governor are those which speak of special responsibilities of the Governor. These Articles are 371A(1)(b), 371A(1)(d), 371A(2)(b) and 371A(2)(f). There are two paragraphs in the Sixth Schedule, namely 9(2) and 18(3) where the words “in his discretion” are used in relation to certain powers of the Governor. Paragraph 9(2) is in relation to determination of amount of royalties payable by licensees or lessees prospecting for, or extracting minerals, to the District Council. Paragraph 18(3) has been omitted with effect from January 21, 1972.

25. The executive power of the Union is vested in the President under Article 53(1). The executive power of the State is vested in the Governor under Article 154(1). The expressions “Union” and “State” occur in Articles 53(1) and 154(1) respectively to bring about the federal principles embodied in the Constitution. Any action taken in the exercise of the executive power of the Union vested in the President under Article 53(1) is taken by the Government of India in the name of the President as will appear in Article 77(1). Similarly, any action taken in the exercise of the executive power of the State vested in the Governor under Article 154(1) is taken by the Government of the State in the name of the Governor as will appear in Article 166(1).

26. There are two significant features in regard to the executive action taken in the name of the President or in the name of the Governor. Neither the President nor the Governor may sue or be sued for any executive action of the State. First, Article 300 states that the Government of India may sue or be sued in the name of the Union and the Governor may sue or be sued in the name of the State. Second, Article 361 states that proceedings may be brought against the Government of India and the Government of the State but not against the President or the Governor. Articles 300 and 361 indicate that neither the President nor the Governor can be sued for executive actions of the Government. The reason is that neither the President nor the Governor exercises the executive functions individually or personally.

Executive action taken in the name of the President is the action of the Union. Executive action taken in the name of the Governor is the executive action of the State.

27. Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under this system the President is the constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Article 103 is an exception to the aid and advice of the Council of Ministers because it specifically provides that the President acts only according to the opinion of the Election Commission. This is when any question arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102.

28. Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.

29. The executive power is generally described as the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for example in Article 123, viz., ordinance making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being ordinance making powers are executive powers of the Union vested in the President under Article 53(1) in one case and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or clause (3) of Article 77 is not limited in its operation to the executive action of the Government of India under clause (1) of Article 77. Similarly, clause (2) or clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under clause (1) of Article 166. The expression "Business of the Government of India" in clause (3) of Article 77, and the expression "Business of the Government of the State" in clause (3) of Article 166 includes all executive business.

30. In all cases in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers he does so by making rules for convenient transaction of the business of the Government of India or the Government of the State respectively or by allocation among his Ministers of the said business, in accordance with Articles 77(3) and 166(3) respectively. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360 the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government. The reasons are these. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Both Articles 77(3) and 166(3) provide that the President under Article 77(3) and the Governor

under Article 166(3) shall make rules for the more convenient transaction of the business of the Government and the allocation of business among the Ministers of the said business. The Rules of Business and the allocation among the Ministers of the said business all indicate that the decision of any Minister or officer under the Rules of Business made under these two articles viz. Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively.

31. Further the Rules of Business and allocation of business among the Ministers are relatable to the provisions contained in Article 53 in the case of the President and Article 154 in the case of the Governor, that the executive power shall be exercised by the President or the Governor directly or through the officers subordinate. The provisions contained in Article 74 in the case of the President and Article 163 in the case of the Governor that there shall be a Council of Ministers to aid and advise the President or the Governor, as the case may be, are sources of the Rules of Business. These provisions are for the discharge of the executive powers and functions of the Government in the name of the President or the Governor. Where functions entrusted to a Minister are performed by an official employed in the Minister's department there is in law no delegation because constitutionally the act or decision of the official is that of the Minister. The official is merely the machinery for the discharge of the functions entrusted to a Minister.

32. It is a fundamental principle of English Constitutional law that Ministers must accept responsibility for every executive act. In England the Sovereign never acts on his own responsibility. The power of the Sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English Constitutional law is incorporated in our Constitution. The Indian Constitution envisages a Parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of the Governor as the constitutional head are not different.

33. This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system.

42. This Court in *Jayantilal Amritlal Shodhan* case [AIR 1964 SC 648] held that Article 258 enables the President to do by notification what the Legislature could do by legislation, namely, to entrust functions relating to matters to which executive power of the Union extends, to officers named in the notification. The notification issued by the President was held to have the force of law. This Court held that Article 258(1) empowers the President to entrust to the State the functions which are vested in the Union, and which are exercisable by the President on behalf of the Union and further went on to say that Article 258 does not authorise the President to entrust such powers as are expressly vested in the President by the Constitution and do not fall within the ambit of Article 258(1). This Court illustrated that observation by stating that the power of the President to promulgate ordinances under Articles 268 to 279 during an emergency, to declare failure of constitutional machinery in States under Article 356, to declare a financial emergency under Article 360, to make rules regulating the recruitment and conditions of service of persons appointed to posts and services, in connection with the affairs of the Union under Article 309, are not powers of the Union

Government but are vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Article 258(1).

43. The ratio in *Jayantilal Amritlal Shodhan* case is confined to the powers of the President which can be conferred on States under Article 258. The effect of Article 258 is to make a blanket provision enabling the President to exercise the power which the Legislature could exercise by legislation, to entrust functions to the officers to be specified in that behalf by the President and subject to the conditions prescribed thereby. The result of the notification by the President under Article 258 is that wherever the expression “appropriate Government” occurs in the Act in relation to provisions for acquisition of land for the purposes of the Union, the words “Appropriate Government or the Commissioner of the Division having territorial jurisdiction over the area in which the land is situate” were deemed to be substituted.

44. The distinction made by this Court between the executive functions of the Union and the executive functions of the President does not lead to any conclusion that the President is not the constitutional head of Government. Article 74(1) provides for the Council of Ministers to aid and advise the President in the exercise of his functions. Article 163(1) makes similar provision for a Council of Ministers to aid and advise the Governor. Therefore, whether the functions exercised by the President are functions of the Union or the functions of the President they have equally to be exercised with the aid and advice of the Council of Ministers, and the same is true of the functions of the Governor except those which he has to exercise in his discretion.

45. In *Sardari Lal* case an order was made by the President under sub-clause (c) to clause (2) of Article 311 of the Constitution. The order was:

The President is satisfied that you are unfit to be retained in the public service and ought to be dismissed from service. The President is further satisfied under sub-clause (c) of proviso to clause (2) of Article 311 of the Constitution that in the interest of the security of the State it is not expedient to hold an inquiry.

The order was challenged on the ground that the order was signed by the Joint Secretary and was an order in the name, of the President of India and that the Joint Secretary could not exercise the authority on behalf of the President.

46. This Court in *Sardari Lal* case relied on two decisions of this Court. One is *Moti Ram Deka v. General Manager, N. E. F. Railway, Maligaon, Pandu* [AIR 1964 SC 600] and the other is *Jayantilal Amritlal Shodhan* case. *Moti Ram Deka* case was relied on in support of the proposition that the power to dismiss a Government servant at pleasure is outside the scope of Articles 53 and 154 of the Constitution and cannot be delegated by the President or the Governor to a subordinate officer and can be exercised only by the President or the Governor in the manner prescribed by the Constitution. Clause (c) of the proviso to Article 311(2) was held by this Court in *Sardari Lal* case to mean that the functions of the President under that provision cannot be delegated to anyone else in the case of a civil servant of the Union and the President has to be satisfied personally that in the interest of the security of the State it is not expedient to hold an inquiry prescribed by Article 311(2). In support of this view this Court relied on the observation in *Jayantilal Amritlal Shodhan* case that the powers

of the President under Article 311(2) cannot be delegated. This Court also stated in *Sardari Lal* case that the general consensus of the decisions is that the executive functions of the nature entrusted by certain articles in which the President has to be satisfied himself about the existence of certain facts or state of affairs cannot be delegated by him to anyone else.

47. The decision in *Sardari Lal* case that the President has to be satisfied personally in exercise of executive power or function and that the functions of the President cannot be delegated is with respect not the correct statement of law and is against the established and uniform view of this Court as embodied in several decisions to which reference has already been made. These decisions are from the year 1955 up to the year 1971. These decisions are *Rai Saheb Ram Jawaya Kapur v. State of Punjab*, *A. Sanjeevi Naidu v. State of Madras* and *U.N.R. Rao v. Smt Indira Gandhi*. These decisions were neither referred to nor considered in *Sardari Lal* case.

48. The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under Rules of Business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of a Minister or officer under the Rules of Business is the decision of the President or the Governor.

49. In *Moti Rain Deka* case, the question for decision was whether Rules 148(3) and 149(3) which provided for termination of the service of a permanent Government servant by a stipulated notice violated Article 311. The majority opinion in *Moti Ram Deka* case was that Rules 148(3) and 149(3) were invalid inasmuch as they are inconsistent with the provisions of Article 311(2). The decision in *Moti Ram Deka* case is not an authority for the proposition that the power to dismiss a servant at pleasure is outside the scope of Article 154 and cannot be delegated by the Governor to a subordinate officer.

50. This Court in *State of U.P. v. Babu Ram Upadhya* [AIR 1961 SC 751] held that the power of the Governor to dismiss at pleasure, subject to the provisions of Article 311, is not an executive power under Article 154 but a constitutional power and is not capable of being delegated to officers subordinate to him. The effect of the judgment in *Babu Ram Upadhya* case was that the Governor could not delegate his pleasure to any officer nor could any law provide for the exercise of that pleasure by an officer with the result that statutory rules governing dismissal were binding on every officer though they were subject to the overriding pleasure of the Governor. This would mean that the officer was bound by the rules but the Governor was not.

51. In *Babu Ram Upadhya* case, the majority view stated seven propositions at p. 701 of the report. Proposition No. 2 is that the power to dismiss a public servant at pleasure is outside the scope of Article 154 and therefore cannot be delegated by the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. Propositions Nos. 3 and 4 are these. The tenure of a public servant is subject to the limitations or qualifications mentioned in Article 311 of the Constitution. The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310 as qualified by Article 311. Proposition No. 5 is that the Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 311. Proposition No. 6 is that the Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of “reasonable opportunity” embodied in Article 311, but the said law would be subject to judicial review.

52. All these propositions were reviewed by the majority opinion of this Court in *Moti Ram Deka* case and this Court restated that proposition No. 2 must be read along with the subsequent propositions specified as propositions Nos. 3, 4, 5 and 6. The ruling in *Moti Ram Deka* case is that a law can be framed prescribing the procedure by which and the authority by whom the said pleasure can be exercised. The pleasure of the President or the Governor to dismiss can therefore not only be delegated but is also subject to Article 311. The true position as laid down in *Moti Ram Deka* case is that Articles 310 and 311 must no doubt be read together but once the true scope and effect of Article 311 is determined the scope of Article 310(1) must be limited in the sense that in regard to cases falling under Article 311(2) the pleasure mentioned in Article 310(2) must be exercised in accordance with the requirements of Article 311.

53. The majority view in *Babu Ram Upadhya* case is no longer good law after the decision in *Moti Ram Deka* case. The theory that only the President or the Governor is personally to exercise the pleasure or dismissing or removing a public servant is repelled by express words in Article 311 that no person who is a member of the civil service or holds a civil post under the Union or a State shall be dismissed or removed by authority subordinate to that by which he was appointed. The words “dismissed or removed by an authority subordinate to that by which he was appointed” indicate that the pleasure of the President or the Governor is exercised by such officers on whom the President or the Governor confers or delegates power.

54. The provisions of the Constitution which expressly require the Governor to exercise his powers in his discretion are contained in articles to which reference has been made. To illustrate, Article 239(2) states that where a Governor is appointed an administrator of an adjoining Union territory he shall exercise his functions as such administrator independently of his Council of Ministers. The other articles which speak of the discretion of the Governor are paragraphs 9(2) and 18(3) of the Sixth Schedule and Articles 371A(1)(b), 371A(1)(d) and 371A(2)(b) and 371A(2)(f). The discretion conferred on the Governor means that as the constitutional or formal head of the State the power is vested in him. In this connection,

reference may be made to Article 356 which states that the Governor can send a report to the President that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution. Again Article 200 requires the Governor to reserve for consideration any Bill which in his opinion if it became law, would derogate from the powers of the High Court as to endanger the position which the High Court is designed to hold under the Constitution.

55. In making a report under Article 356 the Governor will be justified in exercising his discretion even against the aid and advice of his Council of Ministers. The reason is that the failure of the constitutional machinery may be because of the conduct of the Council of Ministers. This discretionary power is given to the Governor to enable him to report to the President who, however, must act on the advice of his Council of Ministers in all matters. In this context Article 163(2) is explicable that the decision of the Governor in his discretion shall be final and the validity shall not be called in question. The action taken by the President on such a report is a different matter. The President acts on the advice of his Council of Ministers. In all other matters where the Governor acts in his discretion he will act in harmony with his Council of Ministers. The Constitution does not aim at providing a parallel administration within the State by allowing the Governor to go against the advice of the Council of Ministers.

56. Similarly Article 200 indicates another instance where the Governor may act irrespective of any advice from the Council of Ministers. In such matters where the Governor is to exercise his discretion he must discharge his duties to the best of his judgment. The Governor is required to pursue such courses which are not detrimental to the State.

57. For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the Executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally. The present appeals concern the appointment of persons other than District Judges to the Judicial Services of the State which is to be made by the Governor as contemplated in Article 234 of the Constitution after consultation with the State Public Service Commission and the High Court. Appointment or dismissal or removal of persons belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution.

58. In the present appeals the two rules which deal with termination of services of probationers in the Punjab Civil Service (Judicial Branch) are Rule 9 of the Punjab Civil Service (Punishment and Appeal) Rules, 1952 and Rule 7(3) in Part D of the Punjab Civil Service (Judicial Branch) Rules, 1951 hereinafter referred to as Rule 9 and Rule 7. The services of the appellant Samsher Singh were terminated under Rule 9. The services of Ishwar Chand Agarwal were terminated under Rule 7(3).

59. Rule 9 provides that where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for

the service, the probationer shall be apprised of the grounds of such proposal, and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the appointment.

60. Rule 7(3) aforesaid provides that on the completion of the period of probation of any member of the service, the Governor may, on the recommendation of the High Court, confirm him in his appointment if he is working against a permanent vacancy or, if his work or conduct is reported by the High Court to be unsatisfactory, dispense with his services or revert him to his former substantive post, if any, or extend his period of probation and thereafter pass such orders as he could have passed on the expiry of the first period of probation.

61. Rule 9 of the Punishment and Appeal Rules contemplates an inquiry into grounds of proposal of termination of the employment of the probationer. Rule 7 on the other hand confers power on the Governor on the recommendation of the High Court to confirm or to dispense with the services or to revert him or to extend his period of probation.

62. The position of a probationer was considered by this Court in *Purshottam LalDhingra v. Union of India* [AIR 1958 SC 36]. Das, C.J. speaking for the Court said that where a person is appointed to a permanent post in Government service on probation the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment because the Government servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to do so. Such a termination does not operate as a forfeiture of any right of a servant to hold the post, for he has no such right. Obviously such a termination cannot be a dismissal, removal or reduction in rank by way of punishment. There are, however, two important observations of Das, C.J. in *Dhingra* case. One is that if a right exists under a contract or Service Rules to terminate the service the motive operating on the mind of the Government is wholly irrelevant. The other is that if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and violates Article 311 of the Constitution. The reasoning why motive is said to be irrelevant is that it inheres in the state of mind which is not discernible. On the other hand, if termination is founded on misconduct it is objective and is manifest.

66. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive *K.H. Phadnis v. State of Maharashtra* [(1971) 1 SCC 790].

67. An order terminating the services of a temporary servant or probationer under the Rules of Employment and without anything more will not attract Article 311. Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with, Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct *State of Bihar v. Shiva Bhikshuk Mishra* [(1970) 2 SCC 871].

68. The appellant Ishwar Chand Agarwal contended that he completed his initial period of two years' probation on November 11, 1967 and the maximum period of three years'

probation on November 11, 1968 and by reason of the fact that he continued in service after the expiry of the maximum period of probation he became confirmed. The appellant also contended that he had a right to be confirmed and there was a permanent vacancy in the cadre of the service on September 17, 1969 and the same should have been allotted to him.

69. Rule 7(1) states that every Subordinate Judge, in the first instance, be appointed on probation for two years but this period may be extended from time to time expressly or impliedly so that the total period of probation including extension, if any, does not exceed three years. The explanation to Rule 7(1) is that the period of probation shall be deemed to have been extended if a Subordinate Judge is not confirmed on the expiry of his period of probation.

72. In this context reference may be made to the proviso to Rule 7(3). The proviso to the rule states that the completion of the maximum period of three years' probation would not confer on him the right to be confirmed till there is a permanent vacancy in the cadre. Rule 7(3) states that an express order of confirmation is necessary. The proviso to Rule 7(3) is in the negative form that the completion of the maximum period of three years would not confer a right of confirmation till there is a permanent vacancy in the cadre. The period of probation is therefore extended by implication until the proceedings commenced against a probationer like the appellant are concluded to enable the Government to decide whether a probationer should be confirmed or his services should be terminated. No confirmation by implication can arise in the present case in the facts and circumstances as also by the meaning and operation of Rules 7(1) and 7(3) as aforesaid.

73. It is necessary at this stage to refer to the second proviso to Rule 7(3) which came into existence on November 19, 1970. That proviso of course does not apply to the facts of the present case. That proviso states that if the report of the High Court regarding the unsatisfactory work or conduct of the probationer is made to the Governor before the expiry of the maximum period of probation, further proceedings in the matter may be taken and orders passed by the Governor of Punjab dispensing with his services or reverting him to his substantive post even after the expiry of the maximum period of probation. The second proviso makes explicit which is implicit in Rule 7(1) and Rule 7(3) that the period of probation gets extended till the proceedings commenced by the notice come to an end either by confirmation or discharge of the probationer.

74. In the present case, no confirmation by implication can arise by reason of the notice to show cause given on October 4, 1968 the enquiry by the Director of Vigilance to enquire into allegations and the operation of Rule 7 of the Service Rules that the probation shall be extended impliedly if a Subordinate Judge is not confirmed before the expiry of the period of probation. Inasmuch as Ishwar Chand Agarwal was not confirmed at the end of the period of probation confirmation by implication is nullified.

75. The second contention on behalf of Ishwar Chand Agarwal was that the termination is by way of punishment. It was said to be an order removing the appellant from service on the basis of charges of gross misconduct by ex-parte enquiry conducted by the Vigilance Department. The enquiry was said to be in breach of Article 311 as also in violation of rules of natural justice. The appellant relied on Rule 9 to show that he was not only entitled to

know the grounds but also to an opportunity to represent as a condition precedent to any such termination. The appellant put in the forefront that the termination of his services was based on the findings of the Vigilance Department which went into 15 allegations of misconduct contained in about 8 complaints and these were never communicated to him.

76. The High Court under Article 235 is vested with the control of subordinate judiciary. The High Court according to the appellant failed to act in terms of the provisions of the Constitution and abdicated the control by not having an inquiry through Judicial Officers subordinate to the control of the High Court but asking the Government to enquire through the Vigilance Department.

78. The High Court for reasons which are not stated requested the Government to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the Vigilance Department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the Director of Vigilance was an act of self abnegation. The contention of the State that the High Court wanted the Government to be satisfied makes matters worse. The Governor will act on the recommendation of the High Court. That is the broad basis of Article 235. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of Article 235 by asking the Government to enquire through the Director of Vigilance.

79. The Enquiry Officer nominated by the Director of Vigilance recorded the statements of the witnesses behind the back of the appellant. The enquiry was to ascertain the truth of allegations of misconduct. Neither the report nor the statements recorded by the Enquiry Officer reached the appellant. The Enquiry Officer gave his findings on allegations of misconduct. The High Court accepted the report of the Enquiry Officer and wrote to the Government on June 25, 1969 that in the light of the report the appellant was not a suitable person to be retained in service. The order of termination was because of the recommendations in the report.

80. The order of termination of the services of Ishwar Chand Agarwal is clearly by way of punishment in the facts and circumstances of the case. The High Court not only denied Ishwar Chand Agarwal the protection under Article 311 but also denied itself the dignified control over the subordinate judiciary. The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside.

81. The appellant Samsher Singh was appointed on May 1, 1964 as Subordinate Judge. He was on probation. On March 22, 1967 the Chief Secretary issued a notice to him

substantially repeating the same charges which had been communicated by the Registrar on December 15, 1966 and asked the appellant to show cause as to why his services should not be terminated as he was found unsuitable for the job. The appellant gave an answer. On April 29, 1967 the services of the appellant were terminated.

82. The appellant Samsher Singh in the context of the Rules of Business contended that the removal of a Subordinate Judge from service is a personal power of the Governor and is incapable of being delegated or dealt with under the Rules of Business. We have already held that the Governor can allocate the business of the Government to the Ministers and such allocation is no delegation and it is an exercise of executive power by the Governor through the Council or officers under the Rules of Business. The contention of the appellant that the order was passed by the Chief Minister without the formal approval of the Governor is, therefore, untenable. The order is the order of the Governor.

83. The appellant was asked to show cause as to why his services should not be terminated. There were four grounds. One was that the appellant's behaviour towards the Bar and the litigant public was highly objectionable, derogatory, non-cooperative and unbecoming of a judicial officer. The second was that the appellant would leave his office early. The third was the complaint of Om Prakash, Agriculture Inspector that the appellant abused his position by proclaiming that he would get Om Prakash involved in a case if he did not co-operate with Mangal Singh, a friend of the appellant and Block Development Officer, Sultanpur. The fourth was the complaint of Prem Sagar that the appellant did not give full opportunity to Prem Sagar to lead evidence. Prem Sagar also complained that the decree-holder made an application for execution of the decree against Prem Sagar and the appellant without obtaining office report incorporated some additions in the original judgment and warrant of possession.

84. The appellant showed cause. The appellant said that he was not provided with an opportunity to work under the same superior officer for at least six months so that independent opinion could be formed about his knowledge, work and conduct. On April 29, 1967 the appellant received a letter from the Deputy Secretary to the Government addressed to the Registrar, Punjab and Haryana High Court that the services of the appellant had been terminated.

85. It appears that a mountain has been made out of a mole hill. The allegation against the appellant is that he helped the opponent of Prem Sagar. The case against Prem Sagar was heard on April 17, 1965. Judgment was pronounced the same day. The application for execution of the decree was entertained on the same day by the appellant. In the warrant the appellant wrote with his own hands the words "Trees, well, crops and other rights attached to the land". This correction was made by the appellant in order that the warrant might be in conformity with the plaint and the decree. There is nothing wrong in correcting the warrant to make it consistent with the decree. It appears that with regard to the complaint of leaving office early and the complaint of Om Prakash, Agriculture Inspector the appellant was in fact punished and a punishment of warning was inflicted on him.

86. The appellant claimed protection of Rule 9. Rule 9 makes it incumbent on the authority that the services of a probationer can be terminated on specific fault or on account of

unsatisfactory record implying unsuitability. In the facts and circumstances of this case it is clear that the order of termination of the appellant Samsher Singh was one of punishment. The authorities were to find out the suitability of the appellant. They however concerned themselves with matters which were really trifles. The appellant rightly corrected the records in the case of Prem Sagar. The appellant did so with his own hand. The order of termination is in infraction of Rule 9. The order of termination is therefore set aside.

87. The appellant Samsher Singh is now employed in the Ministry of Law. No useful purpose will be served by asking for reconsideration as to the suitability of the appellant Samsher Singh for confirmation.

88. For the foregoing reasons we hold that the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers. Where the Governor has any discretion the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers. The appointment as well as removal of the members of the Subordinate Judicial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. Appointments and removals of persons are made by the President and the Governor as the constitutional head of the Executive on the aid and advice of the Council of Ministers. That is why any action by any servant of the Union or the State in regard to appointment or dismissal is brought against the Union or the State and not against the President or the Governor.

89. The orders of termination of the services of the appellants are set aside. The appellant Ishwar Chand Agarwal is declared to be a member of the Punjab Civil Service (Judicial Branch). The appellant Samsher Singh succeeds in so far as the order of termination is set aside. In view of the fact that Samsher Singh is already employed in the Ministry of Law no relief excepting salary or other monetary benefits which accrued to him upto the time he obtained employment in the Ministry of Law is given.

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M.P. Special Police Establishment v. State of M.P.
(2004) 8 SCC 788

(N.Santosh Hegde, S.N.Variava, B.P.Singh, H.K.Sema and S.B.Sinha, JJ.)

S.N. VARIAVA, J. - 3. Respondents 4 (in both these appeals) i.e. Rajendra Kumar Singh and Bisahu Ram Yadav, were Ministers in the Government of M.P. A complaint was made to the Lokayukta against them for having released 7.5 acres of land illegally to its earlier owners even though the same had been acquired by the Indore Development Authority. After investigation the Lokayukta submitted a report holding that there were sufficient grounds for prosecuting the two Ministers under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and also for the offences of criminal conspiracy punishable under Section 120-B of the Penal Code. It must be mentioned that by the time the report was given the two Ministers had already resigned.

4. Sanction was applied for from the Council of Ministers for prosecuting the two Ministers. The Council of Ministers held that there was not an iota of material available against both the Ministers from which it could be inferred that they had entered into a criminal conspiracy with anyone. The Council of Ministers thus refused sanction on the ground that no prima facie case had been made out against them.

5. The Governor then considered grant of sanction keeping in view the decision of the Council of Ministers. The Governor opined that the available documents and the evidence were enough to show that a prima facie case for prosecution had been made out. The Governor accordingly granted sanction for prosecution under Section 197 of the Criminal Procedure Code.

6. Both the Ministers filed separate writ petitions under Articles 226 and 227 of the Constitution assailing the order of the Governor. A Single Judge of the High Court held that granting sanction for prosecuting the Ministers was not a function which could be exercised by the Governor “in his discretion” within the meaning of these words as used in Article 163 of the Constitution. It was held that the Governor could not act contrary to the “aid and advice” of the Council of Ministers. It was further held that the doctrine of bias could not be applied against the entire Council of Ministers and that the doctrine of necessity could not be invoked on the facts of the case to enable the Governor to act in his discretion.

7. The appellants filed two letters patent appeals which have been disposed of by the impugned judgment. The Division Bench dismissed the letters patent appeals upholding the reasoning and judgment of the Single Judge. It must be mentioned that the authority of this Court in the case of ***State of Maharashtra v. Ramdas Shrinivas Nayak*** [(1982) 2 SCC 463] was placed before the Division Bench. The Division Bench, however, held that the observations made therein may apply to the case of a Chief Minister but they could not be stretched to include cases of Ministers.

8. The question for consideration is whether a Governor can act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for

prosecution of Ministers for offences under the Prevention of Corruption Act and/or under the Indian Penal Code.

9. As this question is important, by order dated 12-9-2003 it has been directed that these appeals be placed before a Bench of five Judges. Accordingly, these appeals are before this Bench.

[The court quoted Article 163 of the Constitution.]

11. Mr Sorabjee submits that even though normally the Governor acts on the aid and advice of the Council of Ministers, but there can be cases where the Governor is, by or under the Constitution, required to exercise his function or any of them in his discretion. **The Constitution of India expressly provides for contingencies/cases where the Governor is to act in his discretion. Articles 239(2), 371-A(1)(b), 371-A(2)(b), 371-A(2)(f) and paras 9(2) and 18(3) of the Sixth Schedule are some of the provisions. However, merely because the Constitution of India expressly provides, in some cases, for the Governor to act in his discretion, can it be inferred that the Governor can so act only where the Constitution expressly so provides? If that were so then sub-clause (2) of Article 163 would be redundant.** A question whether a matter is or is not a matter in which the Governor is required to act in his discretion can only arise in cases where the Constitution has not expressly provided that the Governor can act in his discretion. Such a question cannot arise in respect of a matter where the Constitution expressly provides that the Governor is to act in his discretion. Article 163(2), therefore, postulates that there can be matters where the Governor can act in his discretion even though the Constitution has not expressly so provided.

12. Mr Sorabjee relies on the case of *Samsher Singh v. State of Punjab* [(1974) 2 SCC 831]. A seven-Judge Bench of this Court, *inter alia*, considered whether the Governor could act by personally applying his mind and/or whether, under all circumstances, he must act only on the aid and advice of the Council of Ministers. [The court quoted paras. 54-56 of the judgment and proceeded]. The law, however, was declared in the following terms:

“154. We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that de Smith’s statement (*Constitutional and Administrative Law* -

by S.A. de Smith - Penguin Books on Foundations of Law) regarding royal assent holds good for the President and Governor in India:

‘Refusal of the royal assent on the ground that the Monarch strongly disapproved of a Bill or that it was intensely controversial would nevertheless be unconstitutional. The only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course - a highly improbable contingency - or possibly if it was notorious that a Bill had been passed in disregard to mandatory procedural requirements; but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to, prudence would suggest the giving of assent.’ ”

Thus, as rightly pointed out by Mr Sorabjee, a seven-Judge Bench of this Court has already held that the normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Some of the exceptions are as set out hereinabove. It is, however, clarified that the exceptions mentioned in the judgment are not exhaustive. It is also recognised that the concept of the Governor acting in his discretion or exercising independent judgment is not alien to the Constitution. It is recognised that there may be situations where by reason of peril to democracy or democratic principles, an action may be compelled which from its nature is not amenable to Ministerial advice. Such a situation may be where bias is inherent and/or manifest in the advice of the Council of Ministers.

13. Mr Sorabjee also points out that this Court in the case of *Ramdas Shrinivas Nayak*¹ has carved out a further exception. In this case, an MLA filed a complaint against the then Chief Minister of Maharashtra in the Court of Metropolitan Magistrate, 28th Court, Esplanade, Bombay, charging the Chief Minister with commission of offences punishable under Sections 161 and 185 of the Indian Penal Code and Section 5 of the Prevention of Corruption Act. The Metropolitan Magistrate refused to entertain the complaint without requisite sanction of the Government under Section 6 of the Prevention of Corruption Act. Against the order of the Metropolitan Magistrate, R.S. Nayak filed a criminal revision application in the High Court of Bombay wherein the State of Maharashtra and Shri Antulay were impleaded as respondents. During the pendency of this criminal revision application, Shri Antulay resigned as the Chief Minister of the State of Maharashtra. A Division Bench of the Bombay High Court dismissed the revision application, but whilst dismissing the application it was recorded by Gadgil, J. as follows:

“However, I may observe at this juncture itself that at one stage it was expressly submitted by the learned counsel on behalf of the respondents that in case if it is felt that bias is well apparently inherent in the proposed action of the Ministry concerned, then in such a case situation notwithstanding the other Ministers not being joined in the arena of the prospective accused, it would be a justified ground for the Governor to act on his own, independently and without any reference to any Ministry, to decide that question.”

Kotwal, J. in his concurring judgment observed:

“At one stage it was unequivocally submitted by the learned counsel on behalf of the respondents in no uncertain terms that even in this case notwithstanding there being no accusation against the Law Minister as such if the court feels that in the nature of things a bias in favour of the respondents and against a complainant would be manifestly inherent, apparent and implied in the mind of the Law Minister, then in that event, he would not be entitled to consider complainant’s application and on the equal footing even the other Ministers may not be qualified to do so and the learned counsel further expressly submitted that in such an event, it would only be the Governor, who on his own, independently, will be entitled to consider that question.”

The State of Maharashtra sought special leave to appeal to this Court, under Article 136 of the Constitution, against that portion of the judgment which directed the Governor of Maharashtra to exercise his individual discretion. Before this Court it was argued that the High Court could not have decided that the Governor should act in his individual discretion and without the aid and advice of the Council of Ministers. It was submitted that under Article 163(2) if a question arose whether any matter was or was not one in which the Governor was required to act in his discretion, it was the decision of the Governor which was to be final. It was also submitted that under Article 163(3) any advice tendered by the Council of Ministers to the Governor could not be inquired into by the Court. This Court noticed that an express concession had been made in the High Court to the effect that in circumstances like this bias may be apparently inherent and thus it would be a justified ground for the Governor to decide on his own, independently and without any reference to any Ministry. Before this Court it was sought to be contended that no such concession had been made out. This Court held that public policy and judicial decorum required that this Court does not launch into an enquiry whether any such concession was made. It was held that matters of judicial record are unquestionable and not open to doubt. It was held that this Court was bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. This Court then went on to hold as follows:

“10. We may add, there is nothing before us to think that any such mistake occurred, nor is there any ground taken in the petition for grant of special leave that the learned Judges proceeded on a mistaken view that the learned counsel had made a concession that there might arise circumstances, under which the Governor in granting sanction to prosecute a Minister must act in his own discretion and not on the advice of the Council of Ministers. The statement in the judgment that such a concession was made is conclusive and, if we may say so, the concession was rightly made. *In the facts and circumstances of the present case, we have no doubt in our mind that when there is to be a prosecution of the Chief Minister, the Governor would, while determining whether sanction for such prosecution should be granted or not under Section 6 of the Prevention of Corruption Act, as a matter of propriety, necessarily act in his own discretion and not on the advice of the Council of Ministers.*

11. The question then is whether we should permit the State of Maharashtra to resile from the concession made before the High Court and raise before us the contention now advanced by the learned Attorney General. We have not the slightest

doubt that the cause of justice would in no way be advanced by permitting the State of Maharashtra to now renege from the concession and agitate the question posed by the learned Attorney General. On the other hand we are satisfied that the concession was made to advance the cause of justice as it was rightly thought that in deciding to sanction or not to sanction the prosecution of a Chief Minister, the Governor would act in the exercise of his discretion and not with the aid and advice of the Council of Ministers. The application for grant of special leave is, therefore, dismissed.”

(emphasis supplied)

14. As has been mentioned above, the Division Bench had noted this case. The Division Bench, however, held that even though this principle may apply to the case of a Chief Minister, it cannot apply to a case where Ministers are sought to be prosecuted. We are unable to appreciate the subtle distinction sought to be made by the Division Bench. The question in such cases would not be whether they would be biased. The question would be whether there is reasonable ground for believing that there is likelihood of apparent bias. Actual bias only would lead to automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. The principle of real likelihood of bias has now taken a tilt to “real danger of bias” and “suspicion of bias”. [See *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant* [(2001) 1 SCC 182] and *Judicial Review of Administrative Action*, by de Smith, Woolf and Jowell (5th Edn. at p. 527) where two different spectrums of the doctrine have been considered.]

15. Another exception to the aforementioned general rule was noticed in *Bhuri Nath v. State of J& K* [(1997) 2 SCC 745] where the Governor was to chair the Board in terms of the Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 on the premise that in terms of the statute he is required to exercise his ex officio power as Governor to oversee personally the administration, management and governance of the shrine. It was observed that the decision taken by him would be his own on his personal satisfaction and not on the aid and advice of the Council of Ministers opining:

The exercise of powers and functions under the Act is distinct and different from those exercised formally in his name for which responsibility rests only with his Council of Ministers headed by the Chief Minister.”

16. In the case of *A.K. Kraipak v. Union of India* [(1969) 2 SCC 262] the question was whether a selection made by the Selection Board could be upheld. It was noticed that one of the candidates for selection had become a member of the Selection Board. A Constitution Bench of this Court considered the question of bias in such situations. This Court held as follows:

“15. It is unfortunate that Naqishbund was appointed as one of the members of the Selection Board. It is true that ordinarily the Chief Conservator of Forests in a State should be considered as the most appropriate person to be in the Selection Board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the all-India service is entitled to great weight. But then under the circumstances it was improper to have included Naqishbund as a member of the Selection Board. He was

one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the Selection Board must have had its own impact on the decision of the Selection Board. Further admittedly he participated in the deliberations of the Selection Board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the Selection Board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates.

16. The members of the Selection Board other than Naqishbund, each one of them separately, have filed affidavits in this Court swearing that Naqishbund in no manner influenced their decision in making the selections. In a group deliberation each member of the group is bound to influence the others, more so, if the member concerned is a person with special knowledge. His bias is likely to operate in a subtle manner. It is no wonder that the other members of the Selection Board are unaware of the extent to which his opinion influenced their conclusions. We are unable to accept the contention that in adjudging the suitability of the candidates the members of the Board did not have any mutual discussion. It is not as if the records spoke of themselves. We are unable to believe that the members of Selection Board functioned like computers. At this stage it may also be noted that at the time the selections were made, the members of the Selection Board other than Naqishbund were not likely to have known that Basu had appealed against his supersession and that his appeal was pending before the State Government. Therefore there was no occasion for them to distrust the opinion expressed by Naqishbund. Hence the Board in making the selections must necessarily have given weight to the opinion expressed by Naqishbund.”

17. On the basis of the ratio in this case Mr Sorabjee rightly contends that bias is likely to operate in a subtle manner. Sometimes members may not even be aware of the extent to which their opinion gets influenced.

18. Again in the case of *Kirti Deshmankar (Dr.) v. Union of India* [(1991) 1 SCC 104] the mother-in-law of the selected candidate had participated in the Selection Committee. This Court held that the mother-in-law was vitally interested in the admission of her daughter-in-law and her presence must be held to have vitiated the selection for the admission. It was held

that there was a conflict between interest and duty and taking into consideration human probabilities and the ordinary course of human conduct, there was reasonable ground to believe that she was likely to have been biased.

19. Article 163 has been extracted above. Undoubtedly, in a matter of grant of sanction to prosecute, the Governor is normally required to act on aid and advice of the Council of Ministers and not in his discretion. However, an exception may arise whilst considering grant of sanction to prosecute a Chief Minister or a Minister where as a matter of propriety the Governor may have to act in his own discretion. Similar would be the situation if the Council of Ministers disables itself or disentitles itself.

20. Mr Tankha, on behalf of the Ministers, submitted that a case of Chief Minister would be completely different from that of Ministers. He submitted that in this case the Council of Ministers had considered all the materials and had applied their minds and come to the conclusion that sufficient material to grant sanction was not there. He submitted that the Governor was not an appellate body and he could not sit in appeal over the decision of the Council of Ministers. He submitted that the decision of the Council of Ministers could only have been challenged in a court of law.

21. Mr Tankha submitted that the theory of bias cannot be applied to the facts of this case. In support of his submission, he relied upon the case of *V.C. Shukla v. State (Delhi Admn.)* [1980 Supp SCC 249] wherein the vires of the Special Courts Act, 1979 had been challenged. Under Section 5 of the Special Courts Act, sanction had to be granted by the Central Government. Sub-section (2) of Section 5 provided that the sanction could not be called in question by any court. It had been submitted that this would enable an element of bias or malice to operate by which the Central Government could prosecute persons who are political opponents. This Court negated this contention on the ground that the power was vested in a very high authority and therefore, it could not be assumed that it was likely to be abused. This Court held that as the power was conferred on a high authority the presumption would be that the power would be exercised in a bona fide manner and according to law. Mr Tankha also relied upon the case of *State of Punjab v. V.K. Khanna* [(2001) 2 SCC 330]. In this case, two senior IAS officers in the State of Punjab were sought to be prosecuted after obtaining approval from the then Chief Minister of Punjab. Thereafter, there was a change in the Government. The new Government cancelled the sanction granted earlier. The question before the Court was whether the action in withdrawing the sanction was fair and correct. This Court held that fairness was synonymous with reasonableness and bias stood included within the attributes and broader purview of the word "malice". This Court held that mere general statements were not sufficient but that there must be cogent evidence available to come to the conclusion that there existed a bias which resulted in a miscarriage of justice. Mr Tankha also relied upon the case of *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*. In this case, the question was whether the Managing Director had a bias against the respondent therein. This Court held that mere apprehension of bias was not sufficient but that there must be real danger of bias. It was held that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. It was held that if on facts the conclusion was otherwise inescapable that there existed a real danger of bias, the administrative action could not be sustained. It was held that if, on the other hand, the

allegations pertaining to bias are rather fanciful, then the question of declaring them to be unsustainable would not arise.

22. There can be no dispute with the propositions of law. However, in our view, the above authorities indicate that if the facts and circumstances indicate bias, then the conclusion becomes inescapable.

23. Mr Tankha is not right when he submits that the Governor would be sitting in appeal over the decision of the Council of Ministers. However, as stated above, unless a situation arises as a result whereof the Council of Ministers disables or disentitles itself, the Governor in such matters may not have any role to play. Taking a cue from *Antulay* [Ed.: See *R.S. Nayak v. A.R. Antulay* (1984) 2 SCC 183. Other connected *Antulay* cases are reported at (1984) 2 SCC 500; (1984) 3 SCC 86; (1986) 2 SCC 716; 1986 Supp SCC 510; (1988) 2 SCC 602]. it is possible to contend that a Council of Ministers may not take a fair and impartial decision when their Chief Minister or other members of the Council face prosecution. But the doctrine of “apparent bias”, however, may not be applicable in a case where a collective decision is required to be taken under a statute in relation to former Ministers. In a meeting of the Council of Ministers, each member has his own say. There may be different views or opinions. But in a democracy the opinion of the majority would prevail.

24. Mr Soli J. Sorabjee has not placed any material to show as to how the Council of Ministers collectively or the members of the Council individually were in any manner whatsoever biased. There is also no authority for the proposition that a bias can be presumed in such a situation. The real doctrine of likelihood of bias would also not be applicable in such a case. The decision was taken collectively by a responsible body in terms of its constitutional functions. To repeat, only in a case of “apparent bias”, the exception to the general rule would apply.

25. On the same analogy in the absence of any material brought on record, it may not be possible to hold that the action on the part of the Council of Ministers was actuated by any malice. So far as plea of malice is concerned, the same must be attributed personally against the person concerned and not collectively. Even in such a case the persons against whom malice on fact is alleged must be impleaded as parties.

26. However, here arises another question. There are two competing orders; one of the Council of Ministers, another by the Governor, one refusing to grant sanction, another granting the same. The Council of Ministers had refused to grant sanction on the premise that there existed no material to show that Respondents 4 in each appeal had committed an offence of conspiracy, whereas the Governor in his order dated 24-9-1998 was clearly of the view that the materials did disclose their complicity.

27. An FIR was lodged in relation to the commission of offence on 31-3-1998.

28. The Lokayukta for the State of Madhya Pradesh admittedly made a detailed inquiry in the matter on a complaint received by him. The inquiry covered a large area, namely, the statutory provisions, the history of the case, orders dated 11-8-1995, 24-2-1997 and 5-3-1997 which were said to have been passed in the teeth of the statutory provisions, the clandestine manner in which the matter was pursued, the notings in the files as also how the accused persons deliberately and knowingly closed their minds and eyes from the realities of the case.

The report of the Lokayukta is itself replete with the materials which led him to arrive at the conclusion which is as under:

“Having gone through the record of the IDA and the State Government and the statements recorded by Shri P.P. Tiwari and the replies of the two Ministers Shri B.R. Yadav and Shri Rajendra Kumar Singh and Shri R.D. Ahirwar, the then Additional Secretary, Department of Environment, I have come to the conclusion that this is a fit case in which an offence should be registered. Therefore, in exercise of the powers vested in me under Section 4(1) of the M.P. Special Police Establishment Act, I direct the DG (SPE) to register and investigate an offence against Shri B.R. Yadav, Minister, Shri Rajendra Kumar Singh, Minister and Shri R.D. Ahirwar, the then Additional Secretary under relevant provisions of the PC Act, 1988 and IPC. It is also directed that investigation in this case will be done by an officer not below the rank of SP. The entire record be transferred to the SPE wing.”

29. The office of the Lokayukta was held by a former Judge of this Court. It is difficult to assume that the said high authority would give a report without any material whatsoever. We, however, do not intend to lay down any law in this behalf. Each case may be judged on its own merits. In this case, however, we are satisfied that the Lokayukta made a report upon taking into consideration the materials which were placed or received by him. When the Council of Ministers takes a decision in exercise of its jurisdiction it must act fairly and reasonably. It must not only act within the four corners of the statute but also for effectuating the purpose and object for which the statute has been enacted. Respondents 4 in each appeal are to be prosecuted under the Prevention of Corruption Act wherefor no order of sanction is required to be obtained. A sanction was asked for and granted only in relation to an offence under Section 120-B of the Penal Code. It is now trite that it may not be possible in a given case even to prove conspiracy by direct evidence. It was for the court to arrive at the conclusion as regards commission of the offence of conspiracy upon the material placed on record of the case during trial which would include the oral testimonies of the witnesses. Such a relevant consideration apparently was absent in the mind of the Council of Ministers when it passed an order refusing to grant sanction. It is now well settled that refusal to take into consideration a relevant fact or acting on the basis of irrelevant and extraneous factors not germane to the purpose of arriving at the conclusion would vitiate an administrative order. In this case, on the material disclosed by the report of the Lokayukta it could not have been concluded, at the prima facie stage, that no case was made out.

30. It is well settled that the exercise of administrative power will stand vitiated if there is a manifest error of record or the exercise of power is arbitrary. Similarly, if the power has been exercised on the non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous.

31. We have, on the premises aforementioned, no hesitation to hold that the decision of the Council of Ministers was ex facie irrational whereas the decision of the Governor was not. In a situation of this nature, the writ court while exercising its jurisdiction under Article 226 of the Constitution as also this Court under Articles 136 and 142 of the Constitution can pass an appropriate order which would do complete justice to the parties. The High Court unfortunately failed to consider this aspect of the matter.

32. If, on these facts and circumstances, the Governor cannot act in his own discretion there would be a complete breakdown of the rule of law inasmuch as it would then be open for Governments to refuse sanction in spite of overwhelming material showing that a prima facie case is made out. If, in cases where a prima facie case is clearly made out, sanction to prosecute high functionaries is refused or withheld, democracy itself will be at stake. It would then lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted.

33. Mr Tankha also pressed into play the doctrine of necessity to show that in such cases of necessity it is the Council of Ministers which has to take the decision. In support of this submission he relied upon the cases of *J. Mohapatra and Co. v. State of Orissa* [(1984) 4 SCC 103], *Institute of Chartered Accountants v. L.K. Ratna* [(1986) 4 SCC 537], *Charan Lal Sahu v. Union of India* [(1990) 1 SCC 613], *Badrinath v. Govt. of T.N.* [(2000) 8 SCC 395], *Election Commission of India v. Dr. Subramaniam Swamy* (1996) 4 SCC 104], *Ramdas Shrinivas Nayak* and *State of M.P. v. Dr. Yashwant Trimbak*. [(1996) 2 SCC 305]. In our view, the doctrine of necessity has no application to the facts of this case. Certainly, the Council of Ministers has to first consider grant of sanction. We also presume that a high authority like the Council of Ministers will normally act in a bona fide manner, fairly, honestly and in accordance with law. However, on those rare occasions where on facts the bias becomes apparent and/or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors, the Governor would be right, on the facts of that case, to act in his own discretion and grant sanction.

34. In this view of the matter, the appeals are allowed. The decisions of the Single Judge and the Division Bench cannot be upheld and are, accordingly, set aside. The writ petitions filed by the two Ministers will stand dismissed. For the reasons aforementioned we direct that the order of the Governor sanctioning prosecution should be given effect to and that of the Council of Ministers refusing to do so may be set aside. The Court shall now proceed with the prosecution. As the case is very old, we request the Court to dispose of the case as expeditiously as possible.

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State (NCT of Delhi) v. Union of India
(2018) 8 SCC 501

(Dipak Misra, C.J. and Dr. A.K. Sikri, A.M.Khanwilkar, Dr. D.Y.Chandrachud and Ashok Bhushan, JJ.)

[The High Court of Delhi in Government of NCT of Delhi v. Union of India W.P.(C) No.5888/2015 by an Order dated 08.09.2016 vide Sub-Para (iv) of Para 304 held that:

“It is mandatory under the constitutional scheme to communicate the decision of the Council of Ministers to the Lt. Governor even in relation to the matters in respect of which power to make laws has been conferred on the Legislative Assembly of NCT of Delhi under clause (3)(a) of Article 239AA of the Constitution and an order thereon can be issued only where the Lt. Governor does not take a different view and no reference to the Central Government is required in terms of the proviso to clause (4) of Article 239AA of the Constitution read with Chapter V of the Transaction of Business of the Government of NCT of Delhi Rules, 1993.”

The said order of the High Court of Delhi was challenged by the Government of NCT of Delhi before the Supreme Court of India. The two judge bench of the Supreme Court vide order dated 15-02-2017 referred to the Constitutional Bench as substantial questions of law about the interpretation of Article 239AA of the Constitution was involved. Held- the Lieutenant Governor act on the aid and advice of the Council of Ministers except when he decides to refer the matter to the President for final decision.]

DIPAK MISRA, C.J. (for himself, Sikri and Khanwilkar, JJ.) – 16. On 19.10.1956, the Constitution of India (Seventh Amendment) Act, 1956 was passed to implement the provisions of the States Re-organization Act, 1956 which did away with Part A, B, C and D States and only two categories, namely, States and Union Territories remained and Delhi became a Union Territory to be administered by an administrator appointed by the President. The Legislative Assembly of Delhi and the Council stood abolished. In the year 1953, the Government of Union Territories Act, 1963 was enacted to provide for Legislative Assemblies and Council of Ministers for various Union Territories but the provisions of the said Act were not made applicable to Delhi. The Delhi Administration Act, 1966 was enacted to provide for limited representative Government for Delhi through a Metropolitan Council comprising of 56 elected members and five nominated members. In the same year, on 20.08.1966, the Ministry of Home Affairs issued S.O. No. 2524 that provided, inter alia, that the Lieutenant Governor/Administrator/Chief Commissioner shall be subject to the control of the President of India and exercise such powers and discharge the functions of a State Government under the Commission of Inquiry Act, 1952 within the Union Territories. In the year 1987, the Balakrishnan Committee was set up to submit its recommendations with regard to the status to be conferred on Delhi and the said Committee recommended that Delhi should continue to be a Union Territory but there must be a Legislative Assembly and Council of Ministers responsible to the said Assembly with appropriate powers; and to ensure stability, appropriate constitutional measures should be taken to confer the National Capital a special status. The relevant portion of the Balakrishnan Committee report reads as follows:

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6.7.21. The Administrator should be expressly required to perform his functions on the aid and advice of the Council of Ministers. The expression "to aid and advice" is a well understood term of art to denote the implications of the Cabinet system of Government adopted by our Constitution. Under this system, the general Rule is that the exercise of executive functions by the Administrator has to be on the aid and advice of his Council of Ministers which means that it is virtually the Ministers that should take decisions on such matters.

190. We may now focus on the decision in *Shamsher Singh* AIR 1974 SC 2192. The issue centered around the role and the constitutional status of the President. In that context, it has been held that the President and the Governor act on the aid and advice of the Council of Ministers and the Constitution does not stipulate that the President or the Governor shall act personally without or against the aid and

advice of the Council of Ministers. Further, the Court held that the Governor can act on his own accord in matters where he is required to act in his own discretion as specified in the Constitution and even while exercising the said discretion, the Governor is required to act in harmony with the Council of Ministers. We may hasten to add that the President of India, as has been held in the said case, has a distinguished role on certain occasions.

191. That apart, A.N. Ray, C.J., in *Shamsher Singh* (supra), has stated thus:

“15. Article 163(1) states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution, required to exercise his functions or any of them in his discretion. Article 163(2) states that if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that ought or ought not to have acted in his discretion. Extracting the words "in his discretion" in relation to exercise of functions, the Appellants contend that the Council of Ministers may aid and advise the Governor in Executive functions but the Governor individually and personally in his discretion will exercise the constitutional functions of appointment and removal of officers in State Judicial Service and other State Services.

16. It is noticeable that though in Article 74 it is stated that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions, there is no provision in Article 74 comparable to Article 163 that the aid and advice is except in so far as he is required to exercise his functions or any of them in his discretion.

17. It is necessary to find out as to why the words, 'in his discretion' are used in relation to some powers of the Governor and not in the case of the President.

18. Article 143 in the Draft Constitution became Article 163 in the Constitution. The draft constitution in Article 144(6) said that the functions of the Governor Under Article with respect to the appointment and dismissal of Ministers shall be exercised by him in his discretion. Draft Article 144(6) was totally omitted when Article 144 became Article 164 in the Constitution. Again Draft Article 153(3) said that the functions of the Governor under Clauses (a) and (c) of Clause (2) of the Article shall be exercised by him in his discretion. Draft Article 153(3) was totally omitted when it became Article 174 of our Constitution. Draft Article 175 (proviso) said that the Governor "may in his discretion return the Bill together with a message requesting that the House will reconsider the Bill". Those words that "the Governor may in his discretion" were omitted when it became Article 200. The Governor Under Article 200 may return the Bill with a message requesting that the House will reconsider the Bill. Draft Article 188 dealt with provisions in case of grave emergencies, Clauses (1) and (4) in Draft Article 188 used to words "in his discretion in relation to exercise of power by the Governor. Draft Article 188 was totally omitted Draft Article 285(1) and (2) dealing with composition and staff of Public Service Commission used the expression "in his discretion" in relation to exercise of power by the Governor in regard to appointment of the Chairman and Members and making of Regulation. The words "in his discretion" in relation to exercise of power by the Governor were omitted when it became Article 316. **In Paragraph 15 (3) of the Sixth Schedule dealing with annulment or suspension of acts or suspension of acts and resolutions of District and Regional Councils it was said that the functions of the Governor under the Paragraph shall be exercised by him in his discretion. Subparagraph 3 of Paragraph 15 of the Sixth Schedule was omitted at the time of enactment of the Constitution.**

19. It is, therefore, understood in the background of these illustrative Draft Articles as to why Article 143 in the Draft Constitution which became Article 163 in our Constitution used the expression "in his discretion" in regard to some powers of the Governor.

192. Thereafter, A.N. Ray, C.J. discussed the provisions of the Constitution as well as a couple of paragraphs of the Sixth Schedule wherein the words "in his discretion" are used in relation to

certain powers of the Governor to highlight the fact that a Governor can act in his discretion only when the provisions of the Constitution so permit.

196. Thus, *New Delhi Municipal Corporation* (1997) 7 SCC 339 makes it clear as crystal that all Union Territories under our constitutional scheme are not on the same pedestal and as far as the NCT of Delhi is concerned, it is not a State within the meaning of Article 246 or Part-VI of the Constitution. Though the NCT of Delhi partakes a unique position after the Sixty-Ninth Amendment, yet in sum and substance, it remains a Union Territory which is governed by Article 246(4) of the Constitution and to which the Parliament, in the exercise of its constituent power, has given the appellation of the 'National Capital Territory of Delhi'.

204. Drawing an analogy while interpreting the provisions of Article 239AA(3)(a) and Article 239AA(4) would reveal that the executive power of the Government of NCT of Delhi is conterminous with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239AA(4) confers executive power on the Council of Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.

207. At the outset, we must declare that the insertion of Articles 239AA and 239AB which specifically pertain to NCT of Delhi is reflective of the intention of the Parliament to accord Delhi a *sui generis* status from the other Union Territories as well as from the Union Territory of Puducherry to which Article 239A is singularly applicable as on date. The same has been authoritatively held by the majority judgment in the *New Delhi Municipal Corporation case* to the effect that the NCT of Delhi is a class by itself.

209. The exercise of establishing a democratic and representative form of government for NCT of Delhi by insertion of Articles 239AA and 239AB would turn futile if the Government of Delhi that enjoys the confidence of the people of Delhi is not able to usher in policies and laws over which the Delhi Legislative Assembly has power to legislate for the NCT of Delhi.

284.12. In the light of the ruling of the nine-Judge Bench in *New Delhi Municipal Corporation* (supra), it is clear as noonday that by no stretch of imagination, NCT of Delhi can be accorded the status of a State under our present constitutional scheme. The status of NCT of Delhi is *sui generis*, a class apart, and the status of the Lieutenant Governor of Delhi is not that of a Governor of a State, rather he remains an Administrator, in a limited sense, working with the designation of Lieutenant Governor.

284.13. With the insertion of Article 239AA by virtue of the Sixty-ninth Amendment, the Parliament envisaged a representative form of Government for the NCT of Delhi. The said provision intends to provide for the Capital a directly elected Legislative Assembly which shall have legislative powers over matters falling within the State List and the Concurrent List, barring those excepted, and a mandate upon the Lieutenant Governor to act on the aid and advice of the Council of Ministers except when he decides to refer the matter to the President for final decision.

284.17. The meaning of 'aid and advise' employed in Article 239AA(4) has to be construed to mean that the Lieutenant Governor of NCT of Delhi is bound by the aid and advice of the Council of Ministers and this position holds true so long as the Lieutenant Governor does not exercise his power under the proviso to Clause (4) of Article 239AA. The Lieutenant Governor has not been entrusted with any independent decision-making power. He has to either act on the 'aid and advice' of Council of Ministers or he is bound to implement the decision taken by the President on a reference being made by him.

284. 21. The scheme that has been conceptualized by the insertion of Articles 239AA and 239AB read with the provisions of the GNCTD Act, 1991 and the corresponding TBR, 1993 indicates that the Lieutenant Governor, being the Administrative head, shall be kept informed with respect to all the decisions taken by the Council of Ministers. The terminology "send a copy thereof to the Lieutenant Governor", "forwarded to the Lieutenant Governor", "submitted to the Lieutenant Governor" and "cause

to be furnished to the Lieutenant Governor" employed in the said Rules leads to the only possible conclusion that the decisions of the Council of Ministers must be communicated to the Lieutenant Governor but this does not mean that the concurrence of the Lieutenant Governor is required. The said communication is imperative so as to keep him apprised in order to enable him to exercise the power conferred upon him Under Article 239AA(4) and the proviso thereof.

DR. D.Y. CHANDRACHUD, J. (Concurring) – 398. Part IV of the GNCTD Act has inter alia made provisions for matters which lie in the discretion of the Lieutenant Governor, the conduct of business, and the duty of the Chief Minister to communicate with and share information with the Lieutenant Governor. Section 41 provides thus:

Section 41. *Matters in which Lieutenant Governor to act in his discretion:*

(1) *The Lieutenant Governor shall act in his discretion in a matter-*

(i) *which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President;*
or

(ii) *in which he is required by or under any law to act in his discretion or to exercise any judicial functions.*

(2) *If any question arises as to whether any matter is or is not a matter as respects with the Lieutenant Governor is by or under any law required to act in his discretion, the decision of the Lieutenant Governor thereon shall be final.*

(3) *If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is by or under any law required by any law to exercise any judicial or quasi-judicial functions, the decision of the Lieutenant Governor thereon shall be final.*

399. The Lieutenant Governor acts in his discretion in two classes of matters. The first consists of those which are outside the powers conferred upon the legislative assembly but in respect of which the President has delegated powers and functions to the Lieutenant Governor. The second category consists of those matters where the Lieutenant Governor is required to act in his discretion by or under any law or under which he exercises judicial or quasi-judicial functions. Matters falling within the ambit of Section 41 lie outside the realm of the aid and advice mandate. Where a subject or matter lies outside the purview of the legislative assembly, it necessarily lies outside the executive powers of the government of the NCT. Such matters stand excepted from the ambit of the aid and advice which is tendered by the Council of Ministers to the Lieutenant Governor.

467. For the purpose of the present discourse, it is necessary to emphasize the value which the Constitution places on cooperative governance, within the federal structure (Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, at p.232). An illustration is to be found in Chapter II of Part XI which deals with the administrative relations between the Union and the States. Under Article 256, an obligation has been cast upon every state to ensure that its executive power is exercised to secure compliance with laws enacted by Parliament. The executive power of the Union extends to issuing directions to a State as are necessary, for that purpose. Article 257 contains a mandate that in exercising its executive power, a State shall not impede or prejudice the exercise of the executive power of the Union. The constitutional vision of cooperative governance is enhanced by the provision made in Article 258 under which the President may, with the consent of a State, entrust to it or to its officers, functions in relation to any matter to which the power of the Union extends. Similarly, even on matters on which a State legislature has no power to make laws, Parliament may confer powers and impose duties on the officers of the State. Article 261 provides that full faith and credit must be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State. Without determining (it being unnecessary for the present discussion) the extent to which these provisions apply to a Union territory, the purpose of emphasising the principles which emerge from the chapter on administrative relations is to highlight the necessity for cooperative governance between different levels of government, in a Constitution, such as ours, which contains an elaborate distribution of power between political entities and institutions. The construction which the Court places on the proviso to Article

239AA(4) must facilitate mutual cooperation so that the affairs of state are carried out without dislocations occasioned by differences of perception. Differences between political arms of the state are natural to a democratic way of life. The strength inherent in differences is that the Constitution provides a platform for the robust expression of views, accommodates differences of ideology and acknowledges that the resilience, and not the weakness of the nation lies in the plurality of her cultures and the diversity of her opinions. The working of a democratic Constitution depends as much on the wisdom and statesmanship of those in charge of governing the affairs of the nation as much as it relies on the language of the Constitution defining their powers and duties.

468. The proviso to Article 239AA(4) must be operated and applied in a manner which facilitates and does not obstruct the governance of the NCT. If the expression 'any matter' were to be construed as 'every matter' or every trifling matter that would result in bringing to a standstill the administration of the affairs of the NCT. Every conceivable difference would be referred to the President. The elected representatives would be reduced to a cipher. The Union government would govern the day to day affairs. The forms of the Constitution would remain but the substance would be lost. Article 239AA has been introduced as a result of the exercise of the constituent power. The purpose of the exercise is to confer a special status on the National Capital Territory. The arrangements for administering the affairs of Delhi are constitutionally entrenched as a result of the Sixty-Ninth amendment. Whether there should be a Council of Ministers or a Legislature (or both) was not left to determination in an Act of Parliament. The Constitution mandates that both must exist in the NCT. The Constitution mandates direct elections to the Legislature. It obligates the existence of a Council of Ministers which owes collective responsibility to the Legislature. It demarcates the area of legislative and executive power. The Lieutenant Governor, as the substantive part of Article 239AA(4) stipulates, is to act on the aid and advice of the Council of Ministers. In adopting these provisions, the Constitution incorporates the essentials of the cabinet form of government. Was this to have no meaning? A constitutional court must be averse to accepting an interpretation which will reduce these aspirations of governance to a mere form, without the accompanying substance. The Court must take into consideration constitutional morality, which is a guiding spirit for all stakeholders in a democracy.

469. In discharging his constitutional role, the Lieutenant Governor has to be conscious of the fact that the Council of Ministers which tenders aid and advice is elected to serve the people and represents both the aspirations and responsibilities of democracy. Neither the Constitution nor the enabling legislation, which we have noticed earlier, contemplate that every decision of the executive government must receive the prior concurrence of the Lieutenant Governor before it can be implemented.

470. The interpretation of the proviso must be cognizant of the constitutional position that though Delhi has a special status, it continues to be a Union territory governed by Part VIII. There are takeaways from the first line of interpretation which have significance. Within the rubric of Union territories, as the nine-judge Bench decision in NDMC noticed, different Union territories are in varying stages of evolution. Some of the erstwhile Union territories such as Goa attained full statehood and ceased to be Union territories. Some may not have a legislature. Some may have a Legislature under an enactment of Parliament. Delhi has a special position in that both its Legislature as well as Council of Ministers have a constitutionally recognized status. The conferment of this status by a constitutional amendment enhances the position of its arms of governance within Union territories without conferring statehood. Delhi is administered by the President Under Article 239 acting through an Administrator who is designated as a Lieutenant Governor Under Article 239AA(1). The language of the opening words of Article 239(1) must be read in harmony with Article 239AA. In terms of the reach of its legislative powers, the legislative assembly for the NCT does not exercise exclusive jurisdiction over State List subjects. Parliament has legislative authority (in addition to the Union List), both in regard to the State and Concurrent Lists for NCT. Hence legislation by the legislative assembly, even on matters which fall within its legislative domain is subject to the overriding power of Parliament. The principle of repugnancy which Article 254 recognises between Union and State legislation on matters in the Concurrent List is extended by Article 239AA [3(b) and 3 (c)], both with reference to State and Concurrent List subjects for NCT. Moreover,

certain subjects have been expressly carved out from the ambit of the legislative authority of the legislative assembly and vested exclusively in Parliament. Executive powers of the Government of NCT being co-extensive with legislative powers, the aid and advice which is tendered to the Lieutenant Governor by the Council of Ministers is confined to those areas which do not lie outside the purview of legislative powers. These provisions demonstrate that while adopting the institutions of a cabinet form of government, the Constitution has, for NCT, curtailed the ambit of the legislative and executive power, consistent with its status as a Union territory.

471. The exercise of the constituent power to introduce Article 239AA was cognizant of the necessity to protect national interests inherent in the governance of a national capital. A sense of permanence and stability was sought to be attributed to the arrangements made for governing Delhi by bringing in a constitutional amendment. Both in terms of the reach of the legislative power, as well as in relation to the exercise of executive power, the special constitutional arrangements for Delhi recognise that the governance of Delhi implicates a sense of national interest. When matters of national interest arise, they would predicate a predominant role for institutions of national governance.

472. Consistent with the need to preserve national interest, it would not be appropriate to restrict the ambit of the proviso to Article 239AA(4) to situations where the action of the government is ultra vires the limits of its executive powers. This becomes evident on a construction of the provisions of Section 41 (1)(i) and Section 44(1)(a) of the GNCTD Act. Sub-clause(i) of Section 41(1) enables the Lieutenant Governor to act in his discretion on a matter which falls outside the purview of the powers conferred on the legislative assembly but in respect of which powers or functions are entrusted or delegated to him by the President. Under Section 44(1)(a), Rules of Business are made on matters on which the Lieutenant Governor is required to act on the aid and advice of the Council of Ministers. Section 44(1)(a) covers business which is not a part of Section 41(1)(i). This is because matters which fall within Section 44(1)(i) are not governed by the principle of aid and advice.

473. There is much to be said for not laying down an exhaustive catalogue of situations to which the proviso applies. Governance involves complexities. In the very nature of things, it would not be possible for a Court delivering judgment in the context of the problems of the day to anticipate situations which may arise in future. It would be unsafe to confine a constitutional provision to stated categories which may affect the resilience of the Constitution to deal with unforeseen situations. Some of the illustrations which may warrant the exercise of the power under the proviso may shed light on the purpose of the proviso and the object which it seeks to achieve.

475.19. Before the Lieutenant Governor decides to make a reference to the President under the proviso to Article 239AA(4), the course of action mandated in the Transaction of Business Rules must be followed. The Lieutenant Governor must, by a process of dialogue and discussion, seek to resolve any difference of opinion with a Minister and if it is not possible to have it so resolved to attempt it through the Council of Ministers. A reference to the President is contemplated by the Rules only when the above modalities fail to yield a solution, when the matter may be escalated to the President;

475.20. In a cabinet form of government, the substantive power of decision making vests in the Council of Ministers with the Chief Minister as its head. The aid and advice provision contained in the substantive part of Article 239AA(4) recognises this principle. When the Lieutenant Governor acts on the basis of the aid and advice of the Council of Ministers, this recognises that real decision-making authority in a democratic form of government vests in the executive. Even when the Lieutenant Governor makes a reference to the President under the terms of the proviso, he has to abide by the decision which is arrived at by the President. The Lieutenant Governor has, however, been authorised to take immediate action in the meantime where emergent circumstances so require. The provisions of Article 239AA(4) indicate that the Lieutenant Governor must either act on the basis of aid and advice or, where he has reason to refer the matter to the President, abide by the decision communicated by the President. There is no independent authority vested in Lieutenant Governor to take decisions (save and except on matters where he exercises

his discretion as a judicial or quasi-judicial authority under any law or has been entrusted with powers by the President Under Article 239 on matters which lie outside the competence of the Government of NCT); and

475.21. The proviso to Article 239AA is in the nature of a protector to safeguard the interests of the Union on matters of national interest in relation to the affairs of the National Capital Territory. Every trivial difference does not fall under the proviso. The proviso will, among other things, encompass substantial issues of finance and policy which impact upon the status of the national capital or implicate vital interests of the Union. Given the complexities of administration, and the unforeseen situations which may occur in future, it would not be possible for the court in the exercise of judicial review to exhaustively indicate the circumstances warranting recourse to the proviso. In deciding as to whether the proviso should be invoked the Lieutenant Governor shall abide by the principles which have been indicated in the body of this judgment.

ASHOK BHUSHAN, J. (Concurring) – 576. It is well settled that the Governor is to act on aid and advice of the Council of Ministers and as contemplated Under Article 163, according to the Constitutional scheme, Governor is not free to disregard the aid and advice of the Council of Ministers except when he is required to exercise his function in his discretion. There cannot be any dispute to the proposition as laid down by this Court in *Shamsher Singh* (supra) and followed thereafter in number of cases. Whether the "aid and advice" as used in Article 239AA(4) has to be given the same meaning as is contained in Article 163 and Article 74 is the question to be answered. The Appellant's case is that Constitution scheme as delineated in Article 239AA itself having accepted Westminster model of Governing system, "aid and advice" of the Council of Ministers is binding on the LG and he cannot act contrary to the aid and advice and is bound to follow the aid and advice. It is submitted that any other interpretation shall run contrary to the very concept of Parliamentary democracy, which is basic feature of the Constitution. There could have been no second opinion had the proviso to clause (4) of Article 239AA was not there. The aid and advice as given by Council of Ministers as referred to in Sub-clause(4) has to be followed by the Lieutenant Governor unless he decides to exercise his power given in proviso of Sub-clause(4) of Article 239AA. The proviso is an exception to the power as given in clause (4). A case when falls within the proviso, the "aid and advice" of the Council of Ministers as contemplated under Sub-clause (4) is not to be adhered to and a reference can be made by Lieutenant Governor. This is an express Constitution scheme, which is delineated by clause (4) of Article 239AA proviso. It is relevant to note that the scheme which is reflected by clause (4) of Article 239AA proviso is the same scheme which is contained Under Section 44 of the Government of Union Territories Act, 1963.

582. From the above discussions, it is thus clear that aid and advice of the Council of Ministers is binding on the Lieutenant Governor except when he decides to exercise his power given in proviso of clause(4) of Article 239AA. In the matters, where power under Proviso has not been exercised, aid and advice of the Council of Ministers is binding on the Lieutenant Governor. We are of the view that proviso to clause(4) of Article 239AA cannot be given any other interpretation relying on any principle of Parliamentary democracy or any system of Government or any principle of Constitutional silence or implications.

604.6. The "aid and advice" given by Council of Ministers as referred to in clause (4) of Article 239AA is binding on the LG unless he decides to exercise his power given in proviso to clause (2) of Article 239AA.

604.8. The power given in proviso to clause (4) to LG is not to be exercised in a routine manner rather it is to be exercised by the LG on valid reasons after due consideration, when it becomes necessary to safeguard the interest of the Union Territory.

B. R. Kapur v. State of Tamil Nadu

AIR 2001 SC 3435

(S.P.Bharucha, G.B.Pattanaik, Y.K.Sabharwal, Ruma Pal and Brijesh Kumar, JJ)

[Conviction of a person for an offence - disqualified to be a member of the state legislature. Can such a person be appointed as Chief Minister?]

Ms. Jayalalitha was the Chief Minister of Tamil Nadu between 1991 and 1996. She was convicted in two criminal cases in respect of offences she had committed during her tenure as Chief Minister. She was sentenced to undergo three years' rigorous imprisonment and imposed fine of Rs. 10,000 in one case and two years' rigorous imprisonment and fine of Rs. 5,000 in the other. The fine that was imposed in both cases was paid. Her appeals were pending at the time of filing of the petition. At her instance the High Court had suspended the sentences of imprisonment and directed her release on bail. However, her applications for stay of the operation of the judgments in both the criminal cases were rejected. In April, 2001, she filed nomination papers for four constituencies in respect of the general elections to the Tamil Nadu Legislative Assembly. Three of the said nominations were rejected on account of her disqualification under Section 8(3) of the Representation of People Act, 1951, by reason of her conviction. The fourth nomination was rejected because she had filed her nomination for more than two seats. Ms. Jayalalitha did not challenge those rejection orders. However, in the election, her party (AIADMK) secured 132 out of the 234 seats in the Legislative Assembly and the party elected her as its leader. Consequently, she was sworn in as the Chief Minister of the State. This was challenged before the Supreme Court.

Submissions of the Petitioner: Constitution did not envisage that a person disqualified from being (or is not qualified to be) a member of the Legislature can be appointed as a Minister under Article 164(4):

(a) The purpose of Article 164(4) is to enable those persons who are otherwise competent, but who are not members of the Legislature, to work as a Minister for a limited period. It is basically a good governance provision, which should not be so read as to allow those persons who are ineligible at the time of appointment to become Ministers.

(b) The provisions of Article 164(4) itself postulate that a person who has been appointed a Minister ceases to be one if such person does not become a member of the Legislature within the short prescribed time. This necessarily means that such a person is eligible to be a member at the time of appointment as a Minister but is in fact not such a member.

(c) Article 164(4) has to be read in conjunction with Articles 163, 173 and 191 of the Constitution of India, as well as the Representation of the People Act, 1951 ("the RoP Act").

(d) An appointment of any person as a Minister while such person is not a member of the Legislature is an exception to the normal rule that a Minister must be a member of the Legislature at the time of appointment.

(e) The appointment of a Minister under Article 164(4) should be read subject to the provisions of Article 164(2) which speak of the collective responsibility of the Council of Ministers. This means that each Minister is individually and collectively responsible to the House.

S.P. BHARUCHA, J.: 15. Central to the controversy herein is Article 164, with special reference to sub-article (4) thereof. This Court has considered its import in a number of decisions. In *Har Sharan Verma v. Tribhuvan Narain Singh, Chief Minister, U.P.* [(1971) 1 SCC 616], a Constitution Bench rendered the decision in connection with the appointment of the first respondent therein as the Chief Minister of Uttar Pradesh at a time when he was not a member of either House of the Legislature of that State. The Court said:

3. It seems to us that clause (4) of Article 164 must be interpreted in the context of Articles 163 and 164 of the Constitution. Article 163(1) provides that ‘there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except insofar as he is by or under this Constitution required to exercise his functions or any of them in his discretion’. Under clause (1) of Article 164, the Chief Minister has to be appointed by the Governor and the other Ministers have to be appointed by him on the advice of the Chief Minister. They all hold office during the pleasure of the Governor. Clause (1) does not provide any qualification for the person to be selected by the Governor as the Chief Minister or Minister, but clause

(2) makes it essential that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. This is the only condition that the Constitution prescribes in this behalf.

6. It seems to us that in the context of the other provisions of the Constitution referred to above there is no reason why the plain words of clause (4) of Article 164 should be cut down in any manner and confined to a case where a Minister loses for some reason his seat in the Legislature of the State. We are assured that the meaning we have given to clause (4) of Article 164 is the correct one from the proceedings of the Constituent Assembly and the position as it obtains in England, Australia and South Africa.

The Court set out the position as it obtained in England, Australia and South Africa and observed that this showed that Article 164(4) had “an ancient lineage”.

19. In *S.R. Chaudhuri v. State of Punjab* [(2001) 7 SCC 126], one Tej Parkash Singh was appointed a Minister of the State of Punjab on the advice of the Chief Minister, Sardar Harcharan Singh Brar. At the time of his appointment as a Minister, Tej Parkash Singh was not a member of the Punjab Legislative Assembly. He was not elected as a member of that Assembly within a period of six months and he submitted his resignation. During the same legislative term Sardar Harcharan Singh Brar was replaced as Chief Minister by Smt Rajinder Kaur Bhattal. On her advice, Tej Parkash Singh was appointed a Minister yet again. The appointment was challenged by a writ petition in the High Court seeking a writ of quo warranto. The writ petition was dismissed in limine and an appeal was filed by the writ petitioner in this Court. The judgments aforementioned were referred to by this Court and it was said:

17. The absence of the expression ‘from amongst members of the Legislature’ in Article 164(1) is indicative of the position that whereas under that provision a non-legislator can be appointed as a Chief Minister or a Minister but that appointment would be governed by Article 164(4), which places a restriction on such a non-member to continue as a Minister or the Chief Minister, as the case may be, unless he can get himself elected to the Legislature within the period of six consecutive months from the date of his appointment. Article 164(4) is, therefore, not a source of power or an enabling provision

for appointment of a non-legislator as a Minister even for a short duration. It is actually in the nature of a disqualification or restriction for a non-member who has been appointed as a Chief Minister or a Minister, as the case may be, to continue in office without getting himself elected within a period of six consecutive months.

The Court said that in England the position was this:

In the Westminster system, it is an established convention that Parliament maintains its position as controller of the executive. By a well-settled convention, it is the person who can rely on support of a majority in the House of Commons, who forms a Government and is appointed as the Prime Minister. Generally speaking, he and his Ministers must invariably all be members of Parliament (House of Lords or House of Commons) and they are answerable to it for their actions and policies. Appointment of a non-member as a Minister is a rare exception and if it happens it is for a short duration. Either the individual concerned gets elected or is conferred life peerage.

The Court noted the constitutional scheme that provided for a democratic parliamentary form of government, which envisaged the representation of the people, responsible government and the accountability of the Council of Ministers to the Legislature. Thus was drawn a direct line of authority from the people through the Legislature to the Executive. The position in England, Australia and Canada showed that the essentials of a system of representative government, like the one in India, were that, invariably, all Ministers were chosen out of the members of the Legislature and only in rare cases was a non-member appointed a Minister and he had to get himself returned to the Legislature by direct or indirect election within a short period. The framers of the Constitution had not visualised that a non-legislator could be repeatedly appointed a Minister, for a term of six months each, without getting elected because such a course struck at the very root of parliamentary democracy. It was accordingly held that the appointment of Tej Parkash Singh as a Minister for a second time was invalid and unconstitutional.

21. To answer the question before us, three sub-articles of Article 164 need, in our view, to be read together, namely, sub-articles (1), (2) and (4). By reason of sub-article (1), the Governor is empowered to appoint the Chief Minister, the Governor is also empowered to appoint the other Ministers, but, in this regard, he must act on the advice of the Chief Minister. Sub-article (2) provides, as is imperative in a representative democracy, that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. The political executive, namely, the Council of Ministers, is thus, through the Legislative Assembly, made representative of and accountable to the people of the State who have elected the Legislative Assembly. There is necessarily implicit in these provisions the requirement that a Minister must be a member of the Legislative Assembly and thus representative of and accountable to the people of the State. It is sub-article (4) which makes the appointment of a person other than a member of the Legislature of the State as a Minister permissible, but it stipulates that a Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister. Necessarily implicit in sub-article (4) read with sub-articles (1) and (2) is the requirement that a Minister who is not a member of the Legislature must seek election to the Legislature and, in the event of his failing to secure a seat in the Legislature within six

months, he must cease to be a Minister. The requirement of sub-article (4) being such, it follows as the night the day that a person who is appointed a Minister though he is not a member of the Legislature shall be one who can stand for election to the Legislature and satisfy the requirement of sub-article (4). In other words, he must be one who satisfies the qualifications for membership of the Legislature contained in the Constitution (Article 173) and is not disqualified from seeking that membership by reason of any of the provisions therein (Article 191) on the date of his appointment.

22. The provision of sub-article (4) of Article 164 is meant to provide for a situation where, due to political exigencies or to avail of the services of an expert in some field, it is requisite to induct into the Council of Ministers a person who is not then in the Legislature. That he is not in the Legislature is not made an impassable barrier. To that extent we agree with Mr. Venugopal, but we cannot accept his submission that sub-article (4) must be so read as to permit the induction into the Council of Ministers of short-term Ministers whose term would not extend beyond six months and who, therefore, were not required to have the qualifications and be free of the disqualifications contained in Articles 173 and 191 respectively. What sub-article (4) does is to give a non-legislator appointed Minister six months to become a member of the Legislature. Necessarily, therefore, that non-legislator must be one who, when he is appointed, is not debarred from obtaining membership of the Legislature: he must be one who is qualified to stand for the Legislature and is not disqualified to do so. Sub-article (4) is not intended for the induction into the Council of Ministers of someone for six months or less so that it is of no consequence that he is ineligible to stand for the Legislature.

23. It would be unreasonable and anomalous to conclude that a Minister who is a member of the Legislature is required to meet the constitutional standards of qualification and disqualification but that a Minister who is not a member of the Legislature need not. Logically, the standards expected of a Minister who is not a member should be the same as, if not greater than, those required of a member.

24. The *Constituent Assembly Debates* (Vol. VII) notes that when the corresponding article relating to members of Parliament was being discussed by the Constituent Assembly, Dr B.R. Ambedkar said: (Vol. 8, p. 521)

The first amendment is by Mr. Mohd. Tahir. His suggestion is that no person should be appointed a Minister unless at the time of his appointment he is an elected member of the House. He does not admit the possibility of the cases covered in the proviso, namely, that although a person is not at the time of his appointment a member of the House, he may nonetheless be appointed as a Minister in the Cabinet subject to the condition that within six months he shall get himself elected to the House. The second qualification is by Prof. K.T. Shah. He said that a Minister should belong to a majority party and his third qualification is that he must have a certain educational status. Now, with regard to the first point, namely, that no person shall be entitled to be appointed a Minister unless he is at the time of his appointment an elected member of the House. I think it forgets to take into consideration certain important matters which cannot be overlooked. First is this, it is perfectly possible to imagine *that a person who is otherwise competent to hold the post of a Minister* has been defeated in a constituency or for some reason which, although it may

be perfectly good, might have annoyed the constituency and he might have incurred the displeasure of that particular constituency. It is not a reason why a member so competent as that should be not permitted to be appointed a member of the Cabinet on the assumption that he shall be able to get himself elected either from the same constituency or from another constituency. After all the privilege that is permitted - is a privilege that extends only for six months. *It does not confer a right to that individual to sit in the House without being elected at all....* (emphasis supplied)

25. What was said by Dr B.R. Ambedkar is self-explanatory. It shows clearly that the Constituent Assembly envisaged that non-legislator Ministers would have to be elected to the Legislature within six months and it proceeded on the basis that the article as it read required this. The manner in which we have interpreted Article 164 is, thus, borne out.

27. What we have done is to interpret Article 164 on its own language and to read sub-article (4) thereof in the context of sub-articles (1) and (2). In any event, it is permissible to read into sub-article (4) limitations based on the language of sub-articles (1) and (2). The majority judgment in *Kesavananda Bharati* conceded to Parliament the right to make alterations in the Constitution so long as they were within the basic framework. The Preamble assured the people of India of a polity whose basic structure was described therein as a sovereign democratic republic; Parliament could make any amendments to the Constitution as it deemed expedient so long as they did not damage or destroy India's sovereignty and its democratic, republican character. Democracy was a meaningful concept whose essential attributes were recited in the Preamble itself: justice, social, economic and political: liberty of thought, expression, belief, faith and worship; and equality of status and opportunity. Its aim, again as set out in the Preamble, was to promote among the people an abiding sense of "Fraternity assuring the dignity of the individual and the unity of the Nation." The newly introduced clause (5) demolished the very pillars on which the Preamble rested by empowering Parliament to exercise its constituent power without any "limitation whatever". No constituent power could conceivably go higher than the power conferred by clause (5) for it empowered Parliament even to "repeal the provisions of this Constitution", that is to say, to abrogate democracy and substitute for it a totally antithetical form of government. That could most effectively be achieved, without calling democracy by any other name, by denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy was not a power to amend. Since the Constitution had conferred a limited amending power on Parliament, Parliament could not under the exercise of that limited power enlarge that very power into an absolute power. A limited amending power was one of the basic features of the Constitution and, therefore, the limitations on that power could not be destroyed. In other words, Parliament could not, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power could not by the exercise of that power convert the limited power into an unlimited one.

30. We hold, therefore, that a non-legislator can be made a Chief Minister or Minister under Article 164 only if he has the qualifications for membership of the Legislature

prescribed by Article 173 and is not disqualified from the membership thereof by reason of the disqualifications set out in Article 191.

31. The next question is: was the second respondent qualified for membership of the Legislature and not disqualified therefore when she was appointed Chief Minister on 14-5-2001?

32. It was submitted by learned counsel for the respondents that the suspension of the sentences passed against the second respondent by the High Court at Madras was tantamount to the suspension of the convictions against her. Our attention was then drawn to Section 8(3) of the Representation of the People Act, which says that “a person convicted of any offence and sentenced to imprisonment for not less than two years shall be disqualified” In learned counsel’s submission, for the purposes of S. 8(3), it was the sentence alone which was relevant and if there were a suspension of the sentence, there was a suspension of the disqualification. The sentences awarded to the second respondent having been suspended, the disqualification under Section 8(3), insofar as it applied to her, was also suspended.

33. Section 389 of the Code of Criminal Procedure on the basis of which the second respondent was released on bail by the Madras High Court reads, so far as is relevant, as follows:

389. *Suspension of sentence pending the appeal; release of appellant on bail.*—(1) Pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that *the execution of the sentence or order appealed against be suspended* and, also, if he is in confinement, that he be released on bail, or on his own bond. (emphasis supplied)

34. It is true that the order of the High Court at Madras on the application of the second respondent states: “Pending criminal appeals the sentence of imprisonment alone is suspended and the petitioners shall be released on bail....”, but this has to be read in the context of Section 389 under which the power was exercised. Under Section 389 an appellate court may order that “the execution of the sentence or order appealed against be suspended ...”. It is not within the power of the appellate court to suspend the sentence; it can only suspend the execution of the sentence pending the disposal of appeal. The suspension of the execution of the sentence does not alter or affect the fact that the offender has been convicted of a grave offence and has attracted the sentence of imprisonment of not less than two years. The suspension of the execution of the sentences, therefore, does not remove the disqualification against the second respondent. The suspension of the sentence, as the Madras High Court erroneously called it, was in fact only the suspension of the execution of the sentences pending the disposal of the appeals filed by the second respondent. The fact that she secured the suspension of the execution of the sentences against her did not alter or affect the convictions and the sentences imposed on her and she remained disqualified from seeking legislative office under Section 8(3).

37. It was pointed out by learned counsel for the respondents that under Section 8(3) of the Representation of the People Act the disqualification was attracted on the date on which a person was convicted of any offence and sentenced to imprisonment for not less than two years. It was pointed out, rightly, that the law contemplated that the conviction and the

sentence could be on different dates. It was submitted that it was unworkable that the disqualification should operate from the date of conviction which could precede the date of sentence; therefore, the conviction referred to in Section 8(3) should be taken to be that confirmed by the appellate court because it was only in the appellate court that conviction and sentence would be on the same day. We find the argument unacceptable. In those cases where the sentence is imposed on a day later than the date of conviction (which, incidentally, is not the case here) the disqualification would be attracted on the date on which the sentence was imposed because only then would a person be both convicted of the offence and sentenced to imprisonment for not less than two years which is cumulatively requisite to attract the disqualification under Section 8(3).

38. The focus was then turned upon Section 8(4) of the Representation of the People Act and it was submitted that all the disqualifications set down in Section 8 would not apply until a final court had affirmed the conviction and sentence. This was for the reason that the principle underlying Section 8(4) had to be extended to a non-legislator as, otherwise, Article 14 would stand violated for the presumption of innocence would apply to a sitting member till the conviction was finally affirmed but in the case of a non-legislator the disqualification would operate on conviction by the court of first instance. It was submitted that Section 8(4) had to be “read down” so that its provisions were not restricted to sitting members and in all cases the disqualification applied only when the conviction and sentence were finally upheld.

39. Section 8(4) opens with the words “notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3)”, and it applies only to sitting members of Legislatures. There is no challenge to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non-legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators and non-legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be “reading up” the provision, not “reading down”, and that is not known to the law.

40. In much the same vein, it was submitted that the presumption of innocence continued until the final judgment affirming the conviction and sentence was passed and, therefore, no disqualification operated as of now against the second respondent. Before we advert to the four judgments relied upon in support of this submission, let us clear the air. When a lower court convicts an accused and sentences him, the presumption that the accused is innocent comes to an end. The conviction operates and the accused has to undergo the sentence. The execution of the sentence can be stayed by an appellate court and the accused released on bail. In many cases, the accused is released on bail so that the appeal is not rendered infructuous, at least in part, because the accused has already undergone imprisonment. If the appeal of the accused succeeds the conviction is wiped out as cleanly as if it had never existed and the sentence is set aside. A successful appeal means that the stigma of the offence is altogether erased. But that is not to say that the presumption of innocence continues after the conviction by the trial court. That conviction and the sentence it carries operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well.

45. Our conclusion, therefore, is that on the date on which the second respondent was sworn in as Chief Minister she was disqualified, by reason of her convictions under the Prevention of Corruption Act and the sentences of imprisonment of not less than two years, for becoming a member of the Legislature under Section 8(3) of the Representation of the People Act.

46. It was submitted by learned counsel for the respondents that, even so, the court could do nothing about it. It was submitted that in the case of a Chief Minister or a Minister appointed under Article 164(1) read with (4) the people, who were the ultimate sovereign, had expressed their will through their elected representatives. For the period of six months the locus penitentiae operated as an exception, as a result of which, for that period, the people's will prevailed in a true parliamentary democracy, especially as no provision was made for adjudicating alleged disqualifications, like the holding of an office of profit or a subsisting contract for the supply of goods or execution of works. In this area of constitutional governance, for the limited period of six months, it was not open to the court to import qualifications and disqualifications for a Minister qua Minister when none existed in Article 164(4). The Governor, not being armed with the machinery for adjudicating qualifications or disqualifications, for example, on the existence of subsisting contracts or the holding of offices of profit, and having no power to summon witnesses or to administer an oath or to summon documents or to deliver a reasoned judgment, the appointment made by him on the basis of the conventions of the Constitution could not be challenged in quo warranto proceedings so that an appointment that had been made under Article 164 could not be rendered one without the authority of law. If it did so, the court would be entering the political thicket. When qualifications and disqualifications were prescribed for a candidate or a member of the Legislature and a machinery was provided for the adjudication thereof, the absence of the prescription of any qualification for a Minister or a Chief Minister appointed under Article 164(1) read with (4) and for adjudication thereof meant that the Governor had to accept the will of the people in selecting the Chief Minister or the Minister, the only consideration being whether the political party and its leader commanded a majority in the Legislature and could provide a stable Government. Once the electorate had given its mandate to a political party and its leader to run the Government of a State for a term of five years, in the absence of any express provision in the Constitution to the contrary, the Governor was bound to call the leader of that legislature party to form the Government. There was no express, unambiguous provision in the Constitution or in the Representation of the People Act or any decision of this Court or a High Court declaring that a person convicted of an offence and sentenced to imprisonment for a period of not less than two years by the trial court shall not be appointed Chief Minister during the pendency of his first appeal. In such a situation, the Governor could not be expected to take a position of confrontation with the people of the State who had voted the ruling party to power and plunge the State into turmoil. In the present case, the Governor was entitled to proceed on the basis that the appeals of the second respondent having been directed, in October 2000, to be heard within two months, it would be open to the second respondent to have the appeals disposed of within the time-limit of six months and, in the case of an acquittal, no question of ineligibility to contest an election within the period of six months would arise. If the Governor invited the leader of the party which had a majority in the Legislature to form a Government, it would, if the leader was a

non-legislator, thereafter not be open to the court in quo warranto proceedings to decide that the Chief Minister was disqualified. Otherwise, this would mean that when the Governor had invited, in accordance with conventions, the leader to be the Chief Minister, in the next second the leader would have to vacate his office by reason of the quo warranto. The court would then be placing itself in a position of prominence among the three organs of the State, as a result of which, instead of the House deciding whether or not to remove such a person through a motion of no-confidence, the court would take over the function, contrary to the will of the Legislature which would mean the will of the people represented by the majority in the Legislature. In then deciding that the Chief Minister should demit office, the court would be entering the political thicket, arrogating to itself a power never intended by the Constitution, the exercise of which would result in instability in the governance of the State.

48. But submissions were made by learned counsel for the respondents in respect of the Governor's powers under Article 164 which call for comment. The submissions were that the Governor, exercising powers under Article 164(1) read with (4), was obliged to appoint as Chief Minister whosoever the majority party in the Legislature nominated, regardless of whether or not the person nominated was qualified to be a member of the Legislature under Article 173 or was disqualified in that behalf under Article 191, and the only manner in which a Chief Minister who was not qualified or who was disqualified could be removed was by a vote of no-confidence in the Legislature or by the electorate at the next elections. To a specific query, learned counsel for the respondents submitted that the Governor was so obliged even when the person recommended was, to the Governor's knowledge, a non-citizen, under age, a lunatic or an undischarged insolvent, and the only way in which a non-citizen or an under age or a lunatic or an insolvent Chief Minister could be removed was by a vote of no-confidence in the Legislature or at the next election.

49. The nomination to appoint a person who is a non-citizen or under age or a lunatic or an insolvent as Chief Minister having been made by the majority party in the Legislature, it is hardly realistic to expect the Legislature to pass a no-confidence motion against the Chief Minister; and the election would ordinarily come after the Chief Minister had finished his term.

50. To accept learned counsel's submission is to invite disaster. As an example, the majority party in the Legislature could recommend the appointment of a citizen of a foreign country, who would not be a member of the Legislature and who would not be qualified to be a member thereof under Article 173, as Chief Minister under Article 164(1) read with (4) to the Governor; and the Governor would be obliged to comply; the Legislature would be unable to pass a no-confidence motion against the foreigner Chief Minister because the majority party would oppose it; and the foreigner Chief Minister would be ensconced in office until the next election. Such a dangerous — such an absurd interpretation of Article 164 has to be rejected out of hand. The Constitution prevails over the will of the people as expressed through the majority party. The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution. The Governor is a functionary under the Constitution and is sworn to "preserve, protect and defend the Constitution and the law" (Article 159). The Governor cannot, in the exercise of his discretion or otherwise, do anything that is contrary to the Constitution and the laws. It is another thing that by reason of the

protection the Governor enjoys under Article 361, the exercise of the Governor's discretion cannot be questioned. We are in no doubt at all that if the Governor is asked by the majority party in the Legislature to appoint as the Chief Minister a person who is not qualified to be a member of the Legislature or who is disqualified to be such, the Governor must, having due regard to the Constitution and the laws, to which he is subject, decline, and the exercise of discretion by him in this regard cannot be called in question.

51. If perchance, for whatever reason, the Governor does appoint as Chief Minister a person who is not qualified to be a member of the Legislature or who is disqualified to be such, the appointment is contrary to the provisions of Article 164 of the Constitution, as we have interpreted it, and the authority of the appointee to hold the appointment can be challenged in quo warranto proceedings. That the Governor has made the appointment does not give the appointee any higher right to hold the appointment. If the appointment is contrary to constitutional provisions it will be struck down. The submission to the contrary - unsupported by any authority - must be rejected.

52. The judgment of this Court in *Kumar Padma Prasad v. Union of India* [(1992) 2 SCC 428] is a case in point. One K.N. Srivastava was appointed a Judge of the Gauhati High Court by a warrant of appointment signed by the President of India. Before the oath of office could be administered to him, quo warranto proceedings were taken against him in that High Court. An interim order was passed directing that the warrant of appointment should not be given effect to until further orders. A transfer petition was then filed in this Court and was allowed. This Court, on examination of the record and the material that it allowed to be placed before it, held that Srivastava was not qualified to be appointed a High Court Judge and his appointment was quashed. This case goes to show that even when the President, or the Governor, has appointed a person to a constitutional office, the qualification of that person to hold that office can be examined in quo warranto proceedings and the appointment can be quashed.

53. It was submitted that we should not enter a political thicket by answering the question before us. The question before us relates to the interpretation of the Constitution. It is the duty of this Court to interpret the Constitution. It must perform that duty regardless of the fact that the answer to the question would have a political effect. In *State of Rajasthan v. Union of India* [(1977) 3 SCC 592], it was said by Bhagwati, J.:

But merely because a question has a political complexion, that by itself is no ground why the court should shirk from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest possible terms, particularly in the context of recent history, that the Constitution is *suprema lex*, the paramount law of the land, and there is no department or branch of Government above or beyond it.

54. We are satisfied that in the appointment of the second respondent as the Chief Minister there has been a clear infringement of a constitutional provision and that a writ of quo warranto must issue.

56. We are not impressed by the submission that we should not exercise our discretion to issue a writ of quo warranto because the period of six months allowed by Article 164(4) to the second respondent would expire in about two months from now and it was possible that the second respondent might succeed in the criminal appeals which she has filed. We take the view that the appointment of a person to the office of Chief Minister who is not qualified to hold it should be struck down at the earliest.

58. We are of the view that a person who is convicted for a criminal offence and sentenced to imprisonment for a period of not less than two years cannot be appointed the Chief Minister of a State under Article 164(1) read with (4) and cannot continue to function as such.

59. We, accordingly, order and declare that the appointment of the second respondent as the Chief Minister of the State of Tamil Nadu on 14-5-2001 was not legal and valid and that she cannot continue to function as such. The appointment of the second respondent as the Chief Minister of the State of Tamil Nadu is quashed and set aside.

60. All acts, otherwise legal and valid, performed between 14-5-2001 and today by the second respondent acting as the Chief Minister of the State of Tamil Nadu, by the members of the Council of Ministers of that State and by the Government of that State shall not be adversely affected by reason only of this order.

62. In the light of this order, the other writ petitions, the appeal and the transferred writ petition stand disposed of.

* * * * *

Lily Thomas v. Union of India

(2013) 7 SCC 653

(A. K. Patnaik and S.J. Mukhopadhaya, JJ.)

(Parliament had no power to enact S. 8(4)- Disqualification for being chosen as, or, for being MP or MLA/MLC upon conviction as provided in Ss. 8(1), (2) or (3) shall come into effect immediately upon such conviction and such disqualification cannot be postponed/suspended as was sought to be done by S.8(4))

(A. K. PATNAIK AND S.J. MUKHOPADHAYA, JJ.)

These two writ petitions (WRIT PETITION (CIVIL) NO. 490 OF 2005 and WRIT PETITION (CIVIL) NO. 231 OF 2005) have been filed as Public Interest Litigations for mainly declaring sub-section (4) of Section 8 of the Representation of the People Act, 1951 as *ultra vires* the Constitution.

The background facts

2. The background facts relevant for appreciating the challenge to sub-section (4) of Section 8 of the Act are that the Constituent Assembly while drafting the Constitution intended to lay down some disqualifications for persons being chosen as, and for being, a member of either House of Parliament as well as a member of the Legislative Assembly or Legislative Council of the State. Accordingly, in the Constitution which was finally adopted by the Constituent Assembly, Article 102(1) laid down the disqualifications for membership of either House of Parliament or Article 191(1) laid down the disqualifications for membership of the Legislative Assembly or Legislative Council of the State.

These two Articles are extracted hereinbelow:

102. Disqualifications for membership.

–(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

191. Disqualifications for membership.

– (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

- (a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

[Explanation.—For the purposes of this clause], a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

3. A reading of the aforesaid constitutional provisions will show that besides the disqualifications laid down in clauses (a), (b), (c) and (d), Parliament could lay down by law other disqualifications for membership of either House of Parliament or of Legislative Assembly or Legislative Council of the State. In exercise of this power conferred under Article 102(1)(e) and under Article 191(1)(e) of the Constitution, Parliament provided in Chapter-III of the Representation of the People Act, 1951 (for short 'the Act'), the disqualifications for membership of Parliament and State Legislatures. Sections 7 and 8 in Chapter-III of the Act, with which we are concerned in these writ petitions, are extracted hereinbelow:

7. Definitions.—In this Chapter,—

(a) "appropriate Government" means in relation to any disqualification for being chosen as or for being a member of either House of Parliament, the Central Government, and in relation to any disqualification for being chosen as or for being a member of the Legislative Assembly or Legislative Council of a State, the State Government;

(b) "disqualified" means disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.

8. Disqualification on conviction for certain offences.— (1) A person convicted of an offence punishable under—

(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing act prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or subsection (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955) which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) section 11 (offence of importing of exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or (i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of

ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; [or]

[(j) section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991], [or]

[(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971), [or]

[(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or]

[(m) the Prevention of Corruption Act, 1988 (49 of 1988); or] [(n) the Prevention of Terrorism Act, 2002 (15 of 2002),] [shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or (b) any law relating to the adulteration of food or drugs; or (c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or subsection (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

[(4)] Notwithstanding anything [in subsection (1), sub-section (2) or sub-section (3)] a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation. —In this section, —

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(I) the regulation of production or manufacture of any essential commodity;

(II) the control of price at which any essential commodity may be bought or sold; (III) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(IV) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodity Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

4. Clause (b) of Section 7 of the Act quoted above defines the word “disqualified” to mean disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or of Legislative Council of State. Sub-sections (1), (2) and (3) of Section 8 of the Act provide that a person convicted of an offence mentioned in any of these sub-sections shall stand disqualified from the date of conviction and the disqualification was to continue for the specific period mentioned in the sub-section. However, subsection (4) of Section 8 of the Act provides that notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3) in Section 8 of the Act, a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court. It is this saving or protection provided in sub-section (4) of Section 8 of the Act for a member of Parliament or the Legislature of a State which is challenged in these writ petitions as *ultra vires* the Constitution.

Contentions on behalf of the Petitioners

5. Mr. Fali S. Nariman, learned Senior Counsel appearing for the petitioner in Writ Petition No. 490 of 2005 and Mr. S.N. Shukla, the General Secretary of the Petitioner in Writ Petition No. 231 of 2005, submitted that the opening words of clause (1) of Articles 102 and 191 of the Constitution make it clear that the same disqualifications are provided for a person being chosen as a member of either House of Parliament, or the State Assembly or Legislative Council of the State and for a person being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State and therefore the disqualifications for a person to be elected as a member of either House of the Parliament or of the Legislative Assembly or Legislative Council of the State and for a person to continue as a member of either House of Parliament or of the Legislative Assembly or Legislative Council of the State cannot be different. In support of this submission, Mr. Nariman cited a Constitution Bench judgment of this Court in *Election Commission, India v. Saka Venkata Rao* (AIR 1953 SC 210) in which it has been held that Article 191 lays down the same set of disqualifications for election as well as for continuing as a member. Mr. Nariman and Mr. Shukla submitted that sub-section (4) of Section 8 of the Act, insofar as it provides that the disqualification under subsections (1), (2) and (3) of Section 8 for being elected as a member of either House of Parliament or the Legislative Assembly or Legislative Council of State shall not take effect in the case of a person who is already a member of Parliament or Legislature of a State on the date of the conviction if he files an appeal or a revision in respect of the conviction or the sentence within three months till the appeal or revision is disposed of by the Court, is in contravention of the provisions of clause (1) of Articles 102 and 191 of the Constitution.

8. According to Mr. Nariman and Mr. Shukla, in the absence of a provision in Articles 102 and 191 of the Constitution conferring power on Parliament to make a provision protecting sitting members of either House of Parliament or the Legislative Assembly or the Legislative Council of a State, from the disqualifications it lays down for a person being chosen as a member of Parliament or a State Legislature, Parliament lacks legislative powers to enact sub-section (4) of Section 8 of the Act and sub-section (4) of Section 8 of the Act is therefore *ultra vires* the Constitution.

9. Mr. Nariman next submitted that the legal basis of sub-section (4) of Section 8 of the Act is based on an earlier judicial view in the judgment of a Division Bench of this Court in *Shri Manni Lal v. Shri Parmal Lal and Others* [(1970) 2 SCC 462] that when a conviction is set aside by an

appellate order of acquittal, the acquittal takes effect retrospectively and the conviction and the sentence are deemed to be set aside from the date they are recorded. He submitted that in *B.R. Kapur v. State of T.N. and Another* [(2001) 7 SCC 231] a Constitution Bench of this Court reversed the aforesaid judicial view and held that conviction, and the sentence it carries, operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well. He submitted that this later view has been reiterated by a Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* [(2005) 1 SCC 754].

10. Mr. Nariman argued that thus as soon as a person is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act, he becomes disqualified from continuing as a member of Parliament or of a State Legislature notwithstanding the fact that he has filed an appeal or a revision against the conviction and there is no legal basis for providing in sub-section (4) of Section 8 of the Act that his disqualification will not take effect if he files an appeal or revision within three months against the order of conviction. He submitted that in case a sitting member of Parliament or State Legislature feels aggrieved by the conviction and wants to continue as a member notwithstanding the conviction, his remedy is to move the Appellate Court for stay of the order of conviction.

11. Mr. Nariman cited the decision in *Navjot Singh Sidhu v. State of Punjab and Another* [(2007) 2 SCC 574] in which this Court has clarified that under sub-section (1) of Section 389 of the Code of Criminal Procedure, 1973 power has been conferred on the Appellate Court not only to suspend the execution of the sentence and to grant bail, but also to suspend the operation of the order appealed against, which means the order of conviction. He submitted that in appropriate cases, the Appellate Court may stay the order of conviction of a sitting member of Parliament or State Legislature and allow him to continue as a member notwithstanding the conviction by the trial court, but a blanket provision like sub-section (4) of Section 8 of the Act cannot be made to keep the disqualification pursuant to conviction in abeyance till the appeal or revision is decided by the Appellate or Revisional Court.

13. Mr. Nariman and Mr. Shukla submitted that subsection (4) of Section 8 of the Act, in so far as it does not provide a rationale for making an exception in the case of members of Parliament or a Legislature of a State is arbitrary and discriminatory and is violative of Article 14 of the Constitution. They submitted that persons to be elected as members of Parliament or a State Legislature stand on the same footing as sitting members of Parliament and State Legislatures so far as disqualifications are concerned and sitting members of Parliament and State Legislatures cannot enjoy the special privilege of continuing as members even though they are convicted of the offences mentioned in subsections (1), (2) and (3) of Section 8 of the Act.

17. Mr. Paras Kuhad, learned ASG, appearing for the Union of India in Writ Petition (C) No.490 of 2005 also relied on the judgment of the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* (supra) on the validity of sub-section (4) of Section 8 of the Act and the reasoning given in the answer to question no.3 in the aforesaid judgment of this Court. He further submitted that subsection (4) of Section 8 of the Act does not lay down disqualifications for members of Parliament and the State Legislatures different from the disqualifications laid down for persons to be chosen as members of Parliament and the State Legislatures in sub-sections (1), (2) and (3) of Section 8 of the Act. He submitted that sub-section (4) of Section 8 of the Act merely provides that the very same disqualifications laid down in sub-sections (1), (2) and (3) of Section 8 of the Act shall in the case of sitting members of Parliament and State Legislatures take effect

only after the appeal or revision is disposed of by the Appellate or Revisional Court as the case may be if an appeal or revision is filed against the conviction.

18. Mr. Paras Kuhad submitted that Parliament has power under Article 102(1)(e) of the Constitution and Article 191(1)(e) of the Constitution to prescribe when exactly the disqualification will become effective in the case of sitting members of Parliament or the State Legislature with a view to protect the House. He also referred to the provisions of Articles 101(3)(a) and 190 (3)(a) of the Constitution to argue that a member of Parliament or a State Legislature will vacate a seat only when he becomes subject to any disqualification mentioned in clause (1) of Article 102 or clause (1) of Article 191, as the case may be, and this will happen only after a decision is taken by the President or the Governor that the member has become disqualified in accordance with the mechanism provided in Article 103 or Article 192 of the Constitution.

19. Mr. Kuhad further submitted that Mr. Nariman is not right in his submission that the remedy of a sitting member who is convicted or sentenced and gets disqualified under sub-sections (1), (2) or (3) of Section 8 of the Act is to move the Appellate Court under Section 389 of the Code of Criminal Procedure for stay of his conviction. He submitted that the Appellate Court does not have any power under Section 389, Cr.P.C. to stay the disqualification which would take effect from the date of conviction and therefore a safeguard had to be provided in sub-section (4) of Section 8 of the Act that the disqualification, despite the conviction or sentence, will not have effect until the appeal or revision is decided by the Appellate or the Revisional Court. He submitted that there is, therefore, a rationale for enacting sub-section (4) of Section 8 of the Act.

Findings of the Court

20. We will first decide the issue raised before us in these writ petitions that Parliament lacked the legislative power to enact sub-section (4) of Section 8 of the Act as this issue was not at all considered by the Constitution Bench of this Court in the aforesaid case of *K. Prabhakaran* (supra).

21. In *R. v. Burah* the Privy Council speaking through Selborne J. laid down the following fundamental principles for interpretation of a written constitution laying down the powers of the Indian Legislature (IA pp.193-94)

“.....The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it; and it can, of course, do nothing beyond the limits which circumscribes these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.”

22. The correctness of the aforesaid principles with regard to interpretation of a written constitution has been re-affirmed by the majority of Judges in *Kesavananda Bharti v. State of Kerala* (AIR 1973 SC 1465) (See the *Constitutional Law of India*, H.M. Seervai, Fourth Edition, Vol.I, para 2.4 at page 174). Hence, when a question is raised whether Parliament has exceeded the limits of its powers, courts have to decide the question by looking to the terms of the instrument

by which affirmatively, the legislative powers were created, and by which negatively, they are restricted.

23. We must first consider the argument of Mr. Luthra, learned Additional Solicitor General, that the legislative power to enact sub-section (4) of Section 8 of the Act is located in Article 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution.

24. Articles 246 and 248 of the Constitution are placed in Chapter I of Part XI of the Constitution of India. Part XI is titled “Relations between the Union and the States” and Chapter I of Part XI is titled “Legislative Relations”. In Chapter I of Part XI, under the heading “Distribution of Legislative Powers” Articles 245 to 255 have been placed. A reading of Articles 245 to 255 would show that these relate to distribution of legislative powers between the Union and the Legislatures of the States. Article 246(1) provides that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule of the Constitution and under Entry 97 of List I of the Seventh Schedule of the Constitution, Parliament has exclusive power to make law with respect to any other matter not enumerated in List II or List III. Article 248 similarly provides that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List (List III) or State List (List II) of the Seventh Schedule of the Constitution. Therefore, Article 246(1) read with Entry 97 and Article 248 only provide that in residuary matters (other than matters enumerated in List II and List III) Parliament will have power to make law.

25. To quote from *Commentary on the Constitution of India* by Durga Das Basu (8th Edition) Volume 8 at page 8988:

“In short, the principle underlying Article 248, read with Entry 97 of List I, is that a written Constitution, which divides legislative power as between two legislatures in a federation, cannot intend that neither of such Legislatures shall go without power to legislate with respect of any subject simply because that subject has not been specifically mentioned nor can be reasonably comprehended by judicial interpretation to be included in any of the Entries in the Legislative Lists. To meet such a situation, a residuary power is provided, and in the Indian Constitution, this residuary power is vested in the Union Legislature. Once, therefore, it is found that a particular subject-matter has not been assigned to the competence of the State Legislature, “it leads to the irresistible inference that (the Union) Parliament would have legislative competence to deal with the subject-matter in question.”

26. Articles 102(1)(e) and 191(1)(e) of the Constitution, on the other hand, have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State other than those specified in sub-clauses (a), (b), (c) and (d) of clause (1) of Articles 102 and 191 of the Constitution. We may note that no power is vested in the State Legislature to make law laying down disqualifications of membership of the Legislative Assembly or Legislative Council of the State and power is vested in Parliament to make law laying down disqualifications also in respect of members of the Legislative Assembly or Legislative Council of the State. For these reasons, we are of the considered opinion that the legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State can be located only in Articles 102(1)(e) and 191(1)(e) of the Constitution and not in Articles 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution. We do not, therefore, accept the contention of Mr. Luthra that the power to enact sub-section (4) of Section 8 of the Act is vested in Parliament under Articles 246(1) read

with Entry 97 of List I of the Seventh Schedule and 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution.

27. Articles 102(1)(e) and 191(1)(e) of the Constitution, which contain the only source of legislative power to lay down disqualifications for membership of either House of Parliament and Legislative Assembly or Legislative Council of a State, provide as follows:

“102. Disqualification for Membership -(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament-(e) if he is so disqualified by or under any law made by Parliament.”

“191. Disqualification for Membership (1) “A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—(e) if he is so disqualified by or under any law made by Parliament.

28. A reading of the aforesaid two provisions in Articles 102(1)(e) and 191(1)(e) of the Constitution would make it abundantly clear that Parliament is to make one law for a person to be disqualified for being chosen as, and for being, a member of either House of Parliament or Legislative Assembly or Legislative Council of the State. In the language of the Constitution Bench of this Court in *Election Commission, India v. Saka Venkata Rao* (supra), Article 191(1) [which is identically worded as Article 102(1)] lays down “the same set of disqualifications for election as well as for continuing as a member”. Parliament thus does not have the power under Articles 102(1)(e) and 191(1)(e) of the Constitution to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of Parliament or the State Legislature. To put it differently, if because of a disqualification a person cannot be chosen as a member of Parliament or State Legislature, for the same disqualification, he cannot continue as a member of Parliament or the State Legislature. This is so because the language of Articles 102(1)(e) and 191(1)(e) of the Constitution is such that the disqualification for both a person to be chosen as a member of a House of Parliament or the State Legislature or for a person to continue as a member of Parliament or the State Legislature has to be the same.

33. Looking at the affirmative terms of Articles 102(1)(e) and 191(1)(e) of the Constitution, we hold that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a member of Parliament or a State Legislature and for a sitting member of a House of Parliament or a House of a State Legislature. We also hold that the provisions of Article 101(3)(a) and 190(3)(a) of the Constitution expressly prohibit Parliament to defer the date from which the disqualification will come into effect in case of a sitting member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting sub-section (4) of Section 8 of the Act and accordingly sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution.

36. As we have held that Parliament had no power to enact sub-section (4) of Section 8 of the Act and accordingly subsection (4) of Section 8 of the Act is *ultra vires* the Constitution, it is not necessary for us to go into the other issue raised in these writ petitions that sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution. It would have been necessary for us to go into this question only if sub-section (4) of Section 8 of the Act was held to be within the powers of the Parliament. In other words, as we can declare sub-section (4) of Section 8 of the Act as *ultra vires* the Constitution without going into the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution, we do not think it is necessary to decide the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution.

37. The only question that remains to be decided is whether our declaration in this judgment that sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution should affect disqualifications already incurred under subsections (1), (2) and (3) of Section 8 of the Act by sitting members of Parliament and State Legislatures who have filed appeals or revisions against their conviction within a period of three months and their appeals and revisions are still pending before the concerned court.

38. Under subsections (1), (2) and (3) of Section 8 of the Act, the disqualification takes effect from the date of conviction for any of the offences mentioned in the sub-sections and remains in force for the periods mentioned in the subsections. Thus, there may be several sitting members of Parliament and State Legislatures who have already incurred disqualification by virtue of a conviction covered under sub-section (1), or sub-section (2) or sub-section (3) of Section 8 of the Act. In *Golak Nath and Others vs. State of Punjab and Another* (AIR 1967 SC 1643), SubbaRao, C.J. speaking on behalf of himself, Shah, Sikri, Shelat and Vaidialingam, JJ. has held that Articles 32, 141, 142 of the Constitution are couched in such a wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice and has further held that this Court has the power not only to declare the law but also to restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. Sitting members of Parliament and State Legislature who have already been convicted for any of the offences mentioned in sub-section (1), (2) and (3) of Section 8 of the Act and who have filed appeals or revisions which are pending and are accordingly saved from the disqualifications by virtue of sub-section (4) of Section 8 of the Act should not, in our considered opinion, be affected by the declaration now made by us in this judgment. This is because the knowledge that sitting members of Parliament or State Legislatures will no longer be protected by sub-section (4) of Section 8 of the Act will be acquired by all concerned only on the date this judgment is pronounced by this Court. As has been observed by this Court in *Harla v. State of Rajasthan* (AIR 1951 SC 467):

“.....it would be against the principles of natural justice to permit the subjects of a State to be punished or penalized by laws of which they had no knowledge and of which they could not even with exercise of due diligence have acquired any knowledge.”

However, if any sitting member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act and by virtue of such conviction and/or sentence suffers the disqualifications mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act after the pronouncement of this judgment, his membership of Parliament or the State Legislature, as the case may be, will not be saved by subsection (4) of Section 8 of the Act which we have by this judgment declared as *ultra vires* the Constitution notwithstanding that he files the appeal or revision against the conviction and /or sentence.

39. With aforesaid declaration, the writ petitions are allowed. No costs.

Lok Prahari (through General Secretary S N Shukla) v. Election Commission of India, (2018)18 SCC 114

Coram: Dipak Misra, C.J. and AM Khanwelker And Dr. Dhananjaya Chandrachud, JJ.

The petitioner sought declaration that since the law does not provide for stay of conviction, even in case of the stay of conviction by the appellate court for an offence attracting disqualification under Section 8 of the R P Act, 1951, any such order does not have the effect of wiping out the disqualification and the seat of the member concerned is deemed to have become vacant with effect from the date of conviction in terms of Articles 101(3)(a) and 190(3)(a). The Election Commission of India supported this prayer in its counter-affidavit. The Court held that it is settled in *Lily Thomas v. Union of India (2013) 7 SCC 653* and *Ravikant S. Patil v. Sarvabhaou- ma S. Bagali (2007) 1 SCC 673* that upon stay of a conviction under Section 389 of the CrPC the disqualification under Section 8 will not operate.

Consumer Education and Research Society v. Union of India & Ors., (2009) 9 SCC 648.

Coram: K.G. Balakrishnan CJI, R.V. Raveendran J., J.M. Panchal J.

Post the *Jaya Bachchan case (Jaya Bachchan v. Union of India (2005) 3 SCC 87)*, the Parliament (Prevention of Disqualification) Amendment Act, 2006 added to the list of 'Offices of Profit' which do not disqualify the holders thereof for being chosen as, or for being the Members of Parliament. The constitutional validity of this Amendment Act was challenged by way of PIL on the ground that it retrospectively exempted certain offices. The court held that a disqualification results in vacation of the seat of a Member only when under Article 103 the President, on the advice of the Election Commission, declares that Member as disqualified. Therefore, till the time the President makes the declaration, the Parliament can bring an amendment for retrospectively exempting the disqualification.

In Re Special Reference No. 1 of 2002

2002 AIR SC 87

(B.N.Kirpal, C.J. and V.N. Khare, K.G. BALakrishnan, Ashok Bhan and Arijit Pasayat, JJ)

V. N. KHARE, J. (*for himself and on behalf of B. N. Kirpal CJ and Ashok Bhan J.*): The dissolved Legislative Assembly of the State of Gujarat was constituted in March 1998 and its fiveyear term was to expire on 18-3-2003. On 19-7-2002 on the advice of the Chief Minister, the Governor of Gujarat dissolved the Legislative Assembly. The last sitting of the dissolved Legislative Assembly was held on 3rd April, 2002. Immediately after dissolution of the Assembly, the Election Commission of India took steps for holding fresh elections for constituting the new Legislative Assembly. However, the Election Commission by its order dated 16th August, 2002 while acknowledging that Article 174 (1) is mandatory and applicable to an Assembly which is dissolved and further that the elections for constituting new Legislative Assembly must be held within six months of the last session of the dissolved Assembly, was of the view that it was not in a position to conduct elections before 3rd of October, 2002 which was the last date of expiry of six months from last sitting of the dissolved Legislative Assembly. It is in this context the President of India in exercise of powers conferred upon him by virtue of clause (1) of Article 143 of the Constitution of India referred three questions for the opinion of the Supreme Court by his order dated 19th August, 2002 which run as under:

(i) Is Article 174 subject to the decision of the Election Commission of India under Article 324 as to the schedule of elections of the Assembly?

(ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of Article 174 would be remedied by a resort to Article 356 of the President?

(iii) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all the requisite resources of the Union and the State to ensure free and fair elections?"

10. In the present case what we find is that one of the questions is as to whether Article 174(1) prescribes any period of limitation for holding fresh election for constituting Legislative Assembly in the event of premature dissolution of earlier Legislative Assembly. The recitals contained in the Presidential reference manifestly demonstrate that the reference arises out of the order of the Election Commission dated 16th August, 2002. In the said order the Election Commission has admitted under Article 174(1) six months should not intervene between one Assembly and the other even though there is dissolution of the Assembly. The reference proceeds upon the premise that as per order of the Election Commission, a new Legislative Assembly cannot come into existence within the stipulated period of six months as provided under Art. 174(1) of the Constitution on the assessment of conditions prevailing in the State. Further, adoubt has arisen with regard to the application of Article 356 in the order of the Election

Commission. In view of the decision in **Re : Presidential Poll, 1974 (2) SCC 33** holding that in the domain of advisory jurisdiction under Article 143(1) this Court cannot go into the disputed question of facts, we have already declined to go into the facts arising out of the order of the Election Commission. But the legal premise on which order was passed raised questions of public importance and these questions are likely to arise in future. The questions whether Article 174(1) is mandatory and would apply to a dissolved Assembly, that, whether in extraordinary circumstances Article 74(1) must yield to Art. 324, and, that the non-observance of Article 174 would mean that the Government of a State cannot be carried on in accordance with the provisions of the Constitution and in that event Art. 356 would step in, are not only likely to arise in future but are of public importance. It is not disputed that there is no decision of this Court directly on the questions referred and further, a doubt has arisen in the mind of the President of India as regards the interpretation of Art. 174(1) of the Constitution. Under such circumstances, it is imperative that this reference must be answered.

14. A plain reading of Article 174 shows that it stipulates that six months shall not intervene between the last sitting in one session and the date appointed for its first sitting in the next session. It does not provide for any period of limitation for holding fresh election in the event a Legislative Assembly is prematurely dissolved. It is true that after commencement of the Constitution, the practice has been that whenever either Parliament or Legislative Assembly were prematurely dissolved, the election for constituting fresh Assembly or Parliament, as the case may be, were held within six months from the date of the last sitting of the dissolved Parliament or Assembly. It appears that the Election Commission's interpretation of Article 174 that fresh elections for constituting Assembly are required to be held within six months from the date of the last sitting of the last session was very much influenced by the prevailing practice followed by the Election Commission since enforcement of the Constitution. At no point of time any doubt had arisen as to whether the interval of six months between the last sitting of one session and the first sitting of the next session of the Assembly under Article 174(1) provides a period of limitation for holding fresh election to constitute new Assembly by the Election Commission in the event of a premature dissolution of Assembly. Since the question has arisen in this Reference and also in view of the fact that Article 174 on its plain reading does not show that it provides a period of limitation for holding fresh election after the premature dissolution of the Assembly, it is necessary to interpret the said provision by applying accepted rules of interpretations.

15. One of the known methods to discern the intention behind enacting a provision of the Constitution and also to interpret the same is to look into the Historical Legislative Development, Constituent Assembly Debates or any document preceding the enactment of the Constitutional provision.

16. In *His Holiness Kesavananda Bharati Sripadagalvaru etc. v. State of Kerala and another etc.* (1973) 4 SCC 225, it was held that Constituent Assembly debates although not conclusive, yet show the intention of the framers of the Constitution in enacting provisions of the

Constitution and the Constituent Assembly Debates can throw light in ascertaining the intention behind such provisions.

19. Part VI of Government of India Act 1915 dealt with the Indian Legislatures containing provisions dealing with Indian and Governor's provinces legislatures. Section 63D dealt with Indian Legislature while Section 72B dealt with the legislature of Governor's provinces.

20. After repeal of Government of India Act 1915, Government of India Act 1919 came into force. Section 8 of the Government of India Act 1919 provided for sittings of Legislative Council in provinces.

22. A combined reading of Sections 63D (1) and 72B(1) of Government of India Act, 1915 and Sections 8(1) and 21(1) of Government of India Act, 1919 shows that the Governor General could also either dissolve the Council of State or the Legislative Assembly sooner than its stipulated period or extend the period of their functioning. Further, it was mandated that after the dissolution of either Chamber, the Governor General shall appoint a date not more than six months or with the sanction of the Secretary of the State, not more than nine months from the date of dissolution, for the next session of that Chamber. Similarly, the Governor of the province could also either dissolve the Legislative Council sooner than its stipulated period or extend the period of its functioning. Further, the Governor was duty bound after the dissolution of the legislative council to appoint a date not more than six months, or with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of legislative council.

26. We find that under the Government of India Act, 1935, there was a complete departure from the provisions contained in the Government of India Act, 1915 and Government of India Act, 1919 as regards the powers and responsibilities of the Governor General and the Governors of the Provinces to extend the period of the chambers or fix a date for the next session of the new chamber. By the aforesaid provisions, not only were the powers to extend the life of the chambers of the Federal Legislature and the Provincial Legislatures done away with, but the British Convention to fix a date for the next session of the new chamber was also given up. These were the departures from the previous Act.

27. Under the Constitution of India, 1950, even these provisions have been departed from. While under the Government of India Act, 1935, the conduct of elections was vested in an executive authority, under the Constitution of India, a Constitutional authority was created under Art. 324 for the superintendence, direction and conduct of elections. This body, called the Election Commission, is totally independent and impartial, and is free from any interference of the executive. This is a very noticeable difference between the Constitution of India and the Government of India Act, 1935 in respect of matters concerning elections for constituting the House of the People or the Legislative Assembly. It may be noted that Arts. 85(1) and 174(1) which were physically borrowed from Govt. of India Act, 1935 were only for the purposes of providing the frequencies of sessions of existing Houses of Parliament and State Legislature, and they do not relate to dissolved Houses.

28. Draft Articles 69 and 153 correspond to Article 85 and Article 174 of the Constitution respectively. Article 69 dealt with the Parliament and Article 153 dealt with State Legislative Assembly. When the aforesaid two draft Articles were placed before the Constituent Assembly for discussion, there was not much debate on Draft Article 153. But there was a lot of discussion when Draft Article 69 was placed before the Constituent Assembly. Draft Articles 69 and 153 run as under:

"69(1) : The Houses of Parliament, shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this Article, the President may from time to time

(a) summon the Houses or either House of Parliament to meet at such time and place as he thinks fit;

(b) prorogue the Houses;

(c) dissolve the House of the People.

153(1) : The House or Houses of the Legislature of the State shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this Article, the Governor may from time to time

(a) summon the Houses or either House to meet at such time and place as he thinks fit;

(b) prorogue the House or Houses;

(c) dissolve the Legislative Assembly.

(3) The functions of the Governor under sub-clauses (a) and (c) of clause (2) of this Article shall be exercised by him in his discretion".

29. On 18-5-1949, when Draft Article 69 came up for discussion, there was a proposal to change the intervening period between the two sessions of the Houses of Parliament from six months to three months so as to ensure that the Parliament has more time to look into the problems faced by the people of the country. Prof. K. T. Shah one of the members of the Constituent Assembly, while moving an amendment to the Draft Article 69, as it then stood, said that the Draft Article was based on other considerations prevailing during the British times, when the legislative work was not much and the House used to be summoned only for obtaining financial sanction. Shri H.

V. Kamath while intervening in the debate emphasized on the need to have frequent sessions of the Houses of Parliament. He suggested that the Houses should meet at least thrice in each year. He pointed out that in the United States of America and the United Kingdom, the Legislatures sat for eight to nine months in a year as a result of which they were able to effectively discharge their parliamentary duties and responsibilities. He also emphasized that the period of business of transactions provided in the Federal or State Legislature under the Government of India Act, 1935

was very short as there was not much business to be transacted then by those Legislatures. He also reiterated that the Houses of Parliament should sit more frequently so that the interests of the country are thoroughly debated upon and business is not rushed through. Prof. K. T. Shah was very much concerned about the regular sitting of the Parliament and, therefore, he moved an amendment.

31. Shri B. R. Ambedkar, while replying to the aforesaid proposed amendment, highlighted that after the Constitution comes into force, no executive could afford to show a callous attitude towards the legislature, which was not the situation before as the legislature was summoned only to pass revenue demands. Since there was no possibility of the executive showing a callous attitude towards the legislature, this would take care of the fear voiced by some members that no efforts to go beyond the minimum mandatory sittings of the Houses of Parliament would be made. He further dwelled on the fact that the clause provided for minimum mandatory sittings in a year so that if the need arose, the Parliament could sit more often and if more frequent sessions were made mandatory, the sessions could be so frequent and lengthy that members would grow tired.

32. From the aforesaid debates, it is very much manifest that Article 85 and Article 174 were enacted on the pattern of Sections 19(1) and 62(1) of the Government of India Act, 1935 respectively which dealt with the frequency of sessions of the existing Legislative Assembly and were not intended to provide any period of limitation for holding elections for constituting new House of the People or Legislative Assembly in the event of their premature dissolution. Further, the suggestions to reduce the intervening period between the two sessions to three months from six months so that Parliament could sit for longer duration to transact the business shows that it was intended for existing Houses of Parliament and not dissolved ones, as a dissolved House cannot sit and transact legislative business at all.

36. The original Articles show that what was mandated was that the Houses of Parliament and State Legislature were required to meet at least twice in a year and six months shall not intervene between the last sitting in one session and the date appointed for their first sitting in the next session. This resulted in absurdity. If it was found that the session then had been going on continuously for 12 months, technically, it could have been contended that the Parliament had not met twice in that year at all as there must be prorogation in order that there may be new session and, therefore, the original Article 174(1) resulted in contradictions.

37. While intervening in the debate, Dr. B. R. Ambedkar stated thus :

"..... due to the word summon, the result is that although Parliament may sit for the whole year adjourning from time to time, it is still capable of being said that Parliament has been summoned only once and not twice. There must be prorogation in order that there may be a new session. It is felt that this difficulty should be removed and consequently the first part of it has been deleted. The provision that whenever there is a prorogation of Parliament, the new session shall be called within six months is retained."

40. Article 174 shows that the expression 'date appointed for its first sitting in the next session' in Article 174(1) cannot possibly refer to either an event after the dissolution of the House or an event of a new Legislative Assembly meeting for the first time after getting freshly elected. When there is a session of the new Legislative Assembly after elections, the new Assembly will sit in its "first session" and not in the "next session". The expression 'after each general election' has been employed in other parts of the Constitution and one such provision is Article 176. The absence of such phraseology 'after each general election' in Article 174 is a clear indication that the said Article does not apply to a dissolved Assembly or to a freshly elected Assembly. Further, Article 174(1) uses expressions i.e. 'its last sitting in one session', 'first sitting in the next session'. None of these expressions suggest that the sitting and the session would include an altogether different Assembly i.e. a previous Assembly which has been dissolved and its successor Assembly that has come into being after elections. Again, Article 174 also employs the word 'summon' and not 'constitute'. Article 174 empowers the Governor to summon an Assembly which can only be an existing Assembly. The Constitution of an Assembly can only be under Sec. 73 of the Representation of the People Act, 1951 and the requirement of Art. 188 of the Constitution suggests that the Assembly comes into existence even before its first sitting commences.

41. Again, Article 174 contemplates a session, i.e. sitting of an existing Assembly and not a new Assembly after dissolution and this can be appreciated from the expression 'its last sitting in one session and its first sitting in the next session'. Further, the marginal note 'sessions' occurring in Articles 85 and 174 is an unambiguous term and refers to an existing Assembly which a Governor can summon. When the term 'session or sessions' is used, it is employed in the context of a particular Assembly or a particular House of the People and not the legislative body whose life is terminated after dissolution. Dissolution ends the life of legislature and brings an end to all business. The entire chain of sittings and sessions gets broken and there is no next session or the first sitting of the next session after the House itself has ceased to exist. Dissolution of Legislative Assembly ends the representative capacity of legislators and terminates the responsibility of the Cabinet to the members of the Lok Sabha or the Legislative Assembly, as the case may be.

42. The act of summoning, sitting, adjourning, proroguing or dissolving of the Legislature is necessarily referable to an Assembly in praesenti i.e. an existing, functional legislature and has nothing to do with the Legislative Assembly which is not in existence. It is well understood that a dissolved House is incapable of being summoned or prorogated and in this view of the matter also Article 174(1) has no application to a dissolved Legislative Assembly, as nothing survives after dissolution. Article 174 deals with a live legislature. The purpose and object of the said provision is to ensure that an existing legislature meets at least every six months, as it is only an existing legislature that can be prorogued or dissolved. Thus Article 174 which is a complete code in itself deals only with a live legislature.

44. Article 174(1) shows that it does not provide that its stipulation is applicable to a dissolved legislature as well. Further, Article 174 does not specify that interregnum of six months period stipulated between the two sessions would also apply to a new legislature vis-a-vis an outgoing

legislature. If such be the case, then there was no need to insert the proviso to Article 172(1) and insertion of the said proviso is rendered meaningless and superfluous.

45. Further, if Article 174 is held to be applicable to a dissolved House as well, it would mean that Article 174(2) is controlled by Article 174(1) inasmuch as the power has to be exercised under Article 174(2) in conformity with Article 174(1). Moreover, if the House is dissolved in 5th month of the last session, the election will have to be held within one month so as to comply with the requirement of Article 174(1) which would not have been the intention of the framers of the Constitution.

46. Yet, there is another aspect which shows that Article 174(1) is inapplicable to a dissolved Legislative Assembly. It cannot be disputed that each Legislative Assembly after Constitution is unique and distinct from the previous one and no part of the dissolved House is carried forward to a new Legislative Assembly. Therefore, Article 174(1) does not link the last session of the dissolved House with the newly formed one.

47. A perusal of Articles 172 and 174 would show that there is a distinction between the frequency of meetings of an existing Assembly and periodicity of elections in respect of a dissolved Assembly which are governed by the aforesaid provisions.

48. As far as frequency of meetings of Assembly is concerned, the six months rule is mandatory, while as far as periodicity of election is concerned, there is no six months rule either expressly or impliedly in Article 174. Therefore, it cannot be held that Article 174 is applicable to dissolved House and also provides for period of limitation within which the Election Commission is required to hold fresh election for constituting the new Legislative Assembly.

The effect of a Prorogation, Adjournment and Dissolution: Under Art. 85(2) when the President on the advice of the Prime Minister prorogues the House, there is termination of a session of the House and this is called prorogation. When the House is prorogued all the pending proceedings of the House are not quashed and pending Bills do not lapse. The prorogation of the House may take place at any time either after the adjournment of the House or even while the House is sitting. An adjournment of the House contemplates postponement of the sitting or proceedings of either House to reassemble on another specified date. During currency of a session the House may be adjourned for a day or more than a day. Adjournment of the House is also sine die. When a house is adjourned, pending proceedings or Bills do not lapse. So far as, the dissolution of either House of the People or State Legislative Assembly is concerned, the same takes place on expiration of the period of five years from the date appointed for its first meeting or under Art. 85(2) or Art. 174(2). It is only an existing or functional Lok Sabha or Legislative Assembly which is capable of being dissolved. A dissolution brings an end to the life of the House of the People or State Legislative Assembly and the same cannot be revived by the President. When dissolution of House of the People or State Legislative Assembly takes place all pending proceedings stand terminated and pending Bill lapses and such proceedings and Bills are

not carried over to the new House of the People or State Legislative Assembly when they are constituted after fresh elections.

55. From the above, the irresistible conclusion is that Article 174(1) is neither applicable to a dissolved House nor does it provide for any period for holding election for constituting fresh Legislative Assembly.

Whether the expression "the House" is a permanent body and is different than the House of People or the Legislative Assembly under Articles 85 and 174 of the Constitution".

56. It was then urged on behalf of the Union that under Article 174 what is dissolved is an Assembly while what is prorogued is a House. Even when an Assembly is dissolved, the House continues to be in existence. The Speaker continues under Art. 94 in the case of the House of the People or under Art. 179 in the case of the State Legislative Assembly till the new House of the People or the Assembly is constituted. On that premise, it was further urged that the fresh elections for constituting new Legislative Assembly has to be held within six months from the last session of the dissolved Assembly.

2. (a) Is there any period of limitation provided under the Constitution of India or Representation of the People Act for holding fresh election for constituting new Legislative Assembly in the event of premature dissolution of a Legislative Assembly ?

72. In this context, we have looked into the provisions of the Constitution of India, but we do not find any provision expressly providing for any period of limitation for constituting a fresh Legislative Assembly on the premature dissolution of the previous Legislative Assembly. On our interpretation of Article 174(1), we have already held that it does not provide for any period of limitation for holding elections within six months from the date of last sitting of the session of the dissolved Assembly. Section 15 of the Representation of the People Act, 1951 provides that general election is required to be held for the purpose of constituting a new Legislative Assembly on the expiration of duration of the existing Assembly or on its dissolution. Sub-section (2) thereof provides that for constituting new Legislative Assembly, the Governor shall by notification, on such date or dates, as may be recommended by the Election Commission, call upon all Assembly constituencies in the State to elect members in accordance with the provisions of the Act, rules and orders made there under. The proviso to sub-section (2) of Section 15 of the Act provides that where an election is held otherwise than on the dissolution of the existing Legislative Assembly, no such notification shall be issued at any time earlier than six months prior to the dates on which the duration of that Assembly would expire under the provisions of clause (1) of Article 172.

73. The aforesaid provisions also do not provide for any period of limitation for holding elections for constituting new Legislative Assembly in the event of premature dissolution of an existing Legislative Assembly, excepting that election process can be set in motion by issuing a notification six months prior to the date on which the normal duration of the Assembly expires. Thus, the question arises as to whether the Constitution framers have omitted by oversight to

provide any such period for holding election for constituting new Assembly in an event of premature dissolution or it was purposely not provided for in the Constitution. For that purpose, we must look into the legislative developments and the constitutional debates preceding the enactment of Constitution of India.

77. It is in light of the aforesaid discussion, Article 324 was enacted and the superintendence, direction, control and conduct of election was no more left in the hands of the Executive but was entrusted to an autonomous Constitutional Authority i.e. the Election Commission. It appears that since the entire matter relating to the elections was entrusted to the Election Commission, it was found to be a matter of no consequence to provide any period of limitation for holding fresh election for constituting new Legislative Assembly in the event of premature dissolution. This was deliberate and conscious decision. However, care was taken not to leave the entire matter in the hands of the Election Commission and, therefore, under Article 327 read with Entry 72 of List I of VIIth Schedule of the Constitution, Parliament was given power subject to the provisions of the Constitution to make provisions with respect to matters relating to or in connection with the election of either House of Parliament or State Legislature, as the case may be, including preparation of electoral roll. For the States also, under Article 328 read with Entry 37 of List II, the Legislature was empowered to make provisions subject to the provisions of the Constitution with respect to matters relating to or in connection with election of either House of Parliament or State Legislature, including preparation of electoral roll. Thus, the Parliament was empowered to make law as regards matters relating to conduct of election of either Parliament or State Legislature, without affecting the plenary powers of the Election Commission. In this view of the matter, the general power of superintendence, direction, control and conduct of election although vested in the Election Commission under Article 324(1), yet it is subject to any law either made by the Parliament or State Legislature, as the case may be which is also subject to the provisions of the Constitution.

78. We find that the Representation of the People Act, 1951 also has not provided any period of limitation for holding election for constituting fresh Assembly election in the event of premature dissolution of former Assembly. In this context, concerns were expressed by learned Counsel for one of the national political parties and one of the States that in the absence of any period provided either in the Constitution or in the Representation of the People Act, the Election Commission may not hold election at all and in that event it would be the end of democracy. It is no doubt true that democracy is a part of the basic structure of the Constitution and periodical, free and fair election in substratum of democracy

80. However, we are of the view that the employment of words "on an expiration" occurring in Sections 14 and 15 of the Representation of the People Act, 1951 respectively show that Election Commission is required to take steps for holding election immediately on expiration of the term of the Assembly or its dissolution, although no period has been provided for. Yet, there is another indication in Sections 14 and 15 of the Representation of the People Act that the election process can be set in motion by issuing of notification prior to the expiry of six months of the normal term

of the House of People or Legislative Assembly. Clause (1) of Article 172 provides that while promulgation of emergency is in operation, the Parliament by law can extend the duration of the Legislative Assembly not exceeding one year at a time and this period shall not, in any case, extend beyond a period of six months after promulgation has ceased to operate.

2 (b) Is there any limitation on the powers of the Election Commission to frame schedule for the purpose of holding election for constituting Legislative Assembly ?

81. So far as the framing of the schedule or calendar for election of the Legislative Assembly is concerned, the same is in the exclusive domain of the Election Commission, which is not subject to any law framed by the Parliament. The Parliament is empowered to frame law as regards conduct of elections but conducting elections is the sole responsibility of the Election Commission. As a matter of law, the plenary powers of the Election Commission cannot be taken away by law framed by Parliament. If Parliament makes any such law, it would be repugnant to Article 324. Holding periodic, free and fair elections by the Election Commission are part of the basic structure and the same was reiterated in *Indira Nehru Gandhi v. Raj Narain*

82. The same is also evident from Sections 14 and 15 of the Representation of People Act, 1951 which provide that the President or the Governor shall fix the date or dates for holding elections on the recommendation of the Election Commission. It is, therefore, manifest that fixing schedule for elections either for the House of People or Legislative Assembly is in the exclusive domain of the Election Commission.

84. As a result of the aforesaid discussion, our conclusions are as follows:

a) The Reference made by the President of India under Article 143(1) arises out of the order of the Election Commission dated 19-8-2002 and the questions raised therein are of public importance and are likely to arise in future. Further, there being no decision by this Court on the questions raised and a doubt having arisen in the mind of the President in regard to the interpretation of Article 174(1) of the Constitution, the Reference is required to be answered.

b) Article 174(1) of the Constitution relates to an existing, live and functional Legislative Assembly and not to a dissolved Assembly.

c) The provision in Article 174(1) that six months shall not intervene between its last sitting in one session and the date appointed for its sitting in the next session is mandatory and relates to the frequencies of the sessions of a live and existing Legislative Assembly and does not provide for any period of limitation for holding fresh elections for constituting Legislative Assembly on premature dissolution of the Assembly.

d) The expressions "the House", "either House", is synonymous with Legislative Assembly or Legislative Council and they do not refer to different bodies other than the Legislative Assembly or the Legislative Council, as the case may be.

e) Neither under the Constitution nor under the Representation of the People Act, any period of limitation has been prescribed for holding election for constituting Legislative Assembly after

premature dissolution of the existing one. However, in view of the scheme of the Constitution and the Representation of the People Act, the elections should be held within six months for constituting Legislative Assembly from the date of dissolution of the Legislative Assembly.

f) Under the Constitution, the power to frame the calendar or schedule for elections for constituting Legislative Assembly is within the exclusive domain of the Election Commission and such a power is not subject to any law either made by Parliament or State Legislature.

g) In view of the affidavit filed by the Election Commission during hearing of the Reference, the question regarding the application of Article 356 is not required to be gone into.

85. In accordance with the foregoing opinion, we report on the questions referred as follows:

Question No. (i) :

This question proceeds on the assumption that Article 174(1) is also applicable to a dissolved Legislative Assembly. We have found that the provision of Article 174(1) of the Constitution which stipulates that six months shall not intervene between the last sitting in one session and the date appointed for its first sitting in the next session is mandatory in nature and relates to an existing and functional Legislative Assembly and not to a dissolved Assembly whose life has come to an end and ceased to exist. Further, Article 174(1) neither relates to elections nor does it provide any outer limit for holding elections for constituting Legislative Assembly. The superintendence, direction and control of the preparation of electoral roll and conduct of holding elections for constituting Legislative Assembly is in the exclusive domain of the Election Commission under Article 324 of the Constitution. In that view of the matter, Article 174(1) and Article 324 operate on different fields and neither Article 174(1) is subject to Article 324 nor Article 324 is subject to Article 174(1) of the Constitution.

Question No. (ii) :

This question also proceeds on the assumption that Article 174(1) is also applicable to a dissolved House. On our interpretation of Article 174(1), we have earlier reported that the said Article is inapplicable to a dissolved Legislative Assembly. Consequently, there is no infraction of the mandate of Article 174(1) in preparing a schedule for elections to an Assembly by the Election Commission. The Election Commission in its written submissions stated thus :

"The decision, contained in the Election Commission's order dated 16-8-2002, was taken without reference to Article 356. However, it was merely pointed out that there need be no apprehension that there would be a constitutional impasse as Article 356 could provide a solution in such a situation."

Question No. (iii) :

Again, this question proceeds on the assumption that the provisions of Article 174(1) also apply to a dissolved Assembly. In view of our answer to question No. (i), we have already reported that Article 174(1) neither applies to a prematurely dissolved Legislative Assembly nor does it deal with elections and, therefore, the question that the Election Commission is required to carry out

the mandate of Article 174(1) of the Constitution does not arise. Under Article 324, it is the duty and responsibility of the Election Commission to hold free and fair elections at the earliest. No efforts should be spared by the Election Commission to hold timely elections. Ordinarily, law and order or public disorder should not be occasion for postponing the elections and it would be the duty and responsibility of all concern to render all assistance, co-operation and aid to the Election Commission for holding free and fair elections.

86. The Reference is answered accordingly.

* * * * *

Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Ors.,

(2007) 3 SCC 184

(Y.K. Sabharwal, C.J., K.G. Balakrishnan, C.K. Thakker, R.V. Raveendran and D.K. Jain, JJ.)

Y. K. SABHARWAL, C.J.I. (for himself and on behalf of K.B. Balakrishnan, D.K. Jain, JJ.):-

2. The unfortunate background in which the aforesaid questions have arisen is the allegation that the Members of Parliament (MPs) indulged in unethical and corrupt practices of taking monetary consideration in relation to their functions as MPs.

3. A private channel had telecast a programme on 12th December, 2005 depicting 10 MPs of House of People (Lok Sabha) and one of Council of States (Rajya Sabha) accepting money, directly or through middleman, as consideration for raising certain questions in the House or for otherwise espousing certain causes for those offering the lucre. This led to extensive publicity in media. The Presiding Officers of each Houses of Parliament instituted inquiries through separate Committees. Another private channel telecast a programme on 19th December, 2005 alleging improper conduct of another MP of Rajya Sabha in relation to the implementation of Member of Parliament Local Area Development Scheme ('MPLAD' Scheme for short). This incident was also referred to a Committee.

4. The Report of the inquiry concluded, inter alia, that the evidence against the 10 members of Lok Sabha was incriminate; the plea that the video footages were doctored/morphed/edited had no merit; there was no valid reason for the Committee to doubt the authenticity of the video footage; the allegations of acceptance of money by the said 10 members had been established which acts of acceptance of money had a direct connection with the work of Parliament and constituted such conduct on their part as was unbecoming of Members of Parliament and also unethical and calling for strict action. The majority report also recorded the view that in case of misconduct, or contempt, committed by its members, the House can impose punishment in the nature of admonition, reprimand, withdrawal from the House, suspension from service of House, imprisonment, and expulsion from the House. The majority Report recorded its deep distress over acceptance of money by MPs for raising questions in the House and found that it had eroded the credibility of Parliament as an institution and a pillar of democracy in this country and recommended expulsion of the 10 members from the membership of Lok Sabha finding that their continuance as Members of the House would be untenable. One member, however, recorded a note of dissent for the reasons that in his understanding of the procedure as established by law, no member could be expelled except for breach of privileges of the House and that the matter must, therefore, be dealt with according to the rules of the Privileges Committee.

5. On the Report of the Inquiry Committee being laid on the table of the House, a Motion was adopted by Lok Sabha resolving to expel the 10 members from the membership of Lok Sabha, accepting the finding as contained in the Report of the Committee that the conduct of the

members was unethical and unbecoming of the Members of Parliament and their continuance as MPs is untenable. On the same day i.e. 23rd December, 2005, the Lok Sabha Secretariat issued the impugned notification notifying the expulsion of those MPs with effect from same date. In the Writ Petitions/Transfer Cases, the expelled MPs have challenged the constitutional validity of their respective expulsions.

6. Almost a similar process was undertaken by the Rajya Sabha in respect of its Member. The matter was referred to the Ethics Committee of the Rajya Sabha. As per the majority Report, the Committee found that the Member had accepted money for tabling question in Rajya Sabha and the plea taken by him in defence was untenable in the light of evidence before it. However, one Member while agreeing with other Members of the Committee as to the factual finding expressed opinion that in view, amongst others, of the divergent opinion regarding the law on the subject in judgments of different High Courts, to which confusion was added by the rules of procedure inasmuch as Rule 297(d) would not provide for expulsion as one of the punishments, there was a need for clarity to rule out any margin of error and thus there was a necessity to seek opinion of this Court under Article 143(1) of the Constitution.

7. The Report of the Ethics Committee was adopted by Rajya Sabha concurring with the recommendation of expulsion and on the same date i.e. 23rd December, 2005, a notification notifying expulsion of the Member from membership of Rajya Sabha with immediate effect was issued.

8. The case of petitioner in Writ Petition (C) No. 129/2006 arises out of different, though similar set of circumstances. In this case, the telecast of the programme alleged improper conduct in implementation of MPLAD Scheme. The programme was telecast on 19th December, 2005. The Report of the Ethics Committee found that after viewing the unedited footage, the Committee was of the view that it was an open and shut case as Member had unabashedly and in a professional manner demanded commission for helping the so-called NGO to set up projects in his home state/district and to recommend works under MPLAD Scheme. The Committee came to the conclusion that the conduct of the Member amounts to violations of Code of Conduct for Members of Rajya Sabha and it is immaterial whether any money changed hands or not or whether any commission was actually paid or not. It found that the Member has not only committed gross misdemeanor but by his conduct he also impaired the dignity of the House and its Member and acted in a manner which is inconsistent with the standards that the House is entitled to expect of its Members. Since the conduct of the Member has brought the House and its Member into disrepute, the Committee expressed the view that the Member has forfeited his right to continue as Member and, therefore, recommended his expulsion from the membership of the House. The Rajya Sabha accepted the recommendations of the Ethics Committee and Motion agreeing with the recommendation was adopted on 21st March, 2006 thereby expelling the Member from the membership bringing to an end his membership. On the same date notification was issued by Rajya Sabha Secretariat.

9. The two Members of Rajya Sabha have also challenged the constitutional validity of their expulsions.

Article 105 reads as under :

"105. Powers, privileges, etc. of the Houses of Parliament and of the members and committees thereof.- (1) Subject to the provisions of this Constitution and the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act 1978.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament."

10. There is identical provision as contained in Article 194 relating to powers, privileges and immunities of State legislature. Article 194 reads as under :-

"194. Powers, privileges, etc., of the House of Legislatures and of the members and committees thereof.- (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 26 of the Constitution (forty-fourth Amendment) Act, 1978.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a

House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature."

11. Article 105(3) underwent a change in terms of Section 15 of the Constitution (44th Amendment) Act, 1978. In Article 105(3), the words "shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees at the commencement of this Constitution" were substituted by the words "shall be those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution (fourty-fourth Amendment) Act, 1978". The similar changes were also effected in Article 194(3) of the Constitution. These amendments have no relevance for determining the interpretation of Article 105(3) since the amendments clearly seem to be only cosmetic for the purpose of omitting the reference of the House of Commons in these articles.

36. Having given our anxious considerations to the myriad issues that have been raised on both sides of the divide, we have found that the primordial questions that need to be addressed by the Court can be formulated as under :-

1. *Does this Court, within the constitutional scheme, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the Legislatures and its members?*
2. *If the first question is answered in the affirmative, can it be found that the powers and privileges of the Legislatures in India, in particular with reference to Article 105, include the power of expulsion of their members?*
3. *In the event of such power of expulsion being found, does this Court have the jurisdiction to interfere in the exercise of the said power or privilege conferred on the Parliament and its members or Committees and, if so, is this jurisdiction circumscribed by certain limits?*

37. In our approach to these issues of great importance, we have followed the advice of Thomas Huxley in the following words :- "It is not who is right, but what is right, that is of importance" and we must - "learn what is true in order to do what is right".

42. Fortunately, the subject at hand is not a virgin territory. There have been occasions in the past for this court to go into these issues, though in somewhat different fact situations. Similarly, we have the benefit of opinion on these questions, expressed by at least three High Courts, though that happens to be a divided opinion.

43. As can be seen from the language employed in Article 105, the Parliament is empowered to define, by law, the powers, privileges and immunities of each House and of their Members and Committees in respects other than those specified in the Constitutional provisions. Though some part of the arguments advanced on behalf of the petitioners did try to refer to certain statutory provisions, for example, provisions contained in Sections 8 to 11 of the Representation of the People Act, 1951, as referable to the enabling power given to the Parliament in the first part of Article 105(3) but for present purposes, we would assume that Parliament has not yet exercised the said enabling power in as much as there is no law enacted till date that can be referred as

cataloging the powers, privileges and immunities of each House of Parliament and of their members and committees. This consequence leads to continuity of the life of the second part of Article 105(3) in as much as that part of the provision was designed to come to an end as soon as the Parliament defined by law its powers, privileges and immunities. Therefore, powers, privileges and immunities not having been defined, the question is what are those powers which were enjoyed by House of Commons at the commencement of our Constitution as that will determine the powers, privileges and immunities of both Houses of Indian Parliament.

51. The learned counsel would then refer to the law that has been evolved in India, the case of *M.S.M. Sharma v. Sri Krishna Sinha* [1959 Supp (1) SCR 806], hereinafter referred to as case of *Pandit Sharma (I)*, being perhaps the first in a series of such cases on the subject.

52. Pandit Sharma, the petitioner in that case was "editor of an English Daily Newspaper "Searchlight" of Patna. He invited the wrath of the legislative assembly of Bihar by publishing extracts from proceedings of the legislative assembly including certain parts which had been ordered to be expunged by the Speaker. In this context, the Speaker had referred the matter to the Privileges Committee of the assembly which in turn issued a show cause notice to him. Pandit Sharma brought writ petition in this court under Article 32 of the Constitution of India alleging that the proceedings initiated by the legislative assembly had violated his fundamental right of speech and expression under Article 19 (1) (a) as also the fundamental right of protection of his personal liberty under Article 21. The case was decided by a Constitution Bench (five Judges), with main focus on two principal points; namely, the availability of a privilege under Article 194(3) of the Constitution to the House of a legislature in India to prohibit entirely the publication of the publicly seen and heard proceedings that took place in the House or even to prohibit the publication of such part of the proceedings as had been directed to be expunged and as to whether the privilege of the legislative chamber under Article 194(3) prevailed over the fundamental right of a citizen under Article 19 (1) (a). Noticeably, no specific objection as to the jurisdiction of the court in examining the issue of existence and availability of the particular privilege was raised at any stage.

54. The case of *Pandit Sharma* did not end there. Subsequently, the legislative assembly of Bihar came to be prorogued several times and the committee of privileges was also reconstituted. This led to a fresh notice being issued to *Pandit Sharma* in the wake of which he brought another writ petition under Article 32 of the Constitution, substantially raising the same questions and contentions as had been agitated in the earlier proceedings by him before this court. This writ petition was dismissed by the Constitution Bench (eight Judges). The judgment is reported as *M.S.M. Sharma v. Shree Krishna Sinha* [(1961) 1 SCR 96], hereinafter referred to as case of *Pandit Sharma (II)*.

56. By far, the advisory opinion given by a Constitution Bench comprising of seven Judges of this court in *UP Assembly case* is the most elaborate discourse on the subject of powers, privileges and immunities of the legislatures under the Constitution of India. The matter had arisen out of a Reference by the President of India under Article 143(1) of the Constitution

seeking opinion of this court on certain issues, the genesis of which was traceable to certain unfortunate developments concerning the legislative assembly of the State of Uttar Pradesh and the Lucknow Bench of the High Court at Allahabad. The legislative assembly of Uttar Pradesh had committed one Keshav Singh, who was not one of its members, to prison for its contempt. The warrant of committal did not contain the facts constituting the alleged contempt. Keshav Singh moved a petition, inter alia, under Article 226 of the Constitution through his advocate challenging his committal as being in breach of his fundamental rights. A Division Bench of the High Court sitting at Lucknow gave notice to the Government counsel and on the appointed day proceeded to hear the application for bail. At that stage, the Government Counsel did not appear. The Division Bench heard the application and ordered release of Keshav Singh on interim bail pending decision on his writ petition. The legislative assembly found that Keshav Singh and his advocate in moving the High Court and the two Judges of the High Court in entertaining the petition and granting bail had committed contempt of the legislative assembly. The assembly passed a resolution that all of them, including the two High Court Judges, be produced before it in custody. The High Court Judges and the advocate in question thereupon filed writ petitions before the High Court at Allahabad. A Full Bench of the High Court admitted the writ petitions and ordered the stay of execution of the assembly's resolution against them. Subsequently, the legislative assembly passed a clarificatory resolution modifying its earlier stand and asking the Judges and the advocate to appear before the House and offer their explanation. It was against this backdrop that the President made a reference under Article 143(1) of the Constitution seeking opinion mainly as to the Constitutional relationship between the High Court and the State Legislature in matters of the powers and privileges of the latter. The contours of the main controversy were summarized by this court at page 439 in the report in the following words :-

"27. Is the House the sole and exclusive judge of the issue as to whether its contempt has been committed where the alleged contempt has taken place outside the four walls of the House? Is the House the sole and exclusive judge of the punishment which should be imposed on the party whom it has found to be guilty of its contempt? And, if in enforcement of its decision the House issues a general or unspeaking warrant, is the High Court entitled to entertain a habeas corpus petition challenging the validity of the detention of the person sentenced by the House?."

57. It is clear from the opinion rendered in UP Assembly case that the State legislature, though participating in the hearing, expressed reservations as to the jurisdiction of this court in any manner in respect of the area of controversy covered by the questions, insisting that "the question about the existence and extent of the powers, privileges and immunities of the House, as well as the question about the exercise of the powers and privileges were entirely and exclusively within the jurisdiction of the House; and whatever this Court may say will not preclude the House from deciding for itself the points referred to us under this Reference", referring in this context, inter

alia to the fact that there was no lis before the court which was therefore not exercising "its judicial function" while dealing with a reference under Article 143 (1).

61. The case *State of Karnataka v. Union of India* [(1977) 4 SCC 608] decided by a Constitution Bench (seven Judges) of this court finally clinched the issue beyond the pale of any doubts. The case had arisen against the backdrop of appointment by the Central Government of a Commission of Inquiry against the then Chief Minister of Karnataka. The State of Karnataka filed a suit in this court, inter alia, for a declaration that the appointment of the Commission was illegal, in as much as the terms of reference of the Inquiry Commission covered matters falling exclusively within the sphere of the State's legislative and executive power on which basis, amongst others, it was contended that the federal structure implicit and accepted as an inviolable basic feature of the Constitution was being abridged. Some arguments in the context of this controversy were founded on the powers and privileges of the legislature of the State under Article 194 of the Constitution. Examining these arguments, Beg, C.J., in his judgment observed as under

"63. Now, what learned Counsel for the plaintiff seemed to suggest was that Ministers, answerable to a Legislature were governed by a separate law which exempted them from liabilities under the ordinary law. This was never the Law in England. And, it is not so here. Our Constitution leaves no scope for such arguments, based on a confusion concerning the "powers" and "privileges" of the House of Commons mentioned in Articles 105(3) and 194(3). Our Constitution vests only legislative power in Parliament as well as in the State Legislatures. A House of Parliament or State Legislature cannot try anyone or any case directly, as a Court of Justice can, but it can proceed quasi-judicially in cases of contempts of its authority and take up motions concerning its "privileges" and "immunities" because, in doing so, it only seeks removal of obstructions to the due performance of its legislative functions. But, if any question of jurisdiction arises as to whether a matter falls here or not, it has to be decided by the ordinary courts in appropriate proceedings."

62. In view of the above clear enunciation of law by Constitutional Benches of this court in case after case, there ought not be any doubt left that whenever Parliament, or for that matter any State legislature, claims any power or privilege in terms of the provisions contained in Article 105(3), or Article 194(3) as the case may be, it is the court which has the authority and the jurisdiction to examine, on grievance being brought before it, to find out if the particular power or privilege that has been claimed or asserted by the legislature is one that was contemplated by the said constitutional provisions or, to put it simply, if it was such a power or privilege as can be said to have been vested in the House of Commons of the Parliament of United Kingdom as on the date of commencement of the Constitution of India so as to become available to the Indian legislatures.

64. The term 'privilege in law' is defined as immunity or an exemption from some duty, burden, attendance or liability conferred by special grant in derogation of common right. The term is derived from an expression 'privilegium' which means a law specially passed in favour of or against a particular person.

65. May, in his "Parliamentary Practice", has defined parliamentary privilege as "the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies of individuals". Thus, privilege, though not part of the law of the land, is to a certain extent an exemption from the ordinary law.

70. May [23rd edn., pp.78, 79, 83, 89, 90] describes the historical development of privileges as follows :-

"At the commencement of every Parliament it has been the custom for the Speaker, in the name, and on behalf of the Commons, to lay claim by humble petition to their ancient and undoubted rights and privileges; particularly to freedom of speech in debate, freedom from arrest, freedom of access to Her Majesty whenever occasion shall require; and that the most favourable construction should be placed upon all their proceedings.....

Freedom of Speech - The first claim in the Speaker's petition is for freedom of speech in debate. By the latter part of the fifteenth century, the Commons of England seems to have enjoyed an undefined right to freedom of speech, as a matter of tradition rather than by virtue of a privilege sought and obtained.....

FREEDOM FROM ARREST - The second of the Speaker's customary petitions on behalf of the Commons at the beginning of a Parliament is for freedom from arrest. The development of this privilege is in some ways linked to that of other privileges. Arrest was frequently the consequence of the unsuccessful assertion of freedom of speech, for example.....

FREEDOM OF ACCESS - The third of the Speaker's petitions is for freedom of access to Her Majesty whenever occasion shall require. This claim is medieval (probably fourteenth century) in origin, and in an earlier form seems to have been sought in respect of the Speaker himself and to have encompassed also access to the Upper House.....

FAVOURABLE CONSTRUCTION - The final petition which the speaker makes is that the most favourable construction should be placed upon all the House's proceedings.....

106. It is also necessary to take note of sub-section (4) of section 28 of Government of India Act, 1935 since it made the intention clear that for punitive action in certain matters the Legislature would have to go before a court. It provided as follows :-

"28. (3) Provision may be made by an Act of the Federal Legislature for the punishment, on conviction before a court, of persons who refuse to give evidence or produce documents before a committee of a Chamber when duly required by the Chairman of the Committee to do so :

Provided that any such Act shall have effect subject to such rules for regulating the attendance before such committees of persons who are, or have been, in the service of the Crown in India, and safeguarding confidential matter from disclosure as may be made by the Governor General exercising his individual judgment."

108. The Indian Independence Act 1947, which brought freedom from alien rule, made India a full-fledged Dominion of the Commonwealth of Nations. The Act conferred, through Section 6(2), sovereign legislative power on the Indian dominion abrogating the Imperial doctrine of Repugnancy in the following terms :-

"No law and no provision of any law made by the Legislature of either of the new Dominions (India, and Pakistan) shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act."

112. The concept of parliamentary privileges in India in its modern form is indeed one of graft, imported from England. The House of Commons having been accepted by the Constituent Assembly as the model of the legislature, the privileges of that House were transplanted into the draft Constitution through Articles 105 and 194.

113. Article 85 of the Draft Constitution, which corresponds to present Article 105, contained the following provision with respect to parliamentary privileges :-

"85.(1) Subject to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of any thing said or any vote given by him in Parliament or any Committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respect, the privileges and immunities of member of the Houses shall be such as may from time to time be defined by Parliament by law, and until so defined, of Commons of the Parliament of the United Kingdom at the commencement of this Constitution

(4) The provisions of clauses (1), (2), and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise take part in the proceedings of, a House of Parliament as they apply in relation to members of Parliament."

119. Article 169 of the Draft Constitution, which corresponds to present Article 194, contained similar provision with respect to privileges of the State Legislatures and came up for discussion before the Constituent Assembly on 3rd June, 1949. The speeches made on the occasion are available at pages 578-584 of the Constituent Assembly Debates (Volume 8).

138. The argument of availability of all the powers and privileges has been rejected in UP Assembly case with reference to illustrations of some powers claimed by the House of Commons as mentioned in May's Parliamentary Practice (pages 86 and 175 in 16th Edn.), but which cannot be claimed by the Indian legislatures, including the privilege of freedom of access which is exercised by the House of Commons as a body and through its Speaker "to have at all times the right to petition, counsel, or remonstrate with their Sovereign through their chosen representative and have a favourable construction placed on his words was justly regarded by the Commons as

fundamental privilege"; the privilege to pass acts of attainder and impeachments; and the privilege in regard to its own Constitution which is expressed in three ways, first by the order of new writs to fill vacancies that arise in the Commons in the course of a Parliament; secondly, by the trial of controverted elections; and thirdly, by determining the qualifications of its members in cases of doubt.

162. While it is true that the right to vote and be represented is integral to our democratic process, it must be remembered that it is not an absolute right. There are certain limitations to the right to vote and be represented. For example, a citizen cannot claim the right to vote and be represented by a person who is disqualified by law or the right to be represented by a candidate he votes for, even if he fails to win the election. Similarly, expulsion is another such provision. Expulsion is related to the conduct of the member that lowers the dignity of the House, which may not have been necessarily known at the time of election. It is not a capricious exercise of the House, but an action to protect its dignity before the people of the country. This is also an integral aspect of our democratic set-up. In our view, the power of expulsion is not contrary to a democratic process. It is rather part of the guarantee of a democratic process. Further, expulsion is not a decision by a single person. It is a decision taken by the representatives of the rest of the country. Finally, the power of expulsion does not bar a member from standing for re-election or the constituency from electing that member once again.

163. Thus, we hold that the power of expulsion does not violate the right of the constituency or any other democratic principles.

(iv) Fundamental rights of the member :

164. Lastly, it has been contended by the Petitioners that the power of expulsion violates the fundamental rights of the member. It was argued that the power of expulsion violates Article 19(1)(g), which guarantees the right to 'practise any profession, or to carry on any occupation, trade or business'. It was submitted that this right can only be curtailed by a law in the interest of general public and that producing the same result by a resolution of the House is impliedly barred. It was also contended that Article 21, which includes the right to livelihood was violated, since it can only be restricted by a 'procedure established by law'.

165. We are not impressed with any of these contentions of the petitioners. Even if it were to be assumed these rights apply, we do not believe that they could prevent reading the power of expulsion within Article 105(3).

166. First, it is to be remembered that 105(3) is itself a constitutional provision and it is necessary that we must construe the provisions in such a way that a conflict with other provisions is avoided. We are of the view that where there is a specific constitutional provision as may have the effect of curtailing these fundamental rights if found applicable, there is no need for a law to be passed in terms of Article 19(6). For example, Article 102 relating to disqualifications provides that members who are of unsound mind or who are undischarged insolvents as declared by competent courts are disqualified. These grounds are not mentioned in the Representation of

the People Act, 1951. Though this provision would have the effect of curtailing the rights under Article 19(1)(g), we doubt that it can ever be contended that a specific law made in public interest is required. Similarly, if Article 105(3) provides for the power of expulsion (though not so expressly mentioned), it cannot be said that a specific law in public interest is required. Simply because the Parliament is given the power to make law on this subject is no reason to say that a law has to be mandatorily passed, when the Constitution itself provides that all the powers of the House of Commons vest until such a law is made. Thus, we find that Article 19(1)(g) cannot prevent the reading of power of expulsion under Article 105(3).

167. Finally, as far as Article 21 is concerned, it was submitted that the 'procedure established by law' includes the rules relating to the Privileges Committee, etc., which were not followed and thus the right was violated. In our view, this does not prevent the reading of the power to expel in Article 105(3). It is not possible to say that because a 'procedure established by law' is required, it will prevent the 'power of expulsion altogether and that every act of expulsion will be contrary to the procedure established by law. Whether such a claim is maintainable upon specific facts of each case is something that will have to be considered when the question of judicial review is taken up. At this stage, however, a blanket ban on the power of expulsion based on Article 21 cannot be read in the Constitutional provisions. This is an issue that may have a bearing on the legality of the order. But, it cannot negate the power of expulsion.

168. In the light of the above discussion, we hold that the power of expulsion does not come into conflict with any of the constitutional provisions and thus cannot be negated on this basis.

292. It is axiomatic to state that expulsion is always in respect of a member. At the same time, it needs to be borne in mind that a member is part of the House due to which his or her conduct always has a direct bearing upon the perception of the House. Any legislative body must act through its members and the connection between the conduct of the members and the perception of the House is strong. We, therefore, conclude that even if the Parliament had only the limited remedial power to punish for contempt, the power to expel would be well within the limits of such remedial contempt power.

293. We are unable to find any reason as to why legislatures established in India by the Constitution, including the Parliament under Article 105(3), should be denied the claim to the power of expulsion arising out of remedial power of contempt.²⁹⁵ In view of our interpretation of Article 105(3) of the Constitution, it is not essential to determine the question whether 'necessity' as an independent source of power, apart from the power of the House to punish for contempt, by expulsion of a member, is available or not. We may note that number of judgments were cited in support of the respective view points.

Parliamentary privileges vis-'-vis Fundamental Rights

332. Before considering judicial review in Indian context, it is appropriate to first examine this aspect. In the face of arguments of illegalities in the procedure and the breach of fundamental rights, it has been strongly contended on behalf of the Union of India that Parliamentary

privileges cannot be decided against the touchstone of other constitutional provisions, in general, and fundamental rights, in particular.

333. In this context, again it is necessary to seek enlightenment from the judgments in the two cases of Pandit Sharma as also the UP Assembly case where breach of fundamental rights had been alleged by the persons facing the wrong end of the stick.

334. In the case of Pandit Sharma (I), one of the two principal points canvassed before the Court revolved around the question as to whether the privilege of the Legislative Assembly under Article 194 (3) prevails over the fundamental rights of the petitioner (non-member in that case) under Article 19(1)(a). This contention was sought to be supported on behalf of the petitioner through a variety of arguments including the plea that though clause (3) of Article 194 had not, in terms, been made "subject to the provision of the Constitution" it would not necessarily mean that it was not so subject, and that the several clauses of Article 194, or Article 105, should not be treated as distinct and separate provisions but should be read as a whole and that, so read, all the clauses should be taken as subject to the provisions of the Constitution which would include Article 19(1)(a). It was also argued that Article 194 (1), like Article 105 (1), in reality operates as an abridgement of the fundamental rights of freedom of speech conferred by Article 19(1) (a) when exercised in Parliament or the State Legislature, as the case may be, but Article 194 (3) does not purport to be an exception to Article 19(1) (a). It was then submitted that Article 19 enunciates a transcendental principle and confers on the citizens of India indefeasible fundamental rights of a permanent nature while the second part of Article 194 (3) was of the nature of a transitory provision which, from its very nature, could not override the fundamental rights. Further, the contention raised was that if in pursuance of Article 105 (3), Parliament were to make a law under entry 74 in List I to the Seventh Schedule defining the powers, privileges and immunities of the Houses of Parliament and if the powers, privileges and immunities so defined were repugnant to the fundamental rights of the citizens, such law will, under Article 13, to the extent of such repugnancy be void and this being the intention of the Constitution-makers and there being no apparent indication of a different intention in the latter part of the same clause, the powers and privileges of the House of Commons conferred by the latter part of clause (3) must also be taken as subject to the fundamental rights.

335. The arguments of the petitioner to above effect, however, did not find favour with the Court. It was, inter alia, held that the subject matter of each of the four clauses of Article 194 (which more or less correspond to Article 105) was different. While clause (1) had been expressly made subject to the provisions of the Constitution, the remaining clauses had not been stated to be so subject, indicating that the Constitution makers did not intend clauses (2) to (4) to be subject to the provisions of the Constitution. It was ruled that the freedom of speech referred to in clause (1) was different from the freedom of speech and expression guaranteed under Article 19(1) (a) and the same could not be cut down in any way by any law contemplated by Article 19 (2). While agreeing with the proposition that a law made by Parliament in pursuance of the earlier part of Article 105 (3) would not be a law made in exercise of constituent power but would be one made

in exercise of ordinary legislative powers under Article 246 read with the relevant entries of the Seventh Schedule and that consequently if such a law takes away or abridges any of the fundamental rights, it would contravene the peremptory provisions of Article 13 (2) and would be void to the extent of such contravention, it was observed that this did not lead to the conclusion that if the powers, privileges or immunities conferred by the latter part of the said Article are repugnant to the fundamental rights they must also be void to the extent of repugnancy. It was pointed out that it "must not be overlooked that the provisions of Article 105 (3) and Article 194 (3) are constitutional laws and not ordinary laws made by Parliament or the State Legislatures and that, therefore, they are as supreme as the provisions of Part III". Interestingly, it was also observed in the context of amenability of a law made in pursuance of first parts of Article 105(3) and Article 194(3) to the provisions of Article 13(2) that "it may well be that that is perhaps the reason why our Parliament and the State Legislatures have not made any law defining the powers, privileges and immunities....."

336. On the basis of conclusions so reached, this Court reconciled the conflict between fundamental right of speech and expression under Article 19(1)(a) on one hand and the powers and privileges of the Legislative Assembly under Article 194(3) on the other by holding thus :-

"The principle of harmonious construction must be adopted and so construed, the provisions of Art. 19(1)(a), which are general, must yield to Art. 194(1) and the latter part of its Cl. (3) which are special"

337. Pandit Sharma had also invoked Article 21 to contend that the proceedings before the Committee of Privileges of the Legislative Assembly threatened to deprive him of personal liberty otherwise than in accordance with the procedure established by law. This Court, however, found that the Legislative Assembly had framed rules of procedure under Article 208 and, therefore, if the petitioner was eventually deprived of his personal liberty as a result of the proceedings before the Committee of Privileges, such deprivation would be in accordance with the procedure established by law and, therefore, a complaint of breach of fundamental rights under Article 21 could not be made. The Court then proceeded to examine the case to test the contention that the procedure adopted by the Legislative Assembly was not in accordance with the standing orders laying down the rules of procedure governing the conduct of its business made in exercise of powers under Article 208.

338. It is not possible to overlook developments in law post Pandit Sharma, including UP Assembly case.

339. In the course of addressing the issues raised in the case of UP Assembly, this court had the occasion to examine both parts of clause (3) of Article 194. Article 194 (1) provides "freedom of speech" in the legislature, though subject to provision of the Constitution and to the rules and standing orders regulating the procedure of the House in question. Article 194 (2) creates an absolute immunity, in favour of members of the legislature, against liability to any proceedings in any court in respect of anything said or any vote given by them in the legislative body or any

committees thereof. The first part of the clause (3) empowers the legislature to define "by law" the powers, privileges and immunities of the House, its members and the committees thereof, in respect other than those covered by the earlier two clauses of Article 194.

"Therefore, we do not think it would be right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must always yield to the former. The majority decision, therefore, must be taken to have settled that Article 19(1)(a) would not apply, and Article 21 would."

357. The issue of jurisdiction was one of the principal concerns of this court in the case of UP Assembly, under the cover of which the Uttar Pradesh Legislative Assembly had asserted its right to commit Keshav Singh for contempt and later had taken umbrage against the entertainment of a petition for habeas corpus in the High Court under Article 226. The main controversy in that case squarely lay in the question as to whether the legislature was "the sole and exclusive judge" of the issue of contempt and of the punishment that deserved to be awarded against the contemnor, as against the jurisdiction claimed by the High Court to entertain a writ challenging the validity of the detention of the alleging contemnor.

359. The question of extent of judicial review of Parliamentary matters has to be resolved with reference to the provision contained in Article 122 (1) that corresponds to Article 212 referred to in Pandit Sharma (II). On a plain reading, Article 122 (1) prohibits "the validity of any proceedings in Parliament" from being "called in question" in a Court merely on the ground of "irregularity of procedure". In other words, the procedural irregularities cannot be used by the Court to undo or vitiate what happens within the four walls of the legislature. But then, 'procedural irregularity' stands in stark contrast to 'substantive illegality' which cannot be found included in the former. We are of the considered view that this specific provision with regard to check on the role of the judicial organ vis-a-vis proceedings in Parliament uses language which is neither vague nor ambiguous and, therefore, must be treated as the constitutional mandate on the subject, rendering unnecessary search for an answer elsewhere or invocation of principles of harmonious construction.

361. The above indeed was a categorical clarification that Article 122 does contemplate control by the Courts over legality of Parliamentary proceedings. What the provision intended to prohibit thus were cases of interference with internal Parliamentary proceedings on the ground of mere procedural irregularity.... this Court in the case of UP Assembly concluded thus:

40. In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. It is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because Article 368 of the Constitution itself makes a provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the said article. That shows that even when the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself.

Legislators, Ministers, and Judges all take oath of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England cannot be claimed by any legislature in India in the literal absolute sense."

365. The touchstone upon which Parliamentary actions within the four -walls of the Legislature were examined was both the constitutional as well as substantive law. The proceedings which may be tainted on account of substantive illegality or unconstitutionality, as opposed to those suffering from mere irregularity thus cannot be held protected from judicial scrutiny by Article 122 (1) inasmuch as the broad principle laid down in Bradlaugh acknowledging exclusive cognizance of the Legislature in England has no application to the system of governance provided by our Constitution wherein no organ is sovereign and each organ is amenable to constitutional checks and controls, in which scheme of things, this Court is entrusted with the duty to be watchdog of and guarantor of the Constitution.

371. Paragraph 7 of Tenth Schedule contains an express bar of jurisdiction of courts. It reads as under :-

"Bar of jurisdiction of courts.- Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."

373. The following observations in the judgment in KihotoHollohan need to be quoted in extenso :-

101. In the operative conclusions we pronounced on November 12, 1991 we indicated in clauses (G) and (H) therein that judicial review in the area is limited in the manner indicated. If the adjudicatory authority is a tribunal, as indeed we have held it to be, why, then, should its scope be so limited ? The finality clause in Paragraph 6 does not completely exclude the jurisdiction of the courts under Articles 136, 226 and 227 of the Constitution. But it does have the effect of limiting the scope of the jurisdiction. The principle that is applied by the courts is that in spite of a finality clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority....." (emphasis supplied)

375. In our considered view, the principle that is to be taken note of in the aforementioned series of cases is that notwithstanding the existence of finality clauses, this court exercised its jurisdiction of judicial review whenever and wherever breach of fundamental rights was alleged. President of India while determining the question of age of a Judge of a High Court under Article 217 (3), or the President of India (or the Governor, as the case may be) while taking a decision under Article 311 (3) to dispense with the ordinarily mandatory inquiry before dismissal or removal of a civil servant, or for that matter the Speaker (or the Chairman, as the case may be) deciding the question of disqualification under Para 6 of the Tenth Schedule may be acting as

authorities entrusted with such jurisdiction under the constitutional provisions. Yet, the manner in which they exercised the said jurisdiction is not wholly beyond the judicial scrutiny. In the case of Speaker exercising jurisdiction under the Tenth Schedule, the proceedings before him are declared by Para 6 (2) of the Tenth Schedule to be proceedings in Parliament within the meaning of Article 122. Yet, the said jurisdiction was not accepted as non-justiciable. In this view, we are unable to subscribe to the proposition that there is absolute immunity available to the Parliamentary proceedings relating to Article 105(3). It is a different matter as to what parameters, if any, should regulate or control the judicial scrutiny, of such proceedings.

Parameters for judicial review Re : Exercise of Parliamentary Privileges

397. We are of the view that the manner of exercise of the power or privilege by Parliament is immune from judicial scrutiny only to the extent indicated in Article 122(1), that is to say the Court will decline to interfere if the grievance brought before it is restricted to allegations of "irregularity of procedure". But in case gross illegality or violation of constitutional provisions is shown, the judicial review will not be inhibited in any manner by Article 122, or for that matter by Article 105. If one was to accept what was alleged while rescinding the resolution of expulsion by the 7th Lok Sabha with conclusion that it was "inconsistent with and violative of the well-accepted principles of the law of Parliamentary privilege and the basic safeguards assured to all enshrined in the Constitution", it would be partisan action in the name of exercise of privilege. We are not going into this issue but citing the incident as an illustration.

398. Having concluded that this Court has the jurisdiction to examine the procedure adopted to find if it is vitiated by any illegality or unconstitutionality, we must now examine the need for circumspection in judicial review of such matters as concern the powers and privileges of such august body as the Parliament.

Summary of the Principles relating to Parameter of Judicial Review in relation to exercise of Parliamentary Provisions

431. We may summarize the principles that can be culled out from the above discussion. They are :-

- a. Parliament is a co-ordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny;
- b. Constitutional system of government abhors absolutism and it being the cardinal principle of our Constitution that no one, howsoever lofty, can claim to be the sole judge of the power given under the Constitution, mere co-ordinate constitutional status, or even the status of an exalted constitutional functionaries, does not disentitle this Court from exercising its jurisdiction of judicial review of action which part-take the character of judicial or quasi-judicial decision;

- c. The expediency and necessity of exercise of power or privilege by the legislature are for the determination of the legislative authority and not for determination by the courts;
- d. The judicial review of the manner of exercise of power of contempt or privilege does not mean the said jurisdiction is being usurped by the judiciary;
- e. Having regard to the importance of the functions discharged by the legislature under the Constitution and the majesty and grandeur of its task, there would always be an initial presumption that the powers, privileges etc have been regularly and reasonably exercised, not violating the law or the Constitutional provisions, this presumption being a rebuttable one;
- f. The fact that Parliament is an august body of co-ordinate constitutional position does not mean that there can be no judicially manageable standards to review exercise of its power;
- g. While the area of powers, privileges and immunities of the legislature being exceptional and extraordinary its acts, particularly relating to exercise thereof, ought not to be tested on the traditional parameters of judicial review in the same manner as an ordinary administrative action would be tested, and the Court would confine itself to the acknowledged parameters of judicial review and within the judicially discoverable and manageable standards, there is no foundation to the plea that a legislative body cannot be attributed jurisdictional error;
- h. The Judiciary is not prevented from scrutinizing the validity of the action of the legislature trespassing on the fundamental rights conferred on the citizens;
- i. The broad contention that the exercise of privileges by legislatures cannot be decided against the touchstone of fundamental rights or the constitutional provisions is not correct;
- j. If a citizen, whether a non-member or a member of the Legislature, complains that his fundamental rights under Article 20 or 21 had been contravened, it is the duty of this Court to examine the merits of the said contention, especially when the impugned action entails civil consequences;
- k. There is no basis to claim of bar of exclusive cognizance or absolute immunity to the Parliamentary proceedings in Article 105(3) of the Constitution;
- l. The manner of enforcement of privilege by the legislature can result in judicial scrutiny, though subject to the restrictions contained in the other Constitutional provisions, for example Article 122 or 212;
- m. Articles 122 (1) and Article 212 (1) displace the broad doctrine of exclusive cognizance of the legislature in England of exclusive cognizance of internal proceedings of the House rendering irrelevant the case law that emanated from courts in that jurisdiction; inasmuch as the same has no application to the system of governance provided by Constitution of India
- n. Article 122 (1) and Article 212(1) prohibit the validity of any proceedings in legislature from being called in question in a court merely on the ground of irregularity of procedure;

- o. The truth or correctness of the material will not be questioned by the court nor will it go into the adequacy of the material or substitute its opinion for that of the legislature;
- p. Ordinarily, the legislature, as a body, cannot be accused of having acted for an extraneous purpose or being actuated by caprice or mala fide intention, and the court will not lightly presume abuse or misuse, giving allowance for the fact that the legislature is the best judge of such matters, but if in a given case, the allegations to such effect are made, the Court may examine the validity of the said contention, the onus on the person alleging being extremely heavy
- q. The rules which the legislature has to make for regulating its procedure and the conduct of its business have to be subject to the provisions of the Constitution;
- r. Mere availability of the Rules of Procedure and Conduct of Business, as made by the legislature in exercise of enabling powers under the Constitution, is never a guarantee that they have been duly followed;
- s. The proceedings which may be tainted on account of substantive or gross illegality or unconstitutionality are not protected from judicial scrutiny;
- t. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action;
- u. An ouster clause attaching finality to a determination does ordinarily oust the power of the court to review the decision but not on grounds of lack of jurisdiction or it being a nullity for some reason such as gross illegality, irrationality, violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity;

436. In our considered view, conclusions cannot be drawn so as to attribute motive to the Houses of Parliament by reading statements out of the context. The relevant part of the speech of the Hon'ble Speaker made on the floor of the House on 12th December, 2005 has been extracted in the counter affidavit filed on behalf of the Union of India. It is pertinent to note that before stating that nobody would be spared, the Speaker had exhorted the members of the House to rise to the occasion and to see to it that such an event does not occur ever in future and commended that "if anybody is guilty, he should be punished". It is clear that when he stated that nobody would be spared he was not immediately passing a judgment that the petitioners were guilty. He was only giving vent to his feeling on the subject of the proper course of action in the event of inquiry confirming the facts that had been projected in the telecast. The finding of guilt would come later. The fact that he had constituted an Inquiry Committee with members drawn also from parties in opposition rather goes to show that the resolve at that stage was to find the truth.

437. In these circumstances, we are unable to accept the allegation of malafide on the ground that decision had already been taken to expel them. Even otherwise, it cannot be ignored that the dissent within the respective Committees of the two Houses essentially pertained to the procedure adopted. Nothing less and nothing more. Further, the reports of the Committees having been adopted by the respective chambers of Parliament, the decision of the Committee got merged into

that of the Legislative chamber which being collective body, it is difficult to attribute motive thereto, in particular, in the face of the fact that the resolutions in question were virtually unanimous as there was no demand at any stage from any quarter for division of votes.

439. We are unable to subscribe to this reasoning so as to find fault with the action that has been impugned before us. We are not concerned here with what kind of gains, financial or otherwise, those persons made as had conceived or engineered the sting operations leading to the material being brought into public domain through electronic media. This was not an area of anxiety even for the Houses of Parliament when they set about probing the matter resulting ultimately in expulsions. The sole question that was required to be addressed by the Inquiry Committees and the Legislative chambers revolved around the issue of misconduct attributed to the individual members bringing the House in disrepute. We, therefore, reject the above contention reiterating what we have already concluded, namely, that the expediency and necessity of exercise of such a power by the Legislature is for determination by the latter and not by the Courts.

447. We outrightly reject the argument of denial of reasonable opportunity and also that proceedings were concluded in a hurry. It has become almost fashionable to raise the banner of "Justice delayed is justice denied" in case of protracted proceedings and to argue "Justice hurried is justice buried" if the results are quick. We cannot draw inferences from the amount of time taken by the Committees that inquired the matters as no specific time is or can be prescribed. Further such matters are required to be dealt with utmost expedition subject to grant of reasonable opportunity, which was granted to the petitioners.

449. We agree with the submissions of the learned counsel for Union of India that the Inquiry Committee in the face of the refusal on the part of the concerned members was fully justified in not giving any credence to the objections that the video-clippings were doctored or morphed. The Committee in these circumstances could not be expected but to proceed to draw conclusions on the basis of the available material.

450. The reports of the Inquiry Committee of Lok Sabha and the Committee on Ethics of Rajya Sabha indicate that both of the said Committees had called for explanations from each of the Members in question and had given due consideration to the same. The submissions of the learned counsel for Union of India that the proceedings of the respective Committees were open to one and all, including these petitioners who actually participated in the proceedings could not be refuted. Therefore, it is not permissible to the petitioners to contend that evidence had been taken behind their back. The reports further show that the Committees had taken care not to proceed on the edited versions of the video recordings. Each of them insisted and procured the raw video-footage of the different sting operations and drew conclusions after viewing the same. As pointed out by the learned counsel for Union of India, the evidence contained in the video recordings indicating demand or acceptance of money was further corroborated in two cases by the admissions made by the two Members of Rajya Sabha. Dr. Chhatrapal Singh Lodha had sought to attribute the receipt of money to a different transaction connected with some organization he was heading. But this explanation was not believed by the Committee on Ethics

that unanimously found his complicity in unethical behaviour on account of acceptance of money for tabling questions in Rajya Sabha. Dr. Swami Sakshiji Maharaj, on the other hand, went to the extent of expressing his regrets and displaying a feeling of shame for his conduct even before the Committee on Ethics.

453. In these proceedings, this Court cannot not allow the truthfulness or correctness of the material to be questioned or permit the petitioners to go into the adequacy of the material or substitute its own opinion for that of the Legislature. Assuming some material on which the action is taken is found to be irrelevant, this Court shall not interfere so long as there is some relevant material sustaining the action. We find this material was available in the form of raw footage of video recordings, the nature of contents whereof are reflected in the Inquiry reports and on which subject the petitioners have not raised any issue of fact.

454. On perusal of the Inquiry reports, we find that there is no violation of any of the fundamental rights in general and Articles 14, 20 or 21 in particular. Proper opportunity to explain and defend having been given to each of the petitioners, the procedure adopted by the two Houses of Parliament cannot be held to be suffering from any illegality, irrationality, unconstitutionality, violation of rules of natural justice or perversity. It cannot be held that the petitioners were not given a fair deal.

455. Before concluding, we place on record our appreciation for able assistance rendered by learned counsel for the parties in the matter.

456. In view of above, we find no substance in the pleas of the petitioners. Resultantly, all the Petitions and Transferred Cases questioning the validity of the decisions of expulsion of the petitioners from the respective Houses of Parliament, being devoid of merits are dismissed.

* * * * *

D.C. Wadhwa v. State of Bihar

(1987) 1 SCC 378

(P.N. Bhagwati, C.J. and Rangnath Misra, G.L. Oza, M.M. Dutt and K.N.Singh, JJ.)

[Repeated promulgation of the same Ordinance(s) was a fraud on the Constitution]

The petitions under Article 32 of the Constitution raised the question relating to the power of the Governor under Article 213 of the Constitution to repromulgate ordinances from time to time without getting them replaced by Acts of the legislature. The question was: Can the Governor go on repromulgating Ordinances for an indefinite period of time and thus take over to himself the power of the legislature to legislate though that power was conferred on him under Article 213 only for the purpose of enabling him to take immediate action at a time when the legislative assembly of the State was not in session or when in a case where there was a Legislative Council in the State, both Houses of legislature were not in Session

The writ petitions were filed by four petitioners challenging the practice of the State of Bihar in promulgating and repromulgating Ordinances on a massive scale and in particular they challenged the constitutional validity of three different Ordinances issued by the Governor of Bihar, namely, (i) Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983, (ii) The Bihar Intermediate Education Council Third Ordinance, 1983, and (iii) The Bihar Bricks Supply (Control) Third Ordinance, 1983.

P.N. BHAGWATI, C.J.: 2. It was contended on behalf of the respondents that the petitioners had no locus-standi to maintain this writ petition since out of the three Ordinances challenged on behalf of the petitioners, two of them, namely, Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 and the Bihar Bricks Supply (Control) Third Ordinance, 1983 had already lapsed and their provisions were enacted into Acts of the legislature and so far as the third Ordinance, namely, the Bihar Intermediate Education Council Third Ordinance was concerned, a legislative proposal was already introduced for enacting its provisions into an Act. The respondents also contended that the petitioners are not entitled to challenge the practice prevalent in the State of Bihar of repromulgating ordinances from time to time since they were merely outsiders who had no legal interest to challenge the validity of this practice. We do not think this preliminary objection raised on behalf of the respondents is well founded. It is undoubtedly true that the provisions of two out of the three Ordinances challenged in these writ petitions were enacted into Acts of the legislature but that happened only during the pendency of these writ petitions and at the date when these writ petitions were filed, these two Ordinances were very much in operation and affected the interest of Petitioners 2 and 4 respectively. Moreover, the third Ordinance, namely, the Bihar Intermediate Education Council Third Ordinance is still in operation though a bill incorporating the provisions of this Ordinance is pending consideration before the State Legislature and it has been referred to a Select Committee and the right of Petitioner 3 to pursue a particular course of study is vitally affected by the provisions contained in that Ordinance. Besides Petitioner 1 is a Professor of Political Science and is deeply interested in ensuring proper implementation of the constitutional provisions. He has sufficient interest to maintain a petition under Article 32 even as a member of the public because it is a right of

every citizen to insist that he should be governed by laws made in accordance with the Constitution and not laws made by the executive in violation of the constitutional provisions. Of course, if any particular ordinance was being challenged by Petitioner 1 he may not have the locus standi to challenge it simply as a member of the public unless some legal right or interest of his is violated or threatened by such ordinance, but here what Petitioner 1 as a member of the public is complaining of is a practice which is being followed by the State of Bihar of repromulgating the ordinances from time to time without their provisions being enacted into Acts of the legislature. It is clearly for vindication of public interest that Petitioner 1 has filed these writ petitions and he must therefore be held to be entitled to maintain his writ petitions. The rule of law constitutes the core of our Constitution and it is the essence of the rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitations and if any practice is adopted by the executive which is in flagrant and systematic violation of its constitutional limitations, Petitioner 1 as a member of the public would have sufficient interest to challenge such practice by filing a writ petition and it would be the constitutional duty of this Court to entertain the writ petition and adjudicate upon the validity of such practice. We must therefore reject the preliminary contention raised on behalf of the respondents challenging the locus of the petitioners to maintain these writ petitions.

4. We shall now proceed to state how the Governor in the State of Bihar has been indulging in the practice of repromulgating the ordinances from time to time so as to keep them alive for an indefinite period of time. Petitioner 1 carried out a thorough and detailed research in the matter of repromulgation of ordinances by the Governor of Bihar from time to time and the result of this research was compiled by him and published in a book entitled ***Repromulgation of Ordinances : Fraud on the Constitution of India***. Some of the relevant extracts from this book have been annexed to the writ petition indicating the number of ordinances repromulgated repeatedly by the Governor of Bihar. It is clear on a perusal of these extracts that the Governor of Bihar promulgated 256 ordinances between 1967 and 1981 and all these ordinances were kept alive for periods ranging between one to 14 years by repromulgation from time to time. Out of these 256 ordinances 69 were repromulgated several times and kept alive with the prior permission of the President of India. The enormity of the situation would appear to be startling if we have a look at some of the ordinances which were allowed to continue in force by the methodology of repromulgation. It will thus be seen that the power to promulgate ordinances was used by the Government of Bihar on a large scale and after the session of the State Legislature was prorogued, the same ordinances which had ceased to operate were repromulgated containing substantially the same provisions almost in a routine manner. This would be clear from the fact that on August 26, 1973 the Governor of Bihar repromulgated 54 ordinances with the same provisions and on January 17, 1973, 49 ordinances were repromulgated by the Governor of Bihar containing substantially the same provisions and again on April 27, 1974, 7 ordinances were repromulgated and on April 29, 1974, 9 ordinances were repromulgated with substantially the same provisions. Then again on July 23, 1974, 51 ordinances were repromulgated which included the selfsame ordinances which had been repromulgated on April 27 and 29, 1974. On March 18, 1979, 52 ordinances were repromulgated while on August 18, 1979, 51 ordinances were repromulgated containing substantially the same provisions. 49 ordinances were repromulgated on April 28, 1979 and

on August 18, 1979, 51 ordinances were repromulgated. This exercise of making mass repromulgation of ordinances on the prorogation of the session of the State legislature continued unabated and on August 11, 1980, 49 ordinances were repromulgated while on January 19, 1981, the number of ordinances repromulgated was as high as 53. It may be pointed out that the three ordinances challenged in these writ petitions also suffered the same process of repromulgation from time to time. The Bihar Forest Produce (Regulation of Trade) Third Ordinance was first promulgated in 1977 and after its expiry, it was repromulgated several times without it being converted into an Act of the State Legislature and it continued to be in force until it was replaced by Bihar Act 12 of 1984 on May 17, 1984. So far as the Bihar Intermediate Education Council Third Ordinance is concerned it was initially promulgated in 1982 and after its expiry, it was again repromulgated by the Governor of Bihar four times with the same provisions and it was ultimately allowed to lapse on June 6, 1985, but then the Bihar Intermediate Education Council Ordinance, 1985 was promulgated which contained almost the same provisions as those contained in the Bihar Intermediate Education Council Third Ordinance. Similarly the Bihar Bricks Supply (Control) Third Ordinance was initially promulgated in 1979 and after its expiry it was repromulgated by the Governor of Bihar from time to time and continued to be in force until May 17, 1984 when it was replaced by Bihar Act 13 of 1984. Thus the Bihar Forest Produce (Regulation of Trade) Third Ordinance continued to be in force for a period of more than six years, the Bihar Intermediate Education Council Third Ordinance remained in force for a period of more than one year, while the Bihar Bricks Supply (Control) Third Ordinance was continued in force for a period of more than five years.

5. The Government of Bihar, it seems, made it a settled practice to go on repromulgating the ordinances from time to time and this was done methodologically and with a sense of deliberateness. Immediately at the conclusion of each session of the State legislature, a circular letter used to be sent by the Special Secretary in the Department of Parliamentary Affairs to all the Commissioners, Secretaries, Special Secretaries, Additional Secretaries and all Heads of Departments intimating to them that the session of the legislature had been got prorogued and that under Article 213 clause (2)(a) of the Constitution all the Ordinances would cease to be in force after six weeks of the date of reassembly of the legislature and that they should therefore get in touch with the Law Department and immediate action should be initiated to get "all the concerned ordinances repromulgated", so that all those ordinances are positively repromulgated before the date of their expiry. This circular letter also used to advise the officers that if the old ordinances were repromulgated in their original form without any amendment, the approval of the Council of Ministers would not be necessary. The petitioners placed before the court a copy of one such circular letter dated July 29, 1981 and it described the subject of the communication as "regarding repromulgation of ordinances". It would be profitable to reproduce this circular letter dated July 29, 1981 as it indicates the routine manner in which the ordinances were repromulgated by the Governor of Bihar:

**LETTER NO. PA/MISC. 1040/80-872 GOVERNMENT OF BIHAR
DEPARTMENT OF PARLIAMENTARY AFFAIRS**

Dated July 29, 1981

Subject: Regarding repromulgation of ordinances

From: Basant Kumar Dubey, Special Secretary to the Govt.

To: All Commissioners and Secretaries; All Special Secretaries; All Additional Secretaries; All Heads of Departments.

I am directed to say that the budget session of the legislature (June-July 1981) has been got prorogued after the completion of the business of both the houses on July 28, 1981. Under the provisions of Article 213(2)(a) of the Constitution all the ordinances cease to be in force after six weeks of the date of the reassembly of the legislature. This time the session of the Legislative Assembly has begun on June 29, 1981 and that of the Legislative Council on July 1, 1981. Therefore from July 1, 1981, six weeks, that is, 42 days would be completed on August 11, 1981 and if they are not repromulgated before the aforesaid date, then all the ordinances will cease to be in force after August 11, 1981. It is, therefore, requested that the Law Department may be contacted and immediate action be initiated to get all the concerned ordinances repromulgated so that they are definitely repromulgated before August 11, 1981.

If the old ordinances are repromulgated in their original form without any amendment, then the approval of the Council of Ministers is not necessary.

This should be given the topmost priority and necessary action should be taken immediately”.

This circular letter clearly shows beyond doubt that the repromulgation of the ordinances was done on a massive scale in a routine manner without even caring to get the ordinances replaced by Acts of the legislature or considering whether the circumstances existed which rendered it necessary for the Governor to take immediate action by way of repromulgation of the ordinances. The Government seemed to proceed on the basis that it was not necessary to introduce any legislation in the legislature but that the law could be continued to be made by the Government by having the ordinances repromulgated by the Governor from time to time. The question is whether this practice followed by the Government of Bihar could be justified as representing legitimate exercise of power of promulgating ordinances conferred on the Governor under Article 213 of the Constitution.

6. The determination of this question depends on the true interpretation of Article 213 which confers power on the Governor of a State to promulgate ordinances.

The power conferred on the Governor to issue ordinances is in the nature of an emergency power which is vested in the Governor for taking immediate action where such action may become necessary at a time when the legislature is not in session. The primary law making authority under the Constitution is the legislature and not the executive but it is possible that when the legislature is not in session circumstances may arise which render it necessary, to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate ordinances. But every ordinance promulgated by the Governor must be placed before the legislature and it would cease to operate at the expiration of six weeks from the reassembly of the legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly

and agreed to by the Legislative Council, if any. The object of this provision is that since the power conferred on the Governor to issue ordinances is an emergent power exercisable when the legislature is not in session, an ordinance promulgated by the Governor to deal with a situation which requires immediate action and which cannot wait until the legislature reassembles, must necessarily have a limited life. Since Article 174 enjoins that the legislature shall meet at least twice in a year but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session and an ordinance made by the Governor must cease to operate at the expiration of six weeks from the reassembly of the legislature, it is obvious that the maximum life of an ordinance cannot exceed seven-and-a-half months unless it is replaced by an Act of the legislature or disapproved by the resolution of the legislature before the expiry of that period. The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be “perverted to serve political ends”. It is contrary to all democratic norms that the executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time. That is why it is provided that the ordinance shall cease to operate on the expiration of six weeks from the date of assembling of the legislature.

The Constitution-makers expected that if the provisions of the ordinance are to be continued in force, this time should be sufficient for the legislature to pass the necessary Act. But if within this time the legislature does not pass such an Act, the ordinance must come to an end. The executive cannot continue the provisions of the ordinance in force without going to the legislature. 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 to the voice of the legislature, it would be nothing short of usurpation by the executive of the law-making function of the legislature. The executive cannot by taking resort to an emergency power exercisable 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 laws made by the executive. The Government cannot bypass the legislature and without enacting the provisions of the ordinance into an Act of the legislature, re-promulgate the ordinance as soon as the legislature is prorogued. Of course, there may be a situation where it may not be possible for the government to introduce and push through in the legislature a Bill containing the same provisions as in the ordinance, because the legislature may have too much legislative business in a particular session or the time at the disposal of the legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the ordinance. Where such is the case, re-promulgation of the ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the executive to continue an ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of re-promulgation. 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 adoption of any subterfuge. That would be clearly a fraud on the constitutional provision.

7. Shri Lal Narain Sinha, appearing on behalf of the State of Bihar urged that the court is not entitled to examine whether the conditions precedent for the exercise of the power of the Governor under Article 213 existed or not, for the purpose of determining the validity of an ordinance. It is true that, according to the decisions of the Privy Council and this Court, the court cannot examine the question of satisfaction of the Governor in issuing an ordinance, but the question in the present case does not raise any controversy in regard to the satisfaction of the Governor. The only question is whether the Governor has power to repromulgate the same ordinance successively without bringing it before the legislature. That clearly the Governor cannot do. He cannot assume legislative function in excess of the strictly defined limits set out in the Constitution because otherwise he would be usurping a function which does not belong to him. It is significant to note that so far as the President of India is concerned, though he has the same power of issuing an ordinance under Article 123 as the Governor has under Article 213, there is not a single instance in which the President has, since 1950 till today, repromulgated any ordinance after its expiry. The startling facts which we have narrated above clearly show that the executive in Bihar has almost taken over the role of the legislature in making laws, not for a limited period, but for years together in disregard of the constitutional limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid. We hope and trust that such practice shall not be continued in the future and that whenever an ordinance is made and the Government wishes to continue the provisions of the ordinance in force after the assembling of the legislature, a Bill will be brought before the legislature for enacting those provisions into an Act. There must not be ordinance-Raj in the country.

8. We must accordingly strike down the Bihar Intermediate Education Council Ordinance, 1985 which is still in operation as unconstitutional and void.

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Krishna Kumar Singh v. State of Bihar

(2017) 3 SCC 1

*(Justice D Y Chandrachud, T.S. Thakur, Madan B. Lokur, S.A. Bobde, A.K Goel, U.R Lalit, Nageswara Rao)**[A 7-judge Constitution bench has held that unfettered re-promulgation of ordinances is not permissible by the Constitution]***FACTS OF THE CASE:**

In this case there were series of Ordinances passed by the Govt. of Bihar, through the state sought to take over 429 Sanskrit Schools, transferring the teachers and all employees of the school to state government. In the year 1989, the government issued the first Ordinance which was then followed by five successive ordinances. On 13 August 1990 the Governor promulgated a fresh Ordinance. This Ordinance contained in clauses 3 and 4, provisions which were materially different from those of the first three Ordinances.

Clauses 3 and 4 provided as follows:- 3 Taking over of management and control of non- government Sanskrit schools by State Government.(1) With effect from the date of enforcement of this Ordinance, 429 Sanskrit schools mentioned in Schedule 1 shall vest in the State Government and the State Government shall manage and control thereafter.

Effect of taking over the management and control.(1) The staff working in the Sanskrit schools mentioned in Annexure 1 of the Ordinance related to integration of its management and control into the State Government as per Schedule 3(1), will not be the employees of this school until and unless the Government comes to a decision regarding their services.

State Government will appoint a Committee of specialists and experienced persons to enquire about the number of employees, procedure of appointment as well as to enquire about the character of the staff individually and will come on a decision about validity of posts sanctioned by governing body of the school, appointment procedure and affairs of promotions or confirmation of services. Committee will consider the need of institution and will submit its report after taking stock of the views regarding qualification, experience and other related and relevant subjects. Committee will also determine in its report whether the directives regarding reservation for SC, ST and OBCs has been followed or not.State Government, after getting the report, will determine the number of staff as well as procedure of appointments and will go into the affair of appointment of teaching and other staff on individual basis and in the light of their merit and demerit will determine whether his service will be integrated with the Government or not. Government will also determine the place, salary, allowances and other service conditions for them.

The Ordinances promulgated by the Governor followed a consistent pattern. None of the Ordinances was laid before the legislature. Each one of the Ordinances lapsed by efflux of time, six weeks after the convening of the session of the legislative assembly. When the previous Ordinance ceased to operate, a fresh Ordinance was issued when the legislative assembly was not in session. The legislative assembly had no occasion to consider whether any of the Ordinances should be approved or disapproved. No legislation to enact a law along the lines of the Ordinances was moved by the government in the legislative assembly. The last of the Ordinances, like its predecessors, cease to operate as a result of the constitutional limitation contained in Article 213 (2)(a). The subject was entirely governed by successive Ordinances; yet another illustration of

what was described by this Court as an Ordinance raj barely three years prior to the promulgation of the first in this chain of Ordinances.

None of these Ordinances was placed before the state legislature. However, the government failed to enact a statute which met a requirement of all these Ordinances. Thus, the final Ordinance lapsed in the year 1992. The employees and the staff of the school challenged this in the court.

The High Court framed the following issues for consideration:

- Whether the Sanskrit schools stood denationalised upon the expiry of the Ordinances;
- Whether as a result of clause 4 of the fourth Ordinance the employees had ceased to be government servants which they have become in terms of the first Ordinance promulgated on 18 December 1989;
- Whether the fourth Ordinance was ultra vires Article 14 of the Constitution; Whether the services of the teachers must be regularised and they ought to be treated as government servants;
- Whether, in any event the petitioners were entitled to their salaries and emoluments.

The High Court held that there was no permanent vesting of the schools in the State of Bihar, notwithstanding the expiry of the Ordinances. In the view of the High Court, the power to promulgate Ordinances is not a rule but an exception and is conferred upon the Governor to deal with emergent situations. The High Court held that in the present case there was a promulgation of successive Ordinances contrary to the decision of the Constitution Bench in *D C Wadhwa*. Moreover, none of the Ordinances has been laid before the legislature. As a result, the legislature was deprived of its authority to consider whether the Ordinances should or should not be approved.

The High Court held that the failure to comply with the constitutional obligation to place the Ordinances before the legislature would have consequences: the Ordinances which were re-promulgated repeatedly were ultra vires and the petitioners had derived no legal right to continue in the service of the state.

The High Court held that the petitioners were entitled to salary as government servants until 30 April 1992, the last date of the validity of the Ordinances, for the period during which the Ordinances had subsisted. The High Court finally held that in terms of its findings the management of the schools would be governed in the same manner that prevailed prior to the promulgation of the first Ordinance.

After the judgement of High Court, Petitioner moved to the Supreme Court and matter is before the Court for its learned perusal. There are two significant parts in the Judgement namely dissenting opinion of Justice Madan B. Lokur and majority opinion of Justice D.Y Chandrachud. First part covers the judgement of Justice Lokur and later on judgment of Justice D. Y Chandrachud is discussed and final verdict is given.

With regard to power contained under Article 213 of promulgation of Ordinance, Justice Madan B. Lokur observed that when the Governor of the State is satisfied that “circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the

circumstances appear to him to require.” However, this is subject to the exception that the Governor cannot promulgate an Ordinance when both Houses of the Legislature are in session. An Ordinance is promulgated by the Governor of a State on the aid and advice of his Council of Ministers and is in exercise of his legislative power. An Ordinance has the “same force and effect as an Act of the Legislature of the State assented to by the Governor” in terms of Article 213(2) of the Constitution. Clause (a) of Article 213(2) of the Constitution provides that every such Ordinance “shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council.” Clause (b) of Article 213(2) of the Constitution provides that an Ordinance may be withdrawn at any time by the Governor. There is an Explanation to Article 213(2) of the Constitution but we are not concerned with it.

J. Lokur held that an Ordinance cannot create an enduring or irreversible right in a citizen. Consequently and with respect, a contrary view expressed by this Court in *State of Orissa v. Bhupendra Kumar Bose* and *T. Venkata Reddy v. State of Andhra Pradesh* requires to be overruled. In overruling these decisions, he agreed with brother Chandrachud though his reasons are different. As far as the re-promulgation of an Ordinance is concerned, that the re-promulgation of an Ordinance by the Governor of a State is not per se a fraud on the Constitution. There could be exigencies requiring the re-promulgation of an Ordinance. However, re-promulgation of an Ordinance ought not to be a mechanical exercise and a responsibility rests on the Governor to be satisfied that circumstances exist which render it necessary for him to take immediate action for promulgating or re-promulgating an Ordinance.

J. Lokur further held that there is no dispute in these appeals that the Governor of Bihar promulgated as many as eight Ordinances (one after another and on the same subject) in exercise of his legislative power under Article 213(1) of the Constitution. None of these Ordinances was laid before the Legislative Assembly or the Legislative Council.

It is important to stress, right at the threshold, that the promulgation of an Ordinance is a legislative exercise and an Ordinance is promulgated by the Governor of a State only on the aid and advice of the Executive; nevertheless, the Governor must be satisfied that circumstances exist which render it necessary for him to take immediate action. The State Legislature has no role in promulgating an Ordinance or actions taken under an Ordinance - that is within the domain of the Executive. The State Legislature keeps a check on the exercise of power by the Executive through the Governor. This is by a Resolution disapproving an Ordinance. The State Legislature is expected to ensure that the separation of powers between the Executive and the Legislature is maintained and is also expected to ensure that the Executive does not transgress the constitutional boundary and encroach on the powers of the Legislature while requiring the Governor to promulgate an Ordinance.

Article 213 of the Constitution does not require the Legislature to approve an Ordinance - Article 213(2) of the Constitution refers only to a Resolution disapproving an Ordinance. If an Ordinance is disapproved by a Resolution of the State Legislature, it ceases to operate as provided in Article 213(2)(a) of the Constitution. If an Ordinance is not disapproved, it does not lead to any conclusion that it has been approved it only means that the Ordinance has not been disapproved by the State Legislature, nothing more and nothing less.

The concept of disapproval of an Ordinance by a Resolution as mentioned in Article 213(2)(a) of the Constitution may be contrasted with Article 352(4) of the Constitution where a positive act of approval of a Proclamation issued under Article 352(1) of the Constitution is necessary. Similarly, a positive act of approval of a Proclamation issued under Article 356(1) of the Constitution is necessary under Article 356(3) of the Constitution. Attention may also be drawn to a Proclamation issued under Article 360 of the Constitution which requires approval under Article 360(2) of the Constitution. There is therefore a conscious distinction made in the Constitution between disapproval of an Ordinance (for example) and approval of a Proclamation (for example) and this distinction cannot be glossed over. It is for this reason that I am of the view that only disapproval of an Ordinance is postulated by Article 213(2)(a) of the Constitution and approval of an Ordinance is not postulated by Article 213(2)(a) of the Constitution.

After the promulgation of an Ordinance by the Governor of a State at the instance of the Executive, that the Constitution visualizes three possible scenarios.

(a) Firstly, despite the seemingly mandatory language of Article 213(2)(a) of the Constitution, the Executive may not lay an Ordinance before the Legislative Assembly of the State Legislature. The question is: Is it really mandatory for an Ordinance to be laid before the Legislative Assembly and what is the consequence if it is not so laid?

(b) Secondly, the Executive may, in view of the provisions of Article 213(2)(b) of the Constitution advise the Governor of the State to withdraw an Ordinance at any time, that is, before reassembly of the State Legislature or even after reassembly. In this scenario, is it still mandatory that the Ordinance be laid before the Legislative Assembly?

(c) Thirdly, the Executive may, in accordance with Article 213(2)(a) of the Constitution lay an Ordinance before the Legislative Assembly of the State Legislature. What could happen thereafter?

As far as the first scenario is concerned, namely, the Executive not laying an Ordinance before the Legislative Assembly, brother Chandrachud has taken the view that on a textual reading of Article 213(2)(a) of the Constitution an Ordinance promulgated by the Governor shall mandatorily be laid before the State Legislature. With respect, I am unable to subscribe to this view. In this context, does the Constitution provide for any consequence other than the Ordinance ceasing to operate? In my opinion, the answer is No. If an Ordinance is not laid before the State Legislature it does not become invalid or void.

If an Ordinance not laid before the Legislative Assembly does not have the force and effect of a law, then it must necessarily be void ab initio or would it be void from the date on which it is required to be laid before the Legislative Assembly, or some other date? This is not at all clear and the view that the Ordinance would be of no consequence whatsoever or void introduces yet another uncertainty when should the Ordinance be laid before the Legislative Assembly immediately on its reassembly or on a later date and from which date does it become void?

Article 213(3) of the Constitution provides for the only contingency when an Ordinance is void. This provision does not suggest that an Ordinance would be void if it is not placed before the State

Legislature. The framers of our Constitution were quite conscious of and recognized the distinction between an Ordinance that is void (under Article 213(3) of the Constitution) and an Ordinance that ceases to operate (under Article 213(2) of the Constitution). If an Ordinance is void, then any action taken under a void Ordinance would also be void. But if an Ordinance ceases to operate, any action taken under the Ordinance would be valid during the currency of the Ordinance since it has the force and effect of a law. Clearly, therefore, the distinction between Clause (2) and Clause (3) of Article 213 of the Constitution is real and recognizable as also the distinction between an Ordinance that is void and an Ordinance that ceases to operate. A contrary view blurs that distinction and effectively converts an Ordinance otherwise valid into a void Ordinance. I am afraid this is not postulated by Article 213 of the Constitution.

For the above reasons, both textual and otherwise, I hold that on a reading of Article 213(2) of the Constitution it is not mandatory that an Ordinance should be laid before the Legislative Assembly of the State Legislature.

For second scenario J. Lokur, the reasons for withdrawal of an Ordinance by the Governor at the instance of the Executive, whether before or after reassembly of the State Legislature are not relevant for the present discussion and it is not necessary to go into them.

The third scenario is where the Executive, in accordance with Article 213(2)(a) of the Constitution lays an Ordinance before the Legislative Assembly. The Ordinance could be ignored and as a result no one may move a Resolution for its disapproval. In that event, the Ordinance would run its natural course and cease to operate at the expiration of six weeks of reassembly of the State Legislature.

However, if a Resolution is moved for disapproval of the Ordinance, the State Legislature may reject the Resolution and in that event too, the Ordinance would run its natural course and cease to operate at the expiration of six weeks of reassembly of the State Legislature.

The sum and substance of this discussion is: (i) There is no mandatory requirement that an Ordinance should be laid before the Legislative Assembly on its reassembly. (ii) The fate of an Ordinance, whether it is laid before the Legislative Assembly or not, is governed entirely by the provisions of Article 213(2)(a) of the Constitution and by the Legislative Assembly. (iii) The limited control that the Executive has over the fate of an Ordinance after it is promulgated is that of its withdrawal by the Governor of the State under Article 213(2)(b) of the Constitution - the rest of the control is with the State Legislature which is the law making body of the State.

It is clear, therefore, that in the absence of a savings clause Article 213 the Constitution does not attach any degree of permanence to actions or transactions pending or concluded during the currency of an Ordinance. It is apparently for this reason that it was observed in *Bhupendra Kumar Bose* that in view of Article 213(2)(a) of the Constitution an Ordinance cannot have a savings clause which extends the life of actions concluded during the currency of the Ordinance.

58. Therefore, there is a recognizable distinction between a temporary Act which can provide for giving permanence to actions concluded under the temporary Act and an Ordinance which cannot constitutionally make such a provision. The reason for this obviously is that a temporary Act is enacted by a Legislature while an Ordinance is legislative action taken by the Executive.

There is a distinction between actions that are irreversible and actions that are reversible but a burden to implement. The situations that arose in *Bhupendra Kumar Bose and Venkata Reddy*

were not physically irreversible though reversing them may have been burdensome. If elections are set aside or posts are abolished, surely fresh elections can be held and posts revived. In this context, it is worth recalling that should the need arise, as in *Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly* this Court can always restore the status quo ante. *Bhupendra Kumar Bose and Venkata Reddy* did not present any insurmountable situation.

Therefore, I am not in a position to incorporate the enduring nature or irreversible effect theory in an Ordinance or even the public interest or constitutional necessity theory. In a given situation, the State Legislature is competent to pass an appropriate legislation keeping the interests of its constituents in mind. To this extent, both *Bhupendra Kumar Bose* and *Venkata Reddy* are overruled.

KEY TAKE AWAY OF JUSTICE LOKUR OPINION:

- There is no mandatory requirement that an Ordinance should be laid before the Legislative Assembly.
- The fate of an Ordinance, whether it is laid before the Legislative Assembly or not, is governed entirely by the provisions of Article 213(2) (a) of the Constitution and by the Legislative Assembly.
- The limited control that the Executive has over the fate of an Ordinance after it is promulgated is that of its withdrawal by the Governor of the State under Article 213(2)(b) of the Constitution – the rest of the control is with the State Legislature which is the law making body of the State.

Justice D Y Chandrachud while touching the issues before this case touched the historical evolution of ordinance making power of executive. He highlighted the practices in England and then come to British India about the origin of Article 123 and 213.

The dilution of the power of the Monarch in England to rule by proclamations was in sharp contrast to the position which prevailed in the British colonies. The Governor Generals as representatives of the Crown were vested with extensive authority to issue Ordinances. The Indian Councils Act, 1861 empowered the Governor General to issue directions which had the force of law. A power was conferred upon the Governor General to issue ordinances by Section 23, subject to two conditions : (i) the power could be exercised in cases of emergency; and (ii) an Ordinance would remain in force for a period of not more than six months from its promulgation. Under the Government of India Act, 1915, the power to issue Ordinances was retained. In the Government of India Act, 1935, Section 42 empowered the Governor General to promulgate ordinances when the Federal Legislature was not in session provided that he was satisfied that circumstances existed which made it necessary that such a law be passed without awaiting reassembly of the legislature. Section 42(2) provided that an Ordinance promulgated under that provision would have the same force and effect as an Act of the Federal Legislature but was required to be laid before the legislature. The Ordinance would cease to operate upon the expiration of six weeks from the reassembly of the legislature or if before that period, resolutions disapproving it were passed by the legislature. The Governor General was in

certain cases required to exercise his individual judgment for the promulgation of an Ordinance while in others, he was to act on the instructions of His Majesty.

While highlighting constitutional assembly debate Justice *D Y Chandrachud* quoted from the memorandum which was prepared by B N Rau, the constitutional advisor envisaged a constitutional power for making ordinances. The memorandum contemplated that the President may promulgate an ordinance when Parliament is not in session, upon satisfaction that circumstances exist requiring immediate action. B N Rau acknowledged that ordinances were the subject of great criticism under colonial rule but sought to allay the apprehensions which were expressed on the ground that the President would normally act on the aid and advice of ministers responsible to Parliament and was not likely to abuse the ordinance making power.

The Governor (under Article 213) is a necessary concomitant to the supremacy of a democratically elected legislature. The reassembling of the legislature defines the outer limit for the validity of the Ordinance promulgated during its absence in session. Within that period, a legislature has authority to disapprove the Ordinance. The requirement of laying an Ordinance before the legislative body subserves the constitutional purpose of ensuring that the provisions of the Ordinance are debated upon and discussed in the legislature. The legislature has before it a full panoply of legislative powers and as an incident of those powers, the express constitutional authority to disapprove an Ordinance. If an Ordinance has to continue beyond the tenure which is prescribed by Article 213(2)(a), a law has to be enacted by the legislature incorporating its provisions.

The failure to lay an Ordinance before the state legislature constitutes a serious infraction of the constitutional obligation imposed by Article 213(2). It is upon an Ordinance being laid before the House that it is formally brought to the notice of the legislature. Failure to lay the Ordinance is a serious infraction because it may impact upon the ability of the legislature to deal with the Ordinance. A Constitution Bench of this Court in *R.K. Garg v. Union of India* rejected the submission that while promulgating an Ordinance under Article 123 the President had no power to amend or alter tax laws. Dealing with the submission that the legislative power must exclusively belong to elected representatives and vesting such a power in the executive is undemocratic as it may enable the executive to abuse its power by securing the passage of an ordinary Bill without risking a debate in the legislature, the Constitution Bench emphasised the constitutional limitations on the exercise of the ordinance making powers.

Adverting to the speech made by Dr Ambedkar in the Constituent Assembly the Court noted that the legislative power conferred on the President under this Article is not a parallel power of legislation. Among the provisions that the Court emphasised are limitations on when the power can be exercised and the duration of an Ordinance. The Constitution Bench carefully emphasised the element of legislative control in the following observations: ...The conferment of such power may appear to be undemocratic but it is not so, because the executive is clearly answerable to the legislature and if the President, on the aid and advice of the executive, promulgates an Ordinance in misuse or abuse of this power, the legislature can not only pass a resolution disapproving the Ordinance but can also pass a vote of no confidence in the executive. There is in the theory of constitutional law complete control of the legislature over the executive, because if the executive misbehaves or forfeits the confidence of the legislature, it can be thrown out by the legislature. In the view of the Constitution Bench, there is no qualitative difference between an Ordinance issued

by the President and an Act passed by Parliament. The same approach was adopted by another Constitution Bench of this Court in *AK Roy v. Union of India* where this Court spoke about the exact equation, for all practical purposes, between a law made by the Parliament and an ordinance issued by the President. The submission before the Court in a challenge to the validity of the National Security Ordinance was that an Ordinance is an exercise of executive and not legislative power. While rejecting that submission, the Constitution Bench held that : ...the Constitution makes no distinction in principle between a law made by the legislature and an ordinance issued by the President. Both, equally, are products of the exercise of legislative power and, therefore, both are equally subject to the limitations which the Constitution has placed upon that power.

That power was to be used to meet extraordinary situations and not perverted to serve political ends. The Constituent Assembly held forth, as it were, an assurance to the people that an extraordinary power shall not be used in order to perpetuate a fraud on the Constitution which is conceived with so much faith and vision. That assurance must in all events be made good and the balance struck by the founding fathers between the powers of the government and the liberties of the people not disturbed or destroyed. In *R C Cooper v. Union of India*, a Bench of eleven Judges of this Court held that the presidential power to promulgate an ordinance is exercisable in extraordinary situations demanding immediate promulgation of law. This Court held that the determination by the President was not declared to be final.

Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground. (Id at p. 295) By a similar amendment, clause 4 was introduced into Article 213. The effect of the amendment was to grant an immunity from the satisfaction of the President or the Governor being subjected to scrutiny by any court. This amendment was expressly deleted by Section 16 of the Forty-fourth amendment. Applying the principles which emerge from the judgment of Justice Jeevan Reddy in *Bomma*, there is reason to hold that the satisfaction of the President under Article 123(1) or of the Governor under Article 213(1) is not immune from judicial review. The power of promulgating ordinances is not an absolute entrustment but conditional upon a satisfaction that circumstances exist rendering it necessary to take immediate action. Undoubtedly, as this Court held in *Indira Sawhney v. Union of India* the extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions involved and such factors. Since the duty to arrive at the satisfaction rests in the President and the Governors (though it is exercisable on the aid and advice of the Council of Ministers), the Court must act with circumspection when the satisfaction under Article 123 or Article 213 is challenged. The court will not enquire into the adequacy, or sufficiency of the material before the President or the Governor. The court will not interfere if there is some material which is relevant to his satisfaction. The interference of the court can arise in a case involving a fraud on power or an abuse of power. This essentially involves a situation where the power has been exercised to secure an oblique purpose. In exercising the power of judicial review, the court must be mindful both of its inherent limitations as well as of the entrustment of the power to the head of the executive who acts on the aid and advice of the Council of Ministers owing collective responsibility to the elected legislature. In other words, it is only where the court finds that the exercise of power is based on extraneous grounds and amounts to no satisfaction at all that the interference of the court may be warranted in a rare case. However, absolute immunity from judicial review cannot be supported as a matter of first principle or on the basis of constitutional history.

The accountability of the executive to the legislature is symbolised by the manner in which the Constitution has subjected the ordinance making power to legislative authority. This, the Constitution achieves by the requirements of Article 213. The first requirement defines the condition subject to which an ordinance can be made. The second set of requirements makes it mandatory that an ordinance has to be placed before the House of the legislature. The third requirement specifies the tenure of an ordinance and empowers the legislature to shorten the duration on the formulation of a legislative disapproval. Once the legislature has reconvened after the promulgation of an ordinance, the Constitution presupposes that it is for the legislative body in exercise of its power to enact law, to determine the need for the provisions which the ordinance incorporates and the expediency of enacting them into legislation.

A reasonable period is envisaged by the Constitution for the continuation of an ordinance, after the reassembling of the legislature in order to enable it to discuss, debate and determine on the need to enact a law. Re-promulgation of an ordinance, that is to say the promulgation of an ordinance again after the life of an earlier ordinance has ended, is fundamentally at odds with the scheme of Articles 123 and 213. Re-promulgation postulates that despite the intervening session of the legislature, a fresh exercise of the power to promulgate an ordinance is being resorted to despite the fact that the legislature which was in seisin of a previously promulgated ordinance has not converted its provisions into a regularly enacted law.

In a judgment of a Division Bench of the Andhra Pradesh High Court in *Mahanat Narayan Dessjivaru v. State of Andhra*, it was held that once a scheme and a sanad were no longer operative, the rights, if any, accruing there from were extinguished. There was no scope for importing any notion of suspension into that expression. A discontinuation took effect once for all. What then is the effect upon rights, privileges, obligations or liabilities which arise under an ordinance which ceases to operate? There are two critical expressions in Article 213(2) which bear a close analysis. The first is that an ordinance shall have the same force and effect as an act of the legislature while the second is that it shall cease to operate on the period of six weeks of the reassembling of the legislature or upon a resolution of disapproval. The expression shall have the same force and effect is prefaced by the words an ordinance promulgated under this article. In referring to an ordinance which is promulgated under Article 213, the Constitution evidently conveys the meaning that in order to have the same force and effect as a legislative enactment, the ordinance must satisfy the requirements of Article 213. The expression shall cease to operate can on the one hand to be construed to mean that with effect from the date on which six weeks have expired after the reassembling of the legislature or upon the disapproval of the ordinance, it would cease to operate from that date. Cease to operate in this sense would mean that with effect from that date, the ordinance would prospectively have no operation. The ordinance is not void at its inception.

In *State of Orissa v. Bhupendra Kumar Bose* elections to a municipality were set aside by the High Court on a defect in the publication of the electoral roll. The Governor of Orissa promulgated an ordinance by which the elections were validated together with the electoral rolls. A Bill was moved in the state legislature for enacting a law in terms of the provisions of the ordinance but was defeated by a majority of votes. The State of Orissa filed an appeal before this Court against the decision of the High Court striking down material provisions of the ordinance. Before this Court, it was urged on behalf of the respondent that the ordinance was in the nature of a temporary statute which was bound to lapse after the expiration of the prescribed period. It was urged that after the ordinance had lapsed, the invalidity of the elections which it had cured stood revived. It was in the

above background that this Court addressed itself to the question as to whether a lapse of the ordinance affected the validation of the elections under it. Justice Gajendragadkar, writing the opinion of a Constitution Bench held that the general rule in regard to a temporary statute is that in the absence of a special provision to the contrary, proceedings taken against a person under it will terminate when the statute expires. That is why the legislature adopts a savings provision similar to Section 6 of the General Clauses Act. But in the view of the court, it would not be open to the ordinance making authority to adopt such a course because of the limitation imposed by Article 213(2)(a). The Constitution Bench relied upon three English judgments: *Wicks v. Director of Public Prosecutions*, *Warren v. Windle* and *Steavenson v. Oliver*. The court ruled that since Ordinance is different from the legislation, it does not automatically create rights and liabilities that go out of its term of operation. Thus, there exists a vital difference between temporary legislation and Ordinance. Justice Chandrachud held that when the question of what effects will survive after the ordinance is reviewed, the court must examine that whether an undoing of such an act would run counter to the public interest. Thus, a test of public interest was added by Justice Chandrachud in his analysis of maintenance of rights once the Ordinance ceases to operate. Thus, by virtue of this seven-judge decision of Supreme Court bench, the court ensured that the executive does not abuse the power vested upon them under the Indian Constitution. The seven-judge constitution bench of the Supreme Court had held that re-promulgation of Ordinance is a fraud on the Constitution. The court also held that the satisfaction of the President or Governor under Article 123 or 213 while issuing an Ordinance is not immune from judicial scrutiny.

Judgement.

The power which has been conferred upon the President under Article 123 and the Governor under Article 213 is legislative in character. The power is conditional in nature: it can be exercised only when the legislature is not in session and subject to the satisfaction of the President or, as the case may be, of the Governor that circumstances exist which render it necessary to take immediate action; An Ordinance which is promulgated under Article 123 or Article 213 has the same force and effect as a law enacted by the legislature but it must (i) be laid before the legislature; and (ii) it will cease to operate six weeks after the legislature has reassembled or, even earlier if a resolution disapproving it is passed. Moreover, an Ordinance may also be withdrawn; The constitutional fiction, attributing to an Ordinance the same force and effect as a law enacted by the legislature comes into being if the Ordinance has been validly promulgated and complies with the requirements of Articles 123 and 213; The Ordinance making power does not constitute the President or the Governor into a parallel source of law making or an independent legislative authority; Consistent with the principle of legislative supremacy, the power to promulgate ordinances is subject to legislative control.

The requirement of laying an Ordinance before Parliament or the state legislature is a mandatory constitutional obligation cast upon the government. Laying of the ordinance before the legislature is mandatory because the legislature has to determine: (a) The need for, validity of and expediency to promulgate an ordinance; (b) Whether the Ordinance ought to be approved or disapproved; (c) Whether an Act incorporating the provisions of the ordinance should be enacted (with or without amendments); The failure to comply with the requirement of laying an ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process;

The question as to whether rights, privileges, obligations and liabilities would survive an Ordinance which has ceased to operate must be determined as a matter of construction. The appropriate test to be applied is the test of public interest and constitutional necessity. This would

include the issue as to whether the consequences which have taken place under the Ordinance have assumed an irreversible character. In a suitable case, it would be open to the court to mould the relief; and The satisfaction of the President under Article 123 and of the Governor under Article 213 is not immune from judicial review particularly after the amendment brought about by the forty-fourth amendment to the Constitution by the deletion of clause 4 in both the articles. The test is whether the satisfaction is based on some relevant material. The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court will scrutinise whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review in other words would enquire into whether there was no satisfaction at all.

We hold and declare that every one of the ordinances at issue commencing with Ordinance 32 of 1989 and ending with the last of the ordinances, Ordinance 2 of 1992 constituted a fraud on constitutional power. These ordinances which were never placed before the state legislature and were re-promulgated in violation of the binding judgment of this Court in *D C Wadhwa* are bereft of any legal effects and consequences. The ordinances do not create any rights or confer the status of government employees. However, it would be necessary for us to mould the relief (which we do) by declaring that no recoveries shall be made from any of the employees of the salaries which have been paid during the tenure of the ordinances in pursuance of the directions contained in the judgment of the High Court.

By the verdict delivered by 7 Judge bench of the Supreme Court, it is unequivocally clear that Ordinances are subject to the judicial review and they do not automatically create the permanent effect. The ordinance making power of the government is generally alleged to have been abused by the government. The judgment delivered on 2nd January 2017 had concerned itself with the law-making power of the executive. The majority decision held by the Justice D Y Chandrachud, in the ratio of 5:2, has become a novel precedent for the future executions of democratic governance. Justice Chandachud further held that “issuing of Ordinance is conditional upon a satisfaction that circumstances exist rendering it necessary to take immediate action”. Thus, according to the majority decision of the court the Ordinance cannot be relieved from the judicial scrutiny.

UNION AND STATE JUDICIARY

S.P. Gupta v. Union of India

1981 Supp (1) SCC 87

(A.C. Gupta, D.A. Desai, E.S. Venkataramiah, P.N. Bhagwati, R.S. Pathak, S.Murtaza Fazal Ali and V.D. Tulzapurkar, JJ.)

[Independence of Judiciary; Public Interest Litigation, Locus standi, Privilege under Article 74(2)]

The basic question raised in this case related to the independence of the judiciary which was alleged to be eroded on account of short term extensions given to three Additional Judges of Delhi High Court; transfer of Chief Justices of two High Courts and a circular issued by the Union Law Minister to Chief Justices of High Courts and State Chief Ministers requiring them to obtain written consent of the persons whom they recommended for appointment as judges in the High Courts.

Impugned Circular

No. D.O. No. 66/10/81Jus. Ministry of Law, Justice and Company Affairs, India

“It has repeatedly been suggested to Government over the years by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. In this context, I would request you to -

(a) obtain from all the Additional judges working in the High Court of your State their consent to be appointed as permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as permanent Judges; and

(b) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of the Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court.

sd/-

(P. Shiv Shankar)”

A copy of the Circular letter was sent by the Law Minister to the Chief Justice of each High Court and the Chief Minister of each State also forwarded a copy of the circular letter to the Chief Justice of the High Court of his State. Presumably, each Chief Justice sent a copy of the circular letter to the Additional Judges in his court with a request to do the needful in view of what was stated in the circular letter. The Chief Justice of Bombay High Court in any event addressed such a communication to each of the Additional Judges in his Court. The record showed that out of the total number of Additional Judges in the country, quite a few Additional Judges gave their consent to be appointed outside their High Court. The petitioners and other advocates practicing on the original as well as appellate side of the High Court of Bombay however took the view that the circular letter was a direct attack on the independence of the judiciary which is a basic feature of the Constitution and hence the Advocates Association of Western India which represents advocates practicing on the appellate side, the Bombay Bar Association which represents advocates practicing on the original side and the Managing Committee of the Bombay Incorporated Law Society which represents Solicitors practising in the High Court of Bombay, passed resolutions condemning the circular letter as subversive of judicial independence and asking the Government of India to withdraw the circular letter. Since the circular letter was not withdrawn by the Law Minister, the petitioners moved the High Court of Bombay challenging the constitutional validity of the circular letter and seeking a declaration that 'if consent has been given by any Additional Judge or by any person whose name has been or is to be submitted for appointment as a Judge, consequent on or arising from the circular letter, it should be held to be null and void'.

P.N. BHAGWATI, J. - *Locus Standi*

13. When these writ petitions reached hearing before us, a preliminary objection was raised by Mr Mridul, appearing on behalf of the Law Minister, challenging the *locus standi* of the petitioners in Iqbal Chagla's writ petition. He urged that the petitioners in that writ petition had not suffered any legal injury as a result of the issuance of the circular by the Law Minister or the making of short-term appointments by the Central Government and they had therefore no *locus standi* to maintain the writ petition assailing the constitutional validity of the circular or the short-term appointments. The legal injury, if at all, was caused to the Additional Judges whose consent was sought to be obtained under the circular or who were appointed for short terms and they alone were therefore entitled to impugn the constitutionality of the circular and the short-term appointments and not the petitioners. The basic postulate of the argument was that it is only a person who has suffered legal injury who can maintain a writ petition for redress and no third party can be permitted to have access to the court for the purpose of seeking redress for the person injured. The same preliminary objection was urged by Mr Mridul against the writ petition of S. P. Gupta and the contention was that the petitioner in that writ petition not having suffered any legal injury had no *locus standi* to maintain the writ petition. So far as the writ petition of V. M. Tarkunde is concerned, Mr Mridul said that he would have had the same preliminary objection against the *locus standi* of the petitioner to maintain that writ petition because the petitioner had suffered no legal injury, but since S. N. Kumar had appeared, albeit as a respondent, and claimed relief against the decision of the Central Government not to appoint him for a further term and sought redress of the legal injury said to have been caused to him as a result of such decision, the lack of *locus standi* on the part of the petitioner was made good and the writ petition was

maintainable. Mr Mridul asserted that if S.N. Kumar had not appeared and sought relief against the decision of the Central Government discontinuing him as an Additional Judge, the writ petition would have been liable to be rejected at the threshold on the ground that the petitioner had no *locus standi* to maintain the writ petition. This preliminary objection urged by Mr. Mridul raised a very interesting question of law relating to *locus standi*, or as the Americans call it 'standing', in the area of public law. This question is of immense importance in a country like India where access to justice being restricted by social and economic constraints, it is necessary to democratize judicial remedies, remove technical barriers against easy accessibility to justice and promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socio-economic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes.

14. The traditional rule in regard to *locus standi* is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legally protected interest by the impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born.

15. In the first place a ratepayer of a local authority is accorded standing to challenge an illegal action of the local authority. Thus, a ratepayer can question the action of the municipality in granting a cinema licence to a person, vide: ***K. Ramadas Shenoy v. Chief Officers, Town Municipal Council, Udipi*** [AIR 1974 SC 2177]. Similarly, the right of a ratepayer to challenge misuse of funds by a municipality has also been recognised by the courts vide: ***Varadarajan v. Salem Municipal Council*** [AIR 1973 Mad 55].

The reason for this liberalization of the rule in the case of a taxpayer of a municipality is that his interest in the application of the money of the municipality is direct and immediate and he has a close relationship with the municipality. The courts in India have, in taking this view, followed the decisions of the English courts. Secondly, if a person is entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision, he would have *locus standi* to maintain an action challenging the impugned decision, vide: ***Queen v. Bowman*** [1898 1 QB 663] where it was held that any member of the public had a right to be heard in opposition to an application for a licence and having such right, the applicant was entitled to ask for mandamus directing the licensing Justices to hear and determine the application for licence according to law. Thirdly, the statute itself may expressly recognise the *locus standi* of an applicant, even though no legal right or legally protected interest of the applicant has been violated resulting in legal injury to him. For example, in ***Jasbhai Motibhai Desai v. Roshan Kumar*** [AIR 1976 SC 578] this Court

noticed that the Bombay Cinematograph Act, 1918 and the Bombay Cinema Rules, 1954 made under that Act, recognized a special interest of persons residing, or concerned with any institution such as a school, temple, mosque etc. located within a distance of 200 yards of the site on which the cinema house is proposed to be constructed and held that as the petitioner, a rival cinema owner, did not fall within the category of such persons having a special interest in the locality, he had no *locus standi* to maintain the petition for a writ of certiorari to quash the no objection certificate granted by the District Magistrate, to Respondents 1 and 2. It is obvious from the observations made at page 72 of the Report that if the petitioner had been a person falling within this category of persons having a special interest in the locality, he would have been held entitled to maintain the petition.

16. There is also another exception which has been carved out of this strict rule of standing which requires that the applicant for judicial redress must have suffered a legal wrong or injury in order to entitle him to maintain an action for such redress. It is clear that, having regard to this rule, no one can ordinarily seek judicial redress for legal injury suffered by another person; it is only such other person who must bring action for judicial redress. But it must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him. Take for example, the case of a minor to whom a legal wrong has been done or a legal injury caused. He obviously cannot on his own approach the court because of his disability arising from minority. The law therefore provides that any other person acting as his next friend may bring an action in his name for judicial redress, *vide*: Order XXXII of the Code of Civil Procedure. So also where a person is detained and is therefore not in a position to move the court for securing his release, any other person may file an application for a writ of habeas corpus challenging the legality of his detention. Of course, this Court has ruled in a number of cases that a prisoner is entitled to address a communication directly to the court complaining against his detention and seeking release and if he addresses any such communication to the court, the Superintendent of the prison is bound to forward it to the court and, in fact, there have been numerous instances where this Court has acted on such communication received from a prisoner and treating it as an application for a writ of habeas corpus, called upon the detaining authority to justify the legality of such detention and on the failure of the detaining authority to do so, released the prisoner. But since a person detained would ordinarily be unable to communicate with the outside world, the law presumes that he will not be able to approach the court and hence permits any other person to move the court for judicial redress by filing an application for a writ of habeas corpus. Similarly, where a transaction is entered into by the Board of Directors

of a company which is illegal or ultra vires the company, but the majority of the shareholders are in favour of it and hence it is not possible for the company to sue for setting aside the transaction, any shareholder may file an action impugning the transaction. Here it is the company which suffers a legal wrong or a legal injury by reason of the illegal or ultra vires transaction impugned in the action, but an individual shareholder is permitted to sue for redressing such legal wrong or injury to the company, because otherwise the company being under the control of the majority shareholders would be without judicial redress.

17. It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. Where the weaker sections of the community are concerned, such as under-trial prisoners languishing in jails without a trial, inmates of the Protective Home in Agra, or Harijan workers engaged in road construction in the district of Ajmer, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public-spirited individual espousing their cause and seeking relief for them. This Court will readily respond even to a letter addressed by such individual acting pro bono publico. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public-minded individual as a writ petition and act upon it. Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. It is in this spirit that the court has been entertaining letters for judicial redress and treating them as writ petitions and we hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented

approach. But we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court. We may also point out that as a matter of prudence and not as a rule of law, the court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal-aid organisation which can take care of such cases.

18. The types of cases which we have dealt with so far for the purpose of considering the question of *locus standi* are those where there is a specific legal injury either to the applicant or to some other person or persons for whose benefit the action is brought, arising from violation of some constitutional or legal right or legally protected interest. What is complained of in these cases is a specific legal injury suffered by a person or a *determinate* class or group of persons. But there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or is there no one who can complain and the public injury must go unredressed? To answer these questions, it is first of all necessary to understand what is the true purpose of the judicial function?

We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law. If the State or any public authority acts beyond the scope of its power and thereby causes a specific legal injury to a person or to a determinate class or group of persons, it would be a case of private injury actionable in the manner discussed in the preceding paragraphs. So also if the duty is owed by the State or any public authority to a person or to a determinate class or group of persons, it would give rise to a corresponding right in such person or determinate class or group of persons and they would be entitled to maintain an action for judicial redress. But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress

if the law is contravened. The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and care thereby improving the administration of justice.

19. There is also another reason why the rule of *locus standi* needs to be liberalised. Today we find that law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change. The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilized for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons. This is not to say that individual rights have ceased to have a vital place in our society but it is recognised that these rights are practicably meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible, to all. The new social and economic rights which are sought to be created in pursuance of the Directive Principles of State Policy essentially require active intervention of the State and other public authorities. Amongst these social and economic rights are freedom from indigency, ignorance and discrimination as well as the right to a healthy environment, to social security and to protection from financial, commercial, corporate or even governmental oppression. More and more frequently the conferment of these socio-economic rights and imposition of public duties on the State and other authorities for taking positive action generates situations in which a single human action can be beneficial or prejudicial to a large number of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, the discharge of effluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air; defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport. In cases of this kind it would not be possible to say that any specific legal injury is caused to an individual or to a determinate class or group of individuals. What results in such cases is public injury and it is one of the characteristics of public injury that the act or acts complained of cannot necessarily be shown to affect the rights of determinate or identifiable class or group of persons: public injury is an injury to an indeterminate class of persons. In these cases the duty which is breached giving rise to the injury is owed by the State or a public authority not to any specific or determinate class or group of persons, but to the general public. In other words, the duty is one which is not correlative to any individual

rights. Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power except what may be provided by the political machinery, which at best would be able to exercise only a limited control and at worst, might become a participant in misuse or abuse of power. It would also make the new social collective rights and interests created for the benefit of the deprived sections of the community meaningless and ineffectual.

20. The principle underlying the traditional rule of standing is that only the holder of the right can sue and it is therefore, held in many jurisdictions that since the State representing the public is the holder of the public rights, it alone can sue for redress of public injury or vindication of public interest. We have undoubtedly an Attorney-General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field; see Sections 91 and 92 of the Civil Procedure Code. But, even if we had a provision empowering the Attorney-General or the Advocate General to take action for vindicating public interest, I doubt very much whether it would be effective. The Attorney-General or the Advocate General would be too dependent upon the political branches of government to act as an advocate against abuses which are frequently generated or at least tolerated by political and administrative bodies. Be that as it may, the fact remains that we have no such institution in our country and we have therefore to liberalise the rule of standing in order to provide judicial redress for public injury arising from breach of public duty or from other violation of the Constitution or the law. If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though, they may not be directly injured in their own rights. It is for this reason that in public interest litigation – litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest, any citizen who is acting bonafide and who has sufficient interest has to be accorded standing.

What is sufficient interest to give standing to a member of the public would have to be determined by the court in each individual case. It is not possible for the court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable sections of the people by creating new social, collective 'diffuse' rights and interests and imposing new public duties on the State and other public authorities, infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the court in a particular case has sufficient interest to initiate the action.

24. But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that “political pressure groups who could not achieve their aims through the administrative process” and we might add, through the political process, “may try to use the courts to further their aims”. These are some of the dangers in public interest litigation which the court has to be careful to avoid. It is also necessary for the court to bear in mind that there is a vital distinction between *locus standi* and justiciability and it is not every default on the part of the State or a public authority that is justiciable. The court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution. It is a fascinating exercise for the court to deal with public interest litigation because it is a new jurisprudence which the court is evolving, a jurisprudence which demands judicial statesmanship and high creative ability. The frontiers of public law are expanding far and wide and new concepts and doctrines which will change the complexion of the law and which were so far as embedded in the womb of the future, are beginning to be born.

25. Before we part with this general discussion in regard to *locus standi*, there is one point we would like to emphasise and it is, that cases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want.

26. If we apply these principles to determine the question of *locus standi* in the writ petition of Iqbal Chagla in which alone this question has been sharply raised, it will be obvious that the petitioners had clearly and indisputably *locus standi* to maintain their writ petition. The petitioners are lawyers practicing in the High Court of Bombay. The first petitioner is a member of the Bombay Bar Association, petitioners 2 and 3 are members of the Advocates Association of Western India and petitioner 4 is the President of the Incorporated Law Society. There can be no doubt that the petitioners have a vital interest in the independence of the judiciary and if any unconstitutional or illegal action is taken by the State or any public authority which has the effect of impairing the independence of the judiciary, the petitioners would certainly be interested in challenging the constitutionality or legality of such action. The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice. They assist the court in dispensing justice and it can hardly be disputed that without their help, it would be well-nigh impossible for the Court to administer justice. They are really and truly officers of the Court in which they daily sit and practice. They have, therefore, a special interest in

preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would naturally be concerned about it, because they are equal partners with the Judges in the administration of justice. Iqbal Chagla and others cannot be regarded as mere bystanders or meddling interlopers in filing the writ petition. The complaint of the petitioners in the writ petition was that the circular letter issued by the Law Minister constituted a serious threat to the independence of the judiciary and it was unconstitutional and void and if this complaint be true, and for the purpose of determining the standing of the petitioners to file the writ petition, we must assume this complaint to be correct, the petitioners already had *locus standi* to maintain the writ petition. The circular letter, on the averments made in the writ petition, did not cause any specific legal injury to an individual or to a determinate class or group of individuals, but it caused public injury by prejudicially affecting the independence of the judiciary.

The petitioners being lawyers had sufficient interest to challenge the constitutionality of the circular letter and they were, therefore, entitled to file the writ petition as a public interest litigation. They had clearly a concern deeper than that of a busybody and they cannot be told off at the gates. We may point out that this was precisely the principle applied by this Court to uphold the standing of the Fertiliser Corporation Kamgar Union to challenge the sale of a part of the undertaking by the Fertiliser Corporation of India in *Fertilizer Corporation Kamgar Union v. Union of India* [AIR 1981 SC 344]. Justice Krishna Iyer pointed out that if a citizen "belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered". We must therefore, hold that Iqbal Chagla and others had *locus standi* to maintain their writ petition. What we have said in relation to the writ petition of Iqbal Chagla and others must apply equally in relation to the writ petitions of S. P. Gupta and J. C. Kaira and others. So far as the writ petition of V. M. Tarkunde is concerned, Mr Mridul, learned Advocate appearing on behalf of the Law Minister, did not contest the maintainability of that writ petition since S. N. Kumar to whom, according to the averments made in the writ petition, a specific legal injury was caused, appeared in the writ petition and claimed relief against the decision of the Central Government to discontinue him as an Additional Judge. We must, therefore, reject the preliminary objection raised by Mr Mridul challenging the *locus standi* of the petitioners in the first group of writ petitions.

Disclosure of documents: Privilege

56. We now come to a very important question which was agitated before us at great length and which exercised our minds considerably before we could reach a decision. The question related to the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the non-appointment of O.N. Vohra and S.N. Kumar as Additional Judges. The learned counsel for the petitioners and S.N. Kumar argued before us with great passion and vehemence that these documents were

relevant to the inquiry before the court and they should be directed to be disclosed by the Union of India. This claim of the petitioners and S.N. Kumar for disclosure was resisted by the Solicitor-General of India on behalf of the Union of India and MrMridul on behalf of the Law Minister. They contended that so far as O.N. Vohra was concerned his case stood on an entirely different footing from that of S.N. Kumar since, unlike S.N. Kumar who allied himself with the petitioners and actively participated in the arguments almost as if he was petitioner, O.N. Vohra though made a party respondent to the writ petition of V.M. Tarkunde did not appear and participate in the proceedings or seek any relief from the court in regard to his continuance as an Additional Judge. MrMridul on behalf of the Law Minister informed us that in fact O.N. Vohra had started practice in the Delhi High Court and his case could not be considered by us when he himself did not want any relief. So far as the case of S.N. Kumar was concerned the learned Solicitor-General on behalf of the Union of India conceded that the documents of which disclosure was sought on behalf of the petitioners and S.N. Kumar were undoubtedly relevant to the issues arising before the Court, but contended — and in this contention he was supported by MrMridul on behalf of the Law Minister — that they were privileged against disclosure for a two-fold reason. One was that they formed part of the advice tendered by the Council of Ministers to the President and hence by reason of Article 74, clause (2) of the Constitution, the Court was precluded from ordering their disclosure and looking into them and the other was that they were protected against disclosure under Section 123 of the Indian Evidence Act since their disclosure would injure public interest. We propose to consider these rival arguments in the order in which we have set them out, first in regard to O.N. Vohra and then in regard to S.N. Kumar.

58. That takes us to the case of S.N. Kumar which stands on a totally different footing, because S.N. Kumar has appeared in the writ petition, filed an affidavit supporting the writ petition and contested, bitterly and vehemently, the decision of the Central Government not to continue him as an Additional Judge for a further term. Since S.N. Kumar has claimed relief from the Court in regard to his continuance as an Additional Judge, an issue is squarely joined between the petitioners and S.N. Kumar on the one hand and the Union of India on the other which requires to be determined for the purpose of deciding whether relief as claimed in the writ petition can be granted to S.N. Kumar. Now, as we have already pointed out while discussing the scope and ambit of Article 217, there are only two grounds on which the decision of the Central Government not to continue an Additional Judge for a further term can be assailed and they are, firstly, that there has been no full and effective consultation between the Central Government and the constitutional authorities required to be consulted under that Article and, secondly, that the decision of the Central Government is based on irrelevant grounds. It was on both these grounds that the petitioners and S.N. Kumar impugned the decision of the Central Government not to appoint S.N. Kumar as an Additional Judge for a further term and there can be no doubt that the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India would be relevant qua both these grounds. The learned Solicitor-General on behalf of the Union of India and MrMridul on behalf of the Law Minister, with the usual candour and frankness always shown by them; did not dispute the relevance of these documents to the issues arising in the writ petition in regard to S.N. Kumar, but contended that they were protected against disclosure under Article 74, clause (2) of the Constitution as also Section 123 of the Indian Evidence Act. This

contention raised an extremely important question in the area of public law particularly in the context of the open society which we are trying to evolve as part of the democratic structure and it caused great concern to us, for it involved a clash between two competing aspects of public interest, but ultimately after inspecting these documents for ourselves and giving our most anxious thought to this highly debatable question, we decided to reject the claim for protection against disclosure and directed that these documents be disclosed by the Union of India. We now proceed to give our reasons for this decision taken by us by a majority of six against one.

59. The first ground on which protection against disclosure was claimed on behalf of the Union of India and the Law Minister was based on Article 74, clause (2) of the Constitution. It is clear from the constitutional scheme that under our Constitution the President is a constitutional Head and is bound to act on the aid and advice of the Council of Ministers. This was the position even before the amendment of clause (1) of Article 74 by the Constitution (42nd Amendment) Act, 1976, but the position has been made absolutely explicit by the amendment and Article 74, clause (1) as amended now reads as under:

There shall be a Council of Ministers with the Prime Minister at the Head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

What was judicially interpreted even under the unamended Article 74, clause (1) has now been given Parliamentary recognition by the constitutional amendment. There can therefore be no doubt that the decision of the President under Article 224 read with Article 217 not to appoint an Additional Judge for a further term is really a decision of the Council of Ministers and the reasons which have weighed with the Council of Ministers in taking such decision would necessarily be part of the advice tendered by the Council of Ministers to the President. Now clause (2) of Article 74 provides:

The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.

The court cannot, having regard to this constitutional provision, embark upon an inquiry as to whether any and if so what advice was tendered by the Council of Ministers to the President and since the reasons which have prevailed with the Council of Ministers in taking a particular decision not to continue an Additional Judge for a further term would form part of the advice tendered to the President, they would be beyond the ken of judicial inquiry. But the Government may in a given case choose to disclose these reasons or it may be possible to gather them from other circumstances, in which event the Court would be entitled to examine whether they bear any reasonable nexus with the question of appointment of a High Court Judge or they are constitutionally or illegally prohibited or extraneous or irrelevant. But if these reasons are not disclosed by the Government and it is otherwise not possible to discover them, it would be impossible for the Court to decide whether the decision of the Central Government not to appoint an Additional Judge for a further term is based on irrelevant grounds. There would however not be much difficulty by and large in cases of this kind to gather what are the reasons which have prevailed with the Central Government in taking the decision not to continue an Additional Judge. Article 217 requires that there must be full and

effective consultation between the President, that is, the Central Government on the one hand and the Chief Justice of the High Court, the Governor, that is, the State Government and the Chief Justice of India on the other and the “full and identical facts” on which the decision of the Central Government is based must be placed before the Chief Justice of the High Court, the State Government and the Chief Justice of India. The reasons which the Central Government is inclined to take into account for reaching a particular decision have therefore necessarily to be communicated to the Chief Justice of the High Court, the State Government and the Chief Justice of India and in the circumstances, it should ordinarily be possible for the Court to gather from such communication, the reasons which have persuaded the Central Government to take its decision. Of course there may be cases where there are several reasons discussed between the Central Government and the three constitutional authorities and some of these reasons may be relevant, while some others may be irrelevant and without inquiring into the advice given by the Council of Ministers to President, it may not be possible to determine as to what are the reasons, relevant or irrelevant, which have weighed with the Central Government in taking its decision and in such a case, the Court may not be able to pronounce whether the decision of the Central Government is based on irrelevant grounds. But ordinarily the correspondence exchanged between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India would throw light on the question as to what are the reasons which have impelled the Central Government to take any particular decision regarding the continuance of an Additional Judge. This correspondence would also show whether the “full and identical facts” on which the decision of the Central Government is based were placed before the Chief Justice of the High Court, the State Government and the Chief Justice of India before they gave their opinion in the course of the consultative process. Of course if the communication between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India has not taken place by correspondence but has been the subject-matter of only oral talk or discussion, it would become impossible for the Court to discover the reasons which have weighed with the Central Government in taking the decision not to continue the Additional Judge for a further term, unless of course the Central Government chooses to disclose such reasons and it would also become extremely difficult for the Court to decide whether the “full and identical facts” on which the decision of the Central Government is based were placed before the other three constitutional authorities and there was full and effective consultation as required by Article 217. The court would then have to depend only on such affidavits as may be filed before it and the task of the court to ascertain the truth would be rendered extremely delicate and difficult, as it has been in the writ petitions challenging the transfer of Mr Justice K.B.N. Singh, Chief Justice of Patna High Court. It is not at all desirable that when the Chief Justice of the High Court or the Chief Justice of India has to communicate officially with the State Government or the Central Government in regard to a matter where he is discharging a constitutional function, such communication should be only by way of oral talk or discussion unrecorded in writing. We think it absolutely essential that such communication must, as far as possible, be in writing, whether by way of a note or by way of correspondence. The process of consultation, whether under Article 217 or under Article 222, must be evidenced in writing so that if at any point of time a dispute arises as to whether consultation had in fact taken place or what was the nature and content of such

consultation, there must be documentary evidence to resolve such dispute and an ugly situation should not arise where the word of one constitutional authority should be pitted against the word of another and the Court should be called upon to decide which of them is telling the truth. Oral talk or discussion may certainly take place between the Central Government and any other constitutional authority required to be consulted but it must be recorded immediately either in a note or in correspondence. Besides eliminating future dispute or controversy, the practice of having written communication or record of oral discussion ensures greater care and deliberation in expression of views and considerably reduces the possibility of improper or unjustified recommendations or unholy confabulations or conspiracies which might be hidden under the veil of secrecy if there were no written record. Moreover, such a practice would tend to promote openness in society which is the hallmark of a democratic polity. It would indeed be highly regrettable if, instead of following this healthy practice of having a written record of consultation, the Central Government or the State Government or the Chief Justice of the High Court or the Chief Justice of India were to carry on the consultation process either on the telephone or by personal discussion without recording it. But we find that fortunately in the present case, unlike K.B.N. Singh's case which falls for determination in the second batch of writ petitions, there was correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the continuance of S.N. Kumar and the question is whether this correspondence forms part of the advice tendered by the Council of Ministers to the President so as to be protected against disclosure by reason of clause (2) of Article 74.

60. The argument of the learned Solicitor-General was that this correspondence formed part of the advice tendered by the Council of Ministers to the President and he sought to support this argument by adopting the following process of reasoning. He said that the Council of Ministers cannot advise the President to appoint or not to appoint an Additional Judge for a further term without consulting the Chief Justice of the High Court and the Chief Justice of India. It is only after consulting them that appropriate advice can be tendered by the Council of Ministers to the President. When advice is tendered by the Council of Ministers to the President, it is open to the President under the proviso to clause (1) of Article 74 not to immediately accept such advice but to require the Council of Ministers to reconsider the advice generally or otherwise. If in a given case the President finds that advice has been given by the Council of Ministers without consulting either the Chief Justice of the High Court or the Chief Justice of India or both or that there has been no full and effective consultation with them as required by the Constitution, he may, and indeed he must, send the case back to the Council of Ministers and require them to reconsider the advice after carrying out full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India. Now how can the President satisfy himself in regard to the fulfillment of the constitutional requirement of consultation with the Chief Justice of the High Court and the Chief Justice of India, unless the views expressed by the two Chief Justices are placed before him along with the advice tendered by the Council of Ministers. The exercise of the power of the President to appoint or not to appoint an Additional Judge is so integrally connected with the

constitutional requirement of full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India that at no stage can it be delinked from the views expressed by them on consultation and it would not be possible for the President to exercise this executive power in accordance with the Constitution unless the views of the two Chief Justices are placed before him. On the basis of this reasoning and as a logical consequence of it, argued the learned Solicitor-General, the view of the Chief Justice of Delhi and the Chief Justice of India obtained on consultation must be regarded as forming part of the advice tendered by the Council of Ministers to the President. The learned Solicitor-General sought to draw support for his argument from the decision of a Constitution Bench of this Court in the *State of Punjab v. Sodhi Sukhdev* [AIR 1961 SC 493]. We shall presently refer to this decision but before we do so, let us examine the argument of the learned Solicitor-General on principle.

61. There can be no doubt that the advice tendered by the Council of Ministers to the President is protected against judicial scrutiny by reason of clause (2) of Article 74. But can it be said that the views expressed by the Chief Justice of the High Court and the Chief Justice of India on consultation form part of the advice. The advice is given by the Council of Ministers *after* consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on “full and identical facts” and their views are obtained and it is after considering those views that the Council of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the formation of the advice and merely because they are referred to in the advice which is ultimately tendered by the Council of Ministers, they do not necessarily become part of the advice. What is protected against disclosure under clause (2) or Article 74 is only the advice tendered by the Council of Ministers. The reasons which have weighed with the Council of Ministers in giving the advice would certainly form part of the advice, as held by this Court in *State of Rajasthan v. Union of India* [AIR 1977 SC 1361]. *Vide* the observations of Beg, C.J. at page 46, Chandrachud, J. (as he then was) at page 61, Fazal Ali, J. at pages 120 and 121, where all the three learned Judges took the view that by reason of clause (2) of Article 74 the Court would be barred from inquiring into the grounds which might weigh with the Council of Ministers in advising the President to issue a proclamation under Article 356, because the grounds would form part of the advice tendered by the Council of Ministers. But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form part of the advice. The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law. The judgment would undoubtedly be based on the evidence led before the Court and it would refer to such evidence and discuss it but on that account can it be said that the evidence forms part of the judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgment. Similarly the material on which the advice tendered by the Council of Ministers is

based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in clause (2) of Article 74.

62. We may now refer to the decision of the Constitution Bench of this Court in the *State of Punjab v. Sodhi Sukhdev Singh* in which the greatest reliance was placed by the learned Solicitor-General in support of his plea based on clause (2) of Article 74. The respondent who was the District and Sessions Judge in the erstwhile State of PEPSU was removed from service by an order dated April 7, 1953 passed by the President who was then in charge of the Administration of the State. The respondent made a representation against the order of removal which was considered by the Council of Ministers of the State as in the meantime the President's rule had come to an end and the Council of Ministers expressed its views in a Resolution passed on September 28, 1955. But before taking any action it invited the Report of the Public Service Commission. On receipt of the Report of the Public Service Commission, the Council of Ministers considered the matter again and ultimately on August 11, 1956 it reached the final conclusion against the respondent and in accordance with the conclusion, the order was passed to the effect that the respondent must be re-employed on some suitable post. The respondent thereupon instituted a suit against the successor State of Punjab for a declaration that his removal from service was illegal and in that suit he filed an application for the production of certain documents which included inter alia the proceedings of the Council of Ministers dated September 28, 1955 and August 11, 1956 and the Report of the Public Service Commission. The State objected to the production of these documents and ultimately the matter came before this Court. Gajendragadkar, J. (as he then was) speaking on behalf of the majority of the Court upheld the claim of privilege put forward on behalf of the State and so far as the Report of the Public Service Commission was concerned, the learned Judge held that it was protected against disclosure both under clause (3) of Article 163, and Section 123 of the Indian Evidence Act. We are at present concerned only with the claim for protection under clause (3) of Article 163 because that is an Article which corresponds to clause (2) of Article 74 insofar as advice by the Council of Ministers to the Governor is concerned. The learned Judge speaking on behalf of the majority, accorded protection to the report of the Public Service Commission under clause (3) of Article 163 on the ground that it formed part of the advice tendered by the Council of Ministers to the Rajpramukh. This view taken by the majority does appear prima facie to support the contention of the learned Solicitor-General, but we do not think we can uphold the claim for protection put forward by the learned Solicitor-General by adopting a process of analogical reasoning from the majority view in this decision. In the first place, we do not know what were the circumstances in which the majority Judges came to regard the report of the Public Service Commission as forming part of the advice tendered to the Rajpramukh. There is no reasoning in the judgment of the learned Judge showing as to why the majority held that the report of the Public Service Commission fell within the terms of clause (3) of Article 163. The learned Judge has merely set out his ipse dixit, without any reasons at all, saying in just one sentence: "The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers." It is elementary that what is binding on the court in

a subsequent case is not the conclusion arrived at in a previous decision but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion. Secondly, we may point out that we find it difficult to accept the view taken by the majority in this case. We are unable to appreciate how the report of the Public Service Commission which merely formed the material on the basis of which the Council of Ministers came to its decision as recorded in the proceedings dated August 11, 1956 could be said to form part of the advice tendered by the Council of Ministers to the Rajpramukh. We do not think the learned Solicitor-General can invoke the aid of this decision in support of his claim for protection under clause (2) of Article 74.

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In Re Special Reference No. 1 of 1998

(1998) 7 SCC 739

(S.P. Bharucha, M.K.Mukherjee, S.B.Majmudar, Sujata V.Manohar, G.T.Nanavati, S.Saghir Ahmad, K.Venkateswami, B.N.Kirpal and G.B.Pattanaik, JJ.)

[Relevance of seniority of High Court judges in the appointment to Supreme Court; Consultation under Article 124(2) and 217(1) of the Constitution of India for appointment of judges in the Supreme Court and High Courts and transfer of judges of the High Courts under Article 222.]

S.P. BHARUCHA, J. -Article 143 of the Constitution of India confers upon the President of India the power to refer to this Court for its opinion questions of law or fact which have arisen or are likely to arise and which are of such a nature and of such public importance that it is expedient to obtain such opinion. In exercise of this power, the President of India has on 23-7-1998 made the present Reference:

“WHEREAS the Supreme Court of India has laid down principles and prescribed procedural norms in regard to the appointment of Judges of the Supreme Court [Article 124(2) of the Constitution of India], Chief Justices and Judges of the High Court [Article 217(1)], and transfer of Judges from one High Court to another [Article 222(1)], in the case of *Supreme Court Advocates-on-Record Assn. v. Union of India* [AIR 1994 SC 268];

AND WHEREAS doubts have arisen about the interpretation of the law laid down by the Supreme Court and it is in public interest that the said doubts relating to the appointment and transfer of Judges be resolved;

AND WHEREAS, in view of what is hereinbefore stated, it appears to me that the following questions of law have arisen and are of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

NOW, THEREFORE, in exercise of the powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, K.R. Narayanan, President of India, hereby refer the following questions to the Supreme Court of India for consideration and to report its opinion thereon, namely:

- (1) whether the expression ‘consultation with the Chief Justice of India’ in Articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India or does the sole individual opinion of the Chief Justice of India constitute consultation within the meaning of the said articles;
- (2) whether the transfer of Judges is judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that ‘such transfer is not justiciable on any ground’ and its further observation that limited judicial review is available in matters of transfer, and the extent and scope of judicial review;
- (3) whether Article 124(2) as interpreted in the said judgment requires the Chief Justice of India to consult only the two seniormost Judges or whether there should be wider consultation according to past practice;

(4) whether the Chief Justice of India is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of all materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment;

(5) whether the requirement of consultation by the Chief Justice of India with his colleagues, who are likely to be conversant with the affairs of the High Court concerned refers to only those Judges who have that High Court as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief Justice of that Court on transfer from their parent or any other court;

(6) whether in the light of the legitimate expectations of senior Judges of the High Court in regard to their appointment to the Supreme Court referred to in the said judgment, the 'strong cogent reason' required to justify the departure from the order of the seniority has to be recorded in respect of each such senior Judge, who is overlooked, while making recommendation of a Judge junior to him or her;

(7) whether the Government is not entitled to require that the opinions of the other consulted Judges be in writing in accordance with the aforesaid Supreme Court judgment and that the same be transmitted to the Government of India by the Chief Justice of India along with his views;

(8) whether the Chief Justice of India is not obliged to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India;

(9) whether any recommendations made by the Chief Justice of India without complying with the norms and consultation process are binding upon the Government of India?

New Delhi
Dated: 23-7-1998

Narayanan, K.R.
President of India

2. The decision mentioned in the Reference, in *Supreme Court Advocates-on-Record Assn. v. Union of India* [AIR 1994 SC 268] ("the *Second Judges case*") was rendered by a Bench of nine learned Judges. It examined these issues:

"(1) Primacy of the opinion of the Chief Justice of India in regard to the appointments of Judges to the Supreme Court and the High Court, and in regard to the transfers of High Court Judges/Chief Justices; and

(2) Justiciability of these matters, including the matter of fixation of the Judge-strength in the High Courts."

The issues were required to be examined because a smaller Bench was of the opinion that the correctness of the majority view in the case of *S.P. Gupta v. Union of India* [AIR 1982 SC 149] ("the *Judges case*") required reconsideration by a larger Bench.

3. Five judgments were delivered in the *Second Judges case*. Verma, J. spoke for himself and four learned Judges. Pandian, J. and Kuldeep Singh, J. wrote individual judgments supporting the majority view. Ahmadi, J. dissented, adopting, broadly, the reasoning that had found favour in the *Judges case*. Punchhi, J. took the view that the Chief Justice of India had primacy and that he was entitled "to consult any number of Judges on the particular proposal. It is equally within his right not to consult anyone".

4. The questions in the Presidential Reference relate, broadly, to three aspects:

- (1) consultation between the Chief Justice of India and his brother Judges in the matter of appointments of Supreme Court and High Court Judges and transfers of the latter: Questions 1, 3, 4, 5, 7, 8 and 9;
- (2) judicial review of transfers of Judges: Question 2; and
- (3) the relevance of seniority in making appointments to the Supreme Court: Question 6.

[Refer to Articles 124, 216, 217 and 222 of the Constitution of India].

6. The following are extracts of what was said in the majority judgment in the **Second Judges** case about the primacy of the Chief Justice of India in the matter of appointments of Judges to the Supreme Court and the High Courts and the need in this behalf of the desirability of consultation between the Chief Justice of India and his brother Judges:

“A further check in that limited sphere is provided by the conferment of the discretionary authority not to one individual but to a body of men, requiring the final decision to be taken after full interaction and effective consultation between themselves, to ensure projection of all likely points of view and procuring the element of plurality in the final decision with the benefit of the collective wisdom of all those involved in the process. The conferment of this discretionary authority in the highest functionaries is a further check in the same direction. The constitutional scheme excludes the scope of absolute power in any one individual. Such a construction of the provisions also, therefore, matches the constitutional scheme and the constitutional purpose for which these provisions were enacted. * * * * *

Attention has to be focused on the purpose, to enable better appreciation of the significance of the role of each participant, with the consciousness that each of them has some inherent limitation, and it is only collectively that they constitute the selector.

The discharge of the assigned role by each functionary, viewed in the context of the obligation of each to achieve the common constitutional purpose in the jointventure will help to transcend the concept of primacy between them. However, if there be any disagreement even then between them which cannot be ironed out by joint effort, the question of primacy would arise to avoid stalemate. * * * * *

It is obvious that the provision for consultation with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior Judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory

consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice of India as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Acts.

The primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of primacy would arise when the decision is reached in this manner by consensus, without any difference of opinion. * * * * *

The primacy must, therefore, lie in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable. * * * * *

On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism levelled by the ever-vigilant Bar. That controversy is raised primarily in the courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus, in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India.

If that is the position in actual practice of the constitutional provisions relating to the appointments of the superior Judges, wherein the executive itself holds out that it gives primacy to the opinion of the Chief Justice of India, and in the matter of accountability also it indicates the primary responsibility of the Chief Justice of India, it stands to reason that the actual practice being in conformity with the constitutional scheme, should also be accorded legal sanction by permissible constitutional interpretation. This reason given by the majority in *S.P. Gupta*² for its view, that the executive has primacy, does not withstand scrutiny, and is also not in accord with the existing practice and the perception even of the executive.

However, it need hardly be stressed that *the primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion.* (emphasis supplied) * * * * *

Providing for the role of the judiciary as well as the executive in the integrated process of appointment merely indicates that it is a participatory consultative process, and the purpose is best served if at the end of an effective consultative process between all the consultees the decision is reached by consensus, and no question arises of giving primacy to any consultee. Primarily, it is this indication which is given by the constitutional provisions, and the constitutional purpose would be best served if the decision is made by consensus without the need of giving primacy to any one of the consultees on account of any difference remaining between them. The question of primacy of the opinion of any one of the constitutional functionaries qua the others would arise only if the resultant of the consultative process is not one opinion reached by consensus.

The constitutional purpose to be served by these provisions is to select the best from amongst those available for appointment as Judges of the superior judiciary, after consultation with those functionaries who are best suited to make the selection. * * * *

Even the personal traits of the members of the Bar and the Judges are quite often fully known to the Chief Justice of India and the Chief Justice of the High Court who get such information from various sources. There may, however, be some personal trait of an individual lawyer or Judge, which may be better known to the executive and may be unknown to the Chief Justice of India and the Chief Justice of the High Court, and which may be relevant for assessing his potentiality to become a good Judge. It is for this reason that the executive is also one of the consultees in the process of appointment. The object of selecting the best men to constitute the superior judiciary is achieved by requiring consultation with not only the judiciary but also the executive to ensure that every relevant particular about the candidate is known and duly weighed as a result of effective consultation between all the consultees, before the appointment is made. * * *
* *

It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all-pervasive throughout the Constitution; and an adjunct of this principle is the absence of absolute power in one individual in any sphere of constitutional activity. The possibility of intrusion of arbitrariness has to be kept in view, and eschewed, in constitutional interpretation and, therefore, the meaning of the opinion of the Chief Justice of India, in the context of primacy, must be ascertained. A homogeneous mixture, which accords with the constitutional purpose and its ethos, indicates that it is the opinion of the judiciary '*symbolised by the view of the Chief Justice of India*' which is given greater significance or primacy in the matter of appointments. In other words, the view of the Chief Justice of India is to be expressed in the consultative process as truly reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation. In actual practice, this is how the Chief Justice of India does, and is expected to function, so that the final opinion expressed by him is not merely his individual opinion, but the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function.

In view of the primacy of judiciary in this process, the question next is of the modality for achieving this purpose. The indication in the constitutional provisions is found from the reference to the office of the Chief Justice of India, which has been named for achieving this object in a pragmatic manner. *The opinion of the judiciary 'symbolised by the view of the Chief Justice of India', is to be obtained by consultation with the Chief Justice of India; and it is this opinion which has primacy.*

The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior Judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; *the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues*; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any individual, be he the Chief Justice of India or the Prime Minister.

The norms developed in actual practice, which have crystallised into conventions in this behalf, as visualised in the speech of the President of the Constituent Assembly, are mentioned later. (emphasis supplied) * * * * *

NORMS

The absence of specific guidelines in the enacted provisions appears to be deliberate, since the power is vested in high constitutional functionaries and it was expected of them to develop requisite norms by convention in actual working as envisaged in the concluding speech of the President of the Constituent Assembly. The hereinafter mentioned norms emerging from the actual practice and crystallised into conventions - not exhaustive - are expected to be observed by the functionaries to regulate the exercise of their discretionary power in the matters of appointments and transfers.

Appointments

(1) *What is the meaning of the opinion of the judiciary 'symbolised by the view of the Chief Justice of India'?*

This opinion has to be formed in a pragmatic manner and past practice based on convention is a safe guide. In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two seniormost Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the

seniormost Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite. The object underlying Article 124(2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124(2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.

In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the two seniormost Judges of the High Court.

The Chief Justice of India, for the formation of his opinion, has to adopt a course which would enable him to discharge his duty objectively to select the best available persons as Judges of the Supreme Court and the High Courts. *The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, must be in writing to avoid any ambiguity. (emphasis supplied) * * * * **

(5) The opinion of the Chief Justice of India, for the purpose of Articles 124(2) and 217(1), so given, has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Courts, unless it is in conformity with the final opinion of the Chief Justice of India, formed in the manner indicated.

(6) The distinction between making an appointment in conformity with the opinion of the Chief Justice of India, and not making an appointment recommended by the Chief Justice of India has to be borne in mind. Even though no appointment can be made unless it is in conformity with the opinion of the Chief Justice of India, yet in an exceptional case, where the facts justify, a recommendee of the Chief Justice of India, if considered unsuitable on the basis of positive material available on record and placed before the Chief Justice of India, may not be appointed except in the situation indicated later. Primacy is in making an appointment; and, when the appointment is not made, the question of primacy does not arise. There may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and

permits non-appointment of the candidate recommended by the Chief Justice of India, except in the situation indicated hereafter.

It is only to this limited extent of non-appointment of a recommendee of the Chief Justice of India, on the basis of positive material indicating his appointment to be otherwise unsuitable, that the Chief Justice of India does not have the primacy to persist for appointment of that recommendee except in the situation indicated later. This will ensure composition of the courts by appointment of only those who are approved of by the Chief Justice of India, which is the real object of the primacy of his opinion and intended to secure the independence of the judiciary and the appointment of the best men available with undoubted credentials. (emphasis supplied)

(7) Non-appointment of anyone recommended, on the ground of unsuitability must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person, for reasons to be recorded, may be permissible in the public interest. If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment. However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made.

*(8) Some instances when non-appointment is permitted and justified may be given. Suppose the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reasons, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible. (emphasis supplied) * * * * **

(9) In order to ensure effective consultation between all the constitutional functionaries involved in the process, the reasons for disagreement, if any, must be disclosed to all others, to enable reconsideration on that basis. All consultations with everyone involved, including all the Judges consulted, must be in writing and the Chief Justice of the High Court, in the case of appointment to a High Court, and the Chief Justice of India, in all cases, must transmit with his opinion the opinions of all Judges consulted by him, as a part of the record.

Expression of opinion in writing is an inbuilt check on exercise of the power, and ensures due circumspection. Exclusion of justiciability, as indicated hereafter, in this sphere should prevent any inhibition against the expression of a free and frank opinion. *The final opinion of the Chief Justice of India, given after such effective consultation between the constitutional functionaries, has primacy in the manner indicated.*

(emphasis supplied)

7. On the aspect of transfers of Judges and the judicial review thereof, the majority judgment stated:

Transfers

(1) In the formation of his opinion, the Chief Justice of India, in the case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India. The personal factors relating to the Judge concerned, and his response to the proposal, including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice.(emphasis supplied)

Justiciability: Appointments and Transfers

The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judicial review of those decisions, which is ordinarily needed as a check against possible executive excess or arbitrariness. *Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated.* The reduction of the area of discretion to the minimum, *the element of plurality of Judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.*

These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision.(emphasis supplied) * * * * *

It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. *Except on the ground of want of*

consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making.” (emphasis supplied)

8. On the aspect of the relevance of seniority in the matter of Supreme Court appointments, this was stated:

(3) Inter se seniority amongst Judges in their High Court and their combined seniority on all-India basis is of admitted significance in the matter of future prospects. Inter se seniority amongst Judges in the Supreme Court, based on the date of appointment, is of similar significance. *It is, therefore, reasonable that this aspect is kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court.* Apart from recognising the legitimate expectation of the High Court Judges to be considered for appointment to the Supreme Court according to their seniority, this would also lend greater credence to the process of appointment and would avoid any distortion in the seniority between the appointees drawn even from the same High Court. The likelihood of the Supreme Court being deprived of the benefit of the services of some who are considered suitable for appointment, but decline a belated offer, would also be prevented.

(4) *Due consideration of every legitimate expectation* in the decision-making process is a requirement of the rule of non-arbitrariness and, therefore, this also *is a norm to be observed by the Chief Justice of India in recommending appointments to the Supreme Court.* Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India, for appointment to the Supreme Court. Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority.

This legitimate expectation has relevance on the ground of longer experience on the Bench, and is a factor material for determining the suitability of the appointee. *Along with other factors, such as, proper representation of all sections of the people from all parts of the country, legitimate expectation of the suitable and equally meritorious Judges to be considered in their turn is a relevant factor for due consideration while making the choice of the most suitable and meritorious amongst them, the outweighing consideration being merit, to select the best available for the Apex Court.*(emphasis supplied)

9. The majority judgment ends with a summary of its conclusions. Conclusions 1, 2, 3, 4, 5, 7, 9, 10, 11 and 14 are relevant for our purposes. They read thus:

“(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated ‘participatory consultative process’ for selecting the best and most

suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal had to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.

(3) In the event of conflicting opinions by the constitutional functionaries, *the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy.*

(4) *No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.*

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.

(7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices.

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

(10) *In making all appointments and transfers, the norms indicated must be followed.* However, the same do not confer any justiciable right in anyone.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.

(14) The majority opinion in *S.P. Gupta v. Union of India* [(1982) 2 SCR 365] insofar as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation to Judge-strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us.” (emphasis supplied)

10. We have heard the learned Attorney General, learned counsel for the interveners and some of the High Courts and the Advocates General of some States.

11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.

12. The majority view in the *Second Judges* case is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is “reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation”. It is to be formed “after taking into account the view of some other Judges who are traditionally associated with this function”. The opinion of the Chief Justice of India “so given has primacy in the matter of all appointments”. For an appointment to be made, it has to be “in conformity with the final opinion of the Chief Justice of India formed in the manner indicated”. It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon.

13. Insofar as appointments to the Supreme Court of India are concerned, the majority view in the *Second Judges* case is that the opinion given by the Chief Justice of India in this behalf:

“has to be formed taking into account the views of the two seniormost Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the seniormost Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite”.

14. It was urged by the learned Attorney General as also by learned counsel that the Chief Justice of India needs to consult a larger number of Judges of the Supreme Court before he recommends an appointment to the Supreme Court. Attention was drawn to the fact that at the time of the latest selection of Judges appointed to the Supreme Court, the then Chief Justice of India had constituted a panel of himself and five of the then seniormost puisne Judges. It was submitted that this precedent should be treated as a convention and institutionalised.

15. We think it necessary to make clear at the outset the distinction that follows. The opinion of the Chief Justice of India which has primacy in the matter of recommendations for appointment to the Supreme Court has to be formed in consultation with a collegium of Judges. Presently, and for a long time now, that collegium consists of the two seniormost puisne Judges of the Supreme Court. In making a decision as to whom that collegium should recommend, it takes into account the views that are elicited by the Chief Justice of India from the seniormost Judge of the Supreme Court who comes from the same High Court as the person proposed to be recommended. It also takes into account the views of other Judges of the Supreme Court or the Chief Justice or Judges of the High Courts or, indeed, members of the Bar who may also have been asked by the Chief Justice of India or on his behalf. The principal objective of the collegium is to ensure that the best available talent is brought to the Supreme Court Bench. The Chief Justice of India and the seniormost puisne Judges, by reason of their long tenures on the Supreme Court, are best fitted to achieve this objective. They can assess the comparative worth of possible appointees by reason of the fact that their judgments would have been the subject-matter of petitions for special leave to appeal and appeals. Even where the person under consideration is a member of the Bar, he would have frequently appeared before them. In assessing comparative worth as aforesaid, the

collegium would have the benefit of the inputs provided by those whose views have been sought. The distinction, therefore, is between the Judges of the Supreme Court who decide, along with the Chief Justice of India, who should be recommended for appointment to the Supreme Court and the Judges of the Supreme Court and others who are asked to express their views about the suitability of a possible nominee for such appointment.

16. With this in mind, what has to be considered is whether the size of the collegium that makes the recommendation should be increased. Having regard to the terms of Article 124(2) as analysed in the majority judgment in the Second Judges case as also the precedent set by the then Chief Justice of India as set out earlier and having regard to the objective aforesaid, we think it is desirable that the collegium should consist of the Chief Justice of India and the four seniormost puisne Judges of the Supreme Court.

17. Ordinarily, one of the four seniormost puisne Judges of the Supreme Court would succeed the Chief Justice of India, but if the situation should be such that the successor Chief Justice is not one of the four seniormost puisne Judges, he must invariably be made part of the collegium. The Judges to be appointed will function during his term and it is but right that he should have a hand in their selection.

18. It is not practicable to include in the collegium the seniormost Judge of the Supreme Court who comes from the same High Court as the person to be recommended, unless, of course, he is a part of the collegium by virtue of being one of the four seniormost puisne Judges, because, as experience shows, it is normally not one vacancy that has to be filled up but a number thereof. The prospective candidates to fill such multiple vacancies would come from a number of High Courts. It would, therefore, be necessary to consult the seniormost Judges from all those High Courts. All these Judges cannot conveniently be included in the collegium. Secondly, the composition of the collegium cannot vary depending upon where the prospective appointees hail from. To put it differently, for a particular set of vacancies, the seniormost Judges from the High Courts at, let us say, Allahabad and Bombay may have to be consulted. It would neither be proper nor desirable, if they have been part of the collegium for that particular selection, to leave them out of the next collegium although no prospective appointee at that time hails from the High Courts at Allahabad or Bombay. Thirdly, it would not be proper to exclude from the collegium such Judges of the Supreme Court, if any, as are senior to the Judges required to be consulted. Lastly, the seniormost Judge of the Supreme Court who comes from the same High Court as the person to be recommended may be in terms of overall seniority in the Supreme Court, very junior, with little experience of work in the Supreme Court, and, therefore, unable to assess the comparative merit of a number of possible appointees.

19. Necessarily, the opinion of all members of the collegium in respect of each recommendation should be in writing. The ascertainment of the views of the seniormost Supreme Court Judges who hail from the High Courts from where the persons to be recommended come must also be in writing. These must be conveyed by the Chief Justice of India to the Government of India along with the recommendation. The other views that the Chief Justice of India or the other members of the collegium may elicit, particularly if they are from non-Judges, need not be in writing, but it seems to us advisable that he who elicits

the opinion should make a memorandum thereof, and the substance thereof in general terms, should be conveyed to the Government of India.

20. The seniormost Judge in the Supreme Court from the High Court from which a prospective candidate comes would ordinarily know his merits and demerits, but if perchance he does not, the next seniormost Judge in the Supreme Court from that High Court should be consulted and his views obtained in writing.

21. We should add that the objective being to procure the best information that can be obtained about a prospective appointee, it is of no consequence that a Judge in the Supreme Court from the prospective appointee's High Court had been transferred to that High Court either as a puisne Judge or as its Chief Justice.

22. It is, we think, reasonable to expect that the collegium would make its recommendations based on a consensus. Should that not happen, it must be remembered that no one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India. The question that remains is: what is the position when the Chief Justice of India is in a minority and the majority of the collegium disfavour the appointment of a particular person? The majority judgment in the Second Judges case has said if

“the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reasons, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible”.

This is delicately put, having regard to the high status of the President, and implies that if the majority of the collegium is against the appointment of a particular person, that person shall not be appointed, and we think that this is what must invariably happen. We hasten to add that we cannot easily visualise a contingency of this nature; we have little doubt that if even two of the Judges forming the collegium express strong views for good reasons that are adverse to the appointment of a particular person, the Chief Justice of India would not press for such appointment.

23. The majority judgment in the Second Judges case contemplates the non-appointment of a person recommended on the ground of unsuitability. It says that such non-appointment

“must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person, for reasons to be recorded, may be permissible in the public interest. However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made”.

It may be that one or more members of the collegium that made a particular recommendation have retired or are otherwise unavailable when reasons are disclosed to the Chief Justice of India for the non-appointment of that person. In such a situation, the reasons must be placed before the remaining members of the original collegium plus another Judge or Judges who have reached the required seniority and become one of the first four puisne Judges. It is for this collegium, so reconstituted, to consider whether the recommendation should be withdrawn or reiterated. It is only if it is unanimously reiterated that the appointment must be made. Having regard to the objective of securing the best available men for the Supreme Court, it is imperative that the number of Judges of the Supreme Court who consider the reasons for non-appointment should be as large as the number that had made the particular recommendation.

24. The Chief Justice of India may, in his discretion, bring to the knowledge of the person recommended the reasons disclosed by the Government of India for his non-appointment and ask for his response thereto. The response, if asked for and made, should be considered by the collegium before it withdraws or reiterates the recommendation.

25. The majority judgment in the Second Judges case¹ said that “inter se seniority amongst Judges in their High Court and their combined seniority on all-India basis” should be “kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court”. It also said that “the legitimate expectation of the High Court Judges to be considered for appointment to the Supreme Court, according to their seniority” must be duly considered. The statement made thereafter is very important; it is “Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India for appointment to the Supreme Court.”

26. Merit, therefore, as we have already noted, is the predominant consideration for the purposes of appointment to the Supreme Court.

27. Where, therefore, there is outstanding merit, the possessor thereof deserves to be appointed regardless of the fact that he may not stand high in the all-India seniority list or in his own High Court. All that then needs to be recorded when recommending him for appointment is that he has outstanding merit. When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench. All that then needs to be recorded when making the recommendation for appointment is this factor. The “strong cogent reasons” that the majority judgment in the Second Judges case speaks of are good reasons for appointing to the Supreme Court a particular High Court Judge, not for not appointing other High Court Judges senior to him. It is not unusual that a Judge who has once been passed over for appointment to the Supreme Court might still find favour on the occasion of another selection and there is no reason to blot his copybook by recording what might be construed to be an adverse comment about him. It is only when, for very strong reasons, a collegium finds that whatever his seniority, some High Court Judge should never be appointed to the Supreme

Court that it should so record. This would then be justified and would afford guidance on subsequent occasions of considering who to recommend.

28. Mr Parasaran, learned counsel for the intervener, the Advocates-on-Record Association, submitted that the words “legitimate expectation” were not apposite when the reference was to High Court Judges. We make it clear that no disparagement of High Court Judges was meant; all that was intended to be conveyed was that it was very natural that senior High Court Judges should entertain hopes of elevation to the Supreme Court and that the Chief Justice of India and the collegium should bear this in mind.

29. The majority judgment in the Second Judges case requires the Chief Justice of a High Court to consult his two seniormost puisne Judges before recommending a name for appointment to the High Court. In forming his opinion in relation to such appointment, the Chief Justice of India is expected “to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court ”

The Chief Justice of India should, therefore, form his opinion in regard to a person to be recommended for appointment to a High Court in the same manner as he forms it in regard to a recommendation for appointment to the Supreme Court, that is to say, in consultation with his seniormost puisne Judges. They would in making their decision take into account the opinion of the Chief Justice of the High Court which “would be entitled to the greatest weight”, the views of other Judges of the High Court who may have been consulted and the views of colleagues on the Supreme Court Bench “who are conversant with the affairs of the High Court concerned”. Into that last category would fall Judges of the Supreme Court who were puisne Judges of the High Court or Chief Justices thereof, and it is of no consequence that the High Court is not their parent High Court and they were transferred there. The objective being to gain reliable information about the proposed appointee, such Supreme Court Judge as may be in a position to give it should be asked to do so. All these views should be expressed in writing and conveyed to the Government of India along with the recommendation.

30. Having regard to the fact that information about a proposed appointee to a High Court would best come from the Chief Justice and Judges of that High Court and from Supreme Court Judges conversant with it, we are not persuaded to alter the strength of the decision-making collegium’s size; where appointments to the High Courts are concerned, it should remain as it is, constituted of the Chief Justice of India and the two seniormost puisne Judges of the Supreme Court.

31. In the context of the judicial review of appointments, the majority judgment in the Second Judges case said:

“Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias..... The judicial element being predominant in the case of appointments ... , as indicated, the need for further judicial review, as in other executive actions, is eliminated.”

The judgment added:

“Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, ... these matters are not justiciable on any other ground.”

32. Judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his seniormost colleagues, which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to a High Court. Judicial review is also available if, in making the decision, the views of the seniormost Supreme Court Judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a High Court, the views of the Chief Justice and senior Judges of the High Court, as aforesaid, and of Supreme Court Judges knowledgeable about that High Court have not been sought or considered by the Chief Justice of India and his two seniormost puisne Judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility.

33. The majority judgment in the *Second Judges* case dealt with the question of the transfer of a puisne Judge of one High Court as a puisne Judge of another High Court. It said:

“In the formation of his opinion, the Chief Justice of India, in the case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India.”

In regard to the justiciability of such transfers, it said:

“Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias The judicial element being decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated.”

In the same context there was reference to “the element of plurality of Judges in formation of the opinion of the Chief Justice of India”. It was then said that:

“Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.”

Again, it was said:

“Except on the ground of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making.”

34. The same thoughts were expressed in the concurring judgment of Kuldeep Singh, J., thus:

“We are, therefore, of the view that the opinion of the Chief Justice of India in the process of consultation for appointments to the superior courts must be formed in consultation with two of his seniormost colleagues. Apart from that the Chief Justice of India must also consult the seniormost Judge who comes from the same State (the State from where the candidate is being considered). *This process of consultation shall also be followed while transferring any Judge/Chief Justice from one State to another.*”(emphasis supplied)

35. The judgment in the case of *K. Ashok Reddy v. Govt. of India* [(1994) 2 SCC 303] dealt with the justiciability of transfers of High Court Judges from one High Court to another. The judgment, rendered by a Bench of three learned Judges, records that it was a “sequel to the decision” in the *Second Judges* case. It refers to the fact that after the *Second Judges* case the then Chief Justice of India had constituted a Peer Committee comprised of the then two seniormost puisne Judges of the Supreme Court and two Chief Justices of High Courts to make suggestions for transfers and the Chief Justice of India was to make his recommendations on that basis and in accordance with the broad guidelines indicated in the *Second Judges* case. There was, therefore, the judgment said, no room left for any apprehension of arbitrariness or bias in the transfer of any Judge or Chief Justice of a High Court. There was no doubt that the Chief Justice of India, acting on the institutional advice available to him, was the surest and safest bet for preservation of the independence of the judiciary. The *Second Judges* case did not exclude judicial review but limited the area of justiciability to the constitutional requirement of the recommendation of the Chief Justice of India for exercise of power under Article 222 by the President of India. The power of transfer was to be exercised by the highest constitutional functionaries in the country in the manner indicated, which provided several inbuilt checks against the likelihood of arbitrariness or bias. The need for restricting the standing to sue in such a matter to the affected Judge alone had been reiterated in the *Second Judges* case. The transfer of a High Court Judge was justiciable only on the ground indicated in the *Second Judges* case and only at the instance of the transferred Judge himself and no one else. This was necessary to prevent any transferred Judge from being exposed to any litigation involving him except when he chose to resort to it himself in the available limited area of justiciability. When it was said in the *Second Judges* case that the ground of bias was not available for challenging a transfer, it was to emphasise that the decision by the collective exercise of several Judges at the highest level on objective criteria, on which the recommendation of the Chief Justice of India was based, was an inbuilt check against arbitrariness and bias indicating the absence of need for judicial review on those grounds. If any court other than the Supreme Court was called upon to decide a matter relating to the transfer of a High Court Judge, it should promptly consider the option of requesting the Supreme Court to withdraw the case to itself for decision to avoid any embarrassment.

36. What emerges from the aforesaid is this: before recommending the transfer of a puisne Judge of one High Court to another High Court, also as a puisne Judge, the Chief Justice of India must consult a plurality of Judges. He must take into account the views of the

Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may have significance in the case and at least one other senior Chief Justice of a High Court or any other person whose views he considers relevant. The then Chief Justice of India had constituted, as was noted in *Ashok Reddy* case a Peer Committee of the two seniormost puisne Judges of the Supreme Court and two Chief Justices of High Courts to advise him in the matter of transfers of High Court Judges. That Committee is no longer in position.

37. It is to our mind imperative, given the gravity involved in transferring High Court Judges, that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also the Chief Justice of the High Court to which the transfer is to be effected. This is in accord with the majority judgment in the *Second Judges* case which postulates consultation with the Chief Justice of another High Court. The Chief Justice of India should also take into account the views of one or more Supreme Court Judges who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by the Chief Justice of India and the four seniormost puisne Judges of the Supreme Court. These views and those of each of the four seniormost puisne Judges should be conveyed to the Government of India along with the proposal of transfer. Unless the decision to transfer has been taken in the manner aforesaid, it is not decisive and does not bind the Government of India.

38. Wide-based decision-making such as this eliminates the possibility of bias or arbitrariness. By reason of such elimination, the remedy of judicial review can legitimately be confined to a case where the transfer has been made or recommended without obtaining views and reaching the decision in the manner aforesaid.

39. What applies to the transfer of a puisne Judge of a High Court applies as well to the transfer of the Chief Justice of a High Court as Chief Justice of another High Court except that, in this case, only the views of one or more knowledgeable Supreme Court Judges need to be taken into account.

40. The majority judgment in the *Second Judges* case requires that:

“(T)he personal factors relating to the Judge concerned, and his response to the proposal, including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice.”

These factors, including the response of the High Court Chief Justice or puisne Judge proposed to be transferred to the proposal to transfer him, should now be placed before the collegium of the Chief Justice of India and his first four puisne Judges to be taken into account by them before reaching a final conclusion on the proposal.

41. We have heard with some dismay the dire apprehensions expressed by some of the counsel appearing before us. We do not share them. We take the optimistic view that successive Chief Justices of India shall henceforth act in accordance with the *Second Judges* case and this opinion.

42. We have not dealt with any aspect placed before us at the Bar that falls outside the scope of the questions posed in the Reference.

44. The questions posed by the Reference are now answered, but we should emphasise that the answers should be read in conjunction with the body of this opinion:

1. The expression “consultation with the Chief Justice of India” in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute “consultation” within the meaning of the said articles.

2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four seniormost puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two seniormost puisne Judges of the Supreme Court.

4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment.

5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the High Court concerned does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. “Strong cogent reasons” do not have to be recorded as justification for a departure from the order of seniority in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.

7. The views of the other Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.

8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforesaid, in making his recommendations to the Government of India.

9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforesaid, are not binding upon the Government of India.

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SC Advocate on Record Association v. Union of India

(2016) 5 SCC 1

(Jagdish Singh Khehar, J. Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ.)

JAGDISH SINGH KHEHAR, J.: 19. The question which has arisen for consideration, in the present set of cases, pertains to the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 (hereinafter referred to as, the Constitution (99th Amendment) Act), as also, that of the National Judicial Appointments Commission Act, 2014 (hereinafter referred to as, the NJAC Act).

28. Judges to the Supreme Court of India and High Courts of States, are appointed under Articles 124 and 217 respectively. Additional Judges and acting Judges for High Courts are appointed under Articles 224 and 224A. The transfer of High Court Judges and Chief Justices, of one High Court to another, is made under Article 222.

31. As per the position expressed before us, a feeling came to be entertained, that a Commission for selection and appointment, as also for transfer, of Judges of the higher judiciary should be constituted, which would replace the prevailing procedure, for appointment of Judges and Chief Justices of the High Courts and the Supreme Court of India, contemplated under Articles 124(2) and 217(1). It was felt, that the proposed Commission should be broad based. In that, the Commission should comprise of members of the judiciary, the executive and eminent/important persons from public life. In the above manner, it was proposed to introduce transparency in the selection process.

32. To achieve the purported objective, Articles 124 and 217 were inter alia amended, and Articles 124A, 124B and 124C were inserted in the Constitution, through the Constitution (99th Amendment) Act, by following the procedure contemplated under Article 368(2), more particularly, the proviso thereunder. The amendment, received the assent of the President on 31.12.2014. It was however given effect to, with effect from 13.4.2015 (consequent upon its notification in the Gazette of India (Extraordinary) Part II, Section 1). Simultaneously therewith, the Parliament enacted the NJAC Act, which also received the assent of the President on 31.12.2014. The same was also brought into force, with effect from 13.4.2015 (by its notification in the Gazette of India (Extraordinary) Part II, Section 1). The above constitutional amendment and the legislative enactment, are subject matter of challenge through a bunch of petitions, which are collectively being heard by us.

262. Having given our thoughtful consideration to the position assumed by the learned counsel representing the rival parties, it is essential to hold, that every constitutional amendment passed by the Parliament, either by following the ordinary procedure contemplated under Article 368(2), or the special procedure contemplated in the proviso to Article 368(2), could in a sense of understanding, by persons not conversant with the legal

niceties of the issue, be treated as the will of the people, for the simple reason, that parliamentarians are considered as representatives of the people. In our view, as long as the stipulated majority supports a constitutional amendment, it would be treated as a constitutional amendment validly passed. Having satisfied the above benchmark, it may be understood as an expression of the will of the people, in the sense noticed above. The strength and enforceability of a constitutional amendment, would be just the same, irrespective of whether it was passed by the bare minimum majority postulated therefor, or by a substantial majority, or even if it was approved unanimously. What is important, is to keep in mind, that there are declared limitations, on the amending power conferred on the Parliament, which cannot be breached.

263. An ordinary legislation enacted by the Parliament with reference to subjects contained in the Union List or the Concurrent List, and likewise, ordinary legislation enacted by State Legislatures on subjects contained in the State List and the Concurrent List, in a sense of understanding noticed above, could be treated as enactments made in consonance with the will of the people, by lay persons not conversant with the legal niceties of the issue. Herein also, there are declared limitations on the power of legislations, which cannot be violated.

264. In almost all challenges, raised on the ground of violation of the “basic structure” to constitutional amendments made under Article 368, and more particularly, those requiring the compliance of the special and more rigorous procedure expressed in the proviso under Article 368(2), the repeated assertion advanced at the hands of the Union, has been the same. It has been the contention of the Union of India, that an amendment to the Constitution, passed by following the procedure expressed in the proviso to Article 368(2), constituted the will of the people, and the same was not subject to judicial review. The same argument had been repeatedly rejected by this Court by holding, that Article 368 postulates only a “procedure” for amendment of the Constitution, and that, the same could not be treated as a “power” vested in the Parliament to amend the Constitution, so as to alter, the “core” of the Constitution, which has also been described as, the “basic features/basic structure” of the Constitution. The above position has been projected, through the judgments cited on behalf of the petitioners, to which reference has been made hereinabove.

265. Therefore, even though the Parliament may have passed the Constitution (121st Amendment) Bill, with an overwhelming majority, inasmuch as, only 37 Members from the AIADMK had consciously abstained from voting in the Lok Sabha, and only one Member of the Rajya Sabha – Ram Jethmalani, had consciously abstained from voting in favour thereof, it cannot be accepted, that the same is exempted from judicial review. The scope of judicial review with reference to a constitutional amendment and/or an ordinary legislation, whether enacted by the Parliament or a State Legislature, cannot vary, so as to adopt different standards, by taking into consideration the strength of the Members of the concerned

legislature, which had approved and passed the concerned Bill. If a constitutional amendment breaches the “core” of the Constitution or destroys its “basic or essential features” in a manner which was patently unconstitutional, it would have crossed over forbidden territory. This aspect, would undoubtedly fall within the realm of judicial review. In the above view of the matter, it is imperative to hold, that the impugned constitutional amendment, as also, the NJAC Act, would be subject to judicial review on the touchstone of the “basic structure” of the Constitution, and the parameters laid down by this Court in that behalf, even though the impugned constitutional amendment may have been approved and passed unanimously or by an overwhelming majority, and notwithstanding the ratification thereof by as many as twenty-eight State Assemblies. Accordingly, we find no merit in the contention advanced by the learned counsel for the respondents, that the impugned constitutional amendment is not assailable, through a process of judicial review.

266. It was the submission of the learned Attorney General, that the “basic features/basic structure” of the Constitution, should only be gathered from a plain reading of the provision(s) of the Constitution, as it/they was/were originally enacted. In this behalf, it was acknowledged by the learned counsel representing the petitioners, that the scope and extent of the “basic features/basic structure” of the Constitution, was to be ascertained only from the provisions of the Constitution, as originally enacted, and additionally, from the interpretation placed on the concerned provisions, by this Court. The above qualified assertion made on behalf of the petitioners, was unacceptable to the learned counsel representing the respondents.

267. The above disagreement, does not require any detailed analysis. The instant aspect, stands determined in the *M. Nagaraj case (2006) 8 SCC 212*, wherein it was held as under:

“...The question is – whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land.”

268. The cause, effect and the width of a provision, which is the basis of a challenge, may sometimes not be apparent from a plain reading thereof. The interpretation placed by this Court on a particular provision, would most certainly depict a holistic understanding thereof, wherein the plain reading would have naturally been considered, but in addition thereto, the vital silences hidden therein, based on a harmonious construction of the provision, in conjunction with the surrounding provisions, would also have been taken into consideration. The mandate of Article 141, obliges every court within the territory of India, to honour the interpretation, conclusion, or meaning assigned to a provision by this Court. It would, therefore be rightful, to interpret the provisions of the Constitution relied upon, by giving the

concerned provisions, the meaning, understanding and exposition, assigned to them, on their interpretation by this Court. In the above view of the matter, it would neither be legal nor just, to persist on an understanding of the concerned provision(s), merely on the plain reading thereof, as was suggested on behalf of the respondents. Even on a plain reading of Article 141, we are obligated, to read the provisions of the Constitution, in the manner they have been interpreted by this Court.

269. The manner in which the term “consultation” used in Articles 124, 217 and 222 has been interpreted by the Supreme Court, has been considered at great length in the “Reference Order”, and therefore, there is no occasion for us, to re-record the same yet again. Suffice it to notice that the term “consultation” contained in Articles 124, 217 and 222 will have to be read as assigning primacy to the opinion expressed by the Chief Justice of India (based on a decision, arrived at by a collegium of Judges), as has been concluded in the “Reference Order”. In the Second and **Third Judges cases**, the above provisions were interpreted by this Court, as they existed in their original format, i.e., in the manner in which the provisions were adopted by the Constituent Assembly, on 26.11.1949 (which took effect on 26.01.1950). Thus viewed, we reiterate, that in the matter of appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to any other High Court, under Articles 124, 217 and 222, primacy conferred on the Chief Justice of India and his collegium of Judges, is liable to be accepted as an integral constituent of the above provisions (as originally enacted). Therefore, when a question with reference to the selection and appointment (as also, transfer) of Judges to the higher judiciary is raised, alleging that the “independence of the judiciary” as a “basic feature/structure” of the Constitution has been violated, it would have to be ascertained whether the primacy of the judiciary exercised through the Chief Justice of India (based on a collective wisdom of a collegium of Judges), had been breached. Then alone, would it be possible to conclude, whether or not, the “independence of the judiciary” as an essential “basic feature” of the Constitution, had been preserved (-and had not been breached).

270. We have already concluded in the “Reference Order”, that the term “consultation” used in Articles 124, 217 and 222 (as originally enacted) has to be read as vesting primacy in the judiciary, with reference to the decision making process, pertaining to the selection and appointment of Judges to the higher judiciary, and also, with reference to the transfer of Chief Justices and Judges of one High Court, to another. For arriving at the above conclusion, the following parameters were taken into consideration:

(i) Firstly, reference was made to four judgments, namely, the **Samsher Singh case** (1974) 2 SCC 831, rendered in 1974 by a seven-Judge Bench, wherein keeping in mind the cardinal principle – the “independence of the judiciary”, it was concluded, that consultation with the highest dignitary in the judiciary – the Chief Justice of India, in practice meant, that the last

word must belong to the Chief Justice of India, i.e., the primacy in the matter of appointment of Judges to the higher judiciary must rest with the judiciary. The above position was maintained in the *Sankalchand Himatlal Sheth case* (1977) 4 SCC 193 in 1977 by a five- Judge Bench, wherein it was held, that in all conceivable cases, advice tendered by the Chief Justice of India (in the course of his “consultation”), should principally be accepted by the Government of India, and that, if the Government departed from the counsel given by the Chief Justice of India, the Courts would have an opportunity to examine, if any other extraneous circumstances had entered into the verdict of the executive. In the instant judgment, so as to emphasize the seriousness of the matter, this Court also expressed, that it expected, that the above words would not fall on deaf ears. The same position was adopted in the *Second Judges case* rendered in 1993 by a nine-Judge Bench, by a majority of 7:2, which also arrived at the conclusion, that the judgment rendered in the *First Judges case*, did not laydown the correct law. M.M. Punchhi, J., (as he then was) one of the Judges on the Bench, who supported the minority opinion, also endorsed the view, that the action of the executive to put off the recommendation(s) made by the Chief Justice of India, would amount to an act of deprivation, “violating the spirit of the Constitution”. In sum and substance therefore, the *Second Judges case*, almost unanimously concluded, that in the matter of selection and appointment of Judges to the higher judiciary, primacy in the decision making process, unquestionably rested with the judiciary. Finally, the *Third Judges case*, rendered in 1998 by another ninejudge Bench, reiterated the position rendered in the *Second Judges case*.

(ii) Secondly, the final intent emerging from the Constituent Assembly debates, based inter alia on the concluding remarks expressed by Dr. B.R. Ambedkar, maintained that the judiciary must be independent of the executive. The aforesaid position came to be expressed while deliberating on the subject of “appointment” of Judges to the higher judiciary. Dr. B.R. Ambedkar while responding to the sentiments expressed by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar and Ananthasayanam Ayyangar, noted the view of the Constituent Assembly, that the Members were generally in agreement, that “independence of the judiciary”, from the executive “should be made as clear and definite as it could be made by law”. The above assertion made while debating on the issue of appointment of Judges to the Supreme Court, effectively resulted in the acknowledgement, that the issue of “appointment” of the Judges to the higher judiciary, had a direct nexus with “independence of the judiciary”. Dr. B.R. Ambedkar declined the proposal of adopting the manner of appointment of Judges, prevalent in the United Kingdom and in the United States of America, and thereby, rejected the subjugation of the process of selection and appointment of Judges to the higher judiciary, at the hands of the executive and the legislature respectively. While turning down the latter proposal, Dr. B.R. Ambedkar was suspicious and distrustful, that in such an eventuality, appointments to the higher judiciary, could be impacted by “political pressure” and “political considerations”.

(iii) Thirdly, the actual practice and manner of appointment of Judges to the higher judiciary, emerging from the parliamentary debates, clearly depict, that absolutely all Judges (except in one case) appointed since 1950, had been appointed on the advice of the Chief Justice of India. It is therefore clear, that the political-executive has been conscious of the fact, that the issue of appointment of Judges to the higher judiciary, mandated the primacy of the judiciary, expressed through the Chief Justice of India. In this behalf, even the learned Attorney General had conceded, that the supersession of senior Judges of the Supreme Court, at the time of the appointment of the Chief Justice of India in 1973, the mass transfer of Judges of the higher judiciary during the emergency in 1976, and the second supersession of a Supreme Court Judge, at the time of the appointment of the Chief Justice of India in 1977, were executive aberrations.

(iv) Fourthly, the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary drawn in 1950, soon after India became independent, as also, the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary redrawn in 1999, after the decision in the **Second Judges case**, manifest that, the executive had understood and accepted, that selection and appointment of Judges to the higher judiciary would emanate from, and would be made on the advice of the Chief Justice of India.

(v) Fifthly, having adverted to the procedure in place for the selection and appointment of Judges to the higher judiciary, the submission advanced on behalf of the respondents, that the **Second and Third Judges cases** had created a procedure, where Judges select and appoint Judges, or that, the system of Imperium in Imperio had been created for appointment of Judges, was considered and expressly rejected (in the "Reference Order"). Furthermore, the submission, that the executive had no role, in the prevailing process of selection and appointment of Judges to the higher judiciary was also rejected, by highlighting the role of the executive in the matter of appointment of Judges to the higher judiciary. Whilst recording the above conclusions, it was maintained (in the "Reference Order"), that primacy in the matter of appointment of Judges to the higher judiciary, was with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges.

(vi) Sixthly, the contention advanced at the behest of the respondents, that even in the matter of appointment of Judges to the higher judiciary (and in the matter of their transfer) under Articles 124, 217 (and 222), must be deemed to be vested in the executive, because the President by virtue of the constitutional mandate contained in Article 74, had to act in accordance with the aid and advice tendered to him by the Council of Ministers, was rejected by holding, that primacy in the matter of appointment of Judges to the higher judiciary, continued to remain with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges. In recording the above conclusion, reliance was

placed on Article 50. Reliance was also placed on Article 50, for recording a further conclusion, that if the power of appointment of Judges was left to the executive, the same would breach the principles of “independence of the judiciary” and “separation of powers”.

271. In view of the above, it has to be concluded, that in the matter of appointment of Judges to the higher judiciary, as also, in the matter of their transfer, primacy in the decision making process, inevitably rests with the Chief Justice of India. And that the same was expected to be expressed, on the basis of the collective wisdom, of a collegium of Judges. Having so concluded, we reject all the submissions advanced at the hands of the learned counsel for the respondents, canvassing to the contrary.

272. The next question which arises for consideration is, whether the process of selection and appointment of Judges to the higher judiciary (i.e., Chief Justices, and Judges of the High Courts and the Supreme Court), and the transfer of Chief Justices and Judges of one High Court to another, contemplated through the impugned constitutional amendment, retains and preserves primacy in the decision making process, with the judiciary?

274. Having given our thoughtful consideration to the above contention, there can be no doubt, that in the manner expressed by the learned counsel, the suggested inference may well be justified on paper. The important question to be considered is, whether as a matter of practicality, the impugned constitutional amendment can be considered to have sustained, primacy in the matter of decision making, under the amended provisions of Articles 124, 217 and 222, in conjunction with the inserted provisions of Articles 124A to 124C, with the judiciary?

275. The exposition made by the learned Attorney General and some of the other learned counsel representing the respondents, emerges from an over simplified and narrow approach. The primacy vested in the Chief Justice of India based on the collective wisdom of a collegium of Judges, needs a holistic approach. It is not possible for us to accept, that the primacy of the judiciary would be considered to have been sustained, merely by ensuring that the judicial component in the membership of the NJAC, was sufficiently capable, to reject the candidature of an unworthy nominee. We are satisfied, that in the matter of primacy, the judicial component of the NJAC, should be competent by itself, to ensure the appointment of a worthy nominee, as well. Under the substituted scheme, even if the Chief Justice of India and the two other senior most Judges of the Supreme Court (next to the Chief Justice of India), consider a nominee to be worthy for appointment to the higher judiciary, the concerned individual may still not be appointed, if any two Members of the NJAC opine otherwise. This would be out-rightly obnoxious, to the primacy of the judicial component. The magnitude of the instant issue, is apparent from the fact that the two “eminent persons” (-lay persons, according to the learned Attorney General), could defeat the unanimous recommendation made by the Chief Justice of India and the two senior most Judges of the

Supreme Court, favouring the appointment of an individual under consideration. Without any doubt, demeaning primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. The reason to describe it as being obnoxious is this – according to the learned Attorney General, “eminent persons” had to be lay persons having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification, such lay persons would have the collective authority, to override the collective wisdom of the Chief Justice of India and two Judges of the Supreme Court of India. The instant issue, is demonstrably far more retrograde, when the Union Minister in charge of Law and Justice also supports the unanimous view of the judicial component, because still the dissenting voice of the “eminent persons” would prevail. It is apparent, that primacy of the judiciary has been rendered a further devastating blow, by making it extremely fragile.

276. When the issue is of such significance, as the constitutional position of Judges of the higher judiciary, it would be fatal to depend upon the moral strength of individuals. The judiciary has to be manned by people of unimpeachable integrity, who can discharge their responsibility without fear or favour. There is no question of accepting an alternative procedure, which does not ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary (as also, in the matter of transfer of Chief Justices and Judges of High Courts, to other High Courts). In the above stated position, it is not possible to conclude, that the combination contemplated for constitution of the NJAC, is such, that would not be susceptible to an easy breach of the “independence of the judiciary”.

277. Articles 124A(1)(a) and (b) do not provide for an adequate representation in the matter, to the judicial component, to ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary, and therefore, the same are liable to be set aside and struck down as being violative of the “basic structure” of the Constitution of India. Thus viewed, we are satisfied, that the “basic structure” of the Constitution would be clearly violated, if the process of selection of Judges to the higher judiciary was to be conducted, in the manner contemplated through the NJAC. The impugned constitutional amendment, being ultra vires the “basic structure” of the Constitution, is liable to be set aside.

278. It is surprising, that the Chief Justice of India, on account of the position he holds as *pater familias* of the judicial fraternity, and on account of the serious issues, that come up for judicial adjudication before him, which have immeasurable political and financial consequences, besides issues of far reaching public interest, was suspected by none other than Dr. B.R. Ambedkar, during the course of the Constituent Assembly debates, when he declined to accept the suggestions made by some Members of the Constituent Assembly, that the selection and appointment of Judges to the higher judiciary should be made with the “concurrence” of the Chief Justice of India, by observing, that even though the Chief Justice

of India was a very eminent person, he was after all just a man with all the failings, all the sentiments, and all the prejudices, which common people have. And therefore, the Constituent Assembly did not leave it to the individual wisdom of the Chief Justice of India, but required consultation with a plurality of Judges, by including in the consultative process (at the discretion of the President of India), not only Judges of the Supreme Court of India, but also Judges of High Courts (in addition to the mandatory consultation with the Chief Justice of India). One would also ordinarily feel, that the President of India and/or the Prime Minister of India in the discharge of their onerous responsibilities in running the affairs of the country, practically all the time take decisions having far reaching consequences, not only in the matter of internal affairs of the country on the domestic front, but also in the matter of international relations with other countries. One would expect, that vesting the authority of appointment of Judges to the higher judiciary with any one of them should not ordinarily be suspect of any impropriety. Yet, the Constituent Assembly did not allow any of them, any defined participatory role. Infact the debate in the Constituent Assembly, removed the participation of the political-executive component, because of fear of being impacted by “political-pressure” and “political considerations”. Was the view of the Constituent Assembly, and the above noted distrust, legitimate?

279. A little personal research, resulted in the revelation of the concept of the “legitimate power of reciprocity”, debated by Bertram Raven in his article – “The Bases of Power and the Power/Interaction Model of Interpersonal Influence” (this article appeared in *Analyses of Social Issues and Public Policy*, Vol. 8, No.1, 2008, pp. 1-22). In addition to having dealt with various psychological reasons which influenced the personality of an individual, reference was also made to the “legitimate power of reciprocity”. It was pointed out, that the reciprocity norm envisaged, that if someone does something beneficial for another, the recipient would feel an obligation to reciprocate (“I helped you when you needed it, so you should feel obliged to do this for me.” – Goranson and Berkowitz, 1966; Gouldner, 1960). In the view expressed by the author, the inherent need of power, is universally available in the subconscious of the individual. On the satisfaction and achievement of the desired power, there is a similar unconscious desire to reciprocate the favour.

282. Under the constitutional scheme in place in the United States of America, federal Judges are nominated by the President, and confirmed by the Senate. The issue being debated, namely, the concept of “the legitimate power of reciprocity”, therefore directly arises in the United States, in the matter of appointment of federal Judges. The first favour to the federal Judge is extended by the President, who nominates his name, and further favours are extended by one or more Member(s) of the Senate, with whose support the Judge believes he won the vote of confirmation. An article titled as “Loyalty, Gratitude, and the Federal Judiciary”, written by Laura E. Little (Associate Professor of Law, Temple University School of Law, as

far back as in 1995), deals with the issue in hand, pointedly with reference to appointment of Judges. The article reveals, that the issue of reciprocity has been a subject of conscious debate, with reference to the appointment of Judges for a substantial length of time. The conclusions drawn in the above article are relevant to the present controversy, and are being extracted hereunder:

“On the issue of impartiality, an individual undertaking a federal judgeship confronts a difficult task. Contemporary lawyers commonly agree that the law is not wholly the product of neutral principles and that a judge must choose among values as she shapes the law. Yet, the standards governing impartiality in federal courts largely assume that total judicial neutrality and dispassion are possible. The process of mapping out a personal framework for decision making is therefore apt to create considerable discordance for the judge. Added to this burden are the special pulls of gratitude and loyalty toward the individuals who made possible the judge’s job. I have sought to show both that gratitude and loyalty can have a powerful influence for a federal judge undertaking to decide a case. The problem is complex because loyalty and gratitude pose a greater potential problem for some judges than for others. This complexity emerges to a great degree from the process of nomination and confirmation, which often generates, or at least reinforces, a judge’s sense of loyalty and gratitude to her benefactors.... Thus, in studying any new selection procedure, we must contemplate the procedure’s potential for creating and invigorating a judge’s feelings of loyalty and gratitude to her benefactors. The foregoing should, therefore, not only shed light on the process of federal court decision making in general, but also give much needed guidance for evaluating proposed changes to judicial selection.”

284. The consideration recorded hereinabove, endorses the view, that the political-executive, as far as possible, should not have a role in the ultimate/final selection and appointment of Judges to the higher judiciary. Specially keeping in mind the enormity of the participation of the political-executive, in actions of judicial adjudication. Reciprocity, and feelings of pay back to the political-executive, would be disastrous to “independence of the judiciary”. In this, we are only reiterating the position adopted by Dr. B.R. Ambedkar. He feared, that with the participation of the political-executive, the selection of Judges, would be impacted by “political pressure” and “political considerations”. His view, finds support from established behavioural patterns expressed by Psychologists. It is in this background, that it needs to be ensured, that the political-executive dispensation has the least nexus, with the process of finalization of appointments of Judges to the higher judiciary.

285. The jurisdictions that have to be dealt with, by Judges of the higher judiciary, are large and extensive. Within the above jurisdictions, there are a number of jurisdictions, in which the executive is essentially a fundamental party to the lis. This would *inter alia* include cases arising out of taxing statutes which have serious financial implications. The executive is singularly engaged in the exploitation of natural resources, often through private

entrepreneurs. The sale of natural resources, which also, have massive financial ramifications, is often subject to judicial adjudication, wherein also, the executive is an indispensable party. Challenges arising out of orders passed by Tribunals of the nature of the Telecom Disputes Settlement & Appellate Tribunal and the Appellate Tribunal for Electricity, and the like, are also dealt with by the higher judiciary, where also the executive has a role. Herein also, there could be massive financial implications. The executive is also a necessary party in all matters relating to environmental issues, including appeals from the National Green Tribunals. Not only in all criminal matters, but also in high profile scams, which are no longer a rarity, the executive has an indispensable role. In these matters, sometimes accusations are levelled against former and incumbent Prime Ministers and Ministers of the Union Cabinet, and sometimes against former and incumbent Chief Ministers and Ministers of the State Cabinets. Even in the realm of employment issues, adjudication rendered by the Central Administrative Tribunal, and the Armed Forces Appellate Tribunal come up before the Judges of the higher judiciary. These adjudications also sometimes include, high ranking administrators and armed forces personnel. Herein too, the executive is an essential constituent. This is only a miniscule part of the extensive involvement of the political-executive, in litigation before the higher judiciary.

286. Since the executive has a major stake, in a majority of cases, which arise for consideration before the higher judiciary, the participation of the Union Minister in charge of Law and Justice, as an ex officio Member of the NJAC, would be clearly questionable. In today's world, people are conscious and alive to the fact, that their rights should be adjudicated in consonance of the rules of natural justice. One of the rules of natural justice is, that the adjudicator should not be biased. This would mean, that he should neither entertain a prejudice against either party to a lis, nor should he be favourably inclined towards any of them. Another component of the rule of bias is, that the adjudicator should not have a conflict of interest, with the controversy he is to settle. When the present set of cases came up for consideration, a plea of conflict of interest was raised even against one of the presiding Judges on the Bench, which resulted in the recusal of Anil R. Dave, J. on 15.4.2015. A similar prayer was again made against one of us (J.S. Khehar, J.), on 21.4.2015, on the ground of conflict of interest. What needs to be highlighted is, that bias, prejudice, favour and conflict of interest are issues which repeatedly emerge. Judges are careful to avoid adjudication in such matters. Judges are not on one or the other side of the adjudicatory process. The political executive in contrast, in an overwhelming majority of cases, has a participatory role. In that sense, there would/could be an impact/effect, of a decision rendered one way or the other. A success or a defeat – a win or a loss. The plea of conflict of interest would be available against the executive, if it has a participatory role in the final selection and appointment of Judges, who are then to sit in judgment over matters, wherever the executive is an essential and mandatory party. The instant issue arose for consideration in the *Madras*

Bar Association case (2014) 10 SCC 1. In the above case a five-Judge Bench considered the legality of the participation of Secretaries of Departments of the Central Government in the selection and appointment of the Chairperson and Members of the National Tax Tribunal. On the above matter, this Court held, as under:

“131. Section 7 cannot even otherwise be considered to be constitutionally valid, since it includes in the process of selection and appointment of the Chairperson and Members of NTT, Secretaries of Departments of the Central Government. In this behalf, it would also be pertinent to mention that the interests of the Central Government would be represented on one side in every litigation before NTT. It is not possible to accept a party to a litigation can participate in the selection process whereby the Chairperson and Members of the adjudicatory body are selected....”

The position herein is no different. The Attorney General however attempted to distinguish the matter in hand, from the controversy decided in the cited case by asserting, that in cases adjudicated upon by the National Tax Tribunal the “...Central Government would be represented on one side in every litigation ...” which is not the case before the higher judiciary. The rebuttal, clearly avoids the issue canvassed. One would assume from the response, that the position was conceded to the extent of matters, where the executive was a party to the lis. But that itself would exclude the selected Judges from hearing a large majority of cases. One would therefore reject the response of the Union of India.

287. We are of the view, that consequent upon the participation of the Union Minister in charge of Law and Justice, a Judge approved for appointment with the Minister’s support, may not be able to resist or repulse a plea of conflict of interest, raised by a litigant, in a matter when the executive has an adversarial role. In the NJAC, the Union Minister in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest (if such a plea was to be raised, and pressed), where the political-executive is a party to the lis. The above, would have the inevitable effect of undermining the “independence of the judiciary”, even where such a plea is repulsed. Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Therefore, merely the participation of the Union Minister in charge of Law and Justice, in the final process of selection, as an ex officio Member of the NJAC, would render the amended provision of Article 124A(1)(c) as ultra vires the Constitution, as it impinges on the principles of “independence of the judiciary” and “separation of powers”.

288. The learned Attorney General had invited our attention to the manner in which judicial appointments were being made in fifteen countries. It was submitted, that in nine countries Judges were appointed either through a Judicial Appointments Commission, or through a

Judicial Appointments Committee, or through a Judicial Appointments Council. It was highlighted, that in four countries, Judges were appointed directly by the executive, i.e., by the Governor General or the President. We were informed, that in one European country, Judges were nominated by the Minister of Justice and confirmed by the Parliamentary Committee. In the United States of America, Judges were appointed through a process of nomination by the President and confirmation by the Senate. It was highlighted, that in all the fifteen countries, the executive was the final determinative/appointing authority. And further that, in all the countries, the executive had a role to play in the selection and appointment of Judges. The foresaid factual position was brought to our notice for the singular purpose of demonstrating, that executive participation in the process of selection and appointment of Judges had not made the judiciary in any of the fifteen countries, subservient to the political- executive. It was asserted, that the countries referred to by him were in different continents of the world, and there was no complaint with reference to the “independence of the judiciary”. The point sought to be driven home was, that the mere participation of the executive in the selection and appointment of Judges to the higher judiciary, did not impinge upon the “independence of the judiciary”.

289. The aforesaid submission does not require an elaborate debate. Insofar as the instant aspect of the matter is concerned, as the same was examined in the *Second Judges case*, wherein S. Ratnavel Pandian, J., one of the Judges who passed a separate concurring order, supporting the majority view. He had rejected the submission of the nature advanced by the learned Attorney General, with the following observations:

“194. Nevertheless, we have, firstly to find out the ails from which our judicial system suffers; secondly to diagnose the root cause of those ailments under legalisticbiopsies, thirdly to ascertain the nature of affliction on the system and finally to evolve a new method and strategy to treat and cure those ailments by administering and injecting a 'new invented medicine' (meaning thereby a newly-developed method and strategy) manufactured in terms of the formula under Indianpharmacopoeia (meaning thereby according to national problems in a mixed culture etc.) but not according to American or British pharmacopoeia which are alien to our Indian system though the system adopted in other countries may throw some lightfor the development of our system. The outcry of some of the critics is when the power of appointment of Judges in all democratic countries, far and wide, rests only with the executive, there is no substance in insisting that the primacy should be given to the opinion of the CJI in selection and appointment of candidates for judgeship. This proposition that we must copy and adopt the foreign method is a dry legal logic, which has to be rejected even on the short ground that the Constitution ofIndia itself requires mandatory consultation with the CJI by the President before making the appointments to the superior judiciary. It has not been brought to our

notice by any of the counsel for the respondents that in other countries the executive alone makes the appointments notwithstanding the existence of any existing similar constitutional provisions in their Constitutions.”

290. Despite our having dealt with the submission canvassed at the hands of the learned Attorney General based on the system of appointment of Judges to the higher judiciary in fifteen countries, we consider it expedient to delve further on the subject. During the hearing of the present controversy, a paper written in November 2008, by Nuno Garoupa and Tom Ginsburg of the Law School, University of Chicago, came to hand. The paper bore the caption – “Guarding the Guardians: Judicial Councils and Judicial Independence”. The paper refers to comparative evidence, of the ongoing debate, about the selection and discipline of Judges. The article proclaims to aim at two objectives. Firstly, the theory of formation of Judicial Councils, and the dimensions on which they differ. And secondly, the extent to which different designs of Judicial Council, affect judicial quality. These two issues were considered as of extreme importance, as the same were determinative of the fact, whether Judges would be able to have an effective role in implementing social policy, as broadly conceived. It was observed, that Judicial Councils had come into existence to insulate the appointment, promotion and discipline of Judges from partisan political influence, and at the same time, to cater to some level of judicial accountability. It was the authors’ view, that the Judicial Councils lie somewhere in between the polar extremes of letting Judges manage their own affairs, and the alternative of complete political-executive control of appointments, promotions and discipline.

291. According to the paper, France established the first High Council of the Judiciary in 1946. Italy’s Judicial Council was created in 1958. Italy was the first to fully insulate the entire judiciary from political control. It was asserted, that the Italian model was, thereupon, followed in other countries. The model established in Spain and Portugal comprised of a significant proportion of Members who were Judges. These models were established, after the fall of dictatorship in these countries. Councils created by these countries, are stated to be vested with, final decision making authority, in matters pertaining to judicial promotion, tenure and removal. According to the paper, the French model came into existence as a consequence of concerns about excessive politicization. Naturally, the process evolved into extensive independence of judicial power. Yet, judicial concern multiplied manifolds in the judiciary’s attempt to give effect to the European Convention of Human Rights. And the judiciary’s involvement in the process of judicial review, in the backdrop of surmounting political scandals. The paper describes the pattern in Italy to be similar. In Italy also, prominent scandals led to investigation of businessmen, politicians and bureaucrats (during the period from 1992 to 1997), which resulted in extensive judicial participation, in political activity. The composition of the Council in Italy, was accordingly altered in 2002, to increase the influence of the Parliament.

292. The paper noted, that the French-Italian models had been adopted in Latin America, and other developing countries. It was pointed out, that the World Bank and other similar multilateral donor agencies, insist upon Judicial Councils, to be associated with judicial reform, for enforcement of the rule of law. The Elements of European Statute on the Judiciary, was considered as a refinement of the Judicial Council model. The perceived Supreme Council of Magistracy, requires that at least half of the Members are Judges, even though, some of the Members of the Supreme Council are drawn from the Parliament. It was the belief of the authors of the paper, that the motivating concern for adoption of the Supreme Councils, in the French-Italian tradition, was aimed at ensuring “independence of the judiciary” after periods of undemocratic rule. Perhaps because of concerns over structural problems, it was pointed out, that external accountability had emerged as a second goal for these Supreme Councils. Referring to the Germany, Austria and Netherlands models, it was asserted, that their Councils were limited to playing a role in selection (rather than promotion and discipline) of Judges. Referring to Dutch model, it was pointed out, that recent reforms were introduced to ensure more transparency and accountability.

293.. It was also brought out, that Judicial Councils in civil law jurisdictions, had a nexus to the Supreme Court of the country. Referring to Costa Rica and Austria, it was brought out, that the Judicial Councils in these countries were a subordinate organ of the Supreme Court. In some countries like Brazil, Judicial Councils were independent bodies with constitutional status, while in others Judicial Councils governed the entire judiciary. And in some others, like Guatemala and Argentina, they only governed lower courts.

294. Referring to recruitment to the judiciary in common law countries, it was pointed out, that in the United Kingdom, the Constitutional Reform Act, 2005 created a Judicial Appointments Commission, which was responsible for appointments solely based on merit, had no executive participation. It was pointed out, that New Zealand and Australia were debating whether to follow the same. The above legislation, it was argued, postulated a statutory duty on Government Members, not to influence judicial decisions. And also, excluded the participation of the Lord Chancellor in all such activities, by transferring his functions to the President of the Courts of England and Wales, (formerly designated as Lord Chief Justice of England and Wales).

295. Referring to the American experience, it was noted, that concern over traditional methods of judicial selection (either by politicians or by election) had given way to “Merit Commissions” so as to base selection of Judges on merit. Merit Commissions, it was felt, were analogous to Judicial Councils. The system contemplated therein, was non-partisan. The Judicial Selection Commission comprised of judges, lawyers and political appointees.

296. Referring to the works of renowned jurists on the subject, it was sought to be concluded, that in today’s world, there was a strong consensus, that of all the procedures, the merit plan

insulated the judiciary from political pressure. In their remarks, emerging from the survey carried out by them, it was concluded, that it was impossible to eliminate political pressure on the judiciary. Judicial Commissions/ Councils created in different countries were, in their view, measures to enhance judicial independence, and to minimize political influence. It was their view that once given independence, Judges were more useful for resolving a wider range of more important disputes, which were considered essential, given the fact that more and more tasks were now being assigned to the judiciary.

297. In analysing the conclusions drawn in the article, one is constrained to conclude, that in the process of evolution of societies across the globe, the trend is to free the judiciary from executive and political control, and to incorporate a system of selection and appointment of Judges, based purely on merit. For it is only then, that the process of judicial review will effectively support nation building. In the subject matter, which falls for our consideration, it would be imperative for us, to keep in mind, the progression of the concepts of “independence of the judiciary” and “judicial review” were now being recognized the world over. The diminishing role of executive and political participation, on the matter of appointments to the higher judiciary, is an obvious reality. In recognition of the above trend, there cannot be any greater and further participation of the executive, than that which existed hitherto before. And in the Indian scenario, as is presently conceived, through the judgments rendered in the ***Second and Third Judges cases***. It is therefore imperative to conclude, that the participation of the Union Minister in charge of Law and Justice in the final determinative process vested in the NJAC, as also, the participation of the Prime Minister and the Leader of the Opposition in the Lok Sabha (and in case of there being none – the Leader of the single largest Opposition Party in the House of the People), in the selection of “eminent persons”, would be a retrograde step, and cannot be accepted.

298. The only component of the NJAC, which remains to be dealt with, is with reference to the two “eminent persons” required to be nominated to the NJAC. It is not necessary to detail the rival submissions on the instant aspect, as they have already been noticed extensively, hereinbefore.

299. We may proceed by accepting the undisputed position, that neither the impugned constitutional amendment, nor the NJAC Act postulate any positive qualification to be possessed by the two “eminent persons” to be nominated to the NJAC. These constitutional and legislative enactments do not even stipulate any negative disqualifications. It is therefore apparent, that the choice of the two “eminent persons” would depend on the free will of the nominating authorities. The question that arises for consideration is, whether it is just and appropriate to leave the issue, to the free will and choice, of the nominating authorities?

300. The response of the learned Attorney General was emphatic. Who could know better than the Prime Minister, the Chief Justice of India, or the Leader of Opposition in the Lok

Sabha (and when there is no such Leader of Opposition, then the Leader of the single largest Opposition Party in the Lok Sabha)? And he answered the same by himself, that if such high ranking constitutional authorities can be considered as being unaware, then no one in this country could be trusted, to be competent, to take a decision on the matter – neither the legislature, nor the executive, and not even the judiciary. The Attorney General then quipped – surely this Court would not set aside the impugned constitutional amendment, or the NJAC Act, on such a trivial issue. He also suggested, that we should await the outcome of the nominating authorities, and if this Court felt that a particular individual nominated to discharge the responsibility entrusted to him as an “eminent person” on the NJAC, was inappropriate or unacceptable or had no nexus with the responsibility required to be shouldered, then his appointment could be set aside.

301. Having given our thoughtful consideration to the matter, we are of the view, that the issue in hand is certainly not as trivial, as is sought to be made out. The two “eminent persons” comprise of 1/3rd strength of the NJAC, and double that of the political-executive component. We could understand the import of the submission, only after hearing learned counsel. The view emphatically expressed by the Attorney General was that the “eminent persons” had to be “lay persons” having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification.

Mr. T.R. Andhyarujina, learned senior counsel who represented the State of Maharashtra, which had ratified the impugned constitutional amendment, had appeared to support the impugned constitutional amendment, as well as, the NJAC Act, expressed a diametrically opposite view. In his view, the “eminent persons” with reference to the NJAC, could only be picked out of, eminent lawyers, eminent jurists, and even retired Judges, or the like, having an insight to the working and functioning of the judicial system. It is therefore clear, that in the view of the learned senior counsel, the nominated “eminent persons” would have to be individuals, with a legal background, and certainly not lay persons, as was suggested by the learned Attorney General. We have recorded the submissions advanced by Mr. Dushyant A. Dave, learned senior counsel – the President of the Supreme Court Bar Association, who had addressed the Bench in his usual animated manner, with no holds barred. We solicited his view, whether it would be proper to consider the inclusion of the President of the Supreme Court Bar Association and/or the Chairman of the Bar Council of India, as ex officio Members of the NJAC in place of the two “eminent persons”. His response was spontaneous “Please don’t do that !!” and then after a short pause, “...that would be disastrous !!”. Having examined the issue with the assistance of the most learned and eminent counsel, it is imperative to conclude, that the issue of description of the qualifications (– perhaps, also the disqualifications) of “eminent persons” is of utmost importance, and cannot be left to the free

will and choice of the nominating authorities, irrespective of the high constitutional positions held by them. Specially so, because the two “eminent persons” comprise of 1/3rd strength of the NJAC, and double that of the political-executive component, and as such, will have a supremely important role in the decision making process of the NJAC. We are therefore persuaded to accept, that Article 124A(1)(d) is liable to be set aside and struck down, for having not laid down the qualifications of eligibility for being nominated as “eminent persons”, and for having left the same vague and undefined.

302. It is even otherwise difficult to appreciate the logic of including two “eminent persons”, in the six member NJAC. If one was to go by the view expressed by the learned Attorney General, “eminent persons” had been included in the NJAC, to infuse inputs which were hitherto not available with the prevailing selection process, for appointment of Judges to the higher judiciary. Really a submission with all loose ends, and no clear meaning. He had canvassed, that they would be “lay persons” having no connection with the judiciary, or even with the profession of advocacy, perhaps individuals who did not even have any law related academic qualification. It is difficult to appreciate what inputs the “eminent persons”, satisfying the qualification depicted by the learned Attorney General, would render in the matter of selection and appointment of Judges to the higher judiciary. The absurdity of including two “eminent persons” on the NJAC, can perhaps be appreciated if one were to visualize the participation of such “lay persons”, in the selection of the Comptroller and Auditor-General, the Chairman and Members of the Finance Commission, the Chairman and Members of the Union Public Service Commission, the Chief Election Commissioner and the Election Commissioners and the like. The position would be disastrous. In our considered view, it is imprudent to ape a system prevalent in an advanced country, with an evolved civil society.

303. The sensitivity of selecting Judges is so enormous, and the consequences of making inappropriate appointments so dangerous, that if those involved in the process of selection and appointment of Judges to the higher judiciary, make wrongful selections, it may well lead the nation into a chaos of sorts. The role of “eminent persons” cannot be appreciated in the manner expressed through the impugned constitutional amendment and legislative enactment. At best, to start with, one or more “eminent persons” (perhaps even a committee of “eminent persons”), can be assigned an advisory/consultative role, by allowing them to express their opinion about the nominees under consideration. Perhaps, under the judicial component of the selection process. And possibly, comprising of eminent lawyers, eminent jurists, and even retired Judges, or the like having an insight to the working and functioning of the judicial system. And by ensuring, that the participants have no conflict of interest. Obviously, the final selecting body would not be bound by the opinion experienced, but would be obliged to keep the opinion tendered in mind, while finalizing the names of the nominated candidates.

304.. It is also difficult to appreciate the wisdom of the Parliament, to introduce two lay persons, in the process of selection and appointment of Judges to the higher judiciary, and to simultaneously vest with them a power of veto. The second proviso under Section 5(2), and Section 6(6) of the NJAC Act, clearly mandate, that a person nominated to be considered for appointment as a Judge of the Supreme Court, and persons being considered for appointment as Chief Justices and Judges of High Courts, cannot be appointed, if any two Members of the NJAC do not agree to the proposal. In the scheme of the selection process of Judges to the higher judiciary, contemplated under the impugned constitutional amendment read with the NJAC Act, the two “eminent persons” are sufficiently empowered to reject all recommendations, just by themselves. Not just that, the two “eminent persons” would also have the absolute authority to reject all names unanimously approved by the remaining four Members of the NJAC. That would obviously include the power to reject, the unanimous recommendation of the entire judicial component of the NJAC. In our considered view, the vesting of such authority in the “eminent persons”, is clearly unsustainable, in the scheme of “independence of the judiciary”. Vesting of such authority on persons who have no nexus to the system of administration of justice is clearly arbitrary, and we hold it to be so. The inclusion of “eminent persons”, as already concluded above (refer to paragraph 156), would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). For the reasons recorded hereinabove, it is apparent, that Article 124A(1)(d) is liable to be set aside and struck down as being violative of the “basic structure” of the Constitution.

314. It must remain in our minds, that the Indian Constitution is an organic document of governance, which needs to change with the evolution of civil society. We have already concluded, that for far more reasons than the ones, recorded in the *Second Judges case*, the term “consultation”, referred to selection of Judges to the higher judiciary, really meant, even in the wisdom of the framers of the Constitution, that primacy in the matter, must remain with the Chief Justice of India (arrived at, in consultation with a plurality of Judges). Undoubtedly, it is open to the Parliament, while exercising its power under Article 368, to provide for some other alternative procedure for the selection and appointment of Judges to the higher judiciary, so long as, the attributes of “separation of powers” and “independence of the judiciary”, which are “core” components of the “basic structure” of the Constitution, are maintained.

315. That, however, will depend upon the standards of the moral fiber of the Indian polity. It cannot be overlooked, that the learned Attorney General had conceded, that there were certain political upheavals, which had undermined the “independence of the judiciary”, including an executive overreach, at the time of appointment of the Chief Justice of India in 1973, followed by the mass transfer of Judges of the higher judiciary during the emergency in 1976,

and thereafter a second supersession, at the time of appointment of another Chief Justice of India in 1977. And further, the interference by the executive, in the matter of appointment of Judges to the higher judiciary during the 1980's.

316. An important issue, that will need determination, before the organic structure of the Constitution is altered, in the manner contemplated by the impugned constitutional amendment, would be, whether the civil society, has been able to maneuver its leaders, towards national interest? And whether, the strength of the civil society, is of a magnitude, as would be a deterrent for any overreach, by any of the pillars of governance? At the present juncture, it seems difficult to repose faith and confidence in the civil society, to play any effective role in that direction. For the simple reason, that it is not yet sufficiently motivated, nor adequately determined, to be in a position to act as a directional deterrent, for the political-executive establishment. It is therefore, that the higher judiciary, which is the saviour of the fundamental rights of the citizens of this country, by virtue of the constitutional responsibility assigned to it under Articles 32 and 226, must continue to act as the protector of the civil society. This would necessarily contemplate the obligation of preserving the "rule of law", by forestalling the political-executive, from transgressing the limits of their authority as envisaged by the Constitution.

321. It is necessary to appreciate, that the Constitution does not envisage the "spoils system" (also known as the "patronage system"), wherein the political party which wins an election, gives Government positions to its supporters, friends and relatives, as a reward for working towards victory, and as an incentive to keep the party in power.

322. It is also relevant to indicate, the images of the "spoils system" are reflected from the fact, that a large number of persons holding high positions, in institutions of significance, likewise resigned from their assignments, after the present NDA government was sworn in. Some of them had just a few months before their tenure would expire – and some, even less than a month. Those who left included bureaucrats from the All India Services occupying coveted positions at the highest level, Directors/Chairmen of academic institutions of national acclaim, constitutional authorities (other than Governors), Directors/Chairmen of National Research Institutions, and the like. Seriously, the instant narration is not aimed at vilification, but of appreciation of the ground reality, how the system actually works.

323. From the above, is one to understand, that all these individuals were rank favourites, approved by the predecessor political-executive establishment? Or, were the best not chosen to fill the slot by the previous dispensation? Could it be, that those who get to hold the reins of Government, introduce their favourites? Or, whether the existing incumbents, deserved just that? Could it be, that just like its predecessor, the present political establishment has now appointed its rank favourites? What emerges is, trappings of the spoils system, and nothing else. None of the above parameters, can be adopted in the matter of appointment of Judges to

the higher judiciary. For the judiciary, the best out of those available have to be chosen. Considerations cannot be varied, with a change in Government. Demonstrably, that is exactly what has happened (repeatedly?), in the matter of non-judicial appointments. It would be of utmost importance therefore, to shield judicial appointments, from any political-executive interference, to preserve the “independence of the judiciary”, from the regime of the spoils system. Preserving primacy in the judiciary, in the matter of selection and appointment of Judges to the, higher judiciary would be a safe way to do so.

324. In conclusion, it is difficult to hold, in view of the factual position expressed above, that the wisdom of appointment of Judges, can be shared with the political-executive. In India, the organic development of civil society, has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance. In our considered view, the present status of the evolution of the “civil society” in India, does not augur the participation of the political-executive establishment, in the selection and appointment of Judges to the higher judiciary, or in the matter of transfer of Chief Justices and Judges of one High Court, to another.

334. Mr. Mukul Rohatgi, learned Attorney General for India, repulsed the contentions advanced at the hands of the petitioners, that vires of the provisions of the NJAC Act, could be challenged, on the ground of being violative of the “basic structure” of the Constitution.

....

Based on the afore-quoted judgments, it was the assertion of the learned Attorney General, that the validity of a legislative enactment, i.e., an ordinary statute, could not be assailed on the ground, that the same was violative of the “basic structure” of the Constitution. It was therefore asserted, that reliance placed at the hands of the learned counsel, appearing for the petitioners, on the *Madras Bar Association case* was not acceptable in law.

338. It needs to be highlighted, that the issue under reference arose on account of the fact, that learned counsel for the petitioners had placed reliance on the judgment of this Court, in the *Madras Bar Association case*, wherein this Court had examined the provisions of the National Tax Tribunal Act, 2005, and whilst doing so, had held the provisions of the above legislative enactment as ultra vires the provisions of the Constitution, on account of their being violative of the “basic structure” of the Constitution. It is therefore quite obvious, that the instant contention was raised, to prevent the learned counsel for the petitioners, from placing reliance on the conclusions recorded in the *Madras Bar Association case*.

339. We have given our thoughtful consideration to the above contentions. The “basic structure” of the Constitution, presently inter alia includes the supremacy of the Constitution, the republican and democratic form of Government, the “federal character” of distribution of

powers, secularism, “separation of powers” between the legislature, the executive, and the judiciary, and “independence of the judiciary”. This Court, while carving out each of the above “basic features”, placed reliance on one or more Articles of the Constitution (some times, in conjunction with the preamble of the Constitution). It goes without saying, that for carving out each of the “core” or “basic features/basic structure” of the Constitution, only the provisions of the Constitution are relied upon. It is therefore apparent, that the determination of the “basic features” or the “basic structure”, is made exclusively from the provisions of the Constitution. Illustratively, we may advert to “independence of the judiciary” which has been chosen because of its having been discussed and debated during the present course of consideration. The deduction of the concept of “independence of the judiciary” emerged from a collective reading of Articles 12, 36 and 50. It is sometimes not possible, to deduce the concerned “basic structure” from a plain reading of the provisions of the Constitution. And at times, such a deduction is made, from the all-important silences hidden within those Articles, for instance, the “primacy of the judiciary” explained in the *Samsher Singh case*, the *Sankalchand Himatlal Sheth case* and the *Second Judges case*, wherein this Court while interpreting Article 74 along with Articles 124, 217 and 222, in conjunction with the intent of the framers of the Constitution gathered from the Constituent Assembly debates, and the conventions adhered to by the political-executive authority in the matter of appointment and transfer of Judges of the higher judiciary, arrived at the conclusion, that “primacy of the judiciary” was a constituent of the “independence of the judiciary” which was a “basic feature” of the Constitution. Therefore, when a plea is advanced raising a challenge on the basis of the violation of the “basic structure” with reference to the “independence of the judiciary”, its rightful understanding is, and has to be, that Articles 12, 36 and 50 on the one hand, and Articles 124, 217 and 222 on the other, (read collectively and harmoniously) constitute the basis thereof. Clearly, the “basic structure” is truly a set of fundamental foundational principles, drawn from the provisions of the Constitution itself. These are not fanciful principles carved out by the judiciary, at its own. Therefore, if the conclusion drawn is, that the “independence of the judiciary” has been transgressed, it is to be understood, that rule/principle collectively emerging from the above provisions, had been breached, or that the above Articles read together, had been transgressed.

340. So far as the issue of examining the constitutional validity of an ordinary legislative enactment is concerned, all the constitutional provisions, on the basis whereof the concerned “basic feature” arises, are available. Breach of a single provision of the Constitution, would be sufficient to render the legislation, ultra vires the Constitution. In such view of the matter, it would be proper to accept a challenge based on constitutional validity, to refer to the particular Article(s), singularly or collectively, which the legislative enactment violates. And in cases where the cumulative effect of a number of Articles of the Constitution is stated to have been violated, reference should be made to all the concerned Articles, including the

preamble, if necessary. The issue is purely technical. Yet, if a challenge is raised to an ordinary legislative enactment based on the doctrine of “basic structure”, the same cannot be treated to suffer from a legal infirmity. That would only be a technical flaw. That is how, it will be possible to explain the observations made by this Court, in the judgments relied upon by the learned counsel for the petitioners. Therefore, when a challenge is raised to a legislative enactment based on the cumulative effect of a number of Articles of the Constitution, it is not always necessary to refer to each of the concerned Articles, when a cumulative effect of the said Articles has already been determined, as constituting one of the “basic features” of the Constitution. Reference to the “basic structure”, while dealing with an ordinary legislation, would obviate the necessity of recording the same conclusion, which has already been scripted while interpreting the Article(s) under reference, harmoniously. We would therefore reiterate, that the “basic structure” of the Constitution is inviolable, and as such, the Constitution cannot be amended so as to negate any “basic features” thereof, and so also, if a challenge is raised to an ordinary legislation based on one of the “basic features” of the Constitution, it would be valid to do so. If such a challenge is accepted, on the ground of violation of the “basic structure”, it would mean that the bunch of Articles of the Constitution (including the preamble thereof, wherever relevant), which constitute the particular “basic feature”, had been violated. We must however credit the contention of the learned Attorney General by accepting, that it would be technically sound to refer to the Articles which are violated, when an ordinary legislation is sought to be struck down, as being ultra vires the provisions of the Constitution. But that would not lead to the inference, that to strike down an ordinary legislative enactment, as being violative of the “basic structure”, would be wrong. We therefore find no merit in the contention advanced by the learned Attorney General, but for the technical aspect referred to hereinabove.

341. Various challenges were raised to the different provisions of the NJAC Act. First and foremost, a challenge was raised to the manner of selection and appointment of the Chief Justice of India. Section 5(1) of the NJAC Act, it was submitted, provides that the NJAC would recommend the senior most Judge of the Supreme Court, for being appointed as Chief Justice of India, subject to the condition, that he is considered “fit” to hold the office. It was contended, that the Parliament had been authorized by law to regulate the procedure for the appointment of the Chief Justice of India, under Article 124C. It was submitted, that the NJAC should have been allowed to frame regulations, with reference to the manner of selection and appointment of Judges to the higher judiciary including the Chief Justice of India.

352. The contention advanced at the hands of the learned counsel for the petitioners, as has been noticed in the foregoing paragraph, does not require any detailed examination, as the existing declared legal position, is clear and unambiguous. In this behalf, it may be recorded,

that in case a statutory provision vests a decision making authority in a body of persons without stipulating the minimum quorum, then a valid meeting can be held only if the majority of all the members of the body, deliberate in the process of decision making. On the same analogy therefore, a valid decision by such a body will necessitate a decision by a simple majority of all the members of the body. If the aforesaid principles are made applicable to the NJAC, the natural outcome would be, that a valid meeting of the NJAC must have at least four Members participating in a six-Member NJAC. Likewise, a valid decision of the NJAC can only be taken (in the absence of any prescribed prerequisite), by a simple majority, namely, by at least four Members of the NJAC (three Members on either side, would not make up the simple majority). We are satisfied, that the provisions of the NJAC Act which mandate, that the NJAC would not make a recommendation in favour of a person for appointment as a Judge of the High Court or of the Supreme Court, if any two Members thereof did not agree with such recommendation, cannot be considered to be in violation of the rule/principle expressed above. As a matter of fact, the NJAC Act expressly provides, that if any two Members thereof did not agree to any particular proposal, the NJAC would not make a recommendation. There is nothing in law, to consider or treat the aforesaid stipulations in the second proviso to Section 5(2) and Section 6(6) of the NJAC Act, as unacceptable. The instant submission advanced at the hands of the learned counsel for the petitioners is therefore liable to be rejected, and is accordingly rejected.

353. We have also given our thoughtful consideration to the other contentions advanced at the hands of the learned counsel for the petitioners, with reference to Section 5 of the NJAC Act. We are of the view, that it was not within the realm of Parliament, to subject the process of selection of Judges to the Supreme Court, as well as to the position of Chief Justice of India, in uncertain and ambiguous terms. It was imperative to express, the clear parameters of the term “fit”, with reference to the senior most Judge of the Supreme Court under Section 5 of the NJAC Act. We are satisfied, that the term “fit” can be tailor-made, to choose a candidate far below in the seniority list. This has been adequately demonstrated by the learned counsel for the petitioners.

354. The clear stance adopted by the learned Attorney General, that the term “fit” expressed in Section 5(1) of the NJAC Act, had been accepted by the Government, to mean and include, only “...mental and physical fitness...”, to discharge the onerous responsibilities of the office of Chief Justice of India, and nothing more. Such a statement cannot, and does not, bind successor Governments or the posterity for all times to come. The present wisdom, cannot bind future generations. And, it was exactly for this reason, that the respondents could resile from the statement made by the then Attorney General, before the Bench hearing the *Third Judges case*, that the Union of India was not seeking a review or reconsideration of the judgment in the *Second Judges case* (that, it had accepted to treat as binding, the decision in

the *Second Judges case*). And yet, during the course of hearing of the present case, the Union of India did seek a reconsideration of the *Second Judges case*.

355. Insofar as the challenge to Section 5(1) of the NJAC Act is concerned, we are satisfied to affirm and crystallise the position adopted by the Attorney General, namely, that the term “fit” used in Section 5(1) would be read to mean only “... mental and physical fitness ...”. If that is done, it would be legal and constitutional. However, if the position adopted breached the “independence of the judiciary”, in the manner suggested by the learned counsel for the petitioners, the same would be assailable in law.

356. We will now endeavour, to address the second submission with reference to Section 5 of the NJAC Act. Undoubtedly, postulating “seniority” in the first proviso under Section 5(2) of the NJAC Act, is a laudable objective. And if seniority is to be supplemented and enmeshed with “ability and merit”, the most ideal approach, can be seen to have been adopted. But what appears on paper, may sometimes not be correct in practice. Experience shows, that Judges to every High Court are appointed in batches, each batch may have just two or three appointees, or may sometimes have even ten or more individuals. A group of Judges appointed to one High Court, will be separated from the lot of Judges appointed to another High Court, by just a few days, or by just a few weeks, and sometimes by just a few months. In the all India seniority of Judges, the complete batch appointed on the same day, to one High Court, will be placed in a running serial order (in seniority) above the other Judges appointed to another High Court, just after a few days or weeks or months. Judges appointed later, will have to be placed en masse below the earlier batch, in seniority. If appointment of Judges to the Supreme Court, is to be made on the basis of seniority (as a primary consideration), then the earlier batch would have priority in the matter of elevation to the Supreme Court. And hypothetically, if the batch had ten Judges (appointed together to a particular High Court), and if all of them have proved themselves able and meritorious as High Court Judges, they will have to be appointed one after the other, when vacancies of Judges arise in the Supreme Court. In that view of the matter, Judges from the same High Court would be appointed to the Supreme Court, till the entire batch is exhausted. Judges from the same High Court, in the above situation where the batch comprised of ten judges, will occupy a third of the total Judge positions in the Supreme Court. That would be clearly unacceptable, for the reasons indicated by the learned counsel for the petitioners. We also find the position, unacceptable in law.

357. Therefore, insofar as Section 5(2) of the NJAC Act is concerned, there cannot be any doubt, that consideration of Judges on the basis of their seniority, by treating the same as a primary consideration, would adversely affect the present convention of ensuring representation from as many State High Courts, as is possible. The convention in vogue is, to maintain regional representation. For the reasons recorded above, the first proviso under

Section 5(2) is liable to be struck down and set aside. Section 6(1) applies to appointment of a Judge of a High Court as Chief Justice of a High Court. It has the same seniority connotation as has been expressed hereinabove, with reference to the first proviso under Section 5(2). For exactly the same reasons as have been noticed above, based on seniority (as a primary consideration), ten High Courts in different States could have Chief Justices drawn from one parent High Court. Section 6(1) of the NJAC Act was therefore liable to meet the same fate, as the first proviso under Section 5(2).

358. We are also of the considered view, that the power of veto vested in any two Members of the NJAC, would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). Details in this behalf have already been recorded in part VIII hereinabove. Section 6(6) of the NJAC Act, has the same connotation as the second proviso under Section 5(2), and Section 6(6) of the NJAC Act would therefore meet the same fate, as Section 5(2). For the reasons recorded hereinabove, we are satisfied, that Sections 5(2) and 6(6) of the NJAC Act also breach the “basic structure” of the Constitution, with reference to the “independence of the judiciary” and the “separation of powers”. Sections 5(2) and 6(6), in our considered view, are therefore, also liable to be declared as ultra vires the Constitution.

359. A challenge was also raised by the learned counsel for the petitioners to Section 7 of the NJAC Act. It was asserted, that on the recommendation made by the NJAC, the President was obliged to appoint the individual recommended as a Judge of the High Court under Article 217(1). It was submitted, that the above position was identical to the position contemplated under Article 124(2), which also provides, that a candidate recommended by the NJAC would be appointed by the President, as a Judge of the Supreme Court. It was submitted, that neither Article 124(2) nor Article 217(1) postulate, that the President could require the NJAC to reconsider, the recommendation made by the NJAC, as has been provided for under the first proviso to Section 7 of the NJAC Act. It was accordingly the contention of the learned counsel for the petitioners, that the first proviso to Section 7 was ultra vires the provisions of Articles 124(2) and 217(1), by providing for reconsideration, and that, the same was beyond the pale and scope of the provisions referred to above.

360. Having considered the submission advanced by the learned counsel for the petitioners in the foregoing paragraph, it is not possible for us to accept that Section 7 of the NJAC Act, by providing that the President could require the NJAC to reconsider a recommendation made by it, would in any manner violate Articles 124(2) and 217(1) (which mandate, that Judges would be appointed by the President on the recommendation of the NJAC). It would be improper to infer, that the action of the President, requiring the NJAC to reconsider its proposal, amounted to rejecting the proposal made by the NJAC. For, if the NJAC was to reiterate the proposal made earlier, the President even in terms of Section 7, was bound to act

in consonance therewith (as is apparent from the second proviso under Section 7 of the NJAC Act). In our considered view, the instant submission advanced at the hands of the petitioners deserves to be rejected, and is accordingly rejected.

361. Learned counsel for the petitioners had also assailed the validity of Section 8 of the NJAC Act, which provides for the Secretary to the Government of India, in the Department of Justice, to be the convener of the NJAC. It was contended, that the function of a convener, with reference to the NJAC, would entail the responsibility of inter alia preparing the agenda for the meetings of the NJAC, namely, to decide the names of the individuals to be taken up for consideration, in the next meeting. This would also include, the decision to ignore names from being taken up for consideration in the next meeting. He may include or exclude names from consideration, at the behest of his superior. It would also be the responsibility of the convener, to compile data made available from various quarters, as contemplated under the NJAC Act, and in addition thereto, as may be required by the Union Minister in charge of Law and Justice, and the Chief Justice of India. It was submitted, that such an onerous responsibility, could not be left to the executive alone, because material could be selectively placed by the convener before the NJAC, in deference to the desire of his superior – the Union Minister in charge of Law and Justice, by excluding favourable material, with reference to a candidate considered unsuitable by the executive, and by excluding unfavourable material, with reference to a candidate who carried favour with the executive.

362. It was additionally submitted, that it was imperative to exclude all executive participation in the proceedings of the NJAC for two reasons. Firstly, the executive was the largest individual litigant, in matters pending before the higher judiciary, and therefore, cannot have any discretionary role in the process of selection and appointment of Judges to the higher judiciary (in the manner expressed in the preceding paragraph). And secondly, the same would undermine the concepts of “separation of powers” and “independence of the judiciary”, whereunder the judiciary has to be shielded from any possible interference, either from the executive or the legislature.

363. We have given our thoughtful consideration to the above two submissions, dealt with in the preceding two paragraphs. We have already concluded earlier, that the participation of the Union Minister in charge of Law and Justice, as a Member of the NJAC, as contemplated under Article 124A(1), in the matter of appointment of Judges to the higher judiciary, would breach the concepts of “separation of powers” and the “independence of the judiciary”, which are both undisputedly components of the “basic structure” of the Constitution of India. For exactly the same reasons, we are of the view, that Section 8 of the NJAC Act which provides, that the Secretary to the Government of India, in the Department of Justice, would be the convener of the NJAC, is not sustainable in law. In a body like the NJAC, the administrative functioning cannot be under executive or legislative control. The only remaining alternative,

is to vest the administrative control of such a body, with the judiciary. For the above reasons, Section 8 of the NJAC Act would likewise be unsustainable in law.

364. Examined from the legal perspective, it was unnecessary for us to examine the individual provisions of the NJAC Act. Once the constitutional validity of Article 124A(1) is held to be unsustainable, the impugned constitutional amendment, as well as, the NJAC Act, would be rendered a nullity.

V. THE EFFECT OF STRIKING DOWN THE IMPUGNED CONSTITUTIONAL AMENDMENT:

365. Would the amended provisions of the Constitution revive, if the impugned constitutional amendment was to be set aside, as being violative of the “basic structure” of the Constitution? It would be relevant to mention, that the instant issue was not adverted to by the learned counsel for the petitioners, possibly on the assumption, that if on a consideration of the present controversy, this Court would strike down the Constitution (99th Amendment) Act, then Articles 124, 127, 128, 217, 222, 224, 224A and 231, as they existed prior to the impugned amendment, would revive. And on such revival, the judgments rendered in the *Second and Third Judges cases*, would again regulate selections and appointments, as also, transfer of Judges of the higher judiciary.

VI. CONCLUSIONS

373. Article 124A constitutes the edifice of the Constitution (99th Amendment) Act, 2014. The striking down of Article 124A would automatically lead to the undoing of the amendments made to Articles 124, 124B, 124C, 127, 128, 217, 222, 224, 224A and 231. This, for the simple reason, that the latter Articles are sustainable only if Article 124A is upheld. Article 124A(1) provides for the constitution and the composition of the National Judicial Appointments Commission (NJAC). Its perusal reveals, that it is composed of the following:

- (a) the Chief Justice of India, Chairperson, ex officio;
- (b) two other senior Judges of Supreme Court, next to the Chief Justice of India – Members, ex officio;
- (c) the Union Minister in charge of Law and Justice – Member, ex officio;
- (d) two eminent persons, to be nominated – Members.

If the inclusion of anyone of the Members of the NJAC is held to be unconstitutional, Article 124A will be rendered nugatory, in its entirety.

While adjudicating upon the merits of the submissions advanced at the hands of the learned counsel for the rival parties, I have arrived at the conclusion, that clauses (a) and (b) of

Article 124A(1) do not provide an adequate representation, to the judicial component in the NJAC, clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary, in the matter of selection and appointment of Judges, to the higher judiciary (as also transfer of Chief Justices and Judges, from one High Court to another). The same are accordingly, violative of the principle of “independence of the judiciary”. I have independently arrived at the conclusion, that clause (c) of Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC. Clause (c) of Article 124A(1), in my view, impinges upon the principles of “independence of the judiciary”, as well as, “separation of powers”. It has also been concluded by me, that clause (d) of Article 124A(1) which provides for the inclusion of two “eminent persons” as Members of the NJAC is ultra vires the provisions of the Constitution, for a variety of reasons. The same has also been held as violative of the “basic structure” of the Constitution. In the above view of the matter, I am of the considered view, that all the clauses (a) to (d) of Article 124A(1) are liable to be set aside. The same are, accordingly struck down. In view of the striking down of Article 124A(1), the entire Constitution (99th Amendment) Act, 2014 is liable to be set aside. The same is accordingly hereby struck down in its entirety, as being ultra vires the provisions of the Constitution.

374. The contention advanced at the hands of the respondents, to the effect, that the provisions of the Constitution which were sought to be amended by the impugned constitutional amendment, would not revive, even if the challenge raised by the petitioners was accepted (and the Constitution (99th Amendment) Act, 2014, was set aside), has been considered under a separate head, to the minutest detail, in terms of the submissions advanced. I have concluded, that with the setting aside of the impugned Constitution (99th Amendment) Act, 2014, the provisions of the Constitution sought to be amended thereby, would automatically revive, and the status quo ante would stand restored.

375. The National Judicial Appointments Commission Act, 2014 inter alia emanates from Article 124C. It has no independent existence in the absence of the NJAC, constituted under Article 124A(1). Since Articles 124A and 124C have been set aside, as a natural corollary, the National Judicial Appointments Commission Act, 2014 is also liable to be set aside, the same is accordingly hereby struck down. In view of the above, it was not essential for us, to have examined the constitutional vires of individual provisions of the NJAC Act. I have all the same, examined the challenge raised to Sections 5, 6, 7 and 8 thereof. I have concluded that Sections 5, 6 and 8 of the NJAC Act are ultra vires the provisions of the Constitution.

National Judicial Appointment Commission

Introduction

National Judicial Appointments Commission (NJAC) is a proposed body responsible for the appointment and transfer of judges to the higher judiciary in India. The Commission is established by amending the Constitution of India through the ninety-ninth constitution amendment vide the Constitution (Ninety-Ninth Amendment) Act, 2014 passed by the Lok Sabha on 13 August 2014 and by the Rajya Sabha on 14 August 2014. The NJAC replaces the collegium system for the appointment of judges as mandated in the existing pre-amended constitution by a new system. Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014, was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission. The NJAC Bill and the Constitutional Amendment Bill, was ratified by 16 of the state legislatures in India, and subsequently assented by the Hon'ble President of India Pranab Mukherjee on 31 December 2014. The NJAC Act and the Constitutional Amendment Act came into force from 13 April 2015.

The Contextual

Since 1950, judges have been appointed by the government in “consultation” with the Chief Justice of India (CJI). For the first two decades, there was a near consensus between the government of the day and the CJI. In 1981, the question arose whether “Consultation” referred to in Articles 124(2) and 217(1) with the CJI meant “concurrence” in which case the recommendations of the judiciary would be binding on the government. In the *S. P. Gupta* case decided in 1981, the Court held by a majority that the recommendations of the CJI were not binding on the government. Once this decision was rendered the government obtained a licence to disregard the recommendations of the judiciary. While this was a literal interpretation of the word “consultation”, it had devastating political consequences. It appears the recommendation made by the CJI was not accepted as an invariable rule; change was on the cards.

The prime initiators for change in the method of appointment of judges have always been the lawyers. In hindsight it seems almost logical since it is they who end up as Chief Justices of the High Courts and of the Supreme Court. Judges of these courts are invariably sons of former judges or sons of lawyers practising at the bar. The debate on who should appoint judges has never really been thrown open to the public and we as a country do not have an articulated position on this issue. In Court we are confronted with a binary position, either independence of the judiciary or executive control. This process of reasoning is inherent to the legal method and no nuances are allowed to emerge nor options considered. In 1993, once again, the issue was taken to the Supreme Court and the judgment in the *S P Gupta* case was overruled. This time a bench of nine judges held that a collegiate opinion of a collective of judges is binding on the government. The majority gave the conclusions regarding appointments; wherein, all the constitutional functionaries must perform this duty collectively with a view to reach an agreed decision so that the occasion of primacy does not arise. In case of Supreme Court, the proposal is

to be initiated by the CJI and in the case of a high court by the chief justice of that high court. In the event of conflict of opinion, the view of the CJI has primacy. No appointment of any judge to the Supreme Court or any high court can be made unless it is in conformity with the opinion of the CJI. In exceptional cases, for stated strong and cogent reasons, disclosed to the CJI, indicating that the recommendation is not suitable for appointment, the appointment recommended by the CJI may not be made. But in case the CJI reiterates his recommendation then, the appointment should be made in accordance with his recommendation. The senior-most judge of the Supreme Court should be appointed as CJI, if considered fit to hold the office. The judgment established the primacy of the judiciary in the matter of making appointments. It is worthy of mention that the previous NDA government was in power at that time when the reference was made and the then Attorney General for India appeared in the case and argued that the primacy of the Chief Justice over the execution must be maintained.

National Judicial Appointment Commission

The Constitution was amended and the 99th Amendment was inserted into the Constitution of India to give constitutional status to National Judicial Appointment Commission. The National Judicial Appointments Commission Act, 2014 was also enacted with the constitutional amendment to completely change the whole procedure for the appointment of judges in High Court and the Supreme Court. After the two Acts come into force a judge would be appointed on the recommendation of the National Judicial Appointments Commission. The National Judicial Appointments Commission consists of the Chief Justice of India, two senior most judges of the Supreme Court next to the Chief Justice of India, the Union Law Minister, two eminent persons nominated by a committee consisting of the Prime Minister, the Chief Justice of India, the Leader of Opposition in Lok Sabha (in case there is no such leader the leader of the single largest opposition party). The Commission is entrusted to recommend persons for appointment as Chief Justice of India, judges of the Supreme Court, Chief Justice of High Courts and Judges of High Courts and to recommend transfer of Chief Justice and judges of High Courts from one High Court to another. The procedure to be followed by the National Judicial Appointments Commission is that the Central Government shall make a reference to the National Judicial Appointments Commission six months prior to the date of a vacancy arising out of completion of the term of a judge of the Supreme Court or a High Court. The senior-most judge of the Supreme Court shall be recommended for appointment as the Chief Justice of India. A person who is considered fit on the basis of his ability, merit and suitability shall be recommended for appointment as a Supreme Court judge. A judge of a High Court shall be recommended for appointment as Chief Justice after considering his inter-se seniority, ability, merit and suitability. The Commission may select persons who are eligible under Article 217 (2) and forward the name of such persons to the Chief Justice of the High Court for his views but before sending the names and views of the Governor and the Chief Justice shall consult two senior-most judges of High Court. The commission shall before making a recommendation seek in writing the views of the Governor and the Chief Minister of the State. If two members are not in favour of a person his name shall not be recommended.

L. Chandra Kumar v. Union of India

(1997) 3 SCC 261

(A.M. Ahmadi, C.J., M.M. Punchhi, K. Ramaswamy, S.P. Bharucha, Saiyed Saghir Ahmad, K.Venkataswami and K.T. Thomas, JJ.)

[Ouster of power of Judicial Review and vesting the same in administrative tribunals to the total exclusion of the High Courts under Article 226 of the Constitution – not permissible.]

The Constitution (Forty-second Amendment) Act, 1976 inserted Part XIVA in the Constitution which contains Articles 323A and 323B. These articles provide for the setting up of various tribunals as adjudicatory bodies. They, *inter alia*, contain provisions enabling the Parliament and state legislatures to exclude the jurisdiction of all courts except that of the Supreme Court under Article 136 with respect to matters falling within the jurisdiction of the tribunals concerned. The Administrative Tribunals Act, 1985 was enacted by Parliament by virtue of Article 323A. The validity of the Act was upheld in ***S.P. Sampath Kumar v. Union of India*** [(1987) 1 SCC 124].

While upholding the validity of Section 28 of the Act in ***Sampath Kumar*** case, the court had taken the view that the power of judicial review need not always be exercised by regular courts and the same could be exercised by an equally efficacious alternative mechanism. Apart from making suggestions relating to the eligibility, etc. of the persons who could be appointed as chairman, vice-chairman or members of the tribunal, the court stated that every Bench of the tribunal should consist of one Judicial Member and one Administrative Member.

The case required a fresh look at the issues involved in ***Sampath Kumar*** case because the tribunals were equated with the High Courts. A two-judge Bench of the Court in ***J.B. Chopra v. Union of India*** [AIR 1987 SC 357], relying upon ***Sampath Kumar***, had held that the tribunals had the jurisdiction, power and authority to adjudicate upon questions pertaining to the constitutional validity of a rule framed by the President of India under the proviso to Article 309 of the Constitution. They could also adjudicate on the *vires* of the Acts of Parliament and state legislatures. Section 5(6) of the Act conferred this power, if the chairman of the tribunal so desired, even to a single administrative member.

The post ***Sampath Kumar*** cases required a fresh look by a larger Bench over all the issues adjudicated in ***Sampath Kumar*** including the question whether the tribunal could at all have an administrative member on its bench, if it were to have the power of deciding constitutional validity of a statute or Article 309 Rule.

A.M. AHMADI, C.J. - The special leave petitions, civil appeals and writ petitions which together constitute the present batch of matters before us owe their origin to separate decisions of different High Courts and several provisions in different enactments which have been made the subject of challenge. Between them, they raise several distinct questions of law; they have, however, been grouped together as all of them involve the consideration of the following broad issues:

(1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by sub-clause (d) of clause (2) of Article 323A or by sub-clause (d) of clause (3) of Article 323B of the Constitution, to totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323A or with regard to all or any of the

matters specified in clause (2) of Article 323B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?

(2) Whether the Tribunals, constituted either under Article 323-A or under Article 323-B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?

73. We may now analyse certain other authorities for the proposition that the jurisdiction conferred upon the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution respectively, is part of the basic structure of the Constitution. While expressing his views on the significance of draft Article 25, which corresponds to the present Article 32 of the Constitution, Dr. B.R. Ambedkar, the Chairman of the Drafting Committee of the Constituent Assembly stated as follows: (*CAD*, Vol. VII, p. 953)

If I was asked to name any particular article in this Constitution as *the most important* - an article without which this Constitution would be a nullity - I could not refer to any other article except this one. *It is the very soul of the Constitution and the very heart of it* and I am glad that the House has realised its importance.

(emphasis added)

76. To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The doctrine of basic structure was evolved in *Kesavananda Bharati* case [AIR 1973 SC 1461]. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. In *Indira Gandhi* case [AIR 1975 SC 2299], Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country.

77. We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme.

78. The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers

of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation is equally to be avoided.

80. However, it is important to emphasize that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental - as opposed to a substitutional - role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses clause (3) of Article 32 of the Constitution.

81. If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the

provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323-B of the Constitution. It is to be remembered that, apart from the authorization that flows from Articles 323-A and 323-B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.

82. There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. The decision in *Sampath Kumar* case was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in *Sampath Kumar* case adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

83. We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in *Sampath Kumar* case. In his leading judgment, Ranganath Misra, J. refers to the fact that since Independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted.

84. The problem of clearing the backlogs of High Courts which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to half a century. Over time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions, not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India ("the LCI") or similar high-level committees appointed by the Central Government, and are particularly noteworthy.

85. An appraisal of the daunting task which confronts the High Courts can be made by referring to the assessment undertaken by the Law Commission of India in its 124th Report which was released sometime after the judgment in *Sampath Kumar* case. The Report was delivered in 1988, nine years ago, and some changes have occurred since, but the broad perspective which emerges is still, by and large, true:

The High Courts enjoy civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The source of the jurisdiction is the Constitution and the various statutes as well as letters patent and other instruments constituting the High Courts. The High Courts in the country enjoy an original jurisdiction in respect of testamentary, matrimonial and guardianship matters. Original jurisdiction is conferred on the High Courts under the Representation of the People Act, 1951, Companies Act, 1956, and several other special statutes. The High Courts, being courts of record, have the power to punish for its contempt as well as contempt of its subordinate courts. The High Courts enjoy extraordinary jurisdiction under Articles 226 and 227 of the Constitution enabling it to issue prerogative writs, such as, the one in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. Over and above this, the High Courts of Bombay, Calcutta, Delhi, Himachal Pradesh, Jammu and Kashmir and Madras also exercise ordinary original civil jurisdiction. The High Courts also enjoy advisory jurisdiction, as evidenced by Section 256 of the Indian Companies Act, 1956, Section 27 of the Wealth Tax Act, 1957, Section 26 of the Gift Tax Act, 1958, and Section 18 of the Companies (Profits) Surtax Act, 1964. Similarly, there are parallel provisions conferring advisory jurisdiction on the High Courts, such as, Section 130 of the Customs Act, 1962, and Section 354 of the Central Excises and Salt Act, 1944. The High Courts have also enjoyed jurisdiction under the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936. Different types of litigation coming before the High Court in exercise of its wide jurisdiction bear different names. The vast area of jurisdiction can be appreciated by reference to those names, viz., (a) first appeals; (b) appeals under the letters patent; (c) second appeals; (d) revision petitions; (e) criminal appeals; (f) criminal revisions; (g) civil and criminal references; (h) writ petitions; (i) writ appeals; (j) references under direct and indirect tax laws; (k) matters arising under the Sales Tax Act; (l) election petitions under the Representation of the People Act; (m) petitions under the Companies Act, Banking Companies Act and other special Acts and (n) wherever the High Court has original jurisdiction, suits and other proceedings in exercise of that jurisdiction. This varied jurisdiction has to some extent been responsible for a very heavy institution of matters in the High Courts.

88. In *R.K. Jain* case [(1993) 4 SCC 119] this Court had, in order to understand how the theory of alternative institutional mechanisms had functioned in practice, recommended that the LCI [Law Commission of India] or a similar expert body should conduct a survey of the functioning of these Tribunals. It was hoped that such a study, conducted after gauging the working of the Tribunals over a sizeable period of more than five years would provide an answer to the questions posed by the critics of the theory. Unfortunately, we do not have the benefit of such a study. We may, however, advert to the Report of the Arrears Committee (1989-90), popularly known as the Malimath Committee Report, which has elaborately dealt with the aspect. The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, "*Alternative Modes and Forums for Dispute Resolution*", deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up "Gram Nyayalayas", Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunals set up under Articles 323-A and 323-B of the Constitution.

90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the

jurisdiction of the High Courts under Articles 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In

R.K. Jain case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforesaid contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

92. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the

aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

96. It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will

ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

98. Since we have analysed the issue of the constitutional validity of Section 5(6) of the Act at length, we may now pronounce our opinion on this aspect. Though the vires of the provision was not in question in *Dr Mahabab Ram* case [(1994) 2 SCC 401], we believe that the approach adopted in that case, the relevant portion of which has been extracted in the first part of this judgment, is correct since it harmoniously resolves the manner in which Sections 5(2) and 5(6) can operate together. We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a Single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a Single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality.

99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323A and clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the “exclusion of jurisdiction” clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

DISTRIBUTION OF LEGISLATIVE POWERS

[Doctrine of Territorial Nexus – Extra-territorial operation of a state legislation]

State of Bihar v. Charusila Dasi

AIR 1959 SC 1002

(S.R. Das, C.J. and S.K.Das, P.B. Gajendragadkar, K.N.Wanchoo and M. Hidayatullah, JJ.)

S.K. DAS, J. – 1. This appeal relates to a trust known as the Srimati Charusila Trust and the properties appertaining thereto. By its judgment and order dated October 5, 1953 the High Court of Patna has held that the trust in question is a private trust created for the worship of a family idol in which the public are not interested and, therefore, the provisions of the Bihar Hindu Religious Trusts Act, 1950 (Bihar 1 of 1951), hereinafter referred to as the Act, do not apply to it. Accordingly, it allowed an application made to it under Article 226 of the Constitution and quashed the proceedings taken against the respondent herein under Sections 59 and 70 of the Act. The State of Bihar, the President of the Bihar State Board of Religious Trusts and the Superintendent of the said Board who were respondents to the petition under Article 226 are the appellants before us.

2. The trust in question was created by a trust deed executed on March 11, 1938. Srimati Charusila Dasi is the widow of one Akshaya Kumar Ghose of No. 3, Jorabagan Street in Calcutta. She resided at the relevant time in a house known as Charu Niwas at Deoghar in the district of Santhal Perganas in the State of Bihar. In the trust deed she described herself as the settlor who was entitled to and in possession of certain properties described in Schedules B, C and D. Schedule B property consisted of three bighas and odd of land situate in Mohalla Karanibad of Deoghar town together with buildings and structures thereon; Schedule C property was Charu Niwas, also situate in Karanibad of Deoghar; and Schedule D properties consisted of several houses and some land in Calcutta the aggregate value of which was in the neighbourhood of Rs 8,50,000. In a subsequent letter to the Superintendent, Bihar State Board of Religious Trusts, it was stated on behalf of Srimati Charusila Dasi that the total annual income from all the properties was about Rs 87,839. In the trust deed it was recited that the settlor had installed a deity named Iswar Srigopal in her house and had since been regularly worshipping and performing the “puja” of the said deity; that she had been erecting and constructing a twin temple (jugal mandir) and a Nat Mandir (entrance hall) to be named in memory of her deceased son Dwijendra Nath on the plot of land described in Schedule B and was further desirous of installing in one of the two temples the deity Srigopal and such other deity or deities as she might wish to establish during her lifetime and also of installing in the other temple a marble image of Sri Sri Balanand Brahmachari, who was her religious preceptor and who was regarded by his disciples as a divine person. It was further recited in the trust deed that the settlor was also desirous of establishing and founding a hospital at Karanibad for Hindu females to be called Akshaya Kumar Female Hospital in memory of her deceased husband.

By the trust deed the settlor transferred to the trustees the properties described in Schedules B, C and D and the trustees were five in number including Srimati Charusila Dasi

and her deceased husband's adopted son Debi Prasanna Ghosh; the other three trustees were Amarendra Kumar Bose, Tara Shanker Chatterjee and Surendra Nath Burman, but they were not members of the family of the settlor. Amarendra Kumar Bose resigned from the office of trusteeship and was later replaced by Dr Shailendra Nath Dutt. The trusts imposed under the trust deed were - (1) to complete the construction of the two temples and the Nat Mandir at a cost not exceeding three lakhs to be met out of the trust estate and donations, if any; (2) after the completion of the two temples, to instal or cause to be installed the deity Iswar Srigopal in one of the temples and the marble image of Sri Balanand Brahmachari in the other and to hold a consecration ceremony and a festival in connection therewith; (3) after the installation ceremonies and festivals mentioned above, to provide for the payment and expenditure of the daily "sheba puja" and periodical festivals each year of the deity Srigopal and such other deities as might be installed at an amount not exceeding the sum of Rs 13,600 per annum and also to provide for the daily "sheba" of the marble image of Sri Balanand Brahmachari and to celebrate each year in his memory festivals on the occasion of (a) the "Janma-tithi" (the anniversary of the installation of the marble image); (b) "Guru-purnima" (full moon in the Bengali month of Ashar); and (c) "Tirodhan" (anniversary of the day on which Sri Balanand Brahmachari gave up his body) at a cost not exceeding Rs 4500 per annum; and (4) to establish or cause to be established and run and manage in Deoghar a hospital for Hindu females only to be called Akshaya Kumar Female Hospital and an attached outdoor charitable dispensary for all outpatients of any religion or creed whatsoever and pay out of the income for the hospital and the outdoor dispensary an annual sum of Rs 12,000 or such other sum as might be available and sufficient after meeting the charges and expenditure of the two temples and after paying the allowance of the "shebait" and trustees and members of the temple committee. It was further stated that the work of the establishment of the hospital and the outdoor charitable dispensary should not be taken in hand until the construction of the temples and the installation of the deities mentioned above.

3. It may be here stated that it is the case of both parties before us that the temples and the Nat Mandir have been constructed and the deity and the marble image installed therein; but neither the hospital nor the charitable dispensary has yet been constructed. The powers, functions and duties of the trustees were also mentioned in the deed and, in Schedule A, detailed rules were laid down for the holding of annual general meetings, special meetings, and ordinary meetings of the trustees. To these details we shall advert later.

4. On October 27, 1952 the Superintendent, Bihar State Board of Religious Trusts, Patna, sent a notice to Srimati Charusila Dasi under Section 59 of the Act asking her to furnish a return in respect of the trust in question. Srimati Charusila Dasi said in reply that the trust in question was a private endowment created for the worship of a family idol in which the public were not interested and therefore the Act did not apply to it. On January 5, 1953 the Superintendent wrote again to Srimati Charusila Dasi informing her that the Board did not consider that the trust was a private trust and so the Act applied to it. There was further correspondence between the solicitor of Srimati Charusila Dasi and the President of the Bihar State Board of Religious Trusts. The correspondence did not, however, carry the matter any further and on February 5, 1953 the President of the State Board of Religious Trusts said in a notice that he had been authorised to assess a fee under Section 70 of the Act in respect of the

trust. Ultimately, on April 6, 1953, Srimati Charusila Dasi made an application to the High Court under Article 226 of the Constitution in which she prayed that a writ or order be issued quashing the proceedings taken against her by the Bihar State Board of Religious Trusts on the grounds (a) that the trust in question was a private trust to which the Act did not apply and (b) that the Act was ultra vires the Constitution by reason of the circumstance that its several provisions interfered with her rights as a citizen guaranteed under Article 19 of the Constitution.

5. This application was contested by the State of Bihar and the Bihar State Board of Religious Trusts, though no affidavit was filed by either of them. On a construction of the trust deed the High Court came to the conclusion that the trust in question was wholly of a private character created for the worship of a family idol in which the public were not interested and in that view of the matter held that the Act and its provisions did not apply to it. Accordingly, the High Court allowed the application and issued a writ in the nature of a writ of certiorari quashing the proceedings under Sections 59 and 70 of the Act and a writ in the nature of a writ of prohibition restraining the Bihar State Board of Religious Trusts from taking further proceedings against Srimati Charusila Dasi in respect of the trust in question. The appellants then applied for and obtained a certificate from the High Court that the case fulfilled the requirements of Article 133 of the Constitution. The present appeal has been filed in pursuance of that certificate.

6. In connected Civil Appeals numbered 225, 226, 228, 229 and 248 of 1955 judgment has been pronounced today, and we have given therein a conspectus of the provisions of the Act and have further dealt with the question of the constitutional validity of those provisions in the context of fundamental rights guaranteed by Part III of the Constitution. We have held therein that the provisions of the Act do not take away or abridge any of the rights conferred by that Part. In Civil Appeal No. 343 of 1955 in which also judgment has been pronounced today, we have considered the definition clause in Section 2(1) of the Act and come to the conclusion that the Act does not apply to private endowments, and have further explained therein the essential distinction in Hindu law between private and public religious trusts. We do not wish to repeat what we have said in those two decisions; but in the light of the observations made therein, the two questions which fall for decision in this appeal are— (1) if on a true construction of the trust deed dated March 11, 1938 the Charusila Trust is a private endowment created for the worship of a family idol in which the public are not interested, as found by the High Court and (2) if the answer to the first question is in the negative, does the Act apply by reason of Section 3 thereof to trust properties which are situate outside the State of Bihar.

13. Now, we proceed to a consideration of the second point. Section 3 of the Act says—

“This Act shall apply to all religious trusts, whether created before or after the commencement of this Act, any part of the property of which is situated in the State of Bihar.”

The argument before us on behalf of the respondent is this. Under Article 245 of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. clause (2) of

the said Article further states that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Article 246 gives the distribution of legislative power; Parliament has exclusive power to make laws with respect to any of the matters enumerated in what has been called the Union List; Parliament as also the legislature of a State have power to make laws with respect to any of the matters enumerated in the Concurrent List; the legislature of a State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in the State List. Item 28 of the Concurrent List is - "Charities and charitable institutions, charitable and religious endowments and religious institutions." Learned counsel for the respondent contends that by reason of the provisions in Articles 245 and 246 of the Constitution read with Item 28 of the Concurrent List, the Bihar legislature which passed the Act had no power to make a law which has operation outside the State of Bihar; he further contends that under Section 3 the Act is made applicable to all religious trusts, whether created before or after the commencement of the Act, any part of the property of which is situated in the State of Bihar; therefore, the Act will apply to a religious institution which is outside Bihar even though a small part of its property may lie in that State. It is contended that such a provision is ultra vires the power of the Bihar Legislature, and Parliament alone can make a law which will apply to religious institutions having properties in different States. Alternatively, it is contended that even if the Act applies to a religious institution in Bihar a small part of the property of which is in Bihar, the provisions of the Act can have no application to such property of the institution as is outside Bihar, such as the Calcutta properties in the present case.

14. It is necessary first to determine the extent of the application of the Act with reference to Sections 1(2) and 3 of the Act read with the preamble. The preamble states:

"Whereas it is expedient to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection and preservation of properties appertaining to such trusts."

It is clear from the preamble that the Act is intended to provide for the better administration of Hindu religious trusts in the State of Bihar. Section 1(2) states that the Act extends to the whole of the State of Bihar, and Section 3 we have quoted earlier. If these two provisions are read in the context of the preamble, they can only mean that the Act applies in cases in which (a) the religious trust or institution is in Bihar and (b) any part of the property of which institution is situated in the State of Bihar. In other words, the aforesaid two conditions must be fulfilled for the application of the Act. It is now well settled that there is a general presumption that the legislature does not intend to exceed its jurisdiction, and it is a sound principle of construction that the Act of a sovereign legislature should, if possible, receive such an interpretation as will make it operative and not inoperative; see the cases referred to *In re the Hindu Women's Right to Property Act, 1937* and *The Hindu Women's Rights to Property (Amendment) Act, 1936* and *In re a Special Reference under Section 213 of the Government of India Act, 1935* [(1941) FCR 12, 27-30], and the decision of this Court in *R.M.D. Chamarbaugwala v. Union of India* [(1957) SCR 930]. We accordingly hold that Section 3 makes the Act applicable to all public religious trusts, that is to say, all public religious and charitable institutions within the meaning of the definition clause in

Section 2(1) of the Act, which are situate in the State of Bihar and any part of the property of which is in that State. In other words, both conditions must be fulfilled before the Act can apply. If this be the true meaning of Section 3 of the Act, we do not think that any of the provisions of the Act have extra-territorial application or are beyond the competence and power of the Bihar Legislature. Undoubtedly, the Bihar Legislature has power to legislate in respect of, to use the phraseology of Item 28 of the Concurrent List, “charities, charitable institutions, charitable and religious endowments and religious institutions” situate in the State of Bihar. The question, therefore, narrows down to this: in so legislating, has it power to affect trust property which may be outside Bihar but which appertains to the trust situate in Bihar? In our opinion, the answer to the question must be in the affirmative. It is to be remembered that with regard to an interest under a trust the beneficiaries’ only right is to have the trust duly administered according to its terms and this right can normally be enforced only at the place where the trust or religious institution is situate or at the trustees’ place of residence; see *Dicey’s Conflict of Laws, 7th Edn., p. 506*.

The Act purports to do nothing more. Its aim, as recited in the preamble, is to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection of properties appertaining thereto. This aim is sought to be achieved by exercising control over the trustees *in personam*. The trust being situate in Bihar the State has legislative power over it and also over its trustees or their servants and agents who must be in Bihar to administer the trust. Therefore, there is really no question of the Act having extra-territorial operation. In any case, the circumstance that the temples where the deities are installed are situate in Bihar, that the hospital and charitable dispensary are to be established in Bihar for the benefit of the Hindu public in Bihar gives enough territorial connection to enable the legislature of Bihar to make a law with respect to such a trust. This Court has applied the doctrine of territorial connection or nexus to income tax legislation, sales tax legislation and also to legislation imposing a tax on gambling. In *Tata Iron & Steel Co. Ltd. v. State of Bihar* [AIR 1958 SC 452] the earlier cases were reviewed and it was pointed out that sufficiency of the territorial connection involved a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. It cannot be disputed that if the religious endowment is itself situated in Bihar and the trustees function there, the connection between the religious institution and the property appertaining thereto is real and not illusory; indeed, the religious institution and the property appertaining thereto form one integrated whole and one cannot be dissociated from the other. If, therefore, any liability is imposed on the trustees, such liability must affect the trust property. It is true that in the *Tata Iron & Steel Co.* case this Court observed:

“It is not necessary for us on this occasion to lay down any broad proposition as to whether the theory of nexus, as a principle of legislation is applicable to all kinds of legislation. It will be enough for disposing of the point now under consideration, to say that this Court has found no apparent reason to confine its application to income tax legislation but has extended it to sales tax and to tax on gambling.”

We do not see any reason why the principles which were followed in *State of Bombay v. R.M.D. Chamarbaugwala* [(1957) SCR 874] should not be followed in the present case. In

R.M.D. Calmarbaugwala case it was found that the respondent who was the organiser of a prize competition was outside the State of Bombay; the paper through which the prize competition was conducted was printed and published outside the State of Bombay, but it had a wide circulation in the State of Bombay and it was found that “all the activities which the gambler is ordinarily expected to undertake” took place mostly, if not entirely, in the State of Bombay. These circumstances, it was held, constituted a sufficient territorial nexus which entitled the State of Bombay to impose a tax on the gambling that took place within its boundaries and the law could not be struck down on the ground of extra-territoriality. We are of the opinion that the same principles apply in the present case and the religious endowment itself being in Bihar and the trustees functioning there, the Act applies and the provisions of the Act cannot be struck down on the ground of extra-territoriality.

16. There is a decision of this Court to which our attention has been drawn (Petition No. 234 of 1953 decided on March 18, 1953). A similar problem arose in that case where the head of a math situate in Banaras made an application under Article 32 of the Constitution for a writ in the nature of mandamus against the State of Bombay and the Charity Commissioner of that State directing them to forbear from enforcing against the petitioner the provisions of the Bombay Public Trusts Act, 1950 on the ground inter alia that the Bombay Act could have no application to the math situate in Banaras or to any of the properties or places of worship appurtenant to that math. In the course of the hearing of the petition the learned Attorney-General who appeared for the State of Bombay made it clear that there was no intention on the part of the Government of Bombay or the Charity Commissioner to apply the provisions of the Bombay Act to any math or religious institution situated outside the State territory. The learned Attorney-General submitted that the Bombay Act could be made applicable, if at all, to any place of religious instruction or worship which is appurtenant to the math and is actually within the State territory. In view of these submissions no decision was given on the point urged. The case cannot, therefore, be taken as a final decision of the question in issue before us.

17. For the reasons which we have already given the Act applies to the Charusila Trust which is in Bihar and its provisions cannot be struck down on the ground of extra-territoriality.

18. The result is that the appeal succeeds and is allowed with costs, the judgment and order of the High Court dated October 5, 1953 are set aside and the petition of Srimati Charusila Dasi must stand dismissed with costs.

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G. V. K. Industries Ltd. & Anr. V. Income Tax Officer & Anr.

(2011) 4 SCC 36

(S.H. Kapadia, C.J. and B. Sudershan Reddy, K.S.P. Radhakrishnan, S.S. Nijjar and Swatantra Kumar, JJ.)

Factual Background:

The Appellant by way of a writ petition filed in Andhra Pradesh High Court, had challenged an order of the Respondents which decided that the Appellant was liable to withhold a certain portion of monies being paid to a foreign company, under either one of Sections 9(1)(i) or 9(1)(vii)(b) of the Income Tax Act (1961). The Appellant had also challenged the vires of Section 9(1)(vii)(b) of the Income Tax Act (1961) for want of legislative competence and violation of Article 14 of the Constitution. The High Court having upheld that Section 9(1)(i) did not apply in the circumstances of the facts of the case, nevertheless upheld the applicability of Section 9(1)(vii)(b) on the facts and also upheld the constitutional validity of the said provision. The High Court mainly relied on the ratio of the judgment by a three judge bench of this court in *ECIL* [1989 Supp(2) SCC 642]. Hence, the appeal.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. In any federal or quasi federal nation-State, legislative powers are distributed territorially, and legislative competence is often delineated in terms of matters or fields. The latter may be thought of as comprising of aspects or causes that exist independently in the world, such as events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres. While the purpose of legislation could be seen narrowly or purely in terms of intended effects on such aspects or causes, obviously the powers have to be exercised in order to enhance or protect the interests of, the welfare of, the well-being of, or the security of the territory, and the inhabitants therein, for which the legislature has been charged with the responsibility of making laws.

2. Paraphrasing President Abraham Lincoln, we can say that the State and its Government, though of the people, and constituted by the people, has to always function “for” the people, indicating that the mere fact that the State is organized as a democracy does not necessarily mean that its government would always act “for” the people. Many instances of, and vast potentialities for, the flouting of that norm can be easily visualized. In Constitutions that establish nation-States as sovereign democratic republics, those expectations are also transformed into limitations as to how, in what manner, and for what purposes the collective powers of the people are to be used.

3. The central constitutional themes before us relate to whether the Parliament’s powers to legislate, pursuant to Article 245, include legislative competence with respect to aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India. It is obvious that legislative powers of the Parliament incorporate legislative competence to enact laws with

respect to aspects or causes that occur, arise or exist, or may be expected to do so, within India, subject to the division of legislative powers as set forth in the Constitution. It is also equally obvious and accepted that only Parliament may have the legislative competence, and not the State Legislatures, to enact laws with respect to matters that implicate the use of State power to effectuate some impact or effect on aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India.

4.. Two divergent, and dichotomous, views present themselves before us. The first one arises from a rigid reading of the ratio in *Electronics Corporation of India Ltd., v. Commissioner of Income Tax & Anr.*, [(1989) (2) SCC 642-646] (*ECIL*) and suggests that Parliament's powers to legislate incorporate only a competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, solely within India. A slightly weaker form of the foregoing strict territorial nexus restriction would be that the Parliament's competence to legislate with respect to extra-territorial aspects or causes would be constitutionally permissible if and only if they have or are expected to have significant or sufficient impact on or effect in or consequence for India. An even weaker form of the territorial nexus restriction would be that as long as some impact or nexus with India is established or expected, then the Parliament would be empowered to enact legislation with respect to such extra-territorial aspects or causes.

5. The polar opposite of the territorial nexus theory, which emerges also as a logical consequence of the propositions of the learned Attorney General, specifies that the Parliament has inherent powers to legislate "for" any territory, including territories beyond India, and that no court in India may question or invalidate such laws on the ground that they are extra-territorial laws. Such a position incorporates the views that Parliament may enact legislation even with respect to extra-territorial aspects or causes that have no impact on, effect in or consequence for India, any part of it, its inhabitants or Indians, their interests, welfare, or security, and further that the purpose of such legislation need not in any manner or form be intended to benefit India.

6.. Juxtaposing the two divergent views outlined above, we have framed the following questions:

(1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?

(2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

7. It is necessary to note the text of Article 245 and Article 1 at this stage itself:

"Article 245. Extent of laws made by Parliament and by the Legislatures of States – (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

"Article 1. Name and territory of the Union – (1) India, that is Bharat, shall be a Union of States. (2) The States and the territories thereof shall be as specified in the First Schedule. (3) The territory of India shall comprise – (a) the territories of the States; (b) the Union territories

specified in the First Schedule; and (c) such other territories as may be acquired.”

II

Meanings of some phrases and expressions used hereinafter:

6. Many expressions and phrases, that are used contextually in the flow of language, involving words such as “interest”, “benefit”, “welfare”, “security” and the like in order to specify the purposes of laws, and their consequences can, have a range of meanings. In as much as some of those expressions will be used in this judgment, we are setting forth below a range of meanings that may be ascribable to such expressions and phrases:

“Aspects or causes” “aspects and causes”:

events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, in the social, political, economic, cultural, biological, environmental or physical spheres, that occur, arise, exist or may be expected to do so, naturally or on account of some human agency.

“Extra-territorial aspects or causes”:

aspects or causes that occur, arise, or exist, or may be expected to do so, outside the territory of India.

“Nexus with India”, “impact on India”, “effect in India”, “effect on India”, “consequence for India” or “impact on or nexus with India”:

any impact(s) on, or effect(s) in, or consequences for, or expected impact(s) on, or effect(s) in, or consequence(s) for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of or security of inhabitants of India, and Indians in general, that arise on account of aspects or causes.

“Benefit to India” or “for the benefit of India”:

“to the benefit of India”, “in the benefit of India” or “to benefit India” or “the interests of India”, “welfare of India”, “well-being of India” etc.:

protection of and/or enhancement of the interests of, welfare of, well-being of, or the security of India (i.e., the whole territory of India), or any part of it, its inhabitants and Indians.

IV

The ratio in ECIL

20. It was concluded in ECIL that the Parliament does not have the powers to make laws that bear no relationship to or nexus with India. The obvious question that springs to mind is: “what kind of nexus?” Chief Justice Pathak’s words in ECIL are instructive in this regard, both as to the principle and also the reasoning: (SCC p, 646, para 9)

“But the question is whether a nexus with something in India is necessary. It seems to us that unless such nexus exists Parliament will have no competence to make the law. It will be noted that Article 245(1) empowers Parliament to enact laws for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subservise the object, and that object must be related to something in India. It is inconceivable that a law should be made by parliament which has no relationship with anything in India.”

(emphasis added).

21.. We are of the opinion that the distinction drawn in ECIL between “make laws” and “operation” of law is a valid one, and leads to a correct assessment of the relationship between clauses (1) and (2) of Article 245. We will have more to say about this, when we turn our attention to the propositions of the learned Attorney General.

V

The propositions of the learned Attorney General

27.. The main propositions are that the Parliament is a “sovereign legislature”, and that such a “sovereign legislature has full power to make extra-territorial laws.” ...

28.. The further proposition of the learned Attorney General, is that courts in India do not have the powers to declare the “extra- territorial laws” enacted by the Parliament invalid, on the ground that they have an “extra-territorial effect”, notwithstanding the fact: (a) that such extra-territorial laws are with respect to extra- territorial aspects or causes that have no impact on or nexus with India; (b) that such extra-territorial laws do not in any manner or form work to, or intended to be or be to the benefit of India; and (c) that such extra-territorial laws might even be detrimental to India. The word “extra-territorial-effect” is of a much wider purport than “extra-territorial operation”, and would also be expected to include within itself all the meanings of “extra- territorial law” as explained above.

29. The implication of the proposed disability is not merely that the judiciary, under our Constitution, is limited from exercising the powers of judicial review, on specific grounds, over a clearly defined set of laws, with a limited number of enactments; rather, it would be that the judiciary would be so disabled with regard to an entire universe of laws, that are undefined, and unspecified. Further, the implication would also be that the judiciary has been stripped of its essential role even where such extra-territorial laws may be damaging to the interests of India.

30.. In addition the learned Attorney General has also placed reliance on the fact that the Clause 179 of the Draft Constitution, was split up into two separate clauses, Clause 179(1) and Clause 179(2), by the Constitution Drafting Committee, and adopted as Clauses (1) and (2) of Article 245 in the Constitution. It seemed to us that the learned Attorney General was seeking to draw two inferences from this. The first one seemed to be that the Drafting Committee intended Clause 179(2), and hence Clause (2) of Article 245, to be an independent, and a separate, source of legislative powers to the Parliament to make “extra-territorial laws”. The second inference that we have been asked to make is that in as much as Parliament has been explicitly permitted to make laws having “extra-territorial operation”, Parliament should be deemed to possess powers to make “extra-territorial laws”, the implications of which have been more particularly explicated above.

31. The learned Attorney General relied on the following case law in support his propositions and arguments: ..., *British Columbia Electric Railway Company Ltd. v. The King*, [1946] A.C. 527; *Governor General in Council v. Raleigh Investment Co. Ltd.*, [1944] 12 ITR 265 *Wallace Brothers and Co. v. Commissioner of Income Tax, Bombay*, [1948] 16 ITR 240; *A.H. Wadia v. Commissioner of Income Tax, Bombay*, [1949] 17 ITR 63; ... *Shrikant Karulkar Bhalchandra v. State of Gujarat*, (1994) 5 SCC 459; and *State of A.P. v. N.T.P.C.*, (2002) 5 SCC 203.

VI

Constitutional Interpretation:

32.. We are acutely aware that what we are interpreting is a provision of the Constitution.[...] Hence clarity is necessary with respect to the extent of powers granted and the limits on them, so that the organs of the State charged with the working of the mandate of the Constitution can proceed with some degree of certitude.

33.. In such exercises we are of the opinion that a liberal and more extensive interpretative analysis be undertaken to ensure that the court does not, inadvertently and as a consequence of not considering as many relevant issues as possible, unnecessarily restrict the powers of another coordinate organ of the State. Moreover, the essential features of such arrangements, that give the Constitution its identity, cannot be changed by the amending powers of the very organs that are constituted by it.

34. Under our Constitution, while some features are capable of being amended by Parliament, pursuant to the amending power granted by Article 368, the essential features – the basic structure – of the Constitution is beyond such powers of Parliament. The power to make changes to the basic structure of the Constitution vests only in the people sitting, as a nation, through its representatives in a Constituent Assembly. (See *Keshavanadna Bharati v. State of Kerala*, (1973) 4 SCC 225 and *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1). One of the foundational elements of the concept of basic structure is it would give the stability of purpose, and machinery of government to be able to pursue the constitutional vision into the indeterminate and unforeseeable future.

VII

Textual Analysis of Article 245

42.. Prior to embarking upon a textual analysis of Clauses (1) and (2) of Article 245, it is also imperative that we bear in mind that a construction of provisions in a manner that renders words or phrases therein to the status of mere surplussage ought to be avoided.

43.. The subject in focus in the first part of Clause (1) of Article 245 is “the whole or any part of the territory of India”, and the object is to specify that it is the Parliament which is empowered to make laws in respect of the same. The second part of Clause (1) of Article 245 deals with the legislative powers of State legislatures.

44.. The word that links the subject, “the whole or any part of the territory of India” with the phrase that grants legislative powers to the Parliament, is “for”. It is used as a preposition. The word “for”, when ordinarily used as a preposition, can signify a range of meanings between the subject, that it is a preposition for, and that which preceded it:

“-prep 1 in the interest or to the benefit of; intended to go to; 2 in defence, support or favour of 3 suitable or appropriate to 4 in respect of or with reference to 5 representing or in place of 14. conducive or conducively to; in order to achieve...”
(See *Concise Oxford English Dictionary*, 8th Edn. OUP (Oxford, 1990))

46.. Consequently, the range of senses in which the word “for” is ordinarily used would suggest that, pursuant to Clause (1) of Article 245, the Parliament is empowered to enact those laws that are in the interest of, to the benefit of, in defence of, in support or favour of, suitable or appropriate to, in respect of or with reference to “the whole or any part of the territory of India”.

47.. The above understanding comports with the contemporary understanding, that emerged in

the 20th Century, after hundreds of years of struggle of humanity in general, and nearly a century long struggle for freedom in India, that the State is charged with the responsibility to always act in the interest of the people at large. In as much as many extra-territorial aspects or causes may have an impact on or nexus with the nation-state, they would legitimately, and indeed necessarily, be within the domain of legislative competence of the national parliament, so long as the purpose or object of such legislation is to benefit the people of that nation-State.

51.. The notion that a nation-state, including its organs of governance such as the national legislature, must be concerned only with respect to persons, property, things, phenomenon, acts or events within its own territory emerged in the context of development of nation-states in an era when external aspects and causes were thought to be only of marginal significance, if at all. This also relates to early versions of sovereignty that emerged along with early forms of nation-states, in which internal sovereignty was conceived of as being absolute and vested in one or some organs of governance, and external sovereignty was conceived of in terms of co- equal status and absolute non-interference with respect to aspects or causes that occur, arise or exist, or may be expected to do so, in other territories.

52. Oppenheim's International Law (9th edn.) states as follows:

“The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power.... The 20th century has seen the attempt, particularly through the emergence in some instances of extreme nationalism, to transpose this essentially internal concept of sovereignty on to the international plane. In its extreme forms such a transposition is inimical to the normal functioning and development of international law and organization. It is also inappropriate..... no state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states. Thus the relationship of states on the international plane is characterized by their equality, independence, and in fact, by their interdependence.”

55. Within international law, the principles of strict territorial jurisdiction have been relaxed, in light of greater interdependencies, and acknowledgement of the necessity of taking cognizance and acting upon extra-territorial aspects or causes, by principles such as subjective territorial principle, objective territorial principle, the effects doctrine that the United States uses, active personality principle, protective principle etc. However, one singular aspect of territoriality remains, and it was best stated by Justice H.V. Evatt: “The extent of extra-territorial jurisdiction permitted, or rather not forbidden, by international law cannot always be stated with precision. But certainly no State attempts to exercise jurisdiction over matters, persons, or things with which it has absolutely no concern.” (See *Trustees Executors & Agency Co Ltd v. Federal Commissioner of Taxation* (1933) 49 CLR. 220 at 239). The reasons are not too far to grasp.

56. To claim the power to legislate with respect to extra-territorial aspects or causes, that have no nexus with the territory for which the national legislature is responsible for, would be to claim dominion over such a foreign territory, and negation of the principle of self- determination of the people who are nationals of such foreign territory, peaceful co-existence of nations, and co-equal sovereignty of nation-states. Such claims have, and invariably lead to, shattering of

international peace, and consequently detrimental to the interests, welfare and security of the very nation-state, and its people, that the national legislature is charged with the responsibility for.

57.. Because of interdependencies and the fact that many extra- territorial aspects or causes have an impact on or nexus with the territory of the nation-state, it would be impossible to conceive legislative powers and competence of national parliaments as being limited only to aspects or causes that arise, occur or exist or may be expected to do so, within the territory of its own nation-state. Our Constitution has to be necessarily understood as imposing affirmative obligations on all the organs of the State to protect the interests, welfare and security of India. Consequently, we have to understand that the Parliament has been constituted, and empowered to, and that its core role would be to, enact laws that serve such purposes. Hence even those extra- territorial aspects or causes, provided they have a nexus with India, should be deemed to be within the domain of legislative competence of the Parliament, except to the extent the Constitution itself specifies otherwise.

58.. A question still remains, in light of the extreme conclusions that may arise on account of the propositions made by the learned Attorney General. Is the Parliament empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India, and furthermore could such laws be bereft of any benefit to India? The answer would have to be no.

59.. The word “for” again provides the clue. To legislate for a territory implies being responsible for the welfare of the people inhabiting that territory, deriving the powers to legislate from the same people, and acting in a capacity of trust. In that sense the Parliament belongs only to India; and its chief and sole responsibility is to act as the Parliament of India and of no other territory, nation or people. There are two related limitations that flow from this.

60. The first one is with regard to the necessity, and the absolute base line condition, that all powers vested in any organ of the State, including Parliament, may only be exercised for the benefit of India. All of its energies and focus ought to only be directed to that end. It may be the case that an external aspect or cause, or welfare of the people elsewhere may also benefit the people of India. The laws enacted by Parliament may enhance the welfare of people in other territories too; nevertheless, the fundamental condition remains: that the benefit to or of India remain the central and primary purpose. That being the case, the logical corollary, and hence the second limitation that flows thereof, would be that an exercise of legislative powers by Parliament with regard to extra-territorial aspects or causes that do not have any, or may be expected to not have nexus with India, transgress the first condition. Consequently, we must hold that the Parliament’s powers to enact legislation, pursuant to Clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India.

61. For a legislature to make laws for some other territory would be to act in a representative capacity of the people of such a territory. That would be an immediate transgression of the condition that the Parliament be a parliament for India. The word “for”, that connects the territory of India to the legislative powers of the Parliament in Clause (1) of Article 245, when viewed from the perspective of the people of India, implies that it is “our” Parliament, a jealously possessive construct that may not be tinkered with in any manner or form. The formation of the State, and its organs, implies the vesting of the powers of the people in trust; and that trust demands, and its continued existence is predicated upon the belief, that the institutions of the State shall always act completely, and only, on behalf of the people of India.

62. While the people of India may repose, and continue to maintain their trust in the State,

notwithstanding the abysmal conditions that many live in, and notwithstanding the differences the people may have with respect to socio-political choices being made within the country, the notion of the collective powers of the people of India being used for the benefit of some other people, including situations in which the interests of those other people may conflict with India's interests, is of an entirely different order. It is destructive of the very essence of the reason for which Parliament has been constituted: to act as the Parliament for, and only of, India.

63. The grant of the power to legislate, to the Parliament, in Clause (1) of Article 245 comes with a limitation that arises out of the very purpose for which it has been constituted. That purpose is to continuously, and forever be acting in the interests of the people of India. It is a primordial condition and limitation. Whatever else may be the merits or demerits of the Hobbesian notion of absolute sovereignty, even the Leviathan, within the scope of Hobbesian logic itself, sooner rather than later, has to realize that the legitimacy of his or her powers, and its actual continuance, is premised on such powers only being used for the welfare of the people.

64. No organ of the Indian State can be the repository of the collective powers of the people of India, unless that power is being used exclusively for the welfare of India. Incidentally, the said power may be used to protect, or enhance, the welfare of some other people, also; however, even that goal has to relate to, and be justified by, the fact that such an exercise of power ultimately results in a benefit – either moral, material, spiritual or in some other tangible or intangible manner – to the people who constitute India.

65. We also derive interpretational support for our conclusion that Parliament may not legislate for territories beyond India from Article 51, a Directive Principle of State Policy, though not enforceable, nevertheless fundamental in the governance of the country. ...

66.. To enact legislation with respect to extra-territorial aspects or causes, without any nexus to India, would in many measures be an abdication of the responsibility that has been cast upon Parliament as above. International peace and security has been recognised as being vital for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in Article 51.

67. It is one matter to say that because certain extra-territorial aspects or causes have an impact on or nexus with India, Parliament may enact laws with respect to such aspects or causes. That is clearly a role that has been set forth in the Constitution, and a power that the people of India can claim. How those laws are to be effectuated, and with what degree of force or diplomacy, may very well lie in the domain of pragmatic, and indeed ethical, statecraft that may, though not necessarily always, be left to the discretion of the Executive by Parliament. ...

69. For the aforesaid reasons we are unable to agree that Parliament, on account of an alleged absolute legislative sovereignty being vested in it, should be deemed to have the powers to enact any and all legislation, de hors the requirement that the purpose of such legislation be for the benefit of India. The absolute requirement is that all legislation of the Parliament has to be imbued with, and at the core only be filled with, the purpose of effectuating benefits to India. This is not just a matter of the structure of our Constitution; but the very foundation.

70.. The arguments that India inherited the claimed absolute or illimitable powers of the British parliament are unacceptable. ...

72.. We now turn our attention to other arguments put forward by the learned Attorney General with regard to the implications of permissibility of making laws that may operate extra-

territorially, pursuant to Clause (2) of Article 245. In the first measure, the learned Attorney General seems to be arguing that the act and function of making laws is the same as the act and function of “operating” the law. From that position, he also seems to be arguing that Clause (2) of Article 245 be seen as an independent source of power. Finally, the thread of that logic then seeks to draw the inference that in as much as Clause (2) prohibits the invalidation of laws on account of their extra-territorial operation, it should be deemed that the courts do not have the power to invalidate, - i.e., strike down as ultra vires -, those laws enacted by Parliament that relate to any extra-territorial aspects or causes, notwithstanding the fact that many of such aspects or causes have no impact on or nexus with India.

73.. It is important to draw a clear distinction between the acts & functions of making laws and the acts & functions of operating the laws. Making laws implies the acts of changing and enacting laws. The phrase operation of law, in its ordinary sense, means the effectuation or implementation of the laws. The acts and functions of implementing the laws, made by the legislature, fall within the domain of the executive. Moreover, the essential nature of the act of invalidating a law is different from both the act of making a law, and the act of operating a law.

74. Invalidation of laws falls exclusively within the functions of the judiciary, and occurs after examination of the vires of a particular law. While there may be some overlap of functions, the essential cores of the functions delineated by the meanings of the phrases “make laws” “operation of laws” and “invalidate laws” are ordinarily and essentially associated with separate organs of the state – the legislature, the executive and the judiciary respectively, unless the context or specific text, in the Constitution, unambiguously points to some other association.

75.. In Article 245 we find that the words and phrases “make laws” “extra-territorial operation”, and “invalidate” have been used in a manner that clearly suggests that the addressees implicated are the legislature, the executive and the judiciary respectively. While Clause (1) uses the verb “make” with respect to laws, thereby signifying the grant of powers, Clause (2) uses the past tense of make, “made”, signifying laws that have already been enacted by the Parliament. The subject of Clause (2) of Article 245 is the law made by the Parliament, pursuant to Clause (1) of Article 245, and the object, or purpose, of Clause (2) of Article 245 is to specify that a law so made by the Parliament, for the whole or any part of territory of India, should not be held to be invalid solely on the ground that such laws require extra-territorial operation. The only organ of the state which may invalidate laws is the judiciary.

76. Consequently, the text of Clause (2) of Article 245 should be read to mean that it reduces the general and inherent powers of the judiciary to declare a law ultra-vires only to the extent of that one ground of invalidation. One thing must be noted here. In as much as the judiciary’s jurisdiction is in question here, an a-priori, and a strained, inference that is unsupported by the plain meaning of the text may not be made that the powers of the legislature to make laws beyond the pale of judicial scrutiny have been expanded over and above that which has been specified.

77. The learned Attorney General is not only seeking an interpretation of Article 245 wherein the Parliament is empowered to make laws “for” a foreign territory, which we have seen above is impermissible, but also an interpretation that places those vaguely defined laws, which by definition and implication can range over an indefinite, and possibly even an infinite number, of fields beyond judicial scrutiny, even in terms of the examination of their vires. That would be contrary to the basic structure of the Constitution.

78. Clause (2) of Article 245 acts as an exception, of a particular and a limited kind, to

the inherent power of the judiciary to invalidate, if ultra-vires, any of the laws made by any organ of the State. Generally, an exception can logically be read as only operating within the ambit of the clause to which it is an exception. It acts upon the main limb of the Article – the more general clause - but the more general clause in turn acts upon it. The relationship is mutually synergistic in engendering the meaning. In this case, Clause (2) of Article 245 carves out a specific exception that a law made by Parliament, pursuant to Clause (1) of Article 245, for the whole or any part of the territory of India may not be invalidated on the ground that such a law may need to be operated extraterritorially. Nothing more.

79. The power of the judiciary to invalidate laws that are ultra-vires flows from its essential functions, Constitutional structure, values and scheme, and indeed to ensure that the powers vested in the organs of the State are not being transgressed, and that they are being used to realise a public purpose that subserves the general welfare of the people. It is one of the essential defences of the people in a constitutional democracy.

80.. If one were to read Clause (2) of Article 245 as an independent source of legislative power of the Parliament to enact laws for territories beyond India wherein, neither the aspects or causes of such laws have a nexus with India, nor the purposes of such laws are for the benefit of India, it would immediately call into question as to why Clause (1) of Article 245 specifies that it is the territory of India or a part thereof “for” which the Parliament may make laws. If the power to enact laws for any territory, including a foreign territory, were to be read into Clause (2) of Article 245, the phrase “for the whole or any part of the territory of India” in Clause (1) of Article 245 would become a mere surplussage. When something is specified in an Article of the Constitution it is to be taken, as a matter of initial assessment, as nothing more was intended.

81. In this case it is the territory of India that is specified by the phrase “for the whole or any part of the territory of India.” “*Expressio unius est exclusio alterius*”- the express mention of one thing implies the exclusion of another. In this case Parliament has been granted powers to make laws “for” a specific territory – and that is India or any part thereof; by implication, one may not read that the Parliament has been granted powers to make laws “for” territories beyond India.

82. The reliance placed by the learned Attorney General on the history of changes to the pre- cursors of Article 245, in the Draft Constitution, in support of his propositions is also inapposite. In fact one can clearly discern that the history of changes, to Clause 179 of the Draft Constitution (which became Article 245 in our Constitution), supports the conclusions we have arrived at as to the meaning, purport and ambit of Article 245. ...

VIII

Analysis of Constitutional Topological Space: Chapter 1, Part XI:

86. We now turn to Chapter 1 Part XI, in which Article 245 is located, to examine other provisions that may be expected to transform or be transformed by the meaning of Article 245 that we have discerned and explained above. In particular, the search is also for any support that may exist for the propositions of the learned Attorney General that the Parliament may make laws for any territory outside India.

87.. As is well known, Article 246 provides for the division of legislative competence, as between the Parliament and the State legislatures, in terms of subjects or topics of legislation. Clauses (1), (2) and (3) of Article 246 do not mention the word territory. However, Clause (4) of Article 246 specifies that Parliament has the power to “make laws for any part of the territory of

India not included in a State” with respect to any matter, notwithstanding that a particular matter is included in the State List. In as much as Clause (1) of Article 245 specifies that it is for “the whole or any part of the territory of India” with respect of which Parliament has been empowered to make laws, it is obvious that in Article 246 legislative powers, whether of Parliament or of State legislatures, are visualized as being “for” the territory of India or some part of it.

IX

Wider Structural Analysis:

94.. Article 260, in Chapter II of Part XI is arguably the only provision in the Constitution that explicitly deals with the jurisdiction of the Union in relation to territories outside India [...]

95.. It is clear from the above text of Article 260 that it is the Government of India which may exercise legislative, executive, and judicial functions with respect of certain specified foreign territories, the Governments of which, and in whom such powers have been vested, have entered into an agreement with Government of India asking it do the same. Indeed, from Article 260, it is clear that Parliament may enact laws, whereby it specifies the conditions under which the Government of India may enter into such agreements, and how such agreements are actually implemented.

98.. The text of Articles 1 and 2 leads us to an irresistible conclusion that the meaning, purport and ambit of Article 245 is as we have gathered above. Sub-clause (c) of Clause (3) of Article 1 provides that territories not a part of India may be acquired. The purport of said Sub-Clause (c) of Clause 3 of Article 1, pace *Berubari Union and Exchange of Enclaves, In re* (AIR 1960 SC 845) is that such acquired territory, automatically becomes a part of India.

99. It was held in *Berubari*, that the mode of acquisition of such territory, and the specific time when such acquired territory becomes a part of the territory of India, are determined in accordance with international law. It is only upon such acquired territory becoming a part of the territory of India would the Parliament have the power, under Article 2, to admit such acquired territory in the Union or establish a new state. The crucial aspect is that it is only when the foreign territory becomes a part of the territory of India, by acquisition in terms of relevant international laws, is the Parliament empowered to make laws for such a hitherto foreign territory.

100. Consequently, the positive affirmation, in the phrase in Clause (1) of Article 245, that the Parliament “may make laws for the whole or any part of the territory of India” has to be understood as meaning that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional schema it is clear that the Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India.

XI

Conclusion:

124.. We now turn to answering the two questions that we set out with:

(1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of

India, and Indians?

The answer to the above would be yes. However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, – events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like -, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, *only when* such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians.

125. It is important for us to state and hold here that the powers of legislation of the Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a-priori quantitative tests, such as “sufficiency” or “significance” or in any other manner requiring a pre-determined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful.

126. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where the Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

127. (2) Does the Parliament have the powers to legislate “for” any territory, other than the territory of India or any part of it? The answer to the above would be no. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question 1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to Parliament to make laws “for the whole or any part of the territory of India”, and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by Parliament with respect to extra-territorial aspects or causes that have no impact on or nexus with India would be ultra-vires, as answered in response to Question 1 above, and would be laws made “for” a foreign territory.

128. Let the appeal be listed before an appropriate bench for disposal. Ordered accordingly.

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***In Re CP & Berar Sales of Motor Spirit &
Lubricants Taxation Act, 1938***

AIR 1939 F.C. 1

[Doctrine of Harmonious Construction]

[Sir Maurice Gwyer, C.J., Sir Shah Sulaiman and M.R. JAYAKAR, JJ.]

This was the opinion rendered by the Federal Court in a Special Reference made by the Governor-General to the Court under S. 213 of the Government of India Act, 1935. The Reference was in the following terms:

“Is the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, or any of the provisions thereof, and in what particular or particulars, or to what extent, ultra vires the Legislature of the Central Provinces and Berar?”

GWYER C.J. – Notwithstanding the very wide terms in which the Special Reference is framed, the question to be determined lies essentially in a small compass. It has arisen in the following way. S. 3 (1), Provincial Act, to which it will be convenient to refer hereafter as the impugned Act, is in these terms:

There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent on the value of such sales.

“Retail dealer” is defined by S. 2 as any person who, on commission or otherwise, sells or keeps for sale motor spirit or lubricant for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased, and “retail sale” is given a corresponding meaning.

Both motor spirit and lubricants are manufactured or produced (though not to any great extent) in India. Motor spirit is subject to an excise duty imposed by the Motor Spirit (Duties) Act, 1917, an Act of the Central Legislature; no excise duty at present has been imposed on lubricants.

By Sec. 100 (1), Constitution Act the Federal Legislature (which up to the date of the Federation contemplated by the Act, means the present Indian Legislature) has, notwithstanding anything in sub-ss. (2) and (3) of the same Section, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in the Federal Legislative List, that of List I in Sch. 7 to the Act. Entry (45) in that List is as follows: “Duties of excise on tobacco and other goods manufactured or produced in India”, with certain exceptions not here material and it is said on behalf of the Government of India that the tax imposed by S. 3 (1) of the impugned Act, in so far as it may fall on motor spirit and lubricants of Indian origin, is a duty of excise within Entry (45) and therefore an intrusion upon the field of taxation reserved by the Act exclusively for the Federal Legislature.

By Sec. 100 (3) of the Act, a Provincial Legislature has, subject to the two preceding subsections of that Section, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial

Legislative List, that is List II of Sch. 7. Entry (48) in this List is as follows: II “Taxes on the sale of goods and on advertisements”; and it is said on behalf of the Provincial Government that the tax imposed by the impugned Act is within the taxing power conferred by that entry, and therefore within the exclusive competence of the Provincial Legislature.

It will be observed that by Sec. 100 (1) the Federal Legislature are given the exclusive powers enumerated in the Federal Legislative List, “notwithstanding” anything in the two next succeeding sub sections” of that Section. Sub-sec. (2) is not relevant to the Present case but sub-s. (3) is as I have stated, the enactment which gives to the Provincial Legislature the exclusive powers enumerated in the Provincial Legislative List. Similarly Provincial Legislature are given by Sec. 100 (3) the exclusive powers in the Provincial Legislative List “subject to the two preceding sub-sections”, that is sub-sections (1) and (2). Accordingly, the Government of India further contend that, even if the impugned Act were otherwise within the competence of the Provincial Legislature, it is nevertheless invalid, because the effect of the *non obstante* clauses in S. 100 (1), and a *fortiori* of that clause read with the opening words of Sec. 100 (3), is to make the federal power prevail if federal and provincial legislature powers overlap. The Provincial Government, on the other hand, deny that the two entries overlap and say that they are mutually exclusive. The Government of India raise a further point under S. 297, Constitution Act, but it will be more convenient to deal with this separately and at a later stage. I should add that it is common ground between the parties that if S. 3 (1) of the impugned Act is held to be invalid, the rest of the Act must be invalid also, since it only provides the machinery for giving practical effect to the charging Section.

The first case of importance that has come before the Federal Court; and it is desirable, more particularly in view of some of the arguments addressed to us during the hearing, to refer briefly to certain Principles which the Court will take for its guidance. It will adhere to canons of interpretation and construction which are now well known and established. It will seek to ascertain the meaning and intention of Parliament from the language of the statute itself: but with the motives of Parliament it has no concern. It is not for the Court to express, or indeed to entertain, any opinion on the expediency of a particular piece of legislation, if it is satisfied that it was within the competence of the Legislature which enacted it: nor, will it allow itself to be influenced by any considerations of policy, which lie wholly outside its sphere.

The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense: per Lord Wright in [*James v. Commonwealth of Australia*, (1936) A C 578, 614]. The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself; and I respectfully adopt the words of a learned Australian Judge:

Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be: [*Attorney-General for New South Wales v. Brewery Employees Union* (1908) 6 Commonwealth LR 469], per Higgins J. at p. 611.

Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret; but I do not imply but this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis-valeat quam pereat*.

Dispute with regard to central and provincial legislative spheres are inevitable under every federal Constitution, and have been the subject-matter of a long series of cases in Canada, Australia and the United States, as well as of numerous decisions on appeal by the Judicial Committee. Many of these cases were cited in the course of the argument. The decisions of the Canadian and Australian Courts are not bindings upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend on the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly.

The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists. Whether this elaboration will be productive of more or less litigation than in Canada, where there is also a distribution, by enumeration time alone will show; at least this court will not be confronted with the additional problems created by the interlacing provisions of Ss. 91 and 92. British North America Act and the distribution of powers not only by the enumeration of specified subjects, but also by reference to the general or local nature of the subject matter of legislation. But the interpretation of the British North America Act has given rise to questions analogous to that which is now before this Court and there are two decisions of the Judicial Committee which lay down most clearly the principles which should be applied by Courts before which questions may come.

The question before the Court admits of three possible solutions: (1) that the provincial entry covers the tax now challenged and that the federal entry does not; (2) that the federal entry covers it, but that the provincial entry does not; and (3) that the tax falls within both entries, so that there is a real overlapping of jurisdiction between the two. In the first case, the validity of the tax could not be questioned; in the second, the tax would be invalid as the invasion of an exclusively federal sphere, in the third, it would, because falling within both spheres be invalid by reason of the *non obstante* clause. It is necessary therefore to scrutinize

more closely the two entries, first separately and then in relation to each other and to the context and scheme of the Act.

The provincial legislative power extends to making laws with respect to taxes on the sale of goods. The words which this power is given, taken by themselves and in their ordinary and natural sense seem apt to cover such a tax as is imposed by the impugned Act; and it might indeed be difficult to had a more exact or appropriate formula for the purpose.

The federal legislative power extends to making laws with respect to duties of excise on goods manufactured or produced in India. "Excise" is stated in the Oxford Dictionary to have been originally "accise", a word derived through the Dutch from the late Latin *accensare*, to tax; the modern form, which ousted "accise" at an early date, being apparently due to a mistaken derivation from the Latin *excidere*, to cut out. It was at first a general word for a tollor tax, but since the 17th century it has acquired in the United Kingdom particular, though not always precise, signification. The primary meaning of 'excise duty' or 'duty of excise' has come to be that of a tax on certain articles of luxury (such as spirits, beer to tobacco) produced or manufactured in the United Kingdom, and it is used in contradistinction to customs duties on articles imported into the country from elsewhere. At a later date the licence fees payable by persons who produced or sold excisable articles also became known as duties of excise; and the expression was still later extended to licence fees imposed for revenue, administrative, or regulative purposes on persons engaged in a number of other trades or callings. Even the duty payable on payments for admission to places of entertainment in the United Kingdom is called a duty of excise; and, generally speaking, the expression is used to cover all duties and taxes which together with customs duties are collected and administered by the Commissioners of Customs and Excise. But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that is also its primary and fundamental meaning in India; and no one has suggested that it has any other meaning in Entry (45).

It was then contended on behalf of the Government of India that an excise duty is a duty which may be imposed upon home produced goods at any stage from production to consumption and that therefore the federal legislative power extended to imposing excise duties at any stage. This is to confuse two things, the nature of excise duty and the extent of the federal legislative power to impose them. Authorities were cited to us, from Blackstone onwards, to prove that excise duties may be imposed at any stage; and if this means no more than that, instances are to be found where they have been so imposed, authority seems scarcely needed. It would perhaps not be easy without considerable research to ascertain how far Blackstone was justified at the time he wrote in saying that excise duties were an inland imposition, paid sometimes on the consumption of the commodity, and frequently on the retail sale. Blackstone's statement however is repeated, almost verbatim, in the latest edition of Stephen's commentaries, and as a description of excise duty now in force in the United Kingdom it is demonstrably wrong; for, a brief examination of those duties shows that in practically all cases it is the producer or manufacturer from whom the duty is collected. But there can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence

of the taxing authority; a duty on home-produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty; that is a duty on home-produced or home manufactured goods, no matter at what stage it is collected. The definition of excise duties is therefore of little assistance in determining the extent of the legislative power to impose them: for a duty imposed by a restricted legislative power does not differ in essence from the duty imposed by an extended one.

It was argued on behalf of the Provincial Government that an excise duty was a tax on production or manufacture only and that it could not therefore be levied at any later stage. Whether or not there be any difference between a tax on production and a tax on the thing produced, this contention, no less than that of the Government of India, confuses the nature of the duty with the extent of the legislative power to impose it. Nor for the reasons already given, is it possible to agree that in no circumstances could an excise duty be levied at a stage subsequent to production or manufacture.

If therefore a Legislature is given power to make laws "with respect to" duties of excise it is a matter to be determined in each case whether on the true construction of the enactment conferring the power, the power itself extends to imposing duties on home-produced or home manufactured goods at any stage up to consumption, or whether it is restricted to imposing duties, let us say, at the production or manufacture only. A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense, but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

The question must next be asked whether such a tax as is imposed by the impugned Act, though described as a tax on the sale of goods could in any circumstances be held to be a duty of excise, for it is common ground that the Courts are entitled to look at the real substance of the Act imposing it, at what it does and not merely at what it says in order to ascertain the true nature of the tax. Since writers on political economy are agreed that taxes on the sale of commodities are simply taxes on the commodities themselves, it is possible to regard a tax on the retail sale of motor spirit and lubricants as a tax on those commodities, and I will assume for the moment in favour of the Government of India that it is on that ground capable of being regarded as a duty of excise.

It appears then that the language in which the particular legislative powers which the Court is now considering have been granted to the Central and Provincial Legislatures respectively may be wide enough, if taken by itself and without reference to anything else in the Act, to cover in each case a tax of the kind which has been imposed, whether it be called an excise duty, if imposed by the Central Legislature, or a tax on the sale of goods, if imposed by a Province.

But the question before the Court is not how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now in the Constitution

Act. This is a very different problem and one on which case decided under other Constitutions can never be conclusive. In the United Kingdom there are no competing jurisdictions at all: and though in Canada, Australia and United States there is a division or distribution of powers between the Centre and the Provinces or States, there is nowhere to be found set in opposition to one another the power of levying duties of excise and an express power of levying a tax on the sale of goods. In Canada there is, it is true, a double enumeration of legislative powers; but so far as taxation is concerned, the conflict is between direct and indirect taxation, the first being the prerogative of the Provinces, the second of the Dominion; and though duties of excise (as well as those of customs) are mentioned in the British North America Act, it is nearly always as indirect taxes that constitutional questions arise with regard to them. In Australia all taxing powers belong to the States except those which are specifically reserved to the Commonwealth. Among the latter are duties of customs and excise; and the question in Australia always is whether a particular tax falls within the field of taxation reserved to the Commonwealth or not; there can be no overlapping of particular legislative spheres. In the United States the Central Legislature has power to levy "taxes, duties, imposts and excises", provided that they are uniform throughout the States. This is not an exclusive power, and the States can levy what taxes they like (other than imposts or duties on imports or exports), subject to the provisions of the Constitution, though certain of those provisions, such as the commerce clause, operate in practice as a very effective restriction upon State powers. Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and where necessary, modifying the language of the one by the that of the other. If indeed such a reconciliation should prove impossible then, and only then, will the *non obstante* clause operate and the federal power prevail: for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation it would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess. I mention, only to dismiss, the argument that the new autonomy of the provinces and the expenditure necessary to administer and maintain the vital services committed to their charge require that every intendment should be made in favour of the provincial taxing power. I should never deny the high importance of the provincial functions; but the Centre has also great responsibilities, though of another kind, and it is not for this Court to weigh one against the other. The issue must be decided on other grounds than these.

The provincial legislative power defined in Entry (48) may be first considered. The Advocate-General of India, when asked what was left to the legislative power of the Provinces under this entry if the view of the Government of India prevailed, said that it was

clearly within their power to levy the taxes commonly known as turnover taxes, which under that name or under the name of sales taxes have since the War proved so successful a fiscal expedient in many countries. Strictly, a turnover tax appears to be the correct description of a tax usually calculated in the form of a percentage, on the gross receipts of wholesalers or retailers or of both, and in some countries also on receipts in respect of services. It is however sometimes included under the more general name of sales tax, and it is evident from the various modern writers who have dealt with the subject and to whose works we were referred that the latter expression is often used a convenient name for a number of taxes ranging from turnover taxes to taxes on the retail sale of specified classes of goods; the so-called sales taxes which have been imposed by a large number of the State Legislatures in the United States seem to be often of the latter variety. Two citations from these writers will be sufficient to show that neither "turnover tax" nor "sales tax" has yet achieved a recognized and certain meaning:

The scope of sales and turnover taxes has varied greatly. Some extended to all transactions, both wholesale and retail, and others to wholesale transactions only. The first of these are usually called turnover taxes. Certain taxes include both goods and services, while others include only goods. The German turnover tax is an example of a tax which includes nearly every type of transaction in the line of goods and services.

And again:

The tax (i.e. the sales or turnover tax) may be general, as in France or Germany, or retail transactions may be excluded, as in Belgium. It may be as is common in the States of the American Union, confined to retail transactions. It may be imposed, as in Canada and Australia, as a producers' or manufactures' tax, and it may be on classified industries or trades only. It may be levied on nearly all goods and services, as in Germany. It may exempt certain sales, as in France, where the sales of farmers are exempt unless carrying on manufacture as well as agriculture.

Thus the expression "sales tax" may comprehend a good deal more than would be understood by "tax on the sale of goods" in the ordinary and natural meaning of those words, and the expression "turnover tax" seems to be in some directions wider and in others narrower. "Tax on the sale of goods" at any rate seems to include some varieties of turnover tax but it seems also to include more than a turnover tax in the stricter sense could reasonably be held to cover. In these circumstances it may be thought hazardous to impute to Parliament any particular intentions with regard to turnover taxes. Parliament may have had them in mind. The Proposals for Indian Constitutional Reform, commonly known as the White Paper (Cmd. 4268, 1933) and the Report of the Joint Select Committee thereon (H. L. 6 and H. C. 5, 1934) are historical facts and their relation to the Constitution Act is matter of common knowledge to which this court is entitled to refer and it may be observed that "taxes on the sale of commodities and on turnover" appeared in the White Paper as a suggestion for possible sources of provincial revenue, and that the suggestion was approved without comment by the Joint Select Committee. I do not know, and it would be idle to speculate why a different formula was ultimately inserted in the Act, the Court is only concerned with what Parliament has in fact said, and if the Government of India are right and "taxes on the sale of goods" was intended to refer to taxes on turnover alone, I find it difficult to understand why Parliament used so inappropriate and indeed misleading a formula. "Taxes on turnover"

may not be yet a term of art, but some of its meanings are tolerably plain. "Taxes on the sale of goods" appears to me to be plainer still, and though there may be general agreement that it includes some forms of turnover the exclusion of everything else. Certainly that would not be its ordinary meaning, and I cannot persuade myself, even for the purpose of avoiding a conflict between the two entries, that Parliament deliberately used words which cloaked its real intention when it would have been so simple a matter to make that intention clear beyond any possibility of doubt. I therefore proceed to inquire if it is reasonably possible to avoid the conflict by construing the power to make laws "with respect to" duties of excise as not extending to the imposition of a tax or duty on the retail sale of goods. This is the crucial issue in the case.

In my opinion the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacture or producer of the excisable articles, or at least at the stage of or in connection with, manufacture or production, and that it extends no further. I think that this is an interpretation reasonable in itself; more consonant than any other with the context and general scheme of the Act, and supported by other considerations to which I shall refer.

I have said that it seems to me impossible, without straining the language of the Act, to construe a power to impose taxes on the sale of goods as a power to impose only turnover taxes. To construe the power to impose duties of excise, as I think it ought to be construed, involves no straining of language at all. The expression "duties of excise", taken by itself, conveys no suggestion with regard to the time or place of their collection. Only the context in which the expression is used can tell us whether any reference to the time or manner of collection is to be implied. It is not denied that laws are to be found which impose duties of excise at stages subsequent to manufacture or production; but, so far as I am aware, in none of the cases in which any question with regard to such a law has arisen was it necessary to consider the existence of a competing legislative power, such as appears in entry (48).

Much stress was laid upon two cases which were cited to us. In [*Patoon v. Brady* (1901) 184 US 608], a case before the United States Supreme Court, tobacco, which had already paid excise duty had been sold to the plaintiff. While it was still in his hands, an Act was passed doubling the current rate of duty and (no doubt lest persons in possession at the moment of duty paid tobacco should get an unearned increment on its sale) imposing a special duty on all tobacco which had paid the excise duty in force at the date of the Act and was at that date held and intended for sale. The Act was challenged as unconstitutional on the ground (inter alia) that the legislature having once excised an article could not excise it a second time. The Court; upholding the Act on this particular point, referred to the account of excise duties given in Blackstone and Story and to definitions in various standard dictionaries, and then said:

Within the scope of the various definitions we have quoted, there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacture or any intermediate dealer, and until they reach the consumer. Our conclusion then is that it is within the power of Congress to increase an excise, as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer.

The case is thus a decision on the scope and extent of the power to impose excise duties given to the Central Legislature by the Constitution of the United States. No question was involved of a competing legislative power. It is to be observed however that the imposition of an excise duty at a stage later than production or manufacture was obviously regarded as an unusual thing and that the duty about which the litigation arose was not intended as a permanent duty but was imposed once for all. The other case was [*Commonwealth Oil Refineries Co. v. South Australia*, 38 Commonwealth LR 408]. There a State law had (inter alia) purported to impose an additional income tax (for so the duty was described) at the rate of 3 for every gallon of motor spirit sold by any person who sold and delivered it within the State to persons within the State for the first time after its production or manufacture, but not including any purchaser who subsequently sold it. It was argued that this was in substance a duty of excise which under the Constitution only the Commonwealth had the right to impose, and that contention prevailed. It might at first sight appear that this decision supported the Government of India's case; for, as already pointed out, the taxing power of the Australian States is unlimited, save in so far as the Constitution reserves the right for imposing certain specified taxes to the Commonwealth and indirectly limits the power of the States by giving the Commonwealth power to regulate inter-State trade and commerce. But closer examination of the judgment delivered shows that the majority of the Judges took the view that the duty on first sale of the commodity in fact is a tax on the producer and for that a reason a duty of excise without doubt. The case is no authority at all for the proposition that a tax on retail sales must necessarily be a duty of excise.

It cannot be strongly emphasized that the question now before the Court is one of possible limitations on a legislative power, and not possible limitations on the meaning of the expression duties of excise"; for, "duties of excise" will bear the same meaning whether the power of the Central Legislature to impose them is restricted or extended. It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by language of the other. Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and would accord with sound principles of construction to take the more general power; that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for, the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense, effect given to the latter in its ordinary and natural meaning. So in *Bank of Toronto v. Lambe* [(1887) 12 AC 575, 587], where a Provincial Legislature in Canada had imposed a tax upon banks carrying on business in the Province, varying in amount with the paid up capital and with the number of the offices of the bank, whether or not the bank's principal place of business was within the Province, it was argued that even if the tax imposed by the Act was direct taxation and therefore within the power of the Provincial Legislature under Sec. 92, British North America Act, it was nevertheless invalid because it was legislation relating to banking and the incorporation of banks, the making of laws on

which was by S. 91 of the Act vested solely in the Dominion Parliament. The Judicial Committee rejected this argument. They pointed out that in (1882) 7 A C 96, to which reference has already been made, it was found absolutely necessary that the literal meaning of the words defining the powers vested in the Dominion Parliament should sometimes be restricted, "in order to afford scope for powers which are given exclusively to the Provincial Legislatures"; and they summed up the matter thus:

The question they (the Committee) have to answer is whether the one body or the other has power to make a given law. If they find that on the due constitution of the Act the legislative power falls within S. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament.

This is not to ignore the *non obstante* clause, still less to bring into existence, as it were a *non obstante* clause in favour of the Provinces; for if the two legislative powers are read together in the manner suggested above, there will be a separation into two mutually exclusive spheres, and there will be no overlapping between them. Thus, the Central Legislature will have the power to impose duties of excisable articles before they become part of the general stock of the Province that is not say, at the stage of manufacture or the production and the Provincial Legislature an exclusive power to impose a tax on sale thereafter.

In discussing the possible overlapping of the federal and provincial jurisdictions I assumed for the moment that a tax on retail sales might be a duty of excise. Whether it is so or not must depend upon circumstances: certainly I cannot agree that it must always be so regarded, even where the power to impose duties of excise extends to imposing them at stages subsequent to production or manufacture. There are some significant observations on this point in the judgment of Isaacs J. (afterwards Isaacs C.J.) in the *Commonwealth Refineries* case to which reference has already been made. After stating his conclusion that the words "excise duties" were not used in the constitution in the extended sense which had been suggested, the learned Judge proceeded as follows:

I arrive at that conclusion notwithstanding the expression was in South Australia before Federation, as in Victoria, sometimes used in a sense large enough to include breweries' and wine licences. Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the article sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of goods as existing articles of trade and commerce, independently of the fact of their local production, a license or tax on the sale appears to me to fall into a classification of governmental power outside the true content of the words "excise duties as used in the constitution... Therefore, if the taxation by the State Act under S. 4 were simply on motor spirit as an existing substance in South Australia and not subject to any foreign or inter State operation of trade or commerce it would not be open to the challenge here made. [*Commonwealth Oil Refineries Co.* case]

There appears to be a sound basis for the above distinction and the case which the Court is now considering is indeed stronger than the Australian one, for in the latter the power of the State to levy taxes on sale other than duties of excise was implied in its general powers of taxation and was not conferred expressly as in Entry (48). No doubt there will be border line cases in which it may be difficult to say on which side a particular tax or duty falls; but that is one of the inevitable consequences of a division of legislative powers. If however the facts in (1901) 184 U S 608 had been such as to make the decision turn upon the distinction between the two kinds of tax mentioned above, it seems probable that the special duty there imposed would still have been held to be a duty of excise, because it was an attempt, as it were, to relate duty back to the stage of production, even though the person may be liable for payment was not (and indeed could seldom have been) the original producer himself. In the present case it could not be suggested that the tax on retail sales has any connection with production; it is also imposed indifferently on all motor spirit and lubricants, whether produced or manufactured in India or not. I do not say that this is conclusive, but it is to be taken into consideration. And I think that the distinction drawn by the learned Judge corresponds in substance with the distinction which it seems to me ought to be drawn in the case of the federal and provincial spheres in India, that is, between the taxation of goods at the stage of manufacture or production and their taxation by the provincial taxing authority (as in Australia by the State) after they have become part of what I have called the common stock of the Province. The learned Judge's observations, it is true, were obiter, and in any case are not binding upon us; but I am strengthened in my own view by what he has said.

I am impressed also by another argument. The claim of the Government of India must be that any provincial Act imposing a tax on the sale of any goods (other than a turnover tax) is an invasion of Entry (45) in the Federal Legislative List, whether the goods are at the time the subject of a central excise or not, and no matter how improbable it is that any excise will ever be imposed upon them. Duties of excise in the nature of things will always be confined to a comparatively small number of articles; but it is a necessary corollary of the argument of the Government of India that the power to impose excise duties though only exercised with respect to this small group, is an absolute bar to the exercise by the Provinces of any jurisdiction by way of a tax on sales over every other material, commodity and article manufactured or produced in India and to be found in the Province. Nay, more; for though excise duties can only be imposed in respect of goods manufactured or produced in India, it is part of the Government of India's case that to impose a tax on the sale of goods manufactured or produced elsewhere will infringe the provisions of Sec. 297 (1) (b), Constitution Act, against discrimination. It is not necessary for me here to say whether I agree with the latter argument or not; it is sufficient to point out how on one ground or the other this interpretation of the federal entry would exclude the Province from an immense field of taxation in which the Government of India does not now and probably would never in the future seek to compete. I should find it exceedingly difficult to adopt an interpretation of the two entries which would have consequences such as these.

Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties, for Parliament must surely be presumed to have had Indian legislative practice in mind and unless

the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply. There were several central excise duties in force in India at the date of the passing of the Constitution Act, imposed respectively upon motor spirit, kerosene, silver, sugar, matches, mechanical lighters, and iron and steel. In all the Acts by which these duties were imposed it is provided (and substantially by the same words) that the duty is to be paid by the manufacturer or producer, and on the issue of the excisable article from the place of manufacture or production. The Acts which imposed the cotton excise now repealed, were in the same form.

The only provincial excise duty in force was that on alcoholic liquor and intoxicating drugs. The Devolution Rules, 1920, which were made under S. 45-A of the then Government of India Act, for the purpose of distinguishing the functions of the Local Governments and local Legislatures of Governors' Provinces.

Classified a variety of subjects, in relation to the functions of Government, as central and provincial subjects, respectively. Among the provincial subjects appears the following:

16. Excise that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles...

The earlier part of this entry obviously describes an administrative and legislative sphere only, the taxing power being given in the last words quoted, which I take to mean excise duties on the articles mentioned and licence fees in relation to them. But here again, after examining various Provincial Acts relating to the control of alcohol, I have been unable to find any case of excise duties payable otherwise than by the producers or manufacturers or persons corresponding to them; I am speaking, of course, only of alcohol manufactured or produced in the Province itself. The Advocate General of India referred us to an Act of the Central Provinces (Central Provinces Excise Act (No. 2 of 1915)) which was said to make provision for the imposition of an excise duty on retail sales. I have been unable to find any such provision in the Act; it provides, it is true, as do other provincial Acts, for lump sum payments in certain cases by manufacturers and retailers, which may be described as payments either for the privilege of selling alcohol, or as consideration for the temporary grant of a monopoly, but these are clearly not excise duties or anything like them. Provision was also made in most Provincial Acts for the payment of licence fees in connection with the production or sale of alcohol in the Province: but these fees are mentioned in the Devolution Rules Entry in addition to excise duties and are therefore something different from them.

Thus, at the date of the Constitution Act, though it seems that the word "excise" was not infrequently used as a general label for the system of internal indirect taxation or for the administration of a particular indirect tax (as salt excise or opium excise), the only kind of excise duties which were known in India by that name were duties collected from manufacturers or producers, and usually payable on the issue of the excisable articles from the place of manufacture or production. This also may not be conclusive in itself, but it seems a not unreasonable inference that Parliament intended the expression "duties of excise" in the Constitution Act to be understood in the sense in which up to that time it had always in fact been used in India, where indeed excise duties of any other kind were unknown. Nor indeed are excise duties properly so called often to be found at the present day which are not

collected at the stage of production or manufacture, whatever may have been the case in Blackstone's time, and whatever may have been the reasons for Johnson's definition of "Excise" in the first edition of his Dictionary (1755) as a hateful tax levied on commodities and adjudged not by the common Judges of property but wretches hired by those whom the excise is paid.

The conclusion at which I have arrived seems to me to be in harmony with what I conceive to be the general scheme of the Act and its method of differentiation between the functions and powers of the Centre and of the Provinces. It introduces no novel principle. It reconciles the conflict between the two entries without doing violence to the language of either, and it maps out their respective territories on a reasonable and logical basis. It would be strange indeed if the Central Government had the exclusive power to tax retail sales, even if the tax were confined to goods produced or manufactured in India, when the Province has an exclusive power to make laws with respect to trade and commerce, and with respect to the production, supply and distribution of goods, within the provincial boundaries. In the view which I take none of these inconsistencies will arise. Nor will the effect of this interpretation be to deprive the Centre of any source of revenue which it enjoys at present, nor of any which it is reasonable to anticipate that it might have enjoyed in the future. If I may be permitted to hazard a guess, the anxiety of the Government of India arises from the probability that a general adoption by Provinces of this method of taxation will tend to reduce the consumption of the taxed commodities and thus indirectly diminish the Central excise revenue. This however is a circumstance which this Court cannot allow to weigh with it if, as I believe, the interpretation of the Act is clear though it might be an element to take into consideration if there were real ambiguity or doubt. But I do not think there is either ambiguity or doubt, if the two entries are read together and interpreted in the light of one another. The difficulty with which the Government of India may be faced is of a kind which must inevitably arise from time to time in the working of a Federal Constitution, where a number of taxing authorities compete for the privilege of taxing the same taxpayer. In the present case, the result may well be that the Central Government will find itself unable to make such a distribution of the proceeds of central excise duties under S. 140 of the Act as it might otherwise desire to do; but these are not matters for this Court, and they must be left for adjustment by the interest concerned in a spirit of reasonableness and commonsense, qualities which I do not doubt are to be found in India as in other Federations.

I am of opinion that for the reasons which I have given the answer to the question referred to us is that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not ultra vires the Legislature of the Central Provinces and Berar, and since that is also the opinion of the whole Court we shall report to His Excellency accordingly.

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Gujarat University v. Krishna Ranganath Mudholkar

AIR 1963 SC 703

[Bhuvaneshwar Prasad Sinha, C.J. and S.J. Imam, K. Subba Rao, K.N. Wanchoo, J.C. Shah and N. Rajagopala Ayyangar, JJ.]

[Entry 11, List II referred to in this case is presently entry 25 of List III.]

Shrikant, son of Shri Krishna Mudholkar, appeared for the Secondary School Certificate Examination held by the State of Bombay in March 1960 and was declared successful. He took instruction in the various subjects prescribed for the examination through the medium of Marathi, which was his mother tongue and answered the questions at the examination also in Marathi. Shrikant joined the St. Xavier's College affiliated to the University of Gujarat, in the First Year Arts class and was admitted in the section in which instructions were imparted through the medium of English. After successfully completing the First Year Arts course in March 1961, Shrikant applied for admission to the classes preparing for the Intermediate Arts examination of the University through the medium of English. The Principal of the College informed Shrikant that in view of the provisions of the Gujarat University Act, 1949 and Statutes 207, 208 and 209 framed by the Senate of the University, as amended in 1961, he could not permit him to attend classes in which instructions were imparted through the medium of English without the sanction of the University. Shri Krishna, father of Shrikant then moved the Vice Chancellor of the University for sanction to permit Shrikant to attend the "English medium classes" in the St. Xavier's College. The Registrar of the University declined to grant the request. By another letter, Shrikant was "allowed to keep English as a medium of examination" but not for instruction.

A petition was then filed by Shri Krishna Madholkar on behalf of himself and his minor son Shrikant in the High Court of Gujarat for a writ or order in the nature of mandamus or other writ, direction or order requiring the University of Gujarat to treat Sections 4(27), 18(i)(xiv) and 38-A of the Gujarat University Act, 1949, and Statutes 207, 208 and 209 as void and inoperative and to forbear from acting upon or enforcing those provisions and requiring the Vice Chancellor to treat the letters or circulars issued by him in connection with the medium of instruction as illegal and to forbear from acting upon or enforcing the same, and also requiring the University to forbear from objecting to or from prohibiting the admission of Shrikant to "the English medium Intermediate Arts class", and requiring the Principal of the College to admit Shrikant to the "English medium Intermediate Arts class" on the footing that the impugned provisions of the Act, Statutes and letters and circulars were void and inoperative.

The High Court of Gujarat issued the writs prayed for. The University and the State of Gujarat separately appealed to the Supreme Court with certificates of fitness granted by the High Court.

Two substantial questions, which came up before the Supreme Court for determination:

- (1) whether under the Gujarat University Act, 1949 it is open to the University to prescribe Gujarati or Hindi or both as an exclusive medium of media of instruction and examination in the affiliated colleges, and
- (2) whether legislation authorising the University to impose such media would infringe Entry 66 of List I, Seventh Schedule to the Constitution.

J.C. SHAH, J. - 7. St. Xavier's College was affiliated to the University of Bombay under Bombay Act 4 of 1928. The legislature of the Province of Bombay enacted the Gujarat University Act, 1949 to establish and incorporate a teaching and affiliating University "as a measure of decentralisation and re-organisation" of University education in the Province. By Section 5(3) of the Act, from the prescribed date all educational institutions admitted to the privileges of the University of Bombay and situate within the University area of Gujarat were deemed to be admitted to the privileges of the University of Gujarat. Section 3 incorporated the University with perpetual succession and a common seal. Section 4 of the Act enacted a provision which is not normally found in similar Acts constituting Universities. By that section various powers of the University were enumerated. These powers were made exercisable by diverse authorities of the University set out in Section 15. We are concerned in these appeals with the Senate, the Syndicate and the Academic Council. Some of the powers conferred by Section 4 were made exercisable by Section 18 by the Senate. The Senate was by that section authorised, subject to conditions as may be prescribed by or under the provisions of the Act, to exercise the powers and to perform the duties as set out in sub-section (1). By Section 20 certain powers of the University were made exercisable by the Syndicate, and by Section 22, the Academic Council was invested with the control and general regulation of, and was made responsible for, the maintenance of standards of teaching and examinations of the University and was authorised to exercise certain powers of the University. The powers and the duties of the Senate are to be exercised and performed by the promulgation of Statutes of the Syndicate by Ordinances and of the Academic Council by Regulations. In 1954, the Gujarat University framed certain Regulations dealing with the media of instruction. They are Statutes 207, 208 and 209. Statute 207 provided:

- (1) Gujarati shall be medium of Instruction and Examination.
- (2) Notwithstanding anything in clause (1) above, English shall continue to be the medium of instruction and examination for a period not exceeding ten years from the date on which Section 3 of the Gujarat University Act comes into force, except as prescribed from time to time by Statutes.
- (3) Notwithstanding anything in clause (1) above, it is hereby provided that non-Gujarati students and teachers will have the option, the former for their examination and the latter for their teaching work, to use Hindi as the medium, if they so desire. The Syndicate will regulate this by making suitable Ordinances in this behalf, if, as and when necessary.
- (4) Notwithstanding anything in (1), (2), (3) above, the medium of examination and instruction for modern Indian languages and English may be the respective languages.

8. Statute 208 provided that the medium of instruction and examination in all subjects from June 1955 in First Year Arts, First Year Science and First Year Commerce in all subjects and from June 1956 in Inter Arts, Inter Science Inter Commerce and First Year Science (Agri.) shall cease to be English and shall be as laid down in Statute 207(1). This Statute further provided that a student or a teacher who feels that he cannot "use Gujarati or Hindi tolerably well", would be permitted the use of English in examination and instruction respectively upto November, 1960 (which according to the academic year would mean June 1961) in one or more subjects. Statute 209 is to the same effect enumerating therein the permitted use of English for the BA, BSc, and other examinations. After the constitution of a separate State of Gujarat, Act 4 of 1961 was enacted by the Gujarat State Legislature. By that

Act the proviso to Section 4(27) was amended so as to extend the use of English as the medium of instruction beyond the period originally contemplated and Section 38-A which imposed an obligation upon all affiliated colleges and recognised institutions to comply with the provisions relating to the media of instruction was enacted. It was provided by Section 38-A(2) that if an affiliated college or recognised institution contravenes the provisions of the Act, Rules, Ordinance and Regulations in respect of media of instruction the rights conferred on such institution or college shall stand withdrawn from the date of the contravention and that the college or institution shall cease to be affiliated college or recognised institution for the purpose of the Act. The Senate of the University thereafter amended Statutes 207 and 209. Material part of Statute 207 as amended is as follows:

(1) Gujarati shall be the medium of instruction and examination:

Notwithstanding anything contained in sub-item (1) above, Hindi will be permitted as an alternative medium of instruction and examination in the following faculties:

(i) Faculty of Medicine, (ii) Faculty of Technology including Engineering, and (iii) Faculty of Law; and (iv) in all faculties for post graduate studies;

(2) Notwithstanding anything contained in clause (1) above, English may continue to be the medium of instruction and examination for such period and in respect of such subjects and courses of studies as may, from time to time, be prescribed by the Statutes under Section 4(27) of the Gujarat University Act for the time being in force.

(3) Notwithstanding anything contained in clause (1) above, it is hereby provided that students and teachers, whose mother tongue is not Gujarati will have the option, the former for their examination and the latter for their instruction to use Hindi as the medium, if they so desire.

(4) Notwithstanding anything contained in clauses (1) and (3) above, it is hereby provided that the affiliated colleges, recognised Institutions and University Departments, as the case may be, will have the option to use, for one or more subjects, Hindi as a medium of instruction and examination for students whose mother tongue is not Gujarati.

(5) Notwithstanding anything in clauses (1), (2), (3) and (4) above, the medium of examination and instruction for modern Indian languages and English may be the respective languages.

9. Statute 209 as amended provides that the medium of instruction and examination in all subjects in the examinations enumerated therein shall cease to be English and shall be as laid down in Statute 207 as amended with effect from the years mentioned against the respective examinations.

10. The Registrar of the University thereafter issued a circular on June 22, 1961 addressed to Principals of affiliated Colleges stating that the Vice Chancellor in exercise of the powers vested in him under Section 11(4)(a) of the Act was pleased to direct that:

(i) Only those students who have done their secondary education through the medium of English and who have further continued their studies in First Year (Pre-University) Arts class in the year 1960-61 through English, shall be permitted to continue to use English as the medium of their examination in the Intermediate Arts class for one year i.e. in the year 1961-62, and

(ii) the colleges be permitted to make arrangements for giving instructions to students mentioned in (i) above through the medium of English for only one year i.e. during the academic year 1961-62, and

(iii) that the Principals shall satisfy themselves that only such students as mentioned in (i) above are permitted to avail themselves of the concession mentioned therein.

11. Shrikant had not appeared at the SSC Examination in the medium of English and under the first clause of the circular he could not be permitted by the Principal of the St. Xavier's College to continue to use English as the medium of instruction in the Intermediate Arts class: if the Principal permitted Shrikant to do so the College would be exposed to the penalties prescribed by Section 38-A.

12. The petitioner challenged the authority of the University to impose Gujarati or Hindi as the exclusive medium of instruction under the powers conferred by the Gujarat University Act, 1949 as amended by Act 4 of 1961. The University contended that authority in that behalf was expressly conferred under diverse clauses of Section 4, and it being the duty of the Senate to exercise that power under Section 18(XIV), Statutes 207 and 209 were lawfully promulgated. In any event, it was submitted the University being a Corporation invested with control over higher education for the area in which it functions such a power must be deemed to be necessarily implied.

18. The Government of India may have in the year 1948 intended that English should be replaced in gradual stages as the medium of instruction by the language of the State or the Province, or region, but that will not be a ground for interpreting the provisions of the Act in a manner contrary to the intention of the legislature plainly expressed. This recommendation of the Government of India has been ignored if not by all, by a large majority of Universities. It is also true that in the Statement of Objects and Reasons of the Gujarat University Act, it was stated "... As recommended by the Committee, it is proposed to empower the University to adopt Gujarati or the national language as the medium of instruction except that for the first ten years English may be allowed as the medium of instruction in subjects in which this medium is considered necessary." But if the legislature has made no provision in that behalf a mere proposal by the Government, which is incorporated in the Statement of Objects and Reasons will not justify the court in assuming that the proposal was carried out. Statements of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the legislature to enact a Statute, but in interpreting the Statute they must be ignored. We accordingly agree with the High Court that power to impose Gujarati or Hindi or both as an exclusive medium or media has not been conferred under clause (27) or any other clauses of Section 4.

20. [N]either under the Act as originally framed nor under the Act as amended by Act 4 of 1961 was there any power conferred on the University to impose Gujarati or Hindi or both as exclusive medium or media of instruction and examination and if no such power was conferred upon the University, the Senate could not exercise such a power. The Senate is body acting on behalf of the University and its powers to enact Statutes must lie within the contour of the powers of the University conferred by the Act.

22. Power of the Bombay Provincial Legislature to enact the Gujarat University Act was derived from Entry 17 of the Government of India Act, 1935, List II of the Seventh Schedule - "Education including Universities other than those specified in para 13 of List I." In List I Item 13 were included the Banaras Hindu University and the Aligarh Muslim University.

Therefore, except to the extent expressly limited by Item 17 of List II read with Item 13 of List I, a Provincial Legislature was invested with plenary power to enact legislation in respect of all matters pertaining to education including education at University level. The expression “education” is of wide import and includes all matters relating to imparting and controlling education; it may therefore have been open to the Provincial Legislature to enact legislation prescribing either a federal or a regional language as an exclusive medium for subjects selected by the University. If by Section 4(27) the power to select the federal or regional language as an exclusive medium of instruction had been entrusted by the legislature to the University, the validity of the impugned statutes 207, 208 and 209 could not be open to question. But the legislature did not entrust any power to the University to select Gujarati or Hindi as an exclusive medium of instruction under Section 4(27). By the Constitution a vital change has been made in the pattern of distribution of legislative power relating to education between the Union Parliament and the State Legislatures. By Item 11 of List II of the Seventh Schedule to the Constitution, the State Legislature has power to legislate in respect of “education including Universities subject to the provisions of Items 63, 64, 65 and 66 of List I and 25 of List III”. Item 63 of List I replaces with modification Item 13 of List I to the Seventh Schedule of the Government of India Act, 1935. Power to enact legislation with respect to the institutions known at the commencement of the Constitution as the Benaras Hindu University, the Aligarh Muslim University and the Delhi University, and other institutions declared by Parliament by laws to be an institution of national importance is thereby granted exclusively to Parliament. Item 64 invests the Parliament with power to legislate in respect of “institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament, by law, to be institutions of national importance”. Item 65 vests in the Parliament power to legislate for “Union agencies and institutions for - (a) professional, vocational or technical training, including the training of police officers; or (b) the promotion of special studies or research; or (c) scientific or technical assistance in the investigation or detection of crime.” By Item 66 power is entrusted to Parliament to legislate on “coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Item 25 of the Concurrent List confers power upon the Union Parliament and the State Legislatures to enact legislation with respect to “vocational and technical training of labour”. It is manifest that the extensive power vested in the Provincial Legislatures to legislate with respect to higher, scientific and technical education and vocational and technical training of labour, under the Government of India Act is under the Constitution controlled by the five items in List I and List III mentioned in Item 11 of List II. Items 63 to 66 of List I are carved out of the subject of education and in respect of these items the power to legislate is vested exclusively in the Parliament. Use of the expression “subject to” in Item 11 of List II of the Seventh Schedule clearly indicates that legislation in respect of excluded matters cannot be undertaken by the State Legislatures. In *Hingir Rampur Coal Company v. State of Orissa* [(1961) 2 SCR 537] this Court in considering the import of the expression “subject to” used in an entry in List II, in relation to an entry in List I observed that to the extent of the restriction imposed by the use of the expression “subject to” in an entry in List II, the power is taken away from the State Legislature. Power of the State to legislate in respect of education including Universities must to the extent to which it is entrusted to the Union Parliament, whether such power is

exercised or not, be deemed to be restricted. If a subject of legislation is covered by Items 63 to 66 even if it otherwise falls within the larger field of “education including Universities” power to legislate on that subject must lie with the Parliament. The plea raised by counsel for the University and for the State of Gujarat that legislation prescribing the medium or media in which instruction should be imparted in institutions of higher education and in other institutions always falls within Item 11 of List II has no force. If it be assumed from the terms of Item 11 of List II that power to legislate in respect of medium of instruction falls only within the competence of the State Legislature and never in the excluded field, even in respect of institutions mentioned in Items 63 to 65, power to legislate on medium of instruction would rest with the State, whereas legislation in other respects for excluded subjects would fall within the competence of the Union Parliament. Such an interpretation would lead to the somewhat startling result that even in respect of national institutions or Universities of national importance, power to legislate on the medium of instruction would vest in the legislature of the States within which they are situate, even though the State Legislature would have no other power in respect of those institutions. Item 11 of List II and Item 66 of List I must be harmoniously construed. The two entries undoubtedly overlap: but to the extent of overlapping, the power conferred by Item 66 List I must prevail over the power of the State under Item 11 of List II. It is manifest that the excluded heads deal primarily with education in institutions of national or special importance and institutions of higher education including research, sciences, technology and vocational training of labour. The power to legislate in respect of primary or secondary education is exclusively vested in the States by Item 11 of List II, and power to legislate on medium of instruction in institutions of primary or secondary education must therefore rest with the State Legislatures. Power to legislate in respect of medium of instruction is, however, not a distinct legislative head; it resides with the State Legislatures in which the power to legislate on education is vested, unless it is taken away by necessary intendment to the contrary. Under Items 63 to 65 the power to legislate in respect of medium of instruction having regard to the width of those items, must be deemed to vest in the Union. Power to legislate in respect of medium of instruction, insofar it has a direct bearing and impact upon the legislative head of coordination and determination of standards in institutions of higher education or research and scientific and technical institutions, must also be deemed by Item 66 List I to be vested in the Union.

23. The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within Entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and courses of study prescribed and the medium selected do not impair standards of education or render the coordination of such standards either on an all-India or other basis impossible or even difficult. Thus, though the powers of the Union and of the State are in the Exclusive Lists, a degree of overlapping is inevitable. It is not possible to lay down any general test which would afford a solution for every question which might arise on this head. On the one hand, it is certainly within the province of the State Legislature to prescribe syllabi and courses of study and, of course, to indicate the medium or media of instruction. On the other hand, it is also within the power of the Union to legislate in respect of media of instruction so as to ensure coordination and determination of standards, that is, to ensure maintenance or

improvement of standards. The fact that the Union has not legislated, or refrained from legislating to the full extent of its powers does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union. It does not, however, follow that even within the permitted relative fields there might not be legislative provisions in enactments made each in pursuance of separate exclusive and distinct powers which may conflict. Then would arise the question of repugnancy and paramountcy which may have to be resolved on the application of the “doctrine of pith and substance” of the impugned enactment. The validity of the State legislation on University education and as regards the education in technical and scientific institutions not falling within Entry 64 of List I would have to be judged having regard to whether it impinges on the field reserved for the Union under Entry 66. In other words, the validity of State legislation would depend upon whether it prejudicially affects coordination and determination of standards, but not upon the existence of some definite Union legislation directed to achieve that purpose. If there be Union legislation in respect of coordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Article 254(1); even if that power be not exercised by the Union Parliament the relevant legislative entries being in the exclusivelists, a State law trenching upon the Union field would still be invalid.

24. Counsel for the University submitted that the power conferred by Item 66 of List I is merely a power to coordinate and to determine standards i.e. it is a power merely to evaluate and fix standards of education, because, the expression “coordination” merely means evaluation, and “determination” means fixation. Parliament has therefore power to legislate only for the purpose of evaluation and fixation of standards in institutions referred to in Item 66. In the course of the argument, however, it was somewhat reluctantly admitted that steps to remove disparities which have actually resulted from adoption of a regional medium and the falling of standards, may be undertaken and legislation for equalising standards in higher education may be enacted by the Union Parliament. We are unable to agree with this contention for several reasons. Item 66 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditioned by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. Power to legislate on a subject should normally be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that subject. Again there is nothing either in Item 66 or elsewhere in the Constitution which supports the submission that the expression “coordination” must mean in the context in which it is used merely evaluation, coordination in its normal connotation means harmonising or bringing into proper relation in which all the things coordinated participate in a common pattern of action. The power to coordinate, therefore, is not merely power to evaluate, it is a power to harmonise or secure relationship for concerted action. The power conferred by Item 66 List I is not conditioned by the existence of a state of emergency or unequal standards calling for the exercise of the power.

25. There is nothing in the entry which indicates that the power to legislate on coordination of standards in institutions of higher education does not include the power to legislate for preventing the occurrence of or for removal of disparities in standards. This power is not conditioned to be exercised merely upon the existence of a condition of disparity nor is it a power merely to evaluate standards but not to take steps to rectify or to prevent

disparity. By express pronouncement of the Constitution makers, it is a power to coordinate, and of necessity, implied therein is the power to prevent what would make coordination impossible or difficult. The power is absolute and unconditional, and in the absence of any controlling reasons it must be given full effect according to its plain and expressed intention. It is true that "medium of instruction" is not an item in the Legislative List. It falls within Item 11 as a necessary incident of the power to legislate on education : it also falls within Items 63 to 66. Insofar as it is a necessary incident of the powers under Item 66 List I it must be deemed to be included in that item and therefore excluded from Item 11 List II. How far State legislation relating to medium of instruction in institutions has impact upon coordination of higher education is a matter which is not susceptible, in the absence of any concrete challenge to a specific statute, of a categorical answer. Manifestly, in imparting instructions in certain subjects, medium may have subordinate importance and little bearing on standards of education while in certain others its importance will be vital. Normally, in imparting scientific or technical instructions or in training students for professional courses like law, engineering, medicine and the like existence of adequate text books at a given time, the existence of journals and other literature availability of competent instructors and the capacity of students to understand instructions imparted through the medium in which it is imparted are matters which have an important bearing on the effectiveness of instruction and resultant standards achieved thereby. If adequate textbooks are not available or competent instructors in the medium, through which instruction is directed to be imparted are not available, or the students are not able to receive or imbibe instructions through the medium in which it is imparted, standards must of necessity fall, and legislation for coordination of standards in such matters would include legislation relating to medium of instruction.

26. If legislation relating to imposition of an exclusive medium of instruction in a regional language or in Hindi, having regard to the absence of text books and journals, competent teachers and incapacity of the students to understand the subjects, is likely to result in the lowering of standards, that legislation would, in our judgment, necessarily fall within Item 66 of List I and would be deemed to be excluded to that extent from the amplitude of the power conferred by Item 11 of List II.

29. We are unable, however, to agree with the High Court that Act 4 of 1961 insofar as it amended the proviso to Section 4(27) is invalid, because it is beyond the competence of the State Legislature. By the amendment of the proviso to Section 4(27), the legislature purported to continue the use of English as the medium of instruction in subjects selected by the Senate beyond a period of ten years prescribed by the Gujarat University Act 1949. Before the date on which the parent act was enacted, English was the traditional medium of instruction in respect of all subjects at the University level. By enacting the proviso as it originally stood, the university was authorised to continue the use of English as an exclusive medium of instruction in respect of certain subjects to be selected by the Senate. By the amendment it is common ground that no power to provide an exclusive medium other than the pre-existing medium is granted. Manifestly, imparting instruction through a common medium, which was before the Act the only medium of instruction all over the country, cannot by itself result in lowering standards and coordination and determination of standards cannot be affected

thereby. By extending the provisions relating to imparting of instruction for a period longer than ten years through the medium of English in the subjects selected by the University, no attempt was made to encroach upon the powers of the Union under Item No. 66 List I.

30. The order of the High Court relating to the invalidity of the Statutes 207 and 209 of the University insofar as they purport to impose “Gujarati or Hindi or both as exclusive medium” of instruction, and the circulars enforcing those Statutes must therefore be confirmed.

Prafulla Kumar Mukherjee v. Bank of Commerce, Limited, Khulna

AIR 1947 PC 60

[Lord Wright, Lord Porter, Lord Uthwatt, Sir Madhavan Nair and Sir John Beaumont]

[*Doctrine of Pith and Substance*]

In this case, the validity of the Bengal Money Lenders Act, 1940 was challenged. The impugned section 30 of the Act provided:

“Notwithstanding anything contained in any law for the time being in force, or in any agreement (1) No borrower shall be liable to pay after the commencement of this Act” –

more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest. Moreover, it is retrospective in its effect, and its limitations can be relied upon by a borrower by way of defence to an action by the moneylender or the borrower can himself institute a suit in respect of a loan to which the provisions of the Act apply.

Section 100, Government of India Act, 1935, is in the following terms:

“100. (1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sch. 7 to this Act (hereinafter called the ‘Federal Legislative List’).

(2) Notwithstanding anything in the next succeeding subsection, the Federal Legislature, and, subject to the preceding subsection a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the ‘Concurrent Legislative List’).

(3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the ‘Provincial Legislative List’).

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

The Federal Legislative List referred to in this section assigned to the Federal Legislature jurisdiction to make laws with respect to

“(28) Cheques, bills of exchange, promissory notes and other like instruments.”

“(33) Corporations, that is to say, the incorporation regulation and winding up of trading corporations including banking.....”

“(38) Banking, that is to say, the conduct of banking business”

and denies that jurisdiction to Provincial Legislatures.

The Provincial Legislative List, however, empowered the Provincial Legislature in Item (27) to make laws with respect to “Trade and Commerce within the Province; money lending and money lenders,” and therefore no objection could be taken to the provisions of the Bengal Money-lenders Act, if they were concerned only with the limitation of capital and interest recoverable.

[Entries 28, 33 and 38 are entries 46, 43 and 45 of List I and entry 27 is entry 30 of List II of the VII Schedule to the Constitution of India.]

LORD PORTER – 11. Having regard to these provisions the respondents say that whilst it is true that they are money-lenders, yet they are engaged in banking and are holders of promissory notes, matters which are solely within the Federal jurisdiction and that a Provincial Act such as the Bengal Money-lenders Act is ultra vires in that it deals with Federal matters. These matters, they say, are so intertwined with the rest of the Act that they cannot be disassociated and therefore the Act is wholly void. But whether this be so or not the particular loans, the subject matter of the actions under review, are secured by promissory notes and in addition are matters of banking; accordingly they say that the Act is void at any rate so far as concerns promissory notes or banking.

14. In the present cases the Judges of the High Court found in favour of the appellants on the ground that though the Federal List prevails over the Provincial List where the two lists come in conflict, yet the Act being a Money-lenders Act, deals with what is in one aspect at least a Provincial matter and is not rendered void in whole or in part by reason of its effect upon promissory notes. In their view the jurisdiction of the Provincial Legislature is not ousted by the inclusion of provisions dealing with promissory notes though that subject-matter is to be found in Item 28 of the Federal List. The reference to Bills of Exchange and promissory notes in that item, they held, only applies to those matters in their aspect of negotiability and not in their contractual aspect. In their contractual aspect the appropriate item, as they considered, was entry (10) of List 111 "contract". "Interest on promissory notes," they say,

(1) is a matter with respect to contracts, a subject to be found in the Concurrent Legislative List. The Bengal Act has received the assent of the Governor-General and in view of the provisions of S 107 (2), Constitution Act, Ss. 29 (2) and 30, Bengal Money-lenders Act, 1940 must prevail.

15. Section 107, Constitution Act (identical with Article 254 of the Constitution of India), is in the following terms:

107. (1) If any provision of a Provincial law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void.

16. The High Court's conclusion would no doubt be true, if they are right in saying that interest on promissory notes is a matter with respect to contracts and therefore an item contained in the Concurrent List. The Act to which it was said to be repugnant was the Negotiable Instruments Act, 1881, which no doubt applied to the whole of India, but, as the High Court points out this Act is not a Federal but an existing Indian Act, and under the provisions of S. 107 (2) would give place to the Bengal Money-lenders Act (which had received the assent of the Governor-General) provided that Act does not deal with matters over which the Federal Legislature alone has jurisdiction. This opinion, however, was reversed in the Federal Court which thought the Act a clear interference with the subjects set out in Item 28 in the Federal List and declared the Bengal Act to be *ultra vires* in so far as it dealt with those subjects. It was not, however, in their opinion totally void.

17. The Federal Court had in fact already given the matter some consideration in two previous cases, viz: (1) 1940 FCR 188 (1) a case in which the Madras Agriculturists' Relief Act of 1938 was impugned. That Act did not specifically mention promissory notes but it did contain provisions limiting the liability and diminishing the debts of agriculturists in terms wide enough to include debts due on promissory notes. In that case, however, judgment had been obtained upon the promissory note and the Court held that inasmuch as the debt had passed into a claim Under a decree, before the Agriculturists' Relief Act had been enacted, there was nothing to preclude it from being scaled down under the terms of that Act. Accordingly the Court found it unnecessary to deal with a matter in which a claim on promissory notes as such was involved. (2) A similar result was reached in 1944 FCR 126 (2) a case upon which their Lordships have to pronounce at a later stage.

18. All the courts in India have considered the Bengal Money-lenders Act, to deal in pith and substance with money-lenders and money lending and with this view their Lordships agree. But such a view is not necessarily conclusive of the question in India and indeed, as the respondents contend, is not decisive of the matter even in Canada or Australia. With these and the other questions arising in the case their Lordships must now grapple.

19. The appellants set out their contentions under four heads. Firstly, they said that power to make laws with respect to money-lending necessarily imports the power to affect the lender's rights against the borrower upon a promissory note given in the course of a money-lending transaction. The Constitution Act they said must be read as a whole so as to reconcile item 28 of List I with Item 27 of List II, and so read Item 27 is a particular exception from the general provisions of Item 28.

20. Secondly, they argued that the impugned Act is in pith and substance an Act with respect to money-lenders and money-lending and is not rendered void in whole or in part because it incidentally touches upon matters outside the authorized field.

21. Thirdly, they maintained that upon its true construction, item 28 is confined to that part of the law relating to negotiable instruments which has reference to their negotiability and does not extend to that part which governs the contractual relationship existing between

the immediate parties to a bill of exchange or promissory note. That part, they said, lay in the field of contract.

22. If then the subject matter of the Act lay in contract, which is one of the items within the concurrent List, it was, it was true, in conflict with an existing Indian Law viz : the Negotiable Instruments Act, 1881 within the meaning of S.31 (1), Constitution Act, but inasmuch as the impugned Act had received the assent of the Governor-General, it must prevail over the Negotiable Instruments Act as a result of the provision of S. 107 (2), Constitution Act.

23. The Respondents on the other hand pointed out in the first place that the Constitution Act differs in form from the British North America Act and the Australian Commonwealth Act. Those Acts, they said, contain no concurrent list and therefore recognize, as the Constitution Act does not, that there must be some overlapping of powers. Moreover, the Indian Act contains a strict hierarchy of powers since under the terms of S. 100, Federal List prevails over both the Concurrent and the Provincial List, and the Concurrent List in its turn prevails over the Provincial List. "The Provincial Legislature", as it enacts, "has not power to make laws with respect to any of the matters enumerated in List 1", and this prohibition, they contend, extends to any matter whatsoever set out in the Federal List, however incidental to a matter contained in the Provincial List. No question could arise, they maintained, as to pith and substance, The Constitution Act directly prohibits any interference by a Province with any matter set out in List I.

24. For the same reasons they said that there could be no question of an exception out of the generality of expressions used in List I on the ground that a matter dealt with in List II was particularly described whereas it was only referred to generally in List I under a wider heading.

25. In any case they said the expression "Money Lending" was no more particular than the expression "Bills of Exchange, promissory notes, and other instruments of the like kind". Finally, they contended that if money-lending was to be regarded as an incidence of contract, then the Negotiable Instruments Act being an Act of the Government of India had precedence over the impugned Act, in those subjects with which they both dealt.

27. For instance it is no doubt true, as has been pointed out above, and has been accepted in the Courts in India that in the case of a matter contained in the Concurrent List, the Act of a Provincial Legislature which has been approved by the Governor-General prevails over an existing Indian Law (See S. 107 (2), Government of India Act, 1935). If then the impugned Act is to be considered as a matter of contract, it would prevail over the Negotiable Instruments Act if that Act or the part of it in respect of which repugnancy is alleged is also to be regarded as contractual and therefore coming within List III.

28. But this result depends upon two assumptions viz.: (1) that the impugned Act in dealing with promissory notes, or for that matter with banking, is concerned with contract and (2) that the reference to negotiable instruments, promissory notes and the like instruments in List I Item 28 is a reference to them in their capacity of negotiability only.

29. The point was raised in the Federal Court in 1940 FCR 188 but that Court did not find it necessary finally to decide it, though Sulaiman J. in his dissenting judgment inferentially

rejected it. Like the Federal Court, their Lordships in the present case do not find it necessary to express a final opinion upon these points, but it is, they think, essential to determine to what extent under the Indian Constitution Act of 1935 the jurisdiction of the several legislatures is affected by ascertaining what is the pith and substance of an impugned Act.

30. The two remaining points taken on behalf of the appellant can in their Lordships' opinion and indeed must be considered together since to say that power to make laws in respect to money-lending necessarily imparts power to affect the lender's rights in respect of promissory notes given as security in money-lending transactions is in their view to maintain that if the pith and substance of the Act, the validity of which is challenged, is money-lending, it comes within the Provincial jurisdiction. Three questions therefore arise, viz:

- (1) Does the Act in question deal in pith and substance with money-lending ?
- (2) If it does is it valid though it incidentally trenches upon matters reserved for the Federal Legislature?
- (3) Once it is determined whether the pith and substance is money-lending, is the extent to which the Federal field is invaded a material matter?

31. (1) All the Courts in India have held that the transactions in question are in pith and substance money-lending transactions and their Lordships are of the same opinion. To take promissory note as security for a loan is the common practice of money-lenders and if a legislature cannot limit the liability of a borrower in respect of a promissory note given by him it cannot in any real sense deal with money-lending. All the lender would have to do in order to oust its jurisdiction would be to continue his normal practice of taking the security of a promissory note and he would then be free from any restrictions imposed by the Provincial Legislature. In truth, however, the substance is money-lending and the promissory note is but the instrument for securing the loan.

32. (2) The second is a more difficult question and was put with great force by Counsel for the respondents. The principles, it was said, which obtain in Canada and Australia have no application to India. In the former instance either the Dominions and Provinces or the Commonwealth and States divide the jurisdiction between them, the Dominion or as the case may be the States retaining the power not specifically given to the Provinces or the Commonwealth. In such cases it is recognized that there must be a considerable overlapping of powers. But in India, it is asserted, the difficulty in dividing the powers has been foreseen. Accordingly three, not two lists, have been prepared in order to cover the whole field and these lists have a definite order of priority attributed to them so that anything contained in List I is reserved solely for the Federal Legislature, and however incidentally it may be touched upon in an Act of the Provincial Legislature, that Act is ultra vires in whole or at any rate where in any place it affects an entry in the Federal List.

33. Similarly, any item in the Concurrent List if dealt with by the Federal Legislature is outside the power of the Provinces and it is only the matters specifically mentioned in List II over which the Province has complete jurisdiction, although so long as any item in the Concurrent List has not been dealt with by the Federal Legislature the Provincial Legislature is binding.

34. In their Lordships' opinion this argument should not prevail. To take such a view is to simplify unduly the task of distinguishing between the powers of divided jurisdictions. It is not possible to make so clean a cut between the Powers of the various legislatures: they are bound to overlap from time to time.

35. Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap. As Sir Maurice Gwyer C. J. said in 1940 FCR 188, 201:

It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character-for the purpose of determining whether it is legislation with respect to matters in this list or in that.

36. Their Lordships agree that this passage correctly describes the grounds upon which the rule is founded, and that it applies to Indian as well as to Dominion legislation. No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provisions should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two or even by arranging for a hierarchy of jurisdictions.

37. Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with.

38. (3) Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

39. This view places the precedence accorded to the three lists in its proper perspective. No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II, but, the question still remains, priority in what respect? Does the priority

of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view.

40. If this be correct it is unnecessary to determine whether the jurisdiction as to promissory notes given to the Federal Legislature is or is not confined to negotiability. The Bengal Money-lenders Act is valid because it deals in pith and substance with money-lending, not because legislation in respect of promissory notes by the Federal Legislature is confined to legislation affecting their negotiability— a matter as to which their Lordships express no opinion.

41. It will be observed that in considering the principles involved their Lordships have dealt mainly with the alleged invalidity of the Act, based upon its invasion of the Federal entry, "promissory notes" Item (25) in List I. They have taken this course, because the case was so argued in the Courts in India.

42. But the same considerations apply in the case of banking, Whether it be urged that the Act trenches upon the Federal List by making regulations for banking or promissory notes, it is still an answer that neither of those matters is its substance and this view is supported by its provisions exempting scheduled and notified banks from compliance with its requirements.

43. In the result their Lordships are of opinion that the Act is not void either in whole or in part as being ultra vires the Provincial Legislature. This opinion renders it unnecessary to pronounce upon the effect of the Ordinance No.11 of 1945, purporting to validate, inter alia, the impugned Act and their Lordships express no opinion upon it. But having regard to their views expressed in this judgment they will humbly advise His Majesty that the appeal be allowed.

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State of Rajasthan v. G. Chawla

AIR 1959 SC 544

[S.R. Das, C.J. and S.K. Das, P.B. Gajendragadkar, K.N. Wanchoo and M. Hidayatullah, JJ.]

M. Hidayatullah, J. - This appeal was preferred by the State of Ajmer, but after the reorganisation of States, the State of Rajasthan stands substituted for the former State. It was filed against the decision of the Judicial Commissioner of Ajmer, who certified the case as fit for appeal to this Court under Article 132 of the Constitution.

2. The Ajmer Legislative Assembly enacted the Ajmer (Sound Amplifiers Control) Act, 1952 (Ajmer III of 1953), (hereinafter called the Act) which received the assent of the President on 9-3-1953. This Act was successfully impugned by the respondents before the learned Judicial Commissioner, who held that it was in excess of the powers conferred on the State Legislature under Section 21 of the Government of Part C States Act, 1951 (49 of 1951), and therefore, ultra vires the State Legislature.

3. The respondents (who were absent at the hearing) were prosecuted under Section 3 of the Act for breach of the first two conditions of the permit granted to the first respondent, to use sound amplifiers on May 15 and 16, 1954. These amplifiers, it was alleged against them, were so tuned as to be audible beyond 30 yards (Condition 1) and were placed at a height of more than 6 feet from the ground (Condition 2). The second respondent was at the time of the breach, operating the sound amplifiers for the *Sammelan*, for which permission was obtained.

4. On a reference under Section 432 of the Code of Criminal Procedure, the Judicial Commissioner of Ajmer held that the pith and substance of the Act fell within entry No. 31 of the Union list and not within entry No. 6 of the State List, as was claimed by the State.

5. Under Article 246(4) of the Constitution, Parliament had power to make laws for any part of the territory of India not included in Part A or B of the First Schedule, notwithstanding that such matter was a matter enumerated in the State List. Section 21 of the Government of Part C States Act (49 of 1951) enacted:

“(1) Subject to the provisions of this Act, the Legislative Assembly of a State, may undertake laws for the whole or any part of the State with respect to any of the matters enumerated in the State List or in the Concurrent list, * * * * *

(2) Nothing in sub-section (1) shall derogate from the power conferred on Parliament by the Constitution to make laws with respect to any matter for a State or any part thereof.”

6. Under these provisions, the legislative competence of the State Legislature was confined to the two lists other than the Union list. If, therefore, the subject-matter of the Act falls substantially within an Entry in the Union list, the Act must be declared to be unconstitutional, but it is otherwise, if it falls substantially within the other two lists, since prima facie there is no question of repugnancy to a Central statute or of an “occupied field”.

7. The rival entries considered by the Judicial Commissioner read as follows:

Entry No. 31 of the Union List – Post and Telegraphs; Telephones, wireless, broadcasting and other like forms of communication.

Entry No. 6 of the State List – Public health and sanitation, hospitals and dispensaries.

The attention of the learned Judicial Commissioner was apparently not drawn to entry No. 1 of the State List, which is to the following effect:

Entry No. 1 of the State List – Public order (but not including the use of naval, military or air forces of the Union in aid of civil power.

Shri H.J. Umrigar relied upon the last Entry either alone, or in combination with entry No. 6 of the State List, and we are of opinion that he was entitled to do so.

8. After the dictum of Lord Selborne in *Queen v. Burah* [(1878) 3 App Cas 889], oft-quoted and applied, it must be held as settled that the legislatures in our Country possess plenary powers of legislation. This is so even after the division of legislative powers, subject to this that the supremacy of the legislatures is confined to the topics mentioned as Entries in the lists conferring respectively powers on them. These Entries, it has been ruled on many an occasion, though meant to be mutually exclusive are sometimes not really so. They occasionally overlap, and are to be regarded as *enumeratio simplex* of broad categories. Where in an organic instrument such enumerated powers of legislation exist and there is a conflict between rival lists, it is necessary to examine the impugned legislation in its pith and substance, and only if that pith and substance falls substantially within an entry or entries conferring legislative power, is the legislation valid, a slight transgression upon a rival list, notwithstanding. This was laid down by Gwyer C.J. in *Subramanyam Chettiar v. Muthuswamy Goundan* [(1940) FCR 188, 201] in the following words:

“It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its ‘pith and substance’, or its ‘true nature and character’, for the purpose of determining whether it is legislation with respect to matters in this list or in that.”

This dictum was expressly approved and applied by the Judicial Committee in *Prafulla Kumar Mukherjee v. Bank of Commerce, Ltd., Khulna* [(1947) LR 74 IA 23] and the same view has been expressed by this Court on more than one occasion. It is equally well settled that the power to legislate on a topic of legislation carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given.

9. It becomes, therefore, necessary to examine closely how the Act is constructed and what it provides. The Act in its preamble expresses the intent as the control of the ‘use’ of sound amplifiers. The first section deals with the title, the extent, the commencement and the interpretation of the Act. It does not unfold its pith and substance. The last two sections provide for penalty for unauthorised use of sound amplifiers and the power of police officers to arrest without warrant. They stand or fall with the constitutionality or otherwise of the second section, which contains the essence of the legislation.

10. That section prohibits the use in any place, whether public or otherwise, of any sound amplifier except at times and places and subject to such conditions as may be allowed, by order in writing either generally or in any case or class of cases by a police officer not below the rank of an inspector, but it excludes the use in a place other than a public place, of a sound amplifier which is a component part of a wireless apparatus duly licensed under any law for the time being in force. In the explanation which is added, "public place" is defined as a place (including a road, street or way, whether a thoroughfare or not or a landing place) to which the public are granted access or have a right to resort or over which they have a right to pass.

11. The gist of the prohibition is the "use" of an external sound amplifier not a component part of a wireless apparatus, whether in a public place or otherwise, without the sanction in writing of the designated authority and in disregard of the conditions imposed on the use thereof. It does not prohibit the use in a place other than a public place of a sound amplifier which is a component part of a wireless apparatus.

12. There can be little doubt that the growing nuisance of blaring loudspeakers powered by amplifiers of great output needed control, and the short question is whether this salutary measure can be said to fall within one or more of the entries in the State List. It must be admitted that amplifiers are instruments of broadcasting and even of communication, and in that view of the matter, they fall within Entry 31 of the Union list. The manufacture, or the licensing of amplifiers or the control of their ownership or possession, including the regulating of the trade in such apparatus is one matter, but the control of the 'use' of such apparatus though legitimately owned and possessed, to the detriment of tranquillity, health and comfort of others is quite another. It cannot be said that public health does not demand control of the use of such apparatus by day or by night, or in the vicinity of hospitals or schools, or offices or habited localities. The power to legislate in relation to public health includes the power to regulate the use of amplifiers as producers of loud noises when the right of such user, by the disregard of the comfort of and obligation to others, emerges as a manifest nuisance to them. Nor is it any valid argument to say that the pith and substance of the Act falls within Entry 31 of the Union list, because other loud noises, the result of some other instruments etc., are not equally controlled and prohibited.

13. The pith and substance of the impugned Act is the control of the use of amplifiers in the interests of health and also tranquillity, and thus falls substantially (if not wholly) within the powers conferred to preserve, regulate and promote them and does not so fall within the entry in the Union list, even though the amplifier, the use of which is regulated and controlled is an apparatus for broadcasting or communication.

14. On a view of the Act as a whole, we think that the substance of the legislation is within the powers conferred by entry No. 6 and conceivably entry No. 1 of the State List, and it does not purport to encroach upon the field of entry No. 31, though it incidentally touches upon a matter provided there. The end and purpose of the legislation furnishes the key to connect it with the State List. Our attention was not drawn to any enactment under entry No. 31 of the Union list by which the ownership and possession of amplifiers was burdened with any such regulation or control, and there being thus no question of repugnancy or of an occupied field, we have no hesitation in holding that the Act is fully covered by the first cited entry and conceivably the other in the State List.

15. The Judicial Commissioner's order, with respect, cannot be upheld, and it must be set aside. We allow the appeal and reverse the decision, and we declare the Act in all its parts to be *intra vires* the State Legislature. As the matter is four years old we do not order a retrial and we record that the State does not, as a result of the reversal of the decision under appeal, propose to prosecute the respondents, and that a statement to this effect was made before us at the hearing.

State of Karnataka v. Drive-in Enterprises

(2001) 4 SCC 60

[VN Khare and Ruma Pal, JJ.]

V.N. KHARE, J. - This appeal is directed against the judgment of the Karnataka High Court passed in the writ petition filed by the respondent herein whereby sub-clause (v) of clause (i) of Section 2 of the Karnataka Entertainments Tax Act, 1958 (“the Act”) was struck down as being beyond the legislative competence of the State Legislature.

2. The respondent herein, is the owner and proprietor of a drive-in-theatre in the outskirts of Bangalore city wherein cinema films are exhibited. It is alleged that the drive-in-theatre is distinct and separate in its character from other cinema houses or theatres. The drive-in-cinema is defined under Rule 111-A of the Karnataka Cinemas (Regulation) Rules, 1971 (hereinafter referred to as “the Rules”) framed in exercise of the powers conferred on the State Government under Section 19 of the Karnataka Cinemas (Regulation) Act, 1964. The definition of drive-in-cinema runs as under:

“111-A. (1) ‘Drive-in-cinema’ means a cinema with an open-air theatre premises into which admission may be given normally to persons desiring to view the cinema while sitting in motor cars. However, where an auditorium is also provided in a ‘drive-in-cinema’ premises, persons other than those desiring to view the cinema while sitting in motor cars can also be admitted. Such drive-in-cinemas may have a capacity to accommodate not more than one thousand cars;”

The drive-in-theatre of the respondent with which we are concerned here is a cinema with an open-air theatre into which admissions are given to persons desiring to see cinema while sitting in their motor cars taken inside the theatre. The drive-in-theatre has also an auditorium wherein other persons who are without cars, view the film exhibited therein either standing or sitting. The persons who are admitted to view the film exhibited in the auditorium are required to pay Rs 3 for admission therein. It is not disputed that the State Government has levied entertainment tax on such admission and the same is being realised. However, if any person desires to take his car inside the theatre with a view to see the exhibition of the films while sitting in his car in the auditorium, he is further required to pay a sum of Rs. 2 to the proprietor of the drive-in-theatre. The appellant State in addition to charging entertainment tax on the persons being entertained, levied entertainment tax on admission of cars inside the theatre. This levy was challenged by the proprietors of the drive-in-theatres by means of writ petitions before the Karnataka High Court which were allowed and levy was struck down by a Single Judge of the High Court. The said judgment was affirmed by a Division Bench of that Court. It was held, that the levy being not on a person entertained (i.e. car/motor vehicle), the same was ultra vires. After the aforesaid decision, the Karnataka Legislature amended the Act by Act 3 of 1985. By the said amendment, sub-clause (v) was added to clause (i) of Section 2 of the said Act. Simultaneously, Sections 4-A and 6 of the Act were also amended. After the aforesaid amendments, the appellant herein, again levied entertainment tax on admission of cars into the drive-in-theatre. This levy was again challenged by means of a petition under Article 226 of the Constitution and the said writ petition was allowed, and as stated above, the High Court struck down sub-clause (v) to clause (i) of Section 2 of the Act.

3. Learned counsel appearing for the appellant urged that insertion of sub-clause (v) of clause (i) of Section 2 of the Act is a valid piece of legislation and after its insertion and amendment of Section 6 and Section 4-A of the Act, the appellant State was competent to levy and realise the entertainment tax on the admission of cars/motor vehicles inside the drive-in-theatre. Learned counsel urged that in pith and substance, the levy is on the person entertained and not on the admission of cars/motor vehicles inside the drive-in-theatre. It was also urged that the State Legislature is fully competent to impose such a levy.

4. Learned counsel for the respondent, inter alia, urged that the drive-in-theatre is a different category of cinema unlike cinema houses or theatres, that the special feature of the drive-in-theatre is that a person can view the film exhibited therein while sitting in his car, that the admission of cars/motor vehicles into the drive-in-theatre is incidental and part of the concept of drive-in-theatre, that the film that is shown in drive-in-theatre is like any other film shown in cinema houses, and that the State Legislature is not competent to levy entertainment tax on admission of motor vehicles inside the drive-in-theatre. Learned counsel further argued that the incidence of tax being on the entertainment, the State Legislature is competent to enact law imposing tax only on persons entertained. In a nutshell, the argument is that the State Legislature can levy entertainment tax on human beings and not on any inanimate object. According to learned counsel, since the vehicle is not a person entertained, the State Legislature is not competent to enact law to levy entertainment tax on the admission of cars/motor vehicles inside the drive-in-theatre.

5. On the arguments of learned counsel of parties, the question arises as to whether the State Legislature is competent to enact law to levy tax under Entry 62 List II of the Seventh Schedule on admission of cars/motor vehicles inside the drive-in-theatre.

6. Whereas in the present case, the vires of an enactment is impugned on the ground that the State Legislature lacks power to enact such an enactment, what the court is required to ascertain is the true nature and character of such an enactment with reference to the power of the State Legislature to enact such a law. While adjudging the vires of such an enactment, the court must examine the whole enactment, its object, scope and effect of its provision. If on such adjudication it is found that the enactment falls substantially on a matter assigned to the State Legislature, in that event such an enactment must be held to be valid even though nomenclature of such an enactment shows that it is beyond the competence of the State Legislature. In other words, when a levy is challenged, its validity has to be adjudged with reference to the competency of the State Legislature to enact such a law, and while adjudging the matter what is required to be found out is the real character and nature of levy. In sum and substance, what is to be found out is the real nature of levy, its pith and substance and it is in this light the competency of the State Legislature is to be adjudged. The doctrine of pith and substance means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature, it cannot be held to be ultra vires merely because its nomenclature shows that it encroaches upon matters assigned to another heading of legislation. The nomenclature of a levy is not conclusive for determining its true character and nature. It is no longer res integra that the nomenclature of a levy is not a true test of nature of a levy. In *Goodyear India Ltd. v. State of Haryana* [(1990) 2 SCC 71], it was held that the nomenclature of an Act is not conclusive and for determining the true character and nature of

a particular levy with reference to the legislative competence of the legislature, the court will look into the pith and substance of the legislation. In ***R.R. Engineering Co. v. Zila Parishad, Bareilly*** [(1980) 3 SCC 330], the question arose as to whether the Zila Parishad can levy tax on calling or property. The argument was that the levy is tax on income, therefore, it is ultra vires. However this Court held thus: (SCC Headnote)

“The fact that the tax on circumstances and property is often levied on calling or property is not conclusive of the nature of the tax; it is only as a matter of convenience *that income is adopted as a yardstick or measure for assessing the tax*. The measure of the tax is not a true test of the nature of the tax. Considering the pith and substance of the tax, it falls in the category of a tax on ‘*a man’s financial position, his status taken as a whole* and includes what may not be properly comprised under the term “property” and at the same time ought not to escape assessment’.” (emphasis supplied)

7. In ***Kerala SEB v. Indian Aluminium Co. Ltd.*** [(1976) 1 SCC 466], it was held thus:

“For deciding under which entry a particular legislation falls the theory of ‘pith and substance’ has been evolved by the courts. If in pith and substance a legislation falls within one list or the other but some portion of the subject-matter of that legislation incidentally trenches upon and might come to fall under another list, the Act as a whole would be valid notwithstanding such incidental trenching.”

8. In ***Governor-General-in-Council v. Province of Madras*** [AIR 1945 PC 98], the question arose as to whether the levy was sales tax or excise duty. In that connection the Privy Council held:

“Its real nature, its ‘pith and substance’ is that it imposes a tax on the sale of goods. No other succinct description could be given of it except that it is a ‘tax on the sale of goods’. It is in fact a tax which according to the ordinary canons of interpretation appears to fall precisely within Entry 48 of the Provincial Legislative List.”

9. In (***Morris Leventhal v. David Jones Ltd.*** [AIR 1930 PC 129], the question arose as to whether the legislature can impose bridge tax when the power to legislate was really in respect of “tax on land”. The levy of bridge tax was held valid under legislative power of tax on land. It was held as thus: (AIR p. 133)

“The appellants’ contention that though directly imposed by the legislature, the bridge tax is not a land tax, was supported by argument founded in particular on two manifest facts. The bridge tax does not extend to land generally throughout New South Wales, but to a limited area comprising the City of Sydney and certain specified shires, and the purpose of the tax is not that of providing the public revenue for the common purposes of the State but of providing funds for a particular scheme of betterment. No authority was vouched for the proposition that an impost laid by statute upon property within a defined area, or upon specified classes of property, or upon specified classes of persons, is *not within the true significance of the term a tax*. Nor so far as appears has it ever been successfully contended that revenue raised by statutory imposts for specific purposes is not taxation.” (emphasis supplied)

10. In ***Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur*** [AIR 1962 All 83] which was subsequently approved in ***Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur*** [AIR 1965 SC 895], the question arose as to whether the Municipal Board can levy

water tax when the power to legislate was in respect of the land and building. The High Court held that in pith and substance *water tax is not on water but it is a levy on land and building.*

11. We are in full agreement with the aforesaid statement of law and are of the view that it is not the nomenclature of the levy which is decisive of the matter, but its real nature and character for determining the competency or power of the State Legislature to enact law imposing the levy. It is in the light of the aforesaid statement of law, we would examine the validity of levy challenged in the present case. Before we deal with the question in hand, we would first examine the provisions of the Act. Section 2(a) of the Act defines "admission". "Admission" includes admission as a spectator or as one of the audiences, and admission for the purpose of amusement by taking part in an entertainment. Clause (b) of Section 2 defines "admission to an entertainment" which includes admission to any place in which an entertainment is held. Clause (ca) of Section 2 defines "cinema theatre" as any place of entertainment in which cinematography shows are held to which persons are admitted for payment. Clause (e) of Section 2 of the Act defines "entertainment", which means a horse race or cinematography shows including exhibition of video films to which persons are admitted on payment.

12. Section 2(i) defines "payment for admission" which runs as under:

"2. (i)(i) any payment made by a person who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof for admission to which a payment involving a tax or a higher tax is required; * * *

(v) *any payment for admission of a motor vehicle into the auditorium of a cinema known as drive-in-theatre.*" (emphasis supplied)

Section 3 is a charging section. The relevant provisions run as under:

"3. *Tax on payment for admission to entertainments.*- (1) There shall be levied and paid to the State Government on each payment for admission (excluding the amount of tax) to an entertainment, other than the entertainment referred to in sub-clause (iii) of clause (e) of Section 2, entertainment tax at 70 per cent of such payment.

(2) Notwithstanding anything contained in sub-section (1) there shall be levied and paid to the State Government (except as otherwise expressly provided in this Act) on every complimentary ticket issued by the proprietor of an entertainment, the entertainment tax at the appropriate rate specified in sub-section (1) in respect of such entertainment, as if full payment had been made for admission to the entertainment according to the class of seat or accommodation which the holder of such ticket is entitled to occupy or use; and for the purpose of this Act, the holder of such ticket shall be deemed to have been admitted on payment."

Sub-section (1) of Section 6 runs as under:

"6. *Manner of payment of tax.*- (1) Save as otherwise provided in Section 4-A or 4-B, the entertainment tax shall be levied in respect of each payment for admission or each admission on a complimentary ticket and shall be calculated and paid on the number of admissions."

13. Entry 62 List II of the Seventh Schedule empowers the State Legislature to levy tax on luxuries, entertainment, amusements, betting and gambling. Under Entry 62, the State

Legislature is competent to enact law to levy tax on luxuries and entertainment. The incidence of tax is on entertainment. Since entertainment necessarily implies the persons entertained, therefore, the incidence of tax is on the persons entertained. Coming to the question whether the State Legislature is competent to levy tax on admission of cars/motor vehicles inside the drive-in-theatre especially when it is argued that cars/motor vehicles are not the persons entertained. Section 3 which is the charging provision, provides for levy of tax on each payment of admission. Thus, under the Act, the State is competent to levy tax on each admission inside the drive-in-theatre. The challenge to the levy is on the ground that the vehicle is not a person entertained and, therefore, the levy is ultra vires. It cannot be disputed that the car or motor vehicle does not go inside the drive-in-theatre of its own. It is driven inside the theatre by the person entertained. In other words the person entertained is admitted inside the drive-in-theatre along with the car/motor vehicle. Thereafter the person entertained while sitting in his car inside the auditorium views the film exhibited therein. This shows that the person entertained is admitted inside the drive-in-theatre along with the car/motor vehicle. This further shows that the person entertained carries his car inside the drive-in-theatre in order to have better quality of entertainment. The quality of entertainment also depends on with what comfort the person entertained has viewed the cinema films. Thus, the quality of entertainment obtained by a person sitting in his car would be different from a squatter viewing the film show. The levy on entertainment varies with the quality of comfort with which a person enjoys the entertainment inside the drive-in-theatre. In the present case, a person sitting in his car or motor vehicle has the luxury of viewing cinema films in the auditorium. It is the variation in the comfort offered to the person entertained for which the State Government has levied entertainment tax on the person entertained. The real nature and character of the impugned levy is not on the admission of cars or motor vehicles, but the levy is on the person entertained who takes the car inside the theatre and watches the film while sitting in his car. We are, therefore, of the view that in pith and substance the levy is on the person who is entertained. Whatever be the nomenclature of levy, in substance, the levy under heading "admission of vehicle" is a levy on entertainment and not on admission of vehicle inside the drive-in-theatre. As long as in pith and substance the levy satisfies the character of levy, i.e. "entertainment", it is wholly immaterial in what name and form it is imposed. The word "entertainment" is wide enough to comprehend in it, the luxury or comfort with which a person entertains himself. Once it is found there is a nexus between the legislative competence and subject of taxation, the levy is justified and valid. We, therefore, find that the State Legislature was competent to enact sub-clause (v) of clause (i) of Section 2 of the Act. We accordingly hold that the impugned levy is valid.

14. For the aforesaid reasons, we are of the view that the High Court fell in serious error in holding that sub-clause (v) of clause (i) of Section 2 of the Act is ultra vires Entry 62 List II of the Seventh Schedule.

15. Consequently, this appeal deserves to be allowed. The judgment under appeal is set aside. The writ petition shall stand dismissed. The appeal is allowed.

* * * * *

K.C. Gajapati Narayan Deo v. State of Orissa

AIR 1953 SC 375

[M. Patanjali Sastri, C.J. and B.K.Mukherjea, S.R, Das, Ghulam Hasan and N.H. Bhagwati, JJ.]

B.K. MUKHERJEA, J. - These six appeals arise out of as many applications, presented to the High Court of Orissa, under Article 226 of the Constitution, by the proprietors of certain permanently settled estates within the State of Orissa, challenging the constitutional validity of the legislation known as the Orissa Estates Abolition Act, 1952 (hereinafter called “the Act”) and praying for mandatory writs against the State Government restraining them from enforcing the provisions of the Act so far as the estates owned by the petitioners are concerned.

2. The impugned Act was introduced in the Orissa State Legislature on the 17th of January, 1950, and was passed by it on 28th September, 1951. It was reserved by the State Governor for consideration of the President and the President gave his assent on 23rd January, 1952. The Act thus receives the protection of Articles 31(4) and 31(A) of the Constitution though it was not and could not be included in the list of statutes enumerated in the Ninth schedule to the Constitution, as referred to in Article 31(B).

3. The Act, so far as its main features are concerned, follows the pattern of similar statutes passed by the Bihar, Uttar Pradesh and Madhya Pradesh Legislative Assemblies. The primary purpose of the Act is to abolish all zemindary and other proprietary estates and interests in the State of Orissa and after eliminating all the intermediaries, to bring the ryots or the actual occupants of the lands in direct contact with the State Government. It may be convenient here to refer briefly to some of the provisions of the Act which are material for our present purpose. The object of the legislation is fully set out in the Preamble to the Act which discloses the public purpose underlying it. Section 2(g) defines an “estate” as meaning any land held by an intermediary and included under one entry in any of the general registers of revenue-paying lands and revenue-free lands prepared and maintained under the law for the time being in force by the Collector of a district. The expression “intermediary” with reference to any estate is then defined, and it means a proprietor, sub-proprietor, landlord, landholder ... thikadar, tenure-holder, under-tenure-holder and includes the holder of inam estate, jagir and maufi tenures and all other interests of similar nature between the ryot and the State. Section 3 of the Act empowers the State Government to declare, by notification, that the estate described in the notification has vested in the State free from all incumbrances. Under Section 4 it is open to the State Government, at any time before issuing such notification, to invite proposals from “intermediaries” for surrender of their estates and if such proposals are accepted, the surrendered estate shall vest in the Government as soon as the agreement embodying the terms of surrender is executed. The consequences of vesting either by issue of notification or as a result of surrender are described in detail in Section 5 of the Act. It would be sufficient for our present purpose to state that the primary consequence is that all lands comprised in the estate including communal lands, non-ryoti lands, waste lands, trees, orchards, pasture lands, forests, mines and minerals, quarries, rivers and streams, tanks,

water channels, fisheries, ferries, hats and bazars, and buildings or structures together with the land on which they stand shall, subject to the other provisions of the Act, vest absolutely in the State Government free from all incumbrances and the intermediary shall cease to have any interest in them. Under Section 6, the intermediary is allowed to keep for himself his homestead and buildings and structures used for residential or trading purposes such as golas, factories, mills etc. but buildings used for office or estate purposes would vest in the Government. Section 7 provides that an intermediary will be entitled to retain all lands used for agricultural or horticultural purposes which are in his khas possession at the date of vesting. Private lands of the intermediary, which were held by temporary tenants under him, would however vest in the Government and the temporary tenants would be deemed to be tenants under the Government, except where the intermediary himself holds less than 33 acres of land in any capacity. As regards the compensation to be paid for the compulsory acquisition of the estates, the principle adopted is that the amount of compensation would be calculated at a certain number of years' purchase of the net annual income of the estate during the previous agricultural year, that is to say, the year immediately preceding that in which the date of vesting falls. First of all, the gross asset is to be ascertained and by gross asset is meant the aggregate of the rents including all cesses payable in respect of the estate. From the gross asset certain deductions are made in order to arrive at the net income. These deductions include land revenue or rent including cesses payable to the State Government, the agricultural income tax payable in the previous year, any sum payable as chowkidary or municipal tax in respect of the buildings taken over as office or estate buildings and also cost of management fixed in accordance with a sliding percentage scale with reference to the gross income. Any other sum payable as income tax in respect of any other kind of income derived from the estate would also be included in the deductions. The amount of compensation thus determined is payable in 30 annual equated instalments commencing from the date of vesting and an option is given to the State Government to make full payment at any time. These in brief are the main features of the Act.

4. There was a fairly large number of grounds put forward on behalf of the appellants before the High Court in assailing the validity of the Act. It is to be remembered that the question of the constitutional validity of three other similar legislative measures passed, respectively, by the Bihar, Uttar Pradesh and Madhya Pradesh Legislative Assemblies had already come for consideration before this Court and this Court had pronounced all of them to be valid with the exception of two very minor provisions in the Bihar Act. In spite of all the previous pronouncements there appears to have been no lack of legal ingenuity to support the present attack upon the Orissa legislation, and as a matter of fact, much of the arguments put forward on behalf of the appellants purported to have been based on the majority judgment of this Court in the Bihar appeals, where two small provisions of the Bihar Act were held to be unconstitutional.

5. The arguments advanced on behalf of the appellants before the High Court have been classified by the learned Chief Justice in his judgment under three separate heads. In the first place, there were contentions raised, attacking the validity of the Act as a whole. In the second place, the validity of the Act was challenged as far as it related to certain specified items of property included in an estate e.g. private lands, buildings, waste lands etc. Thirdly,

the challenge was as to the validity of certain provisions in the Act relating to determination of compensation payable to the intermediary, with reference either to the calculation of the gross assets or the deductions to be made therefrom for the purpose of arriving at the net income.

6. The learned Chief Justice in a most elaborate judgment discussed all the points raised by the appellants and negated them all except that the objections with regard to some of the matters were kept open. Mr Justice Narasimham, the other learned Judge in the Bench, while agreeing with the Chief Justice as to other points, expressed, in a separate judgment of his own, his suspicion about the bona fides of the Orissa Agricultural Income Tax (Second Amendment) Act, 1950, and he was inclined to hold that though ostensibly it was a taxation measure, it was in substance nothing else but a colourable device to cut down drastically the income of the intermediaries so as to facilitate further reduction of their net income as provided in clause (b) of Section 27(1) of the Act. He, however, did not dissent from the final decision arrived at by the Chief Justice, the ground assigned being that whenever there is any doubt regarding the constitutionality of an enactment, the doubt should always go in favour of the legislature. The result was that with the exception of the few matters that were kept open, all the petitions were dismissed. The proprietors have now come before us on appeal on the strength of certificates granted by the High Court under Articles 132 and 133 of the Constitution as well as under Section 110 of the Code of Civil Procedure.

7. No contention has been pressed before us on behalf of the appellants attacking the constitutional validity of the Act as a whole. The arguments that have been advanced by the learned counsel for the appellants can be conveniently divided under three heads: In the first place, there has been an attack on the validity of the provisions of two other statutes, namely, the Orissa Agricultural Income Tax (Amendment) Act, 1950, and the Madras Estates Land (Amendment) Act, 1947, insofar as they affect the calculation of the net income of an estate for the purpose of determining the compensation payable under the Act. In the second place, the provisions of the Act have been challenged as unconstitutional to the extent that they are applicable to private lands and buildings of the proprietors, both of which vest as parts of the estate, under Section 5 of the Act. Lastly, the manner of payment of compensation money, as laid down in Section 37 of the Act, has been challenged as invalid and unconstitutional.

8. Under the first head the appellants' main contention relates to the validity of the Orissa Agricultural Income Tax (Amendment) Act, 1950. This Act, it is said, is not a bona fide taxation statute at all, but is a colourable piece of legislation, the real object of which is to reduce, by artificial means, the net income of the intermediaries, so that the compensation payable to them under the Act might be kept down to as low a figure as possible. To appreciate this contention of the appellants, it would be necessary to narrate a few relevant facts. Under Section 27(1)(b) of the Act, any sum payable in respect of an estate as agricultural income tax, for the previous agricultural year, constitutes an item of deduction which has to be deducted from the gross asset of an estate for the purpose of arriving at its net income, on the basis of which the amount of compensation is to be determined. The Estates Abolition Bill was published in the local gazette on 3rd January, 1950. As has been said already, it was introduced in the Orissa Legislative Assembly on the 17th of January following and it was passed on 28th September, 1951. There was an Agricultural Income Tax

Act in force in the State of Orissa from the year 1947 which provided a progressive scale of taxation on agricultural income, the highest rate of tax being 3 annas in the rupee on a slab of over Rs 30,000 received as agricultural income. On 8th January, 1950, that is to say, five days after the publication of the Abolition Bill, an amended agricultural income tax bill was published in the Official Gazette. At that time Mr H.K. Mahtab was the Chief Minister of Orissa and this bill was sponsored by him. The changes proposed by this Amendment Act were not very material. The highest rate was enhanced from 3 annas to 4 annas in the rupee and the highest slab was reduced from Rs 30,000 to Rs 20,000. For some reason or other, however, this bill was dropped and a revised bill was published in the local gazette on 22nd July, 1950, and it passed into law on 10th of August following. This new Act admittedly made changes of a very drastic character regarding agricultural income tax. The rate of taxation was greatly enhanced for slabs of agricultural income above Rs 15,000 and for the highest slab the rate prescribed was as much as 12 annas 6 pies in the rupee. It was stated in the statement of objects and reasons that the enhanced agricultural income was necessary for financing various development schemes in the State. This, it is said, was wholly untrue for it could not be disputed that almost all the persons who came within the higher income group and were primarily affected by the enhanced rates were intermediaries under the Estates Abolition Bill which was at that time before the Select Committee and was expected to become law very soon, and as the legislature had already definitely decided to extinguish this class of intermediaries, it was absurd to say that an increased taxation upon them was necessary for the development schemes. The object of this amended legislation, according to the appellants, was totally different from what it ostensibly purported to be and the object was nothing else but to use it as a means of effecting a drastic reduction in the income of the intermediaries, so that the compensation payable to them may be reduced almost to nothing. This change in the provisions of the Agricultural Income Tax Bill, it is further pointed out, synchronized with a change in the Ministry of the Orissa State. The original amended bill was introduced by the then Chief Minister, Mr H.K. Mahtab, who was in favour of allowing suitable compensation to expropriated zemindars; but his successor, who introduced the revised bill, was said to be a champion of the abolition of zemindary rights with little or no compensation to the proprietors. In these circumstances, the argument of the learned counsel is that the agricultural income tax legislation being really not a taxation statute but a mere device for serving another collateral purpose constitutes a fraud on the Constitution and as such is invalid, either in its entirety, or at any rate to the extent that it affects the estate abolition scheme. We have been referred to a number of decisions on this point where the doctrine of colourable legislation came up for discussion before courts of law; and stress is laid primarily upon the pronouncement of the majority of this Court in the case of *State of Bihar v. Maharaja Kameshwar Singh* [1952 SCR 889] which held two provisions of the Bihar Land Reforms Act, namely, Sections 4(b) and 23(f) to be unconstitutional on the ground, among others, that these provisions constituted a fraud on the Constitution. The fact that the provisions in the amended Agricultural Income Tax Act were embodied in a separate statute and not expressly made a part of the Abolition Act itself should not, it is argued, make any difference in principle. As the question is of some importance and is likely to be debated in similar cases in future, it would be necessary to examine the precise scope and meaning of what is known ordinarily as the doctrine of "colourable legislation".

9. It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power [Vide *Cooley's Constitutional Limitations*, Vol 1 p 379]. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by it which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. in *Attorney-General for Ontario v. Reciprocal Insurers* [1924 AC 328 at 337]:

"Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers. It is said by Lefroy in his well known work on Canadian Constitution that even if the legislature avows on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction; yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered ultra vires [See *Lefroy on Canadian Constitution*, page 75].

10. In support of his contention that the Orissa Agricultural Income Tax (Amendment) Act, 1950 is a colourable piece of legislation and hence ultra vires the Constitution, the learned counsel for the appellants, as said above, placed considerable reliance upon the majority decision of this Court in the case of *State of Bihar v. Sir Kameshwar Singh* [1952 SCR 889] where two clauses of the Bihar Land Reform Act were held to be unconstitutional as being colourable exercise of legislative power under Entry 42 of List III of Schedule VII of the Constitution. The learned counsel has also referred us, in this connection, to a number of cases, mostly of the Judicial Committee of the Privy Council, where the doctrine of colourable legislation came up for consideration in relation to certain enactments of the Canadian and Australian Legislatures. The principles laid down in these decisions do appear to us to be fairly well settled, but we do not think that the appellants in these appeals could derive much assistance from them.

11. In the cases from Canada, the question invariably has been whether the Dominion Parliament has, under colour of general legislation, attempted to deal with what are merely provincial matters, or conversely whether the Provincial Legislatures under the pretence of legislating on say of the matters enumerated in Section 92 of the British North America Act really legislated on a matter assigned to the Dominion Parliament. In the case of *Union Colliery Company of British Columbia Ltd. v. Bryden* [1899 AC 580] the question raised was whether Section 4 of the British Columbian Coal Mines Regulation Act, 1890, which prohibited Chinamen of full age from employment in underground coal working, was, in that respect, ultra vires of the Provincial Legislature. The question was answered in the affirmative. It was held that if it was regarded merely as a coal working regulation, it could certainly come within Section 92, sub-section (10) or (13), of the British North America Act; but its exclusive application to Chinamen, who were aliens or naturalised subjects, would be a statutory prohibition which was within the exclusive authority of the Dominion Parliament, conferred by Section 91 sub-section (25) of the Act. As the Judicial Committee themselves explained in a later case [Vide *Cunningham v. Tomeyhomma*, 1903 AC 151, 157] the regulations in the British Columbian Act “were not really aimed at the regulation of coal mines at all, but were in truth a device to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and in effect to prohibit their continued residence in that province since it prohibited their earning their living in that province”.

12. On the other hand, in *Re Insurance Act of Canada* [1932 AC 41] the Privy Council had to deal with the constitutionality of Sections 11 and 12 of the Insurance Act of Canada passed by the Dominion Parliament under which it was declared to be unlawful for any Canadian company or an alien, whether a natural person or a foreign company to carry on insurance business except under a licence from the Minister, granted pursuant to the provisions of the Act. The question was whether a foreign or British insurer licensed under the Quebec Insurance Act was entitled to carry on business within that Province without taking out a licence under the Dominion Act? It was held that Sections 11 and 12 of the Canadian Insurance Act, which required the foreign insurers to be licensed, were ultra vires, since in the guise of legislation as to aliens and immigration — matters admittedly within the Dominion authority — the Dominion legislature was seeking to intermeddle with the conduct of insurance business which was a subject exclusively within the provincial authority. The

whole law on this point was thus summed up by Lord Maugham in *Attorney-General for Alberta v. Attorney-General for Canada* [1939 AC 117]:

“It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive power of the other.”

13. The same principle has been applied where the question was not of one legislature encroaching upon the exclusive field of another but of itself violating any constitutional guarantee or prohibition. As an illustration of this type of cases we may refer to the Australian case of *Moran v. Deputy Commissioner of Taxation for New South Wales* [1940 AC 838]. What happened in that case was that in pursuance of a joint Commonwealth and States scheme to ensure to wheat growers in all the Australian States “a payable price for their produce” a number of Acts were passed by the Commonwealth Parliament imposing taxes on flour sold in Australia for home consumption, so as to provide a fund available for payment of moneys to wheat growers. Besides a number of taxing statutes, which imposed tax on flour, the Wheat Industry Assistance Act 53 of 1938 provided for a fund into which the taxes were to be paid and of which certain payments were to be made to the wheat growers in accordance with State legislation. In the case of Tasmania where the quantity of wheat grown was relatively small but the taxes were imposed as in the other States, it was agreed as a part of the scheme and was provided by Section 14 of the Wheat Industry Assistance Act that a special grant should be made to Tasmania, not subject to any federal statutory conditions but intended to be applied by the Government of Tasmania, in paying back to Tasmanian millers, nearly the whole of the flour tax paid by them and provision to give effect to that purpose was made by the Flour Tax Relief Act 40 of 1938 of the State of Tasmania. The contention raised was that these Acts were a part of a scheme of taxation operating and intended to operate by way of discriminating between States or parts of States and as such were contrary to the provisions of Section 51(ii) of the Commonwealth Australian Constitution Act. The matter came up for consideration before a full Court of the High Court of Australia and the majority of the Judges came to the conclusion that such legislation was protected by Section 96 of the Constitution, which empowered the Parliament of the Commonwealth to grant financial assistance to any State on such terms and conditions as the Parliament thought fit. Evatt, J. in a separate judgment dissented from the view and held that under the guise of executing the powers under Section 96 of the Constitution, the legislature had really violated the constitutional prohibition laid down in Section 51(ii) of the Constitution. There was an appeal taken to the Privy Council. The Privy Council affirmed the judgment of the majority but pointed out that “cases may be imagined in which a purported exercise of the power to grant financial assistance under Section 96 would be merely colourable. Under the guise and pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation. Such an Act might well be ultra vires the Commonwealth Parliament”.

14. We will now come to the decision of the majority of this Court regarding two clauses in the Bihar Land Reforms Act which seems to be the sheet anchor of the appellants' case [vide *State of Bihar v. Kameshwar Singh*, 1952 SCR 889]. In that case the provisions of Sections 23(f) and 4(b) of the Bihar Land Reforms Act were held to be invalid by the majority

of this Court not on the ground that, in legislating on these topics, the State Legislature had encroached upon the exclusive field of the Central Legislature, but that the subject-matter of legislation did not at all come within the ambit of Item 42 of List III, Schedule VII of the Constitution under which it purported to have been enacted. As these sections did not come within Entry 42, the consequence was that half of the arrears of rent as well as 12½% of the gross assets of an estate were taken away, otherwise than by authority of law and therefore there was a violation of fundamental rights guaranteed by Article 31(1) of the Constitution. This was a form of colourable legislation which made these provisions ultra vires the Constitution.

15. It may be stated here that Section 23 of the Bihar Land Reforms Act lays down the method of computing the net income of an estate or a tenure which is the subject-matter of acquisition under the Act. In arriving at the net income certain deductions are to be made from the gross asset and the deductions include, among others, revenue, cess and agricultural income tax payable in respect of the properties and also the costs of management. Section 23(f) provided another item of deduction under which a sum representing 4 to 12½% of the gross asset of an estate was to be deducted as “costs of works for benefit to the raiyat”. The other provision contained in Section 4(b) provides that all arrears of rent which had already accrued due to the landlord prior to the date of vesting, shall vest in the State and the latter would pay only 50% of these arrears to the landlord. Both these provisions purported to have been enacted under Entry 42 of List III Schedule VII of the Constitution and that entry speaks of “principles on which compensation for property acquired is to be determined and the form and manner in which that compensation is to be given”. It was held in the *Bihar* case [Vide *State of Bihar v. Kameshwar Singh*, 1952 SCR 889] by the majority of this Court that the item of deduction provided for in Section 23(f) was a fictitious item wholly unrelated to facts. There was no definable pre-existing liability on the part of the landlord to execute works of any kind for the benefit of the raiyat. What was attempted to be done, therefore, was to bring within the scope of the legislation something which not being existent at all could not have conceivable relation to any principle of compensation. This was, therefore, held to be a colourable piece of legislation which though purporting to have been made under Entry 42 could not factually come within its scope.

16. The same principle was held applicable in regard to acquisition of arrears of rent which had become due to the landlord prior to the date of vesting. The net result of this provision was that the State Government was given the power to appropriate to itself half of the arrears of rent due to the landlord without giving him any compensation whatsoever. Taking the whole and returning the half meant nothing more or less than taking the half without any return and this, it was held, could not be regarded as a principle of compensation in any sense of the word. It was held definitely by one of the learned Judges, who constituted the majority, that Item 42 of List III was nothing but the description of a legislative head and in deciding the competency of the legislation under this entry, the court is not concerned with the justice or propriety of the principles upon which the assessment of compensation is directed to be made; but it must be a principle of compensation, no matter whether it was just or unjust and there could be no principle of compensation based upon something which was unrelated to facts. It may be mentioned here that two of the three learned Judges who formed the majority did base their decision regarding the invalidity of the provision, relating to

arrears of rent, mainly on the ground that there was no public purpose behind such acquisition. It was held by these Judges that the scope of Article 31(4) is limited to the express provisions of Article 31(2) and although the court could not examine the adequacy of the provision for compensation contained in any law which came within the purview of Article 31(4), yet that clause did not in any way debar the court from considering whether the acquisition was for any public purpose. This view was not taken by the majority of the court and Mr Narasaraju, who argued the appeals before us, did not very properly pursue that line of reasoning. This being the position, the question now arises whether the majority decision of this Court with regard to the two provisions of the Bihar Act is really of any assistance to the appellants in the cases before us. In our opinion, the question has got to be answered in the negative.

17. In the first place, the line of reasoning underlying the majority decision in the *Bihar* case cannot possibly have any application to the facts of the present case. The Orissa Agricultural Income Tax (Amendment) Act, 1950 is certainly a legislation on "taxing of agricultural income" as described in Entry 46 of List II of the Seventh Schedule. The State Legislature had undoubted competency to legislate on agricultural income tax and the substance of the amended legislation of 1950 is that it purports to increase the existing rates of agricultural income tax, the highest rate being fixed at 12 annas 6 pies in the rupee. This may be unjust or inequitable, but that does not affect the competency of the legislature. It cannot be said, as was said in the Bihar case, that the legislation purported to be based on something which was unrelated to facts and did not exist at all. Both in form and in substance the Act was an agricultural income tax legislation and agricultural income tax is certainly a relevant item of deduction in the computation of the net income of an estate and is not unrelated to it as Item 23(f) of the Bihar Act was held to be. If under the existing law the agricultural income tax was payable at a certain rate and without any amendment or change in the law, it was provided in the Estates Abolition Act that agricultural income tax should be deducted from the gross asset at a higher rate than what was payable under law, it might have been possible to argue that there being no pre-existing liability of this character it was really a non-existing thing and could not be an ingredient in the assessment of compensation. But here the Agricultural Income Tax (Amendment) Act was passed in August 1950. It came into force immediately thereafter and agricultural income tax was realised on the basis of the amended Act in the following year. It was, therefore, an existing liability in 1952, when the Estates Abolition Act came into force. It may be that many of the people belonging to the higher income group did disappear as a result of the Estates Abolition Act, but even then there were people still existing upon whom the Act could operate.

18. The contention of Mr Narasaraju really is that though apparently it purported to be a taxation statute coming under Entry 46 of List II, really and in substance it was not so. It was introduced under the guise of a taxation statute with a view to accomplish an ulterior purpose, namely, to inflate the deductions for the purpose of valuing an estate so that the compensation payable in respect of it might be as small as possible. Assuming that it is so, still it cannot be regarded as a colourable legislation in accordance with the principles indicated above, unless the ulterior purpose which it is intended to serve is something which lies beyond the powers of the legislature to legislate upon. The whole doctrine of colourable legislation is based upon

the maxim that you cannot do indirectly what you cannot do directly. If a legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner, cannot make the Act invalid. Under Entry 42 of List III which is a mere head of legislative power the legislature can adopt any principle of compensation in respect to properties compulsorily acquired. Whether the deductions are large or small, inflated or deflated they do not affect the constitutionality of a legislation under this entry. The only restrictions on this power, as has been explained by this Court in the earlier cases, are those mentioned in Article 31(2) of the Constitution and if in the circumstances of a particular case the provision of Article 31(4) is attracted to a legislation, no objection as to the amount or adequacy of the compensation can at all be raised. The fact that the deductions are unjust, exorbitant or improper does not make the legislation invalid, unless it is shown to be based on something which is unrelated to facts. As we have already stated, the question of motive does not really arise in such cases and one of the learned Judges of the High Court in our opinion pursued a wrong line of enquiry in trying to find out what actually the motives were which impelled the legislature to act in this manner. It may appear on scrutiny that the real purpose of a legislation is different from what appears on the face of it, but it would be a colourable legislation only if it is shown that the real object is not attainable to it by reason of any constitutional limitation or that it lies within the exclusive field of another legislature. The result is that in our opinion the Orissa Agricultural Income Tax (Amendment) Act, 1950 could not be held to be a piece of colourable legislation, and as such invalid. The first point raised on behalf of the appellants must therefore fail.

19. The other point raised by the learned counsel for the appellants under the first head of his arguments relates to the validity of certain provisions of the Madras Estates Land (Orissa Amendment) Act, 1947. This argument is applicable only to those estates which are situated in what is known as ex-Madras area, that is to say which formerly belonged to the State of Madras but became a part of Orissa from 1st April, 1936. The law regulating the relation of landlord and tenant in these areas is contained in the Madras Estates Land Act, 1908 and this Act was amended with reference to the areas situated in the State of Orissa by the amending Act 19 of 1947. The provisions in the amended Act, to which objections have been taken by the learned counsel for the appellants, relate to settlement and reduction of rents payable by raiyats. Under Section 168 of the Madras Estates Land Act, settlement of rents in any village or area for which a record of rights has been published can be made either on the application of the landholder or the raiyats. On such application being made, the Provincial Government may at any time direct the Collector to settle fair and equitable rents in respect of the lands situated therein. Sub-section (2) of Section 168 expressly provides that in settling rents under this section, the Collector shall presume, until the contrary is proved, that the existing rate of rent is fair and equitable and he would further have regard to the provisions of this Act for determining the rates of rent payable by raiyats. Section 177 provides that when any rent is settled under this chapter, it can neither be enhanced nor reduced for a period of 20 years, except on grounds specified in Sections 30 and 38 of the Act respectively. The amending Act of 1947 introduced certain changes in this law. A new section, namely, Section 168-A was introduced and a further provision was added to Section 177 as sub-section (2) of that section, the original section being renumbered as sub-section (1). Section 168-A of the amended Act runs as follows:

“(1) Notwithstanding anything contained in this Act the Provincial Government may, on being satisfied that the exercise of the powers hereinafter mentioned is necessary in the interests of public order or of the local welfare or that the rates of rent payable in money or in kind whether commuted, settled or otherwise fixed are unfair or inequitable invest the Collector with the following powers:

(a) Power to settle fair and equitable rents in cash;

(b) Power, when settling rents to reduce rents if in the opinion of the Collector the continuance of the existing rents would on any ground, whether specified in this Act or not, be unfair and inequitable.

(2) The power given under this section may be made exercisable within specified areas either generally or with reference to specified cases or class of cases.”

Sub-section (2) which has been added to Section 177 stands thus:

“2. (a) Notwithstanding anything in sub-section (1) where rent is settled under the provisions of Section 168-A, the Provincial Government may either retrospectively or prospectively prescribe the date on which such settlement shall take effect. In giving retrospective effect the Provincial Government may, at their discretion, direct that the rent so settled shall take effect from a date prior to the commencement of the Madras Estates Land (Orissa Amendment) Act, 1947.”

20. The appellants' contention is that by these amended provisions the Provincial Government was authorised to invest the Collector with power to settle and reduce rents, in any way he liked, unfettered by any of the Rules and principles laid down in the Act and the Provincial Government was also at liberty to direct that the reduction of rents should take effect retrospectively, even with reference to a period for which rents had already been paid by the tenant. Under Section 26 of the Orissa Estates Abolition Act, the gross asset of an estate is to be calculated on the basis of rents payable by raiyats for the previous agricultural year. According to the appellants, the State Government made use of the provisions of the amended Madras Estates Land (Orissa Amendment) Act to reduce arbitrarily the rents payable by raiyats and further to make the reduction take effect retrospectively, so that the diminished rents could be reckoned as rents for the previous year in accordance with the provision of Section 26 of the Estates Abolition Act and thus deflate the basis upon which the gross asset of an estate was to be computed.

21. It is conceded by the learned counsel for the appellants that the amendments in the Madras Estates Land Act are no part of the Estates Abolition Act of Orissa and there is no question of any colourable exercise of legislative powers in regard to the enactment of these provisions. The legislation, however, has been challenged, as unconstitutional, on two grounds. First of all, it is urged that by the amended sections mentioned above, there has been an improper delegation of legislative powers by the legislature to the Provincial Government, the latter being virtually empowered to repeal existing laws which govern the relations between landlord and tenant in those areas. The other ground put forward is that these provisions offend against the equal protection clause embodied in Article 14 of the Constitution. It is pointed out that the Provincial Government is given unfettered discretion to choose the particular areas where the settlement of rent is to be made. The Government has also absolute power to direct that the reduced rents should take effect either prospectively or retrospectively in particular cases as they deem proper. It is argued that there being no

principle of classification indicated in these legislative provisions and the discretion vested in the Government being an uncontrolled and unfettered discretion guided by no legislative policy, the provisions are void as repugnant to Article 14 of the Constitution.

22. In reply to these arguments it has been contended by the learned Attorney-General that, apart from the fact as to whether the contentions are well-founded or not, they are not relevant for purposes of the present case. The arguments put forward by the appellants are not grounds of attack on the validity of the Estates Abolition Act, which is the subject-matter of dispute in the present case, and it is not suggested that the provisions of the Estates Abolition Act relating to the computation of gross asset on the basis of rents payable by raiyats is in anyway illegal. The grievance of the appellants in substance is that the machinery of the amended Act is being utilised by the Government for the purpose of deflating the gross asset of an estate. We agree with the learned Attorney-General that if the appellants are right in their contention, they can raise these objections if and when the gross assets are sought to be computed on the basis of the rents settled under the above provisions. If the provisions are void, the rents settled in pursuance thereof could not legitimately form the basis of the valuation of the estate under the Estates Abolition Act and it might be open to the appellants then to say that for purposes of Section 26 of the Estates Abolition Act, the rents payable for the previous year would be the rents settled under the Madras Estates Land Act, as it stood unamended before 1947. The learned counsel for the appellants eventually agreed with the views of the Attorney-General on this point and with the consent of both sides we decided to leave these questions open. They should not be deemed to have been decided in these cases.

23. The appellants' second head of arguments relates to two items of property, namely, buildings and private lands of the intermediary, which, along with other interests, vest in the State under Section 5 of the Act.

24. There are different provisions in the Act in regard to different classes of buildings. Firstly, dwelling houses used by an intermediary for purposes of residence or for commercial or trading purposes remain with him on the footing of his being a tenant under the State in respect to the sites thereof and paying such fair and equitable rent as might be determined in accordance with the provisions of the Act. In the second place, buildings used primarily as office or kutchery for management of the estates or for collection of rents or as rest houses for estate servants or as golas for storing of rents in kind vest in the State and the owner is allowed compensation in respect thereof. In addition to these, there are certain special provisions in the Act relating to buildings constructed after 1st January, 1946, and used for residential or trading purposes, in respect to which the question of bona fides as to its construction and use might be raised and investigated by the Collector. There are separate provisions also in respect to buildings constructed before 1st January, 1946, which were not in possession of the intermediary at the date of coming into force of the Act. The questions arising in regard to this class of cases have been left open by the High Court and we are not concerned with them in the present appeals. No objection has been taken by the appellants in respect to the provisions of the Act relating to buildings used for residential or trade purposes. Their objections relate only to the building used for estate or office purposes which vest in the State Government under the provisions of the Act.

25. In regard to these provisions, it is urged primarily that the buildings raised on lands do not necessarily become parts of the land under Indian law and the legislature, therefore, was wrong in treating them as parts of the estate for purposes of acquisition. This contention, we are afraid, raises an unnecessary issue with which we are not at all concerned in the present cases. Assuming that in India there is no absolute rule of law that whatever is affixed to or built on the soil becomes a part of it and is subject to the same rights of property as the soil itself, there is nothing in law which prevents the State Legislature from providing as a part of the estates abolition scheme that buildings, lying within the ambit of an estate and used primarily for management or administration of the estate, would vest in the Government as appurtenances to the estate itself. This is merely ancillary to the acquisition of an estate and forms an integral part of the abolition scheme. Such acquisition would come within Article 31(2) of the Constitution and if the conditions laid down in clause (4) of that article are complied with, it would certainly attract the protection afforded by that clause. Compensation has been provided for these buildings in Section 26(2)(iii) of the Act and the annual rent of these buildings determined in the prescribed manner constitutes one of the elements for computation of the gross asset of an estate. The contention of the appellants eventually narrows down to this that the effect of treating the annual valuation of the buildings as part of the gross asset of the estate in its entirety, leads to unjust results, for if these buildings were treated as separate properties, the intermediaries could have got compensation on a much higher scale in accordance with slab system adopted in the Act. To this objection, two answers can be given. In the first place, if these buildings are really appurtenant to the estate, they can certainly be valued as parts of the estate itself. In the second place, even if the compensation provided for the acquisitions of the buildings is not just and proper, the provision of Article 31(4) of the Constitution would be a complete answer to such acquisition.

26. As regards the private lands of the proprietor, the appellants have taken strong exception to the provisions of the Act so far as they relate to private lands in possession of temporary tenants. In law these lands are in possession of the proprietor and the temporary tenants cannot acquire occupancy rights therein, yet they vest, under the Act, in the State Government on the acquisition of an estate, the only exception being made in cases of small landholders who do not hold more than 33 acres of land in any capacity. Section 8(1) of the Act gives the temporary tenants the right to hold the lands in their occupation under the State Government on the same terms as they held them under the proprietor. Under the Orissa Tenants Protection Act, which is a temporary Act, the landholder is not entitled to get contractual or competitive rents from these temporary tenants in possession of his private lands and the rent is fixed at two-fifths of the gross produce. It is on the basis of this produce rent which is included in the computation of the gross asset of an estate under Section 26 of the Act, that the landholder gets compensation in respect to the private lands in occupation of temporary tenants. The appellants' main contention is that although in these lands both the *malevaram* and *kudivaram* rights, that is to say, both the proprietor's as well as the raiyat's interests are united in the landholder, the provisions of the Act indicated above, have given no compensation whatsoever for the *kudivaram* or the tenant's right and in substance this interest has been confiscated without any return. This, in our opinion, is a wrong way of looking at the provisions for compensation made in the Act. The Orissa Act, like similar Acts passed by the legislatures of other States, provides for payment of compensation on the basis of the net

income of the whole estate. One result of the adoption of this principle, undoubtedly is, that no compensation is allowed in respect of potential values of properties; and those parts of an estate which do not fetch any income have practically been ignored. There is no doubt that the Act does not give anything like a fair or market price of the properties acquired and the appellants may be right in their contention that the compensation allowed is inadequate and improper but that does not affect the constitutionality of the provisions. In the first place, no question of inadequacy of compensation can be raised in view of the provision of Article 31(4) of the Constitution and it cannot also be suggested that the rule for payment of compensation on rental basis is outside the ambit of Entry 42 of List III. This point is concluded by the earlier decision of this Court in *Raja Suriya Pal Singh v. State of U.P.* [1952 SCR 1056] and is not open to further discussion. Mr Narasaraju is not right in saying that the compensation for the private lands in possession of temporary tenants has been given only for the landlord's interest in these properties and nothing has been given in lieu of the tenant's interest. The entire interest of the proprietor in these lands has been acquired and the compensation payable for the whole interest has been assessed on the basis of the net income of the property as represented by the share of the produce payable by the temporary tenants to the landlord. It is true that the Orissa Tenants Protection Act is a temporary statute, but whether or not it is renewed in future, the rent fixed by it has been taken only as the measure of the income derivable from these properties at the date of acquisition.

27. Mr Narasaraju further argues that his clients are not precluded from raising any objection on the ground of inadequacy of compensation in regard to these private lands by reason of Article 31(4) of the Constitution as the provision of that article is not attracted to the facts of the present case. What is said is that the original Estates Abolition Bill, which was pending before the Orissa Legislature at the time when the Constitution came into force, did not contain any provision that the private lands of the proprietor in occupation of temporary tenants would also vest in the State. This provision was subsequently introduced by way of amendment during the progress of the bill and after the Constitution came into force. It is argued, therefore, that this provision is not protected by Article 31(4). The contention seems to us to be manifestly untenable. Article 31(4) is worded as follows:

“If any bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).”

Thus it is necessary first of all that the bill, which ultimately becomes law, should be pending before the State Legislature at the time of the coming into force of the Constitution. That Bill must be passed by the Legislature and then receive the assent of the President. It is the law to which the assent of the President is given that is protected from any attack on the ground of non-compliance with the provisions of clause (2) of Article 31. The fallacy in the reasoning of the learned counsel lies in the assumption that the Bill has got to be passed in its original shape without any change whatsoever, before the provision of clause (4) of Article 31 could be attracted. There is no warrant for such assumption in the language of the clause. The expression “passed by such Legislature” must mean “passed with or without amendments” in

accordance with the normal procedure contemplated by Article 107 of the Constitution. There can be no doubt that all the requirements of Article 31(4) have been complied with in the present case and consequently there is no room for any objection to the legislation on the ground that the compensation provided by it is inadequate.

28. The last contention of the appellants is directed against the provision of the Act laying down the manner of payment of the compensation money. The relevant section is Section 37 and it provides for the payment of compensation together with interest in 30 annual equated installments leaving it open to the State to make the payment in full at any time prior to the expiration of the period. The validity of this provision has been challenged on the ground that it is a piece of colourable legislation which comes within the principle enunciated by the majority of this Court in the *Bihar case* referred to above. It is difficult to appreciate this argument of the learned counsel. Section 37 of the Act contains the legislative provision regarding the form and the manner in which the compensation for acquired properties is to be given and as such it comes within the clear language of Entry 42 of List III, Schedule VII of the Constitution. It is not a legislation on something which is non-existent or unrelated to facts. It cannot also be seriously contended that what Section 37 provides for, is not the giving of compensation but of negating the right to compensation as the learned counsel seems to suggest. There is no substance in this contention and we have no hesitation in overruling it. The result is that all the points raised by the learned counsel for the appellants fail and the appeals are dismissed.

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Union of India v. H.S. Dhillon

1971(2) SCC 779

[S.M.Sikri, C.J., J.M. Shelat, G.K. Mitter, A.N.Ray, I.D. Dua, S.C.Roy and D.G. Palekar, JJ.]

[*Residuary Power of Legislation*]

S. M. SIKRI, C.J. - This appeal is from the judgment of the High Court of Punjab and Haryana in Civil Writ No. 2291 of 1970, which was heard by a Bench of five Judges. Four Judges held that Section 24 of the Finance Act, 1969, in so far as it amended the relevant provisions of the Wealth Tax Act, 1957, was beyond the legislative competence of Parliament. Pandit, J., however, held that the impugned Act was intra vires the legislative powers of Parliament. The High Court accordingly issued a direction to the effect that the Wealth Tax Act, as amended by Finance Act, 1969, in so far as it includes the capital value of the agricultural land for the purposes of computing net wealth, was ultra vires the Constitution of India.

2. We may mention that the majority also held that the impugned Act was not a law with respect to Entry 49, List II of the Seventh Schedule to the Constitution; in other words, it held that this tax was not covered by Entry 49, List II of the Seventh Schedule.

3. The Wealth Tax Act, 1957, was amended by Finance Act, 1969, to include the capital value of agricultural land for the purposes of computing net wealth. "Assets" is defined in Section 2(c) to include property of every description, movable or immovable. The exclusions need not be mentioned here as they relate to earlier assessment years. "Net Wealth" is defined in Section 2(m) to mean "the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, includes assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owned by the assessee on the valuation date". Other than certain debts which are set out in the definition. "Valuation date" in relation to any year for which the assessment is to be made under this Act is defined in Section 2(q) to mean the last day of the previous year as defined in Section 3 of the Income Tax Act, if an assessment were to be made under this Act for that year. We need not set out the proviso here. Section 3 is the charging section which reads:

3. Subject to the other provisions contained in this Act there shall be charged for every assessment year commencing on and from the first day of April, 1957, a tax hereinafter referred to as the "wealth-tax" in respect of the net wealth on the correspondent valuation date of every individual, Hindu Undivided Family and company at the rate or rates specified in the Schedule.

8. The submissions of Mr Setalvad, appearing on behalf of the Union in brief were these: That the impugned Act is not a law with respect to any entry (including Entry 49) in List II, if this is so, it must necessarily fall within the legislative competence of Parliament under Entry 86, read with Entry 97 or Entry 97 by itself read with Art 248 of the Constitution; the words "exclusive of agricultural land" in Entry 86 could not cut down the scope of either Entry 97, List I or Article 248 of the Constitution.

9. The submissions of Mr Palkiwala, who appeared on behalf of the respondent in the appeal, and the other counsel for the interveners, in brief, were these: It was the scheme of the Constitution to give States exclusive powers to legislate in respect of agricultural land, income on agricultural land and taxes thereon; in this context the object and effect of specifically excluding agricultural land from the scope of Entry 86 was also take it out of the ambit of Entry 97 List I and Article 248; the High Court was wrong in holding that the impugned Act was not a law in respect of Entry 49, List II.

10. It was further urged by Mr Setalvad that the proper way of testing the validity of a parliamentary statute under our Constitution was first to see whether the parliamentary legislation was with respect to a matter or tax mentioned in List II, if it was not, no other question would arise. The learned counsel for the respondent contended that this manner of enquiry had not been even hinted in any of the decisions of the Court during the last 20 years of its existence and there must accordingly be something wrong with this test. He urged that in so far as this test is derived from the Canadian decisions, the Canadian Constitution is very different and those decisions ought not to be followed here and applied to our Constitution.

11. It seems to us that the best way of dealing with the question of the validity of the impugned Act with the contentions of the parties is to ask ourselves two questions:

first is the impugned Act legislation with respect to Entry 49, List II and
secondly if it is not, is it beyond the legislative competence of Parliament.

13. It seems to us unthinkable that the Constitution-makers, while creating a sovereign democratic republic, withheld certain matters or taxes beyond the legislative competency of the Legislatures in this country either legislating singly or jointly. The language of the relevant articles on the contrary is quite clear that this was not the intention of the Constituent Assembly. Chapter I of Part XI of the Constitution deals with "Distribution of Legislative powers".

14. Reading Article 246 with the three lists in the Seventh Schedule, it is quite clear that Parliament has exclusive power to make laws with respect to all the matters enumerated in List I and this notwithstanding anything in clauses (2) and (3) of Article 246. The State Legislatures have exclusive powers to make laws with respect to any of the matters enumerated in List II, but this is subject to clauses (1) and (2) of Article 246. The object of this subjection is to make Parliamentary legislation on matters in Lists I and III paramount. Under clause (4) of Article 246 Parliament is competent also to legislate on a matter enumerated in State List for any part of the territory of India not included in a State. Article 248 gives the residuary powers of legislation to the Union Parliament.

15. This scheme of distribution of legislative power has been derived from the Government of India Act, 1935, but in one respect there is a great deal of difference, and it seems to us that this makes the scheme different in so far as the present controversy is concerned. Under the Government of India Act, the residuary powers were not given either to the Central Legislature or to the Provincial Legislatures. The reason for this was given in the Report of the Joint Committee on Indian Constitutional Reform, Volume I, Para 56. The reason was that there was profound cleavage of opinion existing in India with regard to

allocation of residuary legislative powers. The result was the enactment of Section 104 of the Government of India Act[...]

17. There does not seem to be any dispute that the Constitution-makers wanted to give residuary powers of legislation to the Union Parliament. Indeed, this is obvious from Article 248 and Entry 97, List I. But there is a serious dispute about the extent of the residuary power. It is urged on behalf of the respondent that the words “exclusive of agricultural land” in Entry 86, List I, were words of prohibition, prohibiting Parliament from including capital value of agricultural land in any law levying tax on capital value of assets. Regarding Entry 97, List I, it is said that if a matter is specifically excluded from an entry in List I, it is apparent that it was not the intention to include it under Entry 97, List I; the words “exclusive of agricultural land” in Entry 86 by themselves constituted a matter and therefore they could not fall within the words “any other matter” in Entry 97, List I. Our attention was drawn to a number of entries in List I where certain items have been excluded from List I. For example, in Entry 82, taxes on agricultural income have been excluded from the ambit of “taxes on income”, in Entry 84 there is exclusion of duties of excise on alcoholic liquors for human consumption and on opium, Indian hemp and other narcotic drugs and narcotics; in Entry 86, agricultural land has been excluded from the field of taxes on the capital value of the assets; in Entry 87, agricultural land has again been excluded from the Union Estate duty in respect of property; and in Entry 88, agricultural land has been further excluded from the incidence of duties in respect of succession to property. It was urged that the object of these exclusions was to completely deny Parliament competence to legislate on these excluded matters.

18. It will be noticed that all the matters and taxes which have been excluded, except taxes on the capital value of agricultural land under Entry 86, List I, fall specifically within one of the entries in List II. While taxes on agricultural income have been excluded from Entry 82, List I, they form Entry 46, List II, duties of excise excluded in Entry 84, List I, have been included in Entry 51, List II; agricultural land exempt in Entry 87 has been incorporated as Entry 48, List II; and similarly, agricultural land exempted from the incidence of duties in respect of succession to property has been made the subject-matter of duties in respect of succession in Entry 47, List II.

19. It seems to us that from this scheme of distribution it cannot be legitimately inferred that taxes on the capital value of agricultural land were designedly excluded from Entry 97, List I.

[...] If the residuary subject had ultimately been assigned to the States could it have been seriously argued that vis-a-vis the states the matter of taxes on “Capital value of agricultural land” would have been outside the powers of States? Obviously not, if so, there can be no reason for excluding it from the residuary powers ultimately conferred on Parliament. The content of the residuary power, does not change with its conferment on Parliament.

20. It may be that it was thought that a tax on capital value of agricultural land was included in Entry 49, List II. This contention will be examined a little later. But if on a proper interpretation of Entry 49, List II, read in the light of Entry 86, List I, it is held that tax on the capital value of agricultural land is not included within Entry 49, List II or that the tax imposed by the impugned statute does not fall either in Entry 49, List II or Entry 86, List I, it

would be arbitrary to say that it does not fall within Entry 97, List I. We find it impossible to limit the width of Article 248, and Entry 97, List I by the words “exclusive of agricultural land” in Entry 86, List I. We do not read the words “any other matter” in Entry 97 to mean that it has any reference to topics excluded in Entries 1-96; List I. It is quite clear that the words “any other matter” have reference to matters on which the Parliament has been given power to legislate by the enumerated Entries 1-96, List I and not to matters on which it has not been given power to legislate. The matter in Entry 86, List I, is the whole entry and not the Entry without the words “exclusive of agricultural land”. The matter in Entry 86, List I, again is not tax on capital value of assets but the whole entry. We may illustrate this point with reference to some other entries. In Entry 9, List I “Preventive Detention for reasons connected with defence, foreign affairs or the security of India” the matter is not Preventive Detention but the whole entry. Similarly, in Entry 3, List III “Preventive Detention for reasons connected with the security of the State, the maintenance of public order or the maintenance of supplies and services essential to the community” the matter is not Preventive Detention but the whole entry. It would be erroneous to say that Entry 9, List I and Entry 3, List III deal with the same matter. Similarly, it would, we think, be erroneous to treat Entry 82, List I (taxes on income other than agricultural income) as containing two matters, one, tax on income, and the other, as “other than agricultural income”. It would serve no useful purpose to multiply illustrations.

21. It seems to us that the function of Article 246(1), read with Entries 1-96, List I, is to give positive power to Parliament to legislate in respect of these entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so. Accordingly we do not interpret the words “any other matter” occurring in Entry 97, List I, to mean a topic mentioned by way of exclusion. These words really refer to the matters contained in each of the Entries 1 to 96. The words “any other matter” had to be used because Entry 97, List I follows Entries 1-96, List I. It is true that the field of legislation is demarcated by Entries 1-96, List I, but demarcation does not mean that if Entry 97, List I confers additional powers, we should refuse to give effect to it. At any rate, whatever doubt there may be on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms. On its terms the only question to be asked is: Is the matter sought to be legislated or included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III: No question has to be asked about List I. If the answer is in the negative then it follows that Parliament has power to make laws with respect to that matter or tax.

22. It must be remembered that the function of the lists is not to confer powers; they merely demarcate the legislative field.

24. We are compelled to give full effect to Article 248 because we know of no principle of construction by which we can cut down the wide words of a substantive article like Article 248 by the wording of entry in Schedule VII. If the argument of the respondent is accepted Article 248 would have to be re-drafted as follows:

Parliament has exclusive power to make any law with respect to any matter not mentioned in the Concurrent List or State List, provided it has not been mentioned by way of exclusion in any entry in List I.

We simply have not the power to add a proviso like this to Article 248.

25. We must also mention that no material has been placed before us to show that it was ever in the mind of anybody, who had to deal with the making of the Constitution, that it was the intention to prohibit all the Legislatures in this country from legislating on a particular topic.

31. Two points emerge from this. The Constituent Assembly knew how to prohibit Parliament from levying a tax (see proposed Article 198-A set out above). Secondly, they knew of certain taxes as taxes on the use or consumption of goods. The proposal to include them in the Provincial List was not accepted. Indeed, Shri T.T. Krishnamachari said this about this proposals:

“Sir, one other recommendation of the Expert Committee is, I am afraid, rather mischievous. That is, they have suggested in regard to Sales Tax—which is Item 58 in List 2—that the definition should be enlarged so as to include Use Tax as well, going undoubtedly on the experience of the American State Use Tax which, I think, is a pernicious recommendation. I think, it finds a reflection in the mention of Sales Tax in Item 58 which ought not to be there.”

32. If Parliament were to levy a Use Tax, it could hardly be thrown out on the ground that it cannot be included in the residuary powers because the tax was known at the time of the framing of the Constitution. Indeed it does not seem to be a sound principle of interpretation to adopt to first ascertain whether a tax was known to the framers of the Constitution and include it in the residuary powers only if it was not known. This would be an impossible test to apply. Is the Court to ask members of the Constituent Assembly to give evidence or is the Court to presume that they knew of all the possible taxes which were being levied throughout the world? In our view the only safe guide for the interpretation of an article or articles of an organic instrument like our Constitution is the language employed, interpreted not narrowly but fairly in the light of the broad and high purposes of the Constitution, but without doing violence to the language. To interpret Article 248 in the way suggested by the respondent would in our opinion be to do violence to the language.

33. We are, however, glad to find from the following extracts from the debates that our interpretation accords with what was intended.

34. Entry 91 in the draft Constitution corresponds to the present Entry 97, List I. Article 217 of the draft Constitution corresponds to Article 246 of the Constitution. Article 223 of the draft Constitution corresponds to Article 248 of the Constitution.

35. While dealing with Entry 91, List I of the draft Constitution, Sardar Hukam Singh moved the following amendments:

“That in Entry 91 of List I, the word ‘other’ be deleted.”

36. Extracts from the debates on the proposed amendment are reproduced below:

Sardar Hukam Singh (*Constituent Assembly Debates*, Volume 9, page 854):

“The object of this Entry 91 is, whatever is not included in Lists II and III must be deemed to have been included in this list, I feel that it would be said in very simple words, if the word ‘other’ were omitted, and then there would be no need for this list absolutely. Ultimately, it comes to this that whatever is not covered by Lists II and III is all embraced in the Union

List. This could be said in very simple words and we need not have taken all this trouble which we have taken.”

37. Mr Naziruddin Ahmad (*Constituent Assembly Debates*, Volume 9, page 855):

“Mr President, Sir, I do not wish to oppose Entry 91. It is too late to do it, but I should submit that the moment we adopted Entry 91, it would involve serious redrafting of certain articles and entries. Under Article 217 we have stated in substance that entries in List I will belong to Union, List II to States and List III common to both. That was the original arrangement under which we started. We took the scheme from the Government of India Act. When an entry like 91 was considered at an earlier stage we agreed that the residuary power should be with the Centre. This was an innovation, as there was nothing like it in the Government of India Act. As soon as we accept Entry No. 91, Article 217 and a few other articles would require redrafting and Entries 1 to 90 would be redundant. In fact all the previous entries—from 1 to 90 would be rendered absolutely unnecessary. I fail to see the point now retaining Entries 1 to 90. If every subject which is not mentioned in Lists II and III is to go to the Centre what is the point in enumerating Entries 1 to 90 of List I? That would amount to absolutely needless, cumbersome detail. All complications would be avoided and matters simplified by redrafting Article 217 to say that all matters enumerated in List II must belong to the States, and all matters enumerated in List III are assigned to the Centre and the States concurrently and that every other conceivable subject must come within the purview of the Centre. There was nothing more simple or logical than that. Instead, a long elaborate List has been needlessly incorporated. This was because List I was prepared in advance and Entry No. 91 was inserted by way of afterthought. As soon as Entry 91 was accepted, the drafting should have been altered accordingly. Article 217 should have been re-written on the above lines and matters would have been simplified. May I suggest even at this late stage that these needless entries be scrapped and Article 217 be re-written and things made simple? I had an amendment to that effect but I did not move it because I know that any reasons behind an amendment would not be deemed fit for consideration by the House.”

38. Prof. Shibban Lal Saxena (*Constituent Assembly Debates*, Vol. 9 pages 855-56):

“Sir, today is a great day that we are passing this entry almost without discussion. This matter has been the subject of discussion in this country for several years for about two decades. Today it is being allowed to be passed without any discussion. The point of view of Mr Naziruddin Ahmad is not correct. In fact Dr Ambedkar has said that if there is anything left, it will be included in this Item 91. I, therefore, think that it is a very important entry. There should not be any deletion of Items 1 to 90. I know this entry will include everything that is already contained in the first 90 entries as well as whatever is left. This entry will strengthen the Centre and weld our nation into one single nation behind a strong Centre. Throughout the last decade the fight was that provincial autonomy should be so complete that the Centre should not be able to interfere with the provinces, but now the times are changed. We are now for a strong Centre. In fact some friends would like to do away with provincial autonomy and would like a unitary Government. This entry gives powers to the Centre to have legislation on any subject which has escaped the scrutiny of the House. I support this entry.”

39-40. The Honourable Dr B.R. Ambedkar (*Constituent Assembly Debates*, Vol. 9, pages 856-857):

“My President, I propose to deal with the objection raised by my friend Sardar Hukam Singh. I do not think he has realised what is the purpose of Entry 91 and I should therefore like to

state very clearly what the purpose of Entry 91 in List I is. It is really to define a limit or scope of List I and I think we could have dealt with this matter, viz., of the definition of and scope of Lists II and III by adding an entry such as 67 which would read:

‘Anything not included in List II or III shall be deemed to fall in List I.’

That is really the purpose of it. It could have been served in two different ways, either having an entry such as the one 91 included in List I or to have any entry such as the one which I have suggested ‘that anything not included in List II or III shall fall in List I’. That is the purpose of it. But such an entry is necessary and there can be no question about it. Now I come to the other objection which has been repeated if not openly at least whispered as to why we are having these 91 entries in List I when as a matter of fact we have an article such as 223 which is called residuary article which is ‘Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List’. Theoretically I quite accept the proposition that when anything which is not included in List II or List III is by a specific article of the Constitution handed over to the Centre, it is unnecessary to enumerate these categories which we have specified in List I. The reason why this is done is this. Many States people, and particularly the Indian States at the beginning of the labours of the Constituent Assembly, were very particular to know what are the legislative powers of the Centre. They wanted to know categorically and particularly; they were not going to be satisfied by saying that the Centre will have only residuary powers. Just to allay the fears of the Provinces and the fears of the Indian States, we had to particularise what is included in the symbolic phrase ‘residuary powers’. That is the reason why we had to undergo this labour notwithstanding the fact that we had Article 223.

I may also say that there is nothing very ridiculous about this, so far as our Constitution is concerned, for the simple reason that it has been the practice of all federal constitutions to enumerate the powers of the Centre, even those federations which have got residuary powers given to the Centre. Take for instance the Canadian Constitution. Like the Indian Constitution, the Canadian Constitution also gives what are called residuary powers to the Canadian Parliament. Certain specified and enumerated powers are given to the Provinces. Notwithstanding this fact, the Canadian Constitution, I think in Article 99, proceeds to enumerate certain categories and certain entries on which the Parliament of Canada can legislate. That again was done in order to allay the fears of the French Provinces which were going to be part and parcel of the Canadian Federation. Similarly also in the Government of India Act, the same scheme has been laid down there and Section 104 of the Government of India Act, 1935, is similar to Article 223 here. It also lays down the proposition that the Central Government will have residuary powers. Notwithstanding that, it had its List I. Therefore, there is no reason, no ground to be over critical about this matter. In doing this we have only followed as I said, the requirements of the various Provinces to know specifically what these residuary powers are, and also we have followed well-known conventions which have been followed in any other federal constitutions. I hope the House will not accept either the amendment of my friend Sardar Hukam Singh nor take very seriously the utterings of my friend Mr Naziruddin Ahmad.”

41. It seems to us that this discussion clearly shows that it was realised that the old Entry 91 would cover every matter which is not included in Lists II and III, and that entries were enumerated in List I following the precedent of the Canadian Constitution and also to inform the provinces and particularly the Indian States as to the legislative powers the Union was going to have.

42. The same conclusion is also arrived at if we look at some of the speeches made when the third reading of the Constitution was taken up. Extracts from those speeches are reproduced below.

43. Shri Alladi Krishnaswami Ayyar (*Constituent Assembly Debates*, Vol. 11, p. 838):

“In regard to the distribution and allocation of legislative power, this Assembly has taken into account the political and economic conditions obtaining in the country at present and has not proceeded on any a priori theories as to the principles of distribution in the Constitution of a Federal Government. In regard to distribution, the Centre is invested with residuary power, specific subjects of national and all India importance being expressly mentioned.”

44. Shri T.T. Krishnamachari (*Constituent Assembly Debates*, Vol. 11, pp. 952-954):

“I would in this connection deal with a point raised regarding the vesting of the residuary powers. I think more than one honourable member mentioned that the fact that the residuary power is vested in the Centre in our Constitution, makes it a unitary Constitution. It was, I think, further emphasised by my honourable friend Mr Gupta in the course of his speech. He said: ‘The test is there. The residuary power is vested in the Centre’. I am taking my friend Mr Gupta quite seriously, because he appears to be a careful student who has called out this particular point from some text book on federalism. I would like to tell honourable members that it is not a very important matter in assessing whether a particular Constitution is based on a federal system from the point of view whether the residuary power is vested in the States or in the Central Government. Mr K.C. Wheare who has written recently a book on Federalism has dealt with this point.

Now if you ask me why we have really kept the residuary power with the Centre and whether it means anything at all, I will say that it is because we have gone to such absolute length to enumerate the powers of the Centre and of the States and also the powers that are to be exercised by both of them in the concurrent field. In fact, to quote Professor Wheare again, who has made a superficial survey of the Government of India Act, the best point in the Government of India Act is the complete and exhaustive enumeration of powers of Schedule VII. *To my mind there seems to be the possibility of only one power that has not been enumerated, which might be exercised in the future by means of the use of the residuary power, namely the capital levy on agricultural land. This power has not been assigned either to the Centre or to the Units. It may be that that/allowing the scheme of Estate Duty and succession duty on urban and agricultural property, even if the Centre has to take over this power under the residuary power after some time. It would assign the proceeds of this levy to the provinces, because all things that are supposed to be associated with agriculture are assigned to the provinces. I think the vesting of the residuary power is only a matter of a academic significance today. To say that because residuary power is vested in the Centre and not in the provinces this is not a Federation would not be correct.*”

45. The above speech of Mr T.T. Krishnamachari shows that the members were aware that certain known taxes had not been included specifically in the three lists.

46. It is, therefore, difficult to escape from the conclusion that in India there is no field of legislation which has not been allotted either to Parliament or to the State Legislatures.

47. The last sentence applies much more to the Constitution of a sovereign democratic republic. It is true that there are some limitations in Part III of the Constitution on the Legislatures in India but they are of a different character. They have nothing to do with legislative competence. If this is the true scope of residuary powers of Parliament, then we are

unable to see why we should not, when dealing with a Central Act, enquire whether it is legislation in respect of any matter in List II for this is the only field regarding which there is a prohibition against Parliament. If a Central Act does not enter or invade these prohibited fields there is no point in trying to decide as to under which entry or entries of List I or List III a Central Act would rightly fit in.

48. It was accepted that this test had been applied in Canada, but it was argued that the Canadian Constitution is completely different from the Indian Constitution. It is true that the wording of Sections 91 and 92 of the Canadian Constitution is different and the Judicial Committee has interpreted these sections differently at different periods, but whatever the interpretation, it has always held that the lists are exhaustive. The scheme of distribution of legislative powers between the Dominion and the Provinces is essentially the same as under our Constitution. In this matter it is best to quote the words of the Judicial Committee or some learned authors rather than interpret Sections 91 and 92 ourselves.

66. Be that as it may, we are unable to see how the adoption of this mode of enquiry will destroy the federal structure of our Constitution. The State Legislatures have full legislative authority to pass laws in respect of entries in List II, and subject to legislation by Parliament on matters in List III.

67. It was also said that if this was the intention of the Constitution-makers they need not have formulated List I at all. This is the point which was taken by Sardar Hukam Singh and other in the debates referred to above and was answered by Dr Ambedkar. But apart from what has been stated by Dr Ambedkar in his speech extracted above there is some merits and legal affect in having included specific items in List I for when there are three lists it is easier to construe List II in the light of Lists I and II. If there had been no List I, many items in List II would perhaps have been given much wider interpretation than can be given under the present scheme. Be that as it may, we have the three lists and a residuary power and therefore it seems to us that in this context if a Central Act is challenged as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises.

68. In view of this conclusion, we now come to the question, i.e. whether the impugned Act is a law with respect to Entry 49, List II, or whether it imposes a tax mentioned in Entry 49 in List II? On this matter we have three decisions of this Court and although these decisions were challenged we are of the opinion that they interpreted Entry 49, List II correctly.

69. In *Sudhir Chand Nawa v. Wealth Tax Officer* [AIR 1969 SC 59] this Court was concerned with the validity of the Wealth Tax Act, 1957, as it originally stood. This Court proceeded on the assumption that the Wealth Tax Act was enacted in exercise of the powers under Entry 86, List I. It was argued before this Court that since the expression 'net wealth' includes non-agricultural lands and buildings of an assessee, and power to levy tax on lands and buildings is reserved to the State Legislatures by Entry 49, List II of the Seventh Schedule, Parliament is incompetent to legislate for the levy of wealth-tax on the capital value of assets which include non-agricultural lands and buildings.

70. In rejecting this argument the Court observed:

“The tax which is imposed by Entry 86, List I of the Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on capital value of the assets of individuals and companies, on the valuation date. The tax is not imposed on the components of the assets of the assessee; it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of assets, but the general liability of the assessee to pay his debts and to discharge his lawful obligations, have to be taken into account. Again Entry 49 List II of the Seventh Schedule contemplates the levy of tax on lands and buildings, or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of powers under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not, in our Judgment, make the fields of legislation under the two entries overlapping.”

71. It was urged on behalf of the respondent that in *Assistant Commissioner of Urban Land Tax v. The Buckingham and Carnatic Co. Ltd.* [(1970)1 SCR 268], this Court held that a tax on the capital value of lands and buildings could be imposed under Entry 49, List II, but it seems to us that this is not a correct reading of that decision. Reliance is placed on the following sentence at page 277:

We see no reason, therefore, for holding that the Entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II.

72. The above observations have to be understood in the context of what was stated later. Ramaswami, J., later observed in that Judgment as follows:

“The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals, and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. But Entry 49 of List II, contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings, is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of powers under Entry 86, List I, tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II, the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two

entries overlapping. The *two taxes are entirely different in their basic concept and fell on different subject-matters.*”(Emphasis supplied).

74. The requisites of a tax under Entry 49, List II, may be summarised thus:

(1) It must be a tax on units, that is lands and buildings separately as units.
 (2) The tax cannot be a tax on totality, i. e., it is not a composite tax on the value of all lands and buildings.

(3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns **or** occupies it or two or more persons own or occupy it.

75. In short, the tax under Entry 49, List II, is not a personal tax but a tax on property.

76. It seems to us that this Court definitely held and we agree with the conclusion that the nature of the wealth tax imposed under the Wealth Tax Act, as originally stood, was different from that of a tax under Entry 49, List II, and it did not fall under this entry.

82. In our view the High Court was right in holding that the impugned Act was not a law with respect to Entry 49, List II, or did not impose a tax mentioned in Entry 49, List II. If that is so, then the legislation is valid either under Entry 86, List I, read with Entry 97, List I or Entry 97, List I standing by itself.

83. Although we have held that the impugned Act does not impose a tax mentioned in Entry 49, List II, we would like to caution that in case the real effect of a Central Act, whether called a Wealth Tax Act or not, is to impose a tax mentioned in Entry 49, List I, the tax may be bad as encroaching upon the domain of State Legislatures.

86. Although it is not necessary to decide the question whether the impugned Act falls within Entry 86, List I, read with Entry 97, List I, or Entry 97, List I alone, as some of our brethren are of the view that the original Wealth Tax Act fell under Entry 86, List I, we might express our opinion on that point. It seems to us that there is a distinction between a true net wealth tax and a tax which can be levied under Entry 86, List I. While legislating in respect of Entry 86, List I, it is not incumbent on Parliament to provide for deduction of debits in ascertaining the capital value of assets. Similarly, it is not incumbent on State Legislatures to provide for deduction of debits while legislating in respect of Entry 49, List II. For example the State Legislature need not, while levying tax under Entry 49, List II, provide for deduction of debits owed by the owner of the property. It seems to us that the other part of entry, i. e. “tax on the capital of companies”. In Entry 86, List I, also seems to indicate that this entry is not strictly concerned with taxation of net wealth because capital of a company is in one sense a liability of the company and not its asset. Even if it is regarded as an asset, there is nothing in the entry to compel Parliament to provide for deduction of debits. It would also be noticed that Entry 86, List I, deals only with individuals and companies but net wealth tax can be levied not only on individuals but on other entities and associations also. It is true that under Entry 86, List I, aggregation is necessary because it is a tax on the capital value of assets of an individual but it does not follow from this that Parliament is obliged to provide for deduction of debits in order to determine the capital value of assets of an individual or a company. Therefore, it seems to us that the whole of the impugned Act clearly falls within Entry 97, List I. We may mention that this Court has never held that the original Wealth Tax Act fell

under Entry 86, List I. It was only assumed that the original Wealth Tax Act fell within Entry 86, List I, and on that assumption this entry was analysed and contrasted with Entry 49, List II. Be that as it may, we are clearly of the opinion that no part of the impugned legislation falls within Entry 86, List I.

87. However, assuming that the Wealth Tax Act, as originally enacted, is held to be legislation under Entry 86, List I, there is nothing in the Constitution to prevent Parliament from combining its powers under Entry 86, List I with its powers under Entry 97, List I. There is no principle that we know of which debars Parliament from relying on the powers under specified Entries 1 to 96, List I and supplement them with the powers under Entry 97, List I and Article 248, and for that matter powers under entries in the Concurrent List.

90. It was contended that the case of residuary powers was different but we are unable to see any difference in principle. Residuary power is as much power as the power conferred under Article 246 of the Constitution in respect of a specified item.

91. *In In re: The Regulation and Control of Aeronautics in Canada* [1932 AC 54, 77], the Privy Council upheld the validity of a Parliamentary statute after supplementing the powers under the specified items in Section 91 with the residuary powers. It observed:

“To sum up, having regard (a) to the terms of Section 132; (b) to the terms of the convention which covers almost every conceivable matter relating to aerial navigation; and (c) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of Section 91, Items 2, 5, and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by a specific words in the Provinces. *As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good Government of Canada.* Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under Section 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.” (emphasis supplied).

92. In conclusion we hold that the impugned Act is valid. The appeal is accordingly allowed and the Judgment and order of the High Court set aside and Civil Writ No. 2291 of 1970 in the High Court dismissed. There will be no order as to costs, either here or in the High Court.

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Zaverbhai Amaldas v. State of Bombay

AIR 1954 SC 752

[M.C.Mahajan, C.J. and B.J. Mukherjea, V.Bose, B. Jagannadhadas and T.L. Venkatarama Ayyar, JJ.]

T.L. VENKATARAMA AYYAR, J. - This is an appeal against the judgment of the High Court of Bombay dismissing a revision petition filed by the appellant against his conviction under Section 7 of the Essential Supplies (Temporary Powers) Act 24 of 1946.

2. The charge against the appellant was that on 6th April, 1951, he had transported 15 maunds of juwar from his village of Khanjroli to Mandvi without a permit, and had thereby contravened Section 5(1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949. The Resident First Class Magistrate of Bardoli who tried the case, found him guilty, and sentenced him to imprisonment till the rising of the Court and a fine of Rs 500. The conviction and sentence were both affirmed by the Sessions Judge, Surat, on appeal. The appellant thereafter took up the matter in revision to the High Court of Bombay, and there for the first time, took the objection that the Resident First Class Magistrate had no jurisdiction to try the case, because under Section 2 of the Bombay Act 36 of 1947 the offence was punishable with imprisonment, which might extend to seven years, and under the Second Schedule to the Criminal Procedure Code, it was only the Sessions Court that had jurisdiction to try such offence. The answer of the State to this contention was that subsequent to the enactment of the Bombay Act 36 of 1947, the Essential Supplies (Temporary Powers) Act had undergone substantial alterations, and was finally recast by the Central Act 52 of 1950; that the effect of these amendments was that Act 36 of 1947 had become inoperative, that the governing Act was Act 52 of 1950, and that as under that Act the maximum sentence for the offence in question was three years, the Resident First Class Magistrate had jurisdiction over the offence.

3. The revision petition was heard by a Bench consisting of Bavdekar and Chainani, JJ. Bavdekar, J. was of the opinion that the amendments to the Essential Supplies (Temporary Powers) Act including the re-enactment of Section 7 in Act 52 of 1950 did not trench on the field covered by the Bombay Act 36 of 1947, which accordingly remained unaffected by them. Chainani, J., on the other hand, held that both Act 36 of 1947 and Act 52 of 1950 related to the same subject-matter, and that as Act 52 of 1950 was a Central legislation of a later date, it prevailed over the Bombay Act 36 of 1947. On this difference of opinion, the matter came up under Section 429, Criminal Procedure Code for hearing before Chagla, C.J., who agreed with Chainani, J. that there was repugnancy between Section 7 of Act 52 of 1950 and Section 2 of the Bombay Act 36 of 1947, and that under Article 254(2), the former prevailed; and the revision petition was accordingly dismissed. Against this judgment, the present appeal has been preferred on a certificate under Article 132(1), and the point for determination is whether contravention of Section 5(1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949 is punishable under Section 2 of the Bombay Act 36 of 1947, in which case the trial by the Resident First Class Magistrate would be without jurisdiction; or whether it is punishable under Section 7 of the Essential Supplies

(Temporary Powers) Act, as amended by Act 52 of 1950, in which case, the trial and conviction of the appellant by that Magistrate would be perfectly legal.

4. It is now necessary to refer in chronological sequence to the statutes bearing on the question. We start with the Essential Supplies (Temporary Powers) Act 24 of 1946 enacted by the Central Legislature by virtue of the powers conferred on it by 9 and 10, George VI, Chapter 39. It applied to the whole of British India. Section 3 of the Act conferred power on the Central Government to issue orders for regulating the production, supply and distribution of essential commodities, and under Section 4, this power could be delegated to the Provincial Government. Section 7(1) provided for punishment for contravention of orders issued under the Act, and ran as follows:

“If any person contravenes any order made under Section 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty;

Provided that where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall make such direction, unless for reasons to be recorded in writing it is of opinion that the direction should not be made in respect of the whole or as the case may be, a part of the property.”

The State of Bombay considered that the maximum punishment of three years' imprisonment provided in the above section was not adequate for offences under the Act, and with the object of enhancing the punishment provided therein, enacted Act 36 of 1947. Section 2 of the said Act provided (omitting what is not material for the present purpose) that “Notwithstanding anything contained in the Essential Supplies (Temporary Powers) Act, 1946, whoever contravenes an order made or deemed to be made under Section 3 of the said Act, shall be punished with imprisonment which may extend to seven years, but shall not, except for reasons to be recorded in writing, be less than six months, and shall also be liable to fine.” This section is avowedly repugnant to Section 7(1) of the Essential Supplies (Temporary Powers) Act. Section 107(2) of the Government of India Act, which was the Constitution Act then in force, enacted that,

“Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law having been reserved for the consideration of the Governor-General has received the assent of the Governor-General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter.”

On the footing that the subject-matter of Act 36 of 1947 fell within the Concurrent List, the Bombay Government obtained the assent of the Governor-General therefor, and thereafter, it came into force on 25th November, 1947. The position therefore was that by reason of Section 107(2) of the Government of India Act, Act 36 of 1947 prevailed in Bombay over Section 7 of the Essential Supplies (Temporary Powers) Act; but at the same

time, it was subject under that section to all and any “further legislation with respect to the same matter”, that might be enacted by the Central Legislature.

5. The contention of the State is that there was such further legislation by the Central Legislature in 1948, in 1949 and again in 1950, and that as a result of such legislation, Section 2 of the Bombay Act 36 of 1947 had become inoperative. In 1948 there was an amendment of the Essential Supplies (Temporary Powers) Act, whereby the proviso to Section 7(1) was repealed and a new proviso substituted, which provided inter alia that,

“Where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall direct that any property in respect of which the order has been contravened shall be forfeited to His Majesty, unless for reasons to be recorded in writing it is of opinion that the direction should be made not in respect of the whole, or as the case may be, a part of the property.”

The Essential Supplies (Temporary Powers) Act was again amended in 1949. Under this amendment, the proviso to Section 7(i) was repealed, and a new clause substituted in the following terms:

“(b) Where the contravention is of an order relating to foodstuffs, the Court shall

(i) sentence any person convicted of such contravention to imprisonment for a term which may extend to three years and may, in addition, impose a sentence of fine, unless for reasons to be recorded, it is of opinion that a sentence of fine only will meet the ends of justice; And

(ii) direct that any property in respect of which the order has been contravened or a part thereof shall be forfeited to His Majesty, unless for reasons to be recorded it is of opinion that such direction is not necessary to be made in respect of the whole, or, as the case may be, a part of the property.”

Then came Central Act 52 of 1950, under which the old Section 7 was repealed and a new section enacted in the following terms:

“(1) If any person contravenes any order under Section 3 relating to cotton textiles he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine; and any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government.

(2) If any person contravenes any order under Section 3 relating to foodstuffs,—

(a) he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine, unless for reasons to be recorded the Court is of opinion that a sentence of fine only will meet the ends of justice; and

(b) any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government, unless for reasons to be recorded the Court is of opinion that it is not necessary to direct forfeiture in respect of the whole or, as the case may be, any part of the property:

Provided that where the contravention is of an order prescribing the maximum quantity of any foodgrain that may lawfully be possessed by any person or class of persons, and the person contravening the order is found to have been in possession of foodgrains exceeding twice the maximum quantity so prescribed, the Court shall—

(a) sentence him to imprisonment for a term which may extend to seven years and to a fine not less than twenty times the value of the foodgrain found in his possession, and

(b) direct that the whole of such foodgrain in excess of the prescribed quantity shall be forfeited to the Government.

Explanation.— A person in possession of foodgrain which does not exceed by more than five maunds the maximum quantity so prescribed shall not be deemed to be guilty of an offence punishable under the proviso to this sub-section.

(3) If any person contravenes any order under Section 3 relating to any essential commodity other than cotton textiles and food-stuffs, he shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both, and if the order so provides, any property in respect of which the Court is satisfied that the order has been contravened may be forfeited to the Government.

(4) If any person to whom a direction is given under sub-section (4) of Section 3 fails to comply with the direction, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.”

6. It must be mentioned that while the amendments of 1948 and 1949 were made when Section 107(2) of the Government of India Act was in force, the Constitution of India Act had come into operation, when Act 52 of 1950 was enacted. Article 254(2) of the Constitution is as follows:

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

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

7. This is, in substance, a reproduction of Section 107(2) of the Government of India Act, the concluding portion thereof being incorporated in a proviso with further additions. Discussing the nature of the power of the Dominion Legislature, Canada, in relation to that of the Provincial Legislature, in a situation similar to that under Section 107(2) of the Government of India Act, it was observed by Lord Waston in *Attorney-General for Ontario v. Attorney-General for the Dominion* [(1896) AC 348] that though a law enacted by the Parliament of Canada and within its competence would override Provincial legislation covering the same field, the Dominion Parliament had no authority conferred upon it under the Constitution to enact a statute repealing directly any Provincial statute. That would appear to have been the position under Section 107(2) of the Government of India Act with referenceto the subjects mentioned in the Concurrent List. Now, by the proviso to Article 254(2) the Constitution has enlarged the powers of Parliament, and under that proviso, Parliament can do what the Central Legislature could not under Section 107(2) of the Government of India Act, and enact a law adding to, amending, varying or repealing a law of the State, when it relates to a matter mentioned in the Concurrent List. The position then is that under the Constitution Parliament can, acting under the proviso to Article 254(2), repeal a State law. But where it

does not expressly do so, even then, the State law will be void under that provision if it conflicts with a later “law with respect to the same matter” that may be enacted by Parliament.

8. In the present case, there was no express repeal of the Bombay Act by Act 52 of 1950 in terms of the proviso to Article 254(2). Then the only question to be decided is whether the amendments made to the Essential Supplies (Temporary Powers) Act by the Central Legislature in 1948, 1949 and 1950 are “furthers legislation” falling within Section 107(2) of the Government of India Act or “law with respect to the same matter” falling within Article 254(2). The important thing to consider with reference to this provision is whether the legislation is “in respect of the same matter”. If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Article 254(2) will have no application. The principle embodied in Section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.

9. Considering the matter from this standpoint, the first question to be asked is, what is the subject-matter of the Bombay Act 36 of 1947? The preamble recites that it was “to provide for the enhancement of penalties for contravention of orders made under the Essential Supplies (Temporary Powers) Act, 1946”. Then the next question is, what is the scope of the subsequent legislation in 1948, 1949 and 1950? As the offence for which the appellant has been convicted was committed on 6th April, 1951, it would be sufficient for the purpose of the present appeal to consider the effect of Act 52 of 1950, which was in force on that date. By that Act, Section 7(1) of the Essential Supplies (Temporary Powers) Act as passed in 1946 and as amended in 1948 and 1949 was repealed, and in its place, a new section was substituted. The scheme of that section is that for purposes of punishment, offences under the Act are grouped under three categories - those relating to cotton textiles, those relating to foodstuffs, and those relating to essential commodities other than textiles or foodstuffs. The punishments to be imposed in the several categories are separately specified. With reference to foodstuffs, the punishment that could be awarded when the offence consists in possession of foodgrains exceeding twice the maximum prescribed, is imprisonment for a term which may extend to seven years, with further provisions for fine and forfeiture of the commodities. In other cases, there is the lesser punishment of imprisonment, which may extend to three years. Section 7 is thus a comprehensive code covering the entire field of punishment for offences under the Act, graded according to the commodities and to the character of the offence. The subject of enhanced punishment that is dealt with in Act 36 of 1947 is also comprised in Act 52 of 1950, the same being limited to the case of hoarding of foodgrains. We are, therefore, entirely in agreement with the opinion of Chagla, C.J. and Chainani, J. that Act 52 of 1950 is a legislation in respect of the same matter as Act 36 of 1947.

10. Bavdekar, J. who came to the contrary conclusion observed, and quite correctly, that to establish repugnancy under Section 107(2) of the Government of India Act, it was not necessary that one legislation should say “do” what the other legislation says “don’t”, and that repugnancy might result when both the legislations covered the same field. But he took the view that the question of enhanced penalty under Act 36 of 1947 was a matter different from

that of punishment under the Essential Supplies (Temporary Powers) Act, and as there was legislation in respect of enhanced penalty only when the offence was possession of foodstuffs in excess of twice the prescribed quantity, the subject-matter of Act 36 of 1947 remained untouched by Act 52 of 1950 in respect of other matters. In other words, he considered that the question of enhanced punishment under Act 36 of 1947 was a matter different from that of mere punishment under the Essential Supplies (Temporary Powers) Act and its amendments; and in this, with respect, he fell into an error. The question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act both under Act 36 of 1947 and under Act 52 of 1950 constitutes a single subject-matter and cannot be split up in the manner suggested by the learned Judge. On this principle rests the rule of construction relating to statutes that “when the punishment or penalty is altered in degree but not in kind, the later provision would be considered as superseding the earlier one”. (Maxwell on Interpretation of Statutes, 10th Edition, pages 187 and 188). “It is a well settled rule of construction”, observed Goddard, J. in *Smith v. Benabo* [(1937) 1 KB 518] “that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute: see *Michell v. Brown* [1 El & El 267, 274] per Lord Campbell”.

11. It is true, as already pointed out, that on a question under Article 254(1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law. We must accordingly hold that Section 2 of Bombay Act 36 of 1947 cannot prevail as against Section 7 of the Essential Supplies (Temporary Powers) Act 24 of 1946 as amended by Act 52 of 1950.

12. The appellant also sought to argue that the subject-matter of the legislation in Act 36 of 1947 was exclusively in the Provincial List, and that Section 107(2) of the Government of India Act and Article 254(2) of the Constitution which apply only with reference to legislation on subjects which are in the Concurrent List, have no application. The very legislation on which the appellant relies viz. Act 36 of 1947, proceeds, as already stated, on the basis that the subject-matter is in the Concurrent List. The appellant raised this question before the learned Judges of the Bombay High Court, and they rejected it. In the application for leave to appeal to this Court which was presented under Article 132(1), the only ground that was put forward as involving a substantial question as to the interpretation of the Constitution was, whether the Bombay Act 36 of 1947 was repugnant and void under Article 254 of the Constitution. No other question having been raised in the petition, we must decline to permit the appellant to raise this point.

13. In the result, the appeal fails and is dismissed.

* * * * *

Hoechst Pharmaceuticals Ltd. v. State of Bihar

(1983) 4 SCC 45;

[A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ.]

[*Doctrine of Repugnancy – Article 254*]

The Bihar Finance Act, 1981, ('Act' for short) under Section 5 provided for the imposition of a surcharge at 10 per cent of the total amount of the tax payable by a dealer whose gross turnover during a year exceeded Rs. 5 lakhs, in addition to the tax payable by him.

The facts in Civil Appeal No. 2567 / 1982 as gathered from the judgment are as follows.

Messrs Hoechst Pharmaceuticals Limited and Messrs Glaxo Laboratories (India) Limited are companies incorporated under the Companies Act, 1956 engaged in the manufacture and sale of various medicines and life-saving drugs throughout India including the State of Bihar. They have their branch or sales depot at Patna registered as a dealer under Section 14 of the Act and effect sales of their products through wholesale distributors or stockists appointed in Bihar who, in their turn, sell them to retailers through whom the medicines and drugs reach the consumers. Almost 94 per cent of the medicines and drugs sold by them are at the controlled price exclusive of local taxes under the *Drugs (Prices Control) Order, 1979 issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act* and they are expressly prohibited from selling these medicines and drugs in excess of the controlled price so fixed by the Central Government from time to time which allows the manufacturer or producer to pass on the tax liability to the consumer. The appellants have their printed price-lists of their medicines and drugs showing the price at which they sell to the retailers as also the retail price, both inclusive of excise duty. One of the terms of their contract is that sales tax and local taxes will be charged wherever applicable.

The appellants produced in the Court the orders of assessment together with notices of demand, for the assessment years 1980-81 and 1981-82. These figures showed the magnitude of the business carried on by these appellants in the State of Bihar alone and their capacity to bear the additional burden of surcharge levied under sub-section (1) of Section 5 of the Bihar Finance Act, 1981.

The High Court referred to the decision in *S. Kodar v. State of Kerala* [AIR 1974 SC 2272] where this court upheld the constitutional validity of sub-section (2) of Section 2 of the Tamil Nadu Additional Sales Tax Act, 1970 which is in pari materia with sub-section (3) of Section 5 of the Act and which interdicts that no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable by him. It held that the surcharge levied under sub-section (1) of Section 5 is in reality an additional tax on the aggregate of sales effected by a dealer during a year and that it was not necessary that the dealer should be enabled to pass on the incidence of tax on sale to the purchaser in order that it might be a tax on the sale of goods. Merely because the dealer is prevented by sub-section (3) of Section 5 of the Act from collecting the surcharge, it does not cease to be a surcharge on sales tax. Relying on *Kodar* case, the Court held that:

- the charge under sub-section (1) of Section 5 of the Act falls at a uniform rate of 10 percent of the tax on all dealers falling within the class specified therein i.e. whose gross turnover during a year exceeds Rs. 5 lakhs, and is therefore not discriminatory and violative of Article 14 of the Constitution,

- nor is it possible to say that because a dealer is disabled from passing on the incidence of surcharge to the purchaser, sub-section (3) of Section 5 imposes an unreasonable restriction on the fundamental right guaranteed under Article 19(1) (g).

As regards the manufacturers and producers of medicines and drugs, the High Court held

- that there was no irreconcilable conflict between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order, 1979 and both the laws are capable of being obeyed.

In spite of the decision of the Supreme Court in *Kodar* case, the appellants challenged the constitutional validity of sub-section (3) of Section 5 of the Act on the ground that the court in that case did not consider the effect of price fixation of essential commodities by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which, by reason of Section 6 of that Act, has an overriding effect notwithstanding any other law inconsistent therewith.

A.P. SEN, J. - 3. The principal contention advanced by the appellants in these appeals is that the field of price fixation of essential commodities in general, and drugs and formulations in particular, is an occupied field by virtue of various control orders issued by the Central Government from time to time under sub-section (1) of Section 3 of the Essential Commodities Act, 1955 which allows the manufacturer or producer of goods to pass on the tax liability to the consumer and therefore the State legislature of Bihar had no legislative competence to enact sub-section (3) of Section 5 of the Act which interdicts that no dealer liable to pay a surcharge, in addition to the tax payable by him, shall be entitled to collect the amount of surcharge, and thereby trenches upon a field occupied by a law made by Parliament. Alternatively, the submission is that if sub-section (3) of Section 5 of the Act were to cover all sales including sales of essential commodities whose prices are fixed by the Central Government by various control orders issued under the Essential Commodities Act, then there will be repugnancy between the State law and the various control orders which according to Section 6 of the Essential Commodities Act must prevail. There is also a subsidiary contention put forward on behalf of the appellants that sub-section (1) of Section 5 of the Act is ultra vires the State legislature inasmuch as the liability to pay surcharge is on a dealer whose gross turnover during a year exceeds Rs. 5 lakhs or more i.e. inclusive of transactions relating to sale or purchase of goods which have taken place in the course of inter-State trade or commerce or outside the State or in the course of import into, or export of goods outside the territory of India. The submission is that such transactions are covered by Article 286 of the Constitution and therefore are outside the purview of the Act and thus they cannot be taken into consideration for computation of the gross turnover as defined in Section 2(j) of the Act for the purpose of bearing the incidence of surcharge under sub-section (1) of Section 5 of the Act.

10. In *Kodar* case [*S. Kodar v. State of Kerala*, AIR 1974 SC 2272], this court upheld the constitutional validity of the Tamil Nadu Additional Sales Tax Act, 1970 which imposes additional sales tax at 5 per cent on a dealer whose annual gross turnover exceeds Rs. 10 lakhs. The charging provision in subsection (1) of Section 2 of that Act is in terms similar to sub-section (1) of Section 5 of the Act, and provides that the tax payable by a dealer whose turnover for a year exceeds Rs. 10 lakhs shall be increased by an additional tax at the rate of 5

per cent of the tax payable by him. Sub-section (2) of that Act is in pari materia with sub-section (3) of Section 5 of the Act and provides that no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable by him. The court laid down that:

(1) The additional tax levied under sub-section (1) of Section 2 of that Act was in reality a tax on the aggregate of sales effected by a dealer during a year and therefore the additional tax was really a tax on the sale of goods and not a tax on the income of a dealer and therefore falls within the scope of Entry 54 of List II of the Seventh Schedule.

(2) Generally speaking, the amount or rate of tax is a matter exclusively within the legislative judgment and so long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, its reasonableness cannot be questioned by the court. The imposition of additional tax on a dealer whose annual turnover exceeds Rs. 10 lakhs is not an unreasonable restriction on the fundamental rights guaranteed under Article 19(1) (g) or (f) as the tax is upon the sale of goods and was not shown to be confiscatory.

(3) It is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for seller to collect the tax from the purchasers. Merely because sub-section (2) of Section 2 of that Act prevented a dealer from passing on the incidence of additional tax to the purchaser, it cannot be said that the Act imposes an unreasonable restriction upon the fundamental rights under Article 19(1)(g) or (f). The Act was not violative of Article 14 of the Constitution as classification of dealers on the basis of their turnover for the purpose of levy of additional tax was based on the capacity of dealers who occupy a position of economic superiority by reason of their greater volume of business i.e. on capacity to pay and such classification for purposes of the levy was not unreasonable.

12. Sub-section (1) of Section 5 of the Act provides for the levy of surcharge on every dealer whose gross turnover during a year exceeds Rs. 5 lakhs and the material provisions of which are in the following terms:

5. Surcharge. (1) Every dealer whose gross turn over during a year exceeds rupees five lakhs shall, in addition to the tax payable by him under this Part, also pay a surcharge at such rate not exceeding 10 per cent of the total amount of the tax payable by him, as may be fixed by the State Government by a notification published in the Official Gazette....

Sub-section (3) of section 5 of the Act, the constitutional validity of which is challenged provides:

Notwithstanding anything to the contrary contained in this Part, no dealer mentioned in sub-section (1), who is liable to pay surcharge, shall be entitled to collect the amount of this surcharge.

13. It is fairly conceded that not only sub-section (1) of Section 5 of the Act which provides for the levy of surcharge on dealers whose gross turnover during a year exceeds Rs. 5 lakhs, but also sub-section (3) of Section 5 of the Act which enjoins that no dealer who is liable to pay a surcharge under sub-section (1) shall be entitled to collect the amount of surcharge payable by him, are both relatable to Entry 54 of List II of the Seventh Schedule which reads:

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.

14. There can be no doubt that the Central and the State legislations operate in two different and distinct fields. The Essential Commodities Act provides for the regulation, production, supply, distribution and pricing of essential commodities and is relatable to Entry 33 of List III of the Seventh Schedule which reads:

33. Trade and commerce in, and the production, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

17. We are here concerned with the impact of sub-section (3) of Section 5 of the Act on the price structure of formulations, but nonetheless much stress was laid on fixation of price of bulk drugs under Paragraph 3(2) which allows a reasonable return to the manufacturer under sub-paragraph (3) thereof. A manufacturer or producer of such bulk drugs is entitled to sell it at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any, payable.

22. [...] The amount credited to the Drugs Prices Equalisation Account is meant to compensate a manufacturer, importer or distributor the shortfall between his retention price and the common selling price or, as the case may be, the pooled price for the purpose of increasing the production, or securing the equitable distribution and availability at fair prices, of drugs after meeting the expenses incurred by the Government in connection therewith. Every manufacturer, importer or distributor is entitled to make a claim for being compensated for the shortfall.

25. Much emphasis was laid on fixation of price of bulk drugs under Paragraph 3 which provides by sub-paragraph (1) that the Government may, with a view to regulating the equitable distribution of an indigenously manufactured bulk drug specified in the First Schedule or the Second Schedule and making it available at a fair price and subject to the provisions of sub-paragraph (2) and after making such enquiry as it deems fit, fix from time to time, by notification in the official Gazette, the maximum price at which such bulk drug shall be sold. Sub-paragraph (2) enjoins that while fixing the price of a bulk drug under sub-paragraph (1), the Government may take into account the average cost of production of each bulk drug manufactured by efficient manufacturer and allow a reasonable return on net worth. Explanation thereto defines the expression “efficient manufacturer” to mean a manufacturer

(i) whose production of such bulk drug in relation to the total production of such bulk drug in the country is large, or (ii) who employs efficient technology in the production of such bulk drug. Sub-paragraph (3) provides that no person shall sell a bulk drug at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any, payable.

28. It cannot be doubted that a surcharge partakes of the nature of sales tax and therefore it was within the competence of the State legislature to enact sub-section (1) of Section 5 of the Act for the purpose of levying surcharge on certain class of dealers in addition to the tax payable by them. When the State legislature had competence to levy tax on sale or purchase of goods under Entry 54, it was equally competent to select the class of dealers on whom the charge will fall. If that be so, the State legislature could undoubtedly have enacted sub-section (3) of Section 5 of the Act prohibiting the dealers liable to pay a surcharge under sub-section

(1) thereof from recovering the same from the purchaser. It is fairly conceded that sub-section (3) of Section 5 of the Act is also relatable to Entry 54. The contention however is that there is conflict between Paragraph 21 of the Control Order which allows a manufacturer or producer of drugs to pass on the liability to pay sales tax and sub-section (3) of Section 5 of the Act which prohibits such manufacturers or producers from recovering the surcharge and therefore it is constitutionally void. It is said that the courts should try to adopt the rule of harmonious construction and give effect to Paragraph 21 of the Control Order as the impact of sub-section (3) of Section 5 of the Act is on fixation of price of drugs under the Drugs (Prices Control) Order and therefore by reason of Section 6 of the Essential Commodities Act, Paragraph 21 of the Control Order which provides for the passing on of tax liability must prevail. This submission rests on a construction of Article 246(3) of the Constitution and it is said that the power of the State legislature to enact a law with respect to any subject in List II is subject to the power of Parliament to legislate with respect to matters enumerated in Lists I and III.

29. It is convenient at this stage to deal with the contention of the appellants that if sub-section (3) of Section 5 of the Act were to cover all sales including sales of essential commodities whose prices are controlled by the Central Government under the various control orders issued under sub-section (1) of Section 3 of the Essential Commodities Act, then there will be repugnancy between the State law and such control orders which according to Section 6 of the Essential Commodities Act must prevail. In such a case, the State law must yield to the extent of the repugnancy. In *Harishankar Bagla v. State of M.P.* [AIR 1954 SC 465], the court had occasion to deal with the non obstante clause in Section 6 of the Essential Supplies (Temporary Powers) Act, 1946 which was in pari materia with Section 6 of the Essential Commodities Act and it was observed:

The effect of Section 6 certainly is not to repeal any one of those laws or abrogate them. Its object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, 1946, or the orders made thereunder. In other words, the orders made under Section 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this Order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By-passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the order made under Section 3 it does not operate in that field for the time being.

The court added that after an order is made under Section 3 of that Act, Section 6 then steps in wherein Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than that Act.

30. Placing reliance on the observations in *Harishankar Bagla* case, it is urged that the effect of the non obstante clause in Section 6 of the Essential Commodities Act is to give an overriding effect to the provisions of Paragraph 21. It is further urged that Paragraph 21 of the Control Order having been issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which permits the manufacturer or producer to pass on the liability to pay sales tax must prevail and sub-section (3) of Section 5 of the Act which is inconsistent therewith is by-passed. The contention appears to be misconceived. The

appellants being manufacturers or producers of formulations are not governed by Paragraph 21 of the Control Order but by Paragraph 24 thereof and therefore the price chargeable by them to a wholesaler or distributor is inclusive of sales tax. There being no conflict between sub-section (3) of Section 5 of the Act and Paragraph 24 of the Control Order, the question of non obstante clause to Section 6 of the Essential Commodities Act coming into play does not arise.

31. Even otherwise i.e. if some of the appellants were governed by Paragraph 21 of the Control Order that would hardly make any difference. Under the scheme of the Act, a dealer is free to pass on the liability to pay sales tax payable under Section 3 and additional sales tax payable under Section 6 to the purchasers. Sub-section (3) of Section 5 of the Act however imposes a limitation on dealers liable to pay surcharge under sub-section (1) thereof from collecting the amount of surcharge payable by them from the purchasers which only means that surcharge payable by such dealers under sub-section (1) of Section 5 of the Act will cut into the profits earned by such dealers. The controlled price or retail price of medicines and drugs under Paragraph 21 remains the same, and the consumer interest is taken care of inasmuch as the liability to pay surcharge under subsection (3) of Section 5 cannot be passed on. That being so, there is no conflict between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order. The entire submission advanced by learned counsel for the appellants proceeds on the hypothesis that the various control orders issued under sub-section (1) of Section 3 of the Essential Commodities Act are for the protection of the manufacturer or producer. There is an obvious fallacy in the argument which fails to take into account the purpose of the legislation.

32. Where the fixation of price of an essential commodity is necessary to protect the interests of consumers in view of the scarcity of supply, such restriction cannot be challenged as unreasonable on the ground that it would result in the elimination of middleman for whom it would be unprofitable to carry on business at fixed rate or that it does not ensure a reasonable return to the manufacturer or producer on the capital employed in the business of manufacturing or producing such an essential commodity.

33. The contention that in the field of fixation of price by a control order issued under sub-section (1) of Section 3 of the Essential Commodities Act, the Central Government must have due regard to the securing of a reasonable return on the capital employed in the business of manufacturing or producing an essential commodity is entirely misconceived. The predominant object of issuing a control order under sub-section (1) of Section 3 of the Act is to secure the equitable distribution and availability of essential commodities at fair prices to the consumers, and the mere circumstance that some of those engaged in the field of industry, trade and commerce may suffer a loss is no ground for treating such a regulatory law to be unreasonable, unless the basis adopted for price fixation is so unreasonable as to be in excess of the power to fix the price, or there is a statutory obligation to ensure a fair return to the industry. In *Shree Meenakshi Mills Ltd. v. Union of India* [AIR 1974 SC 366] Ray, C. J. speaking for the court rejected the contention that the controlled price must ensure a reasonable return on the capital employed in the business of manufacturing or producing essential commodities...

36. The principal point in controversy is: Whether there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order and therefore sub-section (3) of Section 5 must yield to that extent. The submission is that if Parliament chooses to occupy the field and there is price fixation of an essential commodity with liberty to pass on the burden of tax to the consumer by a law made by Parliament under Entry 33 of List III of the Seventh Schedule, then it is not competent for the State legislature to enact a provision like sub-section (3) of Section 5 of the Act while enacting a law under Entry 54 of List II prohibiting the passing on of liability of tax to the purchaser.

37. The true principle applicable in judging the constitutional validity of sub-section (3) of Section 5 of the Act is to determine whether in its pith and substance it is a law relatable to Entry 54 of List II of the Seventh Schedule and not, whether there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order made under sub-section (1) of Section 3 of the Essential Commodities Act, is therefore void. In dealing with the question, we must set out Article 246 of the Constitution which is based on Section 100 of the Government of India Act, 1935....

38. It is obvious that Article 246 imposes limitations on the legislative powers of the Union and State legislatures and its ultimate analysis would reveal the following essentials:

1. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). The non obstante clause in Article 246(1) provides for predominance or supremacy of Union legislature. This power is not encumbered by anything contained in clauses (2) and (3) for these clauses themselves are expressly limited and made subject to the non obstante clause in Article 246 (1). The combined effect of the different clauses contained in Article 246 is no more and no less than this : that in respect of any matter falling within List I, Parliament has exclusive power of legislation.
2. The State legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III. The exclusive power of the State legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an entry in List I and an entry in List II which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede pro tanto the exercise of power of the State legislature.
3. Both Parliament and the State legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III.

39. Article 254 provides for the method of resolving conflicts between a law made by Parliament and a law made by the legislature of a State with respect to a matter falling in the Concurrent List[...]

40. We find it difficult to subscribe to the proposition advanced on behalf of the appellants that merely because of the opening words of Article 246(3) of the Constitution “subject to clauses (1) and (2)” and the non-obstante clause in Article 246(1) “notwithstanding anything in clauses (2) and (3)”, sub-section (3) of Section 5 of the Act which provides that no dealer shall be entitled to collect the amount of surcharge must be

struck down as ultra vires the State legislature inasmuch as it is inconsistent with Paragraph 21 of the Drugs (Prices Control) Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which enables the manufacturer or producer of drugs to pass on the liability to pay sales tax to the consumer. The submission is that sub-section (3) of Section 5 of the Act enacted by the State legislature while making a law under Entry 54 of List II of the Seventh Schedule which interdicts that a dealer liable to pay surcharge under sub-section (1) of Section 5 of the Act shall not be entitled to collect it from the purchaser, directly trenches upon Union power to legislate with respect to fixation of price of essential commodities under Entry 33 of List III. It is said that if both are valid, then ex hypothesi the law made by Parliament must prevail and the State law pro tanto must yield. We are afraid, the contention cannot prevail in view of the well accepted principles.

41. The words “notwithstanding anything contained in clauses (2) and (3)” in Article 246(1) and the words “subject to clauses (1) and (2)” in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III, and in case of overlapping between Lists II and III, the former shall prevail. But the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an “irreconcilable” conflict between the entries in the Union and State Lists. In the case of a seeming conflict between the entries in the two Lists, the entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non-obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation, by the application of the doctrine of ‘pith and substance’ appears to fall exclusively under one list, and the encroachment upon another list is only incidental.

42. Union and State legislatures have concurrent power with respect to subjects enumerated in List III, subject only to the provision contained in clause (2) of Article 254 i.e. provided the provisions of the State Act do not conflict with those of any Central Act on the subject. However, in case of repugnancy between a State Act and a Union law on a subject enumerated in List III, the State law must yield to the Central law unless it has been reserved for the assent of the President and has received his assent under Article 254(2).

43. As regards the distribution of legislative powers between the Union and the States, Article 246 adopts with immaterial alterations the scheme for the distribution of legislative powers contained in Section 100 of the Government of India Act, 1935. Our Constitution was not written on a clean slate because a Federal Constitution had been established by the Government of India Act, 1935 and it still remains the framework on which the present Constitution is built. The provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act, 1935 and the principles laid down in connection with the nature and interpretation of legislative power contained in the

Government of India Act, 1935 are applicable, and have in fact been applied, to the interpretation of the Constitution.

45. With regard to the interpretation of non obstante clause in Section 100(1) of the Government of India Act, 1935 Gwyer, C.J. observed:

It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by the language of the other.

In all cases of this kind the question before the Court", according to the learned Chief Justice is not "how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now".

47. Earl Loreburn, L.C. delivering the judgment of the Judicial Committee in *Attorney General for Ontario* case [1912 AC 571] observed that in the interpretation of Sections 91 and 92 of the British North America Act:

If the text is explicit, the text is conclusive alike for what it directs and what it forbids. When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.

48. In *A.L.S.P.L. Subrahmanyam Chettiar v. Muttuswami Goundan* [AIR 1941 FC 47], Gwyer, C.J. reiterated that the principles laid down by the Privy Council in a long line of decisions in the interpretation of Sections 91 and 92 of the British North America Act, 1867 must be accepted as a guide for the interpretation of Section 100 of the Government of India Act, 1935 :

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character", for the purpose of determining whether it is legislation with respect of matters in this list or in that.

49. It has already been stated that where the two lists appear to conflict with each other, an endeavour, should be made to reconcile them by reading them together and applying the doctrine of pith and substance. It is only when such attempt to reconcile fails that the non obstante clause in Article 246(1) should be applied as a matter of last resort. For, in the words of Gwyer, C. J. in *C.P. and Berar Taxation Act* case [AIR 1939 FC 1]:

For the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

50. The observations made by the Privy Council in the *Citizens Insurance Company* case [(1881) 7 AC 96,108], were quoted with approval by Gwyer, C.J. in *C.P. and Berar Taxation Act* case, and he observed that an endeavour should be made to reconcile apparently conflicting provisions and that the general power ought not to be construed as to make a nullity of a particular power operating in the same field. The same duty of reconciling

apparently conflicting provisions was reiterated by Lord Simonds in delivering the judgment of the Privy Council in ***Governor-General in Council v. Province of Madras*** [AIR 1945 PC 98]:

For in a Federal constitution, in which there is a division of legislative powers between Central and Provincial legislatures, it appears to be inevitable that controversy should arise whether one or other legislature is not exceeding its own, and encroaching on the other's, constitutional legislative power, and in such a controversy it is a principle, which their Lordships do not hesitate to apply in the present case, that it is not the name of the tax but its real nature, its "pith and substance" as it has sometimes been said, which must determine into what category it falls.

Their Lordships approved of the decision of the Federal Court in ***Province of Madras v. Boddu Paidanna & Sons*** [AIR 1942 FC 33] where it was held that when there were apparently conflicting entries the correct approach to the question was to see whether it was possible to effect a reconciliation between the two entries so as to avoid a conflict and overlapping.

51. In ***Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna*** [AIR 1947 PC 60], Lord Porter delivering the judgment of the Board laid down that in distinguishing between the powers of the divided jurisdictions under Lists I, II and III of the Seventh Schedule to the Government of India Act, 1935, it is not possible to make a clean cut between the powers of the various legislatures. They are bound to overlap from time to time, and the rule which has been evolved by the Judicial Committee whereby an impugned statute is examined to ascertain its pith and substance or its true character for the purpose of determining in which particular list the legislation falls, applies to Indian as well as to Dominion legislation. In laying down that principle, the Privy Council observed:

Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap.

The Privy Council quoted with approval the observations of Gwyer, C. J. in ***Subrahmanyam Chettiar*** case [1940 FCR 188] quoted above, and observed :

No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars, and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provision should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial Legislation could never effectively be dealt with.

52. It would therefore appear that apparent conflict with the federal power had to be resolved by application of the doctrine of pith and substance and incidental encroachment. Once it is found that a law made by the Provincial legislature was with respect to one of the matters enumerated in the Provincial List, the degree or extent of the invasion into the

forbidden field was immaterial. “The invasion of the provinces into subjects in the Federal List,” in the words of Lord Porter, “was important”:

[...] N]ot, ... because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking ? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

The passage quoted above places the precedence accorded to the three Lists in its proper perspective. In answering the objection that that view does not give sufficient effect to the non obstante clause in Section 100(1) of the Government of India Act, 1935, as between the three Lists, the Privy Council observed:

Where they come in conflict List I has priority over Lists III and II and List III has priority over List II.

But added:

The priority of the Federal legislature would not prevent the Provincial Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.

It would therefore appear that the constitutionality of the law is to be judged by its real subject-matter and not by its incidental effect on any topic of legislation in another field.

53. The decision of the Privy Council in *Prafulla Kumar Mukherjee* case, has been repeatedly approved by the Federal Court and this court as laying down the correct rule to be applied in resolving conflicts which arise from overlapping powers in mutually exclusive lists.. It may be added as a corollary of the pith and substance rule that once it is found that in pith and substance an impugned Act is a law on a permitted field any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact that Act.

57. It is well settled that the validity of an Act is not affected if it incidentally trenches upon matters outside the authorized field and therefore it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another Legislature.

62. [...]The question is whether the field is not clear and the two legislations meet and therefore on the doctrine of federal supremacy sub-section (3) of Section 5 of the Act must be struck down as ultra vires. The principle deducible from the dictum of Lord Dunedin as applied to the distribution of legislative powers under Article 246 of the Constitution is that when the validity of an Act is challenged as ultra vires, the answer lies to the question, what is the pith and substance of the impugned Act ? No doubt, in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If, however, the matter dealt with comes within any of the classes of subjects enumerated in List II, then it is under the terms of Article 246(3) not to be

deemed to come within the classes of subjects assigned exclusively to Parliament under Article 246(1) even though the classes of subjects looked at singly overlap in many respects. The whole distribution of powers must be looked at as Gwyer, C.J. observed in *C.P. and Berar Taxation Act* case, in determining the question of validity of the Act in question. Moreover, as Gwyer, C.J. laid down in *Subrahmanyam Chettiar* case, and affirmed by Their Lordships of the Privy Council in *Prafulla Kumar Mukherjee* case, it is within the competence of the State legislature under Article 246(3) to provide for matters which, though within the competence of Parliament, are necessarily incidental to effective legislation by the State legislature on the subject of legislation expressly enumerated in List II.

63. We must then pass on to the contention advanced by learned counsel for the appellants that there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order and therefore sub-section (3) of Section 5 of the Act is void to that extent. Ordinarily, the laws could be said to be repugnant when they involve impossibility of obedience to them simultaneously but there may be cases in which enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. The question of “repugnancy” arises only with reference to a legislation falling in the Concurrent List but it can be cured by resort to Article 254(2).

64. As we have endeavoured so far, the question raised as to the constitutional validity of sub-section (3) of Section 5 of the Act has to be determined by application of the rule of pith and substance whether or not the subject-matter of the impugned legislation was competently enacted under Article 246, and therefore the question of repugnancy under Article 254 was not a matter in issue. The submission put forward on behalf of the appellants however is that there is direct collision and/or irreconcilable conflict between sub-section (3) of Section 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which is relatable to Entry 33 of List III. It is sought to be argued that the words “a law made by Parliament which Parliament is competent to enact” must be construed to mean not only a law made by Parliament with respect to one of the matters enumerated in the Concurrent List but they are wide enough to include a law made by Parliament with respect to any of the matters enumerated in the Union List. The argument was put in this form. In considering whether a State law is repugnant to a law made by Parliament, two questions arise: First, is the law made by Parliament viz. the Essential Commodities Act, a valid law? For, if it is not, no question of repugnancy to a State law can arise. If however it is a valid law, the question as to what constitutes repugnancy directly arises. The second question turns on a construction of the words “a law made by Parliament which Parliament is competent to enact” in Article 254(1).

66. Nicholas in his *Australian Constitution*, 2nd Edition, p. 303, refers to three tests of inconsistency or repugnancy :

1. There may be inconsistency in the actual terms of the competing statutes;
2. Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and

3. Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter.

In *Ch. Tika Ramji v. State of U.P.* [AIR 1956 SC 676], the court accepted the above three rules evolved by Nicholas, among others, as useful guides to test the question of repugnancy.

67. Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in clause (1), clause (2) engrafts an exception, viz. that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act, will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together.

69. We fail to comprehend the basis for the submission put forward on behalf of the appellants that there is repugnancy between sub-section (3) of Section 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act relatable to Entry 33 of List III and therefore sub-section (3) of Section 5 of the Act which is a law made by the State legislature is void under Article 254(1). The question of repugnancy under Article 254(1) between a law made by Parliament and a law made by the State legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy, become void. Article 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and Lists I and III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non obstante clause in Article 246(1) read with the opening words "subject to" in Article 246(3). In such a case, the State law will fail not because of repugnance

to the Union law but due to want of legislative competence. It is no doubt true that the expression “a law made by Parliament which Parliament is competent to enact” in Article 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as “List I”. But if Article 254(1) is read as a whole, it will be seen that it is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List - in other words, if clause (2) is to be the guide in the determination of scope of clause (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Article 254(1) speaks of a State law being repugnant to (a) a law made by Parliament or (b) an existing law. There was a controversy at one time as to whether the succeeding words “with respect to one of the matters enumerated in the Concurrent List” govern both (a) and (b) or (b) alone. It is now settled that the words “with respect to” qualify both the clauses in Article 254(1) viz, a law made by Parliament which Parliament is competent to enact as well as any provision of an existing law. The underlying principle is that the question of repugnancy arises only when both the legislatures are competent to legislate in the same field i.e. with respect to one of the matters enumerated in the Concurrent List. Hence, Article 254(1) cannot apply unless both the Union and the State laws relate to a subject specified in the Concurrent List, and they occupy the same field.

70. This construction of ours is supported by the observations of Venkatarama Ayyar, J. speaking for the court in *A.S. Krishna* case [*A.S. Krishna v. State of Madras*, AIR 1957 SC 297] while dealing with Section 107(1) of the Government of India Act, 1935 to the effect:

For this section to apply, two conditions must be fulfilled : (1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the Provincial law will, to the extent of the repugnancy, become void.

72. We are unable to appreciate the contention that sub-section (3) of Section 5 of the Act being a State law must be struck down as ultra vires as the field of fixation of price of essential commodities is an occupied field covered by a Central legislation. It is axiomatic that the power of the State legislature to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relating to Entry 54 of List II of the Seventh Schedule and to make ancillary provisions in that behalf, is plenary and is not subject to the power of Parliament to make a law under Entry 33 of List III. There is no warrant for projecting the power of Parliament to make a law under Entry 33 of List III into the State's power of taxation under Entry 54 of List II. Otherwise, Entry 54 will have to be read as : ‘Taxes on the sale or purchase of goods *other than essential commodities et cetera*’. When one entry is made ‘subject to’ another entry, all that it means is that out of the scope of the former entry, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate legislature. Entry 54 of List II of the Seventh Schedule is only subject to Entry 92A of List I and there can be no further curtailment of the State's power of taxation. It is a well established rule of construction that the entries in the three lists must be read in a broad

and liberal sense and must be given the widest scope which their meaning is fairly capable of because they set up a machinery of Government.

73. The controversy which is now raised is of serious moment to the States, and a matter apparently of deep interest to the Union. But in its legal aspect, the question lies within a very narrow compass. The duty of the court is simply to determine as a matter of law, according to the true construction of Article 246(3) of the Constitution, whether the State's power of taxation of sale of goods under Entry 54 of List II and to make ancillary provisions in regard thereto, is capable of being encroached upon by a law made by Parliament with respect to one of the matters enumerated in the Concurrent List. The contention fails to take into account that the Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246.

74. It is equally well settled that the various entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control.

76. It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. In *M.P.V. Sundararamier & Co. v. State of A.P.* [AIR 1958 SC 468] this court dealt with the scheme of the separation of taxation powers between the Union and the States by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92-A deal with taxes. In List II, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal with taxes. This mutual exclusiveness is also brought out by the fact that in List III, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State's exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relating to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play.

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Shree Mahavir Oil Mills v. State of J. & K.

1996 (11) SCC 39

(BP Jeevan Reddy and Suhas C Sen, JJ)

B.P. JEEVAN REDDY, J.: 2. The State of Jammu and Kashmir seeks to encourage and promote the industrialisation of the State - like every other State in the country. Edible oil industry is one such. Because of certain inherent problems, the cost of production of edible oil in Jammu and Kashmir is said to be higher than the cost of production of similar edible oil in the adjoining States with the result that the manufacturers of edible oil in the adjoining States are able to sell their products in Jammu and Kashmir at a price lower than the price at which the local manufacturers are able to sell. This is said to have created a situation where the local industries faced the prospect of closure; at any rate, they were not able to compete with the out-State manufacturers. They approached their Government, which is seeking to protect their interest by inter alia exempting them totally from the levy of sales tax on the sale of their products. That has given rise to the writ petition from which the present appeal arises. On the Jammu and Kashmir High Court dismissing the writ petition, they have approached this Court.

3. The Jammu and Kashmir General Sales Tax Act contains four Schedules. Each of the Schedules carries a particular rate of sales tax. Edible oils were previously included in Schedule D which prescribes the rate of tax at four per cent. On 20-12-1993, edible oils were shifted from Schedule D to Schedule C, which prescribes the rate of tax at eight per cent. (It is stated that SRO 213 of 1993 issued on 3-12-1993 shifting edible oils from Schedule D to Schedule C was rescinded within about a week thereafter but was reissued as SRO 124 of 1994 on 27-5-1994.)

4. With a view to protect the local edible oil industry, the Government of Jammu and Kashmir issued SRO 93 of 1991 on 7-3-1991 under Section 5 of the Jammu and Kashmir General Sales Tax Act, 1962 directing that "the goods manufactured by a dealer operating as a small-scale industrial unit in the State and registered with Director of Industries and Commerce, Handicrafts or Handloom Development, subject to the conditions specified below, shall be exempted from payment of tax to the extent and for the period specified in the Schedule forming Annexure A". All the units manufacturing edible oil in the State are small-scale industrial units as defined by the Jammu and Kashmir Government. (It appears that initially the limit was an investment of rupees ten lakhs according to which one unit in the State did not qualify as a small-scale industrial unit. Subsequently, it is stated, the limit of investment was raised to rupees thirty lakhs, as a result of which the said unit also fell under the definition of small-scale unit.) The exemption was total and the period of exemption was five years - which has later been extended by another five years.

5. The result of the orders aforementioned was that while until December 1993/May 1994, the manufacturers of edible oil in other States were obliged to pay sales tax on the sales effected by them in the State of Jammu and Kashmir at the rate of four per cent, the local manufacturers were totally exempted therefrom. In December 1993/May 1994, the rate of tax was raised from four per cent to eight per cent, as stated above. With the raising of the rate of

sales tax to eight per cent, the outside manufacturers were obliged to pay at eight per cent while the local manufacturers were exempt fully. It is then that some of the outside manufacturers including the appellants herein, approached the Jammu and Kashmir High Court by way of writ petitions which were dismissed by a learned Single Judge. The letters patent appeals preferred by the appellants have also been dismissed by the Division Bench relying mainly upon the decision of this Court in *Video Electronics (P) Ltd. v. State of Punjab* [(1990) 3 SCC 87].

6. Shri Harish Salve, learned counsel for the appellants, assailed the correctness of the judgment of the High Court on several grounds. Counsel submitted that the orders of the Government of Jammu and Kashmir exempting all the edible oil industries in the State from payment of sales tax unconditionally amounts to discriminating against the out-State manufacturers which is prohibited by Articles 301 and 304 of the Constitution. Counsel submitted that Part XIII of the Constitution prohibits raising of fiscal barriers by the States, for such barriers are bound to interfere with the free movement of trade and commerce throughout the territory of India. Raising of protective walls may be justified in international trade. The Government of India can and has been providing several such protectionist measures all these years to encourage the growth and establishment of industries in the country and to protect them from competition from foreign manufacturers. But similar measures cannot be provided by the State Governments internally, i.e., within the country. Parliament can, no doubt, provide such measures but not the State Governments and certainly not without the prior sanction/assent of the President of India. Learned counsel submitted that the decision in *Video Electronics* has not been correctly understood by the High Court and that it does not purport to support the impugned measure. Learned counsel relied upon several decisions rendered by this Court under Part XIII in support of his submissions.

7. On the other hand, Shri M.L. Verma, learned counsel for the State of Jammu and Kashmir, placed strong reliance upon the ratio and upon certain observations made in *Video Electronics*. Notwithstanding certain minor differences, learned counsel submitted, the principle of the said decision clearly applies to the facts of this case. Shri Verma submitted that when the rate of tax was four per cent and the exemption in favour of local manufacturers was operating, the appellants never protested. Only when the rate of tax was raised from four to eight per cent, with the exemption in favour of local manufacturers continuing, the appellants came forward with writ petitions. If they were not aggrieved when the rate was four per cent, they cannot equally be aggrieved merely because the rate is raised to eight per cent. Counsel brought to our notice certain figures relating to turnover of the appellants within the State of Jammu and Kashmir and emphasised that the impugned measure has not really hurt the appellants' business and that the volume of their turnover continues to rise notwithstanding the impugned measure. The submission is that the appellants can have no real or genuine grievance in the matter. Coupled with this, Shri Verma submitted, is the need for protecting the local manufacturers. Because of the peculiar economic conditions prevailing in the State, the cost of production of the local manufacturers is substantially higher than the cost of production of edible oil in the adjoining States or in other States in the country. Unless the impugned protective measure is provided to the local manufacturers, Shri Verma submitted, it was not possible for the local manufacturers to survive in the market.

They would have been eliminated from their business and trade by the out-State manufacturers who are able to sell their goods at a lesser price. The purpose of the impugned measure, Shri Verma submitted, is, therefore, laudable. It is not directed against the out-State manufacturers but only towards saving the local ones. Even otherwise, counsel submitted, the principle of classification relevant under Article 14 has been held by this Court to be equally applicable under Article 304 and if so, it must be held that the classification made between local and out-State manufacturers is a reasonable one and designed to further the aforesaid laudable object.

8. Article 301 declares that “subject to the other provisions of *this Part*, trade, commerce and intercourse throughout the territory of India shall be free”. (emphasis supplied) An exception is, however, provided in favour of Parliament by Article 302 which says that “Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India *as may be required in the public interest.*”(emphasis supplied) The power conferred upon Parliament by Article 302 is, however, qualified by a rider provided in clause (1) of Article 303 which says that the power conferred upon Parliament by Article 302 shall not, however, empower Parliament - or the legislature of a State - “to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule”. [It is not very clear why clause (1) of Article 303 uses the words “nor the legislature of a State” when Article 302 does not refer to the legislature of a State at all. Probably, the idea was to declare affirmatively - in the interest of removing any doubt - that even a legislature of a State shall not have the power to make any law giving or authorising the giving of any preference to one State over another or making or authorising the making of any discrimination between one State and another by virtue of their power to make a law with reference to the entries relating to trade and commerce in the Seventh Schedule. Further, the addition of words “by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule” at the end of the clause have also given rise to a good amount of controversy, which we shall refer to later, to the extent relevant]. Clause (2) of Article 303, is in the nature of a clarification. It says that “nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is *necessary* to do so for the purpose of dealing with a *situation arising from scarcity of goods* in any part of the territory of India”. (emphasis supplied) Article 304 deals with the power of the State Legislatures. It begins with a non obstante clause: “Notwithstanding anything in Article 301 or Article 303.” Article 303 was also referred to in this non obstante clause evidently for the reason that clause (1) of Article 303 refers to “the legislature of a State” besides referring to Parliament. Article 304 contains two clauses. Clause (a) states that “the legislature of a State may by law - (a) impose on goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in that State are subject, *so, however, as not to discriminate between goods so imported and goods so manufactured or produced*”. (emphasis supplied) The wording of this clause is of crucial significance. The first half of the clause would make it appear at the first blush that it merely states the obvious: one may indeed say that the power to

levy tax on goods imported from other States or Union Territories flows from Article 246 read with Lists II and III in the Seventh Schedule and not from this clause. That is of course so, but then there is a meaning and a very significant principle underlying the clause, if one reads it in its entirety. The idea was not really to empower the State Legislatures to levy tax on goods imported from other States and Union Territories - that they are already empowered by other provisions in the Constitution - but to declare that that power shall not be so exercised as to discriminate against the imported goods vis-à-vis locally manufactured goods. The clause, though worded in positive language has a negative aspect. It is, in truth, a provision prohibiting discrimination against the imported goods. *In the matter of levy of tax* - and this is important to bear in mind - the clause tells the State Legislatures - "tax you may the goods imported from other States/Union Territories but do not, in that process, discriminate against them vis-à-vis goods manufactured locally". In short, the clause says: levy of tax on both ought to be at the same rate. This was and is a ringing declaration against the States creating what may be called "tax barriers" - or "fiscal barriers", as they may be called - at or along their boundaries in the interest of freedom of trade, commerce and intercourse throughout the territory of India, guaranteed by Article 301. As we shall presently point out, this clause does not prevent in any manner the States from encouraging or promoting the local industries in such manner as they think fit *so long* as they do not use the weapon of taxation to discriminate against the imported goods vis-à-vis the locally manufactured goods. To repeat, the clause bars the States from creating tax barriers - or fiscal barriers, as they can be called - around themselves and/or insulate themselves from the remaining territories of India by erecting such "tariff walls". Part XIII is premised upon the assumption that so long as a State taxes its residents and the residents of other States uniformly, there is no infringement of the freedom guaranteed by Article 301; no State would tax its people at a higher level merely with a view to tax the people of other States at that level. And it is this clause which has a crucial bearing on this case. Now coming to clause (b), it empowers the legislature of the State to make a law and "impose such *reasonable restrictions* on the freedom of trade, commerce or intercourse with or within that State *as may be required in the public interest*; provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the legislature of a State without the previous sanction of the President". (This proviso has, of course, to be read along with Article 255 which says that if the Act receives the assent of the President, the non-compliance with the requirement of obtaining the previous sanction to the introduction of the Bill is cured.) Though in appearance this clause reads like conferring on the State Legislatures a power akin to the power conferred upon Parliament by Article 302, there are certain distinctions. Firstly, while Article 302 does not use the expression 'reasonable' before the word 'restrictions,' this clause does. Secondly, this power can be exercised by the State Legislature only with the "previous sanction" of the President - which means the Union Ministry, or with the assent of the President, as explained above. It is probably our history which impelled the Founding Fathers to lay store by the Central Government in the matter of imposing restrictions, or reasonable restrictions, as the case may be, on the freedom of trade, commerce and intercourse. The freedom guaranteed, it is worthy of notice, is "*throughout the territory of India*" and not merely between the States as such; the emphasis is upon the oneness of the territory of India. Part XIII starts with this concept of oneness but then it provides exceptions

to that rule, as stated above, to meet certain emerging situations. As a matter of fact, it can well be said that clause (a) of Article 304 is *not* really an exception to Article 301, notwithstanding the non obstante clause in Article 304 and that it is but a restatement of a facet of the very freedom guaranteed by Article 301, viz., power of taxation by the States. (We need not refer to the other articles in Part XIII for the purposes of this case.)

9. Having noticed the scheme of Part XIII, we may now turn to decided cases to see how these articles have been understood over the last fifty years.

10. The first decision to be noticed is, of course, in *Atiabari Tea Co. Ltd. v. State of Assam*. The Legislature of Assam enacted the Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act, 1961 providing for levy of tax on certain goods carried by road or inland waterways in the State of Assam. Its constitutionality was questioned by a large number of tea companies who sold most of their produce outside the State of Assam after transporting it by road or waterways to West Bengal and other States. The majority opinion (Gajendragadkar, Wanchoo and Das Gupta, JJ.) stated their conclusion in the following words:

“Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and *if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301*, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII. At this stage we think it is necessary to repeat that when it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of Article 304(b). It is not as if no restrictions at all can be imposed on the free movement of trade.”

It was also held:

“Thus considered we think it would be reasonable and proper to hold that *restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade*. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. ... We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement?”

11. In *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* validity of Section 4(1) of the Rajasthan Motor Vehicles Taxation Act, 1951 was challenged. The section levied a tax on all motor vehicles used in any public place or kept for use at the rates specified in the Schedules. Violation of the provision invited penalties provided under Section 11. Certain

operators challenged the Act as violative of Articles 301 and 304(b). Since serious doubts were expressed with respect to the propositions enunciated by the majority and by Shah, J. in *Atiabari Tea Co. Ltd.* the matters were referred to a larger Constitution Bench of seven Judges. By a majority of 4:3, (S.K. Das, Kapur and Sarkaria, JJ. joined by Subba Rao, J.), this Court upheld the constitutionality of the Act on the ground that the taxes levied by it are compensatory in nature and, therefore, outside the purview of Article 301. Once outside the purview of Article 301, it was held, Article 304 was also not attracted.

12. Subba Rao, J. concurred with the above propositions though the learned Judge stated the propositions flowing from his opinion at pp. 564-565 separately. The majority opined that:

“The interpretation which was accepted by the majority in the *Atiabari Tea Co.* case is correct, but subject to this clarification. *Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution.*” (emphasis supplied)

13. *A.T.B. Mehtab Majid & Co. v. State of Madras* arose under the Madras General Sales Tax Act, 1939. The effect of Section 3 of the Act read with Rule 16 was that tanned hides and skins imported from outside the State of Madras and sold within the State were subject to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the State. Similarly, hides or skins imported from outside the State after purchase in their raw condition and then tanned inside the State were also subject to higher rate of tax than hides or skins purchased in raw condition in the State and tanned within the State. This distinction was attacked as violative of Articles 301 and 304(a) of the Constitution. Following the law laid down in *Atiabari Tea Co. Ltd.* and *Rajasthan Automobiles* the Constitution Bench held:

“It is therefore now well settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Article 301 and will be valid only if it comes within the terms of Article 304(a).

Article 304(a) enables the legislature of a State to make laws affecting trade, commerce and intercourse. It enables the imposition of taxes on goods from other States if similar goods in the State are subjected to similar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States. This means that *if the effect of the sales tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the proviso to sub-rule of Rule 16 of the Rules, then the tax is discriminatory and unconstitutional and must be struck down.*”

14. *State of Madras v. N.K. Nataraja Mudaliar* [AIR 1969 SC 147] considered the validity of sub-sections (2), (2-A) and (5) of Section 8 of the Central Sales Tax Act, 1956. The respondent's case was that they were violative of Articles 301, 302, 303 and 304. It was held by Shah, J. (speaking for himself, Mitter and Vaidyalingam, JJ.) that while the Central sales tax imposed under Section 3 violates Article 301 being a tax on movement of goods, it

was saved by Article 302. The levy of different rates by sub-section (2-A) was justified on the ground that the Act was meant for imposing tax to be collected and retained by the State and that in such a case the provision does not amount to a law contemplated by clause (1) of Article 303. For the same reason, it was held, leaving it to the States to levy tax at different rates also does not amount to practising discrimination. Article 304(a), it is significant to note, was said to have no application for the reason that it was not a case where tax was imposed on imported goods at a different rate from the rate leviable on goods manufactured locally. Certain observations made by Shah, J. are relied upon by the learned counsel for Jammu and Kashmir and must, therefore, be set out:

“The flow of trade does not necessarily depend upon the rates of sales tax: it depends upon a variety of factors, such as the source of supply, place of consumption, existence of trade channels, the rates of freight, trading facilities, availability of efficient transport and other facilities for carrying on trade. Instances can easily be imagined of cases in which notwithstanding the lower rate of tax in a particular part of the country goods may be purchased from another part, where a higher rate of tax prevails. Supposing in a particular State in respect of a particular commodity, the rate of tax is 2% but if the benefit of that low rate is offset by the freight which a merchant in another State may have to pay for carrying that commodity over a long distance, the merchant would be willing to purchase the goods from a nearer State, even though the rate of tax in that State may be higher. Existence of long-standing business relations, availability of communications, credit facilities and a host of other factors - natural and business - enter into the maintenance of trade relations and *the free flow of trade cannot necessarily be deemed to have been obstructed merely because in a particular State the rate of tax on sales is higher than the rates prevailing in other States.*”

15. It is significant to notice that these observations were made in the context of the argument that different rates of Central sales tax in different States on sale of similar goods is discriminatory. It was not a case like the present one where a State is levying a different/higher rate of tax on goods imported from other States than the rate applicable to sales of similar goods manufactured within that State. We are unable to see how these observations help the State.

18. *H. Anraj v. Govt. of T.N.* [(1986) 1 SCC 414] is a decision of a Bench of two learned Judges. The Government of Tamil Nadu exempted the lottery tickets issued by it totally while levying tax on lottery tickets issued by other Governments and sold in Tamil Nadu. The Court held that laws imposing taxes can amount to restriction on trade, commerce and intercourse if they hampered the free flow of trade unless they are compensatory in nature and that the sales tax which had the effect of discriminating between goods of one State and another may affect free flow of trade and would be offensive to Article 301 unless saved by Article 304(a). It was held that the direct and immediate result of the notification was to impose an unfavourable and discriminatory tax.

19. *Indian Cement v. State of A.P.* [(1988) 1 SCC 743] is also a decision of two learned Judges. The Government of Andhra Pradesh had issued two notifications, one under Section 9(1) of the A.P. General State Sales Tax Act, 1957 and the other under Section 8(5) of the Central Sales Tax Act. Under the first notification, sales tax on sale of

“cement manufactured by cement factories situated in the State and sold to the manufacturing units situated within the State for the purpose of...”

was reduced from 13.5% to 4%. Under the second notification, the Central sales tax was reduced to two per cent. The Government of Karnataka also issued a similar notification reducing in similar situation, Central sales tax from 15% to 2%. These were challenged as violative of Articles 301 and 304 and the challenge was upheld. The first ground upheld was that the “reasonable restrictions” contemplated by Article 304(b) can be imposed by a law made by the legislature of the State and not by the orders of the Government, i.e., by executive action. The second ground given by the Bench (Ranganath Misra and M.M. Dutt, JJ.) is that “Variation of the rate of inter-State sales tax does affect free trade and commerce and creates a local preference which is contrary to the scheme of Part XIII of the Constitution.” and hence bad. In the course of discussion, the Bench observed:

“There can be no dispute that taxation is a deterrent against free flow. As a result of favourable or unfavourable treatment by way of taxation, the course of flow of trade gets regulated either adversely or favourably. If the scheme which Part XIII guarantees has to be preserved in national interest, it is necessary that the provisions in the article must be strictly complied with. One has to recall the farsighted observations of Gajendragadkar, J. in *Atiabari Tea Co.* case and the observations then made obviously apply to cases to the type which is now before us.”

20. The facts in *Weston Electronics v. State of Gujarat* [(1988) 2 SCC 568] are similar. Until 1981, the tax on sale of electronic goods under the Gujarat Sales Tax Act was fifteen per cent whether the goods were manufactured within the State of Gujarat and sold or imported from outside. In 1981 - and again in 1986 - however, a distinction was made between locally manufactured goods and those imported into the State. A lower rate was prescribed for the former. This was held to be discriminatory and offensive to Articles 301 and 304.

22. *Video Electronics (P) Ltd. v. State of Punjab*: [(1988) 4 SCC 134] inasmuch as strong and almost exclusive reliance is placed by the learned counsel for the State of Jammu and Kashmir on this decision, it is necessary to examine the facts of and the law laid down in this decision (rendered by a Bench of three learned Judges) a little more closely. In this decision, notifications issued by two States, viz., Uttar Pradesh and Punjab were considered. The notification issued by the Government of Uttar Pradesh provided an exemption in favour of new units, established in specified areas and for the prescribed period (three to seven years) specified therein. It was further stipulated that the said benefit shall be available only to those new units which have commenced their production between the two dates specified by the Government. The Punjab notification provided that “rate of the sales tax payable by an electronic manufacturing unit existing in Punjab in cases of electronic goods specified in Annexure A was prescribed at one per cent as against the normal 12 per cent”. (This is how the purport of the provision has been set out in the decision.) Both notifications were impugned as violative of Articles 301 and 304. The Bench comprising Mukharji, C.J., Ranganathan and Verma, JJ. upheld both the notifications. So far as the Uttar Pradesh notification was concerned, it was held that inasmuch as it was a case of grant of exemption “to a special class for a limited period on specific conditions” and was not extended to all the producers of those goods, it does not offend the freedom guaranteed by Article 301. Similarly, in the case of Punjab notification, it was held that since the exemption is for certain specified goods and also because “an overwhelmingly large number of local manufacturers of similar goods are subject to sales tax”, it cannot be said that local manufacturers were favoured as

against the outside manufacturers. In the course of their judgment, the Bench made certain observations which are strongly relied upon by Shri M.L. Verma, J. The observations are to the effect that while judging whether a particular exemption granted by the State offends Articles 301 and 304, it is necessary to take into account various factors. A State which is technically and economically weak on account of various factors should be allowed to develop economically by granting concessions, exemptions and subsidies to new industries. All parts of the country are not equally developed, industrially and economically. The concept of economic unity is an ever-changing one; it cannot be imprisoned in a strait-jacket. India is not already an economic unit. Economic unity is possible only when all the units of the country develop equally. The power to grant exemption is inherent in all taxing statutes and the Government cannot be deprived of this power by invoking Articles 301 and 304. The concept of economic barriers must be understood in a dynamic sense. The concept of economic unity or economic barriers must be read along with the power of exemption inhering in the State Governments. Where every State is exempting or reducing the rates of sales tax, there can be no question of an economic war between them.

“A backward State or a disturbed State cannot with parity engage in competition with advanced or developed States. Even within a State, there are often backward areas which can be developed only if some *special incentives* are granted. If the incentives in the form of subsidies or grant are given to any part of (*sic* or) units of a State so that it may come out of its limping or infancy to compete as equals with others, that, in our opinion, does not and cannot contravene the spirit and the letter of Part XIII of the Constitution. However, this is permissible only if there is a valid reason, that is to say, if there are justifiable and rational reasons for differentiation. If there is none, it will amount to hostile discrimination.”

23. All the above observations were made to justify (1) grant of incentives and subsidies and (2) exemption granted to new industries, of a specified type (small-scale industries commencing production within the two specified dates) and for a short period. They were not meant to nor can they be read as justifying a blanket exemption to all small-scale industries in the State irrespective of their date of establishment. The case before us clearly falls within the ratio of the Constitution Bench decision in *A.T.B. Mehtab Majid* and the decisions in *Indian Cement*, *W.B. Hosiery Assn.* and *Weston Electronics*. The limited exception created in *Video Electronics* does not help the State herein for the reason that exemption concerned herein is neither confined to “new industries”, nor is circumscribed by other conditions of the nature stipulated in the Uttar Pradesh notification. It is not possible to go on extending the limited exception created in the said judgment, by stages, which would have the effect of robbing the salutary principle underlying Part XIII of its substance. Indeed, it has been the contention of Shri Salve that, on principle, the exception carved out in *Video Electronics* is unsustainable. For the purpose of this case, it is not necessary for us to say anything about the correctness of *Video Electronics*. Suffice it to say that the limited exception carved out therein cannot be widened or expanded to cover cases of a different kind. It must be held that the total exemption granted in favour of small-scale industries in Jammu and Kashmir producing edible oil (there are no large-scale industries in that State producing edible oil) is not sustainable in law.

24. Shri Salve has brought to our notice a recent decision of the Supreme Court of USA in *West Lynn Creamery, Inc. v. Jonathan Healy, Commr. of Massachusetts Deptt. of Food*

and Agriculture [Cases Nos. 93-141 rendered on 17-6-1994]. The petitioner was a milk dealer licensed to do business in the State of Massachusetts. Most of the milk consumed in that State was imported from other States. In 1992, the Government declared a State of emergency in view of declining trend in the price of raw milk. It found that the cost of production of milk in Massachusetts is higher than the cost of production in other States and that to preserve and protect the milk industry in Massachusetts, it is necessary to take certain measures. Accordingly, an order was issued soon after the declaration of emergency which created the Massachusetts Dairy Equalisation Fund. A levy was imposed upon all the milk sold in the State. At the end of each month, the proceeds of such levy were distributed among the producers of milk in Massachusetts alone. This order was attacked as violative of the Commerce Clause contained in Article 1(8) of the United States Constitution, which reads: "The Congress shall have power - to regulate Commerce with Foreign nations and among the several States, and with the Indian Tribes." The Court held (with one learned Judge, Scalia, J., concurring with the conclusion but on a reasoning different from that of the majority) that the order is bad. The majority observed that the " 'negative' aspect of the Commerce Clause prohibits economic protectionism - that is, regulatory measures designed to benefit in-State economic interests by burdening out-of-State competitors. Thus, State statutes that clearly discriminate against inter-State commerce are routinely struck down ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." The Court observed that the avowed purpose and undisputed effect of the order is to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States and that the premium payments are effectively a tax which makes milk produced out of State more expensive. The Court further observed that a pure subsidy funded out of general revenues ordinarily imposes no burden on inter-State commerce and that it merely assists local business. The impugned order, however, the Court pointed out, was "funded principally from taxes on the sale of milk produced in other States". To the same effect is the decision in *Bacchus Imports Ltd. v. Dias* [460 US 263 (1984)].

25. Now, what is the ratio of the decisions of this Court so far as clause (a) of Article 304 is concerned? In our opinion, it is this: the States are certainly free to exercise the power to levy taxes on goods imported from other States/Union Territories but this freedom, or power, shall not be so exercised as to bring about a discrimination between the imported goods and the similar goods manufactured or produced in that State. The clause deals only with discrimination by means of taxation; it prohibits it. The prohibition cannot be extended beyond the power of taxation. It means in the immediate context that States are free to encourage and promote the establishment and growth of industries within their States by all such means as they think proper *but* they cannot, in that process, subject the goods imported from other States to a discriminatory rate of taxation, i.e., a higher rate of sales tax vis-à-vis similar goods manufactured/produced within that State and sold within that State. Prohibition is against discriminatory taxation by the States. It matters not how this discrimination is brought about. A limited exception has no doubt been carved out in *Video Electronics* but, as indicated hereinbefore, that exception cannot be enlarged lest it eat up the main provision. So far as the present case is concerned, it does not fall within the limited exception aforesaid; it falls within the ratio of *A.T.B. Mehtab Majid* and the other cases following it. It must be held that by exempting unconditionally the edible oil produced within the State of Jammu and

Kashmir altogether from sales tax, even if it is for a period of ten years, while subjecting the edible oil produced in other States to sales tax at eight per cent, the State of Jammu and Kashmir has brought about discrimination by taxation prohibited by Article 304(a) of the Constitution.

26. We are unable to see any substance in the objection raised by Shri Verma that not having attacked the exemption notification when the rate of tax was four per cent, the appellants should not be allowed to question the same when the rate of tax has climbed to eight per cent. There can be no question of any acquiescence in matters affecting constitutional rights or limitations. Similarly, the argument that the volume of trade of the appellants has not shown a downward trend in spite of the said exemption is equally immaterial apart from the fact that an explanation is offered therefor by Shri Salve. Yet another contention of Shri Verma that the principle of classification applicable under Article 14 is equally applicable under Articles 301 and 304(a) is of little help to the respondent-State. Article 14 speaks of equality; Article 301 speaks of freedom and Article 304(a) speaks of uniform taxation of both the imported goods and the locally produced goods by the States. According to Shri Verma, edible oil produced and sold in the State of Jammu and Kashmir and the edible oil produced in other States and sold in the State of Jammu and Kashmir fall in two different classes and that the said classification is designed to achieve the objective of industrialisation of the State. We find it difficult to appreciate how can the concept of classification be read into clause (a) of Article 304 to undo the precise object and purpose underlying the clause. Shri Verma repeatedly stressed that the object underlying the impugned measure is a laudable one and that it seeks to serve and promote the interest of the State of Jammu and Kashmir which is economically and industrially an undeveloped State, besides being a disturbed State. We may agree on this score but then the measures necessary in that behalf have to be taken by the appropriate authority and in the appropriate manner. Part XIII of the Constitution itself contains adequate provisions to remedy such a situation and there is no reason why the necessary measures cannot be taken to protect the edible oil industry in the State in accordance with the provisions of the said Part. Keeping the said aspect in view, we invoke our power under Article 142 of the Constitution and mould the relief to suit the exigencies of the situation.

27. We declare that the exemption granted by Notification No. SRO 93 of 1991 to local manufacturers/producers of edible oil is violative of the provisions contained in Articles 301 and 304(a). At the same time, we direct that: (a) the appellants shall not be entitled to claim any amounts by way of refund or otherwise by virtue of or, as a consequence of, the declaration contained herein and (b) that the declaration of invalidity of the impugned notification shall take effect on and from 1-4-1997. Till that date, i.e., up to and inclusive of 31-3-1997, the impugned notification shall continue to be effective and operative. Appeal allowed in the above terms.

* * * * *

Jindal Stainless Ltd. & Anr v. State of Haryana & Ors
(2017) 12 SCC 1

(T.S. Thakur, A.K. Sikri, S.A. Bobde, Shiva Kirti Singh, N.V. Ramana)

ORDER

By majority the Court answers the reference in the following terms:

1. Taxes simpliciter are not within the contemplation of Part XIII of the Constitution of India. The word 'Free' used in Article 301 does not mean "free from taxation".
2. Only such taxes as are discriminatory in nature are prohibited by Article 304(a). It follows that levy of a non-discriminatory tax would not constitute an infraction of Article 301.
3. Clauses (a) and (b) of Article 304 have to be read disjunctively.
4. A levy that violates 304(a) cannot be saved even if the procedure under Article 304(b) or the proviso there under is satisfied.
5. The compensatory tax theory evolved in Automobile Transport case and subsequently modified in Jindal's case has no juristic basis and is therefore rejected.
6. Decisions of this Court in Atiabari, Automobile Transport and Jindal cases (supra) and all other judgments that follow these pronouncements are to the extent of such reliance over ruled.
7. A tax on entry of goods into a local area for use, sale or consumption therein is permissible although similar goods are not produced within the taxing state.
8. Article 304 (a) frowns upon discrimination (of a hostile nature in the protectionist sense) and not on mere differentiation. Therefore, incentives, set-offs etc. Granted to a specified class of dealers for a limited period of time in a non-hostile fashion with a view to developing economically backward areas would not violate Article 304(a). The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular benches hearing the matters.
9. States are well within their right to design their fiscal legislations to ensure that the tax burden on goods imported from other States and goods produced within the State fall equally. Such measures if taken would not contravene Article 304(a) of the Constitution. The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular benches hearing the matters.
10. The questions whether the entire State can be notified as a local area and whether entry tax can be levied on goods entering the landmass of India from another country are left open to be determined in appropriate proceedings.

T.S. THAKUR, CJI (for himself and A.K. Sikri and A.M. Khanwilkar, JJ.)

1. These appeals bring to fore for our determination vexed questions touching the interpretation of Articles 301 to 307 comprising Part XIII of the Constitution which have been the subject matter of several Constitution Bench decisions of this Court, all but one, decided by majority. The questions assume in a great measure considerable public importance not only because the same deal with the powers of the State legislatures to levy taxes but also because any pronouncement of this Court is bound to impact the federal character of our polity and the Centre-State relationship in legislative and fiscal matters. There is no

gainsaying that it is the importance of the questions that lies at the bottom of the present reference to a larger Bench made in the following circumstances.

2. In exercise of their legislative powers under Entry 52 of List II of the Seventh Schedule to the Constitution several States in the country, at least 14 of whom are parties to these proceedings, have enacted laws that provide for levy of a tax on the “entry of goods into local areas comprising the States”. The constitutional validity of these levies was questioned in different High Courts by assesses/dealers aggrieved of the same, inter alia, on the ground that the same were violative of the constitutionally recognised right to free trade commerce and intercourse guaranteed under Article 301 of the Constitution of India. The levies were also assailed on the ground that the same were discriminatory and, therefore, violative of Article 304(a) of the Constitution of India. Absence of Presidential sanction in terms of Article 304(b) of the Constitution of India was also set-up as a ground of challenge to the levies imposed by the respective State legislatures. Writ Petition (Civil) No. 8700 of 2000 filed before the High Court of Punjab and Haryana was one such petition that assailed the constitutional validity of the Haryana Local Development Act, 2000. Relying upon the decisions of this Court in *Atiabari Tea Co. Ltd. v. State of Assam & Ors.* (AIR 1961 SC 232); *Automobile Transport (Rajasthan) Ltd. etc. v. State of Rajasthan & Ors.* (AIR 1962 SC 1406); *M/s. Bhagatram Rajeev Kumar v. Commissioner of Sales Tax, M.P. and Ors.* (1995 Supp [1] SCC 673); and *State of Bihar and Ors. v. Bihar Chamber of Commerce and Ors.* (1996) 9 SCC 136, a Division Bench of the High Court of Punjab and Haryana dismissed the said petition and connected matters on the ground that the levy was compensatory in character hence outside the purview of Article 301.

3. The correctness of the said order was assailed before this Court in *Jindal Stripe Ltd. and Anr. v. State of Haryana and Ors.* (2003) 8 SCC 60. A two-Judge Bench of this Court, however, referred the matter to a larger Bench as it noticed an apparent conflict between the pronouncements of this Court in *Atiabari* (supra) and *Automobile Transport* (supra) cases on the one hand and *Bhagatram* (supra) and *Bihar Chamber of Commerce* (supra) on the other.

The Court after noticing the development of law on the subject observed:

“25. To sum up: the pre-1995 decisions held that an exaction to reimburse/recompense the State the cost of an existing facility made available to the traders or the cost of a specific facility planned to be provided to the traders is compensatory tax and that it is implicit in such a levy that it must, more or less, be commensurate with the cost of the service or facility. The decisions emphasized that the imposition of tax must be with the definite purpose of meeting the expenses on account of providing or adding to the trading facilities either immediately or in future provided the quantum of tax sought to be generated is based on a reasonable relation to the actual or projected expenditure on the cost of the service or facility.

26. The decisions in *Bhagatram* and *Bihar Chamber of Commerce* now say that even if the purpose of imposition of the tax is not merely to confer a special advantage on the traders but to benefit the public in general including the traders, that levy can still be considered to be compensatory. According to this view, an indirect or incidental benefit to traders by reason of stepping up the developmental activities in various local areas of the State can be legitimately brought within the concept of compensatory tax, the nexus between the tax known as compensatory tax and the trading facilities not being necessarily either direct or specific.

27. Since the concept of compensatory tax has been judicially evolved as an exception to the provisions of Article 301 and as the parameters of this judicial concept are blurred, particularly by reason of the decisions in *Bhagatram and Bihar Chamber of Commerce* we are of the view that the interpretation of Article 301 vis-à-vis compensatory tax should be authoritatively laid down with certitude by the Constitution Bench under Article 145(3).

28. In the circumstances let all these matters be placed before the Hon'ble the Chief Justice for appropriate directions."

4. The matters were, pursuant to the above, placed before a Constitution Bench of this Court in *Jindal Stainless Ltd. (2) and Anr. v. State of Haryana and Ors.*, (2006) 7 SCC 241 which resolved the conflict noticed in the reference order by holding that the working test propounded by seven Judges in *Automobile Transport case (supra)* was incompatible with the test of 'some connection' enunciated by the three Judge Bench in *Bhagatram's case (supra)*. The Court held that the test of 'some connection' as propounded in *Bhagatram's case (supra)* had no application to the concept of compensatory tax. The Court, accordingly, overruled the decisions rendered in *Bhagatram and Bihar Chamber of Commerce cases* and held that the doctrine of 'direct and immediate effect' of the impugned law on trade and commerce under Article 301 as propounded in *Atiabari (supra)* and the working test enunciated in *Automobile Transport (supra)* cases for deciding whether a tax is compensatory or not will continue to apply. The Court observed:

"53. We reiterate that the doctrine of "direct and immediate effect" of the impugned law on trade and commerce under Article 301 as propounded in *Atiabari Tea Co. Ltd. v. State of Assam* and the working test enunciated in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* for deciding whether a tax is compensatory or not vide para 19 of the Report (AIR), will continue to apply and the test of "some connection" indicated in para 8 (of SCC) of the judgment in *Bhagatram Rajeevkumar v. CST* and followed in *State of Bihar v. Bihar Chamber of Commerce* is, in our opinion, not good law. Accordingly, the constitutional validity of various local enactments which are the subject-matters of pending appeals, special leave petitions and writ petitions will now be listed for being disposed of in the light of this judgment."

5. The matters were, in terms of the above direction, listed before a two-Judge bench for hearing of the appeals in the light of the above pronouncement of the Constitution Bench. The two-Judge Bench, however, noticed that although the basic issue in the appeals revolved around the concept of compensatory tax, the High Courts had not examined the same as they had considered themselves bound by the view taken in *Bhagatram and Bihar Chamber of Commerce cases (supra)*. The Court further found that in the absence of relevant data before the High Courts, the issue whether the levies were compensatory could not have been considered and accordingly referred the matter back to the High Courts to decide the said aspect. The appeals were, in the meantime, adjourned to await the finding from the High Courts on the question whether the levies were indeed compensatory in nature having regard to the decisions of this Court in *Atiabari* and *Automobile Transport cases (supra)*.

6. The matters were accordingly taken up by the High Courts, after the remand, who came to the conclusion that the impugned levies were neither compensatory in character nor was the procedure stipulated by Article 304(b) and the proviso to the same followed. The levies were on that basis held to be in violation of Article 301 being an impediment to free trade,

commerce and intercourse and accordingly struck down. The High Courts of Assam, Arunachal Pradesh, Jharkhand, Kerala and Tamil Nadu struck down the levies imposed by their respective States also on the ground that they were discriminatory in nature hence violative of Article 304(a) of the Constitution.

7. All these judgments and orders of the High Courts, passed after the remand, then, came to be challenged by the States concerned in the appeals filed against the same. These appeals initially came-up before a two-Judge Bench of this Court comprising Justice Arijit Pasayat and Justice S.H. Kapadia. Their Lordships referred the same to a Constitution Bench for an authoritative pronouncement on as many as ten questions formulated in the reference order (*Jaiprakash Associates Limited v. State of Madhya Pradesh and Ors.* (2009) 7 SCC 339). The Court noticed the arguments advanced on behalf of the assesseees that entry taxes were, in essence and in the classical sense, in the nature of ‘a fee’ and not ‘a tax’. It also noted the contention that all the cases on which the parties had placed reliance related to entry tax in the context of tax on vehicles in contradiction to taxes on entry of goods. The Court was of the view that while the Constitution Bench in *Jindal Stainless Ltd. (2)* (*supra*) had dealt with some aspects of the matter, certain other important constitutional issues remained to be examined especially because a conceptually and contextually different approach may be required vis-à-vis “transport cases” on the one hand and cases of “entry tax on goods” on the other. The matter was accordingly placed before a five-Judge Bench of this Court (*Jindal Stainless Limited and Anr. v. State of Haryana and Ors.* (2010) 4 SCC 595) who briefly referred to the decisions in *Atiabari, Automobile Transport cases* (*supra*) and *Keshav Mills Co. Ltd. v. CIT* (AIR 1965 SC 1636) and a few others and referred the matters to a larger Bench for reconsideration of the judgment of this Court in *Atiabari and Automobile Transport* (*supra*). The Court noted that the correctness of the view taken in the said two cases had been doubted as early as in the year 1975 in *G.K. Krishnan v. State of Tamil Nadu* (1975) 1 SCC 375. The reference order briefly set out some of the questions that required consideration by a larger Bench.

9. At the hearing before us learned counsel for the parties agreed after a day-long exploratory exercise that the questions that fall for determination by this Court could be re-framed as under:

1. Can the levy of a non-discriminatory tax per se constitute infraction of Article 301 of the Constitution of India?
2. If answer to question No. 1 is in the affirmative, can a tax which is compensatory in nature also fall foul of Article 301 of the Constitution of India?
3. What are the tests for determining whether the tax or levy is compensatory in nature?
4. Is the Entry Tax levied by the States in the present batch of cases violative of Article 301 of the Constitution and in particular have the impugned State enactments relating to entry tax to be tested with reference to both Articles 304(a) and 304(b) of the Constitution for determining their validity?

10. We have heard learned counsel for the parties at considerable length on the above questions which we shall now take up for discussion ad-seriatim.

Re: Question No. 1

11. Power of the State legislatures to levy taxes is subject to the limitations of Article 304(a) of the Constitution appearing in Part XIII thereof, which part regulates trade, commerce and

intercourse within the territory of India and comprises Articles 301 to 307. The provisions of these Articles have been the subject matter of a series of decisions of this Court including several Constitution Bench decisions to some of which we shall presently refer. The language employed in the provisions and the non-obstante clauses with which the same start have all the same given rise to several contentious issues for determination by this Court over the past five decades or so. The fact that the present batch of cases had to be referred to a Nine-Judge Bench to once again examine the very same issues as have been debated and determined in the previous judgments of this Court only shows that the task of interpreting the provisions is by no means easy and has in fact become more and more difficult on account of the pronouncements of this Court taking different views not many of which have been unanimous. The marked difference in the approach adopted by learned counsel for the parties in these appeals is also a measure of the complexities of issues that fall for determination. This is specially so because the prevailing legal position in terms of the judgment of this Court in *Atiabari* and *Automobile* cases (*supra*) holding that fiscal measures that are compensatory fall beyond the mischief of Article 301 has been questioned by both sides. Mr. Harish Salve who led the forensic exercise followed by M/s. Arvind Datar, Laxmi Kumaran, Ravindra Shrivastava, N. Venkataraman and others vehemently argued that the "Compensatory Tax Theory" propounded by the Seven Judges Bench of this Court in *Automobile* case (*supra*) had no legal basis or constitutional sanction and was neither acceptable nor workable. That is particularly so because the State legislatures had taken umbrage under the "Compensatory Tax Theory" and declared the fiscal levies imposed by them to be compensatory in character and claimed the same to be outside the mischief of Article 301 and consequently immune from any challenge on the ground that these taxes and levies were unreasonable restrictions on the right to free trade and commerce. The States who have enacted the laws providing for levy of taxes on the entry of goods into a local area within the meaning of Entry 52 of List II have, on the other hand similarly contended that the Compensatory Tax Theory is bereft of any legal basis and that the decision in *Atiabari* and *Automobile* cases (*supra*) need to be revisited to restore and protect the sovereign power of legislation of the States and the Federal character of our polity. The present reference to a larger Bench is in that backdrop expected to give a quietus to this raging legal controversy of considerable complexity, though given the perseverance of the litigants and the ingenuity of the bar a quietus is only a pious hope which has and may even in future elude us.

66. With the Compensatory Tax Theory no longer found acceptable, we are left with only two competing view points, one expressed by Gajendragadkar, J. and the other by B.P. Sinha, C.J. Which one is the correct view is the critical question that falls for our determination having regard to the Constitutional scheme and the language employed in Articles 301 to 307 to which we must now turn for a closer look.

Article 301 is as under:

"301. Freedom of trade, commerce and intercourse. -

Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free"

A plain reading of the above would show that freedom of trade, commerce and intercourse is by no means absolute, the same being subject to the other provisions of Part XIII of the Constitution. Amongst those provisions are Articles 302, 303 and 304 which have a direct

bearing on the nature and the extent of restrictions subject to which only is the right to freedom of trade, commerce and intercourse referred to in Article 301 exercisable. Article 302 reads thus:

“302. Power of Parliament to impose restrictions

on trade, commerce and intercourse. — Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.”

67. The above leaves no manner of doubt that Parliament is empowered to impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India as may be required in public interest. Reading Articles 301 and 302 together, it is evident, that freedom of trade, commerce and intercourse is subject to restrictions which Parliament may by law impose in public interest. The absolute character of the freedom of trade, commerce and intercourse is thus lost by reason of Article 302 itself empowering Parliament to impose such restrictions as it may consider necessary in public interest. Article 303, in turn, places restrictions on the legislative powers of the Parliament and of the States, when it says :

“303. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce. — (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.”

68. A careful reading of the above would show that notwithstanding the power vested in the Parliament under Article 302, it shall not make any law giving, or authorising the giving of any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. From Clause (2) of Article 303 (supra) it is manifest that the restriction on the power vested in Parliament in terms of Clause (1) of Article 303 shall not extend to Parliament making any law with a view to giving or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising out of scarcity. A conjoint reading of Clauses (1) and (2) of Article 303 would thus make it clear that while Parliament/ Legislature of a State shall have no power to make a law imposing restriction on trade, commerce and intercourse, by giving or authorizing the giving of any preference to one State over the other, such limitation on the legislative power of Parliament shall not extend to giving of any preference or making or authorizing any discrimination if it is declared by law that a situation has arisen out of scarcity of goods that makes it necessary to do so. In other words, while the Parliament may impose restrictions in public interest under Article 302, the restriction so imposed shall not be in the nature of giving preference or discrimination between one State or the other except when the

law declares that scarcity of goods in any part of India necessitates such preference or discrimination.

69. That brings us to Article 304 of the Constitution which too like Articles 302 and 303 deals with restrictions on the freedom of trade, commerce and intercourse. It reads:

“304. Restrictions on trade, commerce and intercourse among States. —Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law— (a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and (b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest: Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.”

The Article starts with a “non-obstante” clause which has been the subject matter of forensic debates in several cases. We do not for the present propose to address the effect of the non-obstante clause at this stage or the interplay between the expression “subject to” appearing in Article 301 and the non-obstante clause in Article 304. We shall turn to that aspect a little later. What we wish to examine is whether Article 304(a) treats taxes as a restriction so that any such levy may fall foul of Article 301. The answer to that question, we say without any hesitation is in the negative. Article 304(a) far from treating taxes as a restriction per se, specifically recognises the State legislature’s power to impose the same on goods imported from other States or Union Territories. The expression “the legislature of a State may by law impose on goods imported from other States (or Union Territories) any tax” are much too clear and specific to be capable of any equivocation or confusion. It is true that the source of power available to the State legislature to levy a tax is found in Articles 245 and 246 of the Constitution but, the availability of such power for taxing goods imported from other States or Union Territories is clearly recognised by Article 304 (a). The expression ‘may by law impose’ is certainly not a restriction on the power to tax. That does not, however, mean that the power to tax goods imported from other States or Union Territories is unqualified or unrestricted. There are, in our opinion, two restrictions on that power. The words “to which similar goods manufactured or produced in that State are subject” impose the first restriction on the power of the State legislature to levy any such tax. These words would imply that a tax on import of goods from other States will be justified only if similar goods manufactured or produced in the State are also taxed. The second restriction comes from the expression “so, however, as not to discriminate between goods so imported and goods so manufactured or produced”. The State legislature cannot in the matter of levying taxes discriminate between goods imported from other States and those manufactured or produced within the State levying such a tax. The net effect of Article 304 (a) therefore is that while levy of taxes on goods imported from others State and Union territories is clearly recognised as Constitutionally permissible, the exercise of such power is subject to the two restrictive conditions referred to above. That does not however detract from the proposition that levy of taxes on goods imported from other States is constitutionally permissible so long as the State legislatures abide by the limitations placed on the exercise of that power. To put it differently,

levy of taxes on import of goods from other States is not by itself an impediment under the scheme of Part XIII or Article 301 appearing therein.

70. That brings us to the question whether Clauses (a) and (b) have to be read conjunctively. In our opinion Clauses (a) and (b) of Article 304 deal with two distinct subjects and must, therefore, be understood to be independent of each other. While Clause (a) deals entirely with imposition of taxes on goods imported from other States, Clause (b) deals with imposition of reasonable restriction in public interest. It is trite that levy of a tax in terms of Article 304(a) may or may not be accompanied by the imposition of any restriction whether reasonable or unreasonable. There is, in our opinion, no rationale in the contention that the legislature of a State cannot levy a tax without imposing one or more reasonable restrictions or that a law that is simply imposing restrictions in terms of Clause (b) to Article 304 must be accompanied by the levy of a tax on the import of goods. The use of the word 'and' between clauses (a) and (b) does not admit of an interpretation that may impose an obligation upon the legislature to necessarily impose a tax and a restriction together. The law may simply impose a tax without any restriction reasonable or otherwise or it may simply impose a reasonable restriction in public interest without imposing any tax whatsoever. It may also levy a tax and impose such reasonable restriction as may be considered necessary in public interest. All the three situations are fully covered and permissible under Article 304 in view of the phraseology used therein. The word 'and' can mean 'or' as well as 'and' depending upon the context in which the law enacted by the legislature uses the same. Suffice it to say that levy of taxes do not constitute a restriction under Part XIII except in cases where the same are discriminatory in nature. Once Article 304 (a) is understood in that fashion, Clause (b) dealing with reasonable restrictions must necessarily apply to restrictions other than those by way of taxes. It follows that for levy of taxes prior Presidential sanction in terms of the proviso under Article 304(b) will be wholly unnecessary. This view is reinforced on the plain language of proviso to Article 304(b), which is limited to law relating to reasonable restrictions referred to in clause (b).

72. The sum total of what we have said above regarding Articles 301, 302, 303 & 304 may be summarized as under:

1. Freedom of trade, commerce and intercourse in terms of Article 301 is not absolute but is subject to the Provisions of Part XIII.
2. Article 302 which appears in Part XIII empowers the Parliament to impose restrictions on trade, commerce and intercourse in public interest.
3. The restrictions which Parliament may impose in terms of Article 302 cannot however give any preference to one State over another by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule.
4. The restriction that the Parliament may impose in terms of Article 302 may extend to giving of preference or permitting discrimination between one State over another only if Parliament by law declares that a situation arising out of scarcity of goods warrants such discrimination or preference.
5. Article 304(a) recognizes the availability of the power to impose taxes on goods imported from other States, the legislative power to do so being found in Articles 245 and 246 of the Constitution.

6. Such power to levy taxes is however subject to the condition that similar goods manufactured or produced in the State levying the tax are also subjected to tax and that there is no discrimination on that account between goods so imported and goods so manufactured or produced.

7. The limitation on the power to levy taxes is entirely covered by Clause (a) of Article 304 which exhausts the universe in so far as the State legislature's power to levy of taxes is concerned.

8. Resultantly a discriminatory tax on the import of goods from other States alone will work as an impediment on free trade, commerce and intercourse within the meaning of Article 301.

9. Reasonable restrictions in public interest referred to in Clause (b) of Article 304 do not comprehend levy of taxes as a restriction especially when taxes are presumed to be both reasonable and in public interest.

79. We may now turn to yet another contextual feature that has a bearing on the true and correct interpretation of Part XIII namely the sovereign character of the power to tax available to the State legislature. It is now fairly well settled that the Constitutionally vested power to levy tax can be regulated or controlled only by specific Constitutional limitations, if any. Applying the above principle to the case at hand, we do not see any specific limitation on the State's power to levy taxes on the import of goods from other States except the one referred to in Article 304(a) of the Constitution. That limitation we have sufficiently explained is confined to levy of discriminatory taxes within the comprehension of Article 304(a). So long as taxes are non-discriminatory and, therefore, consistent with Article 304(a),

there is no limitation leave alone any express limitation on the States' legislative power to levy any tax on the import of goods from another State. The power to levy a tax in terms of Articles 245 and 246 read with Entry 52 of list II not being in dispute in the cases at hand, the absence of any specific limitation forbidding the exercise of such power whether for the sake of free trade, commerce and intercourse or otherwise simply means that the State legislatures are free to levy taxes that are non-discriminatory in nature.

We may at this stage deal with yet another contention urged on behalf of the assesses who argued that while Article 304(a) forbids discriminatory fiscal legislation in respect of goods coming from another state there was no provision which prevented the States from levying discriminatory taxes within its territorial limits. The argument was that the absence of any provision against discriminatory taxation within a State must be understood to mean that taxes would generally be restrictions and unless the States take recourse to Article 304(b) they cannot levy such taxes upon trade and commerce within their territorial limits. The argument is, in our view, more in despair than substantial. It is true that Part XIII does not in terms forbid the levy of discriminatory taxes on goods produced within the States but the fact that there is no such prohibition does not necessarily mean that if such discriminatory taxation does indeed take place the same is constitutionally permissible. Whether or not there is hostile discrimination between goods from one part of the State and those from another part is a matter which will have to be judged on a case to case basis and on the touchstone of Article

14. Having said that we need to remind ourselves that Part XIII of the Constitution was aimed at addressing the mischief arising from fiscal and other barriers which the princely states had imposed and which gravely impeded free trade and commerce. The Constituent Assembly Debates show that framers of the Constitution were concerned with the removal of

such barriers. Discrimination intra-State in terms of levy of taxes was never considered to be a challenge for presumably the Constituent Assembly never considered the same to be a real possibility necessitating a specific provision prohibiting levy of discriminatory intra-State taxes.

126. In the light of what we have said above, we answer Question No.1 in the negative and declare that a non-discriminatory tax does not per se constitute a restriction on the right to free trade, commerce and intercourse guaranteed under Article 301. Decisions taking a contrary view in *Atiabari's case* (supra) followed by a series of later decisions shall, therefore, stand overruled including the decision in *Automobile Transport* (supra) declaring that taxes generally are restrictions on the freedom of trade, commerce and intercourse but such of them as are compensatory in nature do not offend Article 301. Resultantly decisions of this Court in *Jindal Stainless Limited*(2) and *anr. v. State of Haryana and ors.* (2006) 7 SCC 241 shall also stand overruled.

Re. Question No.2

In view of our answer to Question No.1, Question No.2 does not arise for consideration.

128. Re. Question No.3

In the light of what we have said in Question Nos. 1 and 2, this question also does not survive for consideration.

129. Re. Question No.4

This question touching the constitutional validity of the impugned State enactments can be split into two parts. The first part which can be briefly dealt with at the outset is whether the constitutional validity of the impugned legislations has to be tested by reference to both Articles 304(a) and 304(b) as contended by learned counsel for the assesseees or only by reference to Article 304(a) as argued by the States. In the light of what we have said while dealing with question No.1 we have no hesitation in holding that Article 304(b) does not deal with taxes as restrictions. At the risk of repetition, we may say that restrictions referred to in Article 304(b) are non-fiscal in nature. Constitutional validity of any taxing statute has, therefore, to be tested only on the anvil of Article 304(a) and if the law is found to be non-discriminatory, it can be declared to be constitutionally valid without the legislation having to go through the test or the process envisaged by Article 304(b). Should, however, the statute fail the test of non-discrimination under Article 304(a) it must be struck down for the same cannot be sustained even if it had gone through the process stipulated by Article 304(b). That is because what is constitutionally impermissible in terms of Article 304(a) cannot be validated and sanctioned through the medium of Article 304(b). Suffice it to say that a fiscal statute shall be open to challenge only under Article 304(a) of the Constitution without being subjected to the test of Article 304(b) either in terms of the existence of public interest or reasonableness of the levy.

130. That brings us to the second part of question No.4 viz. whether the impugned State enactments violate Article 304(a) of the Constitution. That aspect will necessarily involve a careful reading of the impugned enactments and a proper appreciation of the scheme underlying the same. While we have at some length heard learned counsel for the parties on that aspect, we do not propose to deal with all the dimensions of that challenge based on Article 304(a) except two of them that were argued at great length by learned counsel for the parties. The first of these two dimensions touches upon the State's power to promote

industrial development by granting incentives including those in the nature of exemptions or reduced rates of levy on goods locally produced or manufactured. On behalf of the assesses it was contended that grant of exemptions and incentives in favour of locally manufactured/produced goods is also one form of insidious discrimination which was impermissible in terms of article 304(a) for such exemptions and incentives had the effect of putting goods from another State at a disadvantage. Relying upon a decision of two-Judge Bench of this Court in *Shree Mahavir Oil Mills and Anr. v. State of Jammu and Kashmir and Ors.* (1996) 2 SCC 39 it was argued that exemptions in favour of locally produced goods from payment of taxes was constitutionally impermissible and offensive to article 304(a). That was a case where the State Government had totally exempted goods manufactured by small scale industries within the State from payment of sales tax even when the sales tax payable by other industries including manufacturers of goods in adjoining States was in the range of 8%. This exemption was questioned by manufacturers of edible oils from other States on the ground that the same was discriminatory and violative of Articles 301 and 304 of the Constitution.

131. This Court held that the exemption given to manufacturers of edible oil was total and unconditional, while producers of edible oil from industries in adjoining states had to pay sales tax @ 8%. Grant of exemption to local oil producing units thereby put the former at a disadvantage. Having said that, the Court exercised its powers under Article 142 of the Constitution and struck down the exemption by moulding the reliefs to suit the exigencies of the situation. The Court no doubt noticed a three-Judge Bench decision in *Video Electronics vs. State of Punjab* (1990) 3 SCC 87 in which notifications issued by the States of U.P and Punjab providing for exemptions to new units established in certain areas for a prescribed period of 3 to 7 years were assailed as discriminatory. The challenge to the exemption was in that case also based on the alleged violation of Articles 301 and 304. This Court however upheld the notifications in question on the ground that the same related to a specific class of industrial units and the benefit under the same was admissible for a limited period of time only. The Court observed that if an overwhelmingly large number of local manufacturers were subject to sales tax, it could not be said that the local manufactures were favored as a class against outsiders.

Adverting to the decision in *Video Electronics* (supra) this Court in *Mahavir* (supra) held the same to be distinguishable on the ground that the Punjab and U.P notifications were qualitatively different from the one issued by the Government of Jammu and Kashmir in as much as while the former benefitted only specified units and limited the benefit to a specified period, the latter was not subject to any such limitations. This declared the Court resulted in discrimination vis-a-vis. outside goods. What is important is that in *Video Electronics* (supra) this Court recognized the difference between differentiation and discrimination and held that every differentiation is not discrimination. This Court noted that the word discrimination was not used in Article 14 as it has been used in Article 16, Article 303 and Article 304 (a). The use of the word in 304 (a) observed this Court involved an element of "intentional and unfavorable bias". So long as there was no such bias evident from the measure adopted by the state, mere grant of exemption or incentives aimed at supporting local industries in their growth, development and progress did not constitute discrimination.

134. Seen in the above context the decision in *Mahavir Oil's* case is indeed distinguishable in as much as the manufactures of edible oil were exempted totally and unconditionally while

other manufacturers from outside the State were not so exempted. Whether or not the impugned enactments in the present batch of cases satisfy the tests referred to above and elaborated in Video Electronics case is a matter on which we do not propose to express any opinion for that aspect is best left open to be considered by the regular benches hearing these matters after the reference is disposed off.

141. we are inclined to accept the submission made on behalf of the State that so long as the intention behind the grant of exemption/adjustment/credit is to equalize the fall of the fiscal burden on the goods from within the State and those from outside the State such exemption or set off will not amount to hostile discrimination offensive to Article 304(a). Having said that, we leave open for examination by the regular benches hearing the matters whether the impugned enactment achieve the object of such equalization or lead to a situation that exposes goods from outside the state to suffer any disadvantage vis-a-vis those produced or manufactured in the taxing State.

142. We must, while parting, mention that learned counsel for the parties had attempted to raise certain other issues like whether the entire State can be treated as a local area and whether entry tax can be levied on goods imported from outside the country. We do not, however, consider it necessary in the present reference to address all those issues which are hereby left open to be decided by the regular bench hearing the matter.

143. With that observation the reference is answered. The Registry shall now place the matters before regular benches for an expeditious disposal of the same in the light of what has been observed by us above.

Rameshwar Prasad v. Union of India

(2006) 2 SCC 1

(Y.K. Sabharwal, C.J. and K.G. Balakrishnan, B.N. Agrawal, Ashok Bhan and Arijit Pasayat, JJ)

[Can dissolution of Assembly under Article 356(1) of the Constitution of India be ordered to prevent the staking of claim by a political party on the ground that the majority was obtained by illegal means.]

The challenge in these petitions was to the constitutional validity of Notification dated 23rd May, 2005 ordering dissolution of the Legislative Assembly of the State of Bihar. The present case is of its own kind where before even the first meeting of the Legislative Assembly, its dissolution was ordered on the ground that attempts were being made to cobble a majority by illegal means and laid claim to form the Government in the State and if these attempts continued, it would amount to tampering with constitutional provisions.

Bihar Legislative Assembly comprises of 243 members and to secure an absolute majority support of 122 Members of Legislative Assembly, was required. National Democratic Alliance ('NDA'), comprising of the Bharatiya Janata Party ('BJP') and the Janata Dal (United) ('JD(U)') was the largest pre-poll combination having the support of 92 MLAs. The party-wise strength in the Assembly was as under : NDA : 92, RJD : 75, LJP : 29, Congress (I) : 10, CPI (ML) : 07, Samajwadi Party : 04, NCP : 03, Bahujan Samaj Party : 02, Independents : 17 and Others : 09.

Report dated 6th March, 2005 was sent by the Governor to the President, recommending newly constituted Assembly to be kept in suspended animation for the present. It read as under:

"Respected Rashtrapati Jee,

The present Bihar Legislative Assembly has come to an end on 6th March, 2005. The Election Commission's notification with reference to the recent elections in regard to constitution of the new Assembly issued vide No. 308/B.R.-L.A./2005 dated 4th March 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005 is enclosed (Annexure-I)

2. Based on the results that have come up, the following is the party-wise position (omitted)

3. The present C.M., Bihar, Smt. Rabri Devi met me on 28.2.2005 and submitted her resignation along with her Council of Ministers. I have accepted the same and asked her to continue till an alternative arrangement is made.

4. A delegation of members of LJP met me in the afternoon of 28.2.2005 and they submitted a letter (Annexure II) signed by Shri Ram Vilas Paswan, President of the Party, stating therein that they will neither support the RJD nor the BJP in the formation of Government. The State President of Congress Party, Shri Ram Jatan Sinha, also met in the evening of 28.2.2005.

5. The State President of BJP, Shri Gopal Narayan Singh along with supporters met me on 1.3.2005. They have submitted a letter (Annexure III) stating that apart from combined alliance strength of 92 (BJP & JD(U)) they have support of another 10 to 12 Independents. The request in the letter is not to allow the RJD to form a Government.

6. Shri Dadan Singh, State President of Samajwadi Party, has sent a letter (Annexure IV) indicating their decision not to support the RJD or NDA in the formation of the Govt. He also met me on 2.3.2005.

7. Shri Ram Naresh Ram, Leader of the CPI (ML-Lib.), Legislature Party along with 4 others met me and submitted a letter (Annexure V) that they would not support any group in the formation of Government.

8. Shri Ram Vilas Paswan, National President of LJP, along with 15 others met me and submitted another letter (Annexure VI). They have reiterated their earlier stand.

9. The RJD met me on 5.3.2005 in the forenoon and they staked claim to form a Government indicating the support from the following parties : Cong (I) : 10, NCP : 03, CPI (M) : 01 and BSP : 02 The RJD with the above will have only 91. They have further claimed that some of the Independent members may support the RJD. However, it has not been disclosed as to the number of Independent MLAs from whom they expect support nor their names. Even if we assume the entire Independents totalling 17 to extend support to RJD alliance, which has a combined strength of 91, the total would be 108, which is still short of the minimum requirement of 122 in a House of 243.

10. The NDA delegation led by Shri Sushil Kumar Modi, MP, met me in the evening of 5.3.2005. They have not submitted any further letter. However, they stated that apart from their pre-election alliance of 92, another 10 Independents will also support them and they further stated that they would be submitting letters separately. This has not been received so far. Even assuming that they have support of 10 Independents, their strength will be only 102, which is short of the minimum requirement of 122.

11. Six Independent MLAs met me on 5.3.2005 and submitted a letter in which they have claimed that they may be called to form a Government and they will be able to get support of others (Annexure VIII). They have not submitted any authorization letter supporting their claim.

12. I have also consulted the Legal experts and the case

13. I explored all possibilities and from the facts stated above, I am fully satisfied that no political party or coalition of parties or groups is able to substantiate a claim of majority in the Legislative Assembly, and having explored the alternatives with all the political parties and groups and Independents MLAs, a situation has emerged in which no political party or groups appears to be able to form a Government commanding a majority in the House. Thus, it is a case of complete inability of any political party to form a stable Government commanding the confidence of the majority members. This is a case of failure of constitutional machinery.

14. I, as Governor of Bihar, am not able to form a popular Government in Bihar, because of the situation created by the election results mentioned above.

15. I, therefore, recommend that the present newly constituted Assembly be kept in suspended animation for the present, and the President of India is requested to take such appropriate action/decision, as required.

Since no political party was in a position to form a Government, a notification was issued on 7th March, 2005 under Article 356 of the Constitution imposing President's rule over the State of Bihar and the Assembly was kept in suspended animation....

Governor of Bihar sent a report to the President on 27th April, 2005 reproduced below:

“Respected Rashtrapati Jee,

I invite a reference to my D.O. No.33/GB dated the 6th March, 2005 through which a detailed analysis of the results of the Assembly elections were made and a recommendation was also made to keep the newly constituted Assembly (constituted vide Election Commission's notification No.308/BR-L.A./2005 dated the 4th March, 2005 and 464/Bihar- LA/2005, dated the 4th March, 2005) in a suspended animation and also to issue appropriate direction/decision. In the light of the same, the President was pleased to issue a proclamation under Article 356 of the Constitution of India vide notification NO.G.S.R. 162(E), dated 7th March, 2005, and the proclamation has been approved and assented by the Parliament.

2. As none of the parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government wherein they could claim a support of a simple majority of 122 in a House of 243, I had no alternative but to send the above mentioned report with the said recommendation

3. I am given to understand that serious attempts are being made by JD-U and BJP to cobble a majority and lay claim to form the Government in the State. Contacts in JD-U and BJP have informed that 16-17 LJP MLAs have been won over by various means and attempts being made to win over others. The JD-U is also targetting Congress for creating a split. It is felt in JD-U circle that in case LJP does not split then it can still form the Government with the support of Independent, NCP, BSP and SP MLAs and two-third of Congress MLAs after it splits from the main Congress party. The JD-U and BJP MLAs are quite convinced that by the end of this month or latest by the first week of May JD-U will be in a position to form the Government. The high pressure moves of JD-U/BJP is also affecting the RJD MLAs who have become restive. According to a report there is a lot of pressure by the RJD MLAs on Lalu Pd. Yadav to either form the Government in Bihar on UPA pattern in the centre, with the support of Congress, LJP and others or he should at least ensure the continuance of President's rule in the State.

4. The National Commission to review the working of the Constitution has also noticed that the reasons for increasing instability of elected Governments was attributable to unprincipled and opportunistic political realignment from time to time. A reasonable degree of stability of Government and a strong Government is important. It has also noticed that the changing alignment of the members of political parties so openly really makes a mockery of our democracy.

Under the Constitutional Scheme a political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programmes. The 10th Schedule of the Constitution was introduced on the premise that political propriety and morality demands that if such persons after the elections changes his affiliation, that should be discouraged. This is on the basis that the loyalty to a party is a norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate.

5. Newspaper reports in the recent time and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received by me, indicate a trend to gain over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts etc., which is a disturbing feature. This would affect the constitutional provisions and safeguards built therein. Any such move may also distort the verdict of the people as shown by results of the recent elections. If these attempts are allowed to continue then it would be amounting to tampering with constitutional provisions.

6. Keeping in view the above mentioned circumstances the present situation is fast approaching a scenario wherein if the trend is not arrested immediately, the consequent political instability will further give rise to horse trading being practiced by various political parties/groups trying to allure elected MLAs. Consequently it may not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll.

7. I am submitting these facts before the Hon'ble President for taking such action as deemed appropriate."

The report dated 21st May, 2005:

"Respected Rashtrapati Jee,

I invite a reference to my D.O. letter No.52/GB dated 27th April, 2005 through which I had given a detailed account of the attempts made by some of the parties notably the JD-U and BJP to cobble a majority and lay a claim to form a Government in the State. I had informed that around 16-17 MLAs belonging to LJP were being wooed by various means so that a split could be effected in the LJP. Attention was also drawn to the fact that the RJD MLAs had also become restive in the light of the above moves made by the JD-U. As you are aware after the Assembly Elections in February this year, none of the political parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government since they could not claim a support of a simple majority of 122 in a House of 243 and hence the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No. GSR 162 (E) dated 7th March, 2005 and the Assembly was kept in suspended animation. The reports received by me in the recent past through the media and also through meeting with various political functionaries, as also intelligence reports, indicate a trend to win over elected representatives of the people. Report has also been received of one of the LJP MLA, who is General Secretary of the party having resigned today and also 17-18 more perhaps are moving towards the JD-U clearly indicating that various allurements have been offered which is very disturbing and alarming feature. Any move by the break away faction to align with any other party to cobble a majority and stake claim to form a Government would positively affect the Constitutional provisions and safeguards built therein and distort the verdict of the people as shown by the results in the recent Elections. If these attempts are allowed it would be amounting to tampering with Constitutional provisions. Keeping the above mentioned circumstances, I am of the considered view that if the trend is not arrested immediately, it may not be possible to contain the situation. Hence in my view a situation has arisen in the State wherein it would be desirable in the interest of the State that the Assembly presently kept in suspended animation is dissolved, so that the people/electorate can be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course."

The report of the Governor was received by Union of India on 22nd May, 2005 and on the same day, the Union cabinet met at about 11.00 P.M. and decided to accept the report of the Governor and sent the fax message to the President of India, who had already left for Moscow, recommending the dissolution of the Legislative Assembly of Bihar. This message was received by the President of India at his Camp office in Moscow at 0152 hrs. (IST). President of India accorded his approval and sent the same through the fax message which was received at 0350 hrs. (IST) on 23rd May, 2005. After due process the notification was issued formally at 1430 hrs. (IST) on 23rd May, 2005 dissolving the Bihar Assembly which has been impugned in these writ petitions.

After hearing elaborate arguments, by a brief order dated 7th October, 2005, the notification dated 23rd May, 2005 was held by the Supreme Court to be unconstitutional but having regard to the facts and circumstances of the case, relief directing status quo ante to restore the Legislative Assembly as it stood on 7th March, 2005, was declined. The Order dated 7th October read as under :

The General Elections to the Legislative Assembly of Bihar were held in the month of February 2005. The Election Commission of India, in pursuance of Section 73 of the Representation of the People Act, 1951 in terms of Notification dated 4th March, 2005 notified the names of the elected members. As no party or coalition of the parties was in a position to secure 122 seats so as to have majority in the Assembly, the Governor of Bihar made a report dated 6th March, 2005 to the President of India, whereupon in terms of Notification G.S.R.162(E) dated 7th March, 2005, issued in exercise of powers under Article 356 of the Constitution of India, the State was brought under President's Rule and the

Assembly was kept in suspended animation. By another Notification G.S.R.163(E) of the same date, 7th March, 2005, it was notified that all powers which have been assumed by the President of India, shall, subject to the superintendence direction and control of the President, be exercisable also by the Governor of the State. The Home Minister in a speech made on 21st March, 2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was being discussed in the Rajya Sabha said that the Government was not happy to impose President's Rule in Bihar and would have been happy if Government would have been formed by the elected representatives after the election. That was, however, not possible and, therefore, President's Rule was imposed. It was also said that the Government would not like to see that President's Rule is continued for a long time but it is for elected representatives to take steps in this respect; the Governor can ask them and request them and he would also request that the elected representatives should talk to each other and create a situation in which it becomes possible for them to form a Government. The Presidential Proclamation dated 7th March, 2005 was approved by the Lok Sabha at its sitting held on 19th March, 2005 and Rajya Sabha at its sitting held on 21st March, 2005.

Keeping in view the questions involved, the pronouncement of judgment with detailed reasons is likely to take some time and, therefore, at this stage, we are pronouncing this brief order as the order of the court to be followed by detailed reasons later. Accordingly, as per majority opinion, this court orders as under:

1. The Proclamation dated 23rd May, 2005 dissolving the Legislative Assembly of the State of Bihar is unconstitutional.

2. Despite unconstitutionality of the impugned Proclamation, but having regard to the facts and circumstances of the case, the present is not a case where in exercise of discretionary jurisdiction the status quo ante deserves to be ordered to restore the Legislative Assembly as it stood on the date of Proclamation dated 7th March, 2005 whereunder it was kept under suspended animation.

Y.K. SABHARWAL, C.J. - 20. (T)he points that fall for our determination are :

(1) Is it permissible to dissolve the Legislative Assembly under Article 174(2)(b) of the Constitution without its first meeting taking place?

(2) Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

(3) If the answer to the aforesaid question is in affirmative, is it necessary to direct *status quo ante* as on 7th March, 2005 or 4th March, 2005?

(4) What is the scope of Article 361 granting immunity to the Governor?

POINT NO.1 - *Omitted*

POINT NO.2: Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

40. This point is the heart of the matter. The answer to the constitutional validity of the impugned notification depends upon the scope and extent of judicial review in such matters as determined by a Nine Judge Bench decision in *Bommai* case. Learned counsel appearing for both sides have made elaborate submissions on the question as to what is the *ratio decidendi* of *Bommai* case.

41. According to the petitioners, the notification dissolving the Assembly is illegal as it is based on the reports of the Governor which suffered from serious legal and factual infirmities

and are tainted with pervasive mala fides which is evident from the record. It is contended that the object of the reports of the Governor was to prevent political party led by Mr. Nitish Kumar to form the Government. The submission is that such being the object, the consequent notification of dissolution accepting the recommendation deserves to be annulled.

42. Under Article 356 of the Constitution, the dissolution of an Assembly can be ordered on the satisfaction that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution. Such a satisfaction can be reached by the President on receipt of report from the Governor of a State or otherwise. It is permissible to arrive at the satisfaction on receipt of the report from Governor and on other material. Such a satisfaction can also be reached only on the report of the Governor. It is also permissible to reach such a conclusion even without the report of the Governor in case the President has other relevant material for reaching the satisfaction contemplated by Article 356. The expression 'or otherwise' is of wide amplitude.

43. In the present case, it is not in dispute that the satisfaction that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution has been arrived at only on the basis of the reports of the Governor. It is not the case of the Union of India that it has relied upon any material other than the reports of the Governor which have been earlier reproduced in extenso.

Defections - 73. At this stage, we may consider another side issue, namely, defections being a great evil. Undoubtedly, defection is a great evil.

74. It was contended for the Government that the unprincipled defections induced by allurements of office, monetary consideration, pressure, etc. were destroying the democratic fabric. With a view to control this evil, Tenth Schedule was added by the Constitution (Fifty-Second Amendment) Act, 1985. Since the desired goal to check defection by the legislative measure could not be achieved, law was further strengthened by the Constitution (Ninety-first Amendment) Act, 2003. The contention is that the Governor's action was directed to check this evil, so that a Government based on such defections is not formed.

75. Reliance has been placed on the decision in the case of *Kihoto Hollohan v. Zachillhu* [1992 Supp. (2) SCC 651] to bring home the point that defections undermine the cherished values of democracy and Tenth Schedule was added to the Constitution to combat this evil. It is also correct that to further strengthen the law in this direction, as the existing provisions of the Tenth Schedule were not able to achieve the desired goal of checking defection, by 91st Amendment, defection was made more difficult by deleting provision which did not treat mass shifting of loyalty by 1/3 as defection and by making the defection, altogether impermissible and only permitting merger of the parties in the manner provided in the Tenth Schedule as amended by 91st Amendment.

76. In *Kihoto* case, the challenge was to validity of the Tenth Schedule, as it stood then. Argument was that this law was destructive of the basic structure of the Constitution as it is violative of the fundamental principle of Parliamentary democracy, a basic feature of the Indian Constitutionalism and is destructive of the freedom of speech, right to dissent and freedom of conscience as the provisions seek to penalize and disqualify elected representatives for the exercise of these rights and freedoms which are essential to the

sustenance of the system of parliamentary democracy. It was also urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the remedies, graver than the decease itself, are adopted. It was said that the Tenth Schedule seeks to throw away the baby with the bath water.

77. Dealing with aforesaid submissions, the Court noted that, in fact, the real question was whether under the Indian Constitutional Scheme, is there any immunity from constitutional correctives against a legislatively perceived political evil of unprincipled defections induced by the lure of office and monetary inducements. It was noted that the points raised in the petition are, indeed, far reaching and of no small importance-invoking the 'sense of relevance and constitutionally stated principles of unfamiliar settings'. On the one hand there was the real and imminent threat to the very fabric of Indian democracy posed by certain level of political behaviour conspicuous by their utter and total disregard of well recognised political proprieties and morality. These trends tend to degrade the tone of political life and, in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. There is the legislative determination through experimental constitutional processes to combat that evil. On the other hand, there may be certain side-effects and fall-out which might affect and hurt even honest dissenters and conscientious objectors. While dealing with the argument that the constitutional remedy was violative of basic features of the Constitution, it was observed that the argument ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The unethical political defections was described as a 'canker' eating into the vitals of those values that make democracy a living and worthwhile faith.

78. It was contended that the Governor was only trying to prevent members from crossing the floor as the concept of the freedom of its members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but would also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. The contention is based on Para 144 of the judgment in *Kihoto's* case which reads thus:

“But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things.”

“Clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes

or abstains from voting contrary to “any directions” issued by the political party. The provision, however, recognises two exceptions: one when the Member obtains from the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression “Any Direction” in clause (b) of Paragraph 2(1) whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extra-ordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately.”

80. It is contended that the Governor has many sources information wherefrom led him to conclude that the process that was going on in the State of Bihar was destroying the very fabric of democracy and, therefore, such approach cannot be described as outrageous or in defiance of logic, particularly, when proof in such cases is difficult if not impossible as bribery takes place in the cover of darkness and deals are made in secrecy. It is, thus, contended that Governor's view is permissible and legitimate view.

81. Almost similar contention has been rejected in *Bommai* case.

82. The other decision of House of Lords in *Puhlhofer v. Hillingdon, London Borough Council* (1986) 1 All ER 467 at 474] relied upon by the respondents, has been considered by Justice Sawant in *Bommai* case. The reliance was to the proposition that where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the 'obvious' to the 'debatable' to the 'just conceivable', it is the duty of the Court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. But in the present case, the inference sought to be drawn by the Governor without any relevant material, cannot fall in the category of 'debatable' or 'just conceivable', it would fall in the category of 'obviously perverse'. On facts, the inescapable inference is that the sole object of the Governor was to prevent the claim being made to form the Government and the case would fall under the category of 'bad faith'.

83. The question in the present case is not about MLAs voting in violation of provisions of Tenth Schedule as amended by the Constitution (91st Amendment), as we would presently show.

84. Certainly, there can be no quarrel with the principles laid in *Kihoto* case about evil effects of defections but the same have no relevance for determination of point in issue. The stage of preventing members to vote against declared policies of the political party to which they belonged had not reached. If MLAs vote in a manner so as to run the risk of getting disqualified, it is for them to face the legal consequences. That stage had not reached. In fact,

the reports of the Governor intended to forestall any voting and staking of claim to form the Government.

85. Undisputedly, a Governor is charged with the duty to preserve, protect and defend the Constitution and the laws, has a concomitant duty and obligation to preserve democracy and not to permit the 'canker' of political defections to tear into the vitals of the Indian democracy. But on facts of the present case, we are unable to accept that the Governor by reports dated 27th April and 21st May, 2005 sought to achieve the aforesaid objective. There was no material, let alone relevant, with the Governor to assume that there were no legitimate realignment of political parties and there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means.

86. The report dated 27th April, 2005 refers to (1) serious attempt to cobble a majority; (2) winning over MLAs by various means; (3) targeting parties for a split; (4) high pressure moves; (5) offering various allurements like castes, posts, money etc.; and (6) Horse-trading. Almost similar report was sent by the Governors of Karnataka and Nagaland leading to the dissolution of the Assembly of Karnataka and Nagaland, invalidated in Bommai's case. Further, the contention that the Central Government did not act upon the report dated 27th April, 2005 is of no relevance and cannot be considered in isolation since the question is about the manner in which the Governor moved, very swiftly and with undue haste, finding that one political party may be close to getting majority and the situation had reached where claim may be staked to form the Government which led to the report dated 21st May, 2005. It is in this context that the Governor says that instead of installing a Government based on a majority achieved by a distortion of the system, it would be preferable that the people/electorate could be provided with one more opportunity to seek the mandate of the people. This approach makes it evident that the object was to prevent a particular political party from staking a claim and not the professed object of anxiety not to permit the distortion of the political system, as sought to be urged. Such a course is nothing but wholly illegal and irregular and has to be described as mala fide. The recommendation for dissolution of the Assembly to prevent the staking of claim to form the Government purportedly on the ground that the majority was achieved by distortion of system by allurement, corruption and bribery was based on such general assumptions without any material which are quite easy to be made if any political party not gaining absolute majority is to be kept out of governance. No assumption without any basis whatever could be drawn that the reason for a group to support the claim to form the Government by Nitish Kumar, was only the aforesaid distortions. That stage had not reached. It was not allowed to be reached. If such majority had been presented and the Governor forms a legitimate opinion that the party staking claim would not be able to provide stable Government to the State, that may be a different situation. Under no circumstances, the action of Governor can be held to be bona fide when it is intended to prevent a political party to stake claim for formation of the Government. After elections, every genuine attempt is to be made which helps in installation of a popular Government, whichever be the political party.

Interpretation of a Constitution and Importance of Political Parties

90. In support of the proposition that in Parliament Democracy there is importance of political parties and that interpretation of the constitutional provisions should advance the said

basic structure based on political parties, our attention was drawn to write up *Designing Federalism : A Theory of Self-Sustainable Federal Institution* and what is said about political parties in a Federal State which is as under:

“Political parties created democracy and modern democracy is unthinkable save in terms of parties.” : *Schattschneider* 1942 :

Here is a factor in the organisation of federal Government which is of primary importance but which cannot be ensured or provided for in a constitution a good party system : *Wheare* 1953 : 86

Whatever the general social conditions, if any, that sustain the federal bargain, there is one institutional condition that controls the nature of the bargain in all instances with which I am familiar. This is the structure of the party system, which may be regarded as the main variable intervening between the background social conditions and the specific nature of the federal bargain. : *Riker* 1964 : 136.

In a country which was always to be in need of the cohesive force of institutions, the national parties, for all their faults, were to become at an early hour primary and necessary parts of the machinery of Government, essential vehicles to convey men's loyalties to the state : *Hofstader* 1969 : 70-1

Morality: 93. We may also deal with the aspect of morality sought to be urged. The question of morality is of course very serious and important matter. It has been engaging the attention of many constitutional experts, legal luminaries, jurists and political leaders. The concept of morality has also been changing from time to time also having regard to the ground realities and the compulsion of the situation including the aspect and relevance of coalition governance as opposed to a single party Government. Even in the economic field, the concept of morality has been a matter of policy and priorities of the Government. The Government may give incentive, which ideally may be considered unethical and immoral, but in so far as Government is concerned, it may become necessary to give incentive to unearth black money. It may be difficult to leave such aspects to be determined by high constitutional functionaries, on case to case basis, depending upon the facts of the case, and personal mould of the constitutional functionaries. With all these imponderables, the constitution does not contemplate the dissolution of Assemblies based on the assumption of such immoralities for formation of the satisfaction that situation has arisen in which the Government cannot be of the Constitution of India.

Article 356 and *Bommai* case. 95. Power under Article 356(1) is an emergency power but it is not an absolute power. Emergency means a situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances to discharge the obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution. The Governor takes the oath, prescribed by Article 159 to preserve, protect and defend the Constitution and the laws to the best of his ability. Power under Article 356 is conditional, condition being formation of satisfaction of the President as contemplated by Article 356(1). The satisfaction of the President is the satisfaction of Council of Ministers. As provided in Article 74(1), the President acts on the aid and advice of Council of Ministers. The plain reading of Article

74(2) stating that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court, may seem to convey that the Court is debarred from inquiring into such advice but *Bommai* has held that Article 74(2) is not a bar against scrutiny of the material on the basis of which the President has issued the proclamation under Article 356. Justice Sawant, in Para 86 states that :

“What is further, although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The Courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the Courts undertake an enquiry into the existence of such material, the prohibition contained in Article 74(2) does not negate their right to know about the factual existence of any such material.”

96. It was further said that the Parliament would be entitled to go into the material on basis of what the Council of Ministers tendered the advice and, therefore, secrecy in respect of material cannot remain inviolable. It was said that :

”When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government.”

98. The scope of judicial review has been expanded by *Bommai* and dissent has been expressed from the view taken in *State of Rajasthan* case. The above approach shows objectivity even in subjectivity.

Bommai case

104. The Nine Judge Bench considered the validity of dissolution of Legislative Assembly of States of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Himachal Pradesh and Rajasthan. Out of six States, the majority held as unconstitutional the dissolution of Assemblies of Karnataka, Nagaland and Meghalaya as well. Six opinions have been expressed. There is unanimity on some issues, likewise there is diversity amongst several opinions on various issues.

Karnataka Facts

105. In the case of Karnataka, the facts were that the Janta Party being the majority party in the State Legislature had formed the Government under the leadership of Shri S.R. Bommai on August 30, 1988 following the resignation on August 1, 1988 of the earlier Chief Minister Shri Hegde who headed the ministry from March 1985 till his resignation. On 17th April, 1989 one legislator presented a letter to the Governor withdrawing his support to the Ministry. On the next day he presented to the Governor 19 letters allegedly written by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to

the BJP which was supporting the ministry, withdrawing their support to the ministry. On receipt of these letters, the Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on the said letters verified. On April 19, 1989, the Governor sent a report to the President stating therein that there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and even after the formation of the new party viz. Janta Dal, there were dissensions and defections. In support, the Governor referred to the 19 letters received by him. He further stated that in view of the withdrawal of the support by the said legislators, the Chief Minister Shri Bommai did not command a majority in the Assembly and hence it was inappropriate under the Constitution, to have the State administered by an Executive consisting of Council of Ministers which did not command the majority in the House. He also added that no other political party was in a position to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356(1). The Governor did not ascertain the view of Shri Bommai either after the receipt of the 19 letters or before making his report to the President. On the next day i.e. April 20, 1989, 7 out of the 19 legislators who had allegedly sent the letters to the Governor complained that their signatures were obtained on the earlier letters by misrepresentation and affirmed their support to the Ministry. The State Cabinet met on the same day and decided to convene the Session of the Assembly within a week i.e. on April 27, 1989. The Chief Minister and his Law Minister met the Governor on the same day and informed him about the decision to summon the Assembly Session. The Chief Minister offered to prove his majority on the floor of the House, even by pre-poning the Assembly Session, if needed. To the same effect, the Governor however sent yet another report to the President on the same day i.e. April 20, 1989, in particular, referring to the letters of seven Members pledging their support to the Ministry and withdrawing their earlier letters. He however opined in the report that the letters from the 7 legislators were obtained by the Chief Minister by pressurising them and added that horse-trading was going on and atmosphere was getting vitiated. In the end, he reiterated his opinion that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under Article 356(1) of the Constitution. On that very day, the President issued the Proclamation in dissolving the House. The Proclamation was thereafter approved by the Parliament as required by Article 356(3).

106. A writ petition filed in the High Court challenging the validity of dissolution was dismissed by a three Judge Bench inter alia holding that the facts stated in the Governor's report cannot be held to be irrelevant and that the Governor's satisfaction that no other party was in a position to form the Government had to be accepted since his personal bona fides were not questioned and his satisfaction was based upon reasonable assessment of all the relevant facts. The High Court relied upon the test laid down in the *State of Rajasthan* case and held that on the basis of materials disclosed, the satisfaction arrived at by the President could not be faulted.

Facts of Madhya Pradesh, Rajasthan and Himachal Pradesh

110. Insofar as the cases of States of Madhya Pradesh, Rajasthan and Himachal Pradesh are concerned the dismissal of the Governments was a consequence of violent reactions in India and abroad as well as in the neighbouring countries where some temples were

destroyed, as a result of demolition of Babri Masjid structure on 6th December, 1992. The Union of India is said to have tried to cope up the situation by taking several steps including banning of some organizations which had along with BJP given a call for Kar sevaks to march towards Ayodhya on December 6, 1992. The Proclamation in respect of these States was issued on January 15, 1993. The Proclamations dissolving the assemblies were issued on arriving at satisfaction as contemplated by Article 356(1) on the basis of Governor's report. It was held that the Governor's reports are based on relevant materials and are made bona fide and after due verification.

118. Now, let us see the opinion of Justice Sawant, who spoke for himself and Justice Kuldip Singh and with whom Justice Pandian, Justice Jeevan Reddy and Justice Agrawal agreed, to reach the conclusion as to the invalidity of Proclamation dissolving assemblies of Karnataka and Nagaland.

119. Learned Judge has opined that the President's satisfaction has to be based on objective material. That material may be available in the report sent to the President by the Governor or otherwise or both from the report and other sources. Further opines Justice Sawant that the objective material, so available must indicate that the Government of State cannot be carried on in accordance with the provisions of the Constitution. The existence of the objective material showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the issue of the Proclamation.

120. Reference has been made to a decision of the Supreme Court of Pakistan on the same subject, although the language of the provisions of the relevant Articles of Pakistan Constitution is not couched in the same terms. In *Muhammad Sharif v. Federation of Pakistan*, PLD 1988 (LAH) 725, the question was whether the order of the President dissolving the National Assembly on 29th May, 1988 was in accordance with the powers conferred on him under Article 58(2)(b) of the Pakistan Constitution. It was held in that case that it is not quite right to contend that since it was the discretion of the President, on the basis of his opinion, the President could dissolve the National Assembly but he has to have the reasons which are justifiable in the eyes of the people and supportable by law in a court of justice. He could not rely upon the reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects (Emphasis supplied by us). It would be instructive to note as to what was stated by the learned Chief Justice and Justice R.S. Sidhwa, as reproduced in the opinion of Justice Sawant:

Whether it is 'subjective' or 'objective' satisfaction of the President or it is his 'discretion' or 'opinion', this much is quite clear that the President cannot exercise his powers under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature that the representative of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen. His action must appear to be called for and justifiable under the Constitution if challenged in a Court of Law. No doubt, the Courts will be chary to interfere in his 'discretion' or formation of the 'opinion' about the 'situation' but if there be no basis or justification for the order under the Constitution, the Courts will have to perform their

duty cast on them under the Constitution. While doing so, they will not be entering in the political arena for which appeal to electorate is provided for.

Dealing with the second argument, the learned Chief Justice held:

If the argument be correct then the provision 'Notwithstanding anything contained in clause (2) of Article 48' would be rendered redundant as if it was no part of the Constitution. It is obvious and patent that no letter or part of a provision of the Constitution can be said to be redundant or non-existent under any principle of construction of Constitutions. The argument may be correct in exercise of other discretionary powers but it cannot be employed with reference to the dissolution of National Assembly. Blanket coverage of validity and unquestionability of discretion under Article 48(2) was given up when it was provided under Article 58(2) that

'Notwithstanding clause (2) of Article 48 the discretion can be exercised in the given circumstances. Specific provision will govern the situation. This will also avoid expressly stated; otherwise it is presumed to be there in Courts of record. Therefore, it is not quite right to contend that since it was in his 'discretion', on the basis of his 'opinion' the President could dissolve the National Assembly. He has to have reasons which are justifiable in the eyes of the people and supportable by law in a Court of Justice. It is understandable that if the President has any justifiable reason to exercise his 'discretion' in his 'opinion' but does not wish to disclose, he may say so and may be believed or if called upon to explain the reason he may take the Court in confidence without disclosing the reason in public, may be for reason of security of State. After all patriotism is not confined to the office holder for the time being. He cannot simply say like Caesar it is my will, opinion or discretion. Nor give reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects.....

Dealing with the same arguments, R.S. Sidhwa, J. stated as follows :

I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Arts. 58(2)(b) and 112(2) (b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer.

121. It is well settled that if the satisfaction is mala fide or is based on wholly extraneous or irrelevant grounds, the court would have the jurisdiction to examine it because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. On consideration of these observations made in the case of *State of Rajasthan* as also the other decisions, Justice Sawant concluded that the exercise of power to issue proclamation under Article 356(1) is subject to judicial review at least to the extent of examining whether the conditions precedent to the issue of Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. While considering the question of material, it was held that it is not the personal

whim, wish, view or opinion or the ipse dixit of the President de hors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from material is certainly open to judicial review.

122. It has been further held that when the Proclamation is challenged by making a *prima facie* case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government in view of the provisions of Section 106 of the Evidence Act, the burden of proof would be on the Union Government.

123. Thus having reached the aforesaid conclusions as to the parameters of the judicial review that the satisfaction cannot be based on the personal whim, wish, view, opinion or *ipse dixit de hors* the legitimate inference from the relevant material and that the legitimacy of the inference drawn was open to judicial review, the report on basis whereof Proclamation dissolving the Assembly of Karnataka had been issued was subjected to a close scrutiny, as is evident from paragraphs 118, 119 and 120 of the opinion of Justice Sawant which read as under:

118. In view of the conclusions that we have reached with regard to the parameters of the judicial review, it is clear that the High Court had committed an error in ignoring the most relevant fact that in view of the conflicting letters of the seven legislators, it was improper on the part of the Governor to have arrogated to himself the task of holding, firstly, that the earlier nineteen letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators, but had merely got the authenticity of the signatures verified through the Legislature Secretariat. Secondly, he also took upon himself the task of deciding that the seven out of the nineteen legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their free will. Again he had not cared even to interview the said legislators. Thirdly, it is not known from where the Governor got the information that there was horse-trading going on between the legislators. Even assuming that it was so, the correct and the proper course for him to adopt was to await the test on the floor of the House which test the Chief Minister had willingly undertaken to go through on any day that the Governor chose. In fact, the State Cabinet had itself taken an initiative to convene the meeting of the Assembly on April 27, 1989, i.e., only a week ahead of the date on which the Governor chose to send his report to the President. Lastly, what is important to note in connection with this episode is that the Governor at no time asked the Chief Minister even to produce the legislators before him who were supporting the Chief Minister, if the Governor thought that the situation posed such gravethreat to the governance of the State that he could not await the result of the floor-test in the House. We are of the view that this is a case where all canons of propriety were thrown to wind and the undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356(1) clearly smacked of mala fides. The

Proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, therefore, equally suffered from mala fides. A duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the ipse dixit of the Governor. The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more firmly, cautiously and circumspectly. Instead, it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly. The Proclamation having been based on the said report and so-called other information which is not disclosed was, therefore, liable to be struck down

119. In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some Legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides. It is possible that on some rare occasions, the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court was, therefore, wrong in holding that the floor test was neither compulsory nor obligatory or that it was not a pre-requisite to sending the report to the President recommending action under Article 356(1). Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here.

120. The High Court was further wrong in taking the view that the facts stated in the Governor's report were not irrelevant when the Governor without ascertaining either from the Chief Minister or from the seven MLAs whether their retraction was genuine or not, proceeded to give his unverified opinion in the matter. What was further forgotten by the High Court was that assuming that the support was withdrawn to the Ministry by the 19 MLAs, it was incumbent upon the Governor to ascertain whether any other Ministry could be formed. The question of personal bona fides of the Governor is irrelevant in such matters. What is to be ascertained is whether the Governor had proceeded legally and explored all possibilities of ensuring a constitutional Government in the State before reporting that the constitutional machinery had broken down. Even if this meant installing the Government belonging to a minority party, the Governor was duty bound to opt for it so long as the Government could enjoy the confidence of the House. That is also the recommendation of the Five-member Committee of the Governors appointed by the President pursuant to the decision taken at the Conference of Governors held in New Delhi in November 1970, and of the Sarkaria Commission quoted above. It is also obvious that beyond the report of the Governor, there was no other material before the President before he issued the Proclamation. Since the "facts" stated by the Governor in his report, as pointed out above contained his own opinion based on unascertained

material, in the circumstances, they could hardly be said to form an objective material on which the President could have acted. The Proclamation issued was, therefore, invalid.

124. The view of the High Court that the facts stated in the Governor's report had to be accepted was not upheld despite the fact that the Governor had got the authenticity of the signatures of 19 MLAs on letters verified from the Legislature Secretariat, on the ground that he had not cared to interview the legislators and that there were conflicting letters from the seven legislators. The conclusion drawn by the Governor that those seven legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their own free will was frowned upon, particularly when they had not been interviewed by the Governor. It was further observed that it is not known from where the Governor got the information about the horse-trading going on between the legislators. Further conclusion reached was that the Governor had thrown all cannons of propriety to the winds and showed undue haste in inviting the President to issue Proclamation under Article 356(1) which clearly smacked of mala fides. It was noticed that the facts stated by the Governor in his report were his own opinion based on unascertained material and in the circumstances they could hardly be said to form the objective material on which the President could have acted.

125. When the facts of the present case are examined in light of the scope of the judicial review as is clear from the aforesaid which represents *ratio decidendi* of majority opinion of **Bommai** case, it becomes evident that the challenge to the impugned Proclamation must succeed.

The case in hand is squarely covered against the Government by the dicta laid down in Bommai case. There cannot be any presumption of allurement or horse-trading only for the reason that some MLAs, expressed the view which was opposed to the public posture of their leader and decided to support the formation of the Government by the leader of another political party. The minority Governments are not unknown. It is also not unknown that the Governor, in a given circumstance, may not accept the claim to form the Government, if satisfied that the party or the group staking claim would not be able to provide to the State a stable Government. It is also not unknown that despite various differences of perception, the party, group or MLAs may still not opt to take a step which may lead to the fall of the Government for various reasons including their being not prepared to face the elections. These and many other imponderables can result in MLAs belonging to even different political parties to come together. It does not necessarily lead to assumption of allurement and horse-trading.

135. Thus, it is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not. The absence of these factors resulted in the majority declaring the dissolution of State Legislatures of Karnataka and Nagaland as invalid.

136. In view of the above, we are unable to accept the contention urged by the Id. Attorney General for India, Solicitor General of India and Additional Solicitor General, appearing for the Government that the report of the Governor itself is the material and that it is not permissible within the scope of judicial review to go into the material on which the report of the Governor may be based and the question whether the same was duly verified by

the Governor or not. In the present case, we have nothing except the reports of the Governor. In absence of the relevant material much less due verification, the report of the Governor has to be treated as the personal *ipse dixit* of the Governor. The drastic and extreme action under Article 356 cannot be justified on mere ipse dixit, suspicion, whims and fancies of the Governor. This Court cannot remain a silent spectator watching the subversion of the Constitution. It is to be remembered that this Court is the sentinel on the qui vive. In the facts and circumstances of this case, the Governor may be main player, but Council of Ministers should have verified facts stated in the report of the Governor before hurriedly accepting it as a gospel truth as to what Governor stated. Clearly, the Governor has mislead the Council of Ministers which lead to aid and advice being given by the Council of Ministers to the President leading to the issue of the impugned Proclamation.

137. Regarding the argument urged on behalf of the Government of lack of judicially manageable standards and, therefore, the court should leave such complex questions to be determined by the President, Union Council of Ministers and the Governor, as the situation like the one in Bihar, is full of many imponderables, nuances, implications and intricacies and there are too many ifs and buts not susceptible of judicial scrutiny, the untenability of the argument becomes evident when it is examined in the light of decision in *Bommai* case upholding the challenge made to dissolution of the Assemblies of Karnataka and Nagaland. Similar argument defending the dissolution of these two assemblies having not found favour before a Nine Judge Bench, cannot be accepted by us. There too, argument was that there were no judicially manageable standards for judging Horse-trading, Pressure, Atmosphere being vitiated, wrongful confinement, Allurement by money, contacts with insurgents in Nagaland. The argument was rejected.

138. The position was different when Court considered validity of dissolution of Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh.

139. In paragraphs 432 and 433 of the opinion of Justice Jeevan Reddy in *Bommai* case, after noticing the events that led to demolition of Babri Masjid on 6th December, 1992, the assurances that had been given prior to the said date, the extraordinary situation that had arisen after demolition, the prevailing tense communal situation, the learned Judge came to the conclusion that on material placed before the Court including the reports of the Governors, it was not possible to say that the President had no relevant material before him on the basis of which he could form satisfaction that BJP Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot disassociate themselves from the action and its consequences and that these Governments, controlled by one and the same party, whose leading lights were actively campaigning for the demolition of structure, cannot be disassociated from the acts and deeds of the leaders of BJP. It was further held that if the President was satisfied that the faith of these BJP Governments in the concept of secularism was suspected in view of the acts and conduct of the party controlling these Governments and that in the volatile situation that developed pursuant to the demolition, the Government of these States cannot be carried on in accordance with the provisions of the Constitution, the Court is not able to say that there was no relevant material upon which he could be so satisfied. Under these circumstances, it was observed that the Court cannot question the correctness of the material produced and that even if part of it is not relevant to the action.

The Court cannot interfere so long as there is some relevant material to sustain the action. For appreciating this line of reasoning, it has to be borne in mind that the same learned Judge, while examining the validity of dissolution of Karnataka and Nagaland Assemblies, agreeing with the reasoning and conclusions given in the opinion of Justice Sawant which held that the material relied upon by the Governor was nothing but his *ipse dixit* came to the conclusion that the said dissolution were illegal. The majority opinion and the correct ratio thereof can only be appreciated if it is kept in view that the majority has declared invalid the dissolution of Assemblies of Karnataka and Nagaland and held as valid the dissolution of the Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh. Once this factor is kept in full focus, it becomes absolutely clear that the plea of perception of the same facts or the argument of lack of any judicially manageable standards would have no legs to stand.

140. In the present case, like in *Bommai* case, there is no material whatsoever except the *ipse dixit* of the Governor. The action which results in preventing a political party from staking claim to form a Government after election, on such fanciful assumptions, if allowed to stand, would be destructive of the democratic fabric. It is one thing to come to the conclusion that the majority staking claim to form the Government, would not be able to provide stable Government to the State but it is altogether different thing to say that they have garnered majority by illegal means and, therefore, their claim to form the Government cannot be accepted. In the latter case, the matter may have to be left to the wisdom and will of the people, either in the same House it being taken up by the opposition or left to be determined by the people in the elections to follow. Without highly cogent material, it would be wholly irrational for constitutional authority to deny the claim made by a majority to form the Government only on the ground that the majority has been obtained by offering allurements and bribe which deals have taken place in the cover of darkness but his undisclosed sources have confirmed such deals. The extra-ordinary emergency power of recommending dissolution of a Legislative Assembly is not a matter of course to be resorted to for good governance or cleansing of the politics for the stated reasons without any authentic material. These are the matters better left to the wisdom of others including opposition and electorate.

141. It was also contended that the present is not a case of undue haste. The Governor was concerned to see the trend and could legitimately come to the conclusion that ultimately, people would decide whether there was an 'ideological realignment', then there verdict will prevail and the such realigned group would win elections, to be held as a consequence of dissolution. It is urged that given a choice between going back to the electorate and accepting a majority obtained improperly, only the former is the real alternative. The proposition is too broad and wide to merit acceptance. Acceptance of such a proposition as a relevant consideration to invoke exceptional power under Article 356 may open a floodgate of dissolutions and has far reaching alarming and dangerous consequences. It may also be a handle to reject post-election alignments and realignments on the ground of same being unethical, plunging the country or the State to another election. This aspect assumes great significance in situation of fractured verdicts and in the formation of coalition Governments. If, after polls two or more parties come together, it may be difficult to deny their claim of majority on the stated ground of such illegality. These are the aspects better left to be determined by the political parties which, of course, must set healthy and ethical standards for

themselves, but, in any case, the ultimate judgment has to be left to the electorate and the legislature comprising also of members of opposition.

142. To illustrate the aforesaid point, we may give two examples in a situation where none of the political party was able to secure majority on its own :

1. After polls, two or more political parties come together to form the majority and stake claim on that basis for formation of the Government. There may be reports in the media about bribe having been offered to the elected members of one of the political parties for its consenting to become part of majority. If the contention of the respondents is to be accepted, then the constitutional functionary can decline the formation of the Government by such majority or dissolve the House or recommend its dissolution on the ground that such a group has to be prevented to stake claim to form the Government and, therefore, a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

2 A political party stakes claim to form the Government with the support of independent elected candidates so as to make the deficient number for getting majority. According to the media reports, under cover of darkness, large sums of bribe were paid by the particular party to independent elected candidates to get their support for formation of Government. The acceptance of the contention of the respondents would mean that without any cogent material the constitutional functionary can decline the formation of the Government or recommend its dissolution even before such a claim is made so as to prevent staking of claim to form the Government.

143. We are afraid that resort to action under Article 356(1) under the aforesaid or similar eventualities would be clearly impermissible. These are not the matters of perception or of the inference being drawn and assumptions being made on the basis whereof it could be argued that there are no judicial manageable standards and, therefore, the Court must keep its hands off from examining these matters in its power of judicial review. In fact, these matters, particularly without very cogent material, are outside the purview of the constitutional functionary for coming to the conclusion that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

144. The contention that the installation of the Government is different than removal of an existing Government as a consequence of dissolution as was the factual situation before the Nine Judge Bench in *Bommai's* case and, therefore, same parameters cannot be applied in these different situations, has already been dealt with hereinbefore. Further, it is to be remembered that a political party prima facie having majority has to be permitted to continue with the Government or permitted to form the Government, as the case may be. In both categories, ultimately the majority shall have to be proved on the floor of the House. The contention also overlooks the basic issue. It being that a party even, prima facie, having majority can be prevented to continue to run the Government or claim to form the Government declined on the purported assumption of the said majority having been obtained by illegal means. There is no question of such basic issues allegedly falling in the category of "political thicket" being closed on the ground that there are many imponderables for which there is no judicially manageable standards and, thus, outside the scope of judicial review.

145. The further contention that the expression 'situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution' in Article 356 shows that the power is both preventive and/or curative and, therefore, a constitutional functionary would be well within his rights to deny formation of the Government to a group of parties or elected candidates on the ground of purity of political process is of no avail on the facts and circumstances of this case, in view of what we have already stated. Even if preventive, power cannot be abused.

146. Another contention urged is that the power under Article 356 is legislative in character and, therefore, the parameters relevant for examining the validity of a legislative action alone are required to be considered and in that light of the expressions such as 'mala fide' or 'irrational' or 'extraneous' have to be seen with a view to ultimately find out whether the action is ultra vires or not. The contention is that the concept of malafides as generally understood in the context of executive action is unavailable while deciding the validity of legislative action. The submission is that the malafides or extraneous consideration cannot be attributed to a legislative act which when challenged the scope of inquiry is very limited.

147. For more than one reason, we are unable to accept the contention of the proclamation of the nature in question being a legislative act. Firstly, if the contention was to be accepted, *Bommai* case would not have held the proclamation in case of Karnataka and Nagaland as illegal and invalid. Secondly, the contention was specifically rejected in the majority opinion of Justice Jeevan Reddy in paragraph 377. The contention was that the proclamation of the present nature assumes the character of legislation and that it can be struck down only on the ground on which a legislation can be struck down. Rejecting the contention, it was held that every act of Parliament does not amount to and does not result in legislation and that the Parliament performs many other functions. One of such functions is the approval of the proclamation under clause (3) of Article 356. Such approval can, by no stretch of imagination, be called 'legislation'. Its legal character is wholly different. It is a constitutional function, a check upon the exercise of power under clause (1) of Article 356. It is a safeguard conceived in the interest of ensuring proper exercise of power under clause (1). It is certainly not legislation nor legislative in character.

148. Mr. Subramaniam, learned Additional Solicitor General, however, contended that *Bommai* case proceeded on the assumption that the proclamation under Article 356(1) is not legislative but when that issue is examined in depth with reference to earlier decisions, it would be clear that the conclusion of Justice Reddy in para 377 requires re-look in the light of these decisions. We are unable to accept the contention. The decision of Nine Judge Bench is binding on us.

149. Though *Bommai* has widened the scope of judicial review, but going even by principles laid in *State of Rajasthan* case, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds. Apart from the fact that the narrow minimal area of judicial review as advocated in *State of Rajasthan* case is no longer the law of the land in view of its extension in *Bommai* case but the present case even when considered by applying limited judicial review, cannot

stand judicial scrutiny as the satisfaction herein is based on wholly extraneous and irrelevant ground. The main ground being to prevent a party to stake claim to form the Government.

151. Referring to the opinion of Justice Reddy, in *Bommai* case, it was contended for the respondents that the approach adopted in *Barium Chemicals Ltd. v. Company Law Board* [(1966) Supl. SCR 311] and other cases where action under challenge is taken by statutory or administrative authorities, is not applicable when testing the validity of the constitutional action like the present one.

154. It is evident from the above that what ultimately determines the scope of judicial review is the facts and circumstances of the given case and it is for this reason that the Proclamations in respect of Karnataka and Nagaland were held to be bad and not those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh.

155. We are not impressed with the argument based on a possible disqualification under Tenth Schedule if the MLAs belonging to LJP party had supported the claim of Nitish Kumar to form the Government. At that stage, it was a wholly extraneous to take into consideration that some of the members would incur the disqualification if they supported a particular party against the professed stand of the political party to which they belong. The intricate question as to whether the case would fall within the permissible category of merger or not could not be taken into consideration. Assuming it did not fall in the permissible arena of merger and the MLAs would earn the risk of disqualification, it is for the MLAs or the appropriate functionary to decide and not for the Governor to assume disqualification and thereby prevent staking of claim by recommending dissolution. It is not necessary for us to examine, for the present purpose, para 4 of the Tenth Schedule dealing with merger and/or deemed merger. In this view the question sought to be raised that there cannot be merger of legislative party without the first merger of the original party is not necessary to be examined. The contention sought to be raised was that even if two-third legislators of LJP legislative party had agreed to merge, in law there cannot be any merger without merger of original party and even in that situation those two-third MLAs would have earned disqualification. Presently, it is not necessary to decide this question. It could not have been gone into by the Governor for recommending dissolution.

156. The provision of the Tenth Schedule dealing with defections, those of RP Act of 1951 dealing with corrupt practice, electoral offences and disqualification and the provisions of Prevention of Corruption Act, 1988 are legal safeguards available for ensuring purity of public life in a democracy. But, in so far as the present case is concerned, these had no relevance at the stage when the dissolution of the Assembly was recommended without existence of any material whatsoever. There was no material for the assumption that claim may be staked based not on democratic principles and based on manipulation by breaking political parties.

There cannot be any doubt that the oath prescribed under Article 159 requires the Governor to faithfully perform duties of his office and to the best of his ability preserve, protect and defend the Constitution and the laws. The Governor cannot, in the exercise of his discretion or otherwise, do anything what is prohibited to be done. The Constitution enjoins upon the Governor that after the conclusion of elections, every possible attempt is made for formation of a popular Government representing the will of the people expressed through the

electoral process. If the Governor acts to the contrary by creating a situation whereby a party is prevented even to stake a claim and recommends dissolution to achieve that object, the only inescapable inference to be drawn is that the exercise of jurisdiction is wholly illegal and unconstitutional. We have already referred to the Governor report dated 21st May, 2005, inter alia, stating that 17-18 MLAs belonging to LJP party are moving towards JDU which would mean JDU may be in a position to stake claim to form the Government. The further assumption that the move of the said members was itself indicative of various allurements having been offered to them and on that basis drawing an assumption that the claim that may be staked to form a Government would affect the constitutional provisions and safeguards built therein and distort the verdict of the people would be arbitrary. This shows that the approach was to stall JDU from staking a claim to form the Government. At that stage, such a view cannot be said to be consistent with the provisions of Tenth Schedule. In fact, the provisions of the said Schedule at that stage had no relevance. It is not a case of 'assumption', or 'perception' as to the provisions of Constitution by the Governor. It is a clear case where attempt was to somehow or the other prevent the formation of a Government by a political party - an area wholly prohibited in so far as the functions, duties and obligations of the Governor are concerned. It was thus a wholly unconstitutional act.

157. It is true as has been repeatedly opined in various reports and by various constitutional experts that the defections have been a bane of the Indian Democracy but, at the same time, it is to be remembered that the defections have to be dealt with in the manner permissible in law.

158. If a political party with the support of other political party or other MLA's stakes claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor cannot refuse formation of Government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means. No such power has been vested with the Governor. Such a power would be against the democratic principles of majority rule. Governor is not an autocratic political Ombudsman. If such a power is vested in the Governor and/or the President, the consequences can be horrendous. The ground of mal administration by a State Government enjoying majority is not available for invoking power under Article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1). In the same vein, it has to be held that the power under Tenth Schedule for defection lies with the Speaker of the House and not with the Governor. The power exercised by the Speaker under the Tenth Schedule is of judicial nature.

159. The Governor cannot assume to himself aforesaid judicial power and based on that assumption come to the conclusion that there would be violation of Tenth Schedule and use it as a reason for recommending dissolution of assembly.

161. For all the aforesaid reasons, the Proclamation dated 23rd May, 2005 is held to be unconstitutional.

POINT NO.3 : If the answer to the aforesaid questions is in affirmative, is it necessary to direct *status quo ante* as on 7th March, 2005 or 4th March, 2005?

162. As a consequence of the aforesaid view on point no. 2, we could have made an order of status quo ante as prevailing before dissolution of Assembly. However, having regard to the facts and the circumstances of the case, in terms of order of this Court dated 7th October, 2005, such a relief was declined. Reasons are the larger public interest, keeping in view the ground realities and taking a pragmatic view. As a result of the impugned Proclamation, the Election Commission of India had not only made preparations for the four phase election to be conducted in the State of Bihar but had also issued Notification in regard to first two phases before conclusion of arguments. Further, in regard to these two phases, before 7th October, 2005, even the last date for making nominations and scrutiny thereof was also over. In respect of 1st phase of election, even the last date for withdrawal of nominations also expired and polling was fixed for 18th October, 2005. The election process had been set in motion and was at an advanced stage. Judicial notice could be taken of the fact that considerable amount must have been spent; enormous preparations made and ground works done in the process of election and that too for election in a State like the one under consideration. Having regard to these subsequent developments coupled with numbers belonging to different political parties, it was thought fit not to put the State in another spell of uncertainty. Having regard to the peculiar facts, despite unconstitutionality of the Proclamation, the relief was moulded by not directing status quo ante and consequently permitting the completion of the ongoing election process with the fond hope that the electorate may again not give fractured verdict and may give a clear majority to one or other political party the Indian electorate possessing utmost intelligence and having risen to the occasion on various such occasions in the past.

In view of the above, while holding the impugned Proclamation dated 23rd May, 2005 unconstitutional, we have moulded the relief and declined to grant *status quo ante* and consequentially permitted the completion of the ongoing election process.

Nabam Rabia and Bemang Felix v. Dy. Speaker, Arunachal Pradesh

(2016) 8 SCC 1

(Jagdish Singh Khehar, Dipak Misra, Madan B. Lokur, Pinaki Chandra Ghose and N.V. Ramana, JJ.)

In the 2011 Arunachal Pradesh Elections, Mr. Nabam Tuki won the elections with a full majority of 47 seats out of a total of 60. Later on, a constitutional crisis occurred in the State of Arunachal Pradesh when 33 members of the Legislative Assembly, including 20 Congress members, 11 BJP members and 2 independent MLAs rebelled against Chief Minister Nabam Tuki. Speaker Nabam Rabia preemptively disqualified the rebel MLA on the basis of anti-defection law before the assembly could meet. The rebel members met the Governor to express their dissatisfaction against the Speaker and the Government. The Governor without the aid and advice of Chief Minister or Council of ministers preopened the assembly meeting and also impeached the Speaker of the House and appointed a Congress rebel as a Deputy Speaker who then canceled the disqualification orders of 14 rebel Congress MLAs. As a result many petitions were filed in Gauhati High Court, which went to stay the

disqualification of Congress MLAs. As a result, the Speaker appealed to the Supreme Court of India and the case was brought before a Constitutional bench.

It was held (per curiam), if the Chief Minister enjoys the confidence of the House, the Hon'ble Governor cannot use his independent discretion under Article 174 to either summon, prorogue or dissolve the House without the aid and advice of the Council of Ministers. As long as the Council of Ministers enjoys the confidence of the House, the aid and advice of the Council of Ministers headed by the Chief Minister is binding upon the Governor. If the Governor doubts the majority support to the Chief Minister, he can call for a floor test – In the present case floor test was never called – Thus summoning (that is, preponing 6th Session of the Assembly) by the Governor using his discretion in the present case was held to be illegal. The Hon'ble Apex Court ordered a state of status quo ante bellum.

Per Khehar, J. (for himself, Ghose and Ramana, JJ.; Misra, J. and Lokur, J. concurring)

383. In dealing with the situation in Arunachal Pradesh, the Governor was obliged to adhere to and follow the constitutional principles, that is, to be bound by the advice of the Council of Ministers. In the event the advice was not available and a responsible Government was not possible, the Governor could have resorted to the “breakdown provisions” and left it to the President to break the impasse. The Governor had the advice of the Council of Ministers but chose to ignore it; he assumed (well before the advice was tendered) that the advice would be such that he might not be bound by it.; the Governor, despite being the ‘first citizen’ of the State, chose to take no step to break the impasse caused by a collapse of communications between him and the Chief Minister; finally, the Governor took no steps to resort to the breakdown provisions and obtain impartial advice from the president. Instead, the Governor acted in a manner not only opposed to a rule of law but also opposed to the rule of law and, therefore, arbitrarily and in manner that certainly surprised “a sense of juridical propriety”.

Thus, it is ordered under :

(Para 214)

(i) The Order of the Governor dated 9-12-2015 preponing the 6th Session of the Arunachal Pradesh Legislative Assembly, from 14-1-2016 to 16-12-2015 is violative of Article 163 read with Article 174 of the Constitution of India, and as such, is quashed. (Para 214.1)

(ii) The message of the Governor dated 9-12-2015, directing the manner of conducting proceedings during the 6th Session of the Arunachal Pradesh Legislative Assembly, from 16-12-2015 to 18-12-2015, is violative of Article 163 read with Article 175 of the Constitution of India, and as such, is quashed. (Para 214.2)

(iii) All steps and decisions taken by the Arunachal Pradesh Legislative Assembly, pursuant to the Governor's order and message dated 9-12-2015, are unsustainable in view of the decision at points (i) and (ii) above. The same are accordingly set aside.

(iv) In view of the decisions at points (i) to (iii) above, the status quo ante as it prevailed on 15-12-2015, is ordered to be restored.

Union of India v. Harish Chandra Singh Rawat & Anr.

2016 (16) SCC 744

(Dipak Misra and Shiva Kirti Singh, JJ)

The purpose of an Observer in a floor test in a Legislative House is to save the sanctity of democracy which is the basic feature of our Constitution. The Supreme Court being the sentinel on the qui vive of the Constitution is under the obligation to see that democracy prevails and not gets hallowed by individuals. The directions which have been given on the last occasion, were singularly for the purpose of strengthening the democratic values and the constitutional norms. The collective trust in the Legislature is founded on the bedrock of the constitutional trust. This is a case where one side even in the floor test does not trust the other and the other claims that there is no reason to have the trust vote. Hence, there is the need and there is the necessity to have a neutral perceptionist to see that absolute objectivity is maintained when the voting takes place. Solely for the aforesaid purpose, the order is modified by directing that the Principal Secretary, Legislative and Parliamentary Affairs who belongs to the cadre of District Judge, shall remain present to conduct the affairs with perceptible objectivity and singularity of purpose of neutrality alongwith the Secretary, Legislative Assembly. The order is modified accordingly. It has been so directed so that no party can raise a cavil with regard to the process of voting.

Paras 23 to 30

T H E E N D