

RULE OF LAW*

Constitution of India: Article 14. “Equality before law. – The State shall not deny to any person equality before law or equal protection of laws within the territory of India.”

Dicey’s *Rule of Law***

Dicey said:

“It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law courts; the ‘rule of law’ in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the ‘administrative law’ (*droit administratif*) or the ‘administrative tribunals’ (*tribunaux administratifs*) of France. The notion which lies at the bottom of the ‘administrative law’ known to foreign countries is, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.”

According to Dicey, the Rule of Law, as he formulated it, was a principle of the English Constitution. The preface to the first edition says that the book “deals with only two or three guiding principles which pervade the modern Constitution of England,” and the book shows that the Rule of Law is one such principle. This is important, for the modern version of that rule does not assert that it is a principle of the English Constitution, but that the rule is an ideal by reference to which that Constitution must be judged.

Dicey’s “Rule of Law” has been criticised by eminent writers. I will, however, make certain observations about Dicey’s “Rule of Law” which would be generally accepted today.

(a) Dicey wrote in the hey-day of *laissez-faire* and he dealt with the *rights of individuals* not with the *powers of the administration*.

(b) It is tempting to say that the welfare state has changed public law, and consequently delegated legislation and the exercise of judicial functions by administrative bodies have increased. But the true view is that Dicey’s Rule of Law, *which was founded on the*

* H.M. Seervai, “The Supreme Court of India and the Shadow of Dicey” in *The Position of the Judiciary under the Constitution of India*, pp. 83-96 (1970).

** A.V. Dicey, *Law of the Constitution* (1885).

separation of powers, fixed public attention on administrative law and delegated legislation. Dicey dealt with individual liberty and criticised administrative discretion. But he did not deal with the administration as such, and he failed to distinguish between discretion given to public officials by statute and the arbitrary discretion at one time claimed by the King.

(c) Administrative law existed in England when Dicey's book was published in 1885. the "prophetic vision" of Maitland saw in 1887 that even as a matter of strict law it was not true the executive power was vested in the King. England, he said, was ruled by means of statutory powers which could not be described as the powers of the King. All that we could say was that the King had powers, this Minister had powers and that Minister had powers. In oft quoted words, Maitland said that England was becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which had been committed to them by modern statutes. And Prof. Wade has come to the same conclusion in his appendix to the ninth edition of Dicey's *Law of the Constitution*.

(d) In his *Law of the Constitution*, Dicey did not refer to the prerogative writs of *mandamus*, prohibition and *certiorari* by which superior courts exercised control over administrative action and adjudication. These writs belong to public law and have nothing to do with private law, and had he noticed those writs he could not have denied the existence of administrative law in England.

(e) Dicey's picture of the Englishmen protected by the Rule of Law, and the Frenchmen deprived of that protection because public authorities in France enjoyed privileges and immunities is now recognised as a distorted picture. This recognition is not confined to academic lawyers. An eminent judge, Lord Denning, has said that far from granting privileges and immunities to public authorities, the French Administrative Courts exercise a supervision and control over public authorities which is more complete than which the Courts exercise in England. And that is also the view of leading writers on Constitutional and Administrative Law today. Dicey himself showed "a change of heart" in his long Introduction to the eighth edition of the *Law of the Constitution*. There, he doubted whether law courts were in all cases best suited to adjudicate upon the mistakes or the offences of civil servants, and he said that it was for consideration whether a body of men who combined legal knowledge with official experience, and who were independent of government, would not enforce official law more effectively than the High Court. It is a measure of Dicey's intellectual integrity that he abandoned the doctrine of a lifetime and recognized official law, and a special tribunal substantially on the lines of the *Conseil d'Etat*, as better suited to enforce that law than the High Court. It is unfortunate that Dicey did not re-write the book in the eighth edition, but contented himself with a long Introduction which marked a real change in his thinking. The text remained unchanged, and the Introduction was forgotten or ignored, so that an intemperate judge like Lord Hewart L.C.J. could speak of "the abominable doctrine that, because things are done by officials, therefore some immunity must be extended to them." Coming from a Lord Chief Justice, these words seen ironic, for, on grounds of public policy, the most malicious words of judges of superior courts in the discharge of their judicial duties enjoy absolute immunity. But Lord Hewart would have been shocked had anyone spoken of

“the abominable doctrine that because things are done by judges in their judicial capacity, therefore, some immunity must be extended to their most malicious words.”

(f) When Dicey maintained that the Rule of Law required “the equal subjection of all classes to the ordinary law of the land administered by ordinary courts” and that the Rule of Law was inconsistent with administrative law and administrative tribunals, he created a false opposition between ordinary and special law, and between ordinary courts and special tribunals. The two kinds of laws existed even in his day, and ordinary courts, as well as special tribunals, determined the rights of parties. His antithesis was false in fact and untenable in principle. A law administered by the courts and by special tribunals is equally the law of the land; the determinations of courts and of special tribunals are determinations *under* the law. As we have seen, Dicey himself came to recognise that it may be necessary to create a body of persons for adjudicating upon the offences or the errors of civil servants as such adjudication may be more effective in enforcing official law. This effectively destroyed the opposition between ordinary law administered by ordinary courts and special law administered by special tribunals. As Devlin J., speaking of England, put it, it does not matter where the law comes from: whether from equity, or common law or from some source as yet untapped. And it is equally immaterial whether the law is made by Parliament, or by judges or even by ministers, for what matters is “the Law of England.”

That courts alone are not the best agencies for resolving disputes is shown by the history of the Commercial Court in England. When it was established, it first proved popular and succeeded in arresting the trend in favour of arbitration. After the First World War two judges were sitting full time on the Commercial List. In 1957, out of twenty-six cases only sixteen were actually tried, the rest being stayed, withdrawn or settled, and the question arose whether there was any point in retaining the Commercial Court. In 1960 the Lord Chancellor took an unusual step – he called a Commercial Court Users’ Conference. The Conference presented a Report which is important because it shows why people preferred arbitration to adjudication by the Commercial Court. Mr. Justice Megaw, who was appointed to the Commercial Court, gave a practice direction which went back to an earlier and simpler procedure. The calling of the Commercial Users’ Conference, and the emphasis in the practice direction on the *service* which the court rendered, is a timely reminder that judicial power is not property which *belongs* to the law courts and which therefore can be “usurped” by others, but that judicial power exists to render a service, and if the service is not good enough it will be ignored.

Prof. Robson has given an even more striking example. Before the Committee on Ministers’ Powers evidence was given by the National Federation of Property Owners and Ratepayers representing the owners of more than £1,000 million capital invested in industrial, trading and residential property throughout the United Kingdom. The Federation demanded that the appellate jurisdiction of ministers and their departments should cease. But the Federation did not demand the transfer of such jurisdiction to ordinary courts of law but to a special tribunal consisting of a full-time salaried legal member appointed by the Lord Chancellor, and two part-time honorary members who could bring administrative experience to bear on administrative matters. The Federation also suggested that the special tribunal should also take over the jurisdiction of the country court judges and the courts of summary

jurisdiction in respect of appeals from the decisions, acts or orders of local authorities, an appeal from the special tribunal being permitted only on points of law.

(g) When Dicey said that wide discretionary authority was inconsistent with the Rule of Law he might have expressed his political philosophy, but he certainly did not express a principle of the English Constitution for in fact wide discretionary power existed in England. A leading modern textbook on English Constitutional law observes that if it is contrary to the Rule of Law that discretionary authority should be given to government departments or public officers, then the Rule of Law is inapplicable to any modern Constitution. Dicey's dislike of discretionary power was due, first, to the fear of abuse, and, secondly, to the belief that the judicial function consists in applying settled principles of law to the facts of a case, and not in the exercise of discretionary power. Taking the second point first, the exercise of discretionary power formed then, and forms now, a large part of the work of regular courts. Thus, where an accused pleads guilty, the only question which remains is one of punishment, and here the judge has a very wide discretion. Again, if discretion is opposed to the Rule of Law, a final court with discretionary power to admit or reject an appeal or an application, would contravene the Rule of Law, and yet most final courts, including our Supreme Court, possess this power, and, what is more, exercise it without assigning any reasons. Again, the power to adjourn a case, to allow an amendment, to condone delay, to award costs are discretionary powers, and like all discretionary powers may be abused. But the law confers all necessary discretionary powers notwithstanding the possibility of abuse, though it is usual to provide safeguards against abuse. But the safeguards are not always effective. When High Court judges say, as I have heard them say, "We prefer to be wrong: you can go to the Supreme Court after obtaining special leave from it," judicial power is abused, and the safeguard of an appeal nullified in a practical sense, for an appeal by special leave is expensive, and if the amount at stake is small, few persons will spend thousands of rupees to set right a palpably wrong decision. Nor is it enough to say that the judge is independent and an administrative tribunal is not. First, there is no reason why an administrative tribunal cannot be made independent of Government. Secondly, in England, judges of the superior courts are practically irremovable, but judges of subordinate courts can be removed by the Lord Chancellor for inability or misbehaviour, and Justices of the Peace, who are an essential part of the administration of justice, can be removed by the Lord Chancellor at pleasure. Again, though in theory, the members of the *Conseil d'Etat* in France are removable by the executive, in practice no member has been removed for rendering judgments unpalatable to the Government, though many such judgments have been rendered. The ultimate guarantee against abuse of power, legislative, judicial and executive, lies in the political and legal safeguards against such abuse, in a vigilant public opinion, and in a sense of justice in the people generally.

(h) The emphasis which Dicey laid on personal freedom from arbitrary arrest and detention is as true, if not more true, as when Dicey wrote his book. Dicey's doctrine that all classes in the United Kingdom were subject equally to the ordinary law of the land administered by the ordinary courts was true in the very limited sense that a public servant was individually liable for a tort or a crime. But equality before the law did not mean equality of rights and duties. An unpaid tax is a debt due to the State, but the Income-tax authorities

have powers for recovering that debt which private creditors do not have for the recovery of their debts.

I said earlier that Dicey asserted that his Rule of Law was a principle of the constitution. The modern version of the Rule of Law takes a different line. In a well-known book on Constitutional Law, it is said that the Rule of Law “demands” the payment of compensation in certain circumstances where a person is injured by a change in the law; discretionary power should not be arbitrary power. You will notice that this view does not assert that the Rule of Law is a principle of the English Constitution, and in fact it is not. The Rule of Law thus formulated belongs to the realm of political and moral philosophy, and can be accepted or rejected according as one accepts or rejects that philosophy. “The Rule of Law becomes a banner under which opposing armies march to combat” says one leading text-book on Administrative Law. “The Rule of Law, which is a fine sonorous phrase, can now be put alongside the Brotherhood of Man, Human Rights and all the other slogans of mankind on the march,” says Prof. Jackson. And he rightly observes that the doctrines of the separation of powers and the Rule of Law give little help in determining the practical question: what matters should be assigned to special tribunals and what to courts of law.

Speaking for the Privy Council, Lord Atkin formulated that concept in the following oft-quoted words:

“As the executive, he (i.e. the Governor) can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.”

And this passage has been cited and followed by our Supreme Court.

Is the above discussion merely theoretical? I think not, if we consider *Nanavati* case and *Bharat Singh* case in the light of that discussion. *Nanavati* case involved no question about Dicey’s Rule of Law, or even of the rule of law, because the Governor did not claim the power to act without the authority of law. The question was whether the suspension of Nanavati’s sentence by the Governor under Art. 161, which expressly conferred on him the power to grant reprieve or respite, was valid in law. The majority held that it was not, because according to the majority the power of the Governor did not extend to suspending the sentence after the Supreme Court had admitted an appeal from it. Sinha, C.J. observed that to uphold the power of the Governor to suspend the sentence would involve a conflict between the executive and the judiciary, for an order of the Supreme Court releasing an accused on a bail of Rs. 10,000 could be nullified by obtaining a simple order of suspension from the Governor:

“Avoidance of such a possible conflict will incidentally prevent any invasion of the rule of law which is the very foundation of our Constitution.”

Here you have the distracting influence of the emotional and political overtones of Dicey’s Rule of Law, and of the doctrine of the separation of powers from which it is easy to slip unconsciously into the belief that judicial power is “property.” I say “unconsciously” because judges may be quite unaware that they are treating judicial power as property. If this appears to be a fancy of my own, let me give you a delightful passage from Prof. Robson.

Discussing Prof. Morgan's remark that the acquisition of judicial functions by the executive was "all the more unwarrantable" because courts of law had not in their turn encroached on the functions of the executive, Prof. Robson said:

"(Prof. Morgan) writes as though the executive and the judiciary were riparian owners bargaining over a strip of land or European powers carving up an African colony."

And he adds

"Neither the executive nor the judiciary has any immutable 'right' to a particular province...."

Applying this to *Nanavati* case, if judicial power were "property," the release of a convicted person on a bail of Rs. 10,000 would be legal exercise of a right of property, and the nullification of that order by the Governor's reprieve would violate a legal right and thus appear to be against the Rule of Law.

But if we lay aside Dicey and the separation of powers, it is clear that *Nanavati* case raised no question of the rule of law. Judicial power to try and punish an accused person and the executive power to exercise clemency and to pardon the accused, or to commute or remit his punishment, or to suspend his sentence by a reprieve or respite, is part of our Constitutional scheme. The power to pardon, said Taft C.J., exists to ameliorate or avoid particular criminal judgments. It is a check entrusted to the Executive for special purposes. It requires no argument to show that occasionally miscarriage of justice does take place; that occasionally a judge enters the arena of conflict and his vision is blinded by the dust of controversy. Among other reasons, the power of pardon exists to remedy the miscarriage of justice or to remedy the consequence of human failings in a judge. Such miscarriage can take place in passing a sentence of death; it can take place equally in keeping an appellant in prison by refusing him bail. If, as the Supreme Court admits, the Rule of Law is not violated if the sentence of death is in effect wiped out by a free pardon, surely it is fanciful to say that the Rule of Law is violated if release on a bail of Rs. 10,000 by a Court is wiped out by a reprieve or respite which suspends the sentence. The Rule of Law, like the name of God, can sometimes be invoked in vain.

The *State of M.P. v. Bharat Singh* [AIR 1967 SC 1170] also did not raise any question about Dicey's Rule of Law, though it did raise a question about the Rule of Law in the strict legal sense. In *Bharat Singh* case, it was contended that as the executive power of the State was co-extensive with its legislative power, an executive order restricting the movements of a citizen could be passed without the authority of any law, and the Supreme Court's decision in *Kapur* case [*Ram Jawaya Kapur v. State of Punjab* (1955) 2 SCR 225] was relied upon to support the contention. The Supreme Court could have pointed out, but did not, that the principle of *Kapur* case directly negated the contention when that case held that though the authority of law was not necessary for Government to carry on trade, such authority was necessary when it became necessary to encroach upon private rights in order to carry on trade. The Supreme Court distinguished *Kapur* case on the ground that it involved no action prejudicial to the rights of others. Even so, *Bharat Singh* case is really disposed of by the court's observation that "every act done by the Government or by its officers must, if it is to

operate to the prejudice of any person be supported by some legislative authority,” for that is the strict legal meaning of the Rule of Law. For reasons which I have already given, it was wholly unnecessary to refer to the first meaning which Dicey gave to the Rule of Law, or to Dicey’s contrast between the English and the Continental systems.

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SEPARATION OF POWERS

Constitution of India: “Article 73. Extent of executive power of the Union. – (1) subject to the provisions of this Constitution, the executive power of the Union shall extend –

(a) to the matters with respect to which Parliament has power to make laws...”

“Article 162. Extent of executive power of the State. - Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws....”

Note: The theory of separation of powers envisages: (i) personnel separation; (2) non-interference in the working of one organ by another; and (3) non-usurpation of powers of one organ by another organ.

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Rai Sahib Ram Jawaya Kapur v. State of Punjab **(1955) 2 SCR 225**

MUKHERJEA, C.J. - This is a petition under Article 32 of the Constitution, preferred by six persons, who purport to carry 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 is alleged that the Education Department of the Punjab Government has in pursuance of 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 have not only placed unwarrantable restrictions upon the rights of the petitioners to carry on their business but have practically ousted them and other fellow-traders from the business altogether. It is said that no restrictions could be imposed upon the petitioners’ right to carry on the trade which is guaranteed under Article 19(1)(g) of the Constitution by mere executive orders without proper legislation and that the legislation, if any, must conform to the requirements of clause (6) of Article 19 of the Constitution. Accordingly, the petitioners pray for writs in the nature of mandamus directing the Punjab Government to withdraw the notifications which have affected their rights.

2. To appreciate the contentions that have been raised by the learned counsel who appeared for the parties before us, it will be necessary to narrate certain relevant facts. In the State of Punjab, all recognised schools have got to follow the course of studies approved by the Education Department of the Government and the use, by the pupils, of the text books prescribed or authorised by the Department is a condition precedent to the granting of recognition to a school. For a long period of time prior to 1950, the method adopted by the Government for selection and approval of text books for recognised schools was commonly known as the alternative method and the procedure followed was shortly this: Books on relevant subjects, in accordance with the principles laid down by the Education Department, were prepared by the publishers with their own money and under their own arrangements and they were submitted for approval of the Government. The Education Department after proper

scrutiny selected books numbering between 3 and 10 or even more on each subject as alternative text books, leaving it to the discretion of the Headmasters of the different schools, to select any one of the alternative books on a particular subject out of the approved list. The Government fixed the prices as well as the size and contents of the books and when these things were done it was left to the publishers to print, publish and sell the books to the pupils of different schools according to the choice made by their respective Headmasters. Authors, who were not publishers, could also submit books for approval and if any of their books were approved, they had to make arrangements for publishing the same and usually they used to select some one of the publishers already on the line to do the work.

3. This procedure, which was in vogue since 1905, was altered in material particulars on and from May 1950. By certain resolutions of the Government passed on or about that time, the whole of the territory of Punjab, as it remained in the Indian Union after partition, was divided into three zones. The text books on certain subjects like agriculture, history, social studies etc. for all the zones were prepared and published by the Government without inviting them from the publishers. With respect to the remaining subjects, offers were still invited from “publishers and authors” but the alternative system was given up and only one text book on each subject for each class in a particular zone was selected. Another change introduced at this time was that the Government charged, as royalty, 5% on the sale price of all the approved text books. The result therefore was that the Government at this time practically took upon themselves the monopoly of publishing the textbooks on some of the subjects and with regard to the rest also, they reserved for themselves a certain royalty upon the sale proceeds.

4. Changes of a far more drastic character however were introduced in the year 1952 by a notification of the Education Department issued on the 9th of August, 1952 and it is against this notification that the complaints of the petitioners are mainly directed. This notification omitted the word “publishers” altogether and invited only the “authors and others” to submit books for approval by the Government. These “authors and others”, whose books were selected, had to enter into agreements in the form prescribed by the Government and the principal terms of the agreement were that the copyright in these books would vest absolutely in the Government and the “authors and others” would only get a royalty at the rate of 5% on the sale of the text books at the price or prices specified in the list. Thus the publishing, printing and selling of the books were taken by the Government exclusively in their own hands and the private publishers were altogether ousted from this business. The 5% royalty, in substance, represents the price for the sale of the copyright and it is paid to an author or any other person who, not being the author, is the owner of the copyright and is hence competent in law to transfer the same to the Government. It is against these notifications of 1950 and 1952 that the present petition under Article 32 of the Constitution is directed and the petitioners pray for withdrawal of these notifications on the ground that they contravene the fundamental rights of the petitioners guaranteed under the Constitution.

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. Article 162, with which we are directly concerned in this case, lays down.....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 [*Vide 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. The opinion, whether right or wrong, turns upon the particular facts of the case and upon the provision of Section 61 of the Australian Act and it cannot and does not throw any light on the question that requires decision in the present case.

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 Allah. 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 modelled 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 do 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 text books 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 said already, the executive Government are 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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Asif Hameed v. State of J. & K.
AIR 1989 SC 1899

[Has the High Court power to issue directions to the State Government to constitute “statutory body” for making admissions?]

Jyotshana Sharma and a number of other unsuccessful candidates for admission to the two medical colleges of Jammu & Kashmir for the year 1986-87 challenged the selection by filing writ petitions. A Division Bench of the High Court upheld the selection in general but allowed some individual writ petitions on different grounds. The bench, after adjudicating upon the points involved in the writ petitions, made the following observations:

“In future State Government shall entrust the selection process of the two medical colleges to a statutory independent body who will be vested with the power to conduct examination of written as also of viva voce.

Therefore, it is ideal that an independent statutory body is constituted for conduct of entrance test for the MBBS/BDS course in the State which body shall be kept free from executive influence. Till that is done, State may entrust the process of selection to such a body which will be free from executive influence. At any rate we do not approve Training Branch, or any other department of the State Government under the control of administration or associated with the process of selection for the MBBS/BDS course in the State Medical Colleges. Selection Committee, till a statutory body is constituted, shall consist of such persons who are academicians of high calibre and with the process of selection principals of the two medical colleges shall necessarily be associated”.

KULDIP SINGH, J. - 17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people’s will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

18. Frankfurter, J. of the U.S. Supreme Court dissenting in the controversial expatriation in case of *Trop v. Dulles* [356 US 86], observed as under:

“All power is, in Madison’s phrase, “of an encroaching nature”. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint....

Rigorous observance of the difference between limits of power and wise exercise of power - between questions of authority and questions of prudence - requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail to disregard one’s own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the court’s giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do.”

19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers.

20. Now coming to the judgment under appeal the High Court says that its directions issued in *Jyotshana Sharma* case have not been complied with thereby rendering the State action in making selections for admission to the medical colleges invalid. To examine the High Court reasoning we have to see as to which of the three organs of the State is entrusted, under the Constitution, with the function of taking a policy decision regarding management and admissions to medical colleges in the State. Both the medical colleges at Jammu and Srinagar are government institutions. Entry 25 List III of Seventh Schedule, Article 246(2) and Article 162 of the Constitution of India and Section 5 of the Constitution of Jammu & Kashmir which are relevant, are reproduced hereinafter:

“Entry 25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.”

“Article 246. Subject-matter of laws made by Parliament and by the legislatures of States. - (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).”

“Section 5. Extent of executive and legislative power of the State. - The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India.”

21. The High Court’s directions for constituting “Statutory Independent Body” obviously mean that the State legislature must enact a law in this respect. The Constitution has laid down elaborate procedure for the legislature to act there under. The legislature is supreme in its own sphere under the Constitution. It is solely for the legislature to consider as to when and in respect of what subject matter, the laws are to be enacted. No directions in this regard can be issued to the legislature by the courts. The High Court was, therefore, patently in error in issuing directions in *Jyotshana Sharma* case and reiterating the same in the judgment under appeal.

22. This Court in *Narinder Chand Hem Raj v. Lt. Governor, Union Territory, Himachal Pradesh* [(1971) 2 SCC 747] observed as under:

“The power to impose tax is undoubtedly a legislative power. That power can be exercised by the legislature directly or subject to certain conditions the legislature may delegate that power to some other authority. But the exercise of that power, whether by the legislature or by its delegate is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No court can issue a mandate to a legislature to enact a particular law. Similarly no court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact.”

23. In the *State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla* [(1985) 3 SCC 169], this Court held as under:

“The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging, for otherwise it is difficult to see why, after the clear and categorical statement by the Chief Secretary on behalf of the State Government that the government will introduce legislation if found necessary and so advised, the Division Bench should have proceeded to again give the same direction. This Division Bench was clearly not entitled to do. It is entirely a matter for the executive branch of the government to decide whether or not to introduce any particular legislation. Of course, any member of the legislature can also introduce legislation but the court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the court may consider it to be. That is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution.... But at the same time the court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law-making activities of the executive and the legislature.”

24. The legislature of Jammu & Kashmir having not made any law pertaining to medical education the field is exclusively to be operated by the executive under Article 162 of the Constitution of India read with Section 5 of Jammu & Kashmir Constitution. When the Constitution gives power to the executive government to lay down policy and procedure for admission to medical colleges in the state then the High Court has no authority to divest the executive of that power. The State Government in its executive power, in the absence of any law on the subject, is the competent authority to prescribe method and procedure for admission to the medical colleges by executive instructions but the High Court transgressed its self-imposed limits in issuing the aforesaid directions for constituting statutory authority. We would make it clear that the procedure for selection laid down by the executive as well as the selection is always open to judicial review on the ground of unreasonableness or on any other constitutional or legal infirmity.

25. Mr Altaf Ahmed, learned Advocate General, Jammu & Kashmir, appearing for the State, Mr M.H. Baig and Mr G.L. Sanghi, learned counsel appearing for the selected candidates, have contended that the observations in *Jyotshana Sharma* case were in the nature of suggestions by the court. It is further argued that even if those are taken to be directions, the same have been complied with by the State Government. There was no issue before the court in *Jyotshana Sharma* case regarding method or procedure adopted by the government for making selections. None of the parties argued for Statutory Body on the ground of lack of confidence in the executive. A bare reading of the judgment shows that the bench, before parting with the judgment, laid down some guidelines for the government to follow. The learned Chief Justice in his judgment in *Farooq Bacha* case reiterated the necessity of having an autonomous independent statutory body “on the lines suggested by the Division Bench in *Jyotshana Sharma* case”. The learned Chief Justice rightly treated the bench’s observations as suggestions and we agree with the same. There is also force in the contention that assuming the said suggestions to be the directions; the same have been complied with. SRO 291 was issued as a consequence of the judgment in *Jyotshana Sharma* case. The notification specifically states “whereas a Division Bench of the High Court by judgment and order 17-4-1987 inter alia made certain suggestions for improving the system for making admission to MBBS/BDS course in the State, now, therefore, in deference to the observations of the High Court of Jammu & Kashmir... the government hereby makes the following order....” Mr Bhim Singh, learned counsel appearing for the unsuccessful candidates, however, argued that the principals of two medical colleges have not been associated with the selections. That may be so but we are satisfied that SRO 291 read with 1987 Order issued by the State Government which provide method and elaborate procedure for making selections to the medical colleges of Jammu & Kashmir substantially comply with the directions of the High Court.

40. In view of the above discussion civil appeals filed by the State of Jammu & Kashmir and the successful candidates are allowed, the judgment of the Jammu & Kashmir High Court is set aside and the writ petitions filed by the unsuccessful candidates before the Jammu & Kashmir High Court are dismissed.

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The students are advised to read *State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla* (1985) 3 SCC 169.

State of M. P. & Another v. Thakur Bharat Singh

1967 AIR 1170: 1967 SCR (2) 454

SHAH, J. – On April 24, 1963, the State of Madhya Pradesh made an order in exercise of powers conferred by s. 3 of the Mad Pradesh Public Security Act, 1959 – hereinafter called 'the Act directing the respondent Thakur Bharat Singh -

- (i) “that he shall not be in any place in the Raipur district;
- (ii) that he shall reside in the municipal limits of Jhabua town, district Jhabua, Madhya Pradesh, and shall proceed there, immediately on the receipt of this order ; and
- (iii) that he shall notify his movements and report himself personally every day at 8 a.m. and 8 p.m. to the Police Station Officer, Jhabua.”

The respondent moved a petition in the High Court of Madhya Pradesh under Arts. 226 & 227 of the Constitution challenging the order on the grounds, *inter alia*, that Ss. 3 & 6 and other provisions of the Act which authorised imposition of restrictions on movements and actions of person were ultra vires in that they infringed the fundamental freedoms guaranteed under Art. 19(1) (d) & (e) of the Constitution of India and that the order was "discriminatory, illegal and violated principles of natural justice." Shivdayal, J., declared cl. (i) of the order valid, and declared cls. (ii) and (iii) invalid. In the view of the learned Judge the provisions of s. 3(1)(a) of the Act were valid and therefore the directions contained in cl. (i) of the order could lawfully be made by the State, but cls. (b) & (c) of s. 3(1) of the Act were invalid because they contravened the fundamental freedom of movement guaranteed under Art. 19 of the Constitution, and therefore the directions contained in cls. (ii) & (iii) of the order were invalid. Against the order passed by Shivdayal, J., two appeals were filed under the Letters Patent of the High Court. A Division Bench of the High Court held that cls. (a) & (c) of s. 3(1) of the Act were valid, but in their view cl. (b) of s. 3(1) was not valid because it violated the fundamental guarantee under Art. 19(1) (d) of the Constitution. The High Court however confirmed the order of Shivdayal, J., since in their view the direction contained in cl. (iii) of the order was "inextricably woven" with the directions in cl. (ii) and was on that account invalid. Against the order of the High Court, the State of Madhya Pradesh has appealed to this Court.

The relevant provisions of the Act may be briefly set out. Section 3 of the Act provides:

(1) “If the State Government or a District Magistrate is satisfied with respect to any person that he is acting or is likely to act in a manner prejudicial to the security of the State or to the maintenance of public order, and that, in order to prevent him from so acting it is necessary in the interests of the general public to make an order under this section' the State Government or the District Magistrate, as the case may be, may make an order -

(a) directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or persons as may be specified therein, he shall

not be in any such area or place in Madhya Pradesh as may be specified in the order

(b) requiring him to reside or remain in such place or within such area in Madhya Pradesh as may be specified in the order and if he is not already there to proceed to that place or area within such time as may be specified in the order

(c) requiring him to notify his movements or to report himself or both to notify his movements and report himself in such manner, at such times and to such authority or person, as may be specified in the order ;

(d) imposing upon him such restrictions as may be specified in the order, in respect of his association or communication with such persons as may be mentioned in the order ; (e) prohibiting or restricting the possession or use by him of any such article or articles as may be specified in the order:

x x x

(4) If any person is found in any area or place in contravention of a restriction order or fails to leave any area or place in accordance with, the requirements of such an order, then, without prejudice to the provisions of sub-section (5), he may be removed from such area or place by any police officer.

(5) If any person contravenes the provisions of any restriction order, he shall be punishable with imprisonment for a term which may extend to One year, or with fine which may extend to one thousand rupees, or with both." Section 4 authorises the State to revoke or modify "the restriction order", and S. 5 authorises the State to suspend operation of the "restriction order" unconditionally or upon such conditions as it deems fit and as are accepted by the person against whom the order is made. Section 6 requires the State to disclose the grounds of the "restriction order". Section 8 provides that in every case where a "restriction order" has been made, the State Government shall within thirty days from the date of the order place before the Advisory Council a copy thereof together with the grounds on which it has been made and such other particulars as have a bearing on the matter and the representation, if any, made by the person affected by such order. Section 9 provides for the procedure of the Advisory Council, and s. 16 requires the State to confirm, modify or cancel the "restriction order" in accordance with the opinion of the Advisory Council."

By cl. (ii) of the order the respondent was required to reside within the municipal limits of Jhabua town after proceeding to that place on receipt of the order. Under cl. (b) of s. 3(1) the State is authorised to order a person to reside in the place, where he is ordinarily residing and also to require him to go to any other area or place within the State and stay in that area or place. If the person so ordered fails to carry 'out the direction, he may be removed to the area or place designated and may also be punished with imprisonment for a term which may extend to one year, or with fine, or with both. The Act it may be noticed does not give any opportunity to the person concerned of being heard before the place where he is to reside or remain in is selected. The place selected may be one in which the person concerned may have no residential accommodation, and. no means of subsistence. It may not be possible for the

person concerned to honestly secure the means of subsistence in the place selected. Sub-section 3(1)(b) of the Act does not indicate the extent of the place or the area, its distance from the residence of the person extended and whether it may be habitated or inhabited; the clause also nowhere provides that the person directed to be removed shall be provided with residence, maintenance or means of livelihood in the place selected. In the circumstances we agree with the High Court that cl. (b) authorised the imposition of unreasonable restrictions insofar as it required any person to reside or remain in such place or within such area in Madhya Pradesh as may be specified in the order. Counsel for the State did not challenge the view that the restrictions which may be imposed under cl. (b) of s. 3(1) requiring a person to leave his hearth, home and place of business and live and remain in another place wholly unfamiliar to him may operate seriously to his prejudice, and may on that account be unreasonable. But he contended that normally in exercise of the power under cl. (b) a person would be ordered to remain in the town or village where he resides and there is nothing unreasonable in the order of the State restricting the movements of a person to the town or place where he is ordinarily residing. It is true that under cl. (b) an order requiring a person to reside or remain in a place where he is ordinarily residing may be passed. But in exercise of the power it also open to the State to direct a person to leave the place of his ordinary residence and to go to another place selected by the authorities and to reside and remain in that place. Since the clause is not severable, it must be struck down in its entirety as unreasonable. If it is intended to restrict the movements of a person and to maintain supervision over him, orders may appropriately be made under cls. (c) and (d) of S. 3(1) of the Act.

Counsel for the State urged that in any event so long as the State of emergency declared on October 20, 1962, by the President under Art. 352 was not withdrawn or revoked, the respondent could not move the High Court by a petition under Art. 226 of the Constitution on the plea that by the impugned order his fundamental right guaranteed under Art. 19(1)(d) of the Constitution was infringed. But the Act was brought into force before the declaration of the emergency by the President. If the power conferred by s. 3(1) (b) authorised the imposition of unreasonable restrictions, the clause must be deemed to be void, for Art. 13(2) of the Constitution prohibits the State from making any law which takes away or abridges the rights conferred by Part III, and laws made in contravention of Art. 13(2) are to the extent of the contravention void. Section 3(1) (b) was therefore void when enacted and was not revived when the proclamation of emergency was made by the President. Article 358 which suspends the provisions of Art. 19 during an emergency declared by the President under Art. 352 is in terms prospective: after the proclamation of emergency nothing in Art. 19 restricts the power of the State to make laws or to take any executive action which the State but for the provisions contained in Part III was competent to make or take. Article 358 however does not operate to validate a legislative provision which was invalid because of the constitutional inhibition before the proclamation of emergency. Counsel for the State while conceding that if s. 3(1)(b) was, because it infringed the fundamental freedom of citizens, void before the proclamation of emergency, and that it was not revived by the proclamation, submitted that Art. 358 protects action both legislative and executive taken after proclamation of emergency and therefore any executive action taken by an officer of the State or by the State will not be liable to be challenged on the ground that it infringes the fundamental freedoms under Art.

19. In our judgment, this argument involves a grave fallacy. All executive action which operates to the prejudice of any person must have the authority of law to support it and the terms of Art. 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others; it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority which if the provisions of Art. 19 were operative would have been invalid. Our federal structure is founded on certain fundamental principles: (1) the sovereignty of the people with limited Government authority i.e., the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is distribution of powers between the three organs of the State-legislative, executive and judicial – each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive actions. As pointed out by Dicey in his *Introduction to the Study of the Law of the Constitution*, (10th Edn., at p. 202) the expression "rule of law" has three meanings, or may be regarded from three different points of view. "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government." At p. 188 Dicey points out : "In almost every continental community the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed or in fact exerted by the government in England and a study of European politics now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects." We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority. Counsel for the State relied upon the terms of Art. 162 of the Constitution, and the decision of this Court in *Rai Sahib Ram Jawaya Kapur v. The State of Punjab*, [1955] 2 S.C.R. 225, in support of the contention that it is open to the State to issue executive orders even if there is no legislation in support thereof provided the State could legislate on the subject in respect of which action is taken. Article 162 provides that subject to the provisions of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. But Art. 162 and Art. 73 are concerned primarily with the distribution of executive power between the Union on the one hand and the States on the other and not with the validity of its exercise. Counsel for the State however strongly relied upon the observations of Mukherjea, C. J., in *Rai Sahib Ram Jawaya Kapur's case*

"They do not mean, that it is only when the 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 162 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.”

These observations must be read in the light of the facts of the case. The executive action which was upheld in that case was, it is true, not supported by legislation, but it did not operate to the prejudice of any citizen. In the State of Punjab prior to 1950 the text-books used in recognized schools were prepared by private publishers and they were submitted for approval of the Government. In 1950 the State Government published text books in certain subjects, and in other subjects the State Government approved text-books submitted by publishers and authors. In 1952 a notification was issued by the Government inviting only "authors and others" to submit text-books for approval by the Government. Under agreements with the authors and others the copyright in the text-books vested absolutely in the State and the authors and others received royalty on the sale of those text-books. The petitioners a firm carrying on the business of preparing, printing, publishing and selling text books then moved this Court under Art. 32 of the Constitution praying for writs of mandamus directing the Punjab Government to withdraw the notifications of 1950 and 1952 on the ground that they contravened the fundamental rights of the petitioners guarantee under the Constitution. It was held by this Court that the action of the Government did not amount to infraction of the guarantee under Art. 19(1)(g) of the Constitution, since no fundamental rights of the petitioners were violated by the notifications and the acts of the executive Government done in furtherance of their policy of nationalisation of text-books for students. It is true that the dispute arose before the Constitution (seventh Amendment) Act, 1956, amending, inter alia, Art. 298, was enacted, and there was no legislation authorising the State Government to enter the field of business of printing, publishing and selling text-books. It was contended in support of the petition in *Rai Sahib Ram Jawaya's case* that without legislative authority the Government of the State could not enter the business of printing, publishing and selling text-books. The Court held that by the action of the Government no rights of the petitioners were infringed, since a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest or undertaking. It is clear that the State of Punjab had done no act which infringed a right of any citizen; the State had merely entered upon a trading venture. By entering into competition with the citizens, it did not infringe their rights. Viewed in the light of these facts the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the subject on which the executive order is issued. We are therefore of the view that the order made by the State in exercise of the authority conferred by s. 3(1)(b) of the Madhya Pradesh Public Security Act 25 of 1959 was invalid and for the acts done to the prejudice of the respondent after the declaration of emergency under Art. 352 no immunity from the process of the Court could be claimed under Art. 358 of the Constitution, since the Order was not supported by any valid legislation.

The appeal therefore fails and is dismissed.

In re Delhi Laws Act
AIR 1951 SC 332

[Is it permissible for the legislature to delegate legislative power to a subordinate authority – limits within which this could be done]

Reference was made by the President of India under Article 143 of the Constitution asking the Court's opinion on three questions:

"(1) Was Section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the legislature which passed the said Act?"

Section 7 of the Delhi Laws Act, 1912 read:

"The Provincial Government may, by notification in the Official Gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification."

"(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the legislature which passed the said Act?"

Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947 read:

"Extension of Enactments to Ajmer-Merwara. - The Central Government may, by notification in the Official Gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification."

"(3) Is Section 2 of the Part 'C' States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Parliament?"

Section 2 of the Part 'C' States (Laws) Act, 1950 read:

"Power to extend enactments to certain Part 'C' States. - The Central Government may, by notification in the Official Gazette, extend to any Part 'C' State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part 'C' State."

MUKHERJEA, J. - 273. The necessity of seeking the advisory opinion of this Court is stated to have arisen from the fact that because of the decision of the Federal Court in *Jatindra Nath Gupta v. Province of Bihar* [AIR 1949 FC 175], which held the proviso to sub-section (3) of Section 1 of the Bihar Maintenance of Public Order Act, 1947, ultra vires the Bihar Provincial Legislature, by reason of its amounting to a delegation of its legislative powers to an extraneous authority, doubts have arisen regarding the validity of the three legislative provisions mentioned above, the legality of the first and the second being actually called in question in certain judicial proceedings which are pending before some of the High Courts in India.

274. The Delhi Laws Act, 1912 was passed by the Governor-General-in-Council at its legislative meeting that being the legislature constituted for British India at that time, under the provisions of the group of statutes known as Indian Councils Acts (1861-1909). Delhi, which up till the 17th of September, 1912, was a part of the province of the Punjab, was

created a Chief Commissioner's Province on that date and on the following date the Governor-General's Legislative Council enacted the Delhi Laws Act, 1912 which came into force on and from the 1st of October, 1912.

277. It will be noticed that in all the three items of legislation, mentioned above, there has been, what may be described, as conferment by the legislatures, which passed the respective enactments, to an outside authority, of some of the powers which the legislative bodies themselves could exercise; and the authority in whose favour the delegation has been made has not only been empowered to extend to particular areas the laws which are in force in other parts of India but has also been given a right to introduce into such laws, any restrictions or modifications as it thinks fit. The controversy centres round the point as to whether such delegation was or is within the competency of the particular legislature which passed these enactments.

278. The contention of the learned Attorney-General, who represents the President of India, in substance is that a legislature which is competent to legislate on a particular subject has the competence also to delegate its legislative powers in respect of that subject to any agent or external authority as it thinks proper. The extent to which such delegation should be made is entirely a matter for consideration by the legislature itself and a court of law has no say in the matter. There could be, according to the learned Attorney-General, only two possible limitations upon the exercise of such right of delegation by a competent legislative body. One is that the legislature cannot abdicate or surrender its powers altogether or bring into existence a new legislative power not authorised by the constitutional instrument. The second is that if the constitutional document has provided for distribution of powers amongst different legislative bodies, one legislature cannot delegate to another, powers, which are vested in it, exclusively under the Constitution. It is argued that, save and except these two limitations, the doctrine of inhibition of delegation by legislative authority has no place in a Constitution modelled on the English system which does not recognise the principle of separation of powers as obtains in the American system. These questions are of great constitutional importance and require careful consideration.

279. In America the rule of inhibition against delegation of legislative powers is based primarily upon the traditional American doctrine of "separation of powers." Another principle is also called in to aid in support of the rule, which is expressed in the well-known maxim of private law, "*delegatus non potest delegare*", the authority for the same, being based on one of the dicta of Sir Edward Coke. The modern doctrine of "separation of powers" was a leading tenet in the political philosophy of the 18th century. It was elaborated by Montesquieu in his "*L'esprit des lois*" in explanation of the English political doctrine and was adopted, in theory at least in all its fulness and rigidity by the constitution-makers of America. The Constitution of America provides for the separation of the governmental powers into three basic divisions - the executive, the legislative, and the judicial and the powers appertaining to each department have been vested in a separate body of public servants. It is considered to be an essential principle - underlying the Constitution that powers entrusted to one department should be exercised exclusively by that department without encroaching upon the powers confided to others. As is said by Cooley, "The different classes of power have been apportioned to different departments; and as all derive their authority from the same

instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others.”

280. The other doctrine that is invoked in support of the anti-delegation rule is the well-accepted principle of municipal law, which prevents a person upon whom a power has been conferred, or to whom a mandate has been given, from delegating his powers to other people. The legislature is supposed to be a delegate deriving its powers from the “people” who are the ultimate repository of all powers, and hence it is considered incapable of transferring such powers to any other authority.

281. These doctrines, though well recognised in theory, have a restricted and limited application in actual practice. Mr Justice Story said-

“But when we speak of a separation of the three great departments of Government and maintain that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments: and that such exercise of the whole would subvert the principles of free Constitution.”

282. As regards the maxim *delegatus non potest delegare*, its origin and theoretical basis are undoubtedly different from those of the doctrine of separation of powers. But, for practical purposes, both these doctrines are linked together and are used as arguments against the Congress attempting to invest any other authority with legislative powers. According to Willis, the disability of the Congress to delegate its legislative powers to the executive, purports to be based upon the doctrine of “separation of powers”; while its incapacity to bestow its authority upon an independent body like a board or commission is said to rest on the maxim *delegatus non potest delegare*.

283. As said above, a considerable amount of flexibility was allowed in the practical application of these theories even from early times. The vast complexities of social and economic conditions of the modern age, and the ever growing amount of complicated legislation that is called for by the progressive social necessities, have made it practically impossible for the legislature to provide rules of law which are complete in all their details. Delegation of some sort, therefore, has become indispensable for making the law more effective and adaptable to the varying needs of society.

284. Thus in America, despite the theory which prohibits delegation of legislative power, one comes across numerous rules and regulations passed by non legislative bodies in exercise of authority bestowed on them by the legislature in some shape or other. The legislature has always been deemed competent to create a municipal authority and empower it to make bye-laws. In fact, such legislation is based upon the immemorial Anglo-Saxon practice of leaving to each local community the management and control of local affairs. The Congress can authorise a public officer to make regulations, or the Judges of the court to frame rules of procedure which are binding in the same way as laws proper. It can authorise some other body to determine the conditions or contingencies under which a statute shall become operative and can empower administrative functionaries to determine facts and apply standards. “The separation of powers between the Congress and the Executive,” thus

observed Cardozo, J. in his dissenting judgment in *Panama Refining Company v. Ryan* [293 US 388 (1935)], “is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation; there must be elasticity of adjustment in response to the practical necessities of Government which cannot foresee today the developments of tomorrow in their nearly infinite variety”. In fact, the rule of non-delegation has so many exceptions engrafted upon it that a well known writer of constitutional law has tersely expressed that it is difficult to decide whether the dogma or the exceptions state the Rule correctly.

285. It does not admit any serious dispute that the doctrine of separation of powers has, strictly speaking, no place in the system of government that India has at the present day under her own Constitution or which she had during the British rule. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different sets of powers in the different organs of the State. Under Article 53(1), the executive power is indeed vested in the President, but there is no similar vesting provision regarding the legislative and the judicial powers. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system, the essential feature of which is the responsibility of the executive to the legislature. The President, as the head of the executive, is to act on the advice of the Council of Ministers, and this Council of Ministers, like the British Cabinet, is a “hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part”.

286. There could undoubtedly be no question of the executive being responsible to the legislature in the year 1912, when the Delhi Act 13 of 1912 was passed, but at that time it was the executive which really dominated the legislature, and the idea of a responsible Government was altogether absent. It was the Executive Council of the Governor-General which together with sixty additional members, of whom 33 were nominated, constituted the Governor-General’s Legislative Council and had powers to legislate for the whole of British India. The local legislatures in the provinces were constituted in a similar manner. The first advance in the direction of responsible Government was made by the Government of India Act, 1919, which introduced dyarchy in the provinces. The Government of India Act, 1935, brought in provincial autonomy, and ministerial responsibility was established in the provinces subject to certain reserved powers of the Governor. In the Centre the responsibility was still limited and apart from the discretionary powers of the Governor-General the defence and external affairs were kept outside the purview of ministerial and legislative control. Thus whatever might have been the relation between the legislature and the executive in the different constitutional set ups that existed at different periods of Indian history since the advent of British rule in this country, there has never been a rigid or institutional separation of powers in the form that exists in America.

287. The maxim *delegatus non potest delegare* is sometimes spoken of as laying down a rule of the law of agency; its ambit is certainly wider than that and it is made use of in various fields of law as a doctrine which prohibits a person upon whom a duty or office has devolved or a trust has been imposed from delegating his duties or powers to other persons. The introduction of this maxim into the constitutional field cannot be said to be altogether unwarranted, though its basis rests upon a doubtful political doctrine. To attract the application of this maxim, it is essential that the authority attempting to delegate its powers

must itself be a delegate of some other authority. The Legislature, as it exists in India at the present day, undoubtedly is the creature of the Indian Constitution, which defines its powers and lays down its duties; and the Constitution itself is a gift of the people of India to themselves. But it is not a sound political theory that the legislature acts merely as a delegate of the people. This theory once popularised by Locke and eulogized by early American writers are not much favoured in modern times. With regard to the Indian Legislature as it existed in British days constituted under the Indian Councils Act, it was definitely held by the Judicial Committee in the well-known case of *Queen v. Burah* [(1878) 3 AC 889], that it was in no sense a delegate of the British Parliament. In that case the question arose as to the validity of Section 9 of Act 22 of 1869 passed by the Governor-General's Legislative Council. The Act provided that certain special laws, which had the effect of excluding the jurisdiction of the High Court, should apply to a certain district known as Garo Hills, and Section 9 empowered the Lieutenant-Governor of Bengal to extend the operation of these laws to certain other areas if and when the Lieutenant-Governor, by notification in the Calcutta Gazette, would declare that they should be so applied. The majority of the Judges of the Calcutta High Court upheld the contention of the respondent, Burah, that the authority conferred on the Lieutenant-Governor to extend the Act in this way was in excess of the powers of the Governor-General-in-Council, and in support of this view, one of the learned Judges relied inter alia upon the principles of the law of agency. This view was negated by the Judicial Committee, and Lord Selborne, in delivering the judgment, observed as follows: "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 circumscribe these powers. But when acting within those 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."

289. I am quite willing to concede that the doctrine of separation of powers cannot be of any assistance to us in the solution of the problems that require consideration in the present case. In my opinion, too much importance need not also be attached to the maxim *delegatus non potest delegare*, although as an epigrammatic saying it embodies a general principle that it is not irrelevant for our present purpose. But even then I am unable to agree with the broad proposition enunciated by the learned Attorney-General that a legislative power per se includes within its ambit a right for the legislative body to delegate the exercise of that power in any manner it likes to another person or authority. I am unable also to accept his contention that in this respect the authority of the Indian Legislature is as plenary as that of the British Parliament, and, provided the subject-matter of legislation is not one outside the field of its legislative competence, the legislature in India is able to do through an agent anything which it could do itself.

290. It is to be noted that so far as the British Parliament is concerned, there is no constitutional limitation upon its authority or power. In the words of Sir Edward Coke, "the power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds.... It hath sovereign and uncontrollable authority in the making, confirming, enlarging, abrogating, repealing, reviving and expounding of laws.... this being the place where that absolute despotic power which must in all Governments reside somewhere is entrusted by the constitution of these

kingdoms". The British Parliament can not only legislate on any subject it likes and alter or repeal any law it likes, but being both "a legislative and a constituent assembly", it can change and modify the so-called constitutional laws and they can be changed by the same body and in the same manner as ordinary laws; and no act of the Parliament can be held to be unconstitutional in a British court of law.

291. This sovereign character was not, and could not be, predicated of the Legislative Council of British India as it was constituted under the Indian Councils Act, even though it had very wide powers of legislation and within the scope of its authority could pass laws as important as those passed by the British Parliament. It is not present also in the Indian Parliament of the present day which is a creature of the Indian Constitution and has got to exercise its legislative powers within the limits laid down by the Constitution itself. Acting in its ordinary capacity as a legislative body, the Indian Parliament cannot go beyond the Constitution or touch any of the constitutional or fundamental laws, and its acts can always be questioned in a court of law. Consequences of great constitutional importance flow from this difference and they have a material bearing on the question before us. The contention of the learned Attorney-General in substance is that the power of delegation of legislative authority without any limitation as to its extent is implicit in the exercise of the power itself, and in support of his contention he refers to the unrestricted rights of delegation which are exercised by the British Parliament. But the validity or invalidity of a delegation of legislative power by the British Parliament is not and cannot be a constitutional question at all in the United Kingdom, for the Parliament being the omnipotent sovereign is legally competent to do anything it likes and no objection to the constitutionality of its acts can be raised in a court of law. Therefore, from the mere fact that the British Parliament exercises unfettered rights of delegation in respect of its legislative powers, the conclusion does not follow that such right of delegation is an inseparable adjunct of the legislative power itself. The position simply is this that in England, no matter, to whichever department of the powers exercisable by the British Parliament the right of delegation of legislative authority may be attributed - and there is no dispute that all the sovereign powers are vested in the Parliament - no objection can be taken to the legality of the exercise of such right. But in India the position even at the present day is different. There being a written constitution which defines and limits the rights of the legislature, the question whether the right of delegation, either limited or unlimited, is included within, and forms an integral part of, the right of legislation is a question which must be answered on a proper interpretation of the terms of the Constitution itself. We need not for this purpose pay any attention to the American doctrine of separation of powers; we must look to the express language of our own Constitution and our approach should be to the essential principles underlying the process of law-making which our Constitution envisages. According to the Indian Constitution, the power of law-making can be exercised by the Union Parliament or a State Legislature which is to be constituted in a particular manner and the process of legislation has been described in detail in various articles.

Powers have been given to the President in Article 123 and to the Governor of a State under Article 213 to promulgate Ordinances during recess of the respective legislatures. Specific provisions have also been made for exercise of the legislative powers by the President on proclamation of emergency and in respect of Part-D territories. Law-making undoubtedly is a task of the highest importance and responsibility, and, as our Constitution has entrusted this

task to particular bodies of persons chosen in particular ways, and not only does it set up a machinery for law-making but regulates the methods by which it is to be exercised and makes specific provisions for cases where departure from the normal procedure has been sanctioned, the prima facie presumption must be that the intention of the Constitution is that the duty of law-making is to be performed primarily by the legislative body itself. The power of the Parliament to confer on the President legislative authority to make laws and also to authorise the President to delegate the power so conferred to any other authority has been recognised only as an emergency provision in Article 357 of the Constitution. Save and except this, there is no other provision in the Constitution under which the legislature has been expressly authorised to delegate its legislative powers. "It is a well-known rule of construction that if a statute directs that certain acts shall be done in a specified manner or by certain persons, then performance in any other manner than that specified or by any other persons than those named is impliedly prohibited" It has been observed by Baker in his treatise on "*Fundamental Laws*" that quite apart from the doctrine of separation of powers, there are other cogent reasons why legislative power cannot be delegated. "Representative Government," thus observes the learned author, "vests in the persons chosen to exercise the power of voting taxes and enacting laws, the most important and sacred trust known to civil Government. The representatives of the people are required to exercise wise discretion and a sound judgment, having due regard for the purposes and the needs of the executive and judicial department, the ability of the taxpayer to respond and the general public welfare. It follows as a self-evident proposition that a responsible Legislative Assembly must exercise its own judgment". In the same strain are the observations made by Cooley in his "*Constitutional Law*" that the reason against delegation of power by the legislature is found in the very existence of its own powers. "This high prerogative has been entrusted to its own wisdom, judgment and patriotism, and not to those of other persons, and it will act ultra vires if it undertakes to delegate the trust instead of executing it."

292. The same considerations are applicable with regard to the legislative bodies which exercised the powers of law-making at the relevant periods when the Delhi Laws Act of 1912 and the Ajmer-Merwar Act of 1947 were enacted. Under the Indian Councils Act, 1861, the power of making laws and regulations was expressly vested in a distinct body consisting of the members of the Governor-General's Council and certain additional members who were nominated by the Governor-General for a period of two years. The number of such additional members which was originally from 6 to 12 was increased by the subsequent amending Acts and under the Indian Councils Act of 1909; it was fixed at 60, of which 27 were elected and the rest nominated by the Governor-General. It was this legislative body that was empowered by the Indian Councils Act to legislate for the whole of British India and there were certain local legislatures in addition to this in some of the provinces.

293. Section 18 of the Indian Councils Act of 1861 empowered the Governor-General to make rules for the conduct of business at meetings of the Council for the purpose of making laws; Section 15 prescribed the quorum necessary for such meetings and further provided that the seniormost ordinary member could preside in the absence of the Governor-General. This was the normal process of law-making as laid down by the Indian Councils Act. Special provisions were made for exceptional cases when the normal procedure could be departed from. Thus Section 23 of the Act of 1861 empowered the Governor-General to make

ordinances having the force of law in case of urgent necessity; and later on under Section 1 of the Indian Councils Act of 1870 the executive Government was given the power to make regulations for certain parts of India to which the provisions of the section were declared to be applicable by the Secretary of State. Besides these exceptions for which specific provisions were made, there is nothing in the parliamentary Acts passed during this period to suggest that legislative powers could be exercised by any other person or authority except the Legislative Councils mentioned above.

294. The Ajmer-Merwar Act was passed by the Dominion Legislature constituted under the Government of India Act, 1935, as adapted under the Indian Independence Act of 1947. The provisions of the Constitution Act of 1945 regarding the powers and functions of the legislative bodies were similar to those that exist under the present Constitution and no detailed reference to them is necessary.

295. The point for consideration now is that if this is the correct position with regard to exercise of powers by the legislature, then no delegation of legislative function, however small it might be, would be permissible at all. The answer is that delegation of legislative authority could be permissible but only as ancillary to, or in aid of, the exercise of law-making powers by the proper legislature, and not as a means to be used by the latter to relieve itself of its own responsibility or essential duties by devolving the same on some other agent or machinery. A constitutional power may be held to imply a power of delegation of authority which is necessary to affect its purpose; and to this extent delegation of a power may be taken to be implicit in the exercise of that power. This is on the principle "that everything necessary to the exercise of a power is implied in the grant of the power. Everything necessary to the effective exercise of legislation must therefore be taken to be conferred by the Constitution within that power." But it is not open to the legislature to strip itself of its essential legislative function and vest the same on an extraneous authority. The primary or essential duty of law-making has got to be discharged by the legislature itself; delegation may be resorted to only as a secondary or ancillary measure.

296. Quite apart from the decisions of American courts, to some of which I will refer presently, the soundness of the doctrine rests, as I have said already, upon the essential principles involved in our written Constitution. The work of law-making should be done primarily by the authority to which that duty is entrusted, although such authority can employ an outside agency or machinery for the purpose of enabling it to discharge its duties properly and effectively; but it can on no account throw the responsibility which the Constitution imposes upon it on the shoulders of an agent or delegate and thereby practically abdicate its own powers.

297. The learned Attorney-General in support of the position he took up placed considerable reliance on the observations of the Judicial Committee in the case of *Queen v. Burah*, which I have referred to already and which has been repeated almost in identical language in more than one subsequent pronouncement of the Judicial Committee. The Privy Council made those observations for the purpose of clearing up a misconception which prevailed for a time in certain quarters that the Indian or the colonial legislatures were mere agents or delegates of the imperial Parliament, and being in a sense holder of mandates from the latter, were bound to execute these mandates personally. This conception, the Privy Council pointed out, was wrong. The Indian Legislature, or for the matter of that the Colonial Parliament could, of

course, do nothing beyond the limits prescribed for them by the British Parliament. But acting within these limits they were in no sense agents of another body and had plenary powers of legislation as large and of the same nature as those of the Parliament itself. It should be noted that the majority of the Judges of the Calcutta High Court in *Queen v. Burah* proceeded on the view that the impugned provision of Act 22 of 1869 was not a legislation but amounted to delegation of legislative power and Mr Justice Markby in his judgment relied expressly upon the doctrine of agency. This view of Mr Justice Markby was held to be wrong by the Privy Council in the observations mentioned above and as regards the first and the main point the Judicial Committee pointed out that the majority of the Judges of the High Court laboured under a mistaken view of the nature and principles of legislation, for as a matter of fact nothing like delegation of legislation was attempted in the case at all. It seems to me that the observations relied on by the Attorney-General do not show that in the opinion of the Privy Council the Indian Legislative Council had the same unrestricted rights of delegation of legislative powers as are possessed by the British Parliament. If that were so, there was no necessity of proceeding any further and the case could have been disposed of on the simple point that even if there was any delegation of legislative powers made by the Indian Legislative Council it was quite within the ambit of its authority. In my opinion, the object of making the observations was to elucidate the character in which the Indian Legislative Council exercised its legislative powers. It exercised the powers in its own right and not as an agent or delegate of the British Parliament. If the doctrine of agency is to be imported, the act of the agent would be regarded as the act of the principal, but the legislation passed by the Indian Legislature was the act of the legislature itself acting within the ambit of its authority and not of the British Parliament, although it derived its authority from the latter. This view has been clearly expressed by Rand, J. of the Supreme Court of Canada while the learned Judge was speaking about the essential character of the legislation passed by the legislative bodies in Canada¹. The observations of the learned Judge are as follows:

“The essential quality of legislation enacted by these bodies is that it is deemed to be the law of legislatures of Canada as a self-governing political organization and not law of imperial Parliament. It was law within the Empire and law within the Commonwealth, but it is not law as if enacted at Westminster, though its source or authority is derived from that Parliament.” It should be noted further that in their judgment in *Burah* case the Privy Council while dealing with the matter of delegated authority was fully alive to the implications of a written constitution entrusting the exercise of legislative powers to a legislature constituted and defined in a particular manner and imposing a disability on such legislature to go beyond the specific constitutional provisions. Just after stating that the Indian Legislature was in no sense a delegate of the imperial Parliament the Privy Council observed: “The Governor-General-in-Council could not by any form of an enactment create in India and arm with legislative authority a new legislative power not created and authorised by the Councils Act.”

298. Almost in the same strain were the observations of the Judicial Committee in *In re The Initiative and Referendum Act, 1919* and while speaking about the powers of the Provincial Legislature under the Canadian Act of 1867 Lord Haldane said:

“Section 92 of the Act of 1867 entrusts the legislative power in a province to its legislature and to that legislature only. No doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by the provincial legislature in Canada could, while

preserving its own capacity intact, seek the assistance of subordinate agencies as had been done when in *Hodge v. Queen* the legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.”

299. It is not correct to say that what these observations contemplate is a total effacement of the legislative body on surrender of all its powers in favour of another authority not recognised by the constitution. Such a thing is almost outside the range of practical consideration. The observations of Lord Haldane quoted above make it quite clear that His Lordship had in mind the distinction between “seeking the assistance of a subordinate agency in the framing of rules and regulations which are to become a part of the law”, and “conferring on another body the essential legislative function which under the constitution should be exercised by the legislature itself”. The word “abdication” is somewhat misleading, but if the word is to be used at all, it is not necessary in my opinion to constitute legal abdication that the legislature should extinguish itself completely and efface itself out of the pages of the constitution bequeathing all its rights to another authority which is to step into its shoes and succeed to its rights. The abdication contemplated here is the surrender of essential legislative authority even in respect of a particular subject-matter of legislation in favour of another person or authority which is not empowered by the constitution to exercise this function.

300. I will now attempt to set out in some detail the limits of permissible delegation, in the matter of making laws, with reference to decided authorities. For this purpose it will be necessary to advert to some of the more important cases on the subject decided by the highest courts of America, Canada and Australia. We have also a number of pronouncements of the Judicial Committee in appeals from India and the colonies. I confess that no uniform view can be gathered from these decisions and none could possibly be expected in view of the fact that the pronouncements emanate from Judges in different countries acting under the influence of their respective traditional theories and the weight of opinion of their own courts on the subject. None of these authorities, however, are binding on this Court and it is not necessary for us to make any attempt at reconciliation. We are free to accept the view which appears to us to be well founded on principle and based on sound juridical reasoning.

301. Broadly speaking, the question of delegated legislation has come up for consideration before courts of law in two distinct classes of cases. One of these classes comprises what is known as cases of “conditional legislation”, where according to the generally accepted view, the element of delegation that is present relates not to any legislative function at all, but to the determination of a contingency or event, upon the happening of which the legislative provisions are made to operate. The other class comprises cases of delegation proper, where admittedly some portion of the legislative power has been conferred by the legislative body upon what is described as a subordinate agent or authority. I will take up for consideration these two types of cases one after the other.

302. In a conditional legislation, the law is full and complete when it leaves the legislative chamber, but the operation of the law is made dependent upon the fulfilment of a condition, and what is delegated to an outside body is the authority to determine, by the exercise of its own judgment, whether or not the condition has been fulfilled. “The aim of all legislation,”

said O’Conner, J. in *Baxter v. Ah Way* “is to project their minds as far as possible into the future and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases and therefore legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied or to what its operation shall be extended, or the particular class of persons or goods or things to which it shall be applied”. In spite of the doctrine of separation of powers, this form of legislation is well recognised in the legislative practice of America, and is not considered as an encroachment upon the anti-delegation rule at all. As stated in a leading Pennsylvania case, “the legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power and must, therefore, be a subject of inquiry and determination outside the halls of legislation”.

303. One of the earliest pronouncements of the Judicial Committee on the subject of conditional legislation is to be found in *Queen v. Burah*. In that case, as said already, the Lieutenant-Governor of Bengal was given the authority to extend all or any of the provisions contained in a statute to certain districts at such time he considered proper by notification in the Official Gazette. There was no legislative act to be performed by the Lieutenant-Governor himself. The Judicial Committee observed in their judgment:

“The proper legislature has exercised its judgment as to place, persons, laws, powers, and the result of that judgment has been to legislate conditionally as to those things. The conditions being fulfilled, the legislation is now absolute.”

304. Just four years after this decision was given, the case of *Russell v. Queen* came up before the Judicial Committee. The subject-matter of dispute in that case was the Canadian Temperance Act of 1878, the prohibitory and penal provisions of which were to be operative in any county or city, only if upon a vote of the majority of the electors of that county or city favouring such a course the Governor-General by order-in-council declared the relative part of the Act to be in force. One of the contentions raised before the Judicial Committee was that the provision was void as amounting to a delegation of legislative authority to a majority of voters in the city or county. This contention was negatived by the Privy Council, and the decision in *Queen v. Burah* was expressly relied upon. “The short answer to this question,” thus observed the Judicial Committee, “is that the Act does not delegate any legislative powers whatsoever. It contains within itself the whole legislation on the matter with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer authority or power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient and is certainly not unusual and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency”.

305. The same principle was applied by the Judicial Committee in *King v. Benoari Lal Sarma*. In that case, the validity of an emergency ordinance by the Governor-General of India was challenged inter alia on the ground that it provided for setting up of special criminal

courts for particular kinds of offences, but the actual setting up of the courts was left to the Provincial Governments which were authorised to set them up at such time and place as they considered proper. The Judicial Committee held that “this is not delegated legislation at all. It is merely an example of the not uncommon legislative power by which the local application of the provisions of a statute is determined by the judgment of a local administrative body as to its necessity”.

306. Thus, conditional legislation has all along been treated in judicial pronouncements not to be a species of delegated legislation at all. It comes under a separate category, and, if in a particular case all the elements of a conditional legislation exist, the question does not arise as to whether in leaving the task of determining the condition to an outside authority, the legislature acted beyond the scope of its powers.

307. I now come to the other and more important group of cases where admittedly a portion of the law-making power of the legislature is conferred or bestowed upon a subordinate authority and the rules and regulations which are to be framed by the latter constitute an integral portion of the statute itself. As said already, it is within powers of Parliament or any competent legislative body when legislating within its legislative field, to confer subordinate administrative and legislative powers upon some other authority. The question is what the limits within which such conferment are or bestowing of powers could be properly made? It is conceded by the learned Attorney-General that the legislature cannot totally abdicate its functions and invest another authority with all the powers of legislation which it possesses. Subordinate legislation, it is not disputed, must operate under the control of the legislature from which it derives its authority, and on the continuing operation of which, its capacity to function rests. As was said by Dixon, J. “a subordinate legislation cannot have the independent and unqualified authority, which is an attribute of true legislative power”. It is pointed out by this learned Judge that several legal consequences flow from this doctrine of subordinate legislation. An offence against subordinate legislation is regarded as an offence against the statute and on the repeal of the statute the regulations automatically collapse. So far, the propositions cannot, and need not, be disputed. But, according to the learned Attorney-General all that is necessary in subordinate legislation is that the legislature should not totally abdicate its powers and that it should retain its control over the subordinate agency which it can destroy later at any time it likes. If this is proved to exist in a particular case, then the character or extent of the powers delegated to or conferred upon such subordinate agent is quite immaterial and into that question the courts have no jurisdiction to enter. This argument seems plausible at first sight, but on closer examination, I find myself unable to accept it as sound. In my opinion, it is not enough that the legislature retains control over the subordinate agent and could recall him at any time it likes, to justify its arming the delegate with all the legislative powers in regard to a particular subject. Subordinate legislation not only connotes the subordinate or dependent character of the agency which is entrusted with the power to legislate, but also implies the subordinate or ancillary character of the legislation itself, the making of which such agent is entrusted with. If the legislature hands over its essential legislative powers to an outside authority, that would, in my opinion, amount to a virtual abdication of its powers and such an act would be in excess of the limits of permissible delegation.

308. The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much detail as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy. "So long as a policy is laid down and a standard established by statute no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the legislation is to apply"

342. It will be noticed that the powers conferred by this section upon the Central Government are far in excess of those conferred by the other two legislative provisions, at least in accordance with the interpretation which I have attempted to put upon them. As has been stated already, it is quite an intelligible policy that so long as a proper legislative machinery is not set up in a particular area, the Parliament might empower an executive authority to introduce laws validly passed by a competent legislature and actually in force in other parts of the country to such area, with each modifications and restrictions as the authority thinks proper, the modifications being limited to local adjustments or changes of a minor character. But this presupposes that there is no existing law on that particular subject actually in force in that territory. If any such law exists and power is given to repeal or abrogate such laws either in whole or in part and substitute in place of the same other laws which are in force in other areas, it would certainly amount to an unwarrantable delegation of legislative powers. To repeal or abrogate an existing law is the exercise of an essential legislative power, and the policy behind such acts must be the policy of the legislature itself. If the legislature invests the executive with the power to determine as to which of the laws in force in a particular territory are useful or proper and if it is given to that authority to replace any of them by laws brought from other provinces with such modifications as it thinks proper, that would be to invest the executive with the determination of the entire legislative policy and not merely of carrying out a policy which the legislature has already laid down. Thus the power of extension, which is contemplated by Section 2 of Part-C States (Laws) Act, includes the power of introducing laws which may be in actual conflict with the laws validly established and already in operation in that territory. This shows how the practice, which was adopted during the early British period as an expedient and possibly harmless measure with the object of providing laws for a newly acquired territory or backward area till it grew up into a full-fledged administrative and political unit, is being resorted to in later times for no other purpose than that of vesting almost unrestricted legislative powers with regard to certain areas in the executive Government. The executive Government is given the authority to alter, repeal or amend any laws in existence at that area under the guise of bringing in laws there which are valid in other parts of India. This, in my opinion, is an unwarrantable delegation of legislative duties and cannot be permitted. The last portion of Section 2 of Part-C States (Laws) Act is, therefore, ultra vires the powers of the Parliament as being a delegation of essential legislative powers in favour of a body not competent to exercise it and to that extent the legislation must be held to be void. This portion is however severable; and so the entire section need not be declared invalid.

343. The result is that, in my opinion, the answer to the three questions referred to us would be as follows:

(1) Section 7 of the Delhi Laws Act, 1912, is in its entirety intra vires the legislature which passed it and no portion of it is invalid.

(2) The Ajmer-Merwara (Extension of Laws) Act, 1947, or any of its provisions are not ultra vires the legislature which passed the Act.

(3) Section 2 of Part-C States (Laws) Act 1950, is ultra vires to the extent that it empowers the Central Government to extend to Part-C States laws which are in force in Part A States, even though such laws might conflict with or affect laws already in existence in the area to which they are extended. The power given by the last portion of the section to make provisions in any extended enactment for the repeal or amendment of any corresponding provincial law, which is for the time being applicable to that Part-C State, is, therefore, illegal and ultra vires.

* * * * *

Lachmi Narain v. Union of India
(1976) 2 SCC 953

[The power to make modification in a legislation does not include power to make modification in any essential feature]

Section 2 of the Part C States (Laws) Act, 1950 (later re-titled as Union Territories (Laws) Act, 1950), empowered the Central Government to extend by notification in the Official Gazette, to any Part C State, or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which was in force in a Part A State at the time of notification. In exercise of this power, the Central Government by notification No. SRO 615 dated April 28, 1951, extended to the then Part C State of Delhi, the Bengal Finance (Sales Tax) Act, 1941 with, inter alia, these modifications:

In sub-section (2) of Section 6,-

(b) for the words “add to the Schedule”, the words “add to or omit or otherwise amend the Schedule” shall be substituted.

For the schedule of the Bengal Act, this notification substituted a modified schedule of goods exempted under Section 6. The relevant items in the modified schedule were: 8. Fruits, fresh and dried (except when sold in sealed containers); 11. Pepper, tamarind and chillies. 14. Turmeric; 16. Ghee; 17. Cloth of such description as may from time to time be specified by notification in the Gazette costing less than Rs.3 per yard or such other sum as may be specified.

Section 6 of the Bengal Act after its extension to Delhi, as modified by the said notification, read:

6. (1) No tax shall be payable under this Act on the sale of goods specified in the first column of the Schedule subject to the conditions and exceptions if any set out in the corresponding entry in the second column thereof.

(2) The State Government after giving by Notification in the Official Gazette ‘not less than 3 months’ notice of its intention to do so may by like notification add to or omit from or otherwise amend the Schedule and thereupon the Schedule shall be deemed to be amended accordingly, (emphasis supplied)

By a notification dated October 1, 1951, in sub-section (1) of Section 6, the words “the first column of schedule were omitted and for the words “in the corresponding entry in the second column thereof the word “therein” was substituted.

By a notification country liquor was included in the schedule as item No. 40 of exempted goods with effect from April 19, 1952. On November 1, 1956, as a result of the coming into force of the States Reorganization Act, 1956, and the Constitution (Seventh Amendment) Act, 1956, Part C States were abolished; Part C State of Delhi became a Union territory and the Delhi Legislative Assembly, was also abolished. In 1956, Part C States (Laws) Act, 1950 (hereinafter referred to as Laws Act) also became the Union Territories (Laws) Act, 1950, with necessary adaptations. On December 1, 1956, Parliament passed the Bengal Finance (Sales Tax) (Delhi Amendment) Act, 1956 which introduced amendments in different sections of the Bengal Act as applicable to Delhi. It made only two changes in Section 6. Firstly, the word ‘schedule’, wherever it occurred, was replaced by the words “Second Schedule”. Secondly, the words “Central Government” were substituted for the words “State Government”.

On December 7, 1957, in the Gazette of India Extraordinary there appeared a notification, which read as below:

SRO 3908 - In exercise of the powers conferred by Section 2 of the Union Territories (Laws) Act, 1950 (30 of 1950), the Central Government hereby makes the following amendment in the notification of the Government of India in the Ministry of Home Affairs No. S. R. O. 615, dated the 28th April, 1951 [extending to the Union Territory of Delhi the Bengal Finance (Sales Tax) Act, 1941 subject to certain modifications] namely:-

In the said notification, the modifications to the Bengal Act aforesaid in item 6 [relating to sub-section (2) of Section 6], after sub-item (a) the following sub-item shall be inserted, namely:-

(aa) for the words “not less than three months’ notice”, the word; “*such previous notice as it considers reasonable*” shall be substituted.

R. S. SARKARIA, J. - 10. The *vires* of this notification dated December 7, 1957, is the subject of primary challenge in these appeals (the impugned notification).

11. Item 17 in the Second Schedule of the Bengal Act was amended with effect from December 14, 1957 by Notification No. SRO 3958, as under:

17. All varieties of cotton, woollen, rayon or artificial silk fabric but not including real silk fabrics.

Conditions subject to which tax shall not be payable: In respect of tobacco, cotton fabrics, rayon or artificial silk fabrics and woollen fabrics as defined in items 9, 12, 12A, 12B at the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), included in entries (a) and (e) above, no tax under the Bengal Finance (Sales Tax) Act, 1941, shall be payable in the Union Territory of Delhi only if additional duties of excise have been levied on them under the Additional Duties of Excise (Goods of Special Importance) Act, 1957.

12. The aforesaid condition was withdrawn by notification No. GSR 203, dated April 1, 1958. [By various notifications issued between 1958 and 1970, exemption was withdrawn from the country liquor, of all varieties of cotton fabrics, rayon, or artificial silk fabrics and woollen fabrics but not including durries, druggets and carpets. The appellants included the dealers of durries, knitting wool, pure silk, kirana and country liquor who were aggrieved on account of various notifications withdrawing exemption on the items in which they were dealing].

27. In the High Court, the validity of the withdrawal of the exemptions was challenged on these grounds:

(1) The power given by Section 2 of the Laws Act to the Central Government to extend enactments in force in a State to a Union territory, with such restrictions and modifications, as it thinks fit, could be exercised only to make such modifications in the enactment as were necessary in view of the peculiar local condition. The modification in Section 6(2) of the Bengal Act made by SRO 3908, dated October 7, 1957, was not necessitated by this reason. It was therefore, ultra vires to the Section 2 of the Laws Act.

(2) Such a modification could be made only once when the Bengal Act was extended to Delhi in 1951. No modification could be made after such extension.

(3) The modification could not change the policy of the legislature reflected in the Bengal Act. The impugned modification was contrary to it, and

(4) The modifications giving notice to withdraw the exemptions and the notifications issued pursuant thereto withdrawing the exemptions from sales tax with respect to durries, ghee,

(and other items relevant to these petitions) were void as the statutory notice of ‘not less than three months’ as required by Section 6(2) prior to its modification by the impugned notification of December 7, 1957, had not been given.

28. Finding on all the four grounds in favour of the writ petitioners, the learned Single Judge declared:

that the purported modification of Section 6(2) of the Bengal Finance (Sales Tax) Act, 1941, by the Government of India’s notification No. SRO 3908, dated December 7, 1957, was ineffective and Section 6(2) continues to be the same as before as if it was not so modified at all.

In consequence, he quashed the government notifications Nos. GSR 964, dated June 16, 1966 and GSR 1061, dated June 29, 1966, because they were not in compliance with the requirement of Section 6(2) of the Bengal Act.

29. The contentions canvassed before the learned Single Judge was repeated before the appellate Bench of the High Court. The Bench did not pointedly examine the scope of the power of modification given to the Central Government by Section 2 of the Laws Act with specific reference to the purpose for which it was conferred and its precise limitations. It did not squarely dispel the reasoning of the learned Single Judge that the power of modification is an integral part of the power of extension and “cannot therefore be exercised except for the purpose of the extension”. It refused to accept that reasoning with the summary remark, from the extracts quoted by the learned Single Judge from the judgment of the Supreme Court in *Re Delhi Laws Act* [AIR 1951 SC 332] and from the judgment in *Rajnarin Singh v. Chairman, Patna Administration Committee, Patna* [AIR 1954 SC 569], the principle deduced by the learned Judge does not appear to follow. We are therefore not inclined, as at present advised, to support the above observations. The Bench, however, hastened to add:

However, since the matter was not argued at great length and the appellants’ Counsel rested his submissions on the other aspects of the case, we would not like to express any definite opinion on the question as to whether the power of making any modifications or restrictions in the Act can only be exercised at the time of extending the Act and that it cannot be done subsequently by the Central Government in exercise of its power.

32. Apart from the grounds taken in their writ petitions, the learned Counsel for the appellants have tried to raise before us another ground under the garb of what they styled as “merely an additional argument”. They now seek to challenge the vires of the notification No. SRO 615, dated April 28, 1951, in so far as it relates to the insertion in subsection (2) of” Section 6 of that Act, between the words “add to” and “the Schedule”, of the words “or omit or otherwise amend”. It is argued that this insertion was beyond the power of modification conferred on the Central Government by Section 2 of the Laws Act. The point sought to be made out is that if the insertion made by the notification dated April 28, 1951, in Section 6(2) was ineffective and *non est* in the eye of law, the Central Government would have no power to “omit” anything from the exempted goods itemised in the schedule. It is argued that under Section 6(2) sans this insertion, the Central Government was empowered only to “add to” and not “omit” from the exempted items enumerated in the schedule, and consequently, the withdrawal of the exemptions in question was ultra vires the Central Government.

34. In the present appeal, the Bengal Act as extended by SRO 615, dated April 28, 1951, did not suffer from any infirmity. It is conceded by the learned Counsel for the respondent that

the Central Government at the time it extended the Bengal Act was competent to introduce such modifications and restrictions as it thought fit.

36. On behalf of the appellants, it is contended that the power of modification conferred on the Central Government by Section 2 of the Laws Act is not an unfettered power of delegated legislation but a subsidiary power conferred for the limited purpose of extension and application to a Union territory, an enactment in force in a State. It is maintained that only such modifications are permissible in the exercise of that power which are necessary to adapt and adjust such enactment to local the conditions.

37. According to Shri Ashok Sen, the power given by Section 2 is a power of ‘conditional legislation’ which is different from the power of ‘delegated legislation’. It is submitted that it is not a recurring power; it exhausts itself on extension, and in no case this power can be used to change the basic scheme and structure of the enactment or the legislative policy ingrained in it. The submission is that the impugned notification, dated December 7, 1957, is bad because it has been issued more than 6½ years after the extension of Bengal Act, and it attempts to change the requirement of Section 6(2) as to “not less than three months’ notice” which is the essence of the whole provision.

39. Shri Ashok Sen further submits that by the amending Act 20 of 1959, Parliament did not put its seal of approval on the impugned notification or the changes sought to be made by it in Section 6 of the Bengal Act. It is stressed that the amending Act of 1959, did not touch Section 6 at all and therefore, it could not be said, by any stretch of imagination, that Parliament had referentially or impliedly incorporated or approved the purported change made by the impugned notification, in the Bengal Act.

40. As against the above, Shri B. Sen, the learned Counsel for the Revenue submits that the impugned notification does not change the essential structure or the policy embodied in Section 6(2) of the Bengal Act. According to Counsel, the policy underlying Section 6(2) is that *reasonable notice* of the Government’s intention to add to or omit anything from the Second Schedule must be given by publication in the Official Gazette. It is maintained that the requirement as to “not less than three months’ notice” in the section was not a matter of policy but one of detail or expedience, it was only directory, and the modification made by the impugned notification did not go beyond adjusting and adapting it to the local conditions of Delhi. Bengal, it is pointed out, is a big, far-flung State while the territory of Delhi is a small, compact area and therefore, it would not be necessary or unreasonable to give a notice of less than three months for every amendment of the schedule. It is argued that the power to add or omit from the Second Schedule conferred on the Government is in consonance with the accepted practice of the legislature; that it is usual for the legislature to leave a discretion to the Executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be levied or rates at which it is to be charged in respect of different classes of goods and the like.

41. Shri B. Sen further contends that the power of modification given by Section 2 of the Laws Act, does not exhaust itself on first exercise; it can be exercised even subsequently if through oversight or otherwise, at the time of extension of the enactment, the Central Government fails to adapt or modify certain provisions of the extended enactment for bringing it in accord with local conditions. In this connection support has been sought from the observations of Fazal All, J. at p. 850 of the report in *Re Delhi Laws Act*. Our attention has

also been invited to Section 21 of the General Clauses Act which, according to Counsel, gives power to the Central Government to add to, amend, vary or rescind any notification etc. if the power to do so does not run counter to the policy of the legislature or effect any change in its essential features.

42. Learned Counsel has further tried to support the reasoning of the appellate Bench of the High Court, that whatever infirmity may have existed in the impugned notification and the modification made thereby in Section 6(2), it was rectified and cured by Parliament when it passed the Amendment Act 20 of 1959. It is urged that the Bengal Act together with the modifications made by notifications, dated April 28, 1951 and December 7, 1957, must have been before Parliament when it considered and passed the Amendment Act of 1959. Our attention has been invited to its preamble which is to the effect: “An Act further to amend the Bengal Finance (Sales Tax) Act, 1941, as in force in the Union Territory of Delhi”, and also to the words “as in force in the Union Territory of Delhi” in Section 2 of the amending Act.

43. An alternative argument advanced by Shri B. Sen, is that if in Section 6(2) the requirement as to “not less than three months’ notice” was mandatory and a matter of legislative policy, then the exemptions from tax granted to durries, pure silk, etc. after the issue of the impugned notification must be treated *non est* and void *ab initio*, inasmuch as the amendments of the Second Schedule whereby those exemptions were granted, were made without complying with the requirement of “not less than three months’ notice”. It is argued that if this requirement was a *sine qua non* for amendment of the Second Schedule, it could not be treated mandatory in one situation and directory in another. If it was mandatory then compliance with it would be absolutely necessary both for granting an exemption and withdrawing an exemption from tax. In this view of the matter, according to Shri B. Sen, the withdrawal of the exemption through the impugned notification was a mere formality; the notifications simply declared the withdrawal of something which did not exist in the eye of law. Appellants cannot, therefore, have any cause of grievance if the invalid and still-born exemptions were withdrawn by the questioned notifications.

44. In reply to this last argument, learned Counsel for the appellants submit that this ground of defence was not pleaded by the Revenue in its affidavit before the learned Single Judge. This, according to the Counsel, was a question of fact which required evidence for its determination, and was therefore required to be pleaded. Since the respondents did not do so, they should not have been allowed to take it for the first time at the time of arguments. Even otherwise - proceeds the argument - the respondents are not competent to take this stand which is ‘violative of the basic canon of natural justice, according to which, no party can be allowed to take advantage of its own wrong. It is stressed that the object of the requirement of not less than three months’ notice, was to afford an opportunity to persons likely to be adversely affected, to raise objections against the proposed withdrawal or curtailment of an exemption from tax. That being the case, only the persons aggrieved could have the necessary *locus standi* to complain of a non-compliance with this requirement.

45. In *Re Delhi Laws*, this Court inter alia examined the constitutional validity of Section 2 of the Laws Act in the light of general principles relating to the nature, scope and limits of delegated legislation.

47. The Court by a majority held that the first part of this section which empowers the Central Government to extend to any Part C State or to any part of such State with such modifications

and restrictions as it thinks fit any enactment which is in force in a Part A State, is intra vires, and that the latter part of this section which empowers the Central Government to make provision in any enactment extended to a Part C State, *for repeal or amendment of any law* (other than a Central Act) which is for the time being applicable to that Part C State, is ultra vires. Consequent upon this opinion, the latter part of the section was deleted by Section 3 of the Repealing and Amending Act, 1952 with effect from August 2, 1951.

49. Before proceeding further, it will be proper to say a few words in regard to the argument that the power conferred by Section 2 of the Laws Act is a power of conditional legislation and not a power of 'delegated' legislation. In our opinion, no useful purpose will be served to pursue this line of argument because the distinction propounded between the two categories of legislative powers makes no difference, in principle. In either case, the person to whom the power is entrusted can do nothing beyond the limits which circumscribe the power; he has to act - to use the words of Lord Selbourne - "within the general scope of the affirmative words which give the power" and without violating any "express conditions or restrictions by which that power is limited". There is no magic in a name. Whether you call it the power of "conditional legislation" as Privy Council called it in *Burah* case, or 'ancillary legislation' as the Federal Court termed it in *Choitram v. C. I. T., Bihar* [AIR 1947 FC 32] or 'subsidiary legislation' as Kania, C.J. styled it, or whether you camouflage it under the veiling name of 'administrative or quasi-legislative power' - as Professor Cushman and other authorities have done it - necessary for bringing into operation and effect an enactment, the fact remains that it has a content, howsoever small and restricted, of the law-making power itself. There is ample authority in support of the proposition that the power to extend and carry into operation an enactment with necessary modifications and adaptations is in truth and reality in the nature of a power of delegated legislation

51. In the instant case, the precise question with which we are faced is whether the purported substitution of the words "such previous notice as it considers reasonable" for the words "not less than three months' notice" in Section 6(2) by the impugned notification dated December?, 1957 was in excess or the power of 'modification' conferred on the Central Government by Section 2 of the Laws Act.

52. This question has to be answered in the light of the principles enunciated by this Court in *Re Delhi Laws Act* relating to the nature and scope of this power.

53. Out of the majority who upheld the validity of this provision of Section 2 of the Laws Act, with which we are concerned, Fazi Alt, J. explained the scope of the words "such modifications as it thinks fit" in Section 2, thus:

These are not unfamiliar words and they are often used by careful draftsmen to enable laws which are applicable to one place or object to be so adapted as to apply to another. The power of introducing necessary restrictions and modifications is incidental to the power to apply or adapt the law, and in the context in which the provision as to modification occurs, it cannot bear the sinister sense attributed to it. The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure or the essential purpose to be served by it. The power to modify certainly involves discretion to make suitable changes, but it would be useless to give an authority the power to adapt a law without giving it the power to make suitable changes.

54. Vivian Bose, J. also observed in a similar strain, at p. 1124:

The power to “restrict and modify” does not import the power to make essential changes. It is confined to alterations of a minor character such as are necessary to make an Act intended for one area applicable to another and to bring it into harmony with laws already in being in the State, or to delete portions which are meant solely for another area. To alter the essential character of an Act or to change it in material particulars is to legislate, and that, namely, the power to legislate, all authorities are agreed, cannot be delegated by a legislature which is not unfettered.

55. Mukherjea, J. was of the view that the “essential legislative functions” which consist in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct cannot be delegated. Dealing with the construction of the words “restrictions” and “modifications” in the Laws Act, the learned Judge said, at pages 1004-1006:

The word “restrictions”... connotes limitation imposed on a particular provision so as to restrain its application or limit its scope; it does not by any means involve any change in the principle. It seems to me that in the context and used along with the word “restriction” the word “modification” has been employed also in a cognate sense, and it does not involve any material or substantial alteration. The dictionary meaning of the expression “to modify” is to “tone down” or to “soften the rigidity of the thing;” or “to make partial changes without any radical alteration”. It would be quite reasonable to hold that the word “modification” in Section 7 of the Delhi Laws Act (which is almost identical with the present Section 2. Laws Act) means and signifies changes of such character as are necessary to make the statute which is sought to be extended suitable to the local conditions of the province. I do not think that the executive Government is entitled to change the whole nature or policy underlying any particular Act or to take different portions from different statutes and prepare what has been described before us as “amalgam” of several laws ... these things would be beyond the scope of the section itself, (emphasis supplied)

56. S. R. Das, J. (as he then was) delineated the scope of the power of “modification” given under Section 7 of the Delhi Laws Act, 1912 at p. 1089 as follows:

It may well be argued that the intention of Section 7 of the Delhi Laws Act was that the permissible modifications were to be such as would, after modification, leave the’ general character of the enactment intact. One of the meanings of the word “modify” is given in the *Oxford Dictionary*, Vol. I, page 1269 as “to alter without radical transformation”. If this meaning is given to the word “modification” in Section 7 of the Delhi Laws Act, then the modifications contemplated thereby were nothing more than adaptations which were included in the expressions *mutatis mutandis* and the “restrictions, limitations or proviso” mentioned in the several instances of conditional legislation referred to by the Privy Council (in *Burah’s* case).

57. It is to be noted that the language of Section 7 of the Delhi Act was substantially the same as that of the first portion of Section 2 of the Part C States Laws Act, as it then stood. What Das, J. said about the scope of “restrictions and modifications” in the context of Section 7 of the Delhi Act, substantially applies to the ambit and meaning of these words occurring in Section 2 of the Laws Act.

58. Again, in *Rajnarain Singh* case, Vivian Bose, J. speaking for the Court, summed up the majority view in regard to the nature and scope of delegated legislation in *Re Delhi Laws*, thus:

In our opinion the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above: it cannot include a change of policy.

59. Bearing in mind the principles and the scope and meaning of the expression “restrictions and modifications” explained in *Re Delhi Laws Act*; let us now have a close look at Section 2. It will be clear that the primary power bestowed by the section on the Central Government, is one of *extension that is bringing into operation and effect*, in a Union territory, an enactment already in force in a State. The discretion conferred by the section to make ‘restrictions and modifications’ in the enactment sought to be extended, is not a separate and independent power. It is an integral constituent of the powers of extension. It cannot be exercised apart from the power of extension. This is indubitably clear from the preposition “with” which immediately precedes the phrase ‘such restrictions and modifications’ and conjoins it to the principal clause of the section which gives the power of extension.

60. The power given by Section 2 exhausts itself on extension of the enactment; it cannot be exercised repeatedly or subsequently to such extension. It can be exercised only once, simultaneously with the extension of the enactment. This, if *one* dimension of the statutory limits which circumscribe the power. The *second* is that the power cannot be used for a purpose other than that of extension. In the exercise of this power, only such “restrictions and modifications” can be validly engrafted in the enactment sought to be extended, which are necessary to bring it into operation and effect in the Union territory. “Modifications” which are not necessary for, or ancillary and subservient to the purpose of extension, are not permissible. And, only such “modifications” can be legitimately necessary for such purpose as are required to adjust, adapt and make the enactment suitable to the peculiar local conditions of the Union territory for carrying it into operation and effect. In the context of the section, the words; “restrictions and modifications” do not cover such alterations as involve a change in any essential feature, of the enactment or the legislative policy built into it. This is the *third* dimension of the limits that circumscribe the power.

61. It is true that the word “such restrictions and modifications as it thinks fit”, if construed literally and in isolation, appear to give unfettered power of amending and modifying the enactment sought to be extended. Such a wide construction must be eschewed lest the very validity of the section becomes vulnerable on account of the vice of excessive delegation. Moreover, such a construction would be repugnant to the context and the content of the section, read as a whole, and the statutory limits and conditions attaching to the exercise of the power. We must, therefore, confine the scope of the words “restrictions and modifications” to alterations of such a character which keep the inbuilt policy, essence and substance of the enactment sought to be extended, intact, and introduce only such peripheral or insubstantial changes which are appropriate and necessary to adapt and adjust it to the local conditions of the Union territory.

62. The impugned notification, dated December 7, 1957, transgresses the limits which circumscribe the scope and exercise of the power conferred by Section 2 of Laws Act, at least, in two respects.

63. *Firstly*, the power has not been exercised contemporaneously with the extension or for the purposes of the extension of the Bengal Act to Delhi. The power given by Section 2 of the Laws Act had exhausted itself when the Bengal Act was extended, with some alterations, to Delhi by notification, dated April 28, 1951. The impugned notification has been issued on December 7, 1957, more than 61/2 years after the extension.

64. T

here is nothing in the opinion of this Court rendered in *Re Delhi Laws Act* to support Mr B. Sen's contention that the power given by Section 2 could be validly exercised within one year after the extension. What appears in the opinion of Fazi Ali, J. at page 850, is merely a quotation from the report of the Committee on Ministers' Powers which considered the propriety of the legislative practice of inserting a "Removal of Difficulty Clause" in Acts of British Parliament, empowering the Executive to modify the Act itself so far as necessary for bringing it into operation. This device was adversely commented upon. While some critics conceded that this device is "partly a draftsman's insurance policy, in case he has overlooked something", others frowned upon it, and nicknamed it as "Henry VIII clause" after the British monarch who was a notorious personification of absolute despotism. It was in this perspective that the Committee on Ministers' Powers examined this practice and recommended:

It can only be essential for the limited purpose of bringing an Act into operation and it should accordingly be in most precise language restricted to those purely machinery arrangements vitally requisite for that purpose; and the clause should always contain a maximum time-limit of one year after which the power should lapse.

65. It may be seen that the time-limit of one year within wh

ich the power under a 'Henry VIII clause' should be exercisable, was only a recommendation, and is not an inherent attribute of such power. In one sense, the power of extension-cum-modification given under Section 2 of the Laws Act and the power of modification and adaptation conferred under a usual Henry VIII clause are kindred powers of fractional legislation, delegated by the legislature within narrow circumscribed limits. But there is one significant difference between the two. While the power under Section 2 can be exercised, only once when the Act is extended, that under a 'Henry VIII clause' can be invoked, if there is nothing to the contrary in the clause - more than once, on the arising of a difficulty *when the Act is operative*. That is to say, the power under such a clause can be exercised whenever a difficulty arises in the working of the Act after its enforcement, subject of course to the time-limit, if any, for its exercise specified in the statute.

66. Thus, anything said in *Re Delhi Laws Act*, in regard to the time-limit for the exercise of power under a 'Henry VIII clause', does not hold good in the case of the power given by Section 2 of the Laws Act. Fazal Ali, J. did not say anything indicating that the power in question can be exercised within one year of the extension. On the contrary, the learned Judge expressed in unequivocal terms, at page 849:

Once the Act became operative any defect in its provision cannot be removed until amending legislation is passed.

67. *Secondly*, the alteration sought to be introduced by this notification (December 7, 1957) in Section 6(2), goes beyond the scope of the 'restrictions and modifications' permissible under Section 2 of the Laws Act; it purports to change the essential features of sub-section (2) of Section 6, and the legislative policy inherent therein.

68. Section 6(2), as it stood immediately before the impugned notification, requires the State Government to give by notification in the Official Gazette "not less than 3 months' notice" of its intention to add to or omit from or otherwise amend the Second Schedule-. The primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of "must" instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory. Here the language of sub-section (2) of Section 6 is emphatically prohibitive, it commands the Government in unambiguous negative terms that the period of the requisite notice must not be less than three months.

69. In fixing this period of notice in mandatory terms, the legislature had, it seems taken into consideration several factors. According to the scheme of the Bengal Act, the tax is quantified and assessed on the quarterly turnover. The period of not less than three months' notice conforms to that scheme and is intended to ensure that imposition of a new burden or exemption from tax causes least dislocation and inconvenience to the dealer in collecting the tax for the Government, keeping accounts and filing a proper return, and to the Revenue in assessing and collecting the same. Another object of this provision is that the public at large and the purchasers on whom the incidence of the tax really falls, should have adequate notice of taxable items. The third object seems to be that the dealers and others likely to be affected by an amendment of the Second Schedule may get sufficient time and opportunity for making representations, objections or suggestions in respect of the intended amendment. The dealers have also been ensured adequate time to arrange their sales, adjust their affairs and to get themselves registered or get their licenses amended and brought in accord with the new imposition or exemption.

70. Taking into consideration all these matters, the legislature has, in its judgment solemnly incorporated in the statute, fixed the period of the requisite notice as "not less than three months" and willed this obligation to be absolute. The span of notice was thus the essence of the legislative mandate. The necessity of notice and the span of notice both are integral to the scheme of the provision. The sub-section cannot therefore be split up into essential and non-essential components, the whole of it being mandatory. The rule in *Raza Buland Sugar Co.* case has therefore no application.

71. Thus Section 6(2) embodies a determination of legislative policy and its formulation as an absolute rule of conduct which could be diluted, changed or amended only by the legislature in the exercise of its essential legislative function which could not, as held in *Re Delhi Laws Act* and *Rajnarin Singh* case be delegated to the Government.

72. For these reasons we are of opinion that the learned Single Judge of the High Court was right in holding that the impugned notification was outside the authority of the Central Government as a delegate under Section 2 of the Laws Act.

73. Before proceeding further, we may mention here in passing, that the point for decision in *Banarsi Das Bhanot* case relied on by the Division Bench of the High Court, was different from the one before us. There, the constitutional validity of Section 6(2) of the Central Provinces and Berar Sales Tax Act, 1947, was questioned on the ground of excessive delegation. In the instant case the validity of Section 6(2) of the Bengal Act, as such, is not being impeached.

74. There is yet another facet of the matter. By the impugned notification, the Central Government did not directly seek to amend Section 6(2). Perhaps, it was not sure of its competence to do so more than 6 years after the extension of Bengal Act to Delhi. It therefore chose to amend Section 6(2) indirectly through the amendment of its earlier notification dated April 28, 1951, which was only a vehicle or instrument meant for extension of the Bengal Act to Delhi. On such extension, the notification had exhausted its purpose and had spent its force. It had lost its utility altogether as an instrument for modification of the Bengal Act. Therefore, the issue of the impugned notification which purported to amend Section 6(2) through the medium of a “dead” notification was an exercise in futility. In any case, an amendment which was not directly permissible could not be indirectly smuggled in through the backdoor.

75. We now turn to the main ground on which the judgment of the appellate Bench of the High Court rests. The question is, was the invalidity from which the impugned notification, dated December 7, 1957 suffered, cured by the Amendment Act of 1959? The Bench seems to think that by passing this Amendment Act, Parliament had put its seal of approval on the Bengal Act as it stood extended and amended by the notifications of 1951 and 1957.

76. We find no basis for this surmise. This Amendment Act leaves Section 6(2) untouched; it does not even indirectly, refer to the impugned notification or the amendment purportedly made by it in Section 6(2). Nor does it re-enact or validate what was sought to be achieved by the impugned notification. No indication of referential incorporation or validation of the impugned notification or the amendment sought to be made by it, is available either in the preamble or in any other provision of the Amendment Act.

81. Shri B. Sen’s alternative argument that the notifications whereby the exemptions from tax have been withdrawn in regard to durries, pure silk, country liquor etc. are not assailable because those exemptions were earlier granted without giving three months’ notice, is manifestly unsustainable.

82. Firstly, so far as fruits, fresh and dried (item No. 8), pepper, tamarind and chillies (item No. 11), turmeric (item No. 14), ghee (item No. 16), and knitting wool (item No. 21A) are concerned, they were exempted goods in the schedule of the Bengal Act, as modified and extended by the notification, dated April 28, 1951, to Delhi. No question of giving notice for granting these exemptions therefore arose. Secondly, the validity of the notifications whereby exemptions were granted to pure silk, liquor etc. after the extension of the Bengal Act to Delhi is not in issue. This plea was not set up by the respondents in their affidavits. Whether or not notice for the requisite period was given before issuing the exemption notifications, was a question of fact depending on evidence. Thirdly, to allow the respondents to take their stand

on such a plea would be violative of the fundamental principle of natural justice, according to which, a party cannot be allowed to take advantage of its own lapse or wrong. The statute has imposed a peremptory duty on the Government to issue notice of not less than three months, of its intention to amend the Second Schedule. It therefore cannot be allowed to urge that since it had disobeyed this mandate on an earlier occasion when it granted the exemptions it can withdraw the exemptions in the same unlawful mode. Two wrongs never make a right.

83. Nor could the respondents derive any authority or validity from Section 21 of the General Clauses Act, for the notifications withdrawing the exemptions. The source from which the power to amend the Second Schedule, comes from Section 6(2) of the Bengal Act and not from Section 21 of the General Clauses Act. Section 21, as pointed out by this Court in *Gopi Chand v. Delhi Administration* [AIR 1959 SC 609] embodies only a rule of construction and the nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification. The power, therefore, had to be exercised within the limits circumscribed by Section 6(2) and for the purpose for which it was conferred.

84. For all the foregoing reasons, we are of opinion that the impugned notification, dated December 7, 1957, purporting to substitute the words “such previous notice as it considers reasonable” for the words “not less than three months’ notice” in Section 6(2) of the Bengal Act, is beyond the powers of the Central Government, conferred on it by Section 2 of the Laws Act. In consequence, the notifications, dated April 1, 1958, September 19, 1959, June 29, 1966 and July 31, 1970 in so far as they withdrew the exemptions from tax in the case of durries, pure silk, country liquor, kirana articles etc. without complying with the mandatory requirement of not less than three months’ notice enjoined by Section 6(2) of the Bengal Act, are also invalid and ineffective.

85. In the result, we allow these appeals, set aside the judgment of the appellate bench of the High Court and declare the notification dated December 7, 1957, and the subsequent notifications in so far as they withdrew the exemptions from tax mentioned above, to be unconstitutional. In the circumstances of the case, we leave the parties to bear their own costs.

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The students are also advised to read *Brij Sunder Kapoor v. Ist Addl. Dist. Judge*, AIR 1989 SC 572 and *Ramesh Birch v. Union of India*, AIR 1990 SC 560

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Darshan Lal Mehra v. Union of India
(1992) 4 SCC 28 : AIR 1992 SC 714

[*Delegation of taxing powers on local bodies – effacement, discrimination*]

The relevant provisions of the U.P. Nagar Mahapalika Adhiniyam, 1959 reads:

Section 2.: Definitions - In this Act unless there be something repugnant in the subject or context -

(77) ‘theatre tax’ means a tax on amusement or entertainments.

“172. Taxes to be imposed under this Act. - (1) For the purposes of this Act and subject to the provisions thereof and of Article 285 of the Constitution of India, the Mahapalika shall impose the following taxes, namely,-

(a) property taxes,

(2) In addition to the taxes specified in sub-section (1) the Mahapalika may for the purposes of this Act and subject to the provisions thereof impose any of the following taxes, namely,-

(a) a tax on trades, callings and professions and holding of public or private appointments;

(i) a theatre tax; and

(j) any other tax which the State Legislature has the power under the Constitution of India to impose in the State:

(3) The Mahapalika taxes shall be assessed and levied in accordance with the provisions of this Act and the rules and bye-laws framed thereunder.

(4) Nothing in this section shall authorise the imposition of any tax which the State Legislature has no power to impose in the State under the Constitution of India.”

Sub-section (1) of Section 199 of the Act required the Nagar Mahapalika to make a preliminary proposal specifying the tax which it desired to impose under Section 172(2) of the Act, the persons or class of persons to be made liable, the amount or rate leviable for each such person or class of persons and any other information which the Government required. It further required the executive committee of the Nagar Mahapalika to draft the rules in that respect which were finally to be framed by the State Government. The draft rules were to be published in the prescribed manner to enable the affected public to file objections. Section 200 of the Act made it obligatory for the Nagar Mahapalika to consider the objections so received and to re-publish the draft rules in case any change was made as a result of such consideration. After considering all the objections the draft rules were finalised by the Nagar Mahapalika and forwarded to the State Government along with the objections. Section 201 of the Act empowered the State Government to reject, modify or to accept the proposed rules. Under Section 202 of the Act it was only after the rules were finalised by the State Government that the Nagar Mahapalika could pass a special resolution imposing the tax from the date to be specified. Under Section 203 the special resolution was to be sent to the Government and the tax was to be imposed on the publication of the resolution in the Government Gazette. Section 540(4) of the Act provided that all rules made under the Act shall be laid for not less than 14 days before each House of the State Legislature as soon as they were made and they were subject to such modifications as the legislature might make during the session they were so laid.

The proposal of the Nagar Mahapalika, Lucknow to levy theatre tax, @ Rs 5 per cinema show held in a building assessed on annual rental value of Rs 10,000 or more and @ Rs 3 per

cinema show held in a building assessed on annual rental value of less than Rs 10,000, was accepted by the State Government by following the procedure laid down under the Act. The rules called The Lucknow Nagar Mahapalika Theatre Tax Rules were framed and enforced with effect from December 15, 1965 and thereafter the tax was levied with effect from June 1, 1967. The rate of tax was increased from time to time and finally by a notification dated October 30, 1979 published in the U.P. Government Gazette dated October 31, 1979 the theatre tax was enhanced to Rs 25 per show on all Class I cinemas with annual rental value of more than Rs 10,000 and Rs 20 per show on all Class II cinemas with annual rental value of Rs 10,000 or less.

KULDIP SINGH, J. – 7. The learned counsel for the petitioners has contended that Section 172(2) of the Act is unconstitutional because the legislature has abdicated its function by delegating the essential legislative powers upon the Nagar Palikas to levy all or any of the taxes enumerated in the section. According to him the said power is unguided and uncanalised. We do not agree with the learned counsel. Section 172(2) of the Act authorises the Mahapalikas to impose the taxes mentioned therein, “for the purposes of this Act”. The obligations and functions cast upon the Mahapalikas are laid down in various provisions of the Act. The taxes under Section 172(2) of the Act, therefore, can be levied by the Mahapalikas only for implementing those purposes and for no other purpose. The Mahapalikas have to provide special civic amenities at the places where cinemas/theatres are situated. So long as the tax has a reasonable relation to the purposes of the Act the same cannot be held to be arbitrary. The rate of tax to be levied and the persons or the class of persons liable to pay the same is determined by inviting objections which are finally considered and decided by the State Government. There is no force in the argument that the legislature has abdicated its function to the Mahapalikas. The tax is levied in accordance with the statutory rules framed by the State Government and the said rules are laid before each House of the State Legislature for not less than 14 days and are subject to such modifications as the legislature may make during the session they are so laid. We, therefore, reject the contention raised by the learned counsel for the petitioners.

8. The second contention raised by the learned counsel for the petitioners is that the classification of cinemas on the basis of annual rental value for the purpose of fixing the rate of tax is arbitrary and as such is violative of Article 14 of the Constitution of India. According to him the classification has no nexus with the objects sought to be achieved. We do not agree. In *Western India Theatres Ltd. v. Cantonment Board, Poona Cantonment* [AIR 1959 SC 582], the Cantonment Board, Poona imposed entertainment tax on cinemas. Rs 10 per show was levied on the two cinemas of Western India Theatres Ltd. and Rs 5 per show in other cases. The argument raised before this Court to the effect that the Cantonment Board had singled out the two cinema houses for discriminatory treatment by imposing higher rate of tax, was answered as under:

“It may not be unreasonable or improper if a higher tax is imposed on the shows given by a cinema house which contains large seating accommodation and is situate in fashionable or busy localities where the number of visitors is more numerous and in more affluent circumstances than the tax that may be imposed on shows given in a smaller cinema house containing less accommodation and situate in some localities where the visitors are less

numerous or financially in less affluent circumstances, for the two cannot, in those circumstances, be said to be similarly situated.”

9. The annual rental value under the Act indicates the extent of the accommodation, its quality, the locality in which it is situated and other factors which relate to the enjoyment of the building. The theatre tax is levied as a tax on amusement and entertainment. The amusement in a building is affected by all those factors which are taken into consideration while fixing the annual rental value of the building. Higher rental value in relation to a cinema house shows that it has better accommodation, better situation and better facilities for amusement and entertainment. The higher annual value is indicative of a better quality cinema house as compared to a cinema house which has a lesser annual rental value. We are, therefore, of the view that there is nothing unreasonable or improper in classifying the cinema houses on the basis of annual rental value. The learned counsel for the petitioners has not raised any other point before us. The writ petitions are dismissed with costs.

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The delegation of legislative power which is arbitrary or the exercise of delegated legislative power may be quashed. The students may read: *Dwarka Prasad v. State of U.P.*, AIR 1954 SC 224 and *Delhi Transport Corpn. v. Delhi Transport Corpn. Mazdoor Congress*, AIR 1991 SC 101.

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Procedural Requirements – Publication
Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee
AIR 1976 SC 263

Y.V. CHANDRACHUD, J. - This is an appeal from the judgment of the Gujarat High Court convicting the appellant under Section 36 read with Section 8 of the Gujarat Agricultural Produce Markets Act, 20 of 1964 and sentencing him to pay a fine of Rs 10.

2. An Inspector of Godhra Agricultural Produce Market Committee filed a complaint against the appellant charging him with having purchased a certain quantity of ginger in January and February, 1969 without obtaining a license as required by the Act. The learned Magistrate accepted the factum of purchase but he acquitted the appellant on the ground that the relevant notification in regard to the inclusion of ginger was not shown to have been promulgated and published as required by the Act.

3. The case was tried by the learned Magistrate by the application of procedure appointed for summary trials. That circumstance together with the token sentence of fine imposed by the High Court gives to the case a petty appearance. But occasionally, matters apparently petty seem on closer thought to contain points of importance though, regretfully, such importance comes to be realized by stages as the matter travels slowly from one court to another. As before the Magistrate so in the High Court, the matter failed to receive due attention: a fundamental premise on which the judgment of the High Court is based contains an assumption contrary to the record. Evidently, the attention of the High Court was not drawn either to the error of that assumption or to some of the more important aspects of the case which the parties have now perceived.

5. In the erstwhile composite State of Bombay there was in operation an Act called the Bombay Agricultural Produce Markets Act., 1939. On the bifurcation of that State on May 1, 1960 the new State of Gujarat was formed. The Bombay Act of 1939 was extended by an appropriate order to the State of Gujarat by the Government of that State. That Act remained in operation in Gujarat till September 1, 1964 on which date the Gujarat Agricultural Produce Markets Act, 1964, came into force.

6. The Act was passed to consolidate and amend the law relating to the regulation of buying and selling of agricultural produce and the establishment of markets for agricultural produce in the State of Gujarat. Section 4 of the Act empowers the State Government to appoint an officer to be the Director of Agricultural Marketing and Rural Finance. Sections 5, 6(1) and 6(5) of the Act read thus:

5. Declaration of intention of regulating purchase and sale of agricultural produce in specified area- (1) The Director may, by notification in the Official Gazette, declare his intention of regulating the purchase and sale of such agricultural produce and in such area, as may be specified therein. Such notification shall also be published in Gujarati in a newspaper having circulation in the area and in such other manner as may be prescribed.

(2) Such notification shall state that any objection or suggestion received by the Director within the period specified in the notification which shall not be less than one month from the date of the publication of the notification, shall be considered by the Director.

(3) The Director shall also send a copy of the notification to each of the local authorities functioning in the area specified in the notification with a request to submit its objections and suggestions if any, in writing to the Director within the period specified in the notification.

6. *Declaration of market areas* - (1) After the expiry of the period specified in the notification issued under Section 5 (hereinafter referred to in this section as 'the said notification'), and after considering the objections and suggestions received before its expiry and holding such inquiry as may be necessary, the Director may, by notification in the Official Gazette, declare the area specified in the said notification or any portion thereof to be a market area for the purposes of this Act in respect of all or any of the kinds of agricultural produce specified in the said notification. A notification under this section shall also be published in Gujarati in a newspaper having circulation in the said area and in such other manner, as may be prescribed. (5) After declaring in the manner specified in Section 5 his intention of so doing, and following the procedure therein, the Director may, at any time by notification in the Official Gazette, exclude any area from a market area specified in a notification issued under sub-section (1), or include any area therein and exclude from or add to the kinds of agricultural produce so specified any kind of agricultural produce.

By Section 8, no person can operate in the market area or any part thereof except under and in accordance with the conditions of a license granted under the Act. Section 36 of the Act provides, to the extent material, that whoever without holding a license uses any place in a market area for the purchase or sale of any agricultural produce and thereby contravenes Section 8 shall on conviction be punished with the sentence mentioned therein.

7. Rule 3 of the Gujarat Agricultural Produce Markets Rules, 1965 provides that a notification under Section 5(1) or Section 6(1) shall also be published by affixing a copy thereof at some conspicuous place in the office of each of the local authorities functioning in the area specified in the notification.

8. The simple question, though important, is whether the notification issued under Section 6(5) of the Act, covering additional varieties of agricultural produce like ginger and onion, must not only be published in the official gazette but must also be published in Gujarati in a newspaper. The concluding sentence of Section 6(1) says that a notification under "this section" "shall also be published in Gujarati in a newspaper" having circulation in the particular area. The argument of the appellant is twofold: Firstly, that "this section" means "this sub-section" so that the procedure in regard to publication which is laid down in sub-section (1) of Section 6 must be restricted to notifications issued under that sub-section and cannot be extended to those issued under sub-section (5) of Section 6; and secondly, assuming that the words "this section" are wide enough to cover every sub-section of Section 6, the word "shall" ought to be read as "may".

9. First, as to the meaning of the provision contained in Section 6(1) of the Act. It means what it says. That is the normal rule of construction of statutes, a rule not certainly absolute and unqualified, but the conditions which bring into play the exceptions to that rule do not exist here. Far from it; because, the scheme of the Act and the purpose of the particular provision in Section 6(1) underline the need to give to the provision its plain, natural meaning. It is not reasonable to assume in the Legislature and ignorance of the distinction between a "section" of the statute and the "sub-sections" of that section. Therefore the requirement laid down by Section 6(1) that a notification under "this section" shall also be published in Gujarati in a

newspaper would govern any and every notification issued under any part of Section 6, that is to say, under any of the sub-sections of Section. 6. It is this requirement was to govern notifications issued under sub-section (1) of Section 6 only, the Legislature would have said so.

10. But the little complexity that there is in this matter arises out of a known phenomenon, judicially noticed but otherwise disputed, that sometimes the Legislature does not say what it means. That has given rise to a series of technical rules of interpretation devised or designed to unravel the mind of the law-makers. If the words used in a statute are ambiguous, it is said, consider the object of the statute, have regard to the purpose for which the particular provision is put on the statute-book and then decide what interpretation best carries out that object and purpose. The words of the concluding portion of Section 6(1) are plain and unambiguous rendering superfluous the aid of artificial guidelines to interpretation. But the matter does not rest there. The appellant has made an alternative argument that the requirement regarding the publication in Gujarati in a newspaper is directory and not mandatory, despite the use of the word “shall”. That word, according to the appellant, really means “may”.

11. Maxwell, Crawford and Craies abound in illustrations where the words “shall” and “may” are treated as interchangeable. “Shall be liable to pay interest” does not mean “must be made liable to pay interest”, and “may not drive on the wrong side of the road” must mean “shall not drive on the wrong side of the road”. But the problem which the use of the language of command poses is: Does the Legislature intend that its command shall at all events be performed? Or is it enough to comply with the command in substance? In other words, the question is: is the provision mandatory or directory?

12. Plainly, “shall” must normally be construed to mean “shall” and not “may”, for the distinction between the two is fundamental. Granting the application of mind, there is little or no chance that one who intends to leave a leeway will use the language of command in the performance of an act. But since, even lesser directions are occasionally clothed in words of authority, it becomes necessary to delve deeper and ascertain the true meaning lying behind mere words.

13. The governing factor is the meaning and intent of the Legislature, which should be gathered not merely from the words used by the Legislature but from a variety of other circumstances and considerations. In other words, the use of the word ‘shall’ or ‘may’ is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstance that the Legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. One of the fundamental rules of interpretation is that if the words of a statute are themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature. Section 6(1) of the Act provides in terms, plain and precise, that a notification issued under the section “shall also” be published in Gujarati in a newspaper. The word ‘also’ provides an important clue to the intention of the Legislature because having provided that the notification shall be published in the Official Gazette, Section 6(1) goes on to say that the notification shall also be published in Gujarati in a newspaper. The additional

mode of publication prescribed by law must, in the absence of anything to the contrary appearing from the context of the provision or its object, be assumed to have a meaning and a purpose. In *Khub Chand v. State of Rajasthan* [AIR 1967 SC 1074], it was observed that:

The term 'shall' in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the Legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations.

The same principle was expressed thus in *Haridwar Singh v. Bagun Sumbrui* [(1973) 3 SCC 889, 895]:

Several tests have been propounded in decided cases for determining the question whether a provision in a statute, or a rule is mandatory or directory. No universal rule can be laid down on this matter. In each case one must look to the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured.

14. The scheme of the Act is like this: Under Section 5(1) the Director of Marketing and Rural Finance may by a notification in the Official Gazette declare his intention of regulating purchase, and sale of agricultural produce in the specified, area. Such notification is also required to be published in Gujarati in a newspaper having circulation in the particular area. By the notification, the Director under Section 5(2) has to invite objections and suggestions and the notification has to state that any such objections or suggestions received by the Director within the specified period, which shall not be less than one month from the date of the publication of the notification, shall be considered by the Director. After the expiry of the aforesaid period the Director, under Section 6(1), has the power to declare an area as the market area in respect of the particular kinds of agricultural produce. This power is not absolute because by the terms of Section 6(1) it can only be exercised after considering the objections and suggestions received by the Director within the stipulated period. The notification under Section 6(1) is also required to be published in Gujarati in a newspaper. The power conferred by Section 5(1) or 6(1) is not exhausted by the issuance of the initial notification covering a particular area or relating to a particular agricultural produce. An area initially included in the market area may later be excluded, a new area may be added and likewise an agricultural produce included in the notification may be excluded or a new variety of agricultural produce may be added. This is a salutary power because experience gained by working the Act may show the necessity for amending the notification issued under Section 6(1). This power is conferred by Section 6(5).

15. By Section 6(5), if the Director intends to add or exclude an area or an agricultural produce, he is to declare his intention of doing so in the manner specified in Section 5 and after following the procedure prescribed therein. Thus, an amendment to the Section 6(1) notification in regard to matters described therein is equated with a fresh declaration of intention in regard to those matters, rendering it obligatory to follow afresh the whole of the procedure prescribed by Section 5. That is to say, if the Director intends to add or exclude an area or an agricultural produce, he must declare his intention by notification in the Official

Gazette and such notification must also be published in Gujarati in a newspaper. Secondly, the Director must invite objections or suggestions by such notification and the notification must state that any objections or suggestions received within the stipulated time shall be considered by him. The Director must also comply with the requirement of sub-section (5) of Section 3 by sending a copy of the notification to each of the local authorities functioning in the particular area with a request that they may submit their objections and suggestions within the specified period. After the expiry of the period aforesaid and after considering the objections or suggestions received within that period, the Director may declare that the particular area or agricultural produce be added or excluded to or from the previous notification. This declaration has to be by a notification in the Official Gazette and the notification has to be published in Gujarati in a newspaper having circulation in the particular area. The last of these obligations arises out of the mandate contained in the concluding sentence of Section 6(1).

16. The object of these requirements is quite clear. The fresh notification can be issued only after considering the objections and suggestions which the Director receives within the specified time. In fact, the initial notification has to state expressly that the Director shall consider the objections and suggestions received by him within the stated period. Publication of the notification in the Official Gazette was evidently thought by the Legislature not an adequate means of communicating the Director's intention to those who would be vitally affected by the proposed declaration and who would therefore be interested in offering their objections and suggestions. It is a matter of common knowledge that publication in a newspaper attracts greater public attention than publication in the Official Gazette. That is why the Legislature has taken care to direct that the notification shall also be published in Gujarati in a newspaper. A violation of this requirement is likely to affect valuable rights of traders and agriculturists because in the absence of proper and adequate publicity, their right of trade and business shall have been hampered without affording to them an opportunity to offer objections and suggestions, an opportunity which the statute clearly deems so desirable. By Section 6(2), once an area is declared to be a market area, no place in the said area can be used for the purchase or sale of any agricultural produce specified in the notification except in accordance with the provisions of the Act. by Section 8 no person can operate in the market area or any part thereof except under and in accordance with the conditions of & license granted under the Act. A violation of these provisions attracts penal consequences under Section 36 of the Act. It is therefore vital from the point of view of the citizens' right to carry on trade or business, no less than for the consideration that violation of the Act leads to penal consequences, that the notification must receive due publicity. As the statute itself has devised an adequate means of such publicity, there is no reason to permit a departure from that mode. There is something in the very nature of the duty imposed by Sections 5 and 6, something in the very object for which that duty is cast, that the duty must be performed. "Some rules", as said in *Thakur Pratap Singh v. Shri Krishna* [AIR 1956 SC 140] "are vital and go to the root of the matter: they cannot be broken." The words of the statute here must therefore be followed punctiliously.

17. The legislative history of the Act reinforces this conclusion. As stated before, the Bombay Agricultural Produce Markets Act, 1939 was in force in Gujarat till September 1, 1964 on which date the present Act replaced it. Section 3(1) of the Bombay Act corresponding to

Section 5(1) of the Act provided that the notification ‘may’ also be published in the regional languages of the area. Section 4(1) of the Bombay Act which corresponds to Section 6(1) of the Act provided that “A notification under this section may also be published in the regional languages of the area in a newspaper circulated in the said area”. Section 4(4) of the Bombay Act corresponding to Section 6(5) of the Act provided that exclusion or inclusion of an area or an agricultural produce may be made by the Commissioner by notification in the Official Gazette, “subject to the provisions of Section 3” Section 4(4) did not provide in terms as Section 6(5) does, that the procedure prescribed in regard to the original notification shall be followed if an area or an agricultural produce is to be excluded or included. The Gujarat Legislature, having before it the model of the Bombay Act, made a conscious departure from it by providing for the publication of the notification in a newspaper and by substituting the word ‘shall’ for the word ‘may’. These are significant modifications in the statute which was in force in Gujarat for over 4 years from the date of reorganisation till September 1, 1964. These modifications bespeak the mind of the Legislature that what was optional must be made obligatory.

18. We are therefore of the opinion that the notification issued under Section 6(5) of the Act, like that under Section 6(1), must also be published in Gujarati in a newspaper having circulation in the particular area. This requirement is mandatory and must be fulfilled. Admittedly, the notification issued under Section 6(5) on February 16, 1963 was not published in a newspaper at all, much less in Gujarati. Accordingly, the inclusion of new varieties of agricultural produce in that notification lacks legal validity and no prosecution can be founded upon its breach.

19. Rule 3 of the Gujarat Agricultural Produce Markets Rules, 1965 relates specifically and exclusively to notifications “issued under subsection (1) of Section 5 or under sub-section (1) of Section 6”. As we are concerned with a notification issued under sub-section (5) of Section 6, we need not go into the question whether Rule 3 is complied with. We may however indicate that the authorities concerned must comply with Rule 3 also in regard to notifications issued under Sections 5(1) and 6(1) of the Act. After all, the rule is calculated to cause no inconvenience to the authorities charged with the duty of administering the Act. It only requires publication by affixing a copy of the notification at some conspicuous place in the office of each of the local authorities functioning in the area specified in the notification.

20. The prosecution was conducted before the learned Magistrate in an indifferent manner. That is not surprising because the beneficent purpose of summary trials is almost always defeated by a summary approach. Bhailalbhai Chaturbhai Patel, an Inspector in the Godhra Agricultural Produce Market Committee, who was a material witness for proving the offence, said in his evidence that he did not know whether or not the notifications were published in any newspaper or on the notice board of the Godhra municipality. The learned Magistrate acquitted the appellant holding that the prosecution had failed to prove beyond a reasonable doubt that the notifications were published and promulgated as required by law.

21. In appeal, the High Court of Gujarat began the operative part of its judgment with a wrong assumption that Ex. 9 dated April 19, 1962 was a “notification constituting the Godhra market area”. In fact Ex. 9 as issued under Section 4-A(3) of the Bombay Act as amended by Gujarat Act XXXI of 1961 declaring certain areas as “market proper” within the Godhra market area. The High Court was really concerned with the notification, Ex. 10, dated February 16, 1968

which was issued under Section 6(5) of the Act and by which new varieties of agricultural produce like onion, ginger, sun hemp and jowar were added to the old list. The High Court set aside the acquittal by following the judgment dated February 12, 1971 rendered by A. D. Desai, J. in Cr. Appeal No. 695 of 1969. That judgment has no application because it arose out of the Bombay Act and the question before Desai, J. was whether Section 4(1) of the Bombay Act was mandatory or directory. That section, as noticed earlier, provided that the notification “may” also be published in the regional languages of the area in a newspaper circulated in that area. The High Court, in the instant case, was concerned with Section 6(5) of the Act which has made a conscious departure from the Bombay Act in important respects. The High Court did not even refer to the provisions of the Act and it is doubtful whether those provisions were at all brought to its notice. Everyone concerned assumed that the matter was concluded by the earlier judgment of Desai, J.

22. For these reasons we set aside the judgment of the High Court and restore that of the learned Judicial Magistrate, First Class, Godhra. Fine, if paid, shall be refunded to the appellant.

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Sonik Industries, Rajkot v. Municipal Corporation of the City of Rajkot
(1986) 2 SCC 608 : AIR 1986 SC 1518

R.S. PATHAK, J. -This appeal by special leave raises the question whether the rules for the levy of a rate on buildings and lands can be said to be published under Section 77 of the Bombay Municipal Boroughs Act, 1925 if the notice published in a newspaper reciting the sanction of the State Government to the rules mentions that the rules themselves are open to inspection in the municipal office and that copies of the rules can also be purchased there.

2. The Rajkot Borough Municipality framed draft rules for the levy of rates on buildings and lands in Rajkot. The draft rules were published and objections were invited, and thereafter the State Government accorded its sanction to the rules. In the issue dated November 28, 1964 of "Jai Hind", a Gujarati newspaper published from Rajkot, a notice was published purporting to be under Section 77 of the Bombay Municipal Boroughs Act, 1925 as adopted and applied to the Saurashtra area of the State of Gujarat for the information of persons holding buildings and immovable property within the municipal limits of Rajkot that the municipality had resolved to enforce the "Rules of the Rajkot Borough Municipality for the levy of the Rate (Tax) on Buildings and Lands" sanctioned by the State Government of Gujarat with effect from January 1, 1965. The notice recited the date and serial number of the sanction. It also stated:

These rules can be inspected at the office of the municipality on all days other than holidays during office hours; moreover copies of the rules can be purchased at the municipal office.

It appears that thereafter an assessment list was prepared and steps were taken to demand the tax.

3. The appellant, a registered partnership firm, instituted a suit in the court of the learned Civil Judge, Senior Division, Rajkot, praying for a declaration that the aforesaid rules were invalid, and that the consequent assessment list and the related notices of demand were without authority of law. A permanent injunction was also sought to restrain the municipality from giving effect to the rules. The trial court decreed the suit and granted the declaration and injunction prayed for. An appeal against the decree of the trial court was dismissed by the learned Extra Assistant Judge, Rajkot. A second appeal was filed by the Municipal Corporation of Rajkot (the Municipal Borough of Rajkot having been so renamed) in the High Court, and at the time of admission a learned Single Judge of the High Court formulated three questions of law arising in the appeal. The appeal was referred subsequently to a larger Bench. A Bench of three learned Judges of the High Court took up the case and observed at the outset that the only question which required consideration at that stage was whether the courts below had erred in striking down the rules on the ground that they had not been published as required by Section 77 of the Act. The learned Judges held that the courts below had taken an erroneous view of the statute and that, in their opinion, the conditions of Section 77 of the Act had been satisfied in the case. The case was sent back to the learned Single Judge with that opinion for disposal in accordance with law.

4. Chapter VII of the Act provides for municipal taxation. While the different taxes which can be levied by a municipality are enumerated in Section 73, Sections 75 to 77 detail the procedure to be observed when the municipality proposes to levy a tax. Before imposing a tax the municipality is required by Section 75 to pass a resolution deciding which one or other of the taxes specified in Section 73 would be imposed and to approve rules specifying the

classes of persons or property or both which are proposed to be made liable, the amount or rate proposed for assessment, the basis of valuation on which such rate on buildings and lands is to be imposed and other related matters. The rules so approved by the municipality are required to be published with a notice in a prescribed form. Objections are invited from the inhabitants of the municipal borough, and the municipality is required to take the objections into consideration, and if it decides to pursue the levy it submits the objections with its opinion thereon and any modifications proposed by it, together with the notice and rules to the State Government. Section 76 empowers the State Government to sanction the rules with or without modification, or to return them to the municipality for further consideration. Section 77 provides:

77. Rules sanctioned under Section 76 with the modifications and conditions, if any, subject to which the sanction is given shall be published by the municipality in the municipal borough, together with a notice reciting the sanction and the date and serial number thereof; and the tax as prescribed by the rules so published shall, from a date which shall be specified in such notice and which shall not be less than one month from the date of publication of such notice, be imposed accordingly, . . .

6. In the case of municipal taxation, the conventional procedure enacted in most statutes requires publication of the proposed rules providing for the levy and inviting objections thereto from the inhabitants of the municipality. Thereafter when the rules are finalised and sanctioned by the State Government, it is mandatory that they be published so that the inhabitants of the municipality should know how the levy affects them in its final form. The rules, and consequently the levy, take effect only upon publication in accordance with the statute. The object of the requirement is that a person affected by the levy must know precisely the provisions of the levy and its consequences for him. Section 77 requires that the sanctioned rules should be published by the municipality in the municipal borough together with the notice reciting the sanction. The notice published in the newspaper mentioned that the “Rules of Rajkot Borough Municipality for the levy of Rate (Tax) levied on Buildings and Lands” had been sanctioned by the State Government and the notice recited also the date and serial number of the sanction. It was open to the municipality to publish the sanctioned rules also in the newspaper, but what it did was to state in the notice that the rules could be inspected in the municipal office, and also that copies of the rules could be purchased at the municipal office. In our opinion, the requirement of Section 77 was complied with inasmuch as information was thereby given to all persons holding buildings and immovable property within the municipal limits of Rajkot that the rules mentioned therein had been sanctioned by the State Government and that the rules could be inspected in the municipal office. The mandatory requirement of Section 77 was that the rules should be published and it seems to us that the notice satisfies that requirement. The mode of publishing the rules is a matter for directory or substantial compliance. It is sufficient if it is reasonably possible for persons affected by the rules to obtain, with fair diligence, knowledge of those rules through the mode specified in the notice. Had the Act itself specified the mode in which the rules were to be published, that mode would have to be adopted for publishing the rules. In the opinion of the legislature, that was the mode through which the inhabitants of the municipality could best be informed of the rules. But the Act is silent as to this. Section 102 specifies the modes in which service of a notice contemplated by the Act should be served. There is nothing in the section

prescribing the mode for publishing the rules in question here. Nor does Section 24 of the Bombay General Clauses Act help us. We must, therefore, fall back upon the general principle that if the mode of publication adopted is sufficient for persons, affected by the rules, with reasonable diligence to be acquainted with them, publication of the rules has taken place in contemplation of the law. It is necessary to emphasize that we are dealing with a stage defining the final shape of the rules, after objections to the draft rules have been considered and the State Government has accorded its sanction.

7. Learned counsel for the appellant and learned counsel for the interveners have referred us to Section 102 of the Act, which empowers the State Government on complaint made or otherwise that any tax leviable by the municipality is unfair in its incidence, or that the levy thereof, or any part thereof, is obnoxious to the interest of the general public, to require the municipality to take measures for removing any objection which appears to it to exist to the said tax. If, within the period so fixed, such requirement is not carried into effect to the satisfaction of the State Government, it may, by notification in the official Gazette, suspend the levy of the tax, or of such part thereof, until such time as the objection thereto is removed. It is urged that the rules published under Section 77 of the Act are still open to challenge under Section 102 of the Act and it is for that reason that Section 77 provides that the notice published thereunder should prescribe a date, not less than one month from the date of such publication, as the date on which the tax as prescribed by the rules shall be imposed. It is said that this period is intended to enable persons affected by the levy to object again under Section 102 of the Act, and therefore the rules must be set forth in the newspaper itself. We are unable to agree. To our mind, Section 77 provides the final stage of the procedure enacted in Sections 75 to 77 for imposing a levy. The period referred to in Section 77, after which alone the tax can be imposed, is intended to enable persons affected by the levy to acquaint themselves with the contents of the rules, and to take preparatory measures for compliance with the rules. The period has not been particularly prescribed in order to enable a person to take advantage of the benefit of Section 102 before the tax is imposed. We are of opinion that it would have been more desirable for the municipality to have published the rules in the newspaper along with the notice reciting the sanction, but while saying so we are unable to hold that its omission to do so and notifying instead that inspection of the rules was available in the municipal office does not constitute sufficient compliance with the law.

8. There is no force in this appeal and it is accordingly dismissed with costs.

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The students are advised to read *Narendra Kumar v. Union of India*, AIR 1960 SC 385, where the mode of publication – *official gazette* – was held to be mandatory.

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Legislative Control through Laying Requirement

Atlas Cycle Industries Ltd. v. State of Haryana
(1979) 2 SCC 196 : AIR 1979 SC 1149

JASWANT SINGH, J. - During the course of on spot check carried out by him on December 29, 1964 of B.P. sheets lying in Appellant 1's factory at Sonapat, the Development Officer of the Directorate General of Technical Development, New Delhi, discovered from an examination of the said appellant's account books that it had, during the period intervening between January 1, 1964 and January 12, 1965, acquired black plain iron sheets of prime quality weighing 60-03 metric tons from various parties at a rate higher than the maximum statutory price fixed for such sheets by the Iron and Steel Controller (the 'Controller') in exercise of the powers vested in him under Clause 15(1) of the Iron and Steel (Control) Order, 1956 (the 'Control Order'). On the basis of this discovery, the appellants were prosecuted in the Court of the Special Magistrate, Ambala Cantonment for an offence under Section 120B of the Indian Penal Code read with Section 7 of the Essential Commodities Act, 1955 as also for an offence under Section 7 of the Act read with Clause 15(3) of the Control Order. After the Special Magistrate had framed the charges and examined sixteen prosecution witnesses, the appellants made an application before him on February 12, 1970 under Sections 251A(11) and 288(1) of the Code of Criminal Procedure, 1898 praying that in view of the submissions made therein, the case against them be not proceeded with and they be acquitted. The trial Magistrate dismissed the application vide his order dated June 4, 1970, relevant portion whereof is extracted below for facility of reference:

In the light of the above observations, I am prevented from determining the case otherwise than by making an order of acquittal or conviction which I can pass only after recording further evidence both of prosecution and in defence.

Regarding various objections raised by the learned Counsel for the accused on the points that the notifications were not placed before the Parliament and within a reasonable time and also on the points of formation of opinion and delegation of powers I may submit that the prosecution cannot be prevented from adducing evidence regarding the formation of opinion and laying of the notifications before the Parliament which can be proved by the contemporaneous record. Regarding the non-prosecution of the sellers of the black iron sheets it does not lie in the mouth of the accused to say that such and such person has not been prosecuted. I need not give any observations on merits on the points regarding subsequent exemption of control order, mens rea, formation of opinion and delegation of powers in laying notifications before the Parliament and also need not discuss the citations as I will have to consider all these points at the time of final arguments and any order given now will not be proper.

I dismiss the application of the accused on the short ground that it is not possible for this Court to hold that the cognizance was taken on an invalid report and the order of the Court ordering framing of charge is a nullity on the ground that on record no offence is committed and no cognizance could be taken.

2. Aggrieved by the aforesaid order of the special Magistrate, the appellants moved the High Court of Punjab and Haryana under Articles 226 and 227 of the Constitution and Section 561A of the Code of Criminal Procedure, 1898 challenging their prosecution inter alia on the

grounds that the Control Order and the Notification which formed the basis of their prosecution did not have the force of law as they had not been laid before the Houses of Parliament within a reasonable time as required under Section 3(6) of the Act; that the Control Order and the Notification fixing the maximum selling price of the commodity in question for the contravention of which the appellants had been hauled up were invalid as the same did not appear to be preceded by the formation of the requisite opinion under Section 3(1) of the Act which was a sine qua non for issue of any order by the Central Government or by the Controller; that none of the 18 concerns which, according to the prosecution, sold the aforesaid B.P. sheets to the appellants and who were equally guilty of the offence under Section 7 of the Act having been proceeded against in the Court of the competent jurisdiction, the prosecution of the appellants was violative of Article 14 of the Constitution and that the purchase of the aforesaid B.P. sheets having been openly made and entered in the account books of Appellant 1, the mens rea which was a necessary ingredient of the offence under Section 7 of the Act was totally lacking in the case.

3. In the return statement filed by it in opposition to the writ petition, the respondent while denying that the Control Order had not been placed before both Houses of Parliament, as required by sub-section (6) of Section 3 of the Act or that the issue of the Control Order or the Notification fixing maximum selling prices of various categories of iron and steel including the commodity in question was not based on the formation of the opinion envisaged by sub-section (1) of Section 3 of the Act conceded that the notification fixing the maximum selling prices of the categories of iron and steel including the commodity in question had not placed before both Houses of Parliament but contended that the provisions of sub-section (6) of Section 3 of the Act requiring the placing of the order contained in the aforesaid notification before both Houses of Parliament were directory and not mandatory and the omission to comply with that requirement did not have the effect of invalidating the notification. The respondent further contended that the notification fixing the maximum selling prices of various categories of iron and steel including the black plain iron sheets being a part of the Control Order and a piece of delegated legislation, it was not necessary to lay it before the Houses of Parliament. It was also pleaded by the respondent that the mens rea of the accused was manifested from various manipulation resorted to by them as also from the fact that they wanted to increase their production and earn more profits. The respondent also averred that launching of prosecution against any person depended on the availability of sufficient guidance and that non-prosecution of the sellers of the iron sheets in question did not involve any discrimination as envisaged by Article 14 of the Constitution but was due to non-availability of adequate and reliable evidence against them.

4. After careful consideration of the rival contentions of the parties, the High Court by its elaborate judgment and order dated May 31, 1974 dismissed the petition overruling the contentions of the appellants. One of the learned Judges of the High Court constituting the Bench which dealt with the writ petition also observed that the Notification in question had not in reality been issued under Section 3 of the Act which required it to be laid before both Houses of Parliament but was issued in exercise of the power conferred by Section 4 of the Act which plainly related to issue of incidental orders arising out of the nature of the powers conferred and duties imposed thereunder and the purpose whereof was to enable the various authorities mentioned therein to provide the details to fill up gaps in the Control Orders issued

under Section 3 of the Act so as to ensure the harmonious and rational working of the orders. The High Court, however, being of the opinion that the case involved a substantial question of law relating to the vires of the notification fixing the maximum selling prices of various categories of iron and steel including the commodity in question certified the case as eminently fit for appeal to this Court. This is how the case is before us.

5. At the hearing of the appeal though the learned Counsel for the appellants have reiterated all the contentions raised by them in the aforesaid writ petition, the only substantial question of law which we are concerned with at the present stage is whether the aforesaid notification fixing the maximum selling price of the commodity in question is void for not having been laid before both Houses of Parliament.

7. Section 2 is a glossary of the Act. According to clause (a)(vi) of the said section, iron and steel and manufactured products thereof fall within the ambit of the expression “essential commodity”.

8. Sub-section (1) of Section 3 of the Act confers on the Central Government the general power of making and issuing orders providing for regulating or prohibiting the production, supply and distribution of on essential commodity and trade and commerce therein if it is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing its equitable distribution and availability at fair prices or for securing any essential commodity for the defence of India or the efficient conduct of military operations.

9. Sub-section (2) of Section 3 of the Act specifies the orders which without prejudice to the generality of the powers conferred by sub-section (1) of Section 3 can be issued thereunder.

10. Clause (c) of sub-section (2) of Section 3 of the Act authorises the issue of an order for controlling the price at which any essential commodity may be bought or sold.

11. Sub-section (6) of Section 3 of the Act ordains that every order made under this section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament as soon as may be, after it is made.

12. Section 4 of the Act lays down that an order made under Section 3 may confer powers and impose duties upon the Central Government or the State Government or officers and authorities of the Central Government or State Government and may contain directions to any State Government or to officers and authorities thereof as to the exercise of any such powers or the discharge of any such duties.

13. Section 5 of the Act deals with delegation of powers. It provides that the Central Government may, by notified order, direct that the power to make orders or issue notifications under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by (a) such officer or authority subordinate to the Central Government, or (b) such State Government or such officer or authority subordinate to a State Government, as may be specified in the direction.

14. Section 6 of the Act which embodies a non obstante clause lays down that any order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

15. Section 7 of the Act lays down the penalties which any person contravening any order made under Section 3 shall entail.

16. Section 10 of the Act which deals with offences by the companies provides as follows:

10. (1) If the person contravening an order made under Section 3 is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section,-

(a) “company” means any body corporate, and includes a firm or other association of individuals; and

(b) “director” in relation to a firm means a partner in the firm.

17. We may also at this stage advert to the Control Order which was issued by the Central Government vide S.R.O. 1109/ESS. COMM/IRON AND STEEL dated May 8, 1956 in exercise of the powers conferred on it by Section 3 of the Act. Sub-clause (1) of Clause 15 of this Order authorises the Controller to fix by notification in the Gazette of India the maximum prices at which any iron and steel may be sold (a) by a producer, (b) by a stockholder including a controlled stockholder and (c) any person or class of persons. Sub-clause (3) of Clause 15 of the Control Order which is material for the purpose of the case provides:

15. (3) No producer or stockholder or other person shall sell or offer to sell, and no person shall acquire, any iron or steel at a price exceeding the maximum prices fixed under sub-clause (1) or (2).

18. It was under sub-clause (1) of Clause 15 of the Control Order that the notification in question was issued.

19. Though sub-section (6) of Section 3 of the Act provides that every order made by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament as soon as may be after it is made, the important point to be considered in the absence of analogous statutes like the Statutory Instruments Act, 1946 and the Laying of Documents Before Parliament (Interpretation) Act, 1948 prescribing the conditions, the period and the legal effect of the laying of order before the Parliament is whether the provision is directory or mandatory. It is well to remember at the outset that the use of the word ‘shall’ is not conclusive and decisive of the matter and the Court has to ascertain the true intention of the Legislature, which is the determining factor, and that must be done by looking carefully to the whole scope, nature and design of the statute. Reference in this connection may be made to the decision of this Court in *State of U. P. v. Manbodhan Lal Srivastava* [AIR 1957 SC 912. Reference in this behalf may also be made with advantage to another decision of this Court in the *State of Uttar Pradesh v. Babu Ram Upadhyaya* [AIR

1961 SC 751], where Subba Rao, J. (as he then was) after quoting with approval the passage occurring at pages 516 in Crawford "*On the Construction of Statutes*" as well as the passage occurring at page 242 in '*Craies on Statute Law*', 5th Edition, observed as follows:

The relevant rules of interpretation may be briefly stated thus: When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow there from, and, above all, whether the object of the legislation will be defeated or furthered.

20. Thus two considerations for regarding a provision as directory are: (1) absence of any provision for the contingency of a particular provision not being complied with or followed, and (2) serious general inconvenience and prejudice that would result to the general public if the act of the Government or an instrumentality is declared invalid for non-compliance with the particular provision.

21. Now, the policy and object underlying the provisions relating to laying the delegated legislation made by the subordinate law making authorities or orders passed by subordinate executive instrumentalities before both Houses of Parliament being to keep supervision and control over the aforesaid authorities and instrumentalities, the "laying clauses" assume different terms depending on the degree of control which the Legislature may like to exercise. As evident from the observations made at pages 305 to 307 of the 7th Edition of *Craies on Statute Law* and noticed with approval in *Hukam Chand v. Union of India* [AIR 1972 SC 2427], there are three kinds of laying which are generally used by the Legislature. These Three kinds of laying are described and dealt with in *Craies on Statute Law* as under:

- (i) Laying without further procedure,
- (ii) Laying subject to negative resolution,
- (iii) Laying subject to affirmative resolution.

(i) Simple laying. - The most obvious example is in Section 10(2) of the 1946 Act. In earlier days, before the idea of laying in draft had been introduced, there was a provision for laying rules, etc., for a period during which time they were not in operation and could be thrown out without ever having come into operation (compare Merchant Shipping Act, 1894, Section 417; Inebriates Act, 1898, Section 21) but this is not used now.

(ii) Negative resolution. - Instruments so laid have immediate operative effect but are subject to annulment within forty days without prejudice to a new instrument being made. The phraseology generally used is "subject to annulment in pursuance of a resolution of either House of Parliament". This is by far the commonest form of laying. It acts mostly as a deterrent and sometimes forces a Minister (in Sir Cecil Carr's phrase) to "buy off opposition" by promising some modification.

(iii) Affirmative resolution. - The phraseology here is normally "no order shall be made unless a draft has been laid before Parliament and has been approved by a resolution of each House of Parliament." Normally, no time limit is fixed for obtaining approval - none is necessary

because the Government will naturally take the earliest opportunity of bringing it up for approval - but Section 16(3) of the Housing (Financial and Miscellaneous Provisions) Act, 1946 did impose a limit of forty days. An old form (not much used nowadays) provided for an order to be made but not to become operative until a resolution of both Houses of Parliament had been obtained. This form was used in Section 10(4) of the Road Traffic Act, 1930. The affirmative resolution procedure necessitates a debate in every case. This means that one object of delegation of legislation (viz. saving the time of Parliament) is to some extent defeated. The procedure therefore is sparingly used and is more or less reserved to cases where the order almost amounts to an Act, by effecting changes which approximate to true legislation, or where the order replaces local Acts or provisional orders and, most important of all, where the spending, etc. of public money is affected.

Sometimes where speedy or secret action is required (e.g. the imposition (import duties), the order is laid with immediate operation but has to be confirmed within a certain period [cf. Import Duties Act, 1958, Section 13(4)]. This process of acting first and getting approval after has also been adopted in the Emergency Powers Act, 1920 under which a state of emergency can be proclaimed and regulations made. The proclamation must be immediately communicated to Parliament and does not have effect for longer than a month; but it can be replaced by another proclamation. Any regulations made under the proclamation are to be laid before Parliament immediately and do not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both Houses providing for their continuance.

22. Now at page 317 of the aforesaid Edition of *Craies on Statute Law*, the questions whether the direction to lay the rules before Parliament is mandatory or merely directory and whether laying is a condition precedent to their operation or may be neglected without prejudice to the effect of the rules are answered by saying that "each case must depend on its own circumstances or the wording of the statute under which the rules are made". In the instant case, it would be noticed that sub-section (6) of Section 3 of the Act merely provides that every order made under Section 3 by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made. It does not provide that it shall be subject to the negative or the affirmative resolution by either House of Parliament. It also does not provide that it shall be open to the Parliament to approve or disapprove the order made under Section 3 of the Act. It does not even say that it shall be subject to any modification which either House of Parliament may in its wisdom think it necessary to provide. It does not even specify the period for which the order is to be laid before both Houses of Parliament nor does it provide any penalty for non-observance of or non-compliance with the direction as to the laying of the order before both Houses of Parliament. It would also be noticed that the requirement as to the laying of the order before both Houses of Parliament is not a condition precedent but subsequent to the making of the order. In other words, there is no prohibition to the making of the orders without the approval of both Houses of Parliament. In these circumstances, we are clearly of the view that the requirement as to laying contained in sub-section (6) of Section 3 of the Act falls within the first category, i.e. "simple laying" and is directory not mandatory. We are fortified in this view by a catena of decisions, both English and Indian. In *Bailey v. Williamson* [873 LR VIII QB 118], where by Section 9 of the Parks Regulations Act, 1872

passed on June 27, 1872 “to protect the royal parks from injury, and to protect the public in the enjoyment of those royal parks and other royal possessions for the purpose of innocent recreation and exercise” it was provided that any rules made in pursuance of the first schedule to the Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved by either House of Parliament within one month of the laying, such rules, or such parts thereof as shall be disapproved shall not be enforced and rules for Hyde Park were made and published on September 30, 1872 when Parliament was not sitting and in November 18, 1872, the appellant was convicted under Section 4 of the Act for that he did unlawfully act in contravention of Regulation 8 contained in the first Schedule annexed thereto by delivering a public address not in accordance with the rules of the said Park but contrary to the Statute, and it was inter alia contended on his behalf that in the absence of distinct words in the statute stating that the rules would be operative in the interval from the time they were made to the time when Parliament should meet next or if Parliament was sitting then during the month during which Parliament had an opportunity of expressing its opinion upon them, no rule made as supplementing the schedule could be operative so as to render a person liable to be convicted for infraction thereof unless the same had been laid before the Parliament, it was held by overruling the contention that the rules became effective from the time they were made and it could not be the intention of the Legislature that the laying of the rules before Parliament should be made a condition precedent to their acquiring validity and that they should not take effect until they are laid before and approved by Parliament. If the Legislature had intended the same thing as in Section 4, that the rules should not take effect until they had the sanction of the Parliament, it would have expressly said so by employing negative language.

24. In *Jan Mohammad Now Mohammad Bagban v. State of Gujarat* [AIR 1966 SC 385], where it was urged by the petitioner that the rules framed by the Provincial Government in 1941 in exercise of the powers conferred on it under Section 26(1) of the Bombay Agricultural Produce Markets Act (22 of 1939) had no legal validity as they were not laid before each of the Houses of the Provincial Legislature at the session thereof next following as provided by sub-section (5) of Section 26 of the Act, this Court rejected the contention and upheld the validity of the said rules. The following observations made in that case by Shah. J. (as he then was) on behalf of the Constitution Bench are apposite:

The rules under Act 22 of 1939 were framed by the Provincial Government of Bombay in 1941. At that time there was no Legislature in session, the Legislature having been suspended during the emergency arising out of World War II. The session of the Bombay Legislative Assembly was convened for the first time after 1941 on May 20, 1946 and that session was prorogued on May 24, 1946. The second session of the Bombay Legislative Assembly was convened on July 15, 1946 and that of the Bombay Legislative Council on September 3, 1946 and the rules were placed on the Assembly Table in the second session before the Legislative Assembly on September 2, 1946 and before the Legislative Council on September 13, 1946. Section 26(5) of Bombay Act 22 of 1939 does not prescribe that the rules acquired validity only from the date on which they were placed before the Houses of Legislature. The rules are valid from the date on which they are made under Section 26(1). It is true that the Legislature has prescribed that the rules shall be placed before the Houses of Legislature, but failure to

place the rules before the Houses of Legislature does not affect the validity of the rules, merely because they have *not* been placed before the Houses of the Legislature. Granting that the provisions of sub-section (5) of Section 26 by reason of the failure to place the rules before the Houses of Legislature were violated, we are of the view that sub-section (5) of Section 26 having regard to the purposes for which it is made, and in the context in which it occurs, cannot be regarded as mandatory. (*Emphasis supplied.*) The rules have been in operation since the year 1941 and by virtue of Section 64 of the Gujarat Act 20 of 1964 they continue to remain in operation.

25. In *D. K. Krishnan v. Secretary, Regional Transport Authority, Chittoor* [AIR 1956 AP 129], where the validity of Rule 134A of the Madras Motor Vehicles Rules, 1940, made under the Motor Vehicles Act, 1939 empowering the Regional Transport Authority to delegate its functions to the Secretary was challenged on the ground that it was not laid before the Legislature of the Madras State as required, by Section 133(3) of the Act which provided that the rules, shall be laid for not less than fourteen days before the Legislature as soon as possible after they are made and shall be subject to such modification as Parliament or such Legislature may make during the session in which they are so laid, Subba Rao, J. (as he then was) after an exhaustive review of the case law and the text books on constitutional law by eminent jurists repelled the contention.

26. In *State v. Karna* [(1973) 24 RLW 487], where the very question with which we are concerned in the present case cropped up in connection with the Rajasthan Food grains (Restrictions on Border Movement) Order, 1959, a bench of Rajasthan High Court said as follows:

It is important to note that laying the Order before both the Houses of Parliament is not a condition precedent for bringing into force the Order, all that sub-section (6) provides is that every Order made under Section 3 of the Essential Commodities Act by the Central Government or by any officer or authority of the Central Government shall be laid before both the Houses of Parliament, as soon as may be, after it is made. It is significant that the Order is valid and effective from the date it is duly promulgated. Even the limit or period within which it must be placed before the Parliament has not been specified. It is, therefore, not possible to hold that sub-section (6) of Section 3 of the Essential Commodities Act is mandatory. If the Legislature intended that in order to provide an adequate safeguard it was necessary to make the said provision mandatory it could have done so in express words. We are, therefore, of the opinion that the Order cannot be considered as invalid merely because the State was not able to put on record proof of the fact that the Order was laid before both the Houses of Parliament.

27. In *Mathura Prasad Yadava v. Inspector General, Railway Protection Force, Railway Board, New Delhi* [(1974) 19 MPLJ 373], where it was contended that Regulation 14 of the Railway Protection Force Regulations, 1966 made under Section 21 of the Railway Protection Force Act (23 of 1957) was invalid as it was not laid before both Houses of Parliament as required by sub-section (3) of Section 21 of the Act, it was held:

What then is the consequence of failure to lay the regulation?.... A correct construction of any particular laying clause depends upon its own terms. If a laying clause defers the coming into force of the rules until they are laid, the rules do not come into force before laying and the requirement of laying is obligatory to make the rule operative so the requirement of laying in

a laying clause which requires an affirmative procedure will be held to be mandatory for making the rules operative, because, in such cases the rules do not come into force until they are approved, whether with or without modification, by Parliament. But in case of a laying clause which requires a negative procedure, the coming into force of the rules is not deferred and the rules come into force immediately they are made. The effect of a laying clause of this variety is that the rules continue subject to any modification that Parliament may choose to make when they are laid; but the rules remain operative until they are so modified. Laying clauses requiring a negative procedure are, therefore, construed as directory. The matter is put beyond controversy by the decision of the Supreme Court in *Jan Mohd. v. State of Gujarat*. Our conclusion, therefore, is that the laying requirement enacted in Section 21(3) of the Act is merely directory: It logically follows that failure to lay Regulation 14 has no effect on its validity and it continues to be effective and operative from the date it was made.

30. The decision of this Court in *Narendra Kumar v. Union of India* [AIR 1960 SC 430], on which counsel for the appellants have heavily leaned is clearly distinguishable. In that case, the Non-ferrous Metal Control Order, 1958 was held to be invalid essentially on the ground that the principles specified by the Central Government in accordance with Clause 4 of the Order were not published either on April 2, 1958 on which the order was published in the Government Gazette or any other date. It would be noticed that while considering the effect of non-publication of the aforesaid principles which formed an integral part of the order by which alone the Central Government could regulate the distribution and supply of the essential commodities, it was only incidentally that a mention was made by the Court to the effect that the principles had not been laid before both Houses of Parliament.

32. From the foregoing discussion, it inevitably follows that the Legislature never intended that non-compliance with the requirement of laying as envisaged by sub-section (6) of Section 3 of the Act should render the order void. Consequently non-laying of the aforesaid notification fixing the maximum selling prices of various categories of iron and steel including the commodity in question before both Houses of Parliament cannot result in nullification of the notification. Accordingly, we answer the aforesaid question in the negative. In view of this answer, it is not necessary to deal with the other contention raised by the respondent to the effect that the aforesaid notification being of a subsidiary character, it was not necessary to lay it before both Houses of Parliament to make it valid.

33. In the result, the appeal fails and is dismissed.

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ADMINISTRATIVE DISCRETION
Dwarka Prasad Laxmi Narain v. State of U. P.
1954 SCR 803 : AIR 1954 SC 224
[Arbitrariness/ unreasonableness]

(The Uttar Pradesh Coal Control Order, 1953:

2. In this Order unless there is anything repugnant in the subject or context

(a) 'Coal' includes coke but does not include cinder and ashes.

(c) "The *Licensing Authority*" means the District Magistrate of the District or *any other officer authorised by him* to perform his functions under this Order and includes the District Supply Officer of the district.

(d) 'Licensee' means a person holding a license under the provisions of this Order in Form 'A' or in Form 'B'.

3. (1) *No person shall stock, sell, store for sale or utilise coal for burning bricks or shall otherwise dispose of coal in this State except under a license in Form 'A' or 'B' granted under this Order or in accordance with the provisions of this Order.*

(2) Nothing contained in sub-clause (1) -

(a) shall insofar as it relates to taking out a license for stocking or storing coal for their own consumption, apply to the stocks held by persons or undertakings obtaining coal on permits of the District Magistrate or the State Coal Controller for their own consumption.

(b) shall apply to any person or class of persons exempted from any provision of the above sub-clause by the State Coal Controller, to the extent of their exemption.

4.(1) Every application for license under this Order shall be made in the form given in Schedule I appended to this Order.

(2) A license granted under this Order shall be in Form 'A' or Form 'B' appended to this Order and the holder of a license granted under this Order shall comply with any directions that may be issued to him by the Licensing Authority in regard to the purchase, sale, storage or distribution of coal.

(3) The Licensing Authority may grant, refuse to grant, renew or refuse to renew a license and may suspend, cancel, revoke or modify any license or any terms thereof granted by him under the Order for reasons to be recorded provided that every power which is under this Order exercisable by the Licensing Authority shall also be exercisable by the State Coal Controller or any person authorised by him in this behalf.

7. The State Coal Controller may by written order likewise require any person holding stock of coal to sell the whole or any part of the stock to such person or class of persons and on such terms and prices as may be determined in accordance with the provisions of clause (8).

8. (1) No licensee in Form 'B' and no person acting on his behalf shall sell, agree to sell or offer for sale, coal at a price exceeding the price to be declared by the Licensing Authority in accordance with the formula given in Schedule III.

(2) A licensee in Form 'A' or any other person holding stock of coal or any other person acting for or on behalf of such licensees or person transferring or disposing of such stocks to any person in accordance with clause 6 or clause 7 shall not charge for the coal a price exceeding the landed cost, plus incidental and handling charges, plus an amount not exceeding 10 per cent of the landed cost as may be determined by the Licensing Authority or the State Coal Controller.

Explanation.- (1) Landed cost means the ex-colliery price of the coal plus the L.D.C.C. and Bihar sales tax plus middleman's commission actually paid and railway freight.

Incidental and handling charges mean the cost of unloading from wagons, transporting to stacking site, unloading at the stacking site, plus go down rent, plus choudidari charges, if any, not exceeding Rs 8-8-0 per ton as may be determined by the Licensing Authority or the State Coal Controller according to local conditions.

11. The District Magistrate shall within a week of the commencement of this Order prepare and publish in a local paper a list of persons carrying on the business of sale of coal in his district and upon the publication of the list, the persons included therein will be deemed for purposes of this Order to be licensee until three months next following the publication of the list in Form A or B as may be specified.

12. If any person contravenes any of the provisions of this Order, or the conditions of license granted thereunder, he shall be punishable under Section 7 of the Essential Supplies (Temporary Powers) Act, 1946, with imprisonment for a term which may extend to three years or with fine or with both and without prejudice to any other punishment to which he may be liable”

Schedule III referred to in the Order is as follows:

SCHEDULE III

(Formula for declaration of prices of soft coke/hardcoke/steam coal).

1.	Ex-colliery price	Actuals.
2.	L.D.C.C. and Bihar Sales Tax	Actuals.
3.	Middleman's commission	Actually paid subject to the maximum laid down under clause 6 of the Government of India Colliery Control Order, 1945.
4.	Railway freight	Actuals.
5.	Incidental and handling charges including (i) Unloading from wagons (ii) Transport up to premises of stacking (iii) Unloading and stacking at the premises or (iv) Godown rent and chaukidari charges, if any.	Maximum of Rs 8/8 per ton as may be determined by the Licensing Authority according to local conditions, provided that at places which are depot. extraordinarily (v) distant from the railway head a higher rate may be allowed by the Licensing Authority.
6.	Local taxes Octroi, etc.	Actuals.
7.	Shortage	Not exceeding 3½ maunds per ton in the case of soft coke and 2 ½ maunds in the case of hard coke and steam coal as may be determined by the Licensing Authority.
8.	Profit	At 10 per cent on total Items 1 to 6 above except Item 5.

The petitioners were a firm of traders carrying on the business of retail sellers of coal at a coal depot held by them in the town of Kanpur. The District Magistrate of Kanpur as well as the District Supply Officer had been for a considerable time past issuing directives upon the petitioners as well as other coal depot holders of the town, imposing restrictions of various kinds upon the sale of coal, soft coke, etc. Prior to the 14th of February, 1953, the prices that were fixed by the District Officers left the coal dealers a margin of 20 per cent profit upon the sale of soft coke and 15 per cent profit on the sales of hard coke and steam coal, such profits being allowed on the landed costs of the goods up to the depot. The landed costs comprised several items and besides ex-colliery price, the middleman's commission and the railway freight, there were incidental expenses of various kinds including labour duty, loading and unloading charges, cartage and stacking expenses. After making a total of these cost elements, an allowance was given for shortage of weight at the rate of 5 Mds. and odd seers per ton in the case of soft coke and 3 Mds. and odd seers in the case of hard coke and steam coal, and it was on the basis of the net weight thus arrived at that the price was calculated. On the 14th of February, 1953, the District Supply Officer issued a directive reducing the selling prices of coke, coal, etc., much below the existing rates. This reduction was effected in a three-fold manner. In the first place, the allowance for shortage of weight was made much less than before; secondly, a sum of Rs 4-12-0 only was allowed for all the incidental expenses, and thirdly, the margin of profit was cut down to 10 per cent. On the 22nd of May, 1953, a representative petition was filed by seven colliery depot holders of Kanpur including the present petitioners challenging the validity of the executive order, dated the 14th of February, 1953, mentioned above inter alia on the ground that it infringed the fundamental rights of the petitioners under Articles 14 and 19 of the Constitution. There was an application for ad interim stay in connection with this petition which came up for hearing before the learned Vacation Judge of this court on the 1st of July, 1953. On that day an undertaking was given by the State of Uttar Pradesh to the effect that they would withdraw the order of the 14th February, 1953, and apparently the consideration that weighed with the State in giving this undertaking was that it was a purely executive order without any legislative sanction behind it. The order of the 14th February was in fact withdrawn, but on the 10th of July, 1953, the State of Uttar Pradesh promulgated by a notification an order entitled "The Uttar Pradesh Coal Control Order, 1953" purporting to act in exercise of the powers conferred upon it by Section 3(2) of the Essential Supplies Act, 1946, read with the notified order of the Government of India issued under Section 4 of the Act. As the constitutionality of this Coal Control Order is the main object of attack by the petitioners in the present proceeding, it would be convenient to set out the material provisions of that order in respect of which the controversy between parties primarily centers:

On 16th July, 1953, Respondent issued a declaration whereby he fixed the retail rates for the sale of soft coke, coal, etc. at precisely the same figures as they stood in the directive issued on 14th February, 1953. The result allegedly was that the selling prices were reduced so much that it was not possible for the coal traders to carry on their business at all. In accordance with the provision of clause 11 of the Control Order, the petitioners' name appeared in the list B of license-holders and they did apply for a license in the proper form as required by clause (4). The license was prepared, though not actually delivered over to the petitioners. By a letter dated the 3rd of October, 1953, the Area Rationing Officer, Kanpur,

accused the petitioners of committing a number of irregularities in connection with the carrying on of the coal depot. The charges mainly were that there were two other depots held and financed by the petitioners themselves in the names of different persons and that the petitioners had entered into agreements for sale of coal at more than the fixed rates. The petitioners submitted an explanation which was not considered to be satisfactory and by an order dated 13th October, 1953, the District Supply Officer, Kanpur, cancelled the petitioners' license. The petitioners challenged the validity of the Coal Control Order of the 10th of July, 1953, the declaration of prices made on 16th July and also the order cancelling the petitioners' license on the 13th of October, 1953.

B.K. MUKHERJEA, J. - This is an application presented by the petitioners under Article 32 of the Constitution, complaining of infraction of their fundamental rights guaranteed under Article 14 and clauses (f) and (g) of Article 19(1) of the Constitution and praying for enforcement of the same by issue of writs in the nature of mandamus.

5. The constitutional validity of the Uttar Pradesh Coal Control Order has been assailed before us substantially on the ground that its provisions vest an unfettered and unguided discretion in the licensing authority or the State Coal Controller in the matter of granting or revoking licenses, in fixing prices of coal and imposing conditions upon the traders; and these arbitrary powers cannot only be exercised by the officers themselves but may be delegated at their option to any person they like. It is argued that these provisions imposing as they do unreasonable restrictions upon the right of the petitioners to carry on their trade and business conflict with their fundamental rights under Article 19(1)(g) of the Constitution and are hence void. With regard to the order dated the 16th of July, 1953, by which the prices of coke, coal, etc. were fixed, it is pointed out that it was not only made in exercise of the arbitrary power conferred upon the licensing authority by the Coal Control Order, but the prices as fixed, are palpably discriminatory as would appear from comparing them with the prices fixed under the very same Control Order in other places within the State of Uttar Pradesh like Allahabad, Lucknow and Aligarh. The order of the 13th October, 1953, cancelling the petitioners' license is challenged on the ground that the charges made against the petitioners were vague and indefinite and that the order was made with the ulterior object of driving the petitioners out of the coal business altogether. It is said further that as a result of the cancellation order, the petitioners have been made incapable of disposing of the stocks already in their possession, though at the same time the holding of such stock after the cancellation of their license has become an offence under the Coal Control Order.

6. It is not disputed before us that coal is an essential commodity under the Essential Supplies (Temporary Powers) Act of 1946, and by virtue of the delegation of powers by the Central Government to the Provincial Government under Section 4 of the Act, the Uttar Pradesh Government was competent to make provisions, by notified order, for regulating the supply and distribution of coal in such a way as they considered proper with a view to secure the objects as specified in Section 3 of the Act. All that is necessary is that these provisions should not infringe the fundamental rights of the citizens guaranteed under Part III of the Constitution and if they impose restrictions upon the carrying on of trade or business, they must be reasonable restrictions imposed in the interests of the general public as laid down in Article 19(6) of the Constitution.

7. Nobody can dispute that for ensuring equitable distribution of commodities considered essential to the community and their availability at fair prices, it is quite a reasonable thing to regulate sale of these commodities through licensed vendors to whom quotas are allotted in specified quantities and who are not permitted to sell them beyond the prices that are fixed by the controlling authorities. The power of granting or withholding licenses or of fixing the prices of the goods would necessarily have to be vested in certain public officers or bodies and they would certainly have to be left with some amount of discretion in these matters. So far no exception can be taken; but the mischief arises when the power conferred on such officers is an arbitrary power unregulated by any rule or principle and it is left entirely to the discretion of particular persons to do anything they like without any check or control by any higher authority. A law or order, which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable. As has been held by this court in *Chintaman v. The State of Madhya Pradesh* [1950 SCR 759], the phrase “reasonable restriction” connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in reasonableness. It is in the light of these principles that we would proceed to examine the provisions of this Control Order, the validity of which has been impugned before us on behalf of the petitioners.

8. The provision contained in clause 3(1) of the Order that “no person shall stock, sell, store for sale or otherwise utilise or dispose of coal except under a license granted under this Order” is quite unexceptional as a general provision; in fact, that is the primary object which the Control Order is intended to serve. There are two exceptions engrafted upon this general rule: the first is laid down in sub-clause (2)(a) and to that no objection has been or can be taken. The second exception, which is embodied in sub-clause (2)(b) has been objected to by the learned counsel appearing for the petitioners. This exception provides that nothing in clause 3(1) shall apply to any person or class of persons exempted from any provision of the above sub-clause by the State Coal Controller, to the extent of such exemption. It will be seen that the Control Order nowhere indicates what the grounds for exemption are, nor have any rules been framed on this point. An unrestricted power has been given to the State Controller to make exemptions, and even if he acts arbitrarily or from improper motives, there is no check over it and no way of obtaining redress. Clause 3(2)(b) of the Control Order seems to us, therefore, prima facie to be unreasonable. We agree, however, with Mr Umrigar that this portion of the Control Order, even though bad, is severable from the rest and we are not really concerned with the validity or otherwise of this provision in the present case as no action taken under it is the subject-matter of any complaint before us.

9. The more formidable objection has been taken on behalf of the petitioners against clause 4(3) of the Control Order which relates to the granting and refusing of licenses. The licensing authority has been given absolute power to grant or refuse to grant, renew or refuse to renew, suspend, revoke, cancel or modify any license under this Order and the only thing he has to do is to record reasons for the action he takes. Not only so, the power could be exercised by

any person to whom the State Coal Controller may choose to delegate the same, and the choice can be made in favour of any and every person. It seems to us that such provision cannot be held to be reasonable. No rules have been framed and no directions given on these matters to regulate or guide the discretion of the licensing officer. Practically the Order commits to the unrestrained will of a single individual the power to grant, withhold or cancel licenses in any way he chooses and there is nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same. Mr Umrigar contends that a sufficient safeguard has been provided against any abuse of power by reason of the fact that the licensing authority has got to record reasons for what he does. This safeguard, in our opinion, is hardly effective; for there is no higher authority prescribed in the Order who could examine the propriety of these reasons and revise or review the decision of the subordinate officer. The reasons, therefore, which are required to be recorded are only for the personal or subjective satisfaction of the licensing authority and not for furnishing any remedy to the aggrieved person. It was pointed out and with perfect propriety by Mr Justice Matthews in the well-known American case of *Yick Wo v. Hopkins*, 118 US 356 at 373, that the action or non-action of officers placed in such position may proceed from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives which are easy of concealment and difficult to be detected and exposed, and consequently the injustice capable of being wrought under cover of such unrestricted power becomes apparent to every man, without the necessity of detailed investigation. In our opinion, the provision of clause 4(3) of the Uttar Pradesh Coal Control Order must be held to be void as imposing an unreasonable restriction upon the freedom of trade and business guaranteed under Article 19(1)(g) of the Constitution and not coming within the protection afforded by clause (6) of the article.

10. As this provision forms an integral part of the entire structure of the Uttar Pradesh Coal Control Order, the order cannot operate properly unless the provision of clause 4(3) is brought in conformity with the constitutional requirements indicated above. The license of the petitioners having been cancelled in pursuance with the above clause of the Control Order, the cancellation itself should be held to be ineffective and it is not necessary for us to enquire further whether or not the grounds upon which the licensing authority purported to act were vague or indefinite or could constitute proper grounds for cancellation.

11. The two other clauses of the Control Order to which exception has been taken on behalf of the petitioners are clauses (7) and (8). Clause (7) empowers the State Coal Controller to direct, by written order, any person holding stock of coal to sell the whole or any part of the stock to such person or class of persons and on such terms and prices as may be determined in accordance with the provision of clause (8). Clause 8(1) provides that no licensee in Form 'B' shall sell or agree to sell coal at a price exceeding the price to be declared by the licensing authority in accordance with the formula given in Schedule III. With regard to both these clauses, the contention of the petitioners' counsel, in substance, is that the formula for determining the price, as laid down in Schedule III, is per se unreasonable as it is made dependent on the exercise of an unfettered and uncontrolled discretion by the licensing authority. An unfair determination of the price by the licensing authority, it is argued, would be totally destructive of the business of the coal traders and the grievance of the petitioners is

that that is exactly what has been done by the declaration of prices made on the 16th of July, 1953.

12. We have examined the formula given in Schedule III to the Control Order with some care and on the materials that have been actually placed before us, we are not in a position to say that the formula is unreasonable. The prices, as said already, are calculated on the basis of the landed costs of coke and coal up to the depot, to which a profit of 10 per cent is added. The landed costs comprise seven items in all which are enumerated in Schedule III. With regard to Items 1, 2, 3, 4 and 6 of the Schedule the actual costs are taken into account and to that no objection can possibly be taken. The entire dispute is with regard to incidental charges specified in Item 5 and the allowance for shortage which forms Item 7. So far as incidental charges are concerned, the Schedule allows a maximum of Rs 8/8 per ton to be determined by the licensing authority according to local conditions. The rates undoubtedly vary according to local conditions and some amount of discretion must have to be left in such cases to the local authorities. The discretion given to the licensing authority in fixing these rates is, however, not an unlimited discretion, but has got to be exercised with reference to the condition prevalent in the locality with which the local officers must be presumed to be familiar. The grievance of the petitioners is that in the declaration of 16th of July, 1953, the licensing authority allowed incidental charges only at the rate of Rs 4/12/- per ton and that is grossly unfair. It is pointed out that at Lucknow, Aligarh, Allahabad and other places much higher rates were allowed, though the local conditions of these places are almost identical; and there has been consequently discrimination in this respect which makes the declaration void altogether. The statements that have been made by the petitioners in this connection are not supported by any affidavit of any person who is familiar with the local conditions in the other places and on the materials that we have got here we are unable to say that the rates fixed by the licensing authority of Kanpur are really discriminatory. It is certainly not open to us to substitute our own determination in the matter of fixing the prices for that of the licensing authority and provided we are satisfied that the discretion that has been vested in a public officer is not an uncontrolled discretion and no unfair discrimination has resulted from the exercise of it, we cannot possibly strike down as illegal any order or declaration made by such officer.

13. The same reasons apply, in our opinion, to the seventh item of Schedule III which relates to allowances for shortage of weight. Here also the Control Order specifies a maximum and the determination of the allowance in particular cases have been left to the discretion of the licensing authority. We are not satisfied from the materials placed before us that this provision is unfair or discriminatory. The formula allows a profit of 10 per cent upon the cost items with the exception of Item 5 which relates to incidental charges. We do not know why this item has been omitted and Mr Umrigar, appearing for the respondents, could not suggest any possible reason for it. But even then, the result of this omission would only be to lower the margin of profit a little below 10 per cent and nothing more. If the other traders in the locality are willing to carry on business in coal with that amount of profit, as is stated on the affidavits of the respondents, such fixation of profit would undoubtedly be in the interests of the public and cannot be held to be unreasonable. The counsel for the petitioners is not right in his contention that the Control Order has only fixed the maximum profit at 10 per cent and has left it to the discretion of the licensing authority to reduce it in any way he likes. Schedule

III fixes the profit at 10 per cent upon the landed costs with the exception of Item 5 and as this is not the maximum, it would have to be allowed in all cases and under clause 8(1), the 'B' licensees are to sell their stocks of coal according to the prices fixed under Schedule III. Clause 8(2) indeed is not very clearly worded, but we think that all that it provides is to impose a disability upon all holders of coal stocks to charge prices exceeding the landed costs and a profit upon the same not above 10 per cent as may be determined by the licensing authority. The determination spoken of here must be in accordance with what is laid down in Schedule III and that, as has been said above, does specify a fixed rate and not a maximum and does not allow the licensing authority to make any reduction he likes. On the whole we are of the opinion that clauses (7) and (8) of the Control Order do not impose unreasonable restrictions upon the freedom of trade enjoyed by the petitioners and consequently the declaration of the 16th of July, 1953, cannot be held to be invalid. The result is that, in our opinion, clause 4(3) of the Control Order as well as the cancellation of the petitioners' license should be held to be invalid and a writ in the nature of mandamus would issue against the respondents opposite parties preventing them from enforcing the cancellation order. The rest of the prayers of the petitioners are disallowed. We make no order as to costs.

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A.N. Parasuraman v. State of Tamil Nadu
(1989) 4 SCC 683 : AIR 1990 SC 40

[Conferment of unguided power not permissible]

Section 3 of Tamil Nadu Private Educational Institutions (Regulation) Act, 1966 mandatorily required a private educational institution to obtain the permission of the competent authority for the purpose of running it. Section 4 of the Act required the manager of a private educational institution to make an application for permission in the prescribed form.

“4. Application for permission - (2) Every such application shall -

(c) contain the following particulars, namely:

- (i) the name of the private educational institution and the name and address of the manager;
- (ii) the certificate, degree or diploma for which such private educational institution prepares, trains or guides or proposes to prepare, train or guide its students or the certificate, degree or diploma which it grants or confers or proposes to grant or confer;
- (iii) the amenities available or proposed to be made available to students;
- (iv) the names of the members of the teaching staff and the educational qualifications of each such member;
- (v) the equipment, laboratory, library and other facilities for instructions;
- (vi) the number of students in the private educational institution and the groups into which they are divided;
- (vii) the scales of fees payable by the students;
- (viii) the sources of income to ensure the financial stability of the private educational institution;
- (ix) the situation and the description of the buildings in which such private educational institution is being run or is proposed to be prescribed;
- (x) such other particulars as may be prescribed.”

“6. Grant of permission - On receipt of an application under Section 4 the competent authority may grant or refuse to grant the permission after taking into consideration, the particulars contained in such application:

Provided that the permission shall not be refused under this section unless the applicant has been given an opportunity of making his representation:

Provided further that in case of refusal of permission the applicant shall be entitled to refund of one-half of the amount of the fee accompanying the application”

The competent authority was empowered under Section 7 to cancel the permission in certain circumstances. One of the conditions for exercise of power was contravention of any direction issued by the competent authority under Section 15. The power to exempt any institution from the provisions of the Act was vested in the State Government under Section 22, which read:

“22. Power to exempt - Notwithstanding anything contained in this Act, the government may, subject to such conditions as they deem fit, by notification exempt any private educational institution or class of private educational institutions from all or any of the provisions of this Act or from any rule made under this Act.”

L.M. SHARMA, J. - The question involved in these appeals relates to the vires of the Tamil Nadu Private Educational Institutions (Regulation) Act, 1966, hereinafter referred to as ‘the Act’. The appellants are interested in running educational institutions, which are covered by

the expression “private educational institution” within the ‘meaning of Section 2(f) of the Act. The main challenge is directed against Sections 2(c), 3(a), 3(b), 6, 7 read with Sections 15, 22 and 28. The High Court struck down Section 28 and upheld the other sections. That part of the judgment where Section 28 has been declared to be invalid has not been impugned by the respondent-State.

3. The Act is impugned on the ground that it does not lay down any guideline for the exercise of the power by the delegated authority, as a result of which the authority is in a position to act according to his whims. The Act having failed to indicate the conditions for exercise of power, the decision of the competent authority is bound to be discriminatory and arbitrary. It has also been argued that the restrictions put by the Act on the appellants, who are running tutorial institutions are unreasonable and cannot be justified under sub-clause (g) of Article 19(1) of the Constitution.

4. The learned counsel appearing for the respondent has attempted to defend the Act on the ground that sufficient guidance is available to the authority concerned from sub-section (2)(c) of Section 4 which enumerates the particulars required to be supplied in the application for permission. They are 10 in number.

5. The point dealing with legislative delegation has been considered in numerous cases of this Court, and it is not necessary to discuss this aspect at length. It is well established that determination of legislative policy and formulation of rule of conduct are essential legislative functions which cannot be delegated. What is permissible is to leave to the delegated authority the task of implementing the object of the Act after the legislature lays down adequate guidelines for the exercise of power. When examined in this light the impugned provisions miserably fail to come to the required standard.

6. The purpose of the Act is said to regulate the private educational institutions but does not give, any idea as to the manner in which the control over the institutions can be exercised. The Preamble which describes the Act “for regulation” is not helpful at all. Learned counsel for the State said that the Object and the Reasons for the Act are to eradicate corrupt practices in private educational institutions. The expression “private educational institution” has been defined as meaning any college, school or other institution “established and run with the object of preparing, training or guiding its students for any certificate, degree or diploma”, and it can, therefore, be readily inferred that the purpose of the Act is to see that such institutions do not exploit the students; and while they impart training and guidance to the students of a standard which may effectively improve their knowledge so as to do well at the examination, they do not charge exorbitantly for their services. But the question is as to how this objective can be achieved. Section 6 which empowers the competent authority to grant or refuse to grant the permission for establishing and running an institution does not give any idea as to the conditions which it has to fulfill before it can apply for permission under the Act, nor are the tests indicated for refusing permission or cancelling under Section 1 of an already granted permission. The authority concerned has been left with unrestricted and unguided discretion which renders the provisions unfair and discriminatory.

7. It was argued on behalf of the State that since an application for permission has to supply the particulars as detailed in Section 4(2)(c) (quoted above in paragraph 4), the Act must be deemed to have given adequate guidelines. Special emphasis was given by the learned counsel on the sub-clauses (iii), (iv) and (v) of Section 4(2)(c), which ask for information

about the amenities for the students - the equipment, laboratory, library and other facilities for instruction - and, the names of the teachers with their qualifications. It may be noted that the Act, beyond requiring the applicant to make a factual statement about these matters, does not direct the institution to make provisions for them (or for any or some of them) as condition for grant of permission. The maintenance of any particular standard of these heads are not in contemplation at all, although certain other aspects, not so important, have been dealt with differently in several other sections including Sections 4, 5, 9, 10 and 11. Section 4(2)(b) mandatorily requires the applicant to pay the “prescribed” fee; Section 5 gives precise direction regarding the name by which the institution is to be called; and Section 9 about the certificates to be issued by it; and Section 11 makes it obligatory to maintain accounts in the “prescribed” manner. But, there is no indication, whatsoever, about the legislative policy or the accepted rule of conduct on the vital issue about the maintenance of academic standard of the institution and the other requirements relating to the building, library and necessary amenities for the students, as the Act is absolutely silent about the criteria to be adopted by the prescribed authority for granting or refusing permission. The rules which were made under Section 27 in 1968 and called the Tamil Nadu Private Educational Institutions (Regulation) Rules, 1968, are not called upon to lay down any norm on these issues and naturally do not make any reference to these aspects. The result is that the power to grant or refuse permission is to be exercised according to the whims of the authority and it may differ from person to person holding the office. The danger of arbitrariness is enhanced by the unrestricted and unguided discretion vested in the State Government in the choice of “competent authority” defined in Section 2(c) in the following words:

“(c) “*competent authority*” means any person, officer or other authority authorised by the government, by notification, to perform the functions of the competent authority under this Act for such area or in relation to such class of private educational institutions, as may be specified in the notification;”

The only safeguard given to the applicant institution is to be found in the first proviso to Section 6 which says that the permission shall not be refused unless the applicant has been given an opportunity of making his representation, but that does not by itself protect the applicant from discriminatory treatment. So far Section 7 dealing with power to cancel the permission granted earlier is concerned, no objection can be taken to the first part of the section, where under the permission may be cancelled in case of fraud, misrepresentation, suppression of material particulars or contravention of any provision of the Act or the Rules. But the other ground on which the authority can exercise its power being contravention “of any direction issued by the competent authority under this Act” again suffers from the vice of arbitrariness. Section 15, the relevant section in this regard, states that “the competent authority may, from time to time issue such directions regarding the management of a private educational institution as *it may think fit*” (emphasis added). The section is too wide in terms without indicating the nature of such direction or the extent within which the authority should confine itself while exercising the power. Similar is the situation in the matter of exemption from the Act. The power to grant exemption is contained in Section 22, quoted in paragraph 2 above.

8. The provisions of the Act indicate that the State Government has been vested with unrestricted discretion in the matter of the choice of the competent authority under Section

2(c) as also in picking and choosing the institutions for exemption from the Act under Section 22.

9. The learned counsel for the respondent-State contended that by reference in Section 4 to the particulars to be supplied in the application for permission, it can be easily imagined that the competent authority has to take into account all that may be validly relevant for the grant or refusal of permission. We are afraid; the section cannot be saved by recourse to this argument in absence of any helpful guidance from the Act.

10. For the reasons mentioned above, the impugned sections of the Act must be held to be invalid. These provisions are inextricably bound up with the other parts of the Act so as to form part of a single scheme, and it is not possible to sever the other parts of the Act and save them. In the result, the entire Act is declared ultra vires. The appeal is accordingly allowed, but, in the circumstances, without costs.

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J. R. Raghupathy v. State of A. P., AIR 1988 SC 1681.
AIR 1988 SC 1681; 1988 (4) SCC 364

[No powers to the Judiciary to issue writs when there is nothing on record to show that the decision of the Government was arbitrary or capricious or was one not reached in good faith or actuated with improper considerations or influenced by extraneous considerations.]

Sen, J. – These appeals by special leave and the connected special leave petitions directed against the various judgments and orders of the Andhra Pradesh High Court involve a question of principle, and relate to location of Mandal Headquarters in the State of Andhra Pradesh under s. 3(5) of the Andhra Pradesh Districts (Formation) Act, 1974. The main issue involved is whether location of Mandal Headquarters was a purely governmental function and therefore not amenable to the writ jurisdiction of the High Court under Art. 226 of the Constitution. In the present cases we are concerned with the location of 12 Revenue Mandal Headquarters.

The avowed object and purpose of the Andhra Pradesh District (Formation) Act, 1974, as amended by the Andhra Pradesh District (Formation) Amendment Act, 1985 as reflected in the long title, was to bring about a change in the Revenue Administration with a view to ‘bring the administration nearer to the people and to make all public services easily available to them’. The change in the Revenue Administration was so achieved by the creation of Revenue Mandals in place of taluks and firkas. The purpose of the legislation is brought out in the Statement of Objects and Reasons, a relevant portion whereof is as under:

“On a careful review of the socio-economic development of the State for the last 20 years the State Government felt it necessary to take the administration nearer to the people. It was of the opinion that the only method to be adopted by the Government for a better Revenue Administration and to serve the interests of the people in a more effective and suitable manner was by formation of the Mandals in place of taluks and firkas. It was of the view that a decentralisation of administration and reduction in its levels would be conducive to a more efficient implementation of administration which brings the involvement of the people, particularly in the implementation of several welfare measures of the Government, and especially to uplift the conditions of the weaker sections of the society. It also felt that there was urgent necessity to review its activities and services and welfare programmes and that they should be extended to the interior regions and that the creation of Mandals with a population ranging from 35,000 to 55,000 based upon density of population would be an effective method for providing better facilities to the people at lesser cost and greater convenience. The avowed object was therefore to ‘bring the administration nearer to the people and to make all public services easily available to them’. This was achieved by the creation of Revenue Mandals in place of taluks and firkas.”

To implement the decision of the Government, on 11th January, 1984 the Governor of Andhra Pradesh accordingly promulgated Ordinance No. 22 of 1984. This Ordinance was later replaced by Ordinance No. 5 of 1985 inasmuch as the earlier Ordinance could not be reintroduced due to dissolution of the Legislative Assembly. The Ordinance was later replaced by Act No. 14 of 1985. The change in administration was brought about by amending s. 3 of the Act by introducing the word ‘mandals’ in place of taluks and firkas. Pursuant to their powers under sub-s. (1) of s. 3 of the Andhra Pradesh Districts (Formation)

Act, as amended by Act 14 of 1985, the State Government, by notification published in the official gazette, after following the procedure laid down in sub-s.(5) thereof divided the State for the purpose of revenue administration into 23 Revenue District with such limits as specified therein. Each such district consisted of Revenue Divisions and each Revenue Division consisted of Revenue Mandals. The 23 districts now comprise of 1104 Revenue Mandals.

As many as 124 petitions under Art. 226 of the Constitution were filed in the High Court by individuals and gram panchayat questioning the legality and propriety of the formation of certain Revenue Mandals, and particularly location of Mandal Headquarters, abolition of certain Mandals or shifting of Mandal Headquarters, as notified in the preliminary notification issued under sub-s. (5) of s. 3, deletion and addition of villages to certain mandals. Some of the writ petitions were heard by one Division Bench and the others by another, both the Benches being presided over by Reghuvir, J. who has delivered all the judgments. Incidentally, there is no statutory provision relating to location of Mandal Headquarters and the matter is governed by GOMs dated 25th July, 1985 issued by the State Government laying down the broad guidelines for the formation of Mandals and also for location of Mandal Headquarters. The learned Judges upheld the validity of formation of Mandals as also the aforesaid GOMs and in some cases they declined to interfere with the location of Mandal Headquarters holding that the Government was the best judge of the situation or on the ground that there was a breach of the guidelines, and directed the Government to reconsider the question of location of Mandal Headquarters. However, in other cases the learned Judges have gone a step further and quashed the final notification for location of Mandal Headquarters at a particular place holding that there was a breach of the guidelines based on the system of marking and also on the ground that there were no reasons disclosed for deviating from the preliminary notification, and instead directed the Government to issue a fresh notification for location of Mandal Headquarters at another place. One of the arguments advanced before us in the cases where the High Court has declined to interfere is that both the High Court and the State Government should have applied a uniform standard in dealing with the question and generally it is said that the State Government should at any rate have adhered to the guidelines in fixing the location of Mandal Headquarters without being guided by extraneous considerations.

Myriad are the facts. It is not necessary for us to delve into the facts in any detail. It would suffice for our purposes to touch upon the facts in some of the cases to present the rather confusing picture emerging as a result of conflicting directions made by the High Court. It appears that Raghuvir, J. relied upon the underlying principle emerging from his earlier decision delivered on behalf of himself and Sriramulu, J. in the *Gram Panchayat, Chinna Madur & Ors. v. The Government of Andhra Pradesh*, [1986] 1 Andhra Weekly Reporter 362 which he calls as the 'Chandur principle'. In that case following the earlier decision of the High Court where a place called Chandur was not shown in the preliminary notification for formation of a taluk, but was chosen to be the place of location of the Taluk Headquarters in the final notification, it was held that in such a case publication of the final notification could not be sustained and it was for the Government to give reasons for such deviation. The decision proceeded on the principle that where guidelines are issued regulating the manner in which a discretionary power is to be exercised, the Government is equally bound by the

guidelines. If the guidelines were violated, it was for the Government to offer explanation as to why the guidelines were deviated from. We are afraid, there is no such inflexible rule of universal application. The learned Judges failed to appreciate that the guidelines issued by the State Government had no statutory force and they were merely in the nature of executive instructions for the guidance of the Collectors. On the basis of such guidelines the Collectors were asked to forward proposals for formation of Revenue Mandals and for location of Mandal Headquarters. The proposals so forwarded by the Collectors were processed in the Secretariat in the light of the suggestions and objections received in response to the preliminary notification issued under s. 3(5) of the Act and then placed before a Cabinet Sub Committee. The ultimate decision as to the place of location of Mandal Headquarters was for the Government to take. It cannot be said that in any of the cases the action of the Government for location of such Mandal Headquarters was *mala fide* or in bad faith or that it proceeded on extraneous consideration. Nor can it be said that the impugned action would result in arbitrariness or absence of fair play or discrimination.

We must next refer to the facts in a few illustrative cases. In the Gram Panchayat, Chinna Madur's case, although in the preliminary notification issued under s. 3(5) of the Act for formation of Devaruppalla Mandal, Chinna Madur was proposed as the Mandal Headquarters, the Revenue authorities in the final notification declared Devaruppalla as the Mandal Headquarters. In the writ petition, the High Court produced the records and it showed that both Devaruppalla and Chinna Madur provided equal facilities as to communication, transport, veterinary hospital, bank, school, etc., and secured 15 marks each. The Government preferred Devaruppalla as Chinna Madur was inaccessible in some seasons as that village was divided by two rivers from rest of the villages. Devaruppalla besides is located on Hyderabad-Suryapet Highway which was considered to be a factor in its favour. After reiterating the Chandur principle that it is for the Government to give reasons for such deviation, the learned Judges declined to interfere, observing:

"In the instant case, the record produced shows the authorities considered the comparative merits of Devaruppalla and Chinna Madur. The Revenue authorities applied the correct indicia of accessibility in all seasons. Other facilities of the two villages were discussed at length in the record. Having regard to the overwhelming features in favour of Devaruppalla the village was declared as headquarters"

We have referred to the facts of this case because it highlights the approach of the High Court and it has assumed to itself the function of the Government in weighing the comparative merits and demerits in the matter of location of the Mandal Headquarters.

The same infirmity unfortunately permeates through some of the judgments where the High Court has interfered....

It will serve no useful purpose to delineate the facts in all the cases which follow more or less on the same lines. We are of the opinion that the High Court had no jurisdiction to sit in appeal over the decision of the State Government to locate the Mandal Headquarters at a particular place. The decision to locate such Headquarters at a particular village is dependent upon various factors. The High Court obviously could not evaluate for itself the comparative merits of a particular place as against the other for location of the Mandal Headquarters. In some of the cases the High Court declined to interfere saying that the Government was the best judge of the situation in the matter of location of Mandal Headquarters. However, in a

few cases the High Court while quashing the impugned notifications for location of Mandal Headquarters issued under sub-s. (5) of s. 3 of the Act on the ground that there was a breach of the guidelines, directed the Government to reconsider the question after hearing the parties. We have had the benefit of hearing learned counsel for the parties on various aspects of this branch of administrative law as to the nature and scope of the guidelines and whether their non-observance was justiciable. The learned counsel with their usual industry placed before us a large number of authorities touching upon the subject. On the view that we take, it is not necessary for us to refer to them all.

Shri T.V.S.N. Chari, learned counsel appearing on behalf of the State Government followed by Dr. Y.S. Chitale, Shri U.R. Lalit and Shri C.S. Vaidyanathan, learned counsel appearing for the appellants in cases where the High Court has interfered have, in substance, contended that suitability as to the location of Mandal Headquarters is for the Government to decide and not for the High Court. They contend that the High Court failed to view the case from a proper perspective. According to them, the guidelines are executive instructions, pure and simple, and have no statutory force. It was pointed out that there is no statutory provision made either in the Act or the Rules framed thereunder laying down the manner in which the location of the Headquarters of a Revenue Mandal was to be made. The Legislature has left the matter of selection of a place to be the Mandal Headquarters to the discretion of the State Government and it was purely a Governmental function based on administrative convenience. The Government accordingly issued a White Paper laying down the broad guidelines as contained in Appendix I thereto. The Collector were required to forward their proposals for formation of Revenue Mandals indicating the place where the Headquarters should be located in accordance with the principles laid down in the guidelines based on a system of marking. Although the Collectors were required to propose the location of Mandal Headquarters at a particular place on a system of marking, but that was not determinative of the question. If the marks were to be the sole criterion, then there was no question of inviting objections and suggestions. The ultimate decision therefore lay with the Government and in making the selection the Government had the duty to ensure that the place located for location of Mandal Headquarters promoted administrative convenience and further the object and purpose of the legislation in bringing about a change in the Revenue administration viz., (i) to bring the administration nearer to the people and (ii) to make all public services easily available to them, the main criterion as laid down in the guidelines being suitability and accessibility. Further, the learned counsel contended that the High Court was clearly in error in substituting its judgment for that of the State Government. Non-observance of the guidelines which were in the nature of executive instructions was not justiciable. In any event, the High Court could not have issued a direction requiring the Government to shift the Headquarters of a Revenue Mandal from a particular place to another place on its own evaluation of the comparative merits and demerits merely on the basis of marking. The learned counsel relied upon *G. L. Fernandez v. State of Mysore and others*, [1967] 3 SCR 636 and other decisions taking the same view.

We had an equally persuasive reply to these arguments. Shri Seetaramaiah, learned counsel appearing for the respondents in cases where the High Court has interfered, advanced the main argument on the legal aspect with much learning and resource and placed all the authorities on this abstruse branch of administrative law, namely, the Courts have albeit the

Governmental action which involves exercise of discretionary powers, control over the exercise of such Governmental power by implying limits of reasonableness, relevance and purpose. Judicial control over the executive, or over an administrative authority, must be maintained. Such judicial control by necessary implication is reconciled with legislative intent, on the premise that the legislature never intended that the Government should have unfettered control over a certain area. He drew our attention to several recent English decisions which manifest a definite shift in the attitude of the Courts to increase their control over discretion. According to the learned counsel, the traditional position is that Courts will control the existence and extent of prerogative power i.e., governmental power, but not the manner of exercise thereof. What degree or standard of control would then be exercised would depend upon the type of subject-matter in issue. He submits that there is increasing willingness of the Courts to assert their power to scrutinise the factual bases upon which discretionary powers have been exercised. It is said that the Court is not powerless to intervene where the decision of the Government is reached by taking into account factors that were legally irrelevant or by using its power in a way calculated to frustrate the policy of the Act. It follows that the nature and object of the status had to be considered to determine the area of power possessed. It is urged that the remedy of a writ of mandamus is available if a decision is reached by the Government on the basis of irrelevant considerations or improper purposes or for other misuse of power. Upon that premise, he does not accept that the High Court had no jurisdiction to interfere with the orders passed by the State Government for the location of the Headquarters of a Revenue Mandal under Art. 226 of the Constitution. Substantially, the argument is that the guidelines framed by the State Government have a statutory force inasmuch as the power to issue such administrative directions or instructions to the Collectors is conferred by the provisions of the Act itself. Alternatively, he says that even though a non-statutory rule, bye-law or instruction may be changed by the authority who made it without any formality and it cannot ordinarily be enforced through a Court of law, the party aggrieved by its non-enforcement may nevertheless get relief under Art. 226 of the Constitution where the non-observance of the non-statutory rule or practice would result in arbitrariness or absence of fairplay or discrimination, particularly where the authority making such non-statutory rule - or the like - comes within the definition of 'State' under Art. 12. In substance, the contention is that the principle laid down in the classical decision of the House of Lords in *Padfield v. Minister of Agriculture, Fisheries & Food*, LR 1968 AC 997 that the Courts will control the exercise of statutory powers by the Minister, still prevails over exercise of discretionary powers by the Government. The general approach now is for the Courts to require that the Government must produce reasonable grounds for its action, even where the jurisdictional fact is subjectively framed. He drew our attention to the observations of Lord Denning M.R. in *Laker Airways Ltd. v. Department of Trade*, LR 1977 QB 643 at p. 705 to the effect:

"The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative (of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). The law does not interfere with the proper exercise of the discretion by the executive in those situations; but it

can set limits by defining the bounds of the activity and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution.

* * * *

“Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive. At several times in our history, the executive have claimed that a discretion given by the prerogative is unfettered; just as they have claimed that a discretion given by statute or by regulation is unfettered ... The two outstanding cases are *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] AC 997 and *Secertary of State for Education and Science v. Tameside Metropolitan Borough Council*, [1976] 3 WLR 641, where the House of Lords have shown that when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers to see that they are used properly, and not improperly or mistakenly.”

In order to appreciate the contentions advanced, it is necessary to refer to the relevant statutory provisions bearing on the questions involved. Sub-s. (1) of s. 3, as amended, is in these terms:

“3(1) The Government may, by notification, from time to time, for the purposes of revenue administration, divide the State into such disticts with such limits as may be specified therein; and each district shall consist of such revenue divisions and each revenue division shall consist of such mandals and each mandal shall consist of such villages as the Government may, by notification from time to time, specify in this behalf.”

Sub-s. (2) thereof provides that the Government may, in the interests of better administration and development of the areas, by notification from time to time on and with effect on and from such date as may be specified therein, form a new district, revenue division or mandal or increase or diminish or alter their name. Sub-s. (4) empowers the Board of Revenue in the interests of better administration and development of the areas and subject to such rules as may be prescribed, by notification, group or amalgamate, any two or more revenue villages or portions thereof so as to form a single new revenue village or divide any revenue village into two or more revenue villages, or increase or diminish the area of any revenue village, or alter the boundaries or name of any revenue village. Sub-s. (5) provides that before issuing any notification under the section, the Government or the Board of Revenue, as the case may be, shall publish in such manner as may be prescribed, the proposals inviting objections or suggestions thereon from the person residing within the district, revenue division, taluk. firka or village who are likely to be affected thereby within such period as may be specified therein, and shall take into consideration the objections or suggestions, if any, received. Sub-s. (1) of s. 4 enacts that the Government may, by notification, make rules for carrying out all or any of the purposes of this Act. The rules so framed shall be laid before each House of the State Legislature, etc. In exercise of the powers conferred by sub-s. (1) of s. 4 of the Act, the State Government framed the Andhra Pradesh District (Formation) Rules, 1984. The term ‘Mandal’ as defined in r. 2(iv) means a part of the district within a revenue division under the charge of a Tahsildar or Deputy Tahsildar. The expression ‘revenue division’ is defined in r. 2(v) to mean a part of the district comprising of one or more mandals under the charge of a Revenue Divisional officer/Sub Collector/Assistant Collector or any other officer placed in charge of a division. The word ‘village’ in r. 2(vi) means a settlement or locality or area

consisting of cluster of habitations and the land belonging to their proprietary inhabitants and includes, a town or city and a hamlet (Mazra). Rule 3 lays down the matters for consideration in formation of districts, etc. Rules 4 and 5 provide for the publication of the preliminary and final notifications in the official gazette. Rule 3 insofar as material reads:

“3(1) Where any action is proposed to be taken by the Government under sub-s. (1) or sub-s. (2) of s. 3 of the Act ... the Government shall take into consideration as far as may be the following matters and the views of the Collectors of the districts and of such other authorities as the Government may consider necessary:-

- (i) Area, population, demand under the land revenue and other revenues in respect of areas affected by the proposals;
- (ii) Historical association, Geographical contiguity, Physical features common interests and problems, Cultural and Educational requirements, Infrastructural facilities and economic progress of the areas;
- (iii) Development of the area or areas concerned, having regard to the various developments and welfare schemes undertaken or contemplated by the Government in relation to those areas;
- (iv) Administrative convenience and better administration; and
- (v) Interests of economy”

"3(3). In matters concerning sub-s. (1) or sub-s. (2) of s. 3 of the Act the Collector concerned shall forward to the Government his report with his views together with the record of enquiry if any for the consideration of the Government. If after such consideration the Government so decides, a preliminary notification under sub-s. (5) of s. 3 of the Act inviting objections or suggestions to the proposals from the persons residing in the area/areas which are likely to be affected thereby, shall be issued.”

Sub-r. (1) of r. 4 provides for the manner of publication of the preliminary notification referred to in sub-rr. (3) and (4) of r. 3 inviting objections or suggestions. The notification has to be in Form I appended to the Rules. R. 4(2) provides that any person affected by the proposal may within thirty days from the date of publication of the notification referred to in sub-r. (1), communicate his objections or suggestions thereto to the Secretary to the Government in the Revenue Department through the Collector of the district concerned, who shall forward the same with his remarks to the Government, etc. R. 5 provides that the Government shall having regard to the suggestions or objections referred to in r. 4 either confirm the preliminary notification or issue it with such modification/modifications as may be necessary and publish it in Form II of the Gazette. A preliminary notification under sub-s. (5) of s. 3 of the Act which has to be in Form I has to notify to all concerned that the Government in the interests of better administration and development of the area concerned, proposed to form a new district/revenue division/mandal as set out in the schedule appended thereto. All objections and suggestions have to be addressed to the Collector within whose jurisdiction the area or areas fall. Likewise, Form II prescribes the form of the final notification to the effect that the State Government having taken into consideration the objections and suggestions received thereon, is pleased to notify that with effect from (date) the State shall consist of the District/Revenue Division/Mandal specified in Schedule I appended thereto. There are no statutory provisions formulating the governing principles for formation of Revenue Mandals or for location of Mandal Headquarters. On 25th July, 1985

the State Government published a White Paper on formation of Mandals. It was stated inter alia that the Revenue Mandals would be formed covering urban as well as rural areas unlike Panchayat Mandals which would cover only rural areas. A Revenue Mandal would be demarcated for a population ranging from 35,000 to 55,000 in the case of rural mandals and was expected to cover one-third to one-fourth the size of the existing taluks in areas and in population. When a Municipality came within the area of a Revenue Mandal, the urban population would be in addition. The ushering in of rural mandals would result in introductions of a four-tier system by replacement of the then existing five-tier system. Such reduction in the levels of tiers of administration the Government felt would be more conducive to proper implementation of the policies and programmes of the Government. Greater decentralisation was expected to lead to more intensive involvement of the people, particularly in the implementation of programmes of economic development. According to the scheme contemplated, each Revenue Mandal would be headed by a Revenue Officer of the rank of a Tahsildar or a Deputy Tahsildar and it was stated that the intention of the Government was to vest in such Revenue Officers, all the powers that were till then exercised by the Tahsildars and Taluk Magistrate. Appendix I to the White Paper formulated the principles for formation of Revenue Mandals and also laid down the broad guidelines for location of Mandal Headquarters. The Collectors were accordingly asked to forward their proposals for creation of Revenue Mandals and also for location of Mandal Headquarters in conformity with the guidelines. The proposals were to be duly notified by publication of a preliminary notification under sub-s. (5) of s. 3 of the Act inviting objections and suggestions and the Government after consideration of the objections and suggestions so received would publish the final notification. The broad guidelines for location of Mandal Headquarters are set out below:

“(3) As a general principle, the present Taluk Headquarters, Samithi Headquarters, Municipalities and Corporations will be retained as Headquarters of Revenue Mandals; if any exception is called for on grounds of compelling reasons detailed reasons will have to be given.

(4) Revenue Mandals whose headquarters will be the present Taluk Headquarters/Samithi Headquarters/Municipalities/Corporations will generally have a number of much needed infrastructural facilities already existing. A number of people from the neighbouring villages will therefore be visiting these headquarters for both Governmental/non-Governmental business. In the case of Revenue Mandals to be located exclusively within municipal corporation areas, their requirements will be formulated according to their needs.

In cases of Mandal Headquarters located in urban centres which are not municipalities but with a population of 15,000 or above the total population of the Mandal would be 55,000 irrespective of population density.

(6) In choosing the Headquarters of the Revenue Mandals in the rural areas, weightage may be given to the availability of the following facilities and the future growth of the place.

- (i) Banking facility;
- (ii) Communication facility-either Railway Station or Bus Stand;
- (iii) PHC or Sub-Centre or any Dispensary/Indian Medicine;
- (iv) Veterinary Dispensary;
- (v) Police Station;

- (vi) Post Office/Telephone Exchange;
- (vii) High School.
- (viii) Market Yard/Agricultural Godown;
- (ix) Already a Firka Headquarters;
- (x) Any other special qualification like availability of office accommodation, residential quarters for the staff etc.

A centre having one or more of the above characteristics and more accessible to most of the villages proposed for the Mandal in comparison to any other centre should be generally selected as Headquarters. If in any mandal there is more than one centre having equal accessibility/facilities then the centre which comes forward to donate land for office buildings and to provide temporary office accommodation may be given preference. (8) In the selection of villages for inclusion in the Mandal, the principal criterion shall be that the Mandal Headquarters is most accessible to all the villages.”

It is quite obvious from the guidelines that the location of the Headquarters of a Revenue Mandal is based on a system of marking, the principal criterion being ‘accessibility’ i.e., the place located must be accessible to all the villages in the Revenue Mandal. In choosing the Headquarters of the Revenue Mandals in the rural areas, weightage had to be given to the availability of certain facilities and the future growth of the place as specified in items (i) to (x) of paragraph 6 of the guidelines. A centre or a place having one or more of the characteristics so set out and more accessible to most of the villages proposed for the Mandal in comparison to any other place had to be generally selected as Mandal Headquarters. If in any Mandal there was more than one place having equal accessibility/facilities then the place which came forward to donate land for office buildings and to provide temporary office accommodation had to be given preference. Location of Mandal Headquarters was therefore based on a system of marking. Learned counsel for the parties have with infinite care taken us minutely to the facts of each case in an endeavour to support their respective contentions, viz., as to whether location of the Mandal Headquarters by the Government at a particular place was in breach of the guidelines or not.

We find it rather difficult to sustain the interference by the High Court in some of the cases with location of Mandal Headquarters and quashing of the impugned notification on the ground that the Government acted in breach of the guidelines in that one place or the other was more centrally located or that location at the other place would promote general public convenience or that the Headquarters should be fixed at a particular place with a view to develop the areas surrounded by it or that merely because a particular person who was an influential Member of Legislative Assembly belonging to the party in opposition had the right of representation but failed to avail of it. The location of Headquarters by the Government by the issue of the final notification under sub-s. (5) of s. 3 of the Act was on a consideration by the Cabinet Sub Committee of the proposals submitted by the Collectors concerned and the objections and suggestions received from the local authorities like Gram Panchayat and the general public, keeping in view the relevant factors. Even assuming that any breach of the guidelines was justiciable, the utmost that the High Court could have done was to quash the impugned notification in a particular case and direct the Government to reconsider the question. There was no warrant for the High Court to have gone further and directed the shifting of the Mandal Headquarters at a particular place. Broadly speaking, the contention on

behalf of the State Government is that relief under Art. 226 of the Constitution is not available to enforce administrative rules, regulations or instructions which have no statutory force, in the absence of exceptional circumstances. It is well settled that mandamus does not lie to enforce departmental manuals or instructions not having any statutory force, which do not give rise to any legal right in favour of the petitioner. The law on the subject is succinctly stated in Durga Das Basu's *Administrative Law*, 2nd edn. at p. 144:

“Administrative instructions, rules or manuals, which have no statutory force, are not enforceable in a court of law. Though for breach of such instructions, the public servant may be held liable by the State and disciplinary action may be taken against him, a member of the public who is aggrieved by the breach of such instructions cannot seek any remedy in the courts. The reason is, that not having the force of law, they cannot confer any legal right upon any body, and cannot, therefore, be enforced even by writs under Art. 226.”

The learned author however rightly points out at p. 145:

“Even though a non-statutory rule, bye-law or instruction may be changed by the authority who made it, without any formality and it cannot ordinarily be enforced through a Court of law, the party aggrieved by its non-enforcement may, nevertheless, get relief under Art. 226 of the Constitution where the non-observance of the non- statutory rule or practice would result in arbitrariness or absence of fairplay or discrimination,-particularly where the authority making such non-statutory rule or the like comes within the definition of ‘State’ under Art. 12.”

In *G.J. Fernandez's case*, the petitioner submitting the lowest tender assailed the action of the Chief Engineer in addressing a communication to all the tenderers stating that even the lowest tender was unduly high and enquired whether they were prepared to reduce their tenders. One of them having reduced the amount of his tender lower than the lowest, the Chief Engineer made a report to the Technical Sub-Committee which made its recommendations to the Major Irrigation Projects Control Board, the final authority, which accepted the tender so offered. The High Court dismissed the writ petition holding that there was no breach of the conditions of tender contained in the Public Works Department Code and further that there was no discrimination which attracted the application of Art. 14. The question that fell for consideration before this Court was whether the Code consisted of statutory rules or not. The so-called Rules contained in the Code were not framed under any statutory enactment or the Constitution. Wanchoo, CJ speaking for the Court held that under Art. 162 the executive power of the State enables the Government to issue administrative instructions to its servants how to act in certain circumstances, but that would not make such instructions statutory rules the breach of which is justiciable. It was further held that non-observance of such administrative instructions did not give any right to a person like the appellant to come to Court for any relief on the alleged breach of the instructions. That precisely is the position here. The guidelines are merely in the nature of instructions issued by the State Government to the Collectors regulating the manner in which they should formulate their proposals for formation of a Revenue Mandal or for location of its Headquarters keeping in view the broad guidelines laid down in Appendix I to the White Paper. It must be stated that the guidelines had no statutory force and they had also not been published in the Official Gazette. The guidelines were mere departmental instructions meant for the Collectors. The ultimate decision as to formation of a Revenue Mandal or location of its Headquarters was with the

Government. It was for that reason that the Government issued the preliminary notification under sub-s. (5) of s. 3 of the Act inviting objections and suggestions. The objections and suggestions were duly processed in the Secretariat and submitted to the Cabinet Sub-Committee along with its comments. The note of the Collector appended to the proposal gave reasons for deviating from the guidelines in some of the aspects. Such deviation was usually for reasons of administrative convenience keeping in view the purpose and object of the Act i.e. to bring the administration nearer to the people. The Cabinet Sub-Committee after consideration of the objections and suggestions received from the Gram Panchayat and members of the public and other organisations as well as the comments of the Secretariat and the note of the Collector came to a decision applying the standards of reasonableness, relevance and purpose while keeping in view the object and purpose of the legislation, published a final notification under sub-s. (5) of s. 3 of the Act. There is nothing on record to show that the decision of the State Government in any of these cases was arbitrary or capricious or was one not reached in good faith or actuated with improper considerations or influenced by extraneous considerations. In a matter like this, conferment of discretion upon the Government in the matter of formation of a Revenue Mandal or location of its Headquarters in the nature of things necessarily leaves the Government with a choice in the use of the discretion conferred upon it. It would be convenient at this stage to deal with the arguments of Shri Seetaramaiah that the action of the Government in the matter of location of Mandal Headquarters amounted to misuse of power for political ends and therefore amenable to the writ jurisdiction of the High Court under Art. 226 of the Constitution. The learned counsel mainly relied upon certain English decisions starting from *Padfield v. Minister of Agricultural, Fisheries & Food*, LR 1968 AC 997 down to *Council of Civil Service Unions and Others v. Minister for the Civil Service*, [1984] 3 ALL. ER 935 (HL). What we call 'purely governmental function', it is said, is nothing but exercise of 'discretion derived from the royal prerogative'. The learned counsel contends that ever since the judgment of Lord Denning in *Laker Airways Ltd. v. Department of Trade*, LR 1977 QB 643, the myth of executive discretion in relation to prerogative power no longer exists. The learned counsel equated prerogative and statutory powers for this purpose, saying that in both cases alike the Courts will not review the proper exercise of discretion but will intervene to correct excess or abuse. According to him, the prerogative powers of the Crown in England are akin to the executive functions of the Union and the States under Art. 73 and 162 of the Constitution, on which refrain from expressing any final opinion. Prima facie, it seems to us that the executive powers of the Union and the States under Arts. 73 and 162 are much wider than the prerogative powers in England. We would refer to a couple of English decisions from amongst those to which we were referred to during the arguments.

At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work *Judicial Review of Administrative Action* 4th Edn., at pp. 285-287 states the law in his own terse language. The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another

body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts *ultra vires*. The learned author then deals with the question whether the principles outlined above are applicable to the alleged abuse of wide discretionary powers vested in executive bodies and further states:

“We have already noted that the courts sometimes call a discretionary power executive or administrative when they are unwilling to review the mode of its exercise by reference to ‘judicial’ standards. Does this mean that such discretionary powers are legally absolute, totally immune from judicial review? To this question there is no short answer.

(1) Parliament (or, to put the matter more realistically, the Government) may purport to exclude judicial review by means of special statutory formulae which, if construed literally, would deprive the courts of jurisdiction.

(2) No discretionary power is reviewable unless somebody has *locus standi* in impugn the validity of its exercise.

(3) If it is claimed that the authority for the exercise of discretion derives from the royal prerogative, the courts have traditionally limited review to questions of *vires* in the narrowest sense of the term. They can determine whether the prerogative power exists, what is its extent, whether it has been exercised in the appropriate form and how far it has been superseded by statute; they have not normally been prepared to examine the appropriateness or adequacy of the grounds for exercising the power, or the fairness of the procedure followed before the power is exercised, and they will not allow bad faith to be attributed to the Crown.” Although the weight of authority in England favours only narrow grounds for judicial review of the exercise of prerogative powers, there is not a total absence of support for the view that in some circumstances at least the Court may apply somewhat broader standards of review. See: De Smith's *Judicial Review of Administrative Action*, 4th edn., pp. 285-287; H.W.R. Wade's *Administrative Law*, 5th edn. pp. 350 et. seq.; Foulkes' *Administrative Law*, 6th edn., pp. 213-215, 219-225; *Applications for Judicial Review, Law and Practice* by Grahame Aldous and John Alder, p. 105; and D.C.M. Yardley's *Principles of Administrative Law*, 2nd edn. pp. 65-67. In recent years, the concept of the rule of law in England has been undergoing a radical change. The present trend of judicial opinion is to restrict the doctrine of immunity of prerogative powers from judicial review where purely governmental functions are directly attributable to the royal prerogative, such as whether a treaty should be concluded or the armed forces deployed in a particular manner or Parliament dissolved on one day rather another, etc. The shift in approach to judicial interpretation that has taken place during the last few years is attributable in large part to the efforts of Lord Denning in *Laker Airways' case*.

The attempt was to project the principles laid down in *Padfield's case* into the exercise of discretionary powers by the executive derived from the prerogative, and to equate prerogative and statutory powers for purposes of judicial review, subject to just exceptions. Thus, the present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those classes of cases which relate to deployment of troops, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinise the factual bases upon which discretionary powers have been exercised.

The decision of the House of Lords in *Padfield's case* is an important landmark in the current era of judicial activism in this area of administrative law. The Minister had refused to appoint a committee, as he was statutorily empowered to do when he thought fit, to investigate complaints made by members of the Milk Marketing Board that the majority of the Board had fixed milk prices in a way that was unduly unfavourable to the complainants. The Minister's reason for refusing to accede to the complainants' request inter alia was that 'it would be politically embarrassing for him if he decided not to implement the committee's recommendations'. The House of Lords held that the Minister's discretion was not unfettered and that the reasons that he had given for his refusal showed that he had acted ultra vires by taking into account factors that were legally irrelevant and by using his power in a way calculated to frustrate the policy of the Act. The view was also expressed by four of the Law Lords that even if the Minister had given no reasons for his decision, it would have been open to the Court to infer that the Minister had acted unlawfully if he had declined to supply any justification at all for his decision: De Smith's *Administrative Law*, 4th edn., p. 294. More recently, in *Laker Airways case* and in *Secretary of State for Education and Science v. Tameside M.B.C.*, LR 1977 AC 1014 both the Court of Appeal and the House of Lords have set aside as ultra vires the exercise of discretion that included a substantial subjective element. In *Padfield's case* the scarcely veiled allusion to fear of parliamentary trouble was, in particular, a political reason which was quite extraneous and inadmissible. Lord Reid during the course of his judgment emphatically and unequivocally rejected the contention that the discretion of the Minister was absolute, in these words:

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court."

Lord Upjohn said that the Minister's stated reasons showed a complete misapprehension of his duties, and were all bad in law. Lord Denning in another case observed that the decision in *Padfield* marked the evolution of judicial opinion that the Court could intervene if the Minister 'plainly misdirects himself in fact or in law'. The importance of the decision of the House of Lords in *Padfield's case* was underlined by Lord Denning in *Breen v. Amalgamated Engineering Union*, LR 19712 QB 175 at p. 190, in these words:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this; the statutory body must be guided by

relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by *Padfield v. Minister of Agriculture, Fisheries and Food*, which is a landmark in modern administrative law.”

In *Laker Airways’ case*, the Court of Appeal was concerned with the power of Minister to give directions to the Civil Aviation authorities overriding specific provisions in the statute in time of war, in the interests of national security or international relations or protection of the environment. In his judgment, Lord Denning M.R. held that the review of the prerogative is assimilated to that of statutory power, so that its exercise may be impugned for ‘misdirection in fact or in law’. Lord Denning M.R. discussed the nature of the prerogative and said; “Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive.”

He then went on to say that the prerogative powers were as much capable of abuse as any other power and therefore subject to judicial review and observed:

“Likewise it seems to me that when discretionary powers are entrusted to the executive by the prerogative - in pursuance of the treaty-making power - the courts can examine the exercise of them so as to see that they are not used improperly or mistakenly.”

This observation has given rise to considerable debate. The majority, however, proceeded on a narrower basis concluding that the Civil Aviation Act, 1971 had impliedly superseded the Crown’s prerogative in foreign affairs, and that the holder of a licence under the statute could not be deprived of its commercial value by a decision on the part of the Secretary to State or revoke the licensee’s status as a designated carrier under the Bermuda Agreement. In other respects, the majority accepted the orthodox position on the unreview ability of the exercise of the prerogative, per Roskill and Lawton, L. JJ, Lord Denning however went further and held that the Court could intervene if a Minister ‘plainly misdirects himself in fact or in law’. Another important case in this context is *R. v. Criminal Injuries Compensation Board, ex p. Lain*, [1967] 2 QB 864. The question in this case was whether payments made by the Board to victims of crime were subject to judicial review. The difficulty was that Lord Reid’s phrase ‘power to make decisions affecting rights’ in *Ridge v. Baldwin*, [1964] AC 40 was taken to refer to legal rights, whereas the Criminal Injuries Compensation Scheme was not said to be by legislation but just as an administrative expedience by means of internal departmental circulars. So payments made under the Scheme were not, strictly, a matter of legal right but were *ex gratia*. On the other hand, the criterion on which payments were made were laid down in some detail and were very much like any law rules for assessment of damages in tort. So the Board, like the Courts, was meant to be focussing on the individuals before it, in deciding whether to make an award and how much to award. It was strenuously argued that the Board was not subject to the jurisdiction of the Courts since it did not have what was described as legal authority in the sense of statutory authority. This argument was emphatically and unanimously rejected. In his judgment Lord Parker, C.J. said:

“I can see no reason either in principle or in authority why a board, set up as this board were set up, should not be a body of persons amenable to the jurisdiction of this Court. True the board are not set up by statute but the fact that they are set up by executive government, i.e.,

under the prerogative, does not render their acts any the less lawful. Indeed, the writ of certiorari has been issued not only to courts set up by statute but to courts whose authority was derived; *inter alia*, from the prerogative. Once the jurisdiction is extended, as it clearly has been, to tribunals as opposed to courts, there is no reason why the remedy by way of certiorari cannot be invoked to a body of persons set up under the prerogative.

“Moreover the board, though set up under the prerogative and not by statute, had in fact the recognition of Parliament in debate and Parliament provided the money to satisfy the board’s awards.”

See also the judgment of Lord Diplock, LJ. The ratio derived from *Ex parte Lain*’s decision can best be stated in these words:

“Powers derived from the royal prerogative are public law powers.”

It therefore follows that a non-statutory inferior authority like the Board albeit constituted under the prerogative powers, is just as well amenable to the jurisdiction of the Court as a statutory body. It is clear that certiorari will lie where a decision has de facto effect upon the individual and it is not necessary to show that the ‘right’ in question is legally enforceable. In *Council of Civil Service Unions & Ors. v. Minister for the Civil Service*, [1984] 3 All E.R. 935 the House of Lords reiterated broader standards of review of the exercise of prerogative powers. The principles deducible are clearly brought out in the head-note extracted below:

“(1) Powers exercised directly under the prerogative are not by virtue of their prerogative source automatically immune from judicial review. If the subject matter of a prerogative power is justiciable then the exercise of the power is open to judicial review in the same way as a statutory power. However (per Lord Roskill), prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers are not justiciable or reviewable. (2) Administrative action is subject to control by judicial review under three heads: (i) illegality, where the decision-making authority has been guilty of an error of law, e.g., by purporting to exercise a power it does not possess; (ii) irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision; (iii) procedural impropriety, where the decision-making authority has failed in its duty to act fairly.”

Lord Diplock in his speech found no reason why simply because the decision-making power is derived from a common law and not a statutory source, it should for that reason be immune judicial review, and observed:

“Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action are subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.”

We should also refer to the illuminating judgment of Lord Roskill who found no logical reason to see why the fact that the source of the power is the prerogative and not statute, should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case, the act in question is the act of the executive. The learned Judge agreed with the conclusions reached by Lord Scarman and Lord Diplock and observed: “To talk of that act as the act of the sovereign

savours of the archaism of past centuries.” We may with advantage quote the following passage from his judgment;

“Dicey's classic statement in *Law of the Constitution* (10th edn., 1959) p. 424 that the prerogative is the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown, has the weight behind it not only of the author's own authority but also of the majority of this House in *Burmah Oil Co. (Burma Trading) Ltd. v. Lord Advocate*, [1964] 2 All ER 348 at 353, per Lord Reid. But as Lord Reid himself pointed out, this definition ‘does not take us very far’. On the other hand the attempt by Lord Denning, MR in *Laker Airways Ltd. v. Dept. of Trade*, [1977] 2 All ER 182 at 192, (obiter since the other members of the Court of Appeal did not take so broad a view) to assert that the prerogative ‘if ... exercised improperly or mistakenly’ was reviewable is, with great respect, far too wide. Lord Denning MR sought to support his view by a quotation from *Blackstone's Commentaries* (1 B1 Com (15th edn) 252). But unfortunately and no doubt inadvertently he omitted the opening words of the paragraph: In the exercise therefore of those prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account.” In short the orthodox view was at that time that the remedy for abuse of the prerogative lay in the political and not in the judicial field.

But, fascinating as it is to explore this mainstream of our legal history, to do so in connection with the present appeal have an air of reality. To speak today of the acts of the sovereign as ‘irresistible and absolute’ when modern constitutional convention requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the continual development of our administrative law by harking back to what Lord Atkin once called, albeit in a different context, “the clanking of medieval chains of the ghosts of the past.”

The effect of all these decisions is admirably summed up by Grahame Aldous and John Alder in their *Applications for Judicial Review, Law and Practice* thus: “There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in *Council of Civil Service Union v. Minister for the Civil Service*, this is doubtful. Lords Diplock, Scarman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.” Much of the above discussion is of little or academic interest as the

jurisdiction of the High Court to grant an appropriate writ, direction or order under Art. 226 of the Constitution is not subject to the archaic constraints on which prerogative writs were issued in England. Most of the cases in which the English courts had earlier enunciated their limited power to pass on the legality of the exercise of the prerogative were decided at a time when the Courts took a generally rather circumscribed view of their ability to review Ministerial statutory discretion. The decision of the House of Lords in *Padfield's case* marks the emergence of the interventionist judicial attitude that has characterized many recent judgments. In view of the recent decision of the House of Lords in *Council of Civil Service Unions*, it would be premature to conclude that in no circumstances would the Court be prepared to apply to the exercise by the Crown of some non-statutory powers the same criterion for review as would be applicable were the discretion conferred by statute. In the ultimate analysis, the present trend of judicial opinion in England on the question as to whether a 'prerogative' power is reviewable or not depends on whether its subject-matter is suitable for judicial control. All that we need is to end this part of the judgment by extracting the cautionary note administered by H.W.R. Wade in his *Administrative Law*, 5th edn. at p. 352 in these words:

"On the one hand, where Parliament confers power upon some minister or other authority to be used in discretion, it is obvious that the discretion ought to be that of the designated authority and not that of the court. Whether the discretion is exercised prudently or imprudently, the authority's word is to be law and the remedy is to be political only. On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion."

We find it rather difficult to sustain the judgment of the High Court in some of the cases where it has interfered with the location of Mandal Headquarters and quashed the impugned notifications on the ground that the Government acted in breach of the guidelines in that one place or the other was more centrally located or that location at the other place would promote general public convenience, or that the headquarters should be fixed at a particular place with a view to develop the area surrounded by it. The location of headquarters by the Government by the issue of the final notification under sub-s. (5) of s. 3 of the Act was on a consideration by the Cabinet Sub-Committee of the proposals submitted by the Collectors concerned and the objections and suggestions received from the local authorities like the gram panchayats and the general public. Even assuming that the Government while accepting the recommendations of the Cabinet Sub Committee directed that the Mandal Headquarters should be at place 'X' rather than place 'Y' as recommended by the Collector concerned in a particular case, the High Court would not have issued a writ in the nature of mandamus to enforce the guidelines which were nothing more than administrative instructions not having any statutory force, which did not give rise to any legal right in favour of the writ petitioners. The result therefore is that Civil Appeals Nos. 1980, 1982, 1985 and 1987 of 1986 and all other appeals and special leave petitions directed against the judgment of the High Court where it has interfered with the location of the Mandal Headquarters, must succeed and are

allowed. The petition filed by the appellants under Art. 226 of the Constitution before the High Court are accordingly dismissed. There shall be no order as to costs.

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***Coimbatore District Central Cooperative Bank v.
Coimbatore District Central Coop. Bank Employees Assn.
(2007) 4 SCC 669***

[The *Wednesbury* principle has given way to the *doctrine of proportionality*.]

C.K. THAKKER, J. - *actual matrix* - 4. The appellant is Coimbatore District Central Cooperative Bank having its head office at Coimbatore. It is having 17 branches in the revenue district of Coimbatore. It is the case of the appellant Bank that the Coimbatore District Central Cooperative Bank Employees Association ("the Union") gave a "strike notice" on 31-3-1972 which was received by the Management on 5-4-1972 proposing to go on strike from 14-4-1972. The reason for such notice and going on strike was suspension of certain employees and withholding of their salary by the Management. Since the strike call was illegal and the notice was not in consonance with the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"), the action of going on strike was unlawful. The Union was accordingly informed not to go on strike. The Labour Officer, Coimbatore in the meanwhile commenced conciliation proceedings in connection with certain issues raised by the Union. Despite proper advice by the Labour Officer, the employees commenced strike from 17-4-1972. The strike was totally illegal and unlawful. On 19-4-1972, notice was issued to the Union stating therein that the workmen should join duties by 22-4-1972 by tendering unconditional apology. The employees accepted it. A settlement had been arrived at between the Management and the Union and 134 employees gave up "strike call" and resumed work. 53 employees, however, refused to join duty and continued their illegal strike and acts of misconduct. The illegal acts of employees affected the work of the Bank very badly. It was alleged that not only did the workmen not join duty and continued illegal and unlawful strike, but also prevented other employees from resuming duty and threatened them with dire consequences if they returned for duty. Disciplinary proceedings were, therefore, initiated against 53 workmen, they were placed under suspension and inquiry was instituted. The employees were intimated of the charges levelled against them, which they denied. In spite of notices, the workmen did not participate in the disciplinary proceedings and remained absent. The Management was, therefore, constrained to proceed with the disciplinary inquiry ex parte against them. By an order dated 6-1-1973, the workmen were held guilty of the charges and an order of punishment was passed. By the said order, two punishments were awarded to the workmen: (i) stoppage of increment for 1-4 years with cumulative effect; and (ii) non-payment of salary during the period of suspension. According to the Bank, the case was an appropriate one to impose extreme penalty of dismissal from service, but by taking liberal view, the extreme punishment was not imposed on the employees and they were retained in employment by the Bank. The workmen joined duty on 17-1-1973. They should have accepted the order gracefully and appreciated the attitude adopted by the Management. The workmen, however, did not do so. They preferred to file appeal which was dismissed by the Executive Committee.

5. The workmen, being aggrieved by the decision, raised an industrial dispute and the matter was referred to the Labour Court, Coimbatore by the Government under Section 10 of the Act. The Labour Court after extending opportunity of hearing to both the sides and considering the evidence on record framed the following two issues:

1. Whether the punishment of stoppage of 1 to 4 increments with cumulative effect on 1 to 53 workers is justified?

2. Whether the 53 workmen are entitled to be paid wages for the period of suspension?

6. After considering the evidence in its entirety and relevant case-law on the point, the Court held that all the four charges levelled against the workmen were proved. It also held the inquiry to be legal, valid and in consonance with the principles of natural justice. The evidence established that threat was administered by the employees.

7. The Labour Court concluded:

“Unlike criminal cases it is not necessary that the evidence should be beyond doubt. Nevertheless, the witnesses have given clear evidence to prove charges. Therefore, we have to accept them and hold that Charges 1 to 4 have been proved against all the 53 employees.”

8. On the basis of the above finding, the Labour Court held that it could not be said that the action of the Management could be described as illegal, unlawful or improper. Accordingly, the demands of the workmen were rejected and the reference was dismissed.

Approach of the High Court

9. Being aggrieved by the award passed by the Labour Court, the Union approached the High Court by filing a writ petition. The learned Single Judge did not disagree with the findings recorded by the Labour Court and held that the workmen were not entitled to wages for the period they had not worked. As to the second punishment, however, the learned Single Judge held that stoppage of 1 to 4 annual increments with cumulative effect was “harsh”. The penalty of stoppage of annual increments with cumulative effect had far-reaching consequences. It would adversely affect the workmen throughout their service and in retirement benefits to be received by them. It would further affect their families. Imposition of such punishment, according to the learned Single Judge, was “not valid in law” and liable to be set aside. The petition was, accordingly, partly allowed confirming the withdrawal of wages for the period of suspension, but by setting aside the order of punishment of stoppage of increments. The Management was directed to pay the arrears in respect of stoppage of increments to the workmen with “*interest at the rate of 12% per annum*” within sixty days from the date of receipt of the copy of the order.

10. The Management was aggrieved by the above order passed by the learned Single Judge and preferred intra-court appeal before the Division Bench of the High Court. The Division Bench rightly noted that it is settled law that the question of choice and quantum of punishment is within the discretion of the Management. “But, the sentence has to suit the offence and the offender.” If it is unduly harsh or vindictive, disproportionate or shocks the conscience of the Court, it can be interfered with by the Court. Then referring to a leading decision of this Court in *Ranjit Thakur v. Union of India* [(1987) 4 SCC 611], the Division Bench held that the order passed by the learned Single Judge required modification. The Division Bench opined that proper punishment would be stoppage of increment/increments without cumulative effect on all 53 employees would serve the ends of justice. The Division Bench also held that the order passed by the learned Single Judge directing the Management to pay interest was not proper and was accordingly set aside. It is this order which is challenged by the Management in the present appeal.

Rival submissions

12. The learned counsel for the appellant Bank contended that both, the learned Single Judge as well as the Division Bench of the High Court, were in error in interfering with the order of punishment passed by the Management particularly when the said action had been confirmed by a well-considered and well-reasoned award made by the Labour Court, Coimbatore. It was urged that once an inquiry has been held to be in consonance with rules of natural justice, charges had been proved and an order of punishment had been passed, it could not have been set aside by a “writ court” in judicial review. The Labour Court recorded a finding of fact which had not been disturbed by the High Court that principles of natural justice were not violated. The inquiry was conducted in consonance with law and all the charges levelled against the employees were established. If it is so, the High Court was clearly wrong in interfering with the award of the Tribunal. According to the counsel, the High Court was neither exercising appellate power over the action taken by the Management nor on quantum of punishment awarded. The Court was also not having appellate jurisdiction over the Labour Court. The jurisdiction of the High Court under Articles 226/227 of the Constitution was limited to the exercise of power of judicial review. In exercise of that power, the High Court could not substitute its own judgment for the judgment/order/action of either the Management or the Labour Court. The order of the High Court, therefore, deserves to be quashed and set aside. It was also urged that even if it is assumed that the High Court has jurisdiction to enter into such arena, then also, in the facts and circumstances of the case and considering the allegations levelled and proved against the workmen, it cannot be said that an order of stoppage of increment/increments with cumulative effect could not have been made. On the contrary, the matter was very serious which called for much more severe penalty, but by taking liberal view, the Management had imposed only a “minor” penalty. Such reasonable order could not have been set aside by the High Court. The counsel submitted that “banking service” is an “essential service”. It has public utility element therein and it was the duty of the employees connected with such service to discharge their duties sincerely, faithfully and wholeheartedly. In the instant case, not only the workmen refused to join duty, but they prevented other employees who had amicably settled the matter with the Management in discharging their duties by administering threat and by successfully obstructing the Management in the discharge of its obligations as public utility undertaking. Serious view, therefore, was called for. There was total and complete misconception on the part of the High Court in holding that the punishment was “harsh”. It was, therefore, submitted on behalf of the Management that the order passed by the learned Single Judge and modified by the Division Bench deserves to be set aside by confirming the action taken by the Management and approved by the Labour Court, Coimbatore.

13. The learned counsel for the respondent Union, on the other hand, supported the order passed by the Division Bench of the High Court. According to him, the learned Single Judge was fully justified in partly allowing the petition observing that the punishment imposed on the workmen was “clearly harsh” and in setting aside that part of the punishment by which increment/increments was/were stopped. Since the punishment imposed by the Management was grossly disproportionate, the learned Single Judge was also right in directing the Bank Management to pay salary with 12% interest. It is no doubt true, stated the learned counsel, that the Division Bench partly set aside the direction of the learned Single Judge by modifying the punishment permitting stoppage of increment/increments of the workmen

without cumulative effect and by setting aside payment of salary with 12% interest, but as the said part of the order passed by the Division Bench has not been appealed against by the Union, it would remain. But no case has been made out by the Bank Management to interfere with the order of the Division Bench and the appeal deserves to be dismissed.

Findings recorded

14. We have given our most anxious and thoughtful consideration to the rival contentions of the parties. From the facts referred to above and the proceedings in the inquiry and final order of punishment, certain facts are no longer in dispute. A call for strike was given by the Union which was illegal, unlawful and not in consonance with law. Conciliation proceedings had been undertaken and there was amicable settlement of dispute between the Management on the one hand and the Union on the other hand. Pursuant to such settlement, 134 workmen resumed duty. 53 workmen, however, in spite of the strike being illegal, refused to join duty. Their action was, therefore, *ex facie* illegal. The workmen were, in the circumstances, placed under suspension and disciplinary proceedings were initiated. In spite of several opportunities, they did not cooperate with the inquiry and the inquiry officer was compelled to proceed *ex parte* against them. Four allegations were levelled against the workmen:

- (i) the employees did not come for work from 17-4-1972;
- (ii) they took part in illegal strike from that date i.e. 17-4-1972;
- (iii) they prevented other employees who returned for work from joining duty by administering threat to them; and
- (iv) they prevented the employees who came to receive wages on 17-4-1972.

15. At the enquiry, all the charges levelled against the employees were established. In the light of the said finding, the Management imposed punishment of (i) stoppage of increment of 1 to 4 years with cumulative effect; and (ii) non-payment of salary during period of suspension. In our considered opinion, the action could not be said to be arbitrary, illegal, unreasonable or otherwise objectionable. When the Union challenged the action and reference was made by the “appropriate Government” to the Labour Court, Coimbatore, the Labour Court considered all questions in their proper perspective. After affording opportunity of hearing to both the parties, the Labour Court negated the contention of the Union that the proceedings were not in consonance with principles of natural justice and the inquiry was, therefore, vitiated. It held that the inquiry was in accordance with law. It also recorded a finding that the allegations levelled against the workmen were proved and in view of the charges levelled and proved against the workmen, the punishment imposed on them could not be said to be excessive, harsh or disproportionate. It accordingly disposed of the reference against the workmen. In our considered opinion, the award passed by the Labour Court was perfectly just, legal and proper and required “no interference”. The High Court, in exercise of power of judicial review under Articles 226/227 of the Constitution, therefore, should not have interfered with the well-considered award passed by the Labour Court.

16. The learned counsel for the Union, however, submitted that under the “doctrine of proportionality”, it was not only the *power*, but the *duty* of the “writ court” to consider whether the penalty imposed on workmen was in proportion to the misconduct committed by the workmen. Our attention, in this connection, was invited by both the sides to several decisions of English courts as also of this Court.

Doctrine of proportionality

17. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the “doctrine of proportionality”.

18. “Proportionality” is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise - the elaboration of a rule of permissible priorities.

19. de Smith states that “proportionality” involves “balancing test” and “necessity test”. Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative.

20. In *Halsbury’s Laws of England* (4th Edn.), Reissue, Vol. 1(1), para 78, it is stated:

“The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness.”

21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no “pick and choose”, selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a “sledgehammer to crack a nut”. As has been said many a time; “where paring knife suffices, battle axe is precluded”.

22. In the celebrated decision of *Council of Civil Service Union v. Minister for Civil Service* [1985 AC 374 (HL)] Lord Diplock proclaimed:

“Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action are subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. *I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’....*” (emphasis supplied)

23. *CCSU* has been reiterated by English courts in several subsequent cases. We do not think it necessary to refer to all those cases.

24. So far as our legal system is concerned, the doctrine is well settled. Even prior to *CCSU*, this Court has held that if punishment imposed on an employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to a court to interfere with such penalty in appropriate cases.

25. In *Hind Construction & Engg. Co. Ltd. v. Workmen* [AIR 1965 SC 917], some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. This Court held that the absence could have been treated as leave without pay. The workmen might have been warned and fined. (But)

“It is impossible to think that any other reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner.”

(Emphasis supplied)

The Court concluded that the punishment imposed on the workmen was

“not only severe and out of proportion to the fault, but one which, in our judgment, no reasonable employer would have imposed” (emphasis supplied)

26. In *Federation of Indian Chambers of Commerce and Industry v. Workmen* [AIR 1972 SC 763], the allegation against the employee of the Federation was that he issued legal notices to the Federation and to the International Chamber of Commerce which brought discredit to the Federation—the employer. Domestic inquiry was held against the employee and his services were terminated. The punishment was held to be disproportionate to the misconduct alleged and established. This Court observed that:

“[T]he Federation had made a mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation.”

27. In *Ranjit Thakur* referred to earlier, an army officer did not obey the lawful command of his superior officer by not eating food offered to him. Court-martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment.

28. Applying the doctrine of proportionality and following *CCSU*, Venkatachaliah, J. (as His Lordship then was) observed:

“The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be as disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. *The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.*” (emphasis supplied)

Doctrine of proportionality: Whether applicable

29. From the above decisions, it is clear that our legal system also has accepted the doctrine of proportionality. The question, however, is whether in the facts and circumstances of the

present case, the High Court was justified in invoking and applying the doctrine of proportionality. In our judgment, the answer must be in the negative. Normally, when disciplinary proceedings have been initiated and finding of fact has been recorded in such inquiry, it cannot be interfered with unless such finding is based on “no evidence” or is perverse, or is such that no reasonable man in the circumstances of the case would have reached such finding. In the present case, four charges had been levelled against the workmen. An inquiry was instituted and findings recorded that all the four charges were proved. The Labour Court considered the grievances of the workmen, negative all the contentions raised by them, held the inquiry to be in consonance with principles of natural justice and findings supported by evidence. Keeping in view the charges proved, the Labour Court, in our opinion, rightly held that the punishment imposed on workmen could not be said to be harsh so as to interfere with it.

30. In our opinion, therefore, the High Court was not right in exercising power of judicial review under Articles 226/227 of the Constitution and virtually substituting its own judgment for the judgment of the Management and/or of the Labour Court. To us, the learned counsel for the appellant Bank is also right in submitting that apart from Charges 1 and 2, Charges 3 and 4 were “extremely serious” in nature and could not have been underestimated or underrated by the High Court.

31. In this connection, it is profitable to refer to a decision of this Court in *Bengal Bhatdee Coal Co. v. Ram Probesh Singh* [AIR 1964 SC 486]. In that case, the respondents were employees of the appellant. A strike was going on in the concern of the appellant. The respondents obstructed loyal and willing trimmers from working in the colliery and insisted those workmen to join them in the obstruction. A charge-sheet was served on the respondents and disciplinary inquiry was instituted. They were found guilty and were dismissed from service. Since another reference was pending, approval of the Industrial Tribunal was sought which was granted. In a reference, however, the Industrial Tribunal held that penalty of dismissal was uncalled for and amounted to victimisation. The Management approached this Court.

32. Allowing the appeal, setting aside the order of the Tribunal and upholding the order of dismissal, this Court stated:

“6. Now there is no doubt that though in a case of proved misconduct, normally the imposition of a penalty may be within the discretion of the management there may be cases where the punishment of dismissal for the misconduct proved may be so unconscionable or so grossly out of proportion to the nature of offence that the Tribunal may be able to draw an inference of victimisation merely from the punishment inflicted. But we are of opinion that the present is not such a case and no inference of victimisation can be made merely from the fact that punishment of dismissal was imposed in this case and not either fine or suspension. It is not in dispute that a strike was going on during those days when the misconduct was committed. It was the case of the appellant that the strike was unjustified and illegal and it appears that the Regional Labour Commissioner (Central), Dhanbad, agreed with this view of the appellant. It was during such a strike that the misconduct in question took place and the misconduct was that these thirteen workmen physically obstructed other workmen who were willing to work from doing their work by sitting down between the tramlines. *This was in our opinion serious misconduct on the part of the thirteen workmen and if it is found- as it has*

been found - proved punishment of dismissal would be perfectly justified.” (emphasis supplied)

33. In *M.P. Electricity Board v. Jagdish Chandra Sharma* [(2005) 3 SCC 401] this Court held that dismissal for breach of discipline at workplace by employee could not be said to be disproportionate to the charge levelled and established and no interference was called for on the ground that such punishment was shockingly disproportionate to the charge pleaded and proved.

34. As observed by this Court in *M.P. Gangadharan v. State of Kerala* [(2006) 6 SCC 162] the constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix in each case. It cannot be put in a straitjacket formula. It must be considered keeping in view the doctrine of flexibility. Before an action is struck down, the Court must be satisfied that a case has been made out for exercise of power of judicial review. The Court observed that we are not unmindful of the development of the law that from the doctrine of “Wednesbury unreasonableness”, the Court is leaning towards the doctrine of “proportionality”. But in a case of this nature, the doctrine of proportionality must also be applied having regard to the purport and object for which the Act was enacted.

35. It was then contended on behalf of 53 workmen that if the objectionable act on the part of the workmen was going on strike, all workmen ought to have been treated equally and even-handedly. The Management was not right in reinstating 134 employees immediately by depriving similar benefit to 53 employees. It was, therefore, submitted that in the facts and circumstances of the case, the High Court was right in considering that aspect. Keeping in view the fact that they (134 workmen) had joined work and resumed duty, they were paid wages also. Since other employees (53 workmen) had not joined duty, the action of the Management of non-payment of salary may not be interfered with. But if they would be visited with other penal consequences of stoppage of increment/increments, the action would be arbitrary and unreasonable.

36. We are unable to uphold the contention. In our considered opinion, the 53 employees cannot be said to be similarly situated to the 134 employees who had entered into an amicable settlement with the Management and resumed duty in 1972. It is settled law that equals must be treated equally and unequal treatment to equals would be violation of Article 14 of the Constitution. But, it is equally well established that unequal cannot be treated equally. Equal treatment to unequal would also be violation of “equal protection clause” enshrined by Article 14 of the Constitution. So far as 134 employees are concerned, they accepted the terms and conditions of the settlement and resumed work. 53 workmen, on the other hand, did not accept the settlement, continued with the strike which was declared illegal and unlawful and in departmental inquiry, they were found guilty. Moreover, they resorted to unlawful actions by administering threat to loyal workers. 53 workmen, therefore, in our judgment, cannot be said to form one and the same class in which 134 employees were placed. 53 employees, therefore, cannot claim similar benefit which had been granted to 134 employees.

37. In *Union of India v. Parma Nanda* [(1989) 2 SCC 177] a similar mistake was committed by the Central Administrative Tribunal which was corrected by this Court. In that case, *P*, an employee was charge-sheeted along with other two employees for preparing false pay bills and bogus identity card. All of them were found guilty. A minor punishment was imposed on

two employees, but *P* was dismissed from service since he was the “mastermind” of the plan. *P* approached the Central Administrative Tribunal. The Tribunal modified the punishment on the ground that two other persons were let off with minor punishment but the same benefit was not given to *P*. His application was, therefore, allowed and the penalty was reduced in the line of two other employees. The Union of India approached this Court. It was urged that the case of *P* was not similar to other employees inasmuch as he was the principal delinquent who was responsible for preparing the whole plan, was a party to the fraud and the Tribunal was in error in extending the benefit which had been given to other two employees. Upholding the contention, this Court set aside the order passed by the Tribunal and restored the order of dismissal passed by the authority against him.

38. The principle laid down in *Parma Nanda* has been reiterated recently in *Obettee (P) Ltd. v. Mohd. Shafiq Khan* [(2005) 8 SCC 46]. In *Obettee*, *M* instigated the workers of the factory to go on strike. He did not allow the vehicles carrying the articles to go out of the factory and also administered threat to co-workers. Proceedings were initiated against three employees. Two of them tendered unconditional apology and assurance in writing that they would perform their duties diligently and would not indulge in strike. The proceedings were, therefore, dropped against them. *M*, however, continued to contest the charges levelled against him. He was held guilty and was dismissed from service. The Tribunal upheld the action. The High Court, however, held that the distinction made by the Tribunal between *M* and other two workmen was “artificial” and accordingly granted relief to *M* similar to one granted to other two employees.

39. Setting aside the order of the High Court, upholding the action taken against him and restoring the order of the Tribunal, this Court observed that the cases of other two employees stood on a different footing and the High Court failed to appreciate the distinctive feature that whereas the two employees tendered unconditional apology, *M* continued to justify his action. The order of the High Court was, therefore, clearly unsustainable.

40. It, therefore, cannot be said that the cases of 53 employees were similar to 134 employees and 53 employees were also entitled to claim similar benefit as extended by the Management to 134 employees.

41. The net result of the above discussion would be that the decision rendered by the learned Single Judge and modified by the Division Bench of the High Court must be set aside. Certain developments, however, were brought to our notice by the learned counsel for the Union. It was stated that though in the departmental proceedings the workmen were held guilty, their services were not terminated. They were not paid wages for intervening period for which they had not worked, but were allowed to join duty and in fact they resumed work in the year 1973. This was done before more than three decades. The Labour Court did not grant any relief to them. Though the learned Single Judge allowed their petition and granted some relief, the order was modified by the Division Bench. The 53 employees are now performing their functions and discharging their duties faithfully, diligently and to the satisfaction of the appellant Bank. No proceedings have been initiated against them thereafter. “Industrial peace” has been restored. If at this stage, some order will be passed by this Court after so long a period, it may adversely affect the functioning of the Bank. It was further submitted that the grievance of the Bank has been vindicated and correct legal position has been declared by this

Court. The Court in the peculiar facts and circumstances of the case, therefore, may not interfere with a limited relief granted by the Division Bench of the High Court.

42. In our considered view, the submission is well founded and deserves acceptance. Hence, even though we are of the view that the learned Single Judge was not right in granting benefits and the order passed by the Division Bench also is not proper, it would not be appropriate to interfere with the final order passed by the Division Bench. Hence, while declaring the law on the point, we temper justice with mercy. In the exercise of plenary power under Article 142 of the Constitution, we think that it would not be proper to deprive the 53 workmen who have received limited benefits under the order passed by the Division Bench of the High Court.

43. For the foregoing reasons, we hold that neither the learned Single Judge nor the Division Bench of the High Court was justified in interfering with the action taken by the Management and the award passed by the Labour Court, Coimbatore which was strictly in consonance with law. In peculiar facts and circumstances of the case and in exercise of power under Article 142 of the Constitution, we do not disturb the final order passed by the Division Bench of the High Court on 3-11-2004 in Writ Appeal No. 45 of 2001.

44. The appeal is accordingly disposed of in the above terms.

Om Kumar & Others v. Union of India
AIR 2000 SC 3689; 2000 (7) SCALE 524, 2000 Supp 4 SCR 693
[*Quantum of punishment and the doctrine of proportionality*]

By an order the Supreme Court requested Justice O. Chinnappa Reddy to investigate into the conduct of the officials of the DDA including its ex-officio Chairman at the relevant time, in handing over the possession of the suit land in M/s. Skipper Construction Pvt. Ltd. before receiving the auction amount in full and also in “conniving” at the construction thereon as well as at the advertisements given by it for bookings in the building in question. The learned Judge was also requested to “look into the legality and propriety of the order dated 4.10.98 passed by the then ex-officio Chairman of the DDA and the directions given by the Central Government under Section 41 of the Delhi Development Act.”

The Court accepted the Report and passed an order directing the Department of Personnel to initiate disciplinary proceedings against five officers (i) Sri V.S. Ailawadi IAS (retired), (ii) Sri K.S. Baidwan, IAS, (iii) Sri Virendra Nath IAS, (iv) Sri R.S. Sethi IAS and (v) Sri Om Kumar IAS. The Court, in its order, stated that so far as Sri Om Kumar was concerned, only a minor punishment could be imposed.

On 27.8.97, the Department of Personnel imposed a ‘major’ penalty on Sri Virendra Nath and a ‘minor’ penalty of ‘censure’ on Sri Om Kumar. The Ministry of Home Affairs imposed ‘major’ penalties on Sri K.S. Baidwan and Sri R.S. Sethi on 27.8.97.

M. Jagannadha Rao, J. 10. Two Commissions were appointed by this Court viz. one in favour of Justice O. Chinnappa Reddy and another in favour of Justice R. C. Lahoti. The Commission went into the claims of hundreds of depositors from whom Skipper Construction Co. had collected monies. After the Commissions submitted reports, a few crores were disbursed to the claimants. There were further claims before this Court and Justice P.K. Bahri, retired Judge of the Delhi High Court was appointed to go into the further claims. The inquiry, we are told is almost over. In this process, this Court had to spend a lot of time to sort out various complicated legal and factual issues concerning the claimants. Several orders passed running into two huge volumes have been passed during the last five years. Many more orders remain to be passed. In fact, it took considerable time to bring the Directors of Skipper Company/family/ members before this Court to see that they cooperate in sorting out the mess that was created. If only these officers of DDA had cancelled the contract, encashed the Bank guarantees in time and had not granted extensions to Skipper Construction Company, all this litigation could have been easily avoided.

Show Cause Notice by this Court proposing to refer the matter to the Vigilance Commission by re-opening the quantum of punishment:

11. This Court felt that the officers of the DDA who dealt with these matters at the relevant time were solely responsible for the misery of hundreds of claimants who had put in their life's earnings in the Skipper Construction Company, and that these depositors were virtually taken for a ride. This Court directed that disciplinary action be initiated and thereafter, proceedings were initiated and punishments, as above stated, were imposed. Thereafter, this Court felt that prima facie the punishments imposed on these officers were not proportionate to the gravity of misconduct and that the punishments needed to be upgraded. An order was therefore passed on 4.5.2000 to re-open the punishments imposed and to refer them for reconsideration by the Vigilance Commissioner. Before taking further action, this Court

issued notice to the five officers to show cause why the question relating to the quantum of punishments should not be re-opened and referred to the Vigilance Commissioner for re-examination.

Shri Om Kumar and Shri Virendera Nath:

22. That leaves the cases of Sri Om Kumar, who was awarded a minor punishment (as directed in the order of this Court dated 29.11.95) and of Sri Virendra Nath, who was awarded a major punishment.

Submissions of counsel and Legal Issues emanating therefrom:

23. It was argued at great length by learned senior counsel Sri K. Parasaran and Dr. Rajeev Dhawan that the question as to the quantum of punishment to be imposed was for the competent authority and that the Courts would not normally interfere with the same unless the punishment was grossly disproportionate. The punishments awarded satisfied the Wednesbury rules. On the other hand, learned Amicus Curiae argued that, on the facts of the case, the cases of these two officers justify reference to the Vigilance Commissioner.

24. We agree that the question of the quantum of punishment in disciplinary matters is primarily for the disciplinary authority and the jurisdiction of the High Courts under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or other of the well known principles known as Wednesbury principles. (See *Associated Provincial Picture Houses v. Wednesbury Corporation* 1948 (1) KB 223). This Court had occasion to lay down the narrow scope of the jurisdiction in several cases. The applicability of the principle of 'proportionality' in Administrative law was considered exhaustively in *Union of India v. Ganayutham* (Decided on 27/08/1997) where the primary role of the administrator and the secondary role of the Courts in matters not involving fundamental freedoms, was explained.

25. We shall therefore have to examine the cases of Sri Om Kumar and of Sri Virendra Nath from the stand point of basic principles applicable under Administrative Law, namely, Wednesbury principles and the doctrine of proportionality. It has therefore become necessary to make reference to these principles and trace certain recent developments in the law.

I(a) Wednesbury principle

26. Lord Greene said in 1948 in the Wednesbury case that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or other of the following conditions were satisfied, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in *Council for Civil Services Union v. Minister of Civil Service* [1983 (1) AC 768] (called the GCHQ case) summarised the principles of judicial review of administrative action as based upon one or other of the following - viz. illegality, procedural irregularity and irrationality. He, however, opined that proportionality was a "future possibility".

(b) Proportionality

27. The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the

principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of 'proportionality' to legislative action since 1950, as stated in detail below.

28. By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are however given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.

29. The above principle of proportionality has been applied by the European Court to protect the rights guaranteed under the European Convention for the Protection of Human Rights and fundamental freedoms. 1950 and in particular, for considering whether restrictions imposed were restrictions which were 'necessary' - within Articles 8 to 11 of the said Convention (corresponding to our Article 19(1) and to find out whether the restrictions imposed on fundamental freedoms were more excessive than required. (*Handy Side v. UK* (1976) (1) EHR p. 737). Articles 2 and 5 of the Convention contain provisions similar to Article 21 of our Constitution relating to life and liberty. The European Court has applied the principle of proportionality also to questions of discrimination under Article 14 of the Convention (corresponding to Article 14 of our Constitution) (See *European Administrative Law* by J. Schwarze, 1992, pp. 677-866).

(II) Proportionality and Legislation in U.K. & India

30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional legislation on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of 'proportionality' has indeed been applied vigorously to legislative (and administrative action) in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, such as freedom of speech and expression, freedom to assemble peaceably, freedom to form associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India, this Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. 'Reasonable restrictions' under Article 19(2) to (6) could be imposed on these freedoms only by legislation and Courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which 'reasonable restrictions' could be imposed was considered. In *Chintaman Rao v. State of UP*. (1950 SCR 759), Mahajan J (as he then was) observed that 'reasonable restrictions' which the State could impose on the fundamental rights 'should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation.' 'Reasonable'

implied intelligent care and deliberations, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, CJ in *State of Madras v. V. G. Row*, (1952 SCR 597), observed that the Court must keep in mind the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions of the time. This principle of proportionality vis-a-vis legislation was referred to by Jeevan Reddy, J. in *State of A.P. v. Mc Dowell & Co.*, 2002 (1) ALD 639 recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of 'proportionality'. Provisions of Criminal Procedure Code, 1974 and the Indian Penal Code came up for consideration in *Bachan Singh v. State of Punjab*, the majority upholding the legislation. The dissenting judgment of Bhagwati J [sic.] dealt elaborately with 'proportionality' and held that the punishment provided by the statute was disproportionate.

32. So far as Article 14 is concerned, the Courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the Court considered the question whether the classification was based on intelligible differentia, the Courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [See *Air India v. Nergesh Meerza and others*]. But this latter aspect of striking down legislation only on the basis of 'arbitrariness' has been doubted in *State of A.P. v. Mc Dowell and Co.*

33. In Australia and Canada, the principle of proportionality has been applied to test the validity of statutes [See *Cunliffe v. Commonwealth* (1994) 68 Aust. LJ 791 (at 827, 839)(799, 810, 821)]. In *R v. Oakes* [(1986) 26 DLR (4th) 2001 Dickson, CJ. of the Canadian Supreme Court has observed that there are three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, must not only be rationally connected to the objective in the first sense, but should impair as little as possible the right to freedom in question. Thirdly, there must be 'proportionality' between the effects of the measures and the objective. See also *Ross v. Brunswick School District No. 15* (1996) (1) SCR 825 at 872 referring to proportionality. English Courts had no occasion to apply this principle to legislation. Aggrieved parties had to go to the European Court at Strasbourg for a declaration.

34. in USA, in *City of Boerne v. Flores* [(1997) 521 U.S. 507], the principle of proportionality has been applied to legislation by stating that "there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end".

35. Thus, the principle that legislation relating to restrictions on fundamental freedoms could be tested on the anvil of 'proportionality' has never been doubted in India. This is called

‘primary’ review by the Courts of the validity of legislation which offended fundamental freedoms.

IIIA. Proportionality and Administrative Action (In England)

36. In Administrative Law, the principle of ‘proportionality’ has been applied in several European countries. But, in England, it was considered a future possibility in the *GCHQ case* by Lord Diplock. In India, as stated below, it has always been applied to administrative action affecting fundamental freedoms.

(i) *From Wednesbury to strict scrutiny or proportionality*

37. The development of the principle of ‘strict scrutiny’ or ‘proportionality’ in Administrative Law in England is however recent. Administrative action was traditionally being tested on *Wednesbury* grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of ‘strict scrutiny’. In the case of these freedoms, *Wednesbury* principles are no longer applied. The Courts in England could not expressly apply proportionality in the absence of the Convention but tried to safeguard the rights zealously by treating the said rights as basic to the Common Law and the Courts then applied the strict scrutiny test. In the *Spy Catcher Case Att. General v. Guardian Newspapers Ltd.* (No.2) (1990(1) AC 109 (at pp. 283-284), Lord Goff stated that there was no inconsistency between the Convention and the Common Law. In *Derbyshire County Council v. Times Newspapers Ltd.* (1993 AC 534), Lord Keith treated freedom of expression as part of Common Law. Recently, in *R v. Secretary of State for Home Department, Exp. Simms* (1999(3) All ER 400 (H.L.)), the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the Common Law. Lord Hobhouse held the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in *R. v. Lord Saville Ex pt.* (1999(4) ALL ER 860 (870.872) CCA). In all these cases, the English Courts applied the ‘strict scrutiny’ test rather than describe the test as one of ‘proportionality’. But, in any event, in respect of these rights ‘*Wednesbury*’ rule has ceased to apply.

(ii) *Brind and Proportionality: Primary and Secondary review*

38. However, the principle of ‘strict scrutiny’ or ‘proportionality’ and primary review came to be explained in *R. v. Secretary of State for the Home Department, ex p. Brind* (1991 (1) A.C. 696). That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organisations which were prescribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of the organisations. It did not however, for example, preclude the broadcasting by such persons through the medium of a film, provided there was a ‘voice-over’ account, paraphrasing what they said. The applicant’s claim was based directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English law but stated that freedom of expression was basic to the Common Law and that, even in the absence of the Convention, English Courts could go into the question (see p. 748-749) “...whether the Secretary of State, in the exercise of his discretion could reasonably impose the restriction he has imposed on the broadcasting organisations” and that the Courts were not perfectly entitled to start from the premise that

any restriction of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it.

Lord Templeman also said in the above case that the Courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that 'in terms of the Convention' any such interference must be both necessary and proportionate (*ibid* pp. 750-751).

39. In a famous passage, the seeds of the principle of primary and secondary review by Courts were planted in the Administrative law by Lord Bridge in the *Brind* case, Where Convention rights were in question the Courts could exercise a right of primary review. However, the Courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the Courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

"The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment."

(iii) *Smith explains Proportionality further: Primary & Secondary roles of the Court.*

40. The principle of proportionality and the primary role of the Courts where fundamental freedoms were involved was further developed by Simon Brown, LJ. in the Divisional Court in *R v. Ministry of Defence, Exp. Smith* (1996 Q.B. 517 (at 541) as follows. Adverting to the primary role of the Court in cases of freedoms under the Convention, the learned Judge stated:

"If the Convention for the Protection of Human Rights and Fundamental Freedoms were part of our law and we are accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown disproportionate to its benefits, then clearly the primary judgment (subject only to a limited 'margin of appreciation') would be for us and not for others; the constitutional balance could shift."

Adverting to the position (in 1996) i.e., before the Convention was adopted, Simon Brown, LJ stated that the Courts had then only to play a secondary role and apply Wednesbury rules. The learned Judge said:

"In exercising merely secondary judgment, this Court is bound, even though acting in a human rights context, to act with some reticence."

41. On appeal, the above principles were affirmed in the same case in *R. v. Ministry of Defence Exp. Smith* (1996(1) ALL BR. 257) CA). In the Court of Appeal, Lord Bingham M.R. said the Court, in the absence of the Convention was not thrown into the position of the decision maker. Henry LJ (p. 272) stated as follows:

"If the Convention were part of our law, then as Simon Brown, LJ said in the Divisional Court, the primary judgment on this issue would be for the Judges. But Parliament has not given us the primary jurisdiction on this issue. Our present Constitutional role was correctly identified by Simon Brown LJ as exercising a secondary or reviewing judgment, as it is, in

relation to the Convention, the only primary judicial role lies with the Europe Court at Strasbourg.”

Thus, the principle of primary review and proportionality on the one hand and the principle of secondary review and *Wednesbury* reasonableness on the other hand gave a new dimension to Administrative law, the former applying in the case of fundamental freedoms and the latter, in other cases.

(iv) *Area of discretion of administrator-varies in different situations:*

42. While the courts’ level of scrutiny will be more in case of restrictions on fundamental freedoms, the Courts give a large amount of discretion to the administrator in matters of high-level economic and social policy and may be reluctant to interfere: *R v. Secretary of State for the Environment, Ex p. Nothing Han shore Country Council* (1986 AC 240); *R v. Secretary of State for Environment, ex p. Hammersmith and Fultan London Borough Council* 1991(1) AC 521 (597). Smith speaks of ‘variable margin of appreciation’. The new Rule 1 of the Civil Procedure Rules, 1999 permits the Courts to apply ‘proportionality’ but taking into account the financial issues, complexities of the matter and the special facts of the case.

(v) *Post-Smith and the Human Rights Act, 1998*

43. After Smith, the English Human Right’s Act, 1998 has since been passed and is to be effective from 2.10.2000. The possibility of the demise of *Wednesbury* rules so far as administrative action affecting fundamental freedoms are concerned, is now clearly visualised. (See Prof. R.P. Craig’s Administrative Law. 4th Ed. 1999 pp. 585-586)

44. Though the Act itself does not explicitly enjoin the English Courts to apply the test of ‘proportionality’, it is arguable that it is implicit because Section 2(1)(a) requires the Court to take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights when the Court thinks it fit relevant to proceedings regarding Convention rights.

45. Under Article 3(1) of the Human Rights Act, 1998, the English Court can now declare the legislative action as incompatible with the rights and freedoms referred to in the Schedule. The Minister is then to move Parliament for necessary amendment to remove the incompatibility. While doing so, the English Court, can now apply strict scrutiny or proportionality to legislative and administrative action. The principle is now treated as Central to English Law (See *Human Rights Law and Practice* by Lord Lester of Herne Hill, Q.C. & David Pannick QC, 1999, para 3.16). The more the threshold of *Wednesbury* irrationality is lowered when fundamental human rights are on play, the easier it will become to establish judicial review as an effective remedy with Article 13 of the 1998 Act (See, *ibid.* Supplement August, 2000) (para 4.13.12).

46. The Privy Council, in a case arising under the Constitution of the Republic of Trinidad and Tobago had occasion to deal with life and liberty and validity of certain instructions imposed by Government prescribing time limits for convicts of death sentence to submit representations to international bodies (as per Conventions ratified by the State). The Privy Council held that the instructions were violation of ‘proportionality’ and due process, [see *Thomas v. Baptiste*, 2000(2) AC 1 at 20] (Per Lord Millet for majority).

47. Recently, Lord Irvine of Lairg, the Lord Chancellor has explained the position of ‘proportionality’ after the Commencement of the English Human Rights Act, 1998. (see “The Development of Human Rights in Britain under an Incorporated Convention on Human

Rights”, 1998 *Public Law*, 221) (at pp. 233-234). The difference between the approach of Courts in the cases governed by this Act and the traditional *Wednesbury* rules has been pointed out by the Lord Chancellor as follows:

“Although there is some encouragement in British decisions for the view that the margin of appreciation under the Convention is simply the *Wednesbury* test under another guise, statements by the Court of Human Rights seem to draw significant distinction. The Court of Human Rights has said in terms that its review is not limited to checking that the 'national authority exercised its discretion reasonably, carefully and in good faith'. It has to go further. It has to satisfy itself that the decision was based on an "acceptable assessment of the relevant facts" and that the interference was no more than reasonably necessary to achieve the legislative aim pursued.”

Explaining ‘strict scrutiny’ or ‘proportionality’ as above, in the wake of the Human Rights Act, 1998, the Lord Chancellor referred to the principles laid down by Simon Brown LJ in *Ex. p. Smith*. In cases under the Human Rights Act, 1998, he said “a more rigorous scrutiny than the traditional judicial review will be required”. The Lord Chancellor further observed:

"In areas where the Convention applies, the Court will be less concerned whether there has been a failure in this sense (i.e. *Wednesbury* sense) but will inquire more closely into the merits of the decision to see for example that necessity justified the limitations of a positive right, and that it was no more of a limitation than was needed. This is a discernible shift which may be seen in essence as a shift from form to substance".

Thus, the principle of primary and secondary review respectively in Convention cases and non-Convention cases has become more or less crystalised. These principles were accepted in *Ganayutham*.

(vi) *The recent case in UK in ITF (1999)*

48. While the English Courts were setting down to the principle of 'strict scrutiny' or 'proportionality' for review of administrative action touching fundamental freedoms, leaving *Wednesbury* principles to apply to other non-Convention cases, a new approach has recently been made in a case decided by the House of Lords in *R. v. Chief Constable of Sussex. ex.p. International Trader's Ferry Ltd.* (1999 (I) All E.R. 129). In that case, the decision of the Police not to provide the required help to the ITF for transport of goods across the English Channel by securing adequate police force to remove the activities protesters from the scene - was upheld. It was stated that the Chief Police Constable had properly balanced the right to protest and the right to free movement of goods, by taking into consideration, the lack of finances and the number of policemen available and the risk of injury to protesters etc. (See a contrary view of our Supreme Court recently in *Navinchandra N. Maiithia v. State of Meghalaya and ors.* (JT 2000 Suppl. (1) SC 538).

49. In that connection, the House of Lords appeared to deviate and almost equate *Wednesbury* and proportionality. Lord Slynn for the majority after referring to Brind said that in 'practice, *Wednesbury* reasonableness and proportionality' may mean the same, and that whichever test is adopted, the result is the same. Lord Cooke went further and said that Lord Green's test in *Wednesbury* was 'tautologous and exaggerated' and he advocated a simpler test:

"Was the decision one which a reasonable authority could reach?"

50. It must be said that the House of Lords has deviated both from proportionality and *Wednesbury*. This deviation, in our view, is likely to lead to considerable vagueness in the

administrative law which has just now been crystallising. It is difficult for us to understand how the primary role of the Courts in cases involving fundamental freedoms and the secondary role of Courts in other cases not involving such rights and where *Wednesbury* rule is to be applied, can be equated.

51. In our opinion, the principles laid down in *Brind* and *Exp. Smith* and also as explained by the Lord Chancellor to which we have made reference earlier are more clear-cut and must be adhered to. A differentiation must, in our view, be respectively maintained between the Court's primary and secondary roles in Convention cases and non-Convention cases. (See in this connection see Prof. Craig, *Admn. Law*. 1999, 4th Ed. pp. 573, 589, 621 dealing with Lord Cooke's new test).

III B. Proportionality and Administrative Action in India:

(i) *Fundamental freedoms under Article 19(1) & Article 21*

52. In the Indian scene the existence of a Charter of fundamental freedoms from 1950 distinguishes our law and has placed our Courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action. We have already dealt with proportionality and legislation. Now, we shall deal with administrative decisions and proportionality.

53. Now under Articles 19(2) to (6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the concerned statute permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of 'proportionality', just as it is done in the case of the main legislation. This in fact is being done by our Courts.

54. Administrative action in India affecting fundamental freedoms has always been tested on the anvil of 'proportionality' in the last fifty years even though it has not been expressly stated that the principle that is applied is the 'proportionality' principle. For example, a condition in a licence issued to a cinema house to exhibit, at every show, a certain minimum length of 'approved films' was questioned. The restriction was held reasonable [See *R. M. Seshadri v. Dist. Magistrate Tanjore and another*, AIR 1954 747]. *Union of India v. Motion Pictures Association* also related, inter alia, to validity of licensing conditions. In another case, an order refusing permission to exhibit a film relation to the alleged obnoxious or unjust aspects of reservation policy was held violative of freedom of expression under Article 19(1)(a) [*S. Rangarajan v. Jagjivan Ram and others*, 1989 (1) Scale 812]. Cases of surveillance by police came up for consideration in *Malak Singh and Ors. v. State of P & H and Ors.*, (1981) 1 SCC 420. Cases of orders relating to movement of goods came up in *Bishambhar Dayal Chandra Mohan and others v. State of U.P. and others*, AIR 1982 SC 33. There are hundreds of such cases dealt with by our Courts- In all these matters, the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the Courts as a primary reviewing authority and not on the basis of *Wednesbury* principles. It may be not that the Courts did not call this proportionality but it really was.

55. In *Ganayutham*, the above aspect was left for further discussion, however, we are now pointing out that in administrative action affecting fundamental freedoms, proportionality has always been applied in our country though the word 'proportionality' has not been specifically used.

56. We may point out that in Israel; the Supreme Court of Israel has now recognised 'proportionality' as a separate ground in administrative law - different from unreasonableness. It is stated that it consists of three elements. First, the means adopted by the authority in exercising its power should rationally fit the legislative purpose. Secondly, the authority should adopt such means that do not injure the individual more than necessary. And third, the injury caused to the individual by the exercise of the power should not be disproportional to the benefit which accrues to the general Public. Under this test, the Court recently invalidated several administrative actions (See De Smith, Woolf, Jowell, first Cumulative Supplement to *Judicial Review of Administrative Action*, 1998, p. 114).

(ii) Article 14 and Administrative Action: -- Discriminative Classification and arbitrariness:

57. We next come to the most important aspect of the case. Discussion here can be divided into two parts.

(a)(i) Classification test under Article 14:

58. Initially, our Courts, while testing legislation as well as administrative action which was challenged as being discriminatory under Article 14, were examining whether the classification was discriminatory, in the sense whether the criteria for differentiation were intelligible and whether there was a rational relation between the classification and the object sought to be achieved by the classification. It is not necessary to give citation of cases decided by this Court where administrative action was struck down as being discriminative. There are numerous.

(ii) Arbitrariness test under Article 14:

59. But, in *E. P. Royappa v. State of Tamil Nadu*, 1974 (4) SCC 31, Bhagwati, J. laid down another test for purposes of Article 14. It was stated that if the administrative action was 'arbitrary', it could be struck down under Article 14. This principle is now uniformly followed in all Courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

(b) If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, Wednesbury applies and it is secondary review:

60. We have now reached the crucial aspect directly arising in the case. This aspect was left open for discussion in future in *Ganayutham* but as the question of 'arbitrariness' (and not of discriminatory classification) arises here, we wish to make the legal position clear).

61. When does the Court apply, under Article 14, the proportionality test as a primary reviewing authority and when does the Court apply the *Wednesbury* rules as a secondary reviewing authority? From the earlier review of basic principles, the answer becomes simple. In fact, we have further guidance in this behalf.

62. In the European Court, it appears that administrative action can be challenged under Article 14 of the Convention (corresponding to Article 14 of our Constitution) as being discriminatory and be tested by applying the principle of 'proportionality'. Prof. Craig refers

to the judgment of the European Court under Article 14 in *Lithgow v. UK* (1996) ECHR 329 as follows:

"The differential treatment must not only pursue a legitimate aim. It had to be proportionate. There had to be relationship of proportionality between the means employed and the aim sought to be realised"

63. Similarly, in the European law, in relation to discrimination on ground of sex, the principle of proportionality has been applied and it has been held that the State has to justify its action. In *EU Law and Human Rights* (by Lammy Betten and Nicholas Grief (1998 at P. 98), it is stated:

"If indirect discrimination were established, the Government would have to show 'very weighty reasons' by way of objective justification, bearing in mind that derogations from fundamental rights must be construed strictly and in accordance with the principle of proportionality". [*Johnstone v. Chief Constable of the RVC*, 1986 ECR 1951 (Para 38.51)].

64. In the context of Article 14 of the English Act, 1998, (which is similar to our Article 14) Prof. Craig refers to the above principle. (See *Administrative Law*, Craig 4th Ed., 1999 page 652). Thus, it would appear that under Article 14 of the European Convention, principle of proportionality is invoked and where questions of discrimination are involved and the Court is a primary reviewing authority. According to Prof. Craig, this is likely to be the position under Article 14 of the English Act, 1998.

65. In the US, in the matter of discrimination, tests of 'intermediate scrutiny' and 'strict scrutiny' have been laid down. In cases of affirmative action, the US Courts have hitherto been applying the 'intermediate scrutiny test.' See the discussion in *Indira Sawhney v. Union of India*, (1992 Supple. (3) SCC at 217, at pp. 684-685) by Jeevan Reddy, J. but recently, however, in 1995, the US Supreme Court has shifted, in matters of affirmative action, from the 'intermediate scrutiny' test to the 'strict scrutiny' test. See *Adarand Constructors Inc v. Peña* [(1995) 75 US 200] referred to by the Constitution Bench recently in *Ajit Singh (II) v. State of Punjab*.

66. It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequal are treated equally, the question is for the Constitutional Courts as primary reviewing Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Hence the Court deals with the merits of the balancing action of the administrator and is, in essence, applying 'proportionality' and is a primary reviewing authority.

67. But where, an administrative action is challenged as 'arbitrary' under Article 14 on the basis of *Royappa* (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the *Wednesbury* test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. [In *G. B. Mahajan v. Jalgaon Municipal Council*, AIR 1991 SC 1153]. Venkatachaliah, J. (as he then was) pointed out that 'reasonableness' of the administrator under Article 14 in the context of

administrative law has to be judged from the stand point of *Wednesbury* rules. In *Tata Cellular v. Union of India*, [1994 (6) SCC 651] (at pp. 679-680), *Indian Express Newspapers v. Union of India*, AIR 1986 SC 872, *Supreme Court Employees Welfare Association v. Union of India*, (1999) 2 SCC 548, and *U P Financial Corporation v. GEM CAP (India) Pvt. Ltd.*, AIR 1993 SC 1435, while Judging whether the administrative action is 'arbitrary' under Article 14 (i.e., otherwise than being discriminatory), this Court has confined itself to a *Wednesbury* review always.

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on *Wednesbury* principles applies.

Proportionality and punishments in Service Law:

69. The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of 'arbitrariness' of the order of punishment is questioned under Article 14.

70. In this context, we shall only refer to these cases. In *Ranjit Thakur v. Union of India*, this Court referred to 'proportionality' in the quantum of punishment but the Court observed that the punishment was 'shockingly' disproportionate to the misconduct proved. In *B. C. Chaturvedi v. Union of India*, AIR 1996 SC 484, and this Court stated that the Court will not interfere unless the punishment awarded was one which shocked the conscience of the Court. Even then, the court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the Court could award an alternative penalty. It was also so stated in *Ganayutham*.

71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as 'arbitrary' under Article 14, the Court is confined to *Wednesbury* principles as a secondary reviewing authority. The Court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms or of discrimination under Article 14 applies in such a context. The Court while reviewing punishment and if it is satisfied that *Wednesbury* principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the Courts, and such extreme or rare cases can the Court substitute its own view as to the quantum of punishment. On Facts:

72. In the light of the above discussion, we shall now deal with the cases of the two officers and test, on *Wednesbury* grounds and as a Court of secondary review, the punishments could be interfered with as being arbitrary.

Sri Om Kumar:

73. So far as Sri Om Kumar is concerned, learned Senior counsel Sri K. Parasaran has taken us through the entire record including the Report of Justice O. Chinnappa Reddy holding that there is a *prima facie* case, the Report of the Inquiry Officer which is adverse to the Officer, the recommendation of the UPSC which is favourable to him and to the order of the disciplinary authority which has not accepted the recommendation of the UPSC. On facts, the disciplinary authority felt that misconduct was proved as held by the Inquiry Officer. However, it felt that the officer deserved only 'censure' because of two mitigating factors: (i)

the complicated stage at which Sri Om Kumar was required to handle the case and (ii) absence of malafides. Question is whether the punishment requires upward revision.

74. Learned Senior counsel Sri K. Parasaran has, however, contended that as a secondary reviewing authority we should not interfere and that in the order of this Court dated 29-1-95, this Court itself recommended that only a 'minor penalty' should be imposed and that 'censure' was a minor penalty. Whether a more severe minor penalty could have been chosen or not was for the primary reviewing authority. Learned senior counsel referred to the direction of this Court earlier that, so far as Sri Om Kumar was concerned, only a minor punishment could be awarded. This Court said:

"It is brought to our notice that he (Sri Om Kumar) was brought to DDA as Vice Chairman to set right the mess which the DDA had become under Sri Prem Kumar, Vice Chairman. We take note of the fact that by that time the matter relating to sale of the said plot to Skipper had become sufficiently complicated. Having regard to these facts, we direct that disciplinary proceedings for a minor penalty be taken by the Government...."

Learned Senior counsel Sri K. Parasaran, therefore, argued on the basis of *Wednesbury* rules as explained in *Ganayutham* that it is now not open to this Court to say that the punishment of 'censure' awarded was not the proper one and that Sri Om Kumar deserved some other minor punishment of a higher degree. That would amount to assuming a primary role. According to learned Counsel, it could not be said that the punishment of censure awarded could be deserved as shocking the conscience of the Court. Counsel also submitted that in hindsight one might now say that when Skipper Company defaulted, Sri Om Kumar who was the senior most officer in DDA ought to have cancelled the bid and encashed the bank guarantee rather than give extensions of time on the pretext that the plans were not made ready by DDA.

75. After giving our anxious consideration to the above submissions and the facts and the legal principles above referred to, we have finally come to the conclusion that it will be difficult for us to say that among the permission for minor punishments; the choice of the punishment of 'censure' was violation of the *Wednesbury* rules. No relevant fact was omitted nor irrelevant fact was taken into account. There is no illegality. Nor could we say that it was shockingly disproportionate. The administrator had considered the report of Justice Chinnappa Reddy Commission, the finding of the Inquiry Officer, the opinion of the UPSC which was given twice and the views of the Committee of Secretaries. Some were against the officer and some were in his favour. The administrator felt that there were two mitigating factors (i) the complicated stage at which the officer was sent to DDA and (ii) the absence of malafides. In the final analysis, we are not inclined to refer the matter to the Vigilance Commissioner for upward revision of punishment.

Sri Virendra Nath:

76. So far as Sri Virendra Nath is concerned, learned senior Counsel Sri Rajeev Dhawan advanced elaborate arguments. The punishment imposed on the officer was one of the major punishments. On a consideration of the report of Justice Chinnappa Reddy, the report of the Inquiry Officer - which are no doubt both adverse to the officer, and the recommendations of the UPSC which were favourable to the officer on both occasions and the order of the disciplinary authority which accepted the finding as to misconduct, we feel that the administrator's decision in the primary role is not violation of *Wednesbury* Rules. The

punishment awarded was a major punishment. We, therefore, do not propose to refer the matter to the vigilance Commissioner for further upward revision of the punishment.

77. In the result, we do not propose to pursue the matter further and we drop further proceedings. The show cause notice is disposed of accordingly.

* * * * *

R v. Secretary of State for the Home Department, Ex Parte Daly
[2001] UKHL 26

[Some Comments et cetera are given in square brackets]

Lord Bingham of Cornhill - 1. On 31 May 1995 the Home Secretary introduced a new policy ('the policy') governing the searching of cells occupied by convicted and remand prisoners in closed prisons in England and Wales. The policy was expressed in the Security Manual as an instruction to prison governors in these terms:

"... 17.72 Subject to paragraph 17.73, staff may normally read legal correspondence only if the Governor has reasonable cause to suspect that their contents endanger prison security, or the safety of others, or are otherwise of a criminal nature. In this case the prisoner involved shall be given the opportunity to be present and informed that their correspondence is to be read.

17.73 But during a cell search, staff must examine legal correspondence thoroughly in the absence of the prisoner. Staff must examine the correspondence only so far as necessary to ensure that it is bona fide correspondence between the prisoner and a legal adviser and does not conceal anything else.

17.74 When entering cells at other times (e.g. when undertaking accommodation fabric checks) staff must take care not to read legal correspondence belonging to prisoners unless the Governor has decided that the reasonable cause test in 17.72 applies."

2. Mr. Daly is a long term prisoner. He challenges the lawfulness of the policy. He submits that section 47(1) of the Prison Act 1952, which empowers the Secretary of State to make rules for the regulation of prisons and for the discipline and control of prisoners, does not authorise the laying down and implementation of such a policy ... requirement that a prisoner may not be present when his legally privileged correspondence is examined by prison officers. He contends that a blanket policy of requiring the absence of prisoners when their legally privileged correspondence is examined infringes, to an unnecessary and impermissible extent, a basic right recognised both at common law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that the general terms of section 47 authorise no such infringement, either expressly or impliedly.

The legal background

5. Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights.

Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege? Such rights may be curtailed only

by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.

6. These propositions rest on a solid base of recent authority. In *R v. Board of Visitors of Hull Prison, Ex p St Germain* [1979] QB 425, 455 Shaw LJ made plain that “despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration ... An essential characteristic of the right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise.”

7. *Raymond v. Honey* [1983] 1 AC 1 arose from the action of a prison governor who blocked a prisoner’s application to a court. The House of Lords affirmed, at p 10, that “under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication ...”

Section 47 was held to be quite insufficient to authorise hindrance or interference with so basic a right as that of access to a court. To the extent that rules were made fettering a prisoner’s right of access to the courts and in particular his right to institute proceedings in person they were ultra vires.

8. In *R v. Secretary of State for the Home Department, Ex p Anderson* [1984] QB 778 the prisoner’s challenge was directed to a standing order which restricted visits by a legal adviser to a prisoner contemplating proceedings concerning his treatment in prison when he had not at the same time made any complaint to the prison authorities internally.

Reiterating the principle that a prisoner remains invested with all civil rights which are not taken away expressly or by necessary implication, Robert Goff LJ, giving the judgment of the Queen’s Bench Divisional Court, said, at p 790: “At the forefront of those civil rights is the right of unimpeded access to the courts; and the right of access to a solicitor to obtain advice and assistance with regard to the initiation of civil proceedings is inseparable from the right of access to the courts themselves.”

The standing order in question was held to be ultra vires. At pp. 793-794 the court observed: “As it seems to us, a requirement that an inmate should make ... a complaint as a prerequisite of his having access to his solicitor, however desirable it may be in the interests of good administration, goes beyond the regulation of the circumstances in which such access may take place, and does indeed constitute an impediment to his right of access to the civil court.”

10. ... *R v. Secretary of State for the Home Department, Ex p Leech* [1994] QB 198 ... concerned rule 33(3) of the Prison Rules 1964 (SI 1964/388) [essentially, that letters to or from prisoners should be read by the Governor and any letter could be stopped if the contents were considered to be objectionable] ... The decision is important for several reasons.

First, it re-stated the principles that every citizen has a right of unimpeded access to the court, that a prisoner’s unimpeded access to a solicitor for the purpose of receiving advice and assistance in connection with a possible institution of proceedings in the courts forms an inseparable part of the right of access to the courts themselves and that section 47(1) of the 1952 Act did not authorise the making of any rule which created an impediment to the free flow of communication between a solicitor and a client about contemplated legal proceedings. Legal professional privilege was described as an important auxiliary principle serving to buttress the cardinal principles of unimpeded access to the court and to legal advice.

Secondly, it was accepted that section 47(1) did not expressly authorise the making of a rule such as rule 33(3), and the court observed, at p 212, that a fundamental right such as the common law right to legal professional privilege would very rarely be held to be abolished by necessary implication. But the court accepted that section 47(1) should be interpreted as conferring power to make rules for the purpose of preventing escapes from prison, maintaining order in prisons, detecting and preventing offences against the criminal law and safeguarding national security. Rules could properly be made to permit the examining and reading of correspondence passing between a prisoner and his solicitor in order to ascertain whether it was in truth bona fide correspondence and to permit the stopping of letters which failed such scrutiny.

The crucial question was whether rule 33(3) was drawn in terms wider than necessary to meet the legitimate objectives of such a rule. As it was put, at p 212: “The question is whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters on the ground of ... objectionability”

The court concluded that there was nothing which established objectively that there was a need in the interests of the proper regulation of prisons for a rule of the width of rule 33(3). While section 47(1) of the 1952 Act by necessary implication authorised some screening of correspondence between a prisoner and a solicitor, such intrusion had to be the minimum necessary to ensure that the correspondence was in truth *bona fide* legal correspondence: since rule 33(3) created a substantial impediment to exercise by the prisoner of his right to communicate in confidence with his solicitor the rule was drawn in terms which were needlessly wide, and so was held to be ultra vires.

11. In the light of the decisions in *Campbell* and *Leech*, a new prison rule was made, now rule 39 of the Prison Rules 1999 (SI 1999/728). It provides, so far as material:

“(1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule.

“(2) Correspondence to which this rule applies may be opened if the governor has reasonable cause to believe that it contains an illicit enclosure and any such enclosures shall be dealt with in accordance with the other provision of these Rules.

“(3) Correspondence to which this rule applies may be opened, read and stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature.

“(4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed if it or any enclosure is to be read or stopped.”

This rule, it is accepted, applies only to correspondence in transit from prisoner to solicitor or vice versa. The references to opening and stopping make plain that it has no application to legal correspondence or copy correspondence received or made by a prisoner and kept by him in his cell.

12. The Court of Appeal decision in *Leech* was endorsed and approved by the House of Lords in *R v. Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, which arose from a prohibition on visits to serving prisoners by journalists seeking to investigate whether the prisoners had, as they claimed, been wrongly convicted, save on terms which

precluded the journalists from making professional use of the material obtained during such visits. The House considered whether the Home Secretary's evidence showed a pressing need for a measure which restricted prisoners' attempts to gain access to justice, and found none. The more substantial the interference with fundamental rights, the more the court would require by way of justification before it could be satisfied that the interference was reasonable in a public law sense.

In this as in other cases there was applied the principle succinctly stated by Lord Browne-Wilkinson in *R v. Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575: "... A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based, unless the statute conferring the power makes it clear that such was the intention of Parliament."

15. It is necessary, first, to ask whether the policy infringes in a significant way Mr. Daly's common law right that the confidentiality of privileged legal correspondence be maintained. He submits that it does for two related reasons: first, because knowledge that such correspondence may be looked at by prison officers in the absence of the prisoner inhibits the prisoner's willingness to communicate with his legal adviser in terms of unreserved candour; and secondly, because there must be a risk, if the prisoner is not present, that the officers will stray beyond their limited role in examining legal correspondence, particularly if, for instance, they see some name or reference familiar to them, as would be the case if the prisoner were bringing or contemplating bringing proceedings against officers in the prison ...

16. I have no doubt that the policy infringes Mr. Daly's common law right to legal professional privilege. This was the view of two very experienced judges in *R v. Governor of Whitemoor Prison, Ex p Main* [1999] QB 349, against which decision the present appeal is effectively brought. At p 366 Kennedy LJ said: "In my judgment legal professional privilege does attach to correspondence with legal advisers which is stored by a prisoner in his cell, and accordingly such correspondence is to be protected from any unnecessary interference by prison staff. Even if the correspondence is only inspected to see that it is what it purports to be that is likely to impair the free flow of communication between a convicted or remand prisoner on the one hand and his legal adviser on the other, and therefore it constitutes an impairment of the privilege."

Judge LJ was of the same opinion. At p 373, he said: "Prisoners whose cells are searched in their absence will find it difficult to believe that their correspondence has been searched but not read. The governor's order will sometimes be disobeyed. Accordingly I am prepared to accept the potential 'chilling effect' of such searches."

In an imperfect world there will necessarily be occasions when prison officers will do more than merely examine prisoners' legal documents, and apprehension that they may do so is bound to inhibit a prisoner's willingness to communicate freely with his legal adviser.

17. The next question is whether there can be any ground for infringing in any way a prisoner's right to maintain the confidentiality of his privileged legal correspondence. Plainly there can. Some examination may well be necessary to establish that privileged legal correspondence is what it appears to be and is not a hiding place for illicit materials or information prejudicial to security or good order.

18. It is then necessary to ask whether, to the extent that it infringes a prisoner's common law right to privilege, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime. Mr. Daly's challenge at this point is directed to the blanket nature of the policy, applicable as it is to all prisoners of whatever category in all closed prisons in England and Wales, irrespective of a prisoner's past or present conduct and of any operational emergency or urgent intelligence ...

19. ... [I]t must be recognised that the prison population includes a core of dangerous, disruptive and manipulative prisoners, hostile to authority and ready to exploit for their own advantage any concession granted to them. Any search policy must accommodate this inescapable fact. I cannot however accept that the reasons put forward justify the policy in its present blanket form. Any prisoner who attempts to intimidate or disrupt a search of his cell, or whose past conduct shows that he is likely to do so, may properly be excluded even while his privileged correspondence is examined so as to ensure the efficacy of the search, but no justification is shown for routinely excluding all prisoners, whether intimidatory or disruptive or not, while that part of the search is conducted ... The policy cannot in my opinion be justified in its present blanket form ... I accept Mr. Daly's submission on this point.

21. ... Section 47(1) of the 1952 Act does not authorise such excessive intrusion, and the Home Secretary accordingly had no power to lay down or implement the policy in its present form. I would accordingly declare paragraphs 17.[72] to 17.74 of the Security Manual to be unlawful and void in so far as they provide that prisoners must always be absent when privileged legal correspondence held by them in their cells is examined by prison officers.

23. I have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review. But the same result is achieved by reliance on the European Convention.

Article 8.1 gives Mr. Daly a right to respect for his correspondence. While interference with that right by a public authority may be permitted if in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr Daly's exercise of his right under article 8.1 to an extent much greater than necessity requires. In this instance, therefore, the common law and the convention yield the same result ...

Now, following the incorporation of the convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy. On this aspect of the case, I agree with and adopt the observations of my noble and learned friend Lord Steyn which I have had the opportunity of reading in draft.

Lord Steyn -

24. I am in complete agreement with the reasons given by Lord Bingham of Cornhill in his speech. For the reasons he gives I would also allow the appeal. Except on one narrow but important point I have nothing to add.

25. There was written and oral argument on the question whether certain observations of Lord Phillips of Worth Matravers MR in *R (Mahmood) v. Secretary of State for the Home*

Department [2001] 1 WLR 840 were correct. The context was an immigration case involving a decision of the Secretary of State made before the Human Rights Act 1998 came into effect. The Master of the Rolls nevertheless approached the case as if the Act had been in force when the Secretary of State reached his decision. He explained the new approach to be adopted.

The Master of the Rolls concluded, at p 857, para 40: "When anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention. When considering the test of necessity in the relevant context, the court must take into account the European jurisprudence in accordance with section 2 of the 1998 Act."

26. The explanation of the Master of the Rolls in the first sentence of the cited passage requires clarification. It is couched in language reminiscent of the traditional *Wednesbury* ground of review (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223), and in particular the adaptation of that test in terms of heightened scrutiny in cases involving fundamental rights as formulated in *R v. Ministry of Defence, Ex p Smith* [1996] QB 517, 554E-G per Sir Thomas Bingham MR. There is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where convention rights are at stake.

27. The contours of the principle of proportionality are familiar. In *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three stage test.

Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach.

... I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the

Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test.

The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138: ‘the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court’s analysis of complaints under article 8 of the Convention.’

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary ... the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, ‘that the intensity of review in a public law case will depend on the subject matter in hand’. That is so even in cases involving Convention rights. In law context is everything.

* * * * *

Malafides

G. Sadanandan v. State of Kerala

(1966) 3 SCR 590 : AIR 1966 SC 1925

P.B. GAJENDRAGADKAR, C.J. - 2. The petitioner, G. Sadanandan, has been detained by Respondent 1, the State of Kerala, under Rule 30(1)(b) of the Defence of India Rules, 1962 ("the Rules") by an order passed by it on 20th October, 1965. The said order recites that from the materials placed before Respondent 1, it was satisfied that with a view to prevent the petitioner from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community it was necessary to detain him. The said order further shows that under Rule 30(4) of the Rules, Respondent 1 had decided that the petitioner be detained in the Central Prison, Trivandrum, under conditions as to maintenance, discipline and punishment of offences and breaches of discipline as provided in the Travancore-Cochin Security Prisoners Order, 1950. The petitioner challenges the validity of this order by his present petition filed under Article 32 of the Constitution.

3. The petitioner is a businessman who carries on wholesale business in kerosene oil as ESSO dealer and in provisions in his places of business at Trivandrum. In connection with his wholesale business of selling kerosene oil, the petitioner receives kerosene oil either in bulk or in sealed tins from the ESSO company. When the kerosene oil is thus received by him, the petitioner transfers the kerosene oil from barrels into empty tins purchased from the market and sells them to his customers. Until the Kerala Kerosene Control Order, 1965 was promulgated, and brought into force on 24th October, 1965, the petitioner was not required to take a license for carrying on his business in kerosene oil. As from 24th October, 1965 the said trade could not be carried on in Kerala without obtaining a license. It is common ground that the petitioner has not been granted a license in that behalf. To his present petition, the petitioner has joined Respondent 1 and N. Paramasivan Nair, Deputy Superintendent of Police (Civil) Supplies Cell, Crime Branch, Trivandrum, as Respondent 2.

4. The petitioner alleges that Respondent 2 caused to be initiated criminal proceedings against him in Criminal Case No. 70 of 1965 in the Court of the District Magistrate, Trivandrum. These proceedings were commenced on 20th May, 1965. The charge against the petitioner set out in the first information report was that the petitioner had exhibited a board showing stock "nil" on 20th May, 1965, at about 7 .00 p.m. in his wholesale shop at Chalai, Trivandrum when, in fact, there was stock available in his shop. The police searched the shop that day in the presence of Respondent 2, though in the relevant papers prepared in regard to the said search, no reference was made to his presence. According to the petitioner, the board indicating "nil" stock had been exhibited in his shop, because 7 tins out of the available stock had been sold to one D.N. Siktar in regard to which a sale memo was being prepared when the raid took place, whereas the two remaining tins were in a damaged condition and could not have been sold. Even so, the raid was carried out and FIR was lodged against the petitioner alleging that he had committed an offence by violating Rule 125(2) and (3) of the Rules read with clause 4 of the Kerosene (Price Control) Order, 1963.

5. The petitioner appeared before the District Magistrate before whom the FIR had been filed, and was released by him on bail. In this case, all the witnesses for the prosecution had been examined, except the officer who had submitted the charge-sheet. Except the Sub-Inspector of

Police, and the Head Constable, no other witnesses supported the prosecution case, though in all five witnesses were examined for the prosecution.

6. Pending the trial of this case, the Inspector of Police, Crime Branch (Food), Trivandrum, who is a subordinate of Respondent 2, initiated another case at his instance, being case No. 332 of 1965 before the District Magistrate, Trivandrum, on 29th September, 1965. In this case, it was alleged that the petitioner had violated Rule 125(4) of the Rules read with Rules 3 and 4 of the Kerosene (Price Control) Order, 1963, as well as had committed an offence under Section 420 IPC. The FIR in regard to this case was made by Narayan Pillai Sivasankaran Nair of Tampanoor, Trivandrum. This Nair is a salesman in his elder brother's provision store at Trivandrum, and both these brothers are close relatives of Respondent 2. This case was initiated after the search of the petitioner's shop at Chalai. The petitioner was then arrested and brought before the District Magistrate on 30th September, 1965. On this occasion also, when the petitioner's shop was searched, Respondent 2 was present. During the course of the search, the police seized one tin weighing 16.200 kgs. None of the other 899 tins which were stored in the two rooms of the place of sale of the petitioner were seized. The police party also searched the go down of the petitioner and took into custody 632 tins of kerosene oil. Six barrels of oil were likewise seized. According to the petitioner, all this was done at the instance of N. Sivasankaran Nair who is a close relative of Respondent 2 and who had purchased two tins of kerosene oil from the petitioner which were produced before the police officers for the purpose of showing that the tins were short of contents.

7. The petitioner was granted interim bail on 30th September, 1965 by the District Magistrate, and finally released on bail on the execution of a bail bond on 21st October, 1965. When the order of bail was made absolute by the District Magistrate, the Assistant Public Prosecutor did not oppose the release of the petitioner on bail. The petitioner contends that though the case was posted several times for the submission of the final report by the prosecution, Respondent 2 has so managed that the said final report has not been submitted till the date of the present petition.

8. After the petitioner was released by the District Magistrate on 21st October, 1965, he reached home at 4 o'clock in the evening. Immediately thereafter, Respondent 2 came in a jeep to the petitioner's residence and took him into custody. When the petitioner asked Respondent 2 as to why he was being arrested, he refused to disclose the grounds. Respondent 2 took the petitioner into custody by force and carried him to jail.

9. The petitioner's wife thereafter instructed her advocate to file a writ petition in the Kerala High Court for the production of the petitioner. Accordingly, a writ petition was filed on 22nd October, 1965.

10. Later, the advocate engaged by the petitioner's wife was able to get in touch with the petitioner with the permission of the Home Secretary in the Central Jail at Trivandrum. At this interview, the advocate was given the detention order which had been served on the petitioner, and instructed to take suitable action to challenge the said order. In view of the fact that the petition filed by the advocate in the Kerala High Court under the vague instructions of the petitioner's wife contained a very limited prayer, the petitioner's advocate withdrew the said petition on 27th October, 1965. Ultimately, the present petition has been filed in this Court on behalf of the petitioner on 20th November, 1965. That, in brief is the background of the present writ petition.

11. The petitioner challenges the validity of the impugned order of detention mainly on the ground that it is mala fide, and has been passed as a result of the malicious and false reports which have been prepared at the instance of Respondent 2. The whole object of Respondent 2, according to the petitioner, in securing the preparation of these false reports is to eliminate the petitioner from the field of wholesale business in kerosene oil in Trivandrum, so that his relatives may benefit and obtain the dealership of the ESSO Company. The petitioner further alleges that the order of detention has been passed solely with the purpose of denying him the benefit of the order of bail which was passed in his favour by the District Magistrate on 21st October, 1965. In support of the plea that his detention is malafide, the petitioner strongly relies on the fact that on 24th October, 1965, the Kerala Kerosene Control Order, 1965 has come into force and in consequence unless the petitioner gets a license, it would be impossible for him to carry on his business of kerosene oil; and yet, the detention order ostensibly passed against him as a result of his activities alleged to be prejudicial in respect of his business in kerosene oil, continues to be enforced against him even after the Control Order has been brought into operation. It is mainly on these grounds that the petitioner challenges the validity of the impugned order of his detention.

12. The allegations made in the petition have been controverted by Mr Devassy who is the Secretary in the Home Department of Respondent 1. In his counter-affidavit, the Home Secretary has, in a general way, denied all the allegations made in the petition. The purport of the counter-affidavit filed by the Home Secretary is that the impugned order of detention has been passed by Respondent 1 bonafide and after full consideration of the merits of the case. Respondent 1 was satisfied, says the counter-affidavit that the activity of the petitioner was likely to prejudice supplies essential to the life of the community as a whole; and so, the petitioner's contention that the impugned order is malafide is controverted.

13. In dealing with writ petitions by which orders of detention passed by the appropriate authorities under Rule 30(1)(b) of the Rules are challenged, this Court has consistently recognised the limited scope of the enquiry which is judicially permissible. Whether or not the detention of a detenu is justified on the merits, is not open to judicial scrutiny; that is a matter left by the Rules to the subjective satisfaction of the appropriate authorities empowered to pass orders under the relevant Rule. This Court, no doubt, realises in dealing with pleas for habeas corpus in such proceedings that citizens are detained under the Rules without a trial, and that clearly is inconsistent with the normal concept of the rule of law in a democratic State. But having regard to the fact that an emergency has been proclaimed under Article 352 of the Constitution, certain consequences follow; and one of these consequences is that the citizens detained under the Rules are precluded from challenging the validity of the Rules on the ground that their detention contravenes their fundamental rights guaranteed by Articles 19, 20 and 21. The presence of the proclamation of emergency and the notification subsequently issued by the President constitute a bar against judicial scrutiny in respect of the alleged violation of the fundamental rights of the detenu. This position has always been recognised by this Court in dealing with such writ petitions.

14. Nevertheless, this Court naturally examines the detention orders carefully and allows full scope to the detenus to urge such statutory safeguards as are permissible under the Rules, and it has been repeatedly observed by this Court that in cases where this Court is satisfied that the impugned orders suffer from serious infirmities on grounds which it is permissible for the

detenus to urge, the said orders would be set aside. Subject to this position, the merits of the orders of detention are not open to judicial scrutiny. That is why pleas made by the detenus that the impugned orders have been passed by the appropriate authorities without applying their minds properly to the allegations on which the impugned orders purport to be based, or that they have been passed malafide, do not usually succeed, because this Court finds that the allegations made by the detenus are either not well founded, or have been made in a casual and light-hearted manner. But cases do come before this Court, though not frequently, where this Court comes to the conclusion that the impugned order of detention is passed without the appropriate authority applying its mind to the problem, or that it can well be regarded as an order passed malafide. Having heard Mr Ramamurthi for the petitioner and the learned Additional Solicitor-General for Respondent 1, we have come to the conclusion that the impugned order in the present case must be characterised as having been passed malafide.

15. The first consideration which has weighed in our minds in dealing with Mr Ramamurthi's contentions in the present proceedings is that Respondent 2 has not chosen to make a counter-affidavit denying the several specific allegations made against him by the petitioner. Broadly stated, the petition alleges that Respondent 2 is responsible for the criminal complaints made against the petitioner, that Respondent 2 was present when his premises were searched, and that Respondent 2 actually went to the house of the petitioner when the petitioner was forcibly taken into custody and removed to the jail. The petition further alleges that the second criminal complaint filed against the petitioner was the direct result of the FIR by Narayan Pillai Sivasankaran Nair who and his brothers are the trade rivals of the petitioner and are closely related to Respondent 2. The petition likewise specifically alleges that the reports on which the impugned order of detention has been passed, were the result of the instigation of Respondent 2. Whether or not these allegations, if proved, would necessarily make the impugned order malafide, is another matter; but, for the present, we are dealing with the point that Respondent 2 who has been impleaded to the present proceedings and against whom specific and clear allegations have been made in the petition, has not chosen to deny them on oath. In our opinion, the failure of Respondent 2 to deny these serious allegations constitutes a serious infirmity in the case of Respondent 1.

16. The significance of this infirmity is heightened when we look at the counter-affidavit filed by the Home Secretary. This affidavit has not been made in a proper form. The deponent does not say which of the statements made by him in his affidavit are based on his personal knowledge and which is the result of the information received by him from documents or otherwise. The form in which the affidavit has been made is so irregular that the learned Additional Solicitor-General fairly conceded that the affidavit could be ignored on that ground alone. That, however, is not the only infirmity in this affidavit.

17. It is surprising that the Home Secretary should have taken upon himself to deny the allegations made by the petition against Respondent 2 when it is plain that his denial is based on hearsay evidence at the best. It is not easy for us to appreciate why the Home Secretary should have undertaken the task of refuting serious allegations made by the petition against Respondent 2 instead of requiring Respondent 2 to make a specific denial on his own. Whether or not Narayan Pillai Sivasankaran Nair and his brother are close relatives of Respondent 2 and whether or not they are the trade rivals of the petitioner and expect to receive benefit from his detention, are matters on which the Home Secretary should have

wisely refrained from making any statement in his affidavit. He should have left it to Respondent 2 to make the necessary averments. Besides, it is impossible to understand why the specific allegations made by the petition against Respondent 2 in regard to the part played by him either in searching the petitioner's shop or in arresting him should not have been definitely denied by Respondent 2 himself. The statements made by the Home Secretary in his affidavit in that behalf are very vague and unsatisfactory. We have carefully considered the affidavit made by the Home Secretary and we are satisfied that apart from the formal defect from which it plainly suffers, even otherwise the statements made in the affidavit do not appear to us to have been made by the deponent after due deliberation.

18. Take, for instance, the statements made by the Home Secretary in regard to the petitioner's contention that the continuance of his detention after the Kerala Kerosene Control Order, 1965 came into operation on 24th October, 1965, is wholly unjustified. The petitioner's grievance is clear and unambiguous. He says that unless a license is granted to him, he would no longer be able to trade in kerosene oil; and since admittedly, no license has been granted to him, his continued detention on the ostensible ground that his dealings in kerosene oil amount to a prejudicial activity, is entirely unjustified. Now, what does the Home Secretary say in respect of this contention? On the date of the detention of the petitioner, says the Home Secretary's affidavit, the Control Order had not come into force, and that, no doubt, is true. But the question is: is the continuance of the petitioner's detention justified after the said Order came into force? The affidavit says that the petitioner is not a licensee under the Kerala Kerosene Control Order, 1965, and cannot legally carry on the business as a dealer in kerosene at present; but there is nothing under the law preventing him from applying for such license to carry on the same business. It is difficult to understand the logic or the reasonableness of this averment. Indeed, we ought to add that the learned Additional Solicitor-General fairly, and we think rightly and wisely, conceded that this part of the Home Secretary's affidavit could not be supported and that he saw no justification for the continuance of the petitioner's detention after the Kerala Kerosene Control Order came into operation on 24th October, 1965. It is remarkable that in the whole of his affidavit, the Home Secretary does not say how he came to know all the facts to which he has purported to depose in his affidavit. We have, however, assumed that as Home Secretary, the file relating to the detention of the petitioner must have been handled by him, though the Home Secretary should have realised that he should himself have made a statement to that effect in his affidavit. We have had occasion to criticise affidavits made by appropriate authorities in support of the detention orders in writ proceedings, but we have not come across an affidavit which shows such an amount of casualness as in the present case. We have carefully examined all the material and relevant facts to which our attention has been drawn in the present proceedings and we see no escape from the conclusion that the impugned order of detention passed against the petitioner on 20th October, 1965, and more particularly, the petitioner's continued detention after 24th October, 1965, must be characterised as clearly and plainly mala fide. This is a case in which the powers conferred on the appropriate authority have, in our opinion, been abused.

19. We are conscious that even if a subordinate officer makes a malicious report against a citizen suggesting that he should be detained, the malice inspiring the report may not necessarily or always make the ultimate order of detention passed by the appropriate authority

invalid. Even a malicious report may be true in the sense that the facts alleged may be true, but the person making the report was determined to report those facts out of malice against the party concerned. But a malicious report may also be false. In either case, the malice attributable to the reporting authority cannot, in law, be attributed to the detaining authority; but in such cases, it must appear that the detaining authority carefully examined the report and considered all the relevant material available in the case before passing the order of detention. Unfortunately, in the present case, the affidavit made by the Home Secretary is so defective and in many places so vague and ambiguous that we do not know which authority acting for Respondent 1 in fact examined the case against the petitioner and what was the nature of the material placed before such authority; and the affidavit does not contain any averment that after the material was examined by the appropriate authority, the appropriate authority reached the conclusion that it was satisfied that the petitioner should be detained with a view to prevent him from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community.

20. After all, the detention of a citizen in every case is the result of the subjective satisfaction of the appropriate authority; and so, if a *prima facie* case is made by the petitioner that his detention is either *malafide*, or is the result of the casual approach adopted by the appropriate authority, the appropriate authority should place before the Court sufficient material in the form of proper affidavit made by a duly authorised person to show that the allegations made by the petitioner about the casual character of the decision or its *mala fides*, are not well founded. The failure of Respondent 1 to place any such material before us in the present proceedings leaves us no alternative but to accept the plea made by the petitioner that the order of detention passed against him on 20th October, 1965, and more particularly, his continued detention after 24th October, 1965, are totally invalid and unjustified.

21. In conclusion, we wish to add that when we come across orders of this kind by which citizens are deprived of their fundamental right of liberty without a trial on the ground that the emergency proclaimed by the President in 1962 still continues and the powers conferred on the appropriate authorities by the Defence of India Rules justify the deprivation of such liberty, we feel rudely disturbed by the thought that continuous exercise of the very wide powers conferred by the Rules on the several authorities is likely to make the conscience of the said authorities insensitive, if not blunt, to the paramount requirement of the Constitution that even during emergency, the freedom of Indian citizens cannot be taken away without the existence of the justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded. It is true that cases of this kind are rare; but even the presence of such rare cases constitutes a warning to which we think it is our duty to invite the attention of the appropriate authorities.

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Relevant and Irrelevant Considerations

State of Bombay v. K.P. Krishnan

(1961) 1 SCR 227 : AIR 1960 SC 1223

The respondents' union had addressed four demands to the Firestone Tyre and Rubber Co. of India Ltd. in respect of gratuity, holidays, classification of certain employees and for the payment of an unconditional bonus for the financial year ended October 31, 1953. The respondents' union also addressed the Assistant Commissioner of Labour, Bombay, forwarding to him a copy of the said demands, and intimating to him that since the company had not recognised the respondents' union there was no hope of any direct negotiations between the union and the company. The Assistant Commissioner of Labour, who was the Conciliation Officer, was requested to commence the conciliation proceedings at an early date. Soon thereafter the company declared a bonus equivalent to 1/4 of the basic earnings for the year 1952-53. The respondents then informed the company that they were entitled to a much higher bonus having regard to the profits made by the company during the relevant year and that they had decided to accept the bonus offered by the company without prejudice to the demand already submitted by them in that behalf. After holding a preliminary discussion with the parties, the Conciliation Officer examined the four demands made by the respondents and admitted into conciliation only two of them; they were in respect of the classification of certain employees and the bonus for the year 1952-53; the two remaining demands were not admitted in conciliation. The conciliation proceedings initiated by the conciliator, however, proved infructuous with the result that on July 5, 1954, the conciliator made his failure report under Section 12(4) of the Act. In his report, the conciliator has set out the arguments urged by both the parties before him in respect of both the items of dispute. In regard to the respondents' claim for bonus, the conciliator made certain suggestions to the company but the company did not accept them, and so it became clear that there was no possibility of reaching a settlement on that issue. Incidentally, the conciliator observed that it appeared to him that there was considerable substance in the case made out by the respondents for payment of additional bonus. The conciliator also dealt with the respondents' demand for classification and expressed his opinion that having regard to the type and nature of the work which was done by the workmen in question, it seemed clear that the said work was mainly of a clerical nature and the demand that the said workmen should be taken on the monthly-paid roll appeared to be in consonance with the practice prevailing in other comparable concerns. The management, however, told the conciliator that the said employees had received very liberal increments and had reached the maximum of their scales and so the management saw no reason to accede to the demand for classification. On receipt of the report, the Government of Bombay considered the matter and came to the conclusion that the dispute in question should not be referred to an Industrial Tribunal for its adjudication. Accordingly, as required by Section 12(5) on December 11, 1954, the Government communicated to the respondents the said decision and stated that it did not propose to refer the said dispute to the Tribunal under Section 12(5) "*for the reason that the workmen resorted to go slow during the year 1952-53*". It was this decision of the Government refusing to refer the dispute for industrial adjudication that gave rise to the present proceedings.

On February 18, 1955, the respondents filed in the Bombay High Court a petition under Article 226 of the Constitution praying for the issue of a writ of mandamus or a writ in the

nature of mandamus or other writ, direction or order against the State of Maharashtra calling upon it to refer the said dispute for industrial adjudication under Section 10(1) and Section 12(5) of the Industrial Disputes Act, 1947.

It was common ground that during a part of the relevant year the respondents had adopted go-slow tactics. The respondent's case was that despite the go-slow strategy adopted by them for some months during the relevant year the total production for the said period compared very favourably with the production for previous years and that the profit made by the company during the relevant year fully justified their claim for additional bonus. The appellant had taken the view that because the respondents adopted go-slow strategy during the relevant year the industrial dispute raised by them in regard to bonus as well as classification was not to be referred for adjudication under Section 12(5). The question before the court was: whether the order passed by the appellant refusing to refer the dispute for adjudication under Section 12(5) could be sustained.

P.B. GAJENDRAGADKAR, J. – 5. Let us first examine the scheme of the relevant provisions of the Act. Chapter III which consists of Section 10 and 10-A deals with reference of dispute to Boards, Courts or Tribunals. Section 10(1) provides that where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing refer the dispute to one or the other authority specified in clauses (a) to (d). This section is of basic importance in the scheme of the Act. It shows that the main object of the Act is to provide for cheap and expeditious machinery for the decision of all industrial disputes by referring them to adjudication, and thus avoid industrial conflict resulting from frequent lock-outs and strikes. It is with that object that reference is contemplated not only in regard to existing industrial disputes but also in respect of disputes which may be apprehended. This section confers wide and even absolute discretion on the Government either to refer or to refuse to refer an industrial dispute as therein provided. Naturally this wide discretion has to be exercised by the Government bona fide and on a consideration of relevant and material facts. The second proviso to Section 10(1) deals with disputes relating to a public utility service, and it provides that where a notice under Section 22 has been given in respect of such a dispute the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced. It is thus clear that in regard to cases falling under this proviso an obligation is imposed on the Government to refer the dispute unless of course it is satisfied that the notice is frivolous or vexatious or that considerations of expediency required that a reference should not be made. This proviso also makes it clear that reference can be made even if other proceedings under the Act have already commenced in respect of the same dispute. Thus, so far as discretion of the Government to exercise its power of referring an industrial dispute is concerned it is very wide under Section 10(1) but is limited under the second proviso to Section 10(1). Section 10(2) deals with a case where the Government has to refer an industrial dispute and has no discretion in the matter. Where the parties to an industrial dispute apply in the prescribed manner either jointly or separately for a reference of the dispute between them the Government has to refer the said dispute if it is satisfied that the persons applying represent the majority of each party. Thus, in dealing with this class of cases the only point on which

the Government has to be satisfied is that the persons applying represent the majority of each party; once that test is satisfied the Government has no option but to make a reference as required by the parties. Similarly Section 10-A deals with cases where the employer and his workmen agree to refer the dispute to arbitration at any time before the dispute has been referred under Section 10, and it provides that they may so refer it to such person or persons as may be specified in the arbitration agreement; and Section 10-A(3) requires that on receiving such an arbitration agreement the Government shall, within fourteen days, publish the same in the Official Gazette. Section 10-A(4) prescribes that the arbitrator or arbitrators shall investigate the dispute and submit the arbitration award to the appropriate Government; and Section 10-A(5) provides that such arbitrations are outside the Arbitration Act. Thus cases of voluntary reference of disputes to arbitration are outside the scope of any discretion in the Government. That in brief is the position of the discretionary power of the Government to refer industrial disputes to the appropriate authorities under the Act.

6. The appropriate authorities under the Act are the conciliator, the Board, Court of Enquiry, Labour Court, Tribunal and National Tribunal. Section 11(3) confers on the Board, Court of Enquiry, Labour Court, Tribunal and National Tribunal all the powers as are vested in a civil court when trying a suit in respect of the matters specified by clauses (a) to (d). A Conciliation Officer, however, stands on a different footing. Under Section 11(4) he is given the power to call for and inspect any relevant document and has been given the same powers as are vested in civil courts in respect of compelling the production of documents.

7. Section 12 deals with the duties of Conciliation Officers. Under Section 12(1) the Conciliation Officer may hold conciliation proceedings in the prescribed manner where an industrial dispute exists or is apprehended. In regard to an industrial dispute relating to a public utility service, where notice under Section 22 has been given, the Conciliation Officer shall hold conciliation proceedings in respect of it. The effect of Section 12(1) is that, whereas in regard to an industrial dispute not relating to a public utility service the Conciliation Officer is given the discretion either to hold conciliation proceedings or not, in regard to a dispute in respect of a public utility service, where notice has been given, he has no discretion but must hold conciliation proceedings in regard to it. Section 12(2) requires the Conciliation Officer to investigate the dispute without delay with the object of bringing about a settlement, and during the course of his investigation he may examine all matters affecting the merits and the right settlement of the dispute and do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement. The duty and function of the Conciliation Officer is, as his very name indicates, to mediate between the parties and make an effort at conciliation so as to persuade them to settle their disputes amicably between themselves. If the Conciliation Officer succeeds in his mediation Section 12(3) requires him to make a report of such settlement together with the memorandum of the settlement signed by the parties to the dispute. Section 18(3) provides that a settlement arrived at in the course of conciliation proceedings shall be binding on the parties specified therein. It would thus be seen that if the attempts made by the Conciliation Officer to induce the parties to come to a settlement succeeds and a settlement is signed by them it has in substance the same binding character as an award under Section 18(3). Sometimes efforts at conciliation do not succeed either because one of the parties to the dispute refuses to cooperate or they do not agree as to the terms of settlement. In such cases the Conciliation Officer has to send his report to the

appropriate Government under Section 12(4). This report must set forth the steps taken by the officer for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof together with a full statement of such facts and circumstances and the reasons on account of which in his opinion a settlement could not be arrived at. The object of requiring the Conciliation Officer to make such a full and detailed report is to apprise the Government of all the relevant facts including the reasons for the failure of the Conciliation Officer so that the Government may be in possession of the relevant material on which it can decide what course to adopt under Section 12(5). In construing Section 12(5), therefore, it is necessary to bear in mind the background of the steps which the Conciliation Officer has taken under Section 12(1) to (4). The Conciliation Officer has held conciliation proceedings, has investigated the matter, attempted to mediate, failed in his effort to bring about a settlement between the parties, and has made a full and detailed report in regard to his enquiry and his conclusions as to the reasons on account of which a settlement could not be arrived at.

8. Section 12(5) with which we are concerned in the present appeals provides that if, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor. This section requires the appropriate Government to consider the report and decide whether a case for reference has been made out. If the Government is satisfied that a case for reference has been made out it may make such reference. If it is satisfied that a case for reference has not been made out it may not make such a reference; but in such a case it shall record and communicate to the parties concerned its reasons for not making the reference which in the context means its reasons for not being satisfied that there is a case for reference. The High Court has held that the word “may” in the first part of Section 12(5) must be construed to mean “shall” having regard to the fact that the power conferred on the Government by the first part is coupled with a duty imposed upon it by the second part. The appellant and the company both contend that this view is erroneous. According to them the requirement that reasons shall be recorded and communicated to the parties for not making a reference does not convert “may” into “shall” and that the discretion vesting in the Government either to make a reference or not to make it is as wide as it is under Section 10(1) of the Act. Indeed their contention is that, even after receiving the report, if the Government decides to make a reference it must act under Section 10(1) for that is the only section which confers power on the appropriate Government to make a reference.

9. It is true that Section 12(5) provides that the appropriate Government may make such reference and in that sense it may be permissible to say that a power to make reference is conferred on the appropriate Government by Section 12(5). The High Court was apparently inclined to take the view that in cases falling under Section 12(5) reference can be made only under Section 12(5) independently of Section 10(1). In our opinion that is not the effect of the provisions of Section 12(5). If it is held that in cases falling under Section 12(5) reference can and should be made only under Section 12(5) it would lead to very anomalous consequences. Section 10(3) empowers the appropriate Government by an order to prohibit the continuance of any strike or lockout in connection with an industrial dispute which may be in existence on the date of the reference, but this power is confined only to cases where industrial disputes are

referred under Section 10(1). It would thus be clear that if a reference is made only under Section 12(5) independently of Section 10(1) the appropriate Government may have no power to prohibit the continuance of a strike in connection with a dispute referred by it to the Tribunal for adjudication; and that obviously could not be the intention of the legislature. It is significant that Section 23 and 24 prohibit the commencement of strikes and lock-outs during the pendency of proceedings therein specified, and so even in the case of a reference made under Section 12(5) it would not be open to the employer to declare a lock-out or for the workmen to go on strike after such a reference is made; but if a strike has commenced or a lock-out has been declared before such a reference is made, there would be no power in the appropriate Government to prohibit the continuance of such a strike or such a lock-out. Section 24(2) makes it clear that the continuance of a lock-out or strike is deemed to be illegal only if an order prohibiting it is passed under Section 10(3). Thus the power to maintain industrial peace during adjudication proceedings which is so essential and which in fact can be said to be the basis of adjudication proceedings is exercisable only if a reference is made under Section 10(1). What is true about this power is equally true about the power conferred on the appropriate Government by Sections 10(4), (5), (6) and (7). In other words, the material provisions contained in sub-sections (3) to (7) of Section 10(1) which are an integral part of the scheme of reference prescribed by Chapter III of the Act clearly indicate that even if the appropriate Government may be acting under Section 12(5) the reference must ultimately be made under Section 10(1). Incidentally it is not without significance that even in the petition made by the respondents in the present proceedings they have asked for a writ of mandamus calling upon the appellant to make a reference under Sections 10(1) and 12(5).

10. Besides, even as a matter of construction, when Section 12(5) provides that the appropriate Government may make such reference it does not mean that this provision is intended to confer a power to make reference as such. That power has already been conferred by Section 10(1); indeed Section 12(5) occurs in a Chapter dealing with the procedure, powers and duties of the authorities under the Act; and it would be legitimate to hold that Section 12(5) which undoubtedly confers power on the appropriate Government to act in the manner specified by it, the power to make a reference which it will exercise if it comes to the conclusion that a case for reference has been made must be found in Section 10(1). In other words, when Section 12(5) says that the Government may make such reference it really means it may make such reference under Section 10(1). Therefore it would not be reasonable to hold that Section 12(5) by itself and independently of Section 10(1) confers power on the appropriate Government to make a reference.

11. The next point to consider is whether, while the appropriate Government acts under Section 12(5), it is bound to base its decision only and solely on a consideration of the report made by the Conciliation Officer under Section 12(4). The tenor of the High Court's judgment may seem to suggest that the only material on which the conclusion of the appropriate Government under Section 12(5) should be based is the said report. There is no doubt that having regard to the background furnished by the earlier provisions of Section 12 the appropriate Government would naturally consider the report very carefully and treat it as furnishing the relevant material which would enable it to decide whether a case for reference has been made or not; but the words of Section 12(5) do not suggest that the report is the only material on which Government must base its conclusion. It would be open to the Government

to consider other relevant facts which may come to its knowledge or which may be brought to its notice, and it is in the light of all these relevant facts that it has to come to its decision whether a reference should be made or not. The problem which the Government has to consider while acting under Section 12(5) (a) is whether there is a case for reference. This expression means that Government must first consider whether a prima facie case for reference has been made on the merits. If the Government comes to the conclusion that a prima facie case for reference has been made then it would be open to the Government also to consider whether there are any other relevant or material facts which would justify its refusal to make a reference. The question as to whether a case for reference has been made out can be answered in the light of all the relevant circumstances which would have a bearing on the merits of the case as well as on the incidental question as to whether a reference should nevertheless be made or not. A discretion to consider all relevant facts which is conferred on the Government by Section 10(1) could be exercised by the Government even in dealing with cases under Section 12(5) provided of course the said discretion is exercised bona fide, its final decision is based on a consideration of relevant facts and circumstances, and the second part of Section 12(5) is complied with.

12. We have already noticed that Section 12 deals with the conciliation proceedings in regard to all industrial disputes, whether they relate to a public utility service or not. Section 12(1) imposes an obligation on the Conciliation Officer to hold conciliation proceedings in regard to an industrial dispute in respect of public utility service provided a notice under Section 22 has been given. If in such a dispute the efforts at conciliation fail and a failure report is submitted under Section 12(4) Government may have to act under Section 12(5) and decide whether there is a case for reference. Now, in dealing with such a question relating to a public utility service considerations prescribed by the second proviso to Section 10(1) may be relevant, and Government may be justified in refusing to make a reference if it is satisfied that the notice given is frivolous or vexatious or that reference would be inexpedient. Just as discretion conferred on the Government under Section 10(1) can be exercised by it in dealing with industrial disputes in regard to non-public utility services even when Government is acting under Section 12(5), so too the provisions of the second proviso can be pressed into service by the Government when it deals with an industrial dispute in regard to a public utility service under Section 12(5).

13. It would; therefore, follow that on receiving the failure report from the Conciliation Officer Government would consider the report and other relevant material and decide whether there is a case for reference. If it is satisfied that there is such a case for reference it may make a reference. If it does not make a reference it shall record and communicate to the parties concerned its reasons therefor. The question which arises at this stage is whether the word “may” used in the context means “shall”, or whether it means nothing more than “may” which indicates that the discretion is in the Government either to refer or not to refer.

14. It is urged for the respondent that where power is conferred on an authority and it is coupled with, the performance of a duty the words conferring power though directory must be construed as mandatory. The argument is that Section 12(5) makes it obligatory on the Government to record and communicate its reasons for not making the reference and this obligation shows that the power to make reference is intended to be exercised for the benefit of the party which raises an industrial dispute and wants it to be referred to the authority for

decision. It may be that the legislature intended that this requirement would avoid casual or capricious decisions in the matter because the recording and communication of reasons postulates that the reasons in question must stand public examination and scrutiny and would therefore be of such a character as would show that the question was carefully and properly considered by the Government; but that is not the only object in making this provision. The other object is to indicate that an obligation or duty is cast upon the Government, and since the power conferred by the first part is coupled with the duty prescribed by the second part “may” in the context must mean “shall”. There is considerable force in this argument. Indeed it has been accepted by the High Court and it has been held that if the Government is satisfied that there is a case for reference it is bound to make the reference.

15. On the other hand, if the power to make reference is ultimately to be found in Section 10(1) it would not be easy to read the relevant portion of Section 12(5) as imposing an obligation on the Government to make a reference. Section 12(5) when read with Section 10(1) would mean, according to the appellant, that, even after considering the question, the Government may refuse to make a reference in a proper case provided of course it records and communicates its reasons for its final decision. In this connection the appellant strongly relies on the relevant provisions of Section 13. This section deals with the duties of Boards and is similar to Section 12 which deals with Conciliation Officers. A dispute can be referred to a Board in the first instance under Section 10(1) or under Section 12(5) itself. Like the Conciliation Officer the Board also endeavors to bring about a settlement of the dispute. Its powers are wider than those of a conciliator but its function is substantially the same; and so if the efforts made by the Board to settle the dispute fail it has to make a report under Section 13(3). Section 13(4) provides that if on receipt of the report made by the Board in respect of a dispute relating to a public utility service the appropriate Government does not make a reference to a Labour Court, Tribunal or National Tribunal under Section 10, it shall record and communicate to the parties concerned its reasons therefor. The provisions of Section 13 considered as a whole clearly indicate that the power to make a reference in regard to disputes referred to the Board are undoubtedly to be found in Section 10(1). Indeed in regard to disputes relating to non-public utility services there is no express provision made authorising the Government to make a reference, and even Section 13(4) deals with a case where no reference is made in regard to a dispute relating to a public utility service which means that if a reference is intended to be made it would be under the second proviso to Section 10(1). Incidentally this fortifies the conclusion that whenever reference is made the power to make it is to be found under Section 10(1). Now, in regard to cases falling under Section 13(4) since the reference has to be made under Section 10 there can be no doubt that the considerations relevant under the second proviso to Section 10(1) would be relevant and Government may well justify their refusal to make a reference on one or the other of the grounds specified in the said proviso. Besides, in regard to disputes other than those falling under Section 13(4) if a reference has to be made, it would clearly be under Section 10(1). This position is implicit in the scheme of Section 13. The result, therefore, would be that in regard to a dispute like the present it would be open to Government to refer the said dispute under Section 12(5) to a Board, and if the Board fails to bring about a settlement between the parties Government would be entitled either to refer or to refuse to refer the said dispute for industrial adjudication under Section 10(1). There can be no doubt that if a reference has to be made in regard to a

dispute referred to a Board under Section 13 Section 10(1) would apply, and there would be no question of importing any compulsion or obligation on the Government to make a reference. Now, if that be the true position under the relevant provisions of Section 13 it would be difficult to accept the argument that a prior stage when Government is acting under Section 12(5) it is obligatory on it to make a reference as contended by the respondent.

16. The controversy between the parties as to the construction of Section 12(5) is, however, only of academic importance. On the respondents' argument, even if it is obligatory on Government to make a reference provided it is satisfied that there is a case for reference, in deciding whether or not a case for reference is made Government would be entitled to consider all relevant facts, and if on a consideration of all the relevant facts it is not satisfied that there is a case for reference it may well refuse to make a reference and record and communicate its reasons therefor. According to the appellant and the company also though the discretion is with Government its refusal to make a reference can be justified only if it records and communicates its reasons therefor and it appears that the said reasons are not wholly extraneous or irrelevant. In other words, though there may be a difference of emphasis in the two methods of approach adopted by the parties in interpreting Section 12(5) ultimately both of them are agreed that if in refusing to make a reference Government is influenced by reasons which are wholly extraneous or irrelevant or which are not germane then its decision may be open to challenge in a court of law. It would thus appear that even the appellant and the Company do not dispute that if a consideration of all the relevant and germane factors leads the Government to the conclusion that there is a case for reference the Government must refer though they emphasise that the scope and extent of relevant consideration is very wide; in substance the plea of the respondents that "may" must mean "shall" in Section 12(5) leads to the same result. Therefore both the methods of approach ultimately lead to the same crucial enquiry: are the reasons recorded and communicated by the Government under Section 12(5) germane and relevant or not?

17. It is common ground that a writ of mandamus would lie against the Government if the order passed by it under Section 10(1) is for instance contrary to the provisions of Section 10(1)(a) to (d) in the matter of selecting the appropriate authority; it is also common ground that in refusing to make a reference under Section 12(5) if Government does not record and communicate to the parties concerned its reasons therefore a writ of mandamus would lie. Similarly it is not disputed that if a party can show that the refusal to refer a dispute is not bona fide or is based on a consideration of wholly irrelevant facts and circumstances a writ of mandamus would lie. The order passed by the Government under Section 12(5) may be an administrative order and the reasons recorded by it may not be justiciable in the sense that their propriety, adequacy or satisfactory character may not be open to judicial scrutiny; in that sense it would be correct to say that the court hearing a petition for mandamus is not sitting in appeal over the decision of the Government; nevertheless if the court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane then the court can issue, and would be justified in issuing, a writ of mandamus even in respect of such an administrative order. After an elaborate argument on the construction of Section 12(5) was addressed to us it became clear that on this part of the case there was no serious dispute between the parties. That is why we think the controversy as to the construction of Section 12(5) is of no more than academic importance.

18. That takes us to the real point of dispute between the parties, and that is whether the reason given by the appellant in the present case for refusing to make a reference is germane or not. The High Court has held that it is wholly extraneous and it has issued a writ of mandamus against the appellant. We have already seen that the only reason given by the appellant is that the workmen resorted to go slow during the year 1952-53. It would appear *prima facie* from the communication addressed by the appellant to the respondents that this was the only reason which weighed with the Government in declining to refer the dispute under Section 12(5). It has been strenuously urged before us by the appellant and the company that it is competent for the Government to consider whether it would be expedient to refer a dispute of this kind for adjudication. The argument is that the object of the Act is not only to make provision for investigation and settlement of industrial disputes but also to secure industrial peace so that it may lead to more production and help national economy. Cooperation between capital and labour as well as sympathetic understanding on the part of capital and discipline on the part of labour are essential for achieving the main object of the Act; and so it would not be right to assume that the Act requires that every dispute must necessarily be referred to industrial adjudication. It may be open to Government to take into account the facts that the respondents showed lack of discipline in adopting go-slow tactics, and since their conduct during a substantial part of the relevant year offended against the standing orders that was a fact which was relevant in considering whether the present dispute should be referred to industrial adjudication or not. On the other hand, the High Court has held that the reason given by the Government is wholly extraneous and its refusal to refer the dispute is plainly punitive in character and as such is based on considerations which are not at all germane to Section 12(5). This Court has always expressed its disapproval of breaches of law either by the employer or by the employees, and has emphasized that while the employees may be entitled to agitate for their legitimate claims it would be wholly wrong on their part to take, recourse to any action which is prohibited by the standing orders or statutes or which shows willful lack of discipline or a concerted spirit of non-cooperation with the employer. Even so the question still remains whether the bare and bald reason given in the order passed by the appellant can be sustained as being germane or relevant to the issue between the parties. Though considerations of expediency cannot be excluded when Government considers whether or not it should exercise its power to make a reference it would not be open to the Government to introduce and rely upon wholly, irrelevant or extraneous considerations under the guise of expediency. It may for instance be open to the Government in considering the question of expediency to enquire whether the dispute raises a claim which is very stale, or which is opposed to the provisions of the Act, or is inconsistent with any agreement between the parties, and if the Government comes to the conclusion that the dispute suffers from infirmities of this character, it may refuse to make the reference. But even in dealing with the question as to whether it would be expedient or not to make the reference Government, must not act in a punitive spirit but must consider the question fairly and reasonably and take into account only relevant facts and circumstances. In exercising its power under Section 10(1) it would not be legitimate for the Government for instance to say that it does not like the appearance, behaviour, or manner of the secretary of the union, or even that it disapproves of the political affiliation of the union, which has sponsored the

dispute. Such considerations would be wholly extraneous and must be carefully excluded in exercising the wide discretion vested in the Government.

In the present case it is significant that the company has voluntarily paid three months bonus for the relevant year notwithstanding the fact that the workmen had adopted go-slow tactics during the year, and the report of the conciliator would show prima facie that he thought that the respondents' claim was not at all frivolous. The reasons communicated by the Government do not show that the Government was influenced by any other consideration in refusing to make the reference. It is further difficult to appreciate how the misconduct of the respondents on which the decision of the Government is based can have any relevance at all in the claim for the classification of the specified employees which was one of the items in dispute. If the work done by these employees prima facie justified the claim and if as the conciliator's report shows the claim was in consonance with the practice prevailing in other comparable concerns the misconduct of the respondents cannot be used as a relevant circumstance in refusing to refer the dispute about classification to industrial adjudication. It was a claim which would have benefitted the employees in future and the order passed by the appellant deprives them of that benefit in future. Any considerations of discipline cannot, in our opinion, be legitimately allowed to impose such a punishment on the employees. Similarly, even in regard to the claim for bonus, if the respondents are able to show that the profits earned by the company during the relevant year compared to the profits earned during the preceding years justified their demand for additional bonus it would plainly be a punitive action to refuse to refer such a dispute solely on the ground of their misconduct. In this connection it may be relevant to remember that for the said misconduct the company did take disciplinary action as it thought fit and necessary and yet it paid the respondents bonus to which it thought they were entitled. Besides, in considering the question as to whether a dispute in regard to bonus should be referred for adjudication or not it is necessary to bear in mind the well-established principles of industrial adjudication which govern claims for bonus. A claim for bonus is based on the consideration that by their contribution to the profits of the employer the employees are entitled to claim a share in the said profits, and so any punitive action taken by the Government by refusing to refer for adjudication an industrial dispute for bonus would, in our opinion, be wholly inconsistent with the object of the Act. If the Government had given some relevant reasons which were based on, or were the consequence of, the misconduct to which reference is made it might have been another matter. Under these circumstances we are unable to hold that the High Court was in error in coming to the conclusion that the impugned decision of the Government is wholly punitive in character and must in the circumstances be treated as based on a consideration which is not germane and is extraneous. It is clear that the Act has been passed in order to make provision for the investigation and settlement of industrial disputes, and if it appears that in cases falling under Section 12(5) the investigation and settlement of any industrial dispute is prevented by the appropriate Government by refusing to make a reference on grounds which are wholly irrelevant and extraneous a case for the issue of a writ of mandamus is clearly established. In the result we confirm the order passed by the High Court though not exactly for the same reasons. The appeals accordingly fail and are dismissed.

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Ranjit Singh v. Union of India

1981 AIR 461, 1981

Pathak, J. – In these three petitions under Article 32 of the Constitution, the petitioners separately pray for a restoration of the quota originally granted to them in their respective licences for the manufacture of fire-arms. Writ Petition No. 833 of 1979 has been filed by Ranjit Singh who alleges that his father Pritam Singh commenced the business of manufacturing guns in 1950 under a licence issued by the Government of Jammu and Kashmir. The licence permitted him to manufacture 30 guns per month. The guns were manufactured by hand and were not proof-tested. The licence was renewed annually and the quota was maintained throughout. Later, with the enactment of the Arms Act, 1959, the licence was issued under that statute. The Government insisted that the guns manufactured by Pritam Singh should undergo proof-testing, and for that purpose it became necessary for the manufacturer to purchase and install the necessary machinery and plant. The machinery was installed shortly after 1960 on a substantial investment of funds raised with great difficulty and, it is said, in the result the factory is now capable of manufacturing 50 guns per month. Until the year 1963, the licence in favour of Pritam Singh was renewed by the Government of Jammu & Kashmir for the full quota of 30 guns. But with effect from the year 1964 the Government of India began to issue the licences. The quota was reduced from 30 guns to 10 guns per month, and it is alleged that this has resulted in considerable hardship in view of the financial liability and the establishment expenses suffered pursuant to the installation of the machinery. On the death of Pritam Singh in 1969, the business was carried on by the petitioner and his mother, and the licence now stands in their names. Several representations were made to the authorities for the restoration of the original quota but there was no satisfactory response. The petitioner claims that his plea for the restoration of his original quota has been supported by the State Government. The petitioner cites a number of cases where the quota reduced in the case of other manufacturers has been restored and relies on other material to show that the determination of his quota has been arbitrary.

Writ Petition No. 834 of 1979 has been filed by Bachan Singh. The facts incorporated in the petition run a materially similar course, except that the original quota granted to the petitioner consisted of 50 guns per month and has now been reduced to 5 guns per month.

The petitioner in the third Writ Petition, No. 835 of 1979, is Uttam Singh. In his case, the original quota of 50 guns a month has been reduced to 15 guns a month. Here again, the pattern of facts is substantially similar to that traced in the other two writ petitions.

In opposition to the writ petitions, the Union of India which is the sole respondent relies on an Industrial Policy Resolution of 1956 which envisions an exclusive monopoly in the Central Government in the matter of manufacturing arms and ammunition while permitting existing manufacturers in the private sector to continue to carry on their business on a limited scale. It is asserted that in fixing a quota the manufacturing capacity of a concern is not a determining factor, and it is denied that the Government has acted arbitrarily. It is also urged that the petitioners should be denied relief on the ground of laches. The Union of India rests its case on the Industrial Policy Resolution of 1956. Under that Resolution, however, it was decided that no objection would be taken to the continuance of the manufacture of arms and ammunition by existing units in the private sector already licensed for such manufacture

provided the operation of those units was strictly restricted to the items already manufactured by them and that no expansion of their production or increasing the capacity of the items already produced was undertaken without the prior sanction of the Government of India.

Plainly, what was envisaged was a prohibition against an increase in the quota, not its curtailment. Purporting to implement the Industrial Policy Resolution, the Government issued instructions that the quota fixed should be such that the market was not flooded with arms and ammunition. No objection can be raised to that. It is as it should be, but with that primary consideration defining the outer limits, there are other factors which govern the fixation of the actual quota. There is the production capacity of the factory, the quality of guns produced and the economic viability of the unit. The Government is bound to keep these in mind while deciding on the manufacturing quota. There is need to remember that the manufacture of arms has been the business of some of these units for several years and the Industrial Policy Resolution contains a specific commitment to permit the continuance of those factories. On the other side, the Government is entitled to take into consideration the requirements of current administrative policy pertinent to the maintenance of law and order and internal security.

Any curtailment of the quota must necessarily proceed on the basis of reason and relevance. If all relevant factors are not considered, or irrelevant considerations allowed to find place, the decision is vitiated by arbitrary judgment. On the material placed before us, we are not satisfied that the Government of India has taken into careful consideration the several elements necessary for forming a decision on the quota permissible to each of these petitioners. We are of opinion that it should do so now. And, for that purpose, the petitioners should be entitled to place before the Government a fresh and complete statement of their case, with supporting written material, to enable the Government to reach a just decision in each case. We need not, in the circumstances, consider the other grounds on which the petitioners claim relief.

On behalf of the Government it is urged that there is no fundamental right under Article 19(1)(g) of the Constitution to carry on the manufacture of arms. That contention is disposed of shortly. The Arms Act, 1959, expressly contemplates the grant of licences for manufacturing arms. An applicant for a licence is entitled to have it considered in accordance with the terms of the statute and to have for its grant on the basis of the criteria set forth in it. The other contention on behalf of the Government is that the petitioners are guilty of laches. We are not impressed by the contention for the reason that the licences are granted for specific periods with a right to apply for renewal on the expiry of each period. Each renewal constitutes a further grant of rights and it is open to the applicant to show on each occasion that the quota governing the preceding period should now be revised in the light of present circumstances. Besides, the petitioners have been continuously agitating for the restoration of their quota.

Having regard to the peculiar circumstances of these cases, we are not inclined to deny them relief.

Accordingly, we allow the writ petitions and direct the respondent Union of India to reconsider the manufacturing quota fixed in the case of each petitioner after allowing a reasonable period to the respective petitioners to set forth their case on the merits, with such supporting written material as they may choose to place before it.

Petitions allowed.

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Nandlal Khodidas Barot v. Bar Council of Gujarat and others
AIR 1981 SC 477, 1980 Supp (1) SCC 318

A.C. Gupta, J. – 1. This is an appeal under Section 38 of the Advocates Act, 1961. In a proceeding transferred to it under Section 36B of the Act, the Bar Council of India by its order dated 17 April, 1977 found that the appellant was guilty of professional misconduct and suspended him from practice for a period of one year. The complaint on which the proceeding was initiated was filed in the Gujarat Bar Council on 9 October, 1971.

2. Section 35(1) of the Advocates Act, 1961 reads:

“Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary Committee.”

In *Bar Council of Maharashtra v. M. V. Dabholkar*, [AIR 1976 SC 242] this Court having examined the scheme and the provisions of the Advocates Act observed:

“It is apparent that a State Bar Council not only receives a complaint but is required to apply its mind to find out whether there is any reason to believe that any advocate has been guilty of professional or other misconduct. The Bar Council of a State acts on that reasoned belief...”

“The Bar Council acts as the sentinel of professional code of conduct and is vitally interested in the rights and privileges of the Advocates as well as the purity and dignity of the profession.

“The function of the Bar Council in entertaining complaints against advocates is when the Bar Council has reasonable belief that there is a prima facie case of misconduct that a disciplinary committee is entrusted with such inquiry....”

3. In the case before us the Bar Council of Gujarat passed a resolution on 16 November, 1971 referring several complaints against different advocates including the one against the appellant to the Disciplinary Committee of the Bar Council, The resolution reads:

“Resolved that the following complaints be and are hereby referred to the Disciplinary Committee of the Bar Council.”

The names of the advocates and the complaints in which they were concerned were listed. Nothing appears from the record of the case to suggest that before referring the complaint against the appellant to the Disciplinary Committee, the State Bar council applied its mind to the allegations made in the complaint and found that there was a prima facie case to go before the Disciplinary Committee.

4. In *Dabholkar's case* referred to above, a bench of seven Judges decided the question whether the Bar Council of a State was a "person aggrieved" to maintain an appeal under Section 38 of the Advocates Act, the merits of the individual cases were left to be decided by another bench. Our attention is drawn by Counsel for Bar Council of India to the following observation in the judgment of this Court deciding the merits of the cases:

“(2) The requirement of "reason to believe" cannot be converted into a formalized procedural road block. It being essentially a barrier against frivolous enquiries. It is implicit in the resolution of the Bar Council, when it says that it has considered the complaint and decided to refer the matter to the disciplinary committee that it had reason to believe, as prescribed by the statute.”

5. But in the case before us the resolution does not even say that the State Bar Council had considered the complaint and found that there was a prima facie case. It must therefore be held that the reference by the State Bar Council to the Disciplinary Committee was invalid and that being so the proceedings before the Disciplinary Committee of Bar Council of Gujarat and also before the Disciplinary Committee of the Bar Council of India on transfer were void. In the view we take It is not necessary to consider the merit of the case.

6. The appeal is allowed and the order of the Disciplinary Committee of the Bar Council of India suspending the appellant from practice for one year is set aside. There will be no order as to Costs.

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Fetters on Discretionary Powers
Shri Rama Sugar Industries Ltd. v. State of Andhra Pradesh
(1974) 1 SCC 534 : AIR 1974 SC 1745

Alagiriswami, J. (for himself, A.N. Ray, C. J. and H.R. Khanna, J.) – The appeal and the writ petitions raise the question of interpretation of Section 21(3) of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961. The appellant and the petitioners are sugar factories in the State of Andhra Pradesh. They applied under the provisions of Section 21(3) for exemption from the tax payable under sub-section (1) of that Section on the ground that they, having substantially expanded, were entitled, to the extent of such expansion, to exemption from the payment of tax. The Government of Andhra Pradesh having refused that request these writ petitions have been filed before this Court contending that the decision denying them exemption is contrary to Section 21(3) which does not countenance any classification and that the classification adopted is based on no nexus to the object of the Act. The appeal is against the decision of the Andhra Pradesh High Court dismissing a writ petition filed for similar relief.

2. Two contentions, one regarding promissory estoppel and another regarding the exemption given to Sarvaraya Sugars Ltd. were not pressed before this Court. Though in the beginning it was urged that the grant of exemption under the Section was obligatory, later the only contention raised was that the application of each of the factories should have been considered on its merits and the State should not have fettered its discretion by laying down a policy of granting exemption only to co-operative sugar factories and that the policy had no nexus to the object of the Act.

3. Section 21 reads as follows:

“21. (1) The Government may, by notification, levy a tax at such rate not exceeding five rupees per metric tons as may be prescribed on the purchase of cane required for use, consumption or sale in a factory.

(2) The Government may, by notification, remit in whole or in part such tax in respect of cane used or intended to be used in a factory for any purpose specified in such notification.

(3) The Government may, by notification, exempt from the payment of tax under this Section—

(a) any new factory for a period not exceeding three years from the date on which it commences crushing of cane;

(b) any factory which, in the opinion of the Government, has substantially expanded, to the extent of such expansion, for a period not exceeding two years from the date of completion of the expansion.

(4) The tax payable under sub-section (1) shall be levied and collected from the occupier of the factory in such manner and by such authority as may be prescribed.

(5) Arrears of tax shall carry interest at the rate of nine per cent per annum.

(6) If the tax under this Section together with the interest, if any, due thereon, is not paid by the occupier of a factory within the prescribed time, it shall be recoverable from him as an arrear of land revenue.”

4. In its judgment in *Andhra Sugars Ltd. v. A. P. State* [AIR 1968 SC 599], this Court upheld the constitutional validity of Section 21(3) and made the following observations:

“It was next argued that the power under Section 21(3) to exempt new factories and factories which in the opinion of the Government have substantially expanded was discriminatory and violation of Art. 14. We are unable to accept this contention. The establishment of new factories and the expansion of the existing factories need encouragement and incentives. The exemption in favour of new and expanding factories is based on legitimate legislative policy. The question whether the exemption should be granted to any factory, and if so, for what period and the question whether any factory has substantially expanded and if so, the extent of such expansion have to be decided with reference to the facts of each individual case. Obviously, it is not possible for the State Legislature to examine the merits of individual cases and the function was properly delegated to the State Government. The Legislature was not obliged to prescribe a more rigid standard for the guidance of the Government. We hold that Section 21 does not violate Art. 14.”

Though, as we have stated, it was sought to be argued originally that under the provisions of this Section it was obligatory on the part of the Government to grant exemption, it was later argued based on the above observations that the question whether the exemption would be granted to any factory and if so for what period and the question whether any factory has substantially expanded and if so the extent of such expansion, has to be decided with reference to the facts of each individual case. It was also further argued that the Government could not by laying down a policy to exempt only co-operative sugar factories fetter their hands from examining the merits of each individual case. It was contended that the policy behind Section 21(3) being to encourage new sugar factories or expanded sugar factories the Government could not refuse to consider all except one class i.e. the co-operative sugar factories for the purpose of granting exemption. It was further urged that new sugar factories and expanded sugar factories all fall into one class and there is nothing particular or special about co-operative sugar factories justifying their treatment as a special class deserving a special treatment. It was also urged that the only discretion which the Government had was in deciding whether a factory had substantially expanded or not and in no other respect.

5. On behalf of the State of Andhra Pradesh, however, it was stated that only new co-operative sugar factories have been granted exemption and that too only for one year as against the period of three years contemplated by the Act in the case of new factories and no expanded factory, even a co-operative sugar factory, has been granted any exemption. It was contended that the discretion has been given to the State to decide which factory or which class of factories should be granted exemption, whether any exemption should be granted at all and if so for what period, that the discretion is to be exercised by taking into consideration the state of the industry and the financial position of any sugar factory during any particular period or in any particular area, that it is open to the State to take into account all relevant considerations and decide which class of factories should be granted exemption, and that the co-operative sugar factories consisting of cane growers is a distinct category justifying their treatment as a class separate from other sugar factories.

6. In view of the abandonment at a later stage of the contention that it was obligatory on the part of the Government to grant the exemption contemplated under Section 21(3) to every new factory or expanded factory for the period mentioned in the Section, it is unnecessary to consider whether the word “may” found in that Section should be interpreted to mean “shall” except to indicate that the policy behind the whole of Section 21 does not indicate that it is

obligatory on the part of the State to grant exemption. Quite clearly the discretion has been left to the State to decide whether any particular factory should be granted exemption or not. This is what this Court stated in its earlier decision. In deciding this question it is open to the Government to take into consideration the state of the industry at any particular period. At one period the industry may be in a very prosperous condition and might not need this concession. It may also be that factories in a particular area are in need of this concession but not factories in another area. How a power vested in an authority is to be exercised has got to be decided by taking into consideration the whole of the background of the Act and the purpose behind it. The purpose of the Act is, of course, to encourage new sugar factories and expanded sugar factories. But how that power is to be exercised will have to be decided by taking into consideration all the relevant factors relating to the sugar industry. It is well-known that there is a difference in the sucrose content in the cane produced in different areas. The quantity of sugar-cane produced per acre varies from 60 tons per acre in Maharashtra to 40 tons in Tamil Nadu and far less in Uttar Pradesh. These facts are available in any standard literature and official publications on the subject. The varying fortunes of the sugar industry at various periods are too well-known to need emphasis. We, are, therefore, of opinion that it would be open to the State Government to grant exemption to new factories only but not the expanded factories, to grant the exemption for one year instead of three years or two years as contemplated under the Section, to grant the exemption to factories in one area but not to factories in another area, to grant the exemption during a particular period but not during another period.

7. We are also of opinion that co-operative sugar factories consisting of sugar-cane growers fall under a distinct category different from other categories. Sugar cane growers have been the object of particular consideration and care of the Legislature. This country which was at one time a big importer of sugar has built up a sizeable sugar industry by a policy of protection given to the sugarcane growers and sugar industry. The figures we have given above have been one of the factors in fixing the price of sugarcane so that even a sugar-cane grower in U.P. might get a reasonable return on his produce. We are of opinion, therefore, that the Government are justified in treating the sugar factories consisting of sugarcane growers as a distinct category. In this connection we should mention that the appellant in Civil Appeal No. 1453 of 1969 urged before this Court that out of its 1280 shares 1247 shares were held by cane-growers. But this was not urged in the petition before the High Court nor had the State an opportunity of meeting such a contention. It is therefore not possible for us at this stage to go into the question whether that appellant has been discriminated against.

8. The only question that arises is whether the Government would be justified in refusing to consider the question of exemption to all factories other than co-operative sugar factories. In its counter-affidavit the State of Andhra Pradesh has stated that application of each one of the petitioners was considered on its merits and it was refused. On the other hand the petitioners referred to the letter (Annexure III) written by the Government of Andhra Pradesh to the appellant in Civil Appeal No. 1453 of 1969 which reads:

“I am to invite reference to your letter cited and to state that the Government have given careful consideration to your request for exemption from payment of purchase tax to the extent of expansion for two crushing seasons in respect of Bobbili and Seethanagaran: Units. The present policy of the Government is to grant exemption from payment of purchase tax to

new and expanded sugar factories in the Co-operative Sector only. Besides Bobbili and Seethanagaram Sugar Factories, there are a few other sugar factories in the private sector which have also embarked on expansion programmes. Any concession given in one case will be a precedent for others and it cannot be denied to others who will naturally apply for a similar concession. The present financial position of the Government does not permit them to be generous. In the circumstances, the Government very much regrets that it is not possible for them to accede to your request.”

and urged that the Government could not have examined the request of each of the factories on their merits. But it is to be noticed that that letter itself shows that the Government have given careful consideration to the appellant’s request. It also shows that the present policy of the Government is not a policy for all times. We have, therefore, no reason not to accept the statement on behalf of the State of Andhra Pradesh that they have considered the request of the appellant as well as the petitioners on their merits. The fact that after such examination they have laid down a policy of exempting only sugar-cane growers’ factories cannot show that they have fettered their discretion in any way. As we have already mentioned, even in the case of co-operative sugar factories the exemption is granted only to new factories and that too only for one year.

9. As regards the power of a statutory authority vested with discretion, de Smith also points out:

“(B)ut its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs;’ all ... although it is not obliged to consider every application before it with a fully open mind, it must at least keep its mind ajar.”

In *R v. Port of London Authority* [(1919) 1 KB 176, 184], Bankes, L.J., stated the relevant principle in the following words:

“There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, *unless there is something exceptional in his case* if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of particular character by whosoever made. There is a wide distinction to be drawn between these two classes.”

The present cases come under the earlier part and not the latter. The case in *Rex v. London County Council* [(1918) 1 KB 68], is distinguishable on the facts of the case. The policy behind the Act there under consideration was obviously to permit sale of any article or distribution of bills or like things and in deciding that no permission would be granted at all the London County Council was rightly held not to have properly exercised the discretion vested in it. In the decision in *Padfield v. Min. of Agriculture* [(1970) 3 All ER 165], the refusal of the Minister to exercise the power vested in him was considered as frustrating the object of the statute which conferred the discretion and that is why a direction was issued to the Minister to consider the appellants’ complaint according to law. We have already discussed the background and the purpose of the Act under consideration and are unable to

hold that in refusing to grant exemption in these cases the State of Andhra Pradesh was acting so as to frustrate the purpose of the Act.

10. In a recent case, *British Oxygen v. Minister of Technology* [(1970) 3 All ER 165], the whole question has been discussed at length after referring to the decisions in *R. v. Port of London Authority* and *Padfield v. Minister of Agriculture*. The House of Lords was in that case considering the provisions of the Industrial Development Act 1966. The Act provided for the Board of Trade making to any person a grant towards approved capital expenditure incurred by that person in providing new machinery or plant for carrying on a qualifying industrial process in the course of the business. After stating that the Board was intended to have a discretion and after examining the provisions of the Act the House of Lords came to the conclusion that the Board was not bound to pay grants to all who are eligible nor did the provisions give any right to any person to get a grant. After quoting the passage from the decision in *R. v. Port of London Authority*, Lord Reid went on to state:

“But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not ‘shut (his) ears to the application’ (to quote from Bankes, L.J.). I do not think that there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say - of course I do not mean to say that there need be an oral hearing. In the present case the Minister’s officers have carefully considered all that the appellants have had to say and I have no doubt that they will continue to do so. The Minister might at any time change his mind and therefore I think that the appellants are entitled to have a decision whether these cylinders are eligible for grant.”

Viscount Dilhorne again after referring to the passage in *R v. Port of London Authority*, said: “Bankes, L.J. clearly meant that in the latter case there is a refusal to exercise the discretion entrusted to the authority or tribunal but the distinction between a policy decision and a rule may not be easy to draw. In this case it was not challenged that it was within the power of the Board to adopt a policy not to make a grant in respect of such an item. That policy might equally well be described as a rule. It was both reasonable and right that the Board should make known to those interested the policy that it was going to follow. By doing so fruitless applications involving expense and expenditure of time might be avoided. The Board says that it has not refused to consider any application. It considered the appellants’. In these circumstances it is not necessary to decide in this case whether, if it had refused to consider an application on the ground that it related to an item costing less than £25, it would have acted wrongly.

“I must confess that I feel some doubt whether the words used by Bankes, L.J., in the passage cited above are really applicable to a case of this kind. It seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail. Representations could of course be made that the policy should be changed.”

11. It is, therefore, clear that it is open to the Government to adopt a policy not to make a grant at all or to make a grant only to a certain class and not to a certain other class, though such a decision must be based on considerations relevant to the subject-matter on hand. Such a consideration is found in this case. *Halsbury* (Vol. 1, 4th Edn. para 33 at page 35) puts the matter succinctly thus:

“A public body endowed with a statutory discretion may legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that such rules or principles are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and not arbitrary or capricious. Nevertheless, it must not disable itself from exercising a genuine discretion in a particular case directly involving individual interests; hence it must be prepared to consider making an exception to the general rule if the circumstances of the case warrant special treatment. These propositions, evolved mainly in the context of licensing and other regulatory powers, have been applied to other situations, for example, the award of discretionary investment grants and the allocation of pupils to different classes of schools. The amplitude of a discretionary power may, however, be so wide that the competent authority may be impliedly entitled to adopt a fixed rule never to exercise its discretion in favour of a particular class of persons; and such a power may be expressly conferred by statute.”

12. We are satisfied that in this case the State of Andhra Pradesh has properly exercised the discretion conferred on it by the statute. The appeal and the writ petitions are dismissed.

K.K. Mathew, J. (*dissenting*) (*for himself and Bhagwati, J.*) - The short question for consideration in these writ petitions and the civil appeal is whether the Government of Andhra Pradesh was right in dismissing the applications filed by the writ petitioners and the appellant claiming benefit of exemption from payment of the tax as provided in Section 21(3)(b) of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1951, hereinafter called the Act, for the reason that the Government has taken a policy decision to confine the benefit of the exemption to sugar factories in the co-operative sector.

16. It was contended that looking at the scheme of Section 21 the word ‘may’ occurring in sub-section (3) thereof should be read as ‘shall’ as otherwise the sub-section will be unconstitutional in that it does not provide guideline for the exercise of the discretion to grant or refuse the exemption when all applicants fulfill the conditions specified in clause (b) of the sub-section. The argument was that since no guidelines are furnished by the Legislature for choosing between two factories fulfilling the conditions specified in clause (b), the sub-section must be read as mandatory, namely, that it imposed an obligation upon the Government, by notification, to exempt from payment of the tax all factories which, in the opinion of the Government, have substantially expanded, to the extent of such expansion, for a period not exceeding two years from the date of the completion of the expansion.

17. We do not think that there is any merit in the contention. Clause (a) of sub-section (3) only says that if any factory “in the opinion of the Government, has substantially expanded”, the Government may exempt it from the payment of tax to the extent of such expansion for a period not exceeding two years from the date of completion of the expansion. So, if in the opinion of the Government, a factory has substantially expanded, it is open to the Government in its discretion to exempt that factory from payment of tax to the extent of such expansion and that for a period not exceeding two years from the date of the completion of

the expansion. We are unable to read the Section as imposing a mandatory obligation upon the Government to grant the exemption even if all the conditions specified in clause (h) of subsection (3) are satisfied. There is nothing in the context which compels us to read the word 'may' as 'shall' and it seems to us clear that the Government was intended to have a discretion. But how was the Government intended to operate or exercise the discretion? Does the Act as a whole or the provision in question in particular indicate any policy which the Government has to follow? The Legislature has, no doubt, clearly laid down the conditions of eligibility for the exemption and it has clearly given to the Government discretion so that the Government is not bound to grant the exemption to a factory which is eligible to the exemption. But the discretion must not so unreasonably be exercised as to show that there cannot have been any real or genuine exercise of it. The general rule is that anybody exercising a statutory discretion should not "shut his ears to the application".

18. The question, therefore, is whether the Government shut its ears and fettered its discretion when it said that it will confine the benefit of the exemption provided in clause (b) of subsection (3) only to factories established in co-operative sector.

19. It was submitted that there is nothing in the provisions of sub-section (3)(b) to indicate that the Government could confine the benefit of the exemption only to new and expanded sugar factories in the co-operative sector fulfilling the conditions therein specified, and if the Government chose to fetter the exercise of its discretion by a self-imposed rule or policy by confining the benefit of the exemption only to new and expanded sugar factories established or owned by cooperative societies, no discretion was exercised by Government in disposing of the individual applications and that, at any rate, considerations foreign to the exercise of the discretion had entered into its exercise.

20. It is therefore to be seen whether the policy decision of the Government to limit the benefit of the exemption to sugar factories owned or established by co-operative societies of sugar-cane growers is derivable from the sub-section or from any other provision of the Act or could be gleaned even from its preamble. The questions to be asked and answered are: Has the policy decision any nexus with the object of the provision in question or is it based on considerations which are irrelevant to the purpose and object of the Act? Is there anything in the provisions of the Act from which it is possible to infer that the Legislature could have contemplated that the benefit of the exemption provided by sub-section (3)(b) should be confined only to factories owned by co-operative societies consisting of sugar-cane growers?

21. It appears to us that the object of Section 21(3)(b) is to give incentive to sugar factories which are new and which have expanded. It might be that the factories situate in one area may require greater consideration at one time than factories situate in other areas. We will assume that co-operative sugar factories consisting only of sugar-cane growers stand on a different footing and form a class by themselves or for that matter, a distinct category. But what follows? Can the Government evolve a policy confining the benefit of the exemption to the category alone and exclude others however deserving they might be from the point of view of the object of the provision for the legislative boundary?

22. The letter of the Government leaves no doubt in our mind that the Government could not have considered the applications of the writ petitioners and the appellant on their merits. We think that by the policy decision the Government had precluded itself from considering the applications of the petitioners and the appellant on their merits. In fact, the Government, by

making the policy decision, had shut its ears to the merits of the individual applications. We see no merit in the contention of Andhra Pradesh Government that it considered the applications for exemption filed by the writ petitioners and the appellant on their merits as, by its policy decision, it had precluded itself from doing so. We are not very much concerned with the question that only a few of the co-operative societies have been granted the exemption or that the exemption to them has been limited to a period of one year. We are here really concerned with a principle and that is whether the Government was justified in evolving a policy of its own which has no relevance to the purpose of the provision in question or the object of the Act, as gatherable from the other provisions. We could have understood the Government making a policy decision to confine the benefit of the exemption to factories established by co-operative societies of sugar cane growers, if that policy decision had any warrant in the directive principles of the Constitution as directive principles are fundamental in the governance of the country and are binding on all organs of the State. There is no provision in the Chapter on Directive Principles which would warrant the particular predilection now shown by Government to the factories established in the co-operative sector. Whence then did the Government draw its inspiration for the policy? We should not be understood as saying that sugar-cane factories established by co-operative societies of sugar-cane growers do not deserve encouragement or that they should not be granted exemption from payment of tax. All that we say is that the wholesale exclusion of other factories established, say, by a firm consisting of sugar-cane growers, or a company of which sugar cane growers are the shareholders, is not warranted by anything in the provisions of Section 21(3). Now could we assume in the light of the language of Section 21 (3) (b) that the Legislature intended that new factories owned by co-operative societies consisting of cane growers alone should be the object of the legislative bounty? What is the relevant distinction between a factory established by a co-operative society consisting of sugar-cane growers and a factory established by a sugar-cane grower or a firm consisting of sugar cane growers for the purpose of the sub-section? The object of sub-section, as we said, is to give incentive to new and expanded factories with the ultimate object of increasing the production of sugar. Whether a factory is established or owned by a co-operative society consisting of sugar cane growers or by a company of which sugar-cane growers are the shareholders or established by an individual who is a sugar-cane grower or a firm consisting of sugar-cane growers would make no difference in this respect. They all stand on the same footing so far as their claim to the legislative bounty is concerned.

23. We do not also say that it is illegal for the Government to adopt a general line of policy and adhere to it. But the policy it adopts must comport with and be reconcilable with the provisions of the Act and must have some relevance to its object.

24. Generally speaking, an authority entrusted with discretion must not, by adopting a rule or policy, disable itself from exercising its discretion in individual cases. There is no objection in its formulating a rule or policy. But the rule it frames or the policy it adopts must not be based on considerations extraneous to those contemplated or envisaged by the enabling Act. It "must not predetermine the issue, as by resolving to refuse all applications or all applications of a certain class or all applications except those of a certain class."

27. To sum up, the policy or rule adopted by the State Government to guide itself in the exercise of its discretion must have some relevance to the object of Section 21(3) which is to

provide incentive to the establishment of new industries and substantial expansion of existing industries with a view to increasing production of sugar. The classification made by the policy or rule must not be arbitrary but must have rational relation to the object of the exempting provision. That appears to be absent in the present case. Here, from the point of view of the object of the exempting provision, co-operative societies of sugar-cane growers and other new or substantially expanded industries stand on the same footing and there can be no justification for specially favouring the former class of industries by confining the benefit of exemption to them and leaving out of the exemption the latter class of industries. Picking out co-operative societies of sugar-cane growers for favoured treatment, to the exclusion of other new or substantially expanded industries, is wholly unrelated to the object of the exempting provision and the policy or rule adopted by the State Government is not legally relevant to the exercise of the power of granting exemption.

28. We would, therefore, quash Annexure III and issue a mandamus to the Government of Andhra Pradesh in each of these writ petitions and the civil appeal to consider the applications of the writ petitioners and the appellant on merits and pass the proper order in each case without taking into account the policy decision contained in Annexure III. We would allow the writ petitions and the civil appeal without any order as to costs.

ORDER

29. In accordance with the majority judgment of the Court, the Court dismissed the appeal and the writ petitions.

*Application of the Principles of Natural Justice in
Administrative Actions*

A. K. Kraipak v. Union of India
AIR 1970 SC 150 : (1969) 2 SCC 262

“The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated.”

(Section 2(a) of the All India Services Act, 1951 (the Act), authorises the Central Government to constitute three new All India Services including the Indian Forest Service. Section 3 provides that the Central Government shall after consulting the Government of the States concerned including that of the State of Jammu and Kashmir to make rules for the regulation of recruitment and the conditions of service of persons appointed to those All India Services.

In exercise of powers given under Section 3, the Indian Forest Service (Recruitment) Rules, 1966 (the rules) for recruitment to the Indian Forest Service were framed.

Rule 4(1): “As soon as may be, after the commencement of these rules, the Central Government may recruit to the service any person from amongst the members of the State Forest Service adjudged suitable in accordance with such Regulations as the Central Government may make in consultation with the State Governments and the Commission.”

The Indian Forest Service (Initial Recruitment) Regulations, 1966 were framed under rule 4(1).

Regulation 5: “(1) The Board shall prepare, in the order of preference, a list of such officers of State Forest Service who satisfy the conditions specified in Regulation 4 and who are adjudged by the Board suitable for appointment to posts in the senior and junior scales of the service.

(2) The list prepared in accordance with sub-regulation (1) shall then be referred to the Commission for advice, by the Central Government along with—

- (a) the records of all officers of State Forest Service included in the list;
- (b) the records of all other eligible officers of the State Forest Service who are not adjudged suitable for inclusion in the list, together with the reasons as recorded by the Board for their non-inclusion in the list; and
- (c) the observations, if any, of the Ministry of Home Affairs on the recommendations of the Board.

(3) On receipt of the list, along with the other documents received from the Central Government the Commission shall forward its recommendations to that Government.”

In pursuance of the above Regulation, the Central Government constituted a special selection board for selecting officers to the Indian Forest Service in the senior scale as well as in the junior scale from those serving in the forest department of the State of Jammu and Kashmir. The nominee of the Chairman of the Union Public Service Commission, one M. A. Venkataraman was the Chairman of the board. The other members of the board were the Inspector General of Forests of the Government of India, one of the joint Secretaries in the

Government of India, the Chief Secretary to the State Government of Jammu and Kashmir and Naqishbund, the Acting Chief Conservator of Forests of Jammu and Kashmir.

The selection board met at Srinagar in May, 1967 and selected Respondents 7 to 31 in W.P. No. 173/1967. The cases of respondents Nos. 32 to 37 were reserved for further consideration. The selections in question were made solely on the basis of the records of officers. Their suitability was not tested by any examination, written or oral. Nor were they interviewed. For several years before that selection the adverse entries made in the character rolls of the officers had not been communicated to them and their explanation called for. In doing so quite clearly the authorities concerned had contravened the instructions issued by the Chief Secretary of the State. Sometime after the aforementioned selections were made, at the instance of the Government of India, the adverse remarks made in the course of years against those officers who had not been selected were communicated to them and their explanations called for. Those explanations were considered by the State Government and on the basis of the same, some of the adverse remarks made against some of the officers were removed. Thereafter the selection board reviewed the cases of officers not selected earlier as a result of which a few more officers were selected. The selections as finally made by the board were accepted by the Commission. On the basis of the recommendations of the Commission, the impugned list was published. Even after the review, Basu, Baig and Kaul were not selected. It may also be noted that Naqishbund's name is placed at the top of the list of selected officers.

Naqishbund was promoted as Chief Conservator of Forests in the year 1964. He is not yet confirmed in that post. G. H. Basu, Conservator of Forests in the Kashmir Forest Service admittedly senior to Naqishbund had appealed to the State Government against his supersession and that appeal was pending with the State Government at the time the impugned selections were made.

Naqishbund was also one of the candidates seeking to be selected to the All India Forest Service. The court was informed that he did not sit in the selection board at the time his name was considered for selection but admittedly he did sit in the board and participated in its deliberations when the names of Basu, Baig and Kaul, his rivals, were considered for selection. It is further admitted that he did participate in the deliberations of the board while preparing the list of selected candidates in order of preference, as required by Regulation 5.

It is true that the list prepared by the selection board was not the last word in the matter of the selection in question. That list along with the records of the officers in the concerned cadre selected as well as not selected had to be sent to the Ministry of Home Affairs. The court assumed that as required by Regulation 5, the Ministry of Home Affairs had forwarded that list with its observations to the Commission and the Commission had examined the records of all the officers afresh before making its recommendation. But the recommendations made by the selection board should have weighed with the Commission, the court held. Undoubtedly the adjudging of the merits of the candidates by the selection board was extremely an important step in the process.

The petitioners serving as Conservators of Forests, Divisional Forest Officers and Assistant Conservators of Forests were aggrieved by the selections made from among the officers serving in the forest department of the State of Jammu and Kashmir to the Indian Forest Service. They had moved to the Supreme Court to quash notification No. 3/24/66-A-

15(iv), dated the 29th July, 1967, issued by the Government of India, Ministry of Home Affairs, as according to them, the selections notified in the notification were violative of Articles 14 and 16 of the Constitution and that the selections in question were vitiated by the contravention of the principles of natural justice. They also challenged the *vires* of Section 3 of the Act, Rule 4 and Regulation 5).

K.S. HEGDE, J. - 11. It was contended before us that Section 3 of the All India Services Act, Rule 4 of the rules framed there under and Regulation 5 of the Indian Forest Service (Initial Recruitment) Regulations, 1966, are void as those provisions confer unguided, uncontrolled and uncanalised power on the concerned delegates. So far as the *vires* of Sections 3 of the Indian Administrative Act is concerned, the question is no more *res integra*. We have not thought it necessary to go into the question of the *vires* of Rule 4 and Regulation 5 as we have come to the conclusion that the impugned selections must be struck down for the reasons presently stated.

12. There was considerable controversy before us as to the nature of the power conferred on the selection board under Rule 4 read with Regulation 5. It was contended on behalf of the petitioners that power was a non-judicial power whereas the case for the contesting respondents was that it was purely an administrative power. In support of the contention that the power in question was a part-judicial power, emphasis was laid on the language of Rule 4 as well as Regulation 5 which prescribe that the selections should be made after adjudging the suitability of the officers belonging to the State service. The word 'adjudge' we were told means "to judge or decide". It was contended that such a power is essentially a judicial power and the same had to be exercised in accordance with the well accepted rules relating to the exercise of such a power. Emphasis was also laid on the fact that the power in question was exercised by a statutory body and a wrong exercise of that power is likely to adversely affect the careers of the officers not selected. On the other hand, it was contended by the learned Attorney-General that though the selection board was a statutory body, it was not required to decide about any right, the proceedings before it cannot be considered *quasi-judicial*; its duty was merely to select officers who in its opinion were suitable for being absorbed in the Indian Forest Service. According to him the word 'adjudge' in Rule 4 as well as Regulation 5 means "found worthy of selection".

13. *The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated.* For determining whether a power is an administrative power or a *quasi-judicial* power, one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The

procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of ^non-judicial power has undergone a radical change. What was considered as an administrative power some years back is now being considered as a *quasi-judicial* power.

With the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, courts are gradually evolving the principles to be observed while exercising such powers. In matters like these, public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power. But for the purpose of the present case we shall assume that the power exercised by the selection board was an administrative power and test the validity of the impugned selections on that basis.

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 were 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. This takes us to the question whether the principles of natural justice apply to administrative proceedings similar to that with which we are concerned in these cases. According to the learned Attorney-General those principles have no bearing in determining the validity of the impugned selections. In support of his contention he read to us several decisions. It is not necessary to examine those decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding.

20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (*Nemo debet esse judex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that *quasi*-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from *quasi*-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as *quasi*-judicial in character. Arriving at a just decision is the aim of both *quasi*-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far more reaching effect than a decision in a *quasi*-judicial enquiry. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.

21. It was next urged by the learned Attorney-General that after all the selection board was only a recommendatory body. Its recommendations had first to be considered by the Home Ministry and thereafter by the U.P.S.C. The final recommendations were made by the U.P.S.C. Hence grievances of the petitioners have no real basis. According to him while considering the validity of administrative actions taken, all that we have to see is whether the

ultimate decision is just or not. We are unable to agree with the learned Attorney-General that the recommendations made by the selection board were of little consequence. Looking at the composition of the board and the nature of the duties entrusted to it we have no doubt that its recommendations should have carried considerable weight with the U.P.S.C. If the decision of the selection board is held to have been vitiated, it is clear to our mind that the final recommendation made by the Commission must also be held to have been vitiated. The recommendations made by the Union Public Service Commission cannot be disassociated from the selections made by the selection board which is the foundation of the recommendations of the Union Public Service Commission.

22. It was next urged by the learned Attorney-General that the mere fact that one of the members of the Board was biased against some of the petitioners cannot vitiate the entire proceedings

23. One more argument of the learned Attorney-General remains to be considered. He urged that even if we are to hold that Naqishbund should not have participated in the deliberations of the selection board while it considered the suitability of Basu, Baig and Kaul, there is no ground to set aside the selection of other officers. According to him it will be sufficient in the interest of justice if we direct that the cases of Basu, Baig and Kaul be reconsidered by a Board of which Naqishbund is not a member. Proceeding further he urged that under any circumstance, no case is made out for disturbing the selection of the officers in the junior scale. We are unable to accept either of these contentions. As seen earlier Naqishbund was a party to the preparation of the select list in order of preference and that he is shown as No. 1 in the list. To that extent he was undoubtedly a judge in his own case, a circumstance which is abhorrent to our concept of justice. Now coming to the selection of the officers in the junior scale service, the selections to both the senior scale service as well as junior scale service were made from the same pool. Every officer who had put in service of 8 years or more, even if he was holding the post of an Assistant Conservator of Forests was eligible for being selected for the senior scale service. In fact some Assistant Conservators have been selected for the senior scale service. At the same time some of the officers who had put in more than eight years of service had been selected for the junior scale service. Hence it is not possible to separate the two sets of officers.

24. For the reasons mentioned above these petitions are allowed and the impugned selections are set aside.

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Ashok Kumar Yadav v. State of Haryana
(1985) 4 SCC 417 : AIR 1987 SC 454

[Rule against bias - doctrine of necessity]

Sometime in October 1980, the Haryana Public Service Commission invited applications for recruitment to 61 posts in Haryana Civil Service (Executive) and other Allied Services. The procedure for recruitment was governed by the Punjab Civil Service (Executive Branch) Rules, 1930 as applicable in the State of Haryana. Rule 9 clause (1) of these Rules provided that a competitive examination shall be held at any place in Haryana each year in or around the month of January for the purpose of selection by competition of as many candidates for the Haryana Civil Service (Executive) and other Allied Services as the Governor of Haryana may determine and such competitive examination shall be held in accordance with the Regulations contained in Appendix I to the Rules. Rule 10 laid down the conditions for eligibility to appear at the competitive examination. Regulation I in Appendix I provided that the competitive examination shall include compulsory and optional subjects and every candidate shall take all the compulsory subjects and not more than three of the optional subjects, provided that ex-servicemen shall not be required to appear in the optional subjects. The compulsory subjects included English Essay, Hindi, Hindi Essay and General Knowledge carrying the aggregate of 400 marks and there was also viva voce examination which was compulsory and which carried 200 marks and each optional subject carried 100 marks. The result was that the written examination carried an aggregate of 700 marks for candidates in general and for ex-servicemen, it carried an aggregate of 400 marks while in case of both, the viva voce examination carried 200 marks. Regulation 3 read as follows:

“3. No candidate shall be eligible to appear in the viva voce test unless he obtains 45% marks in the aggregate of all subjects including at least 33% marks in each of the language papers in Hindi (in Devnagri Script) and Hindi Essay provided that if at any examination a sufficient number of candidates do not obtain 45% marks in the aggregate, the Commission may at their discretion lower this percentage to not below than 40% for the language papers remaining unchanged.”

In response to the advertisement issued by the Haryana Public Service Commission, about 6000 candidates applied for recruitment and appeared for the written examination held by the Haryana Public Service Commission. Out of 6000 candidates who appeared for the written examination, over 1300 obtained more than 45% marks and thus qualified for being called for the viva voce examination. The Haryana Public Service Commission invited all the 1300 and more candidates who qualified for the viva voce test, for interview and the interviews lasted for almost half a year. It seems that though originally applications were invited for recruitment to 61 posts, the number of vacancies rose during the time taken up in the written examination and the viva voce test and ultimately 119 posts became available for being filled and on the basis of total marks obtained in the written examination as well as viva voce test, 119 candidates were selected and recommended by the Haryana Public Service Commission to the State Government. There were some candidates who had obtained very high marks at the written examination but owing to rather poor marks obtained by them in the viva voce test, they could not come within the first 119 candidates and they were

consequently not selected. They were aggrieved by the selections made by the Commission and three out of them filed Civil Writ 2495 of 1983 in the High Court of Punjab and Haryana challenging the validity of the selections and seeking a writ for quashing and setting aside the same. They also claimed that the marks given in the viva voce test should be ignored and selections should be made only on the basis of the marks obtained by the candidates in the written examination and they contended that if this was done, they would have been within first 119 to be selected by the Haryana Public Service Commission. Some other candidates who did not figure in the list of 119 selected candidates also filed Civil Writ Petitions challenging the validity of the selections on substantially the same grounds and claiming substantially the same relief as the petitioners in Civil Writ Petition 2495 of 1983. The State of Haryana was joined as Respondent 1, the Haryana Public Service Commission as Respondent 2 and three out of the five members of the Haryana Public Service Commission, as Respondents 3 to 5 in the writ petitions. The Chairman and one other member of the Haryana Public Service Commission, namely, Shri B.S. Lather and Shri Gurmesh Prakash Bishnoi were however not impleaded as respondents in the writ petitions. None of the 119 selected candidates were joined as respondents.

P.N. BHAGWATI, J. - 4. There were several grounds on which the validity of the selections made by the Haryana Public Service Commission was assailed on behalf of the petitioners and a declaration was sought that they were entitled to be selected as falling within the first 119 candidates. It was urged on behalf of the petitioners that two of the selected candidates, namely Mrs. Shakuntala Rani and Balbir Singh were related to one of the members of the Haryana Public Service Commission namely, Sh. R.C. Marya, while the third selected candidate namely Trilok Nath Sharma was related to another member namely, Sh. Raghubar Dayal Gaur and though these two members did not participate in the interview of their respective relatives they did participate in the interview of other candidates and the tactics adopted by the Chairman and the members of the Commission was to give high marks to the relatives and award low marks to the other candidates so as to ensure the selection of their relatives. This, according to petitioners, vitiated the entire selection process.

5. It was also urged on behalf of the respondents that the Haryana Public Service Commission being a constitutional authority, it was not necessary for Sh. R.C. Marya and Sh. Raghubar Dayal Gaur to withdraw altogether from the interviews and they acted correctly in abstaining from participation when their relatives came to be interviewed. This was according to the respondents, in conformity with the principles of fair play and did not affect the validity of the selections.

11. This takes us to the next ground of attack which found favour with the Division Bench of the High Court, namely that the participation of Shri R.C. Marya and Shri Raghubar Dayal Gaur in the process of selection introduced a serious infirmity in the selections. It was not disputed and indeed on the record it could not be, that when the close relatives of Shri R.C. Marya and Shri Raghubar Dayal Gaur came up for interview (*sic*), but, according to the Division Bench of the High Court, such limited withdrawal from participation was not enough and both the members, said the Division Bench, ought to have withdrawn from the selection process altogether. The Division Bench of the High Court relied heavily on the fact

that Trilok Nath Sharma, who was the son-in-law of the sister of Shri Raghubar Dayal Gaur obtained 160 marks out of 200 in the viva voce test while Shakuntala Rani daughter-in-law of Shri R.C. Marya obtained 131 marks and Balbir Singh brother of the son-in-law of Shri R.C. Marya obtained 130 marks and observed that “these admitted facts are obviously tell-tale”. The Division Bench went to the length of imputing nepotism and favouritism to the Chairman and members of the Haryana Public Service Commission by observing that each member of the Haryana Public Service Commission adjusted the relatives of the others and awarded low marks in the interview to the other candidates with a view to ousting the latter and bolstering up the former in the merit list. We are pained to observe that such a serious aspersion should have been cast on the Chairman and members of the Haryana Public Service Commission without any basis or justification. Merely because Trilok Nath Sharma obtained 160 marks, Shakuntala Rani obtained 131 marks and Balbir Singh obtained 130 marks, no inference can necessarily be drawn that these high marks were given to them in viva voce examination undeservedly with a view to favouring them at the cost of more meritorious candidates. There is nothing to show that these three candidates who happened to be related to Shri Raghubar Dayal Gaur and Shri R.C. Marya were not possessed of any requisite calibre or competence or their performance at the viva voce examination did not justify the marks awarded to them. The only circumstance on which the Division Bench relied for raising the inference that such high marks were given to these three candidates, not on merit, but as an act of nepotism with a view to unduly favouring them so that they can come within the range of selection, was that out of these three candidates, two were related to Shri R.C. Marya and one was related to Shri Raghubar Dayal Gaur. This inference, we are constrained to observe, was wholly unjustified. We cannot help remarking that the Division Bench indulged in surmises and conjectures in reaching the conclusion that high marks were given unjustifiably to these three candidates at the viva voce examination with a view to pushing them up and low marks were deliberately given to other more meritorious candidates with a view to pushing them down and thus facilitating the selection of these three candidates who would not otherwise have come within the range of selection.

We fail to appreciate as to what is the basis on which the Division Bench could observe that these three candidates got high marks at the viva voce examination only because they were related to Shri R.C. Marya and Shri Raghubar Dayal Gaur. Can a relative of a member of a Public Service Commission, Central or State, not get high marks at the viva voce examination on his own merit? Must he always get low marks, so that if high marks are awarded to him, that would necessarily be attributed to his relationship with the member of the Public Service Commission?

12. The Division Bench sought to draw support for its inference from an article written by Shri D.R. Chaudhary, a member of the Haryana Public Service Commission, who is arrayed as Respondent 3 in the writ petition. This article was captioned “Public Service Commissions under Pressures” and was written by Shri D.R. Chaudhary and published in the issue of Tribune dated March 13, 1981. Shri D.R. Chaudhary was appointed a member of the Haryana Public Service Commission on December 2, 1977. He had been such member for over three years at the time of writing this article.

13. He pointed out in this article, and we are quoting here a passage which has been strongly relied upon by the Division Bench:

“With political morality in our system at its lowest ebb, the politicians are always in a hurry to pack the P.S.Cs. with such persons who would be pliable tools in the matter of recruitment. Academic worth, intellectual calibre, experience of men and matters, and integrity are of no relevance. What is important is a person’s ‘dependability’.

Narrow caste, communal and regional issues dominate Indian politics today and these considerations override questions of talent in the matter of recruitment. In the process a member with little intellectual calibre and less integrity begins to serve his own interests and those of his political benefactor. No wonder there is a widespread feeling in the States (mercifully, with the U.P.S.C. as a possible exception) that every post carries a price tag.

We have reached a state when the composition and functioning of our P.S.Cs. should be critically evaluated. This is necessary if the institution has to survive as a meaningful body. Its functioning should be brought under public gaze. At present there is a halo of secrecy surrounding the P.S.C. and secrecy always breeds corruption. It would be suicidal to treat the P.S.C. as a sacred cow. There is nothing more sacred than the public interest and the public interest demands that the functioning of the P.S.Cs. should be widely debated through the press and other forums I invite my colleagues of the P.S.Cs. and public spirited individuals to join the debate.”

We may reasonably assume that a person who wrote such an article would never be a party to any manipulation in the selection of candidates nor would he debase or demean himself by indulging in or even lending his support to, any acts of nepotism or favouritism. It would be quite legitimate to infer that if there had been any attempt to manipulate the marks at the viva voce examination with a view to favouring the undeserving or pushing down the meritorious, Shri D.R. Chaudhary would have protested against such improper and unholy attempt. The very fact that Shri D.R. Chaudhary not only did not register any dissent in regard to the marks awarded at the viva voce examination but actually agreed with the evaluation made by his colleagues shows that there was nothing wrong with the marking nor there was any manipulation of marks indicating nepotism or favouritism. In fact Shri D.R. Chaudhary filed an affidavit in these proceedings where he candidly said that this article written by him was based on his direct experience of working in the Haryana Public Service Commission and he proceeded to add boldly and courageously:

“As a member of H.P.S.C., I noticed various forces trying to undermine the independent functioning of the Commission. What irked me the most was the political interference. An attempt was made to convert this august body into a petty government department where politicians’ writ could run large. Besides this, caste lobbies and money-bags were active to influence its decisions at every stage.

I was in a state of agony. I decided to take the matter to the public through the medium of the press. I knew that I would incur the wrath of the powers and dismay caste lobbies and money-bags.

I took a calculated risk and wrote the article under question. It did infuriate the political bosses as is evident from a news item published in the Tribune dated June 25, 1981 (clipping attached). But at the same time it served the purpose I had in mind. It started a public debate. It created a furor. It was read and debated widely. A number of letters to the Editor appeared in the Tribune. It also figured in the session of the Haryana Vidhan Sabha.

The article had a desired effect. Pressures ceased. Political operators and other manipulators were put on the alert. As such I did not feel the necessity of writing again on the same issue though I continued writing on other matters.”

Then speaking specifically about the viva voce examination held by the Haryana Public Service Commission in the present case, Shri D.R. Chaudhary stated:

“The interviews for the recruitment of H.C.S. and Allied Services, which is the subject of writ petitions in the Hon’ble Punjab and Haryana High Court, were conducted about two years after the publication of the article. No pressure, political or otherwise, was exercised on me, nor to the best of my knowledge, on any other colleague of mine in the Commission during the course of this recruitment.”

14. There is no reason as to why this statement made by Shri D.R. Chaudhary should not be believed. It is indeed surprising that the Division Bench accepted readily what was said by Shri D.R. Chaudhary in the article written by him on March 13, 1981 but for some inexplicable reason, refused to believe the same Shri D.R. Chaudhary when he stated that this article had the desired effect and on account of the exposure made in this article, pressures, political or otherwise, ceased so far as the functioning of the Haryana Public Service Commission was concerned and in the awarding of marks at the viva voce examination, no pressure, political or otherwise, was exercised on Shri D.R. Chaudhary nor to the best of his knowledge, on any of his other colleagues. We accept what has been stated by Shri D.R. Chaudhary in his affidavit and disapprove the observation made by the Division Bench that high marks were undeservedly given to the three candidates related to Shri R.C. Marya and Shri Raghubar Dayal Gaur and low marks were deliberately given to the other meritorious candidates with a view to manipulating the selection of the former at the cost of the latter. We are of the view that there was no material whatsoever on record to justify such observation on the part of the Division Bench. In fact, far from there being any material supportive of such observation, we find that there is one circumstance, which, in our opinion, completely militates against the view taken by the Division Bench and that circumstance is that the marks obtained by the candidates at the written examination were not disclosed to the members of the Haryana Public Service Commission who held the viva voce examination. If the members, who interviewed the candidates, did not know what were the marks obtained by the candidates at the written examination, it is difficult to see how they could have manipulated the marks at the viva voce examination with a view to pushing up the three candidates related to Shri R.C. Marya and Shri Raghubar Dayal Gaur or any other candidates of their choice so as to bring them within the range of selection.

15. But the question still remains whether the selections made by the Haryana Public Service Commission could be said to be vitiated on account of the fact that Shri R.C. Marya and Shri Raghubar Dayal Gaur participated in the selection process, though Trilok Nath

Sharma who was related to Shri Raghubar Dayal Gaur and Shakuntala Rani and Balbir Singh both of whom were related to Shri R.C. Marya, were candidates for selection. It is undoubtedly true that Shri Raghubar Dayal Gaur did not participate when Trilok Nath Sharma came up for interview and similarly Shri R.C. Marya did not participate when Shakuntala Rani and Balbir Singh appeared for interview at the viva voce examination. But, according to the petitioners, this was not sufficient to wipe out the blemish in the process of selection for two reasons: firstly, because Shri R.C. Marya and Shri Raghubar Dayal Gaur participated in the interviews of the other candidates and that gave rise to a reasonable apprehension in the mind of the candidates that Shri R.C. Marya and Shri Raghubar Dayal Gaur might tend to depress the marks of the other candidates with a view to ensuring the selection of the candidates related to them and secondly, because there could be reasonable apprehension in the mind of the candidates that the other members of the Haryana Public Service Commission interviewing the candidates might, out of regard for their colleagues, tend to give higher marks to the candidates related to them. The argument of the petitioners was that the presence of Shri R.C. Marya and Shri Raghubar Dayal Gaur on the interviewing committee gave rise to an impression that there was reasonable likelihood of bias in favour of the three candidates related to Shri R.C. Marya and Shri Raghubar Dayal Gaur and this had the effect of vitiating the entire selection process.

16. We agree with the petitioners that it is one of the fundamental principles of our jurisprudence that no man can be a judge in his own cause and that if there is a reasonable likelihood of bias it is “in accordance with natural justice and common sense that the justice likely to be so biased should be incapacitated from sitting”. The question is not whether the judge is actually biased or in fact decides partially, but whether there is a real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted with bias but that the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. The basic principle underlying this rule is that justice must not only be done but must also appear to be done and this rule has received wide recognition in several decisions of this Court. It is also important to note that this rule is not confined to cases where judicial power strict sense is exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of parties. Justice is not the function of the courts alone; it is also the duty of all those who are expected to decide fairly between contending parties. The strict standards applied to authorities exercising judicial power are being increasingly applied to administrative bodies, for it is vital to the maintenance of the rule of law in a Welfare State where the jurisdiction of administrative bodies is increasing at a rapid pace that the instrumentalities of the State should discharge their functions in a fair and just manner. This was the basis on which the applicability of this rule was extended to the decision-making process of a selection committee constituted for selecting officers to the Indian Forest Service in *A.K. Kraipak*. This Court emphasized that it was not necessary to establish bias but it was sufficient to invalidate the selection process if it could be shown that there was reasonable likelihood of bias. The likelihood of bias may arise on account of proprietary interest or on account of personal reasons, such as, hostility to one party or personal friendship or family relationship with the other. Where reasonable likelihood of bias is alleged on the ground of relationship, the question would always be as to how close be the

degree of relationship or in other words, is the nearness of relationship so great as to give rise to reasonable apprehension of bias on the part of the authority making the selection.

18. We must straightaway point out that *A.K. Kaipak* case is a landmark in the development of administrative law and it has contributed in a large measure to the strengthening of the rule of law in this country. We would not like to whittle down in the slightest measure the vital principle laid down in this decision which has nourished the roots of the rule of law and injected justice and fair play into legality. There can be no doubt that if a Selection Committee is constituted for the purpose of selecting candidates on merits and one of the members of the Selection Committee is closely related to a candidate appearing for the selection, it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but he must withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the Selection Committee, because otherwise all the selections made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. But the situation here is a little different because the selection of candidates to the Haryana Civil Service (Executive) and Allied Services is being made not by any Selection Committee constituted for that purpose but it is being done by the Haryana Public Service Commission which is a Commission set up under Article 316 of the Constitution. It is a Commission which consists of a Chairman and a specified number of members and is a constitutional authority. We do not think that the principle which requires that a member of a Selection Committee whose close relative is appearing for selection should decline to become a member of the Selection Committee or withdraw from it leaving it to the appointing authority to nominate another person in his place, need be applied in case of a constitutional authority like the Public Service Commission, whether Central or State. If a member of a Public Service Commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection, no other person save a member can be substituted in his place. And it may sometimes happen that no other member is available to take the place of such member and the functioning of the Public Service Commission may be affected. When two or more members of a Public Service Commission are holding a viva voce examination, they are functioning not as individuals but as the Public Service Commission. Of course, we must make it clear that when a close relative of a member of a Public Service Commission is appearing for interview, such member must withdraw from participation in the interview of that candidate and must not take part in any discussion in regard to the merits of that candidate and even the marks or credits given to that candidate should not be disclosed to him. Here in the present case it was common ground between the parties that Shri Raghubar Dayal Gaur did not participate at all in interviewing Trilok Nath Sharma and likewise Shri R.C. Marya did not participate at all when Shakuntala Rani and Balbir Singh came to be interviewed and in fact, both of them retired from the room when the interviews of their respective relatives were held. Moreover, neither of them took any part in any discussion with regard to the merits of his relatives nor is there anything to show that the marks or credits obtained by their respective relatives at the interviews were disclosed to them. We are therefore of the view that there was no infirmity attaching to the selections made by the Haryana Public Service Commission on the ground that, though their close relatives were appearing for the interview, Shri Raghubar Dayal Gaur and Shri R.C. Marya did not withdraw

completely from the entire selection process. This ground urged on behalf of the petitioners must therefore be rejected.

19. There was also one other contention which found favour with the Division Bench in support of its conclusion that there was reasonable likelihood of bias vitiating the “whole gamut of the selection process”. This contention was based on the fact that though only 61 vacant posts were advertised for being filled up, over 1300 candidates representing more than 20 times the number of available vacancies, were called for the viva voce examination. The Division Bench pointed out that in order to have a proper balance between the objective assessment of a written examination and the subjective assessment of personality by a viva voce test, the candidates to be called for interview at the viva voce test should not exceed twice or at the highest, thrice the number of available vacancies. This practice of confining the number of candidates to be called for interview to twice or at the highest, thrice the number of vacancies to be filled up, was being followed consistently by the Union Public Service Commission in case of Civil Services Examination, but in the present case, as observed by the Division Bench, a departure was made by the Haryana Public Service Commission and candidates numbering more than 20 times the available vacancies were called for interview. The result, according to the Division Bench, was that the area of arbitrariness in the viva voce test was considerably enlarged and even a student who had got poor marks in the written examination and who having regard to dismal performance at the written examination did not deserve to be called for interview, could get a chance of being called and he could then be pulled up within the range of selection by awarding unduly high marks at the viva voce examination. This conclusion was sought to be buttressed by the Division Bench by relying on a comparison of the marks obtained by some of the petitioners in the written examination and at the viva voce test. This comparison showed that eight of the petitioners secured “a percentage of around 60% rising up to a highest of 68.5%” in the written examination, but they were awarded “a disastrously low percentage of marks in the viva voce ranging from the rock bottom of 13% to 21%”, making it impossible for them to bridge the difference so as to be able to come within the range of selection. How could such brilliant candidates who had done so well in the written examination fare so poorly in the viva voce test that they could not get more than 20% marks, asked the Division Bench? The Division Bench also pointed out that some out of these eight petitioners had appeared in an earlier examination held in 1977-78 and at the viva voce test held at that time, they had secured more than 50 to 55% marks and it was difficult to believe that during the next three succeeding years, they had deteriorated to such an extent that they slumped down to 20% marks. The Division Bench also analysed the comparative marks obtained by the first 16 candidates who topped the list in the written examination and noted that on account of the poor marks obtained by them at the viva voce test, 10 out of these 16 candidates were “knocked out of the race” because their ranking, on the basis of the total marks obtained by them in the written examination and the viva voce test, went far below 61 and only 4 out of the remaining 6 could rank within the first 16 so as to be eligible for appointment in the Haryana Civil Service (Executive Branch) which is a superior service compared to other allied services. It was also pointed out by the Division Bench that out of 16 candidates who topped the list on the basis of combined marks obtained in the written and viva voce examinations and who consequently secured appointment to posts in the Haryana Civil

Service (Executive Branch), 12 could make it only on account of the high marks obtained by them at the viva voce examination, though they were not high up in ranking in the written examination. On the basis of these facts and circumstances, the Division Bench concluded that the petitioners had discharged the burden of showing that there was reasonable likelihood of bias vitiating the entire selection process.

20. We do not think we can agree with this conclusion reached by the Division Bench. But whilst disagreeing with the conclusion, we must admit that the Haryana Public Service Commission was not right in calling for interview all the 1300 and odd candidates who secured 45% or more marks in the written examination. The respondents sought to justify the action of the Haryana Public Service Commission by relying on Regulation 3 of the Regulations contained in Appendix 1 of the Punjab Civil Service (Executive Branch) Rules, 1930 which were applicable in the State of Haryana and contended that on a true interpretation of that Regulation, the Haryana Public Service Commission was bound to call for interview all the candidates who secured a minimum of 45% marks in the aggregate at the written examination. We do not think this contention is well founded. A plain reading of Regulation 3 will show that it is wholly unjustified. We have already referred to Regulation 3 in an earlier part of the judgment and we need not reproduce it again. It is clear on a plain natural construction of Regulation 3 that what it prescribes is merely a minimum qualification for eligibility to appear at the viva voce test. Every candidate to be eligible for appearing at the viva voce test must obtain at least 45% marks in the aggregate in the written examination. But obtaining of minimum 45% marks does not by itself entitles a candidate to insist that he should be called for the viva voce test. There is no obligation on the Haryana Public Service Commission to call for the viva voce test all the candidates who satisfy the minimum eligibility requirement. It is open to the Haryana Public Service Commission to say that out of the candidates who satisfy the eligibility criterion of minimum 45% marks in the written examination, only a limited number of candidates at the top of the list shall be called for interview. And this has necessarily to be done because otherwise the viva voce test would be reduced to a farce. It is indeed difficult to see how a viva voce test for properly and satisfactorily measuring the personality of a candidate can be carried out, if over 1300 candidates are to be interviewed for recruitment to a service. If a viva voce test is to be carried out in a thorough and scientific manner, as it must be in order to arrive at a fair and satisfactory evaluation of the personality of a candidate, the interview must take anything between 10 to 30 minutes. In fact, Herman Finer in his book on *Theory and Practice of Modern Government* points out that “the interview should last at least half an hour”. The Union Public Service Commission making selections for the Indian Administrative Service also interviews a candidate for almost half an hour. Only 11 to 12 candidates are called for interview in a day of 5½ hours. It is obvious that in the circumstances, it would be impossible to carry out a satisfactory viva voce test if such a large unmanageable number of over 1300 candidates are to be interviewed. The interviews would then tend to be casual, superficial and sloppy and the assessment made at such interviews would not correctly reflect the true measure of the personality of the candidate. Moreover, such a course would widen the area of arbitrariness, for even a candidate who is very much lower down in the list on the basis of marks obtained in the written examination, can, borrow an expression used by the Division Bench, ‘gatecrash’ into the range of selection, if he is awarded unduly high marks at the viva

voce examination. It has therefore always been the practice of the Union Public Service Commission to call for interview, candidates representing not more than twice or thrice the number of available vacancies. Kothari Committee's Report on the "Recruitment Policy and Selection Methods for the Civil Services Examination" also points out, after an in-depth examination of the question as to what should be the number of candidates to be called for interview:

"The number of candidates to be called for interview, in order of the total marks in written papers, should not exceed, we think, twice the number of vacancies to be filled...."

Otherwise the written examination which is definitely more objective in its assessment than the viva voce test will lose all meaning and credibility and the viva voce test which is to some extent subjective and discretionary in its evaluation will become the decisive factor in the process of selection. We are therefore of the view that where there is a composite test consisting of a written examination followed by a viva voce test, the number of candidates to be called for interview in order of the marks obtained in the written examination, should not exceed twice or at the highest, thrice the number of vacancies to be filled. The Haryana Public Service Commission in the present case called for interview all candidates numbering over 1300 who satisfied the minimum eligibility requirement by securing a minimum of 45% marks in the written examination and this was certainly not right, but we may point out that in doing so, the Haryana Public Service Commission could not be said to be actuated by any mala fide or oblique motive, because it was common ground between the parties that this was the practice which was being consistently followed by the Haryana Public Service Commission over the years and what was done in this case was nothing exceptional. The only question is whether this had any invalidating effect on the selections made by the Haryana Public Service Commission.

21. We do not think that the selections made by the Haryana Public Service Commission could be said to be vitiated merely on the ground that as many as 1300 and more candidates representing more than 20 times the number of available vacancies were called for interview, though on the view taken by us that was not the right course to follow and not more than twice or at the highest thrice, the number of candidates should have been called for interview. Something more than merely calling an unduly large number of candidates for interview must be shown in order to invalidate the selections made. That is why the Division Bench relied on the comparative figures of marks obtained in the written examination and at the viva voce test by the petitioners, the first 16 candidates who topped the list in the written examination and the first 16 candidates who topped the list on the basis of the combined marks obtained in the written examination and the viva voce test, and observed that these figures showed that there was reasonable likelihood of arbitrariness and bias having operated in the marking at the viva voce test. Now it is true that some of the petitioners did quite well in the written examination but fared badly in the viva voce test and in fact their performance at the viva voce test appeared to have deteriorated in comparison to their performance in the year 1977-78.

Equally it is true that out of the first 16 candidates who topped the list in the written examination, 10 secured poor rating in the viva voce test and were knocked out of the reckoning while 2 also got low marks in the viva voce test but just managed to scrape through

to come within the range of selection. It is also true that out of the first 16 candidates who topped the list on the basis of the combined marks obtained in the written examination and the viva voce test, 12 could come in the list only on account of high marks obtained by them at the viva voce test, though the marks obtained by them in the written examination were not of sufficiently high order. These figures relied upon by the Division Bench may create a suspicion in one's mind that some element of arbitrariness might have entered the assessment in the viva voce examination. But suspicion cannot take the place of proof and we cannot strike down the selections made on the ground that the evaluation of the merits of the candidates in the viva voce examination might be arbitrary. It is necessary to point out that the Court cannot sit in judgment over the marks awarded by interviewing bodies unless it is *proved or obvious* that the marking is plainly and indubitably arbitrary or affected by oblique motives. It is only if the assessment is patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrariness. Moreover, apart from only three candidates, namely, Trilok Nath Sharma, Shakuntala Rani and Balbir Singh one of whom belonged to the general category and was related to Shri Raghubar Dayal Gaur and the other two were candidates for the seats reserved for Scheduled Castes and were related to Shri R.C. Marya, there was no other candidate in whom the Chairman or any member of the Haryana Public Service Commission was interested, so that there could be any motive for manipulation of the marks at the viva voce examination. There were of course general allegations of casteism made against the Chairman and the members of the Haryana Public Service Commission, but these allegations were not substantiated by producing any reliable material before the Court. The Chairman and members of the Haryana Public Service Commission in fact belonged to different castes and it was not as if any particular caste was predominant amongst the Chairman and members of the Haryana Public Service Commission so as even to remotely justify an inference that the marks might have been manipulated to favour the candidates of that caste. We do not think that the Division Bench was right in striking down the selections made by the Haryana Public Service Commission on the ground that they were vitiated by arbitrariness or by reasonable likelihood of bias.

22. That takes us to the next ground of challenge which found acceptance with the Division Bench. The contention of the petitioners under this ground of challenge was that in comparison to the marks allocated to the written examination, the proportion of the marks allocated to the viva voce test was excessively high and that introduced an irredeemable element of arbitrariness in the selection process so as to offend Articles 14 and 16 of the Constitution. It is necessary in order to appreciate this contention and to adjudicate upon its validity to consider the relative weight attached by the relevant rules to the written examination and the viva voce test. We have already referred to the Punjab Civil Service (Executive Branch) Rules, 1930 as applicable in the State of Haryana. Rule 9 of these rules prescribes that a competitive examination shall be held in accordance with the Regulations set out in Appendix 1 for the purpose of selection by competition of candidates to the Haryana Civil Service (Executive Branch) and other Allied Services and under Regulations 1 and 5 every ex-service officer has to appear in a written examination in 5 compulsory subjects carrying the aggregate of 400 marks and a viva voce test carrying 200 marks and likewise, every candidate belonging to the general category has to appear in a written examination in 8

subjects carrying the aggregate of 700 marks and for him also there is a viva voce test carrying 200 marks. The argument of the petitioners was that in case of ex-service officers the marks allocated for the viva voce test were 200 as against 400 allocated for the written examination so that the marks allocated for the viva voce test came to 33.3% of the total number of marks taken into account for the purpose of making selection. So also in the case of candidates belonging to the general category, the marks allocated for the *viva voce* test were 200 as against 700 allocated for the written examination with the result that the marks allocated for the viva voce test came to 22.2% of the total number of marks for the competitive examination. This percentage of 33.3% in the case of ex-service officers and 22.2% in the case of other candidates was, according to the Division Bench, unduly high and rendered the selection of the candidates arbitrary. The correctness of this view has been challenged before us on behalf of the respondents.

24. It is now admitted on all hands that while a written examination assesses the candidate's knowledge and intellectual ability, a viva voce test seeks to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities can be evaluated, perhaps with some degree of error, by viva voce test, much depending on the constitution of the interview board.

26. We may now, in the background of this discussion, proceed to consider whether the allocation of as high a percentage of marks as 33.3% in case of ex-service officers and 22.2% in case of other candidates, for the viva voce test renders the selection process arbitrary. So far as ex-service officers are concerned, there can be no doubt that the percentage of marks allocated for the viva voce test in their case is unduly high and it does suffer from the vice of arbitrariness. It has been pointed out by the Division Bench in a fairly elaborate discussion that so far as the present selections in the category of ex-service officers are concerned, the spread of marks in the viva voce test was inordinately high compared to the spread of marks in the written examination. The minimum marks required to be obtained in the written examination for eligibility for the viva voce test are 180 and as against these minimum 180 marks, the highest marks obtained in the written examination in the category of ex-service officers were 270, the spread of marks in the written examination thus being only 90 marks which works out to a ratio of 22.2%. But when we turn to the marks obtained in the viva voce test, we find that in case of ex-service officers the lowest marks obtained were 20 while the highest marks secured were 171 and the spread of marks in the viva voce test was thus as wide as 151 in a total of 200 marks, which worked out to an inordinately high percentage of 76. The spread of marks in the viva voce test being enormously large compared to the spread of marks in the written examination, the viva voce test tended to become a determining factor in the selection process, because even if a candidate secured the highest marks in the written examination, he could be easily knocked out of the race by awarding him the lowest marks in the viva voce test and correspondingly, a candidate who obtained the lowest marks in the written examination could be raised to the top most position in the merit list by an

inordinately high marking in the viva voce test. It is therefore obvious that the allocation of such a high percentage of marks as 33.3% opens the door wide for arbitrariness and in order to diminish, if not eliminate, the risk of arbitrariness, the percentage needs to be reduced. But while considering what percentage of marks may legitimately be allocated for the viva voce test without incurring the reproach of arbitrariness, it must be remembered that ex-service officers would ordinarily be middle-aged persons of mature personality and it would be hard on them at that age to go through a long written examination involving 8 subjects and hence it would not be unfair to require them to go through a shorter written examination in only 5 subjects and submit to a viva voce test carrying a higher percentage of marks than what might be prescribed in case of younger candidates. The personalities of these ex-service officers being fully mature and developed, it would not be difficult to arrive at a fair assessment of their merits on the basis of searching and incisive viva voce test and therefore in their case, the viva voce test may be accorded relatively greater weight. But in any event the marks allocated for the viva voce test cannot be as high as 33.3%.

27. The position is no different when we examine the question in regard to the percentage of marks allocated for the viva voce test in case of persons belonging to the general category. The percentage in the case of these candidates is less than that in the case of ex-service officers, but even so it is quite high at the figure of 22.2%. Here also it has been pointed out by the Division Bench by giving facts and figures as to how in the case of present selections from the general category the spread of marks in the viva voce test was inordinately high compared to the spread of marks in the written examination so that a candidate receiving low marks in the written examination could be pulled up to a high position in the merit list by inordinately high marking in the viva voce test. The viva voce test in the general category, too, would consequently tend to become a determining factor in the process of selection, tilting the scales in favour of one candidate or the other according to the marks awarded to him in the viva voce test. This is amply borne out by the observations of the Kothari Committee in the Report made by it in regard to the selections to the Indian Administrative Service and other Allied Services. The competitive examination in the Indian Administrative Service and other Allied Services also consists of a written examination followed by a viva voce test. Earlier in 1948 the percentage of marks allocated for the viva voce test was 22 and it was marginally brought down to 21.60 in 1951 and then again in 1964, it was scaled down to 17.11. The Kothari Committee in its Report made in 1976 pleaded for further reduction of the percentage of marks allocated for the viva voce test and strongly recommended that the viva voce test should carry only 300 out of a total of 3000 marks. The Kothari Committee pointed out that even where the percentage of marks allocated for the viva voce test was 17.11, nearly one-fourth of the candidates selected owed their success to the marks obtained by them at the viva voce test. This proportion was regarded by the Kothari Committee as "somewhat on the high side". It is significant to note that consequent upon the Kothari Committee Report, the percentage of marks allocated for the viva voce test in the competitive examination for the Indian Administrative Service and other Allied Services was brought down still further to 12.2. The result is that since the last few years, even for selection of candidates in the Indian Administrative Service and other Allied Services where the personality of the candidate and his personal characteristics and traits are extremely relevant for the purpose of selection, the marks allocated for the viva voce test constitute only 12.2%

of the total marks. Now if it was found in the case of selections to the Indian Administrative Service and other Allied Services that the allocation of even 17.11% marks for the viva voce test was on the higher side and it was responsible for nearly one-fourth of the selected candidates securing a place in the select list owing to the marks obtained by them at the viva voce test, the allocation of 22.2% marks for the viva voce test would certainly be likely to create a wider scope for arbitrariness. When the Kothari Committee, admittedly an Expert Committee, constituted for the purpose of examining recruitment policy and selection methods for the Indian Administrative Service and other Allied Services took the view that the allocation of 17.11% marks for the viva voce test was on the higher side and required to be reduced, it would be legitimate to hold that in case of selections to the Haryana Civil Services (Executive Branch) and other Allied Services, which are services of similar nature in the State, the allocation of 22.2% marks for the viva voce test was unreasonable. We must therefore regard the allocation of 22.2% of the total marks for the viva voce test as infecting the selection process with the vice of arbitrariness.

28. But the question which then arises for consideration is as to what is the effect of allocation of such a high percentage of marks for the viva voce test, both in case of ex-service officers and in case of other candidates, on the selections made by the Haryana Public Service Commission. Though we have taken the view that the percentage of marks allocated for the viva voce test in both these cases is excessive, we do not think we would be justified in the exercise of our discretion in setting aside the selections made by the Haryana Public Service Commission after the lapse of almost two years. The candidates selected by the Haryana Public Service Commission have already been appointed to various posts and have been working on these posts since the last about two years. Moreover the Punjab Civil Service (Executive Branch) Rules, 1930 under which 33.3% marks in case of ex-service officers and 22.2% marks in case of other candidates have been allocated for the viva voce test have been in force for almost 50 years and everyone has acted on the basis of these rules. If selections made in accordance with the prescription contained in these rules are now to be set aside, it will upset a large number of appointments already made on the basis of such selections and the integrity and efficiency of the entire administrative machinery would be seriously jeopardised. We do not therefore propose to set aside the selections made by the Haryana Public Service Commission though they have been made on the basis of an unduly high percentage of marks allocated for the viva voce test.

29. Now if the allocation of such a high percentage of marks as 33.3 in case of ex-service officers and 22.2 in case of other candidates, for the viva voce test is excessive, as held by us, what should be the proper percentage of marks to be allocated for the viva voce test in both these cases. So far as candidates in the general category are concerned we think that it would be prudent and safe to follow the percentage adopted by the Union Public Service Commission in case of selections to the Indian Administrative Service and other Allied Services. The percentage of marks allocated for the viva voce test by the Union Public Service Commission in case of selections to the Indian Administrative Services and other Allied Services is 12.2, and that has been found to be fair and just, as striking a proper balance between the written examination and the viva voce test. We would therefore direct that hereafter in case of selections to be made to the Haryana Civil Services (Executive

Branch) and other Allied Services, where the competitive examination consists of a written examination followed by a viva voce test, the marks allocated for the viva voce test shall not exceed 12.2% of the total marks taken into account for the purpose of selection. We would suggest that this percentage should also be adopted by the Public Service Commissions in other States, because it is desirable that there should be uniformity in the selection process throughout the country and the practice followed by the Union Public Service Commission should be taken as a guide for the State Public Service Commissions to adopt and follow. The percentage of marks allocated for the viva voce test in case of ex-service officers may, for reasons we have already discussed, be somewhat higher than the percentage for the candidates belonging to the general category. We would therefore direct that in case of ex-service officers, having regard to the fact that they would ordinarily be middle-aged persons with personalities fully developed, the percentage of marks allocated for the viva voce test may be 25. Whatever selections are made by the Haryana Public Service Commission in the future shall be on the basis that the marks allocated for the viva voce test shall not exceed 12.2% in case of candidates belonging to the general category and 25% in case of ex-service officers.

30. Before we part with this judgment we would like to point out that the Public Service Commission occupies a pivotal place of importance in the State and the integrity and efficiency of its administrative apparatus depends considerably on the quality of the selections made by the Public Service Commission. It is absolutely essential that the best and finest talent should be drawn in the administration and administrative services must be composed of men who are honest, upright and independent and who are not swayed by the political winds blowing in the country. The selection of candidates for the administrative services must therefore be made strictly on merits, keeping in view various factors which go to make up a strong, efficient and people oriented administrator. This can be achieved only if the Chairman and members of the Public Service Commission are eminent men possessing a high degree of calibre, competence and integrity, who would inspire confidence in the public mind about the objectivity and impartiality of the selections to be made by them. We would therefore like to strongly impress upon every State Government to take care to see that its Public Service Commission is manned by competent, honest and independent persons of outstanding ability and high reputation who command the confidence of the people and who would not allow themselves to be deflected by any extraneous considerations from discharging their duty of making selections strictly on merit. Whilst making these observations we would like to make it clear that we do not for a moment wish to suggest that the Chairman and members of the Haryana Public Service Commission in the present case were lacking in calibre, competence or integrity.

31. We would also like to point out that in some of the States, and the State of Haryana is one of them, the practice followed is to invite a retired Judge of the High Court as an expert when selections for recruitment to the Judicial Service of the State are being made and the advice given by such retired High Court Judge who participates in the viva voce test as an expert is sometimes ignored by the Chairman and members of the Public Service Commission. This practice is in our opinion undesirable and does not commend itself to us. When selections for the Judicial Service of the State are being made, it is necessary to

exercise the utmost care to see that competent and able persons possessing a high degree of rectitude and integrity are selected, because if we do not have good, competent and honest Judges, the democratic polity of the State itself will be in serious peril. It is therefore essential that when selections to the Judicial Service are being made, a sitting Judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting Judge comes as an expert who, by reason of the fact that he is a sitting High Court Judge, knows the quality and character of the candidates appearing for the interview, the advice given by him should ordinarily be accepted, unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and members of the Public Service Commission. We are giving this direction to the Public Service Commission in every State because we are anxious that the finest talent should be recruited in the Judicial Service and that can be secured only by having a real expert whose advice constitutes a determinative factor in the selection process.

32. We accordingly allow the appeals, set aside the judgment of the Division Bench of the Punjab and Haryana High Court and reject the challenge to the validity of the selections made by the Haryana Public Service Commission to the Haryana Civil Services (Executive Branch) and other Allied Services. But in view of the fact that an unduly large number of candidates were called for interview and the marks allocated in the viva voce test were excessively high, it is possible that some of the candidates who might have otherwise come in the select list were left out of it, perhaps unjustifiably. We would therefore direct that all the candidates who secured a minimum of 45% marks in the written examination but who could not find entry in the select list, should be given one more opportunity of appearing in the competitive examination which would now have to be held in accordance with the principles laid down in this judgment and this opportunity should be given to them, even though they may have passed the maximum age prescribed by the rules for recruitment to the Haryana Civil Services (Executive Branch) and other Allied Services. We would direct that in the circumstances of the case the fair order of costs would be that each party should bear and pay his own costs throughout.

* * * * *

G.N. Nayak v. Goa University
(2002) 2 SCC 712 : AIR 2002 SC 790

On 10-8-1994, an advertisement was issued for the post of Professor, Marine Science. The handout distributed to the applicants prescribed the minimum qualifications as:

“An eminent scholar with published work of high quality actively engaged in research with 10 years of experience in postgraduate teaching and/or research at the university/national-level institution including experience of guiding research at doctoral level or *an* outstanding scholar with established reputation with significant contribution to knowledge.”

Additional qualifications prescribed by the University Grants Commission were also stated as:

“*Specialization.* – MSc, PhD in Marine Science or any related subject with outstanding accomplishments of teaching and research in branches of Marine Science, Marine Biology, Marine Biotechnology, Marine Geology, Chemical Oceanography or Physical Oceanography with a proven record of publications in international journals.”

Both the appellant and Respondent 5 applied for the post. Both of them were Readers in the Department of Marine Science, Respondent 5 being senior most. Both were called for interviews on 13-9-1995. Sometime before the date of the interview a note was written by Respondent 2 as Head of the Department to the Vice-Chancellor requesting for the holding of an urgent interview for the appointment of Professor, Marine Science. The note placed on record an appointment letter received by the appellant for appointment as Professor in Geology in University of Gulbarga. The note extolled the qualities of the appellant and concluded with the following paragraphs:

“8. HOD (Head of Department) submits that if Dr Nayak (the appellant) is relieved from this Department, the Department and the University will lose a dedicated and intelligent faculty whose services are very essential for this newly emerged Department and the young Goa University in general at this juncture.

Goa University had already advertised a post of Professor in Marine Sciences in January 1995 for which Dr Nayak is also an applicant. In the light of above, it is earnestly requested that the Vice-Chancellor may kindly hold the interviews as early as possible without re-advertising the same, so that Dr Nayak is given a chance to answer the interview and if selected, may be retained by the University.”

This note was endorsed by the Dean of the Faculty on 6-8-1995 who forwarded the note with the endorsement that he fully agreed with the views expressed by Respondent 2 and suggested that interviews should be held. Respondent 5 obtained a copy of this note and on 23-8-1995 wrote a letter to the Chancellor as well as to the Vice-Chancellor objecting to the participation of Respondent 2 and the Dean of the Faculty in the selection on the ground that he apprehended that they would be biased against him and that they had in writing disclosed their bias in favour of the appellant. The Vice-Chancellor received the letter but did not reply.

Respondent 5 filed a writ application in the High Court in 1995 seeking to stop the participation of Respondent 2 as well the nominee of the Vice-Chancellor in the selection process. The writ petition was withdrawn. According to Respondent 5, the previous writ application had been withdrawn because the Court had observed that the petition was premature and also because the respondent-University had given an oral assurance to the Court that Respondent 2 would not be participating in the selection process. This was denied by the appellant and the University. On 13-9-1995, interviews were held as scheduled. However, Respondent 2 did not take part in the selection process. The Selection Committee found that neither the appellant nor Respondent 5 were suitable for the post.

In October 1995, a fresh advertisement was issued for the post. This time, although the essential qualifications as advertised in 1994 remained the same, the additional qualifications were amended so that the specialisation read: “*Professor of Marine Science: Specialisation: Any branch of Marine Sciences, namely, Physical Oceanography, Marine Chemistry, Marine Geology or Marine Biology.*” The requirement of “MSc-PhD in Marine Science or any related subject with outstanding accomplishment of teaching and research and also with proven record of publications in international journals” was done away with. A fresh Selection Committee was constituted pursuant to the 1995 advertisement. It met on 20-5-1996. This time Respondent 2 participated. The Committee recommended the appointment of the appellant. The appellant’s appointment was accepted by the Executive Council and a formal order appointing the appellant as Professor of Marine Science was issued to him on 8-6-1996.

Respondent 5 filed a second writ petition challenging the selection of the appellant. The challenge was upheld by the High Court broadly on the following grounds:

(1) the eligibility criteria as advertised for the purpose of selection had been illegally amended in disregard of the provisions of the statutes of the University; (2) the Selection Committee was not legally constituted; (3) no records had been maintained by the Selection Committee as to how the inter se grading was done between the candidates; (4) the selection process was vitiated by bias; (5) the appellant was not qualified and did not possess the essential qualifications as advertised for the post.

RUMA PAL, J. - 18. To appreciate the arguments of opposing counsel on the merits, the framework of the law within which the events took place is noted. University of Goa was established in 1984 by the Goa University Act, 1984 (“the Act”). The Act provides for the management and running of the University by the statutes framed under Sections 22 and 23, ordinances under Section 24 and regulations under Section 25. Under the Act, the Lt. Governor of the Union Territory has been constituted ex-officio Visitor of the University. By virtue of an amendment to the Act in 2000, the Visitor is now known as the Chancellor of the University. The Chancellor is the Head of the University. Among the authorities of the University, we are concerned with the Executive Council and the Academic Council. The Executive Council is the principal executive body of the University (Section 18) and is empowered by Section 23(2) to make the statutes subject to the approval of the Chancellor dealing with a range of subjects including the appointment of teachers and other academic staff of the University. The Academic Council is, on the other hand, the principal academic

body of the University and is mandated to “subject to the provisions of the Act, the statutes and ordinances, coordinate and exercise general supervision over the academic policies of the University”.

19. The first statutes of the University are set out in the Schedule to the Act. They have been amended from time to time and further, statutes have also been incorporated in the Schedule. We are concerned primarily with Statutes 8 and 15.

20. Statute 8(1) empowers the Executive Council:

“(i) to create teaching and academic posts, to determine the number and emoluments of such posts and to define the duties and conditions of service of Professors, Readers, Lecturers and other academic staff and Principal of colleges and institutions maintained by the University:

Provided that no action shall be taken by the Executive Council in respect of the number, qualifications and the emoluments of teachers of the University and academic staff otherwise than after consideration of the recommendations of the Academic Council.”

21. Statute 15 provides for constitution of the Selection Committee for making recommendations to the Executive Council for appointments to the various posts. The constitution of the Selection Committee varies according to the nature of the post. For the post of Professor, the Selection Committee is required to consist of the Vice-Chancellor, a nominee of the Chancellor (Visitor), the Head of the Department and in case of his non-availability, a person nominated by the Planning Board from its members, the Dean of the Faculty concerned, one Professor to be nominated by the Vice-Chancellor and three persons not in the service of the University nominated by the Executive Council out of a panel of names recommended by the Academic Council for their special knowledge of or interest in the subject with which the Professor as the case may be, will be concerned.

22. According to Respondent 5, the amendment of the qualifications for the post of Professor of Marine Science was illegal. It was contended that under Statute 8, it is the Executive Council which has to prescribe the qualifications after considering the recommendations of the Academic Council. According to Respondent 5, the qualifications which were prescribed in the 1995 advertisement and handout issued to the applicants in connection therewith had not been prescribed by the Executive Council nor recommended by the Academic Council. Whether this is so or not, this is not a grievance which could have been raised by Respondent 5. He knew that there was a change in the eligibility criteria for the post yet he applied for the post and appeared at the interview without protest. He cannot be allowed to now contend that the eligibility criteria were wrongly framed.

23. We then come to the question of the qualifications of the appellant and whether he was qualified to have at all been considered for appointment to the post of Professor.

24. If we analyse the 1995 advertisement and handout it will be seen that the minimum qualifications prescribed for a candidate were that he/she had to be:

(a) an eminent scholar; (b) with work of high quality; (c) actively engaged in research; (d) with 10 years’ experience in postgraduate teaching and/or research at

the university/national-level institution including experience of guiding research at doctoral level; or

(a) an outstanding scholar; (b) with established reputation; (c) with significant contribution to knowledge.

25. For a candidate to be qualified under the second limb, apart from a brilliant academic record and having an established standing, the candidate must have been responsible for original research which had added to the field of the particular science, not in small measure but significantly. The appellant has not sought to justify his appointment under this limb but has claimed that he was qualified under the first. For the purposes of this judgment, we will assume that the appellant fulfilled the first three qualifications under the first limb. The difficulty arises in connection with the fourth requirement, namely, 10 years' experience of teaching or research.

26. The appellant claims in his biodata that he completed his post graduation in 1982 and acquired his Doctorate in the year 1986. On 17-12-1986, he was appointed as a Lecturer in the University after which he became a Reader on 19-6-1991. The advertisement was issued in October 1995 and the Selection Committee met on 20-5-1996. The appellant claims that if the research which was conducted by him for three years in connection with obtaining his Doctoral degree is counted in addition to his teaching experience, he is qualified.

27. That a candidate can club together his qualifications of teaching and research to cover the 10 years' period has been held in *Kumar Bar Das (Dr) v. Utkal University* [1999 SCC (L & S) 236]. The question still remains, would any kind of research at a university do? Strictly speaking and as a matter of legal interpretation, the phrase "research at the university/national-level institution" should be read *ejusdem generis* and in the context of the alternate qualifications specified viz. "teaching experience" and the last phrase "including experience of guiding research at doctoral level". In other words, the research must be independent such that the researcher could guide others aspiring for Doctorate degrees and not the research where the researcher is striving for a Doctorate degree himself. The appellant's research prior to 17-9-1986 was pre-doctoral. Consequently and according to the letter of the law, perhaps the appellant was not qualified to be considered as a candidate for a Professorship in 1996 since he had failed to meet the criteria by about four months.

28. However, the Court would not be justified in adopting a legalistic approach and proceed on a technical view of the matter without considering the intention of the University in laying down the condition of eligibility, since it is for the University to decide what kind of research would be adequate to qualify for professorship. The University had intended, understood and consistently proceeded on the basis that the pre-doctoral research could be counted towards the 10 years' experience clause. So did Respondent 5. When Respondent 5 applied for the post when it was advertised in 1994 he did not have 10 years' cumulative experience of teaching and post-doctoral research. Since he had obtained a Doctorate degree in November 1985, the University also considered his application and called him for an interview in September 1985, though according to a strict interpretation of the eligibility criteria Respondent 5 was not qualified. Finally in *Kumar Bar Das*, this Court in construing similar eligibility criteria has held that the research required could include pre-doctoral research experience.

29. Then it was said that the Selection Committee was faultily constituted. Statute 15 has already been quoted earlier. According to the Registrar's affidavit, the Academic Council had prepared a panel of subject experts and forwarded it to the Executive Council. The panel as approved by the Executive Council was: (1) Prof. Subba Rao or Prof. V.V. Modi; (2) Dr J. Samant or Dr D. Chandramohan; (3) Prof. K.T. Damodaran or Prof. R.K. Banerjee, Prof. Subba Rao and Prof. V.V. Modi had both regretted their inability to be part of the Selection Committee. Dr D. Chandramohan who had been mentioned as an alternative choice by the Executive Council was inducted into the panel. According to Respondent 5, the panel of experts had been prepared by the Executive Council subject wise, the idea being to have experts from the specialised fields mentioned in the advertisement of October 1995. Our attention was drawn to the fact that Prof. Subba Rao was Professor, Immunology and Biochemistry and Professor Modi was from the Department of Biology and Biotechnology.

30. There is nothing on the record which shows that the Executive Council had "paired" the experts according to their special field of knowledge. On the contrary, it has not been pointed out how the subjects of Immunology and Biochemistry on the one hand can be paired with Biology and Biochemistry and not with Marine Biology in which Dr Chandramohan is stated to be an expert. In fact each of the experts had been approved by the Academic Council as being fit to be in the Selection Committee. The Executive Council merely prepared the panel in order of preference. If the preferred members were unavailable, the other members approved by the Academic Council and recommended by the Executive Council could be empanelled. There has thus been no violation of Statute 15.

31. The High Court, however, held that there was a further defect in the proceedings. The Selection Committee was constituted by the following persons: Prof. N.C. Nigam, Vice-Chancellor Chairman; Prof. S. Mavinkurve, Dean of the Faculty; Prof. U.M.X. Sangodkar, Head of Department (Respondent 2); Prof. D.J. Bhat, nominee of the VC; Ex-Admiral Dr Menon, nominee of the VC; Prof. K.T. Damodaran, subject expert; Prof. J. Samant, subject expert and Dr Chandramohan, subject expert as Members but the report of the Selection Committee records, "Shri/Dr D. Chandramohan regretted his/her ability to be present at the meeting." With the absence of Dr Chandramohan the quorum would have been incomplete. According to the Registrar's affidavit, this was a typographical error as Dr Chandramohan had in fact participated and signed the report. The statement of the Registrar on oath should have been accepted by the High Court, particularly when there was no allegation even on the part of Respondent 5 that Dr Chandramohan did not in fact sit on the Selection Committee.

32. This brings us to the issue of bias.

33. Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially.

"If however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices."

34. It is not every kind of bias which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest — whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension of the principles of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.

36. As we have noted, every preference does not vitiate an action. If it is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. For example, if a senior officer expresses appreciation of the work of a junior in the confidential report, it would not amount to bias nor would it preclude that senior officer from being part of the Departmental Promotion Committee to consider such junior officer along with others for promotion.

37. In this case, Respondent 5 has relied on the note quoted earlier to allege bias against Respondent 2. No doubt Respondent 2 has, in the note, lavished praise on the performance of the appellant. As the Head of the Department it would be but natural that he formed an opinion as to the abilities of the Readers working under him. It is noteworthy that it was not Respondent 5's case that Respondent 2's praise of the appellant was unmerited or that Respondent 2 had any extraneous reasons or reason other than the competence of the appellant for selecting the appellant as Professor. We are also not persuaded as the High Court was, to infer bias merely because at the previous selection in September 1995 the appellant was found unsuitable. If the outcome of the previous selection was conclusive as to the non-suitability of the appellant for all times to come, it was conclusive as far as Respondent 5 as well. Yet Respondent 5 applied again because he knew that a reappraisal by a new Selection Committee at a later point of time might yield a different result.

38. As for the failure to keep any record as to the grading of the candidates under Statute 15, the procedure to be followed by the Selection Committee in making recommendations are required to be such as may be laid down in the ordinances. No ordinance was drawn to our notice which prescribes a particular mode of rating the respective merits of the candidates. When appointments are being made to posts as high as that of a Professor, it may not be necessary to give marks as the means of assessment. But whatever the method of measurement of suitability used by the Selection Committee, it was a unanimous decision and the courts will, in the circumstances obtaining in this case, have to respect that.

39. Accordingly, we set aside the decision of the High Court and allow the appeal.

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Amar Nath Chowdhury v. Braithwaite and Co. Ltd.
(2002) 2 SCC 290 : AIR 2002 SC 678

[Rule against bias - necessity]

The appellant was an employee of Braithwaite and Company Limited, Calcutta, a Government of India undertaking ("the Company"). Certain misconduct committed by the appellant came to the notice of the Company about which it decided to initiate disciplinary proceedings against the appellant. The appellant was served with a charge-sheet to which he gave an explanation. An Inquiry Committee constituted for that purpose after making an enquiry, found the charges leveled against the appellant proved. The Inquiry Committee accordingly submitted its report to the disciplinary authority. The disciplinary authority, who was the then Chairman-cum-Managing Director of the Company accepted the report submitted by the Inquiry Committee and he, by order dated 13-2-1984, removed the appellant from service.

The appellant preferred an appeal against the order of his removal from service before the Board of Directors as permitted under rules. It was un-disputed that S. Krishnaswami, Chairman-cum-Managing Director of the Company and who, in his capacity as the disciplinary authority, had removed the appellant from service presided over and participated in the deliberations of the meeting of the Board. The Board by order dated 31-8-1984, dismissed the appeal filed by the appellant by a non-speaking order.

V.N. KHARE, J. - 5. One of the arguments raised by Shri P.P. Rao, learned Senior Counsel appearing on behalf of the appellant, is that the order of removal having been passed by the disciplinary authority - Shri S. Krishnaswami, who was then the Chairman-cum-Managing Director of the Company, was disqualified to have presided over and participated in the deliberations of the meeting of the Board which heard and dismissed the appeal and, therefore, the order of the Appellate Authority was vitiated on account of legal bias. We find substance in the argument. It is not disputed that Shri S. Krishnaswami was then the Chairman-cum-Managing Director of the Company. It is also not disputed that Shri Krishnaswami was also the disciplinary authority who passed the order of removal against the appellant. The question, therefore, arises whether the proceedings of the Board were vitiated on account of participation of the disciplinary authority while deciding the appeal preferred by the appellant.

6. One of the principles of natural justice is that no person shall be a judge in his own cause or the adjudicating authority must be impartial and must act without any kind of bias. The said rule against bias has its origin from the maxim known as *nemo debet esse judex in propria causa*, which is based on the principle that justice not only be done but should manifestly be seen to be done. This could be possible only when a Judge or an adjudicating authority decides the matter impartially and without carrying any kind of bias. Bias may be of different kinds and forms. It may be pecuniary, personal or there may be bias as to the subject-matter etc. In the present case, we are not concerned with any of the aforesaid forms of bias. What we are concerned with in the present case is whether an authority can sit in appeal against its own order passed in the capacity of disciplinary authority. In the present

case, the subject-matter of appeal before the Board was whether the order of removal passed by the disciplinary authority was in conformity with law. It is not disputed that Shri S. Krishnaswami, the then Chairman-cum-Managing Director of the Company acted as a disciplinary authority as well as an Appellate Authority when he presided over and participated in the deliberations of the meeting of the Board while deciding the appeal of the appellant. Such a dual function is not permissible on account of established rule against bias. In a situation where such a dual function is discharged by one and the same authority, unless permitted by an act of legislation or statutory provision, the same would be contrary to rule against bias. Where an authority earlier had taken a decision, he is disqualified to sit in appeal against his own decision, as he already prejudged the matter otherwise such an appeal would be termed an appeal from Caesar to Caesar and filing of an appeal would be an exercise in futility. In that view of the matter, in the present case, fair play demanded that Shri Krishnaswami, the then Chairman-cum-Managing Director of the Company ought not to have participated in the deliberations of the meeting of the Board when the Board heard and decided the appeal of the appellant.

7. Learned counsel appearing for the respondent, however, pressed into service the “*doctrine of necessity*” in support of his contention. He contended that the rule against bias is not available when, under the Regulations framed by the Company, the disciplinary authority who happened to be the Chairman-cum-Managing Director of the Company was required to preside over the meeting of the Board and, therefore, the then Chairman-cum-Managing Director of the Company was not disqualified to preside over and participate in the meeting of the Board which dismissed the appeal of the appellant. We find no merit in the argument. Rule 3(d) of the Company’s Conduct, Discipline and Appeal Rules (“CDAR”) defines “Board” in the following terms:

“Board means the proprietors of the Company and includes, in relation to exercise of powers, any committee of the Board/management or any officer of the Company to whom the Board delegates any of its powers.”

8. In view of the aforesaid definition of the expression “Board”, the Board could have constituted a committee of the Board/management or any officers of the Company by excluding the Chairman-cum-Managing Director of the Company and delegated any of its powers, including the appellate power, to such a committee to eliminate any allegation of bias against such an Appellate Authority. It is, therefore, not correct to contend that the rule against bias is not available in the present case in view of the “*doctrine of necessity*”. We are, therefore, of the view that reliance on the doctrine of necessity in the present case is totally misplaced.

9. For the reasons stated hereinbefore, we find that the appeal deserves to succeed. Accordingly, the order and judgment under challenge as well as the order passed by the Appellate Authority are set aside and the matter is sent back to the Appellate Authority to decide the appeal by a speaking order, in accordance with law. The appeal is allowed.

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If a person had waived his right to challenge a selection on the ground of bias, he cannot subsequently challenge the same – *G. Sarna v. University of Lucknow* (1976) 3 SCC 585.

State of W.B. v. Shivananda Pathak
(1998) 5 SCC 513

S. Saghir Ahmad, J.— Whether “judicial obstinacy” can be treated as a form of “bias” is the question which we intend to answer in these appeals. As the answer depends upon the peculiar facts involved in these cases, they are being examined in a little detail.

18. A copy of the writ petition filed before the Calcutta High Court by the respondents a second time (being Matter No. 1449 of 1987) has been filed before us. In order to indicate the real controversy involved in that writ petition, the relevant paragraphs of that writ petition are reproduced below:

“4. Your petitioners state that against the aforesaid illegalities, namely, the denial of promotion seniority and other benefits to the petitioners as prescribed in law, a writ application was filed on behalf of the petitioners before this Hon'ble Court which was numbered as CO No. 6584(W) of 1984. After hearing of the parties the Hon'ble Mr Justice A.K. Sengupta was pleased to allow the said application of the petitioners directing the authorities to give promotion on the basis of the seniority. His Lordship was further pleased to direct the authorities to give promotion to the writ petitioners to the Subordinate Labour Service w.e.f. 13th March, 1980. His Lordship was further pleased to direct the authorities to give promotion to the petitioners to the West Bengal Subordinate Labour Service forthwith. But against the said judgment of His Lordship Mr A.K. Sengupta an appeal having Tender No. FMAT No. 3213 was preferred before this Hon'ble Court. The Division Bench after hearing the parties was pleased to dispose of the said appeal directing the respondent-authorities to follow and/or to give promotions in accordance with the above prescribed rules. Therefore the judgment and the order of the trial Judge stood upheld. Accordingly, pursuant to the judgment of the trial court, the authorities promoted the writ petitioners on 17-4-1985 to the posts of Investigators/Inspectors under the West Bengal Subordinate Labour Service, Labour Directorate, Government of West Bengal and the petitioners have been posted in different places in the said posts where they are now serving. A copy of the judgment in CO No. 6584(W) of 1984 passed by the Hon'ble Mr Justice A.K. Sengupta annexed herewith and along with the order passed by the Division Bench in FMAT No. 3213 of 1984 and marked as Annexure 'A'.”

5. Your petitioners state that now they have been promoted in the West Bengal Subordinate Labour Service, but as per the order of this Hon'ble Court they are deemed to be promoted and or in service since 13-3-1980. Accordingly, the petitioners are entitled to get the seniority and also the monetary benefits of West Bengal Subordinate Labour Service with retrospective effect from 13-3-1980.

6. Your petitioners state that there have been arrear dues to the petitioners since 13-3-1980. The petitioners made several representations before the authorities for the payment of the said arrear dues but the respondent-authorities have not paid the same to the petitioners. On 12-12-1986, the petitioners made a written representation to Respondent 1 along with the statement of arrear dues praying immediate payment of the said arrear dues from 13-3-1980 to 16-4-1985 and in that letter demanding justice. The petitioners also pointed out that because of the above non-payment of the arrear dues, the petitioners were facing acute financial troubles. But uptil now the authorities have done nothing for the grant and/or payment of the said dues

from 13-3-1980 to 16-4-1985 to the petitioners. A copy of the said representation dated 12-12-1986 along with the statements of the said arrear dues are collectively marked as Annexures 'B' and 'B-1' to this application.

7. Your petitioners state that the authorities denied equal opportunities of promotion to them. The authorities gave promotions to West Bengal Subordinate Labour Service only from the Upper Division Clerks, even some of these clerks were not confirmed. Thus the authorities denied Computer Assistants and Labour Welfare workers of the Labour Department equal promotion seniority and other benefits for a long time. Thus the whole activities regarding promotion was totally illegal and/or mala fide. That is why the Hon'ble Mr Justice A.K. Sengupta in CO No. 6584(W) of 1984 was pleased to direct that the petitioners whose claim for promotion accrued long ago should be deemed to be promoted to West Bengal Subordinate Labour Service on and from 13-3-1980, because on that date many junior persons and even unconfirmed Upper Division Clerks were promoted to the Labour Service. But the petitioners were illegally deprived of the said promotion and/or seniority. Thus the petitioners are entitled to the arrear financial benefits and seniority on and from 13-3-1980.

8. Your petitioners state that they made a series of representations before the authorities for the promotion and payment of their arrear benefits since 13-3-1980, but the authorities had not yet paid the said arrear. Thus the petitioners have been put to unnecessary financial hardships by the aforesaid non-payment of arrear dues."

19. The following prayer was made in the writ petition:

"10. Your petitioners humbly state and submit that the authorities illegally withheld their promotion for a long time but only pursuant to the direction and/or order of this Hon'ble Court they got promotion in the West Bengal Subordinate Labour Service which has been illegally withheld for a long time. Therefore, the direction of this Hon'ble Court that the petitioners should be deemed to be promoted since 13-3-1980 should be complied with by the authorities by paying all arrear benefits and/or dues to the West Bengal Subordinate Labour Service to the petitioners immediately, otherwise they will suffer irreparable loss and/or injury."

20. The real question which was, therefore, involved in that writ petition was whether the direction given by Mr Justice Ajit Kumar Sengupta on 21-8-1984 while disposing of the earlier writ petition [CO No. 6584(W) of 1984], was in existence or had ceased to be an operative direction after the disposal of FMAT No. 3213 of 1984 by a Division Bench on 17-1-1985. The ultimate order passed by the Division Bench in that appeal has already been extracted in the earlier part of the judgment which would show that the direction that the respondents shall be promoted with effect from 13-3-1980 was set aside and was substituted by a fresh direction that the cases of the respondents along with other eligible candidates for promotion to the Subordinate Labour Service shall be considered in accordance with law and the prescribed rules including the appointment rules. It was in pursuance of this direction that the State Government considered the matter of promotion and by its order dated 16-4-1985, it made promotions of the eligible candidates drawn from all the three sources (including the respondents who had filed writ petition [CO No. 6584(W) of 1984], to various posts in the Subordinate Labour Service. This order does not indicate that the respondents were promoted with effect from 13-3-1980; maybe this was not indicated as that direction had been set aside in appeal by the Division Bench.

21. When the respondents claimed arrears of salary with effect from 13-3-1980 in pursuance of the direction issued by Mr Justice Ajit Kumar Sengupta through a fresh petition (Matter No. 1449 of 1987) filed in the Calcutta High Court, the learned Single Judge did not grant the relief and instead observed that since the direction issued by Mr Justice Ajit Kumar Sengupta was modified, it was for the State Government to consider their claims in accordance with the Rules in terms of directions of the Division Bench (court of appeal).

22. An appeal against this judgment was disposed of by a Division Bench which included Mr Justice Ajit Kumar Sengupta. The question which, therefore, arises is whether Mr Justice Ajit Kumar Sengupta could sit in the Division Bench to decide the appeal against that judgment.

23. All judicial functionaries have necessarily to have an unflinching character to decide a case with an unbiased mind. Judicial proceedings are held in open court to ensure transparency. Access to judicial record by way of inspection by the litigant or his lawyer and the facility of providing certified copies of that record are factors which not only ensure transparency but also instil and inspire confidence in the impartiality of the court proceedings.

24. Unlike suits, proceedings under Article 226 of the Constitution are not conducted strictly following the provisions contained in the Code of Civil Procedure but are held in accordance with the procedure devised by the High Court itself under which a fair hearing is provided to the parties concerned before a decision is rendered. In other words, principles of natural justice are observed strictly in letter and spirit. One of the requirements of natural justice is that the hearing should be done by a judge with an unbiased mind.

25. Bias may be defined as a preconceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction. It is, in fact, a condition of mind, which sways judgments and renders the judge unable to exercise impartiality in a particular case.

26. Bias has many forms. It may be pecuniary bias, personal bias, bias as to subject-matter in dispute, or policy bias etc. In the instant case, we are not concerned with any of these forms of bias. We have to deal, as we shall presently see, a new form of bias, namely, bias on account of judicial obstinacy.

27. Judges, unfortunately, are not infallible. As human beings, they can commit mistakes even in the best of their judgments reflective of their hard labour, impartial things and objective assessment of the problem put before them. In the matter of interpretation of statutory provisions or while assessing the evidence in a particular case or deciding questions of law or facts, mistakes may be committed bona fide which are corrected at the appellate stage. This explains the philosophy behind the hierarchy of courts. Such a mistake can be committed even by a judge of the High Court which are corrected in the letters patent appeal, if available.

28. If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to that judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment. Even if it was a decision on a pure question of law which came to be overruled, it cannot be reiterated in the same proceedings at the subsequent stage by reason of the fact that the judgment of the higher court which has overruled that judgment, not only binds the parties to the proceedings but also the judge who had earlier rendered that decision. That judge may have his occasion to reiterate his dogmatic views on a particular question of common law or

constitutional law in some other case but not in the same case. If it is done, it would be exhibit of his bias in his own favour to satisfy his egoistic judicial obstinacy.

29. As pointed out earlier, an essential requirement of judicial adjudication is that the judge is impartial and neutral and is in a position to apply his mind objectively to the facts of the case put up before him. If he is predisposed or suffers from prejudices or has a biased mind, he disqualifies himself from acting as a judge. But Frank, J. of the United States in *Linahan, In re* [138 F 2d 650] says:

“If, however, ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions.... Much harm is done by the myth that, merely by ... taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.”

[See also Griffith and Street, *Principles of Administrative Law* (1973 Edn.), p. 155; *Judicial Review of Administrative Action* by de Smith (1980 Edn.), p. 272; *II Administrative Law Treatise* by Davis (1958 Edn.), p. 130.]

30. These remarks imply a distinction between prejudging of facts specifically relating to a party, as against preconceptions or predispositions about general questions of law, policy or discretion. The implication is that though in the former case, a judge would disqualify himself, in the latter case, he may not. But this question does not arise here and is left as it is.

31. This Court has already, innumerable times, beginning with its classic decision in *A.K. Kraipak v. Union of India* [(1969) 2 SCC 262 : AIR 1970 SC 150] laid down the need of “fair play” or “fair hearing” in quasi-judicial and administrative matters. The hearing has to be by a person sitting with an unbiased mind. To the same effect is the decision in *S.P. Kapoor (Dr) v. State of H.P.* [(1981) 4 SCC 716 : 1982 SCC (L&S) 14 : AIR 1981 SC 2181] In an earlier decision in *Mineral Development Ltd. v. State of Bihar* [AIR 1960 SC 468 : (1960) 2 MLJ (SC) 16] it was held that the Revenue Minister, who had cancelled the petitioner's licence or the lease of certain land, could not have taken part in the proceedings for cancellation of licence as there was political rivalry between the petitioner and the Minister, who had also filed a criminal case against the petitioner. This principle has also been applied in cases under labour laws or service laws, except where the cases were covered by the doctrine of necessity. In *Financial Commr. (Taxation), Punjab v. Harbhajan Singh* [(1996) 9 SCC 281] the Settlement Commissioner was held to be not competent to sit over his own earlier order passed as Settlement Officer under the Displaced Persons (Compensation & Rehabilitation) Act, 1954. The maxim *nemo debet esse iudex in proprias causas* was invoked in *Gurdip Singh v. State of Punjab* [(1997) 10 SCC 641 : 1997 SCC (L&S) 1742] .

32. The above maxim as also the other principle based on the most frequently quoted dictum of Lord Hewart, C.J. in *R. v. Sussex JJ., ex p McCarthy* [(1924) 1 KB 256 : 1923 All ER Rep 233] KB at p. 259, that

“it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

constitute the well-recognised rule against bias.

33. Bias, as pointed out earlier, is a condition of mind and, therefore, it may not always be possible to furnish actual proof of bias. But the courts, for this reason, cannot be said to be in a crippled state. There are many ways to discover bias; for example, by evaluating the facts

and circumstances of the case or applying the tests of “real likelihood of bias” or “reasonable suspicion of bias”. de Smith in *Judicial Review of Administrative Action*, 1980 Edn., pp. 262, 264, has explained that “reasonable suspicion” test looks mainly to outward appearances while “real likelihood” test focuses on the court's own evaluation of the probabilities.

34. In *Metropolitan Properties Co. v. Lannon* [(1968) 1 WLR 815 : (1968) 1 All ER 354] it was observed “whether there was a real likelihood of bias or not has to be ascertained with reference to right-minded persons; whether they would consider that there was a real likelihood of bias”. Almost the same test has also been applied here in an old decision, namely, in *ManakLal v. DrPrem Chand Singhvi* [AIR 1957 SC 425 : 1957 SCR 575] . In that case, although the Court found that the Chairman of the Bar Council Tribunal appointed by the Chief Justice of the Rajasthan High Court to enquire into the misconduct of ManakLal, an advocate, on the complaint of one Prem Chand was not biased towards him, it was held that he should not have presided over the proceedings to give effect to the salutary principle that justice should not only be done, it should also be seen to be done in view of the fact that the Chairman, who, undoubtedly, was a Senior Advocate and an ex-Advocate General, had, at one time, represented Prem Chand in some case. These principles have had their evolution in the field of administrative law but the courts performing judicial functions only cannot be excepted from the rule of bias as the Presiding Officers of the court have to hear and decide contentious issues with an unbiased mind. The maxim *nemodebetessejude in propriasuacausa* and the principle “justice should not only be done but should manifestly be seen to be done” can be legitimately invoked in their cases.

35. Applying these principles in the instant case, it will be seen that although the judgment passed by Mr Justice Ajit Kumar Sengupta in the first writ petition in which he had given a direction that the respondents shall be promoted with effect from 13-3-1980 was set aside, he (Mr Justice Ajit Kumar Sengupta), in the subsequent writ petition between the same parties, gave a declaration that the respondents shall be treated to have been promoted with effect from 13-3-1980. Significantly, such a declaration was not prayed for and what was prayed in the subsequent writ petition was a direction to the State Government to pay arrears of salary of the higher post with effect from 13-3-1980. To put it differently, in the first writ petition, Mr Justice Ajit Kumar Sengupta commanded: “Promote the respondents with effect from 13-3-1980;” in the second writ petition, he directed: “Treat the respondents as promoted with effect from 13-3-1980.” There is hardly any difference between the two judgments. In fact, the second writ petition constitutes a crude attempt to revive the directions passed by Mr Justice Ajit Kumar Sengupta in the first judgment and, curiously, Mr Justice Ajit Kumar Sengupta, sitting in the Division Bench, wrote a second time, a judgment which was already overruled. He garnished the judgment by innocuously providing that arrears would not be payable to the respondents nor will the respondents affect the seniority of others. But the garniture cannot conceal the deceptive innocence as it is obvious, on a judicial scrutiny, that the paramount purpose was to rewrite the overruled judgment.

36. In view of these facts, we are constrained to observe that it was not competent for Mr Justice Ajit Kumar Sengupta to have presided over the Bench in which the impugned judgment was passed as he had already expressed his opinion in the earlier writ petition which was overruled. He should have disassociated himself from that Bench in keeping with the high traditions of the institution so as to give effect to the rule that “justice should not only be

done, it should manifestly be seen to have been done” apart from sitting in appeal, though collaterally, over his own judgment.

37. The appeals are consequently allowed. The judgment and order dated 21-7-1992 passed by the Division Bench of the Calcutta High Court is set aside and the writ petition (Matter No. 1449 of 1987) is dismissed without any order as to costs.

Right of Cross-examination

Hira Nath Mishra v. Principal, Rajendra Medical College
(1973) 1 SCC 805 : AIR 1973 SC 1260

The appellants were Second Year students of the college and lived in a hostel attached to the college. There was another hostel for girl students. On the night between June 10 and 11, 1972, some male students of the college were found sitting on the compound wall of the girls Hostel. Later they entered into the compound and were seen walking without clothes on them. They went near the windows of the rooms of some of the girls and tried to pull the hand of one of the girls. Some five of these boys then climbed up along the drain pipes to the terrace of the girls Hostel where a few girls were doing their studies. On seeing them, the girls raised an alarm following which the students ran away. The girls recognised four out of these male students.

On June 14, 1972, a complaint was received by the Principal from 36 girl students residing in the Girls Hostel alleging the above facts. The Principal ordered an enquiry to be conducted by three member of the staff viz., Dr J. Sharan, Dr B.B.P. Roy and Dr (Miss) M. Quadros. The four students were directed to present themselves at 4.30 p.m. on June 15, 1972, in the Principal's room in connection with the enquiry. Accordingly, they attended at the time of enquiry which was conducted by the Enquiry Committee in the room itself—the Principal having left the place. The students were called one after other in the room and to each one of them the contents of the complaint were explained, due care being taken not to disclose the names of the girls who had made the complaint. They were also given a charge which ran as follows:

“A complaint has been lodged that you trespassed into the premises of the girls hostel at late night of June 10 and 11, 1972, made unauthorised entry into the Junior Girls Hostel. Further you have been accused of gross misconduct. You are, therefore, asked to show cause why disciplinary action should not be taken against you for the misconduct.

You are directed to file your reply immediately to the Enquiry Committee and appear before the Committee as and when required.

Non-compliance will lead to ex-parte decision.”

Each one of the students was given paper and pen and asked to write down whatever he had to say. The students uniformly denied having trespassed into the girls Hostel or having misbehaved with them as alleged. They added that they were in their own Hostel at that time. Before the students had been called in the afternoon, the Enquiry Committee had called 10 girls of the Hostel who were party to the complaint and their statements in writing had been recorded. The Enquiry Committee also found that though there were many more students the girls could identify only those four students by name. The girls belonged to the same college and hence they had known these students. The statements of the girls had not been recorded in the presence of the appellants as it was thought it was unwise to do so.

After making the necessary enquiry and considering the statements of the four students who did not intimate that they wished to lead any evidence, the Committee came to the unanimous conclusion that the three appellants and Upendra were four out of the students

who had taken part in the raid that night. The Committee was of the view that the students were guilty of gross misconduct and deserved deterrent punishment. They further recommended that they may be expelled from the college for a minimum period of two calendar years and also from the hostel. Acting on this report which was given on June 21, 1972, the Principal of the college issued the order: on June 24, 1972, in these terms:

“I have carefully perused your reply to the show-cause notice issued against you and the report submitted by the Enquiry Committee consisting of Dr J. Sharan, Dr B. B. P. Roy and Dr (Miss) M. Quadros.

You have been found guilty of the charges which are of very serious nature. You are, therefore, expelled from this college for two academic sessions i.e. 1972-73 and 1973-74. You are further directed to vacate the hostel within 24 hours and report compliance to the Hostel Superintendent.”

D.G PALEKAR, J. - 7. It was against this Order that the appellants and Upendra filed the Writ Petition in the High Court. Their chief contention was that rules of natural justice had not been followed before the Order was passed against them expelling them from the college. They submitted that the enquiry, if any, had been held behind their back; the witnesses who gave evidence against them were not examined in their presence; there was no opportunity to cross-examine the witnesses with a view to test their veracity; that the Committee's report was not made available to them and for all these reasons the enquiry was vitiated and the Order passed by the Principal acting on the report was illegal. The High Court held that rules of natural justice were not inflexible and that in the circumstances and the facts of the case, the requirements of natural justice had been satisfied. The Petition was, therefore, dismissed.

9. The High Court was plainly right in holding that principles of natural justice are not inflexible and may differ in different circumstances. This Court has pointed out in *Union of India v. P.K. Roy* [AIR 1968 SC 850] that the doctrine of natural justice cannot be imprisoned within strait-jacket of a rigid formula and its application depends upon several factors. In the present case the complaint made to the Principal related to an extremely serious matter as it involved not merely internal discipline but the safety of the girl students living in the Hostel under the guardianship of the college authorities. These authorities were in loco parents to all the students - male and female who were living in the Hostels and the responsibility towards the young girl students was greater because their guardians had entrusted them to their care by putting them in the Hostels attached to the college. The authorities could not possibly dismiss *the* matter as of small consequence because if they did, they would have encouraged the male student rowdies to increase their questionable activities which would, not only, have brought a bad name to the college but would have compelled the parents of the girl students to withdraw them from the Hostel and, perhaps, even stop their further education. The Principal was, therefore, under an obligation to make a suitable enquiry and punish the miscreants.

10. But how to go about it was a delicate matter. The police could not be called in because if an investigation was started the female students out of sheer fright and harm to their reputation would not have co-operated with the police. Nor was an enquiry, as before a regular tribunal, feasible because the girls would not have ventured to make their statements in the presence of the miscreants because if they did, they would have most certainly exposed

themselves to retaliation and harassment thereafter. The college authorities are in no position to protect the girl students outside the college precincts. Therefore, the authorities had to devise a just and reasonable plan of enquiry which, on the one hand, would not expose the individual girls to harassment by the male students and, on the other, secure reasonable opportunity to the accused to state their case.

11. Accordingly, an Enquiry Committee of three independent members of the staff was appointed. There is no suggestion whatsoever that the members of the Committee were anything but respectable and independent. The Committee called the girls privately and recorded their statements. Thereafter the students named by them were called. The complaint against them was explained to them. The written charge was handed over and they were asked to state whatever they had to state in writing. The Committee was not satisfied with the explanation given and thereafter made the report.

12. We think that under the circumstances of the case the requirements of natural justice were fulfilled. The learned counsel for the respondents made available to us the report of the Committee just to show how meticulous the members of the Committee were to see that no injustice was done. We are informed that this report had also been made available to the learned Judges of the High Court who heard the case and it further appears that the counsel for the appellants before the High Court was also invited to have a look into the report, but he refused to do so. There was no question about the incident. The only question was of identity. The names had been specifically mentioned in the complaint and, not to leave anything to chance, the Committee obtained photographs of the four delinquents and mixed them up with 20 other photographs of students. The girls by and large identified these four students from the photographs. On the other hand, if as the appellants say, they were in their own Hostel at the time it would not have been difficult for them to produce necessary evidence apart from saying that they were innocent and they had not gone to the girls Hostel at all late at night. There was no evidence in that behalf. The Committee on a careful consideration of the material before them came to the conclusion that the three appellants and Upendra had taken part in the night raid on the girls Hostel. The report was confidentially sent to the Principal. The very reasons, for which the girls were not examined in the presence of the appellants, prevailed on the authorities not to give a copy of the report to them. It would have been unwise to do so. Taking all the circumstances into account it is not possible to say that rules of natural justice had not been followed. In *Board of Education v. Rice* [1911 AC 179], Lord Loreburn laid down that in disposing of a question, which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on everyone who decided anything. He did not think that the Board was bound to treat such a question as though it were a trial. The Board need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. More recently in *Russell v. Duke of Norfolk* (1949) 1 All ER 109, 118 Tucker, L.J. observed "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal.

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person accused should have a reasonable opportunity of presenting his case". More recently in *Byrne v. Kinematograph Renters Society Ltd.* [(1968) 2 All ER 579], Harman, J., observed "What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made-; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

13. Rules of natural justice cannot remain the same applying to all conditions. We know of statutes in India like the Goonda Acts which permit evidence being collected behind the back of the goonda and the goonda being merely asked to represent against the main charges arising out of the evidence collected. Care is taken to see that the witnesses who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses. The reason is obvious. No witness will come forward to give evidence in the presence of the goonda. However unsavoury the procedure may appear to a judicial mind, these are facts of life which are to be faced. The girls who were molested that night would not have come forward to give evidence in any regular enquiry and if a strict enquiry like the one conducted in a court of law were to be imposed in such matters, the girls would have had to go under the constant fear of molestation by the male students who were capable of such indecencies. Under the circumstances the course followed by the Principal was a wise one. The Committee whose integrity could not be impeached collected and shifted the evidence given by the girls. Thereafter the students definitely named by the girls were informed about the complaint against them and the charge. They were given an opportunity to state their case. We do not think that the facts and circumstances of this case require anything more to be done.

14. There is no substance in the appeal which must be dismissed. The appeal is dismissed.

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Right of Legal Representation

***J.K. Aggarwal v. Haryana Seeds Development Corpn. Ltd.*
(1991) 2 SCC 283 : AIR 1991 SC 1221**

Appellant was the Company Secretary of the Haryana Seeds Development Corporation Ltd., a government company. The short question in this appeal was whether in the course of the disciplinary inquiry initiated against the appellant by the Corporation on certain charges, which if established might lead to appellant's dismissal from service, appellant was entitled to engage the services of a legal practitioner in the conduct of his defence. The proceedings in the inquiry were regulated by the Haryana Civil Services (Punishment and Appeal) Rules, 1952. Inquiry Authority, by his order dated August 8, 1989 had rejected the prayer made by the appellant even at the initial stage of the inquiry for permission to engage the services of a lawyer. Before the High Court, appellant challenged the proceedings in the inquiry on grounds of denial of natural justice. The High Court dismissed the writ petition in limine.

M.N. VENKATACHALIAH AND K.N. SAIKIA, JJ.

ORDER

4. The right of representation by a lawyer may not in all cases be held to be a part of natural justice. No general principle valid in all cases can be enunciated. In non-statutory domestic tribunals, Lord Denning in the Court of Appeal in England favoured such a right where a serious charge had been made which affected the livelihood or the right of a person to pursue an avocation and observed. *Pett v. Greyhound Racing Association Ltd.*, (1969) 1 QBD 125, 132:

“I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor.”

But this was not followed by Lyell, J. in *Pett* case (*No. 2*) [(1970) 1 QBD 46].

5. But the learned Master of Rolls, however, reiterated his earlier view in *Pett* case in *Enderby Town Football Club Ltd. v. Football Association Ltd.* [1971 Ch D 591, 605-06]:

“Is a party who is charged before a domestic tribunal entitled *as of right* to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the *discretion* of the tribunal. They are masters of their own procedure: and, if they, in the proper exercise of their discretion, decline to allow legal representation, the courts will not interfere.... In many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than by a bad lawyer.... But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: ‘We will *never* allow anyone to have a lawyer to

appear for him.' The tribunal must be ready, in a proper case, to allow it. That applies to anyone in authority who is entrusted with discretion. He must not fetter his discretion by making an absolute rule from which he will never depart.... That is the reason why this Court intervened in *Pett v. Greyhound Racing Association Ltd.* Mr Pett was charged with doping a dog - a most serious offence carrying severe penalties. He was to be tried by a domestic tribunal. There was nothing in the rules to exclude legal representation, but the tribunal refused to allow it. Their reason was because they never did allow it. This Court thought that that was not a proper exercise of their discretion. Natural justice required that Mr Pett should be defended, if he so wished, by counsel or solicitor. So we intervened and granted an injunction. Subsequently Lyell, J. thought we were wrong. He held that Mr Pett had no right to legal representation. But I think we were right. Maybe Mr Pett had no positive right, but it was case where the tribunal in their discretion ought to have allowed it. And on appeal the parties themselves agreed it. They came to an arrangement which permitted the plaintiff to be legally represented at the inquiry. The long and short of it is that if the court sees that a domestic tribunal is proposing to proceed in a manner contrary to natural justice, it can intervene to stop it. The court is not bound to wait until after it has happened:"

6. In *C.L. Subramaniam v. Collector of Customs, Cochin* [(1972) 3 SCR 485], this Court did not accept the enunciation in *Pett* case. Referring to *Pett* case it was observed:

"The rule laid down in *Pett* case has not commended itself to this Court. In *Kalindi v. Tata Locomotive and Engineering Co. Ltd.* [AIR 1960 SC 914], a question arose whether in an enquiry by management into misconduct of a workman, the workman was entitled to be represented by a representative of the Union. Answering this question this Court observed that a workman against whom an enquiry is being held by the management has no right to be represented at such an enquiry by a representative of the Union though the employer in his discretion can and may allow him to be so represented."

7. In the present case, the matter is guided by the Provisions of Rule 7(5) of the Haryana Civil Services (Punishment and Appeal) Rules, 1952 which says:

"7.(5) Where the punishing authority itself enquires into any charge or charges or appoints an enquiry officer for holding enquiry against a person in the service of the government, it may, by an order, appoint a government servant or a legal practitioner to be known as a "presenting officer" to present on its behalf the case, in support of the charge or charges.

The person against whom a charge is being enquired into, shall be allowed to obtain the assistance of a government servant, if he so desires, in order to produce his defence before the enquiring officer. *If the charge or charges are likely to result in the dismissal of the person from the service of the government. Such person may, with the sanction of the enquiry officer, be represented by counsel.*"

8. It would appear that in the inquiry, the respondent-Corporation was represented by its Personnel and Administration Manager who is stated to be a man of law. The rule itself

recognises that where the charges are so serious as to entail a dismissal from service the inquiry authority may permit the services of a lawyer. This rule vests discretion. In the matter of exercise of this discretion one of the relevant factors is whether there is likelihood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reasons of the appellant being pitted against a presenting officer who is trained in law. Legal Adviser and a lawyer are for this purpose somewhat liberally construed and must include “whoever assists or advises on facts and in law must be deemed to be in the position of a legal adviser”. In the last analysis, a decision has to be reached on a case to case basis on the situational particularities and the special requirements of justice of the case. It is unnecessary, therefore, to go into the larger question “whether as a sequel to an adverse verdict in a domestic enquiry serious civil and pecuniary consequences are likely to ensue, in order to enable the person so likely to suffer such consequences with a view to giving him a reasonable opportunity to defend himself, on his request, should be permitted to appear through a legal practitioner” which was kept open in *Board of Trustees of the Port of Bombay v. Dilipkumar* [(1983) 1 SCR 828]. However, it was held in that case:

“In our view we have reached a stage in our onward march to fair play in action that where in an enquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated....”

9. On a consideration of the matter, we are persuaded to the view that the refusal to sanction the service of a lawyer in the inquiry was not a proper exercise of the discretion under the rule resulting in a failure of natural justice; particularly, in view of the fact that the Presenting Officer was a person with legal attainments and experience. It was said that the appellant was no less adept having been in the position of a Senior Executive and could have defended, and did defend, himself competently; but as was observed by the learned Master of Rolls in *Pett* case that in defending himself one may tend to become “nervous” or “tongue-tied”. Moreover, appellant, it is claimed, has had no legal background. The refusal of the service of a lawyer, in the facts of this case, results in denial of natural justice.

10. The question remains as to the manner of remedying the situation. Some circumstances require to be noticed in this behalf. The inquiry was proceeded with and as many as 13 witnesses have been examined. The examination-in-chief as well as such cross-examination as the appellant himself attempted is on record. They shall remain part of the record. The examination-in-chief of these witnesses is not vitiated by reason alone of the circumstance that the appellant did not then have the assistance of a lawyer to cross-examine them. The situation could be remedied now by tendering the witnesses for further cross-examination by a lawyer to be engaged by the appellant. In order that further protraction of the inquiry proceedings is avoided we required the appellant to state the names of the witnesses he wants to be so tendered for further cross-examination. Appellant has filed a list of eight such witnesses, viz. J.L. Sah Thulgharia, Production Manager; Joginder Singh, Senior Scale Stenographer; D.M. Tyagi, Executive Engineer; Vakil Singh, Ex-Driver; B.P. Bansal,

Chief Accounts Officer; Randhir Singh, Manager (Personnel) and R.S. Malik, Ex-Managing Director. The further proceedings of the inquiry shall be commenced on October 20 and continued from day to day.

11. There shall be no necessity for the inquiry authority to issue fresh notices to the appellant in respect of the further proceedings on that day. The appellant shall appear along with his lawyer before the inquiry authority on that date and the subsequent dates to which the proceedings may stand adjourned. Appellant's lawyer shall be entitled to cross-examine these witnesses and to address arguments. The inquiry officer shall be at liberty to refuse any prayer for adjournment which he thinks unreasonable and which in his opinion is intended to protract the proceedings.

* * * * *

Bharat Petroleum Corpn. Ltd. v. Maharashtra General Kamgar Union
(1999) 1 SCC 626

[Issue: Representation of an employee in the disciplinary proceedings through another employee who, though not an employee of the appellant-Corporation was, nevertheless, a member of the Trade Union – is it valid?]

S. SAGHIR AHMAD, J. - Bharat Petroleum Corporation Ltd. was incorporated in 1976.

3. On 4-12-1985, the appellant submitted Draft Standing Orders to the Certifying Officer for certification under the Industrial Employment (Standing Orders) Act, 1946 (“the Act”) which were intended to be applicable to the Marketing Division, Western Region, including its Head Office at Bombay. On receipt of the Draft Standing Orders, the Certifying Officer issued notices to various employees’ unions and after following the statutory procedure and after giving the parties an opportunity of hearing, certified the Draft Standing Orders on 14-10-1991 by an order passed under Section 5 of the Act. The Draft Standing Orders, as submitted by the appellant, were not certified in their entirety but were modified in various respects.

4. One of the clauses of the Draft Standing Orders which was not certified by the Certifying Officer, related to the representation of an employee in the disciplinary proceedings. The result was that the provision relating to the representation of an employee during departmental proceedings, as contained in the Model Standing Orders, continued to apply to the appellant’s establishment.

5. Aggrieved by the order passed by the Certifying Officer, two appeals, one by the present appellant and the other by Respondent 1, were filed before the appellate authority and the latter, by its order dated 23-11-1993, certified the Standing Orders as final. The clause relating to the representation of an employee during disciplinary proceedings, as set out in the Draft Standing Orders, was approved and the order of the Certifying Officer in that regard was set aside. The Standing Orders, as finally certified by the appellate authority, were notified by the appellant on 30-11-1993 and it was with effect from this date that they came into force.

6. The order of the appellate authority was challenged by Respondent 1 in Writ Petition No. 231 of 1994 in the Bombay High Court which admitted the petition on 15-3-1994 but refused the interim relief with the direction that during the pendency of the writ petition, a charge-sheeted workman would be permitted to be represented at the departmental enquiry, at his option, by an office-bearer of the trade union of which he is a member. Since this order was contrary to the Standing Orders, as certified by the appellate authority, the appellant filed Special Leave Petition (Civil) No. 12274 of 1994 in which this Court, on 30-9-1994, passed the following order:

“Issue notice. Interim stay of the direction of the High Court by which any office-bearer of the Union who may not be a workman of the petitioner-Corporation is permitted to represent the delinquent workman. It is made clear that in the

meanwhile, the workman may be represented by any other workman who is an employee of the petitioner-Corporation.”

7. By its judgment dated 18-9-1995, this Court set aside the interim order passed by the Bombay High Court and directed the High Court to pass a fresh interim order in the writ petition after hearing the parties.

8. In December 1995, Respondent 1 took out a Notice of Motion but the High Court, by its order dated 11-12-1995, rejected the same. However, the High Court, by its final judgment dated 28-6-1996, allowed the writ petition and the order dated 23-11-1993 passed by the appellate authority by which the clause relating to the representation of an employee during the disciplinary proceedings, as contained in the Draft Standing Orders, was certified, was set aside and the order dated 14-10-1991 passed by the Certifying Officer was maintained. It is against this judgment that the present appeals have been filed and the only question with which we are concerned in these appeals is as to whether an employee, against whom disciplinary proceedings have been initiated, can claim to be represented by a person, who, though, is a member of a trade union but is not an employee of the appellant.

9. Para 14(4)(ba) of the Model Standing Orders, as framed by the Central Government under the Act for industrial establishments, not being industrial establishments in coal mines, provides as under:

“In the enquiry, the workman shall be entitled to appear in person or to be represented by an office-bearer of a trade union of which he is a member.”

10. Clause 29.4 of the Draft Standing Orders, as certified by the appellate authority by its judgment dated 23-11-1993, provides as under:

“29.4 If it is decided to hold an enquiry, the workman concerned will be given an opportunity to answer the charge/charges and permitted to be defended by a fellow workman of his choice, who must be an employee of the Corporation. The workman defending shall be given necessary time off for the conduct of the enquiry.”

11. The vital difference between the Model Standing Orders, as set out above, and the Draft Standing Orders, as certified by the appellate authority, is that while under the Model Standing Orders, a workman can be represented in the departmental proceedings by an office-bearer of a trade union of which he is a member, he does not have this right under the Draft Standing Orders, as certified by the appellate authority, which restrict his right of representation by a fellow workman of his choice from amongst the employees of the appellant-Corporation. The contention of the learned counsel for the appellant is that the Model Standing Orders framed by the Central Government under the Industrial Employment (Standing Orders) Central Rules, 1946 can operate only during the period of time when the Standing Orders are not made by the establishment itself. If and when those Standing Orders are made which, in any case, have to be compulsorily made in terms of the Act, they have to be submitted to the Certifying Officer and if they are certified, they take effect from the date on which they are notified and effectively replace the Model Standing Orders. The order of the Certifying Officer is appealable before the appellate authority and the appellate authority can legally interfere with the order passed by the Certifying Officer and set it aside or uphold it. There is no restriction under the Act that the management or the establishment, or, for that

matter, the employer would adopt the Model Standing Orders. It is contended that the Standing Orders have only to be in consonance with the Model Standing Orders besides being fair and reasonable.

12. The submission of the learned counsel for Respondent 1, on the contrary, is that the Standing Orders, as framed by the management, have to be on the lines indicated in the Model Standing Orders and there cannot be a departure either in principle or policy from the Model Standing Orders. It is contended that once it was provided by the Model Standing Orders that an employee of the Corporation can be represented by an employee of another establishment with the only restriction that he should be an office-bearer of a trade union, it was not open to the appellant to have made a provision in their Standing Orders that an employee of the Corporation would be represented in the disciplinary proceedings only by another employee of the Corporation. It is contended that this departure is impermissible in law and, therefore, the High Court was justified in setting aside the order of the appellate authority which had certified the Draft Standing Orders submitted by the appellant.

13. The Industrial Employment (Standing Orders) Act, 1946 was made by Parliament to require employers of all industrial establishments to define formally the conditions of employment on which the workmen would be engaged.

14. The object underlying this Act, which is a beneficent piece of legislation, is to introduce uniformity of terms and conditions of employment in respect of workmen belonging to the same category and discharging the same and similar work under the industrial establishment and to make the terms and conditions of industrial employees well settled and known to the employees before they accept the employment.

15. The Act applies to every industrial establishment wherein hundred or more workmen are employed.

16. “Model Standing Orders” have been defined in Section 2(*ee*). They mean Standing Orders prescribed under Section 15 which gives rule-making power to the appropriate Government and provides, inter alia, that the Rules so made by the Government may set out Model Standing Orders for the purpose of this Act.

17. Section 12-A provides as under:

“12-A. Temporary application of model standing orders.— (1) Notwithstanding anything contained in Sections 3 to 12, for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the standing orders as finally certified under this Act come into operation under Section 7 in that establishment, the prescribed model standing orders shall be deemed to be adopted in that establishment, and the provisions of Section 9, sub-section (2) of Section 13 and Section 13-A shall apply to such model standing orders as they apply to the standing orders so certified.

(2) Nothing contained in sub-section (1) shall apply to an industrial establishment in respect of which the appropriate Government is the Government of the State of Gujarat or the Government of the State of Maharashtra.”

18. This section provides that the Model Standing Orders will be applicable to an industrial establishment during the period commencing on the date on which the Act becomes applicable to that establishment and the date on which the Standing Orders, as finally certified under this Act, come into operation.

19. Section 7 of the Act sets out the date on which the Standing Orders or amendments made thereto would become operative. It provides as under: (Section 7 as amended in Maharashtra by Act 21 of 1958)

“7. Date of operation of standing orders and model standing orders, together with all certified amendments.- Standing orders or model standing orders together with all the amendments shall, unless an appeal is preferred under Section 6, come into operation on the expiry of thirty days from the date on which authenticated copies thereof are sent under sub-section (3) of Section 5, or where an appeal as aforesaid is preferred, on the expiry of seven days from the date on which copies of the order of the appellate authority are sent under sub-section (2) of Section 6.”

20. The Standing Orders are certified under Section 5. The procedure for certification of the Standing Orders is set out therein and it will be useful to quote Section 5 at this stage:

“5. Certification of amendments.- (1) On receipt of the draft under Section 3, the Certifying Officer shall forward a copy thereof to the trade union, if any, of the workmen, or where there is no such trade union, to the workmen in such manner as may be prescribed, or the employer, as the case may be, together with a notice in the prescribed form requiring objections, if any, which the workmen, or employer may desire to make to the draft amendments to be submitted to him within fifteen days from the receipt of the notice.

(2) After giving the employer, workmen submitting the amendment and the trade union or such other representatives of the workmen as may be prescribed an opportunity of being heard, the Certifying Officer shall decide whether or not any modification of the draft submitted under sub-section (1) of Section 3 is necessary, and shall make an order in writing accordingly.

(3) The Certifying Officer shall thereupon certify the draft amendments after making any modifications therein which his order under sub-section (2) may require, and shall within seven days thereafter send copies of the model standing orders, together with copies of the certified amendments thereof, authenticated in the prescribed manner and of his order under sub-section (2) to the employer and to the trade union or other prescribed representatives of the workmen.”

21. The order certifying the Standing Orders is made under sub-sections (2) and (3) of the Act.

22. After certifying the Standing Orders or the Draft Amendments, the Certifying Officer is required to send copies of the Certified Standing Orders, authenticated in the prescribed manner, to the employer as also to the trade union or other prescribed representatives of the workmen. Once the Standing Orders are certified, they constitute the conditions of service binding upon the management and the employees who are already in employment or who may be employed after certification

27. The basic principle is that an employee has no right to representation in the departmental proceedings by another person or a lawyer unless the Service Rules specifically provide for the same. The right to representation is available only to the extent specifically provided for in the Rules. For example, Rule 1712 of the Railway Establishment Code provides as under:

“The accused railway servant may present his case with the assistance of any other railway servant employed on the same Railway (including a railway servant on leave preparatory to retirement) on which he is working.”

28. The right to representation, therefore, has been made available in a restricted way to a delinquent employee. He has a choice to be represented by another railway employee, but the choice is restricted to the Railway on which he himself is working, that is, if he is an employee of the Western Railway, his choice would be restricted to the employees working on the Western Railway. The choice cannot be allowed to travel to other Railways.

29. Similarly, a provision has been made in Rule 14(8) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, where too, an employee has been given the choice of being represented in the disciplinary proceedings through a co-employee.

34. We have seriously perused the judgment of the High Court which, curiously, has treated the decision of this Court in *Crescent Dyes and Chemicals Ltd.* case as a decision in favour of Respondent 1. The process of reasoning by which this decision has been held to be in favour of Respondent 1 for coming to the conclusion that he had a right to be represented by a person who, though an office-bearer of the Trade Union, was not an employee of the appellant is absolutely incorrect and we are not prepared to subscribe to this view. Consequently, we are of the opinion that the judgment passed by the High Court insofar as it purports to quash the order of the appellate authority, by which the Draft Standing Orders were certified, cannot be sustained.

35. The contention of the learned counsel for Respondent 1 that the Standing Orders as made by the appellant must conform to the Model Standing Orders cannot be accepted. It is true that originally the jurisdiction of the Certifying Officer as also that of the appellate authority was very limited and the only jurisdiction available to them under the Act was to see whether the Standing Orders made by the establishment and submitted for their certification conformed to the Model Standing Orders. This required the process of comparison of the Draft Standing Orders with the Model Standing Orders and on comparison, if it was found that the Draft Standing Orders were in conformity with the Model Standing Orders, the same would be certified even if they were not reasonable or fair. The workmen practically had no say in the matter and they would not be listened even if they agitated that the Draft Standing Orders were not fair or reasonable.

36. In 1956, radical changes were introduced in the Act by Parliament as a result of which not only the scope of the Act was widened, but jurisdiction was also conferred upon the Certifying Officer as also the appellate authority to adjudicate upon and decide the question relating to fairness or reasonableness of any provision of the Standing Orders.

37. In the instant case, the Standing Orders as finally certified cannot be said either to be not in consonance with the Model Standing Orders or unreasonable or unfair.

38. The Model Standing Orders, no doubt, provided that a delinquent employee could be represented in the disciplinary proceedings through another employee who may not be the employee of the parent establishment to which the delinquent belongs and may be an employee elsewhere, though he may be a member of the trade union, but this rule of representation has not been disturbed by the Certified Standing Orders, inasmuch as it still provides that the delinquent employee can be represented in the disciplinary proceedings through an employee. The only embargo is that the representative should be an employee of the parent establishment. The choice of the delinquent in selecting his representative is affected only to the extent that the representative has to be a co-employee of the same establishment in which the delinquent is employed. There appears to be some logic behind this as a co-employee would be fully aware of the conditions prevailing in the parent establishment, its Service Rules, including the Standing Orders, and would be in a better position, than an outsider, to assist the delinquent in the domestic proceedings for a fair and early disposal. The basic features of the Model Standing Orders are thus retained and the right of representation in the disciplinary proceedings through another employee is not altered, affected or taken away. The Standing Orders conform to all standards of reasonableness and fairness and, therefore, the appellate authority was fully justified in certifying the Draft Standing Orders as submitted by the appellant.

39. The appeals are consequently allowed. The impugned judgment dated 28-6-1996, passed by the Bombay High Court, insofar as it relates to the clauses in question which are the subject-matter of these appeals, is set aside and the order passed by the appellate authority certifying the Draft Standing Orders is upheld.

* * * * *

Post-decisional Hearing

***Maneka Gandhi v. Union of India*
(1978) 1 SCC 248**

P.N. BHAGWATI, J. - The petitioner is the holder of the passport issued to her on June 1, 1976 under the Passports Act, 1967. On July 4, 1977 the petitioner received a letter dated July 2, 1977 from the Regional Passport Officer, Delhi intimating to her that it has been decided by the Government of India to impound her passport under Section 10(3)(c) of the Act in public interest and requiring her to surrender the passport within seven days from the date of receipt of the letter. The petitioner immediately addressed a letter to the Regional Passport Officer requesting him to furnish a copy of the statement of reasons for making the order as provided in Section 10(5) to which a reply was sent by the Government of India, Ministry of External Affairs on July 6, 1977 stating inter alia that the Government has decided “in the interest of the general public” not to furnish her a copy of the statement of reasons for the making of the order. The petitioner thereupon filed the present petition challenging the action of the Government in impounding her passport and declining to give reasons for doing so. The principal challenge set out in the petition against the legality of the action of the Government was based mainly on the ground that Section 10(3)(c), insofar as it empowers the Passport Authority to impound a passport “in the interests of the general public” is violative of the equality clause contained in Article 14 of the Constitution, since the condition denoted by the words “in the interests of the general public” limiting the exercise of the power is vague and undefined and the power conferred by this provision is, therefore, excessive and suffers from the vice of “over-breadth”. The petition also contained a challenge that an order under Section 10(3)(c) impounding a passport could not be made by the Passport Authority without giving an opportunity to the holder of the passport to be heard in defence and since in the present case, the passport was impounded by the Government without affording an opportunity of hearing to the petitioner, the order was null and void, and, in the alternative, if Section 10(3)(c) were read in such a manner as to exclude the right of hearing, the section would be infected with the vice of arbitrariness and it would be void as offending Article 14. These were the only grounds taken in the petition as originally filed and on July 20, 1977 the petition was admitted and rule issued by this Court and an interim order was made directing that the passport of the petitioner should continue to remain deposited with the Registrar of this Court pending the hearing and final disposal of the petition.

2. The hearing of the petition was fixed on August 30, 1977, but before that, the petitioner filed an application for urging additional grounds and by this application, two further grounds were sought to be urged by her. One ground was that Section 10(3)(r) is ultra vires Article 21 since it provides for impounding of passport without any procedure as required by that article, or, in any event, even if it could be said that there is some procedure prescribed under the Passports Act, 1967, it is wholly arbitrary and unreasonable and, therefore, not in compliance with the requirement of that article. The other ground urged on behalf of the petitioner was that Section 10(3)(c) is violative of Articles 19(1)(a) and 19(1)(g) inasmuch as it authorises imposition of restrictions on freedom of speech and expression guaranteed under Article 19(1)(a) and freedom to practise any profession or to carry on any occupation, or business

guaranteed under Article 19(1)(g) and these restrictions are impermissible under Article 19(2) and Article 19(6) respectively. The application for urging these two additional grounds was granted by this Court and ultimately at the hearing of the petition these were the two principal grounds which were pressed on behalf of the petitioner.

9. We may commence the discussion of this question with a few general observations to emphasise the increasing importance of natural justice in the field of administrative law. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Lord Morris of Borth-y-Gest spoke of this rule in eloquent terms in his address before the Bentham Club:

We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a “majestic” conception? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance? I believe that it is very much more. If it can be summarised as being fair-play in action - who could wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled; it lacks more exalted inspiration.

And then again, in his speech in the House of Lords in *Wiseman v. Borneman*, the learned Law Lord said in words of inspired felicity:

(T)hat the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only “fair play in action”. Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles, J., called “the justice of the common law”.

Thus, the soul of natural justice is ‘fair-play in action’ and that is why it has received the widest recognition throughout the democratic world. In the United States, the right to an administrative hearing is regarded as essential requirement of fundamental fairness. And in England too it has been held that ‘fair-play in action’ demands that before any prejudicial or adverse action is taken against a person, he must be given an opportunity to be heard. The rule was stated by Lord Denning, M. R. in these terms in *Schmidt v. Secretary of State or Home*

Affairs” where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf”. The same rule also prevails in other Commonwealth countries like Canada, Australia and New Zealand. It has even gained access to the United Nations. It is the quintessence of the process of justice inspired and guided by ‘fair-play in action’. If we look at the speeches of the various law Lords in *Wisemen* case, it will be seen that each one of them asked the question “whether in the particular circumstances of the case, the Tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded”, or, was the procedure adopted by the Tribunal ‘in all the circumstances unfair’? The test adopted by every Law Lord was whether the procedure followed was fair in all the circumstances and ‘fair-play in action’ required that an opportunity should be given to the tax-payer “to see and reply to the counter-statement of the Commissioners” before reaching the conclusion that “there is a prima facie case against him”. The inquiry must, therefore, always be: does fairness in action demand that an opportunity to be heard should be given to the person affected?

10. Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other? Can it be said that the requirement of ‘fair-play in action’ is any the less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice must apply equally in an administrative inquiry which entails civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi-judicial proceeding as distinguished from an administrative proceeding and the distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by the law under which it is functioning to act judicially. This requirement of a duty to act judicially in order to invest the function with a quasi-judicial character was spelt out from the following observation of Atkin, L.J. in *Rex v. Electricity Commissioners*, “wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King Bench Division” Lord Hewart, C.J., in *Rex v. Legislative Committee of the Church Assembly* read this observation to mean that the duty to act judicially should be an additional requirement existing independently of the “authority to determine questions affecting the rights of subjects” - something super-added to it. This gloss placed by Lord Hewart, C.J., on the dictum of Lord Atkin, L.J., bedevilled the law for a considerable time and stultified the growth of the doctrine of natural justice. The Court was constrained in every case that came before it, to make a search for the duty to act judicially sometimes from tenuous material and sometimes in the services of the statute and this led to over subtlety and over-refinement resulting in confusion and uncertainty in the law. But this

was plainly contrary to the earlier authorities and in the epoch-making decision of the House of Lords in *Ridge v. Baldwin*, which marks a turning point in the history of the development of the doctrine of natural justice, Lord Reid pointed out how the gloss of Lord Hewart, C.J., was based on a misunderstanding of the observations of Atkin, L.J., and it went counter to the law laid down in the earlier decisions of the Court. Lord Reid observed: "If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to me impossible to reconcile with the earlier authorities". The learned Law Lord held that the duty to act judicially may arise from the very nature of the function intended to be performed and it need not be shown to be super-added. This decision broadened the area of application of the rules of natural justice and to borrow the words of Prof. Clark in his article on '*Natural Justice, Substance and Shadow*' in Public Law Journal, 1975, restored light to an area "benighted by the narrow conceptualism of the previous decade". This development in the law had its parallel in India in the *Associated Cement Companies Ltd. v. P. N. Sharma* where this Court approvingly referred to the decision in *Ridge v. Baldwin* and, later in *State of Orissa v. Dr Binapani Dei* observed that: "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power". This Court also pointed out in *A. K. Kraipak v. Union of India* another historic decision in this branch of the law, that in recent years the concept of quasi-judicial power has been undergoing radical change and said:

The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised.

The net effect of these and other decisions was that the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected and where it is found to exist, the rules of natural justice would be attracted.

13. Now, here, the power conferred on the Passport Authority is to impound a passport and the consequence of impounding a passport would be to impair the constitutional right of the holder of the passport to go abroad during the time that the passport is impounded. Moreover, a passport can be impounded by the Passport Authority only on certain specified grounds set out in sub-section (3) of Section 10 and the Passport Authority would have to apply its mind to the facts and circumstances of a given case and decide whether any of the specified grounds exists which would justify impounding of the passport. The Passport Authority is also required by sub-section (5) of Section 10 to record in writing a brief statement of the reasons for making an order impounding a passport and, save in certain exceptional situations, the Passport Authority is obliged to furnish a copy of the statement of reasons to the holder of the passport. Where the Passport Authority which has impounded a passport is other than the Central Government, a right of appeal against the order impounding the passport is given by Section 11, and in the appeal, the validity of the reasons given by the

Passport Authority for impounding the passport can be canvassed before the Appellate Authority. It is clear on a consideration of these circumstances that the test laid down in the decisions of this Court for distinguishing between a quasi-judicial power and an administrative power is satisfied and the power conferred on the Passport Authority to impound a passport is quasi-judicial power. The rules of natural justice would, in the circumstances, be applicable in the exercise of the power of impounding a passport even on the orthodox view which prevailed prior to *A. K. Kraipak* case. The same result must follow in view of the decision in *A. K. Kraipak* case, even if the power to impound a passport were regarded as administrative in character, because it seriously interferes with the constitutional right of the holder of the passport to go abroad and entails adverse civil consequences.

14. Now, as already pointed out, the doctrine of natural justice consists principally of two rules, namely, *nemo debet esse judex in propria causa*: no one shall be a judge in his own cause, and *audi alteram partem*: no decision shall be given against a party without affording him a reasonable hearing. We are concerned here with the second rule and hence we shall confine ourselves only to a discussion of that rule. The learned Attorney General, appearing on behalf of the Union of India, fairly conceded that the *audi alteram partem* rule is a highly effective tool devised by the courts to enable a statutory authority to arrive at a just decision and it is calculated to act as a healthy check on abuse or misuse of power and hence its reach should not be narrowed and its applicability circumscribed. He rightly did not plead for reconsideration of the historic advances made in the law as a result of the decisions of this Court and did not suggest that the Court should retrace its steps. That would indeed have been a most startling argument coming from the Government of India and for the Court to accede to such an argument would have been an act of utter retrogression. But fortunately no such argument was advanced by the learned Attorney General. What he urged was a very limited contention, namely, that having regard to the nature of the action involved in the impounding of a passport, the *audi alteram partem* rule must be held to be excluded, because if notice were to be given to the holder of the passport and reasonable opportunity afforded to him to show cause why his passport should not be impounded, he might immediately, on the strength of the passport, make good his exit from the country and the object of impounding the passport would be frustrated. The argument was that if the *audi alteram partem* rule were applied, its effect would be to stultify the power of impounding the passport and it would defeat and paralyse the administration of the law and hence the *audi alteram partem* rule cannot in fairness be applied while exercising the power to impound a passport. This argument was sought to be supported by reference to the statement of the law in S. A. de Smith's *Judicial Review of Administrative Action*, 2nd ed, where the learned author says at page 174 that "in administrative law a prima facie right to prior notice and opportunity to be heard may be held to be excluded by implication..... where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature". Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from 'fair-play in action', it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion. There are certain well recognised exceptions to the *audi*

alteram partem rule established by judicial decisions. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair-play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases, the *audi alteram partem* rule is held inapplicable not by way of an exception to "fair-play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The *audi alteram partem* rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the *audi alteram partem* rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the Court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the *audi alteram partem* should be wholly excluded. The Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The *audi alteram partem* rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J., emphasised in *Russel v. Duke of Norfolk* that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal: it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing. The *audi alteram partem* rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise. This circumstantial flexibility of the *audi alteram partem* rule was emphasised by Lord Reid in *Wiseman v. Borneman* when he said that he would be "sorry to see this fundamental general principle degenerate into a series of hard and fast rules". It would not, therefore, be right to conclude that the *audi alteram partem* rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. The Passport Authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, an opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport

should not be impounded and the order impounding it recalled. This should not only be possible but also quite appropriate, because the reasons for impounding the passport are required to be supplied by the Passport Authority after the making of the order and the person affected would, therefore, be in a position to make a representation setting forth his case and plead for setting aside the action impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure 'established' by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article.

15. But the question then immediately arises whether the Central Government has complied with this procedure in impounding the passport of the petitioner. Now, it is obvious and indeed this could not be controverted, that the Central Government not only did not give an opportunity of hearing to the petitioner after making the impugned order impounding her passport but even declined to furnish to the petitioner the reasons for impounding her passport despite request made by her. We have already pointed out that the Central Government was wholly unjustified in withholding the reasons for impounding the passport from the petitioner and this was not only in breach of the statutory provision, but it also amounted to denial of opportunity of hearing to the petitioner. The order impounding the passport of the petitioner was, therefore, clearly in violation of the rule of natural justice embodied in the maxim *audi alteram partem* and it was not in conformity with the procedure prescribed by the Passports Act, 1967. Realising that this was a fatal defect which would void the order impounding the passport, the learned Attorney General made a statement on behalf of the Government of India to the following effect:

1. The Government is agreeable to considering any representation that may be made by the petitioner in respect of the impounding of her passport and giving her an opportunity in the matter. The opportunity will be given within two weeks of the receipt of the representation. It is clarified that in the present case the grounds for impounding the passport are those mentioned in the affidavit in reply dated August 18,, 1977 of Shri Ghosh except those mentioned in para 2(xi).

2. The representation of the petitioner will be dealt with expeditiously in accordance with law.

This statement removes the vice from the order impounding the passport and it can no longer be assailed on the ground that it does not comply with the *audi alteram partem* rule or is not in accord with the procedure prescribed by the Passports Act, 1967.

45. We do not, therefore, see any reason to interfere with the impugned Order made by the Central Government. We, however, wish to utter a word of caution to the Passport Authority while exercising the power of refusing or impounding or cancelling a passport. The Passport Authority would do well to remember that it is a basic human right recognised in

Article 13 of the Universal Declaration of Human Rights with which the Passport Authority is interfering when it refuses or impounds or cancels a passport. It is a highly valuable right which is a part of personal liberty, an aspect of the spiritual dimension of man, and it should not be lightly interfered with. Cases are not unknown where people have not been allowed to go abroad because of the views held, opinions expressed or political beliefs or economic ideologies entertained by them. It is hoped that such cases will not recur under a Government constitutionally committed to uphold freedom and liberty but it is well to remember, at all times, that eternal vigilance is the price of liberty, for history shows that it is always subtle and insidious encroachments made ostensibly for a good cause that imperceptibly but surely corrode the foundations of liberty.

46. In view of the statement made by the learned Attorney General to which reference has already been made in the judgment we do not think it necessary to formally interfere with the impugned Order. We, accordingly, dispose of the writ petition without passing any formal order. There will be no order as to costs.

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H.L. Trehan v. Union of India
(1989) 1 SCC 764: AIR 1989 SC 568

M.M. DUTT, J. - The said Civil Appeal No. 3214 of 1979 is directed against the judgment of the Delhi High Court whereby the High Court has quashed a circular dated 8-3-1978 issued by the Board of Directors of Caltex Oil Refinery (India) Ltd. ('CORIL'), a Government Company, on the writ petition filed by the employees of CORIL being Writ Petition No. 426 of 1978.

2. The Caltex [Acquisition of Shares of Caltex Refining (India) Ltd. and of the Undertakings in India of Caltex (India) Ltd.] Act, 17 of 1977 was enacted by the Union Parliament and came into force with effect from 23-4-1977. The Act provides for the acquisition of shares of CORIL and for the acquisition and transfer of the right, title and interest of Caltex (India) Ltd. in relation to its Undertakings in India with a view to ensuring co-ordinate distribution and utilization of petroleum products.

3. Under Section 3 of the Act, the shares in the capital of the CORIL stood transferred to and vested in the Central Government on the appointed day being 30-12-1976. Under Section 5, the right, title and interest of Caltex (India) Ltd. in relation to its Undertakings in India stood transferred to and vested in the Central Government on the appointed day. Section 9 of the Act provides that the Central Government may by a notification direct that the right, title and interest and the liabilities of Caltex (India) Ltd. in relation to any of its Undertakings in India shall, instead of continuing to vest in the Central Government, vest in the Government Company either on the date of the notification or on such earlier or later date not being a date earlier than the appointed day, as may be specified in the notification. Section 11(2) provides that subject to rules made in this behalf under Section 23, every whole time officer or other employee of CORIL would on the appointed day continue to be an officer or other employee of CORIL on the same terms and conditions and with the same rights to pension, gratuity and other matters as are admissible to him immediately before that day and shall continue to hold such office unless and until his employment under CORIL is duly terminated or until his remuneration and conditions of service are duly altered by that company.

4. The Chairman of the Board of Directors of CORIL issued the impugned circular dated 8-3-1978, inter alia, stating therein that consequent upon the takeover of the Caltex (India) Ltd. by the government, the question of rationalization of the perquisites and allowances admissible to Management Staff had been under consideration of the Board for some time, and that as an interim measure, the Board had decided that the perquisites admissible to the Management Staff should be rationalized in the manner stated in the said circular.

5. At this stage, it may be mentioned that by the Caltex Oil Refinery (India) Ltd. and Hindustan Petroleum Corporation Ltd. Amalgamation Order, 1978 which was published in the Gazette of India, Extraordinary, dated 9-5-1978, the Undertaking of CORIL was transferred to and vested in Hindustan Petroleum Corporation Ltd. which thus became a Government Company referred to in Section 9 of the Act.

6. After the issue of the said circular, the respondents 1 to 4, who were some of the employees of CORIL, filed a writ petition in the Delhi High Court being Civil Writ Petition

No. 426 of 1978 challenging the legality and validity of the impugned order. It was submitted by the said respondents that under the said circular the terms and conditions of service of the employees of CORIL had been substantially and adversely altered to their prejudice.

7. At the hearing of the said writ petition before the High Court it was contended on behalf of respondents 1 to 4 that the notification issued under Section 9 of the Act vesting the management of the Undertakings of Caltex (India) Ltd. in CORIL was ultra vires subsection (1) of Section 9. It was contended that the provision of sub-section (1) of Section 11 of the Act offended against the provisions of Articles 14, 19 and 31 of the Constitution of India and, as such, it should be struck down. Further, it was contended that there was no valid classification between the contracts referred to in Section 11(1) and Section 15 of the Act. It was urged that unguided and arbitrary powers had been vested in the official by subsection (1) of Section 11 for the alteration of the terms and conditions of service of the employees. Besides the above contentions, another contention was advanced on behalf of Respondent 1 to 4, namely, that the employees not having been given an opportunity of being heard before altering to their prejudice the terms and conditions of service, the impugned circular should be struck down as void being opposed to the principles of natural justice.

8. All the contentions except the last contention of respondents 1 to 4 were rejected by the High Court. The High Court, however, took the view that as no opportunity was given to the employees of CORIL before the impugned circular was issued, the Board of Directors of CORIL acted illegally and in violation of the principles of natural justice. In that view of the matter, the High Court quashed the impugned circular. Hence this appeal by special leaves.

9. It is not disputed that the employees were not given any opportunity of being heard before the impugned circular dated 8-3-1978 was issued. It is, however, submitted by Mr Pai, learned counsel appearing on behalf of CORIL, that there has been no prejudicial alteration of the terms and conditions of service of the employees of CORIL by the impugned circular. It is urged that nothing has been pleaded by Respondents 1 to 4 as to which clauses of the impugned circular are to their detriment. The High Court has also not pointed out such clauses before quashing the impugned circular. It appears that for the first time before us such a contention is advanced on behalf of CORIL. In this connection, we may refer to an observation of the High Court which is: “Admittedly, the impugned order adversely affects the perquisites of the petitioners. It has resulted in civil consequences.” The above observation clearly indicates that it was admitted by the parties that the impugned circular had adversely affected the terms and conditions of service of Respondents 1 to 4 who were the petitioners in the writ petition before the High Court. Mr. Sachar, learned counsel appearing on behalf of Respondents 1 to 4, has handed over to us a copy of the writ petition filed by Respondents 1 to 4 before the High Court being Civil Writ Petition No. 426 of 1978. In paragraph 12 of the writ petition it has been inter alia stated as follows:

“The petitioners respectfully submit that under the said circular the terms and conditions of service of the employees of the second respondent including the petitioners herein have been substantially and adversely altered to the prejudice of such employees. The same would be clear inter alia from the statements annexed hereto and marked as Annexure IV.”

10. Annexure IV is a statement of Annual Loss in Remuneration/ Income per person/employee posted at Delhi and U.P. Nothing has been produced before us on behalf of CORIL or the Union of India to show that the statements contained in Annexure IV are untrue. In the circumstances, there is no substance in the contention made by Mr Pai that there has been no prejudicial alteration of the terms and conditions of service of the employees of CORIL, and that nothing has been pleaded by Respondents 1 to 4 as to which clauses of the impugned circular are to their detriment.

11. One of the contentions that was urged by Respondents 1 to 4 before “the High Court at the hearing of the writ petition, as noticed above, is that unguided and arbitrary powers have been vested in the official by sub-section (1) of Section 11 for the alteration of the terms and conditions of service of the employees. It has been observed by the High Court that although the terms and conditions of service could be altered by CORIL, but such alteration has to be made ‘duly’ as provided in sub-section (2) of Section 11 of the Act. The High Court has placed reliance upon the ordinary dictionary meaning of the word ‘duly’ which, according to *Concise Oxford Dictionary*, means ‘rightly, properly, fitly’ and according to Stroud’s *Judicial Dictionary*, 4th Edn., the word ‘duly’ means ‘done in due course and according to law’. In our opinion, the word ‘duly’ is very significant and excludes any arbitrary exercise of power under Section 11(2). It is now a well established principle of law that there can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a government servant without complying with the rules of natural justice by giving the government servant concerned an opportunity of being heard. Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a government servant will offend against the provision of Article 14 of the Constitution. Admittedly, the employees of CORIL were not given an opportunity of hearing or representing their case before the impugned circular was issued by the Board of Directors. The impugned circular cannot, therefore, be sustained as it offends against the rules of natural justice.

12. It is, however, contended on behalf of CORIL that after the impugned circular was issued, an opportunity of hearing was given to the employees with regard to the alterations made in the conditions of their service by the impugned circular. In our opinion, the post-decisional opportunity of hearing does not sub-serve the rules of natural justice. The authority that embarks upon a post-decisional hearing will naturally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional opportunity. In this connection, we may refer to a recent decision of this Court in *K.I. Shephard v. Union of India* [(1987) 4 SCC 431]. What happened in that case was that the Hindustan Commercial Bank, the Bank of Cochin Ltd. and Lakshmi Commercial Bank, which were private banks, were amalgamated with Punjab National Bank, Canara Bank and State Bank of India respectively in terms of separate schemes drawn under Section 45 of the Banking Regulation Act, 1949. Pursuant to the schemes, certain employees of the first mentioned three banks were excluded from employment and their services were not taken over by the respective transferee banks. Such exclusion was made without giving the employees, whose services were terminated, an opportunity of being heard. Ranganath Misra, J. speaking for the court observed as follows:

“We may now point out that the learned Single Judge for the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, there is no justification to think of a post-decisional hearing. On the other hand the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could not represent and their case could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yields any fruitful purpose.”

13. The view that has been taken by this Court in the above observation is that once a decision has been taken, there is a tendency to uphold it and a representation may not yield any fruitful purpose. Thus, even if any hearing was given to the employees of CORIL after the issuance of the impugned circular, that would not be any compliance with the rules of natural justice or avoid the mischief of arbitrariness as contemplated by Article 14 of the Constitution. The High Court, in our opinion, was perfectly justified in quashing the impugned circular. In the result, Civil Appeal No. 3214 of 1979 is dismissed.

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Requirement of passing Reasoned Order

S.N. Mukherjee v. Union of India
(1990) 4 SCC 594: AIR 1990 SC 1984

This appeal was directed against the order dated August 12, 1981, passed by the High Court of Delhi dismissing the writ petition filed by the appellant challenging the validity of the finding and the sentence recorded by the General Court Martial on November 29, 1978, the order dated May 11, 1979, passed by the Chief of Army Staff confirming the findings and the sentence recorded by the General Court Martial and the order dated May 6, 1980, passed by the Central Government dismissing the petition filed by the appellant under Section 164(2) of the Army Act, 1950.

The appellant held a permanent commission, as an officer, in the regular army and was holding the substantive rank of Captain. He was officiating as a Major. On December 27, 1974, the appellant took over as the Officer Commanding of 38 Coy ASC (Sup) Type 'A' attached to the Military Hospital, Jhansi. In August 1975, the appellant had gone to attend a training course and he returned in the first week of November 1975. In his absence Captain G.C. Chhabra was the officer commanding the unit of the appellant. During this period Captain Chhabra submitted a Contingent Bill dated September 25, 1975 for Rs 16,280 for winter liveries of the depot civilian chowkidars and sweepers. The said Contingent Bill was returned by the Controller of Defence Accounts (CDA) Meerut with certain objections. Thereupon the appellant submitted a fresh Contingent Bill dated December 25, 1975 for a sum of Rs 7029.57. In view of the difference in the amounts mentioned in the two Contingent Bills, the CDA reported the matter to the headquarters for investigation and a Court of Enquiry blamed the appellant for certain lapses.

The report of the Court of Enquiry was considered by the General Officer Commanding, M.P., Bihar and Orissa Area, who, on January 7, 1977 recommended that 'severe displeasure' (to be recorded) of the General Officer Commanding-in-Chief of the Central Command be awarded to the appellant. The General Officer Commanding-in-Chief, Central Command did not agree with the said opinion and by order dated August 26, 1977, directed the disciplinary action be taken against the appellant for the lapses.

In view of the aforesaid order passed by the General Officer Commanding-in-Chief, Central Command, a charge-sheet dated July 20, 1978, containing three charges was served on the appellant and it was directed that he be tried by General Court Martial. The first charge was in respect of the offence under Section 52(f) of the Act, i.e. doing a thing with intent to defraud, the second charge was alternative to the first charge and was in respect of offence under Section 63 of the Act, i.e. committing an act prejudicial to good order and military discipline and the third charge was also in respect of offence under Section 63 of the Act.

The appellant pleaded not guilty to the charges. The prosecution examined 22 witnesses to prove the charges. The General Court Martial, on November 29, 1978, found the appellant not guilty of the second charge but found him guilty of the first and the third charge and awarded the sentence of dismissal from service. The appellant submitted a petition dated December 18, 1978, to the Chief of Army Staff wherein he prayed that the findings and the sentence of the General Court Martial be not confirmed. The findings and sentence of the

General Court Martial were confirmed by the Chief of the Army Staff by his order dated May 11, 1979. The appellant, thereafter, submitted a post-confirmation petition under Section 164(2) of the Act. The said petition of the appellant was rejected by the Central Government by order dated May 6, 1980. The appellant thereupon filed the writ petition in the High Court of Delhi. The said writ petition was dismissed, in limine, by the High Court.

Section 164 of the Army Act, 1950 provides:

“164. (1) Any person subject to this Act who considers himself aggrieved by any order passed by any court martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court martial and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any court martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such orders thereon as it or he thinks fit.”

S.C. AGRAWAL, J. – 5. The appeal involves the question as to whether it was incumbent for the Chief of the Army Staff, while confirming the findings and the sentence of the General Court Martial, and for the Central Government, while rejecting the post-confirmation petition of the appellant, to record their reasons for the orders passed by them.

6. It may be mentioned that this question has been considered by this Court in *Som Datt Datta v. Union of India* [AIR 1969 SC 414]. In that case it was contended before this Court that the order of the Chief of Army Staff confirming the proceedings of the court martial under Section 164 of the Act was illegal since no reason had been given in support of the order by the Chief of the Army Staff and that the Central Government had also not given any reasons while dismissing the appeal of the petitioner in that case under Section 165 of the Act and that the order of the Central Government was also illegal. This contention was negative. After referring to the provisions contained in Sections 164, 165 and 162 of the Act this Court pointed out that while Section 162 of the Act expressly provides that the Chief of Army Staff may “for reasons based on the merits of the case” set aside the proceedings or reduce the sentence to any other sentence which the court might have passed, there is no express obligation imposed by Sections 164 and 165 of the Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the court martial. This Court observed that no other section of the Act or any of the rules made therein had been brought to its notice from which necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. This Court did not accept the contention that apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, there is a general principle or a rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision.

7. Shri A.K. Ganguli has urged that the decision of this Court in *Som Datt Datta* case to the extent it holds that there is no general principle or rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision needs reconsideration inasmuch as it is not in consonance with the other decisions of this Court.

8. The learned Additional Solicitor General has refuted the said submission of Shri Ganguli and has submitted that there is no requirement in law that reasons be given by the confirming authority while confirming the finding or sentence of the court martial or by the Central Government while dealing with the post-confirmation petition submitted under Section 164 of the Act and that the decision of this Court in *Som Datt Datta* case in this regard does not call for reconsideration.

9. The question under consideration can be divided into two parts:

- (i) Is there any general principle of law which requires an administrative authority to record the reasons for its decision; and
- (ii) If so, does the said principle apply to an order confirming the findings and sentence of a court martial and post-confirmation proceeding under the Act?

11. In the United States the courts have insisted upon recording of reasons for its decision by an administrative authority on the premise that the authority should give clear indication that it has exercised the discretion with which it has been empowered because “administrative process will best be vindicated by clarity in its exercise”. The said requirement of recording of reasons has also been justified on the basis that such a decision is subject to judicial review and “the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review” and that “the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained”. In *John T. Dunlop v. Walter Bachowski* [(1975) 44 L ed 2d 377], it has been observed that a statement of reasons serves purposes other than judicial review inasmuch as the reasons promotes thought by the authority and compels it to cover the relevant points and eschew irrelevancies and assures careful administrative consideration. The Federal Administrative Procedure Act, 1946 which prescribed the basic procedural principles which are to govern formal administrative procedures contained an express provision [Section 8(b)] to the effect that all decisions shall indicate a statement of findings and conclusions as well as reasons or basis therefore upon all the material issues of fact, law or discretion presented on the record. The said provision is now contained in Section 557(c) of Title 5 of the United States Code (1982 edition). Similar provision is contained in the State statutes.

12. In England the position at common law is that there is no requirement that reasons should be given for its decision by the administrative authority. There are, however, observations in some judgments wherein the importance of reasons has been emphasised. In his dissenting judgment in *Breen v. Amalgamated Engineering Union* [(1971) 1 All ER 1148], Lord Denning M.R., has observed that “the giving of reasons is one of the fundamentals of good administration.”

15. The *Committee on Ministers’ Powers (Donoughmore Committee)* in its report submitted in 1932, recommended that “any party affected by a decision should be informed of

the reasons on which the decision is based” and that “such a decision should be in the form of a reasoned document available to the parties affected”. (p. 100) The Committee on Administrative Tribunals and Enquiries (Franks Committee) in its report submitted in 1957 recommended that “decisions of tribunals should be reasoned and as full as possible”. The said Committee has observed:

“Almost all witnesses have advocated the giving of reasoned decisions by tribunals. We are convinced that if tribunal proceedings are to be fair to the citizen reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out. Further, a reasoned decision is essential in order that, where there is a right of appeal; the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal.”

16. The recommendations of the Donoughmore Committee and the *Franks Committee* led to the enactment of the Tribunals and Enquiries Act, 1958 in United Kingdom. Section 12 of that Act prescribed that it shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving of notification of the decision to support the decision. The said Act has been replaced by the Tribunals and Enquiries Act, 1971 which contains a similar provision in Section 12. This requirement is, however, confined, in its applications to tribunals and statutory authorities specified in Schedule I to the said enactment. In respect of the tribunals and authorities who are not covered by the aforesaid enactment, the position, as prevails at common law, applies. The Committee of Justice in its Report, *Administration under Law*, submitted in 1971, has expressed the view:

“No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions.”

19. This position at common law has been altered by the Commonwealth Administrative Decisions (Judicial Review) Act, 1977. Section 13 of the said Act enables a person who is entitled to apply for review of the decision before the Federal Court to request the decision maker to furnish him with a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision and on such a request being made the decision maker has to prepare the statement and furnish it to the persons who made the request as soon as practicable and in any event within 28 days. The provisions of this Act are not applicable to the classes of decisions mentioned in Schedule I to the Act. A similar duty to give reasons has also been imposed by Sections 28 and 37 of the Commonwealth Administrative Appeals Tribunal Act, 1975.

20. In India the matter was considered by the Law Commission in the *Fourteenth Report relating to reform in Judicial Administration*. The Law Commission recommended: (Vol. II, p. 694)

“In the case of administrative decisions provision should be made that they should be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery of appropriate writs.”

21. No law has, however, been enacted in pursuance of these recommendations, imposing a general duty to record the reasons for its decision by an administrative authority though the requirement to give reasons is found in some statutes.

22. The question as to whether an administrative authority should record the reasons for its decision has come up for consideration before this Court in a number of cases.

23. In *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunhunwala* [AIR 1961 SC 1669], a Constitution Bench of this Court, while dealing with an order passed by the Central Government in exercise of its appellate powers under Section 111(3) of the Companies Act, 1956 in the matter of refusal by a company to register the transfer of shares, has held that there was no proper trial of the appeals before the Central Government since no reasons had been given in support of the order passed by the Deputy Secretary who heard the appeals. In that case it has been observed:

“If the Central Government acts as a tribunal exercising judicial powers and the exercise of that power is subject to the jurisdiction of this Court under Article 136 of the Constitution, we fail to see how the power of this Court can be effectively exercised if reasons are not given by the Central Government in support of its order.”

24. In *Madhya Pradesh Industries Ltd. v. Union of India* [AIR 1966 SC 671], the order passed by the Central Government dismissing the revision petition under Rule 55 of the Mineral Concession Rules, 1960, was challenged before this Court on the ground that it did not contain reasons. Bachawat, J., speaking for himself and Mudholkar, J., rejected this contention on the view that the reason for rejecting the revision application appeared on the face of the order because the Central Government had agreed with the reasons given by the State Government in its order. The learned Judges did not agree with the submission that omission to give reasons for the decision is of itself a sufficient ground for quashing it and held that for the purpose of an appeal under Article 136 orders of courts and tribunals stand on the same footing. The learned Judges pointed out that an order of court dismissing a revision application often gives no reasons but this is not a sufficient ground for quashing it and likewise an order of an administrative tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give reasons for the rejection. The decision in *Harinagar Sugar Mills* case was distinguished on the ground that in that case the Central Government had reversed the decision appealed against without giving any reasons and the record did not disclose any apparent ground for the reversal. According to the learned Judges there is a vital difference between an order of reversal and an order of affirmance. Subba Rao, J., as he then was, did not concur with this view and found that the order of the Central Government was vitiated as it did not disclose any reasons for rejecting the revision application. The learned Judge has observed:

“In the context of a welfare State, administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a welfare State. But arbitrariness in their functioning destroys the concept of a welfare State itself. Self-discipline and

supervision exclude or at any rate minimize arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal.”

“If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuses of power. But, if reasons for an order are given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard.”

“There is an essential distinction between a court and an administrative tribunal. A Judge is trained to look at things objectively, uninfluenced by considerations of policy or expediency; but, an executive officer generally looks at things from the standpoint of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties; and the least they should do is to give reasons for their orders. Even in the case of appellate courts invariably reasons are given, except when they dismiss an appeal or revision in limine and that is because the appellate or revisional court agrees with the reasoned judgment of the subordinate court or there are no legally permissible grounds to interfere with it. But the same reasoning cannot apply to an appellate tribunal, for as often as not the order of the first tribunal is laconic and does not give any reasons.”

25. With reference to an order of affirmance the learned Judge observed that where the original tribunal gives reasons, the appellate tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons and that what is essential is that reasons shall be given by an appellate or revisional tribunal expressly or by reference to those given by the original tribunal.

26. This matter was considered by a Constitution Bench of this Court in *Bhagat Raja* case where also the order under challenge had been passed by the Central Government in exercise of its revisional powers under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957 read with Rules 54 and 55 of the Mineral Concession Rules, 1960. Dealing with the question as to whether it was incumbent on the Central Government to give any reasons for its decision on review this Court has observed:

“The decisions of tribunals in India are subject to the supervisory powers of the High Court’s under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word “rejected”, or “dismissed”. In such a case, this Court can probably only exercise its appellate jurisdiction satisfactorily by

examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal.”

27. This Court has referred to the decision in *Madhya Pradesh Industries* case and the observations of Subba Rao, J., referred to above, in that decision have been quoted with approval. After taking note of the observations of Bachawat, J. in that case, the learned Judges have held:

“After all a tribunal which exercises judicial or quasi-judicial powers can certainly indicate its mind as to why it acts in a particular way and when important rights of parties of far-reaching consequence to them are adjudicated upon in a summary fashion, without giving a personal hearing where proposals and counter-proposals are made and examined, the least that can be expected is that the tribunal should tell the party why the decision is going against him in all cases where the law gives a further right of appeal.”

28. Reference has already been made to *Som Datt Datta* case wherein a Constitution Bench of this Court has held that the confirming authority, while confirming the findings and sentence of a court martial, and the Central Government, while dealing with an appeal under Section 165 of the Act, are not required to record the reasons for their decision and it has been observed that apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, it could not be said that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision. In that case the court was primarily concerned with the interpretation of the provisions of Act and the Army Rules, 1954. There is no reference to the earlier decisions in *Harinagar Sugar Mills* case and *Bhagat Raja* case wherein the duty to record reasons was imposed in view of the appellate jurisdiction of this Court and the supervisory jurisdiction of the High Court under Articles 136 and 227 of the Constitution of India respectively.

29. In *Travancore Rayon Ltd. v. Union of India* [(1970) 3 SCR 40], this Court has observed:

“The court insists upon disclosure of reasons in support of the order on two grounds: one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.”

30. In *Mahabir Prasad Santosh Kumar v. State of U.P.*, the District Magistrate had cancelled the license granted under the U.P. Sugar Dealers’ Licensing Order, 1962 without giving any reason and the State Government had dismissed the appeal against the said order of the District Magistrate without recording the reasons. This Court has held:

“The practice of the executive authority dismissing statutory appeals against orders which prima facie seriously prejudice the rights of the aggrieved party without giving reasons is a negation of the rule of law.

“Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just.”

31. In *Woolcombers of India Ltd.* case this Court was dealing with an award of an Industrial Tribunal. It was found that the award stated only the conclusions and it did not give the supporting reasons. This Court has observed:

“The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Second, it is a well known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have also the appearance of justice. Third, it should be remembered that an appeal generally lies from the decision of judicial and quasi-judicial authorities to this Court by special leave granted under Article 136. A judgment which does not disclose the reasons, will be of little assistance to the court.”

32. In *Siemens Engineering & Manufacturing Co. of India Limited* case, this Court was dealing with an appeal against the order of the Central Government on a revision application under the Sea Customs Act, 1878. This Court has laid down:

“It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons... If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of *audi alteram partem*, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its

proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.”

33. *Tara Chand Khatri v. Municipal Corporation of Delhi* [(1972) 2 SCR 198] was a case where an inquiry was conducted into charges of misconduct and the disciplinary authority, agreeing with the findings of the Inquiry Officer, had imposed the penalty of dismissal. The said order of dismissal was challenged on the ground that the disciplinary authority had not given its reasons for passing the order. The said contention was negated by this Court and distinction was drawn between an order of affirmance and an order of reversal. It was observed:

“(W)hile it may be necessary for a disciplinary or administrative authority exercising quasi-judicial functions to state the reasons in support of its order if it differs from the conclusions arrived at and the recommendations made by the enquiring officer in view of the scheme of a particular enactment or the rules made there under, it would be laying down the proposition too broadly to say that even an ordinary concurrence must be supported by reasons.”

34. In *Raipur Development Authority v. Chokhamal Contractors* [(1989) 2 SCC 721], a Constitution Bench of this Court was considering the question whether it is obligatory for an arbitrator under the Arbitration Act, 1940 to give reasons for the award. It was argued that the requirement of giving reasons for the decision is a part of the rules of natural justice which are also applicable to the award of an arbitrator and reliance was placed on the decisions in *Bhagat Raja* case and *Siemens Engineering Co.* case. The said contention was rejected by this Court. After referring to the decisions in *Bhagat Raja* case, *Som Datt Datta* case and *Siemens Engineering Co.* case this Court has observed:

“It is no doubt true that in the decisions pertaining to administrative law, this Court in some cases has observed that the giving of reasons in an administrative decision is a rule of natural justice by an extension of the prevailing rules. It would be in the interest of the world of commerce that the said rule is confined to the area of administrative law... But at the same time it has to be borne in mind that what applies generally to settlement of disputes by authorities governed by public law need not be extended to all cases arising under private law such as those arising under the law of arbitration which is intended for settlement of private disputes.”

35. The decisions of this Court referred to above indicate that with regard to the requirement to record reasons the approach of this Court is more in line with that of the American courts. An important consideration which has weighed with the court for holding that an administrative authority exercising quasi-judicial functions must record the reasons for its decision, is that such a decision is subject to the appellate jurisdiction of this Court under Article 136 of the Constitution as well as the supervisory jurisdiction of the High Court's under Article 227 of the Constitution and that the reasons, if recorded, would enable this Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations which have also weighed with the Court in taking this view are that the requirement of recording reasons would (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise

chances of arbitrariness in decision-making. In this regard a distinction has been drawn between ordinary courts of law and tribunals and authorities exercising judicial functions on the ground that a Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency whereas an executive officer generally looks at things from the standpoint of policy and expediency.

36. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.

37. Having considered the rationale for the requirement to record the reasons for the decision of an administrative authority exercising quasi-judicial functions we may now examine the legal basis for imposing this obligation. While considering this aspect the Donoughmore Committee observed that it may well be argued that there is a third principle of natural justice, namely, that a party is entitled to know the reason for the decision, be it judicial or quasi-judicial. The Committee expressed the opinion that “there are some cases where the refusal to give grounds for a decision may be plainly unfair; and this may be so, even when the decision is final and no further proceedings are open to the disappointed party by way of appeal or otherwise” and that “where further proceedings are open to a disappointed party, it is contrary to natural justice that the silence of the Minister or the Ministerial Tribunal should deprive them of the opportunity”. (p. 80) Prof. H.W.R. Wade has also expressed the view that “natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man’s sense of justice”. In *Siemens Engineering Co.* case this Court has taken the same view when it observed that “the rule requiring reasons to be given in support of an order is, like the principles of *audi alteram partem*, a basic principle of natural justice which must inform every quasi-judicial process”. This decision proceeds on the basis that the two well known principles of natural justice, namely (i) that no man should be a judge in his own cause, and (ii) that no person should be judged without a hearing, are not exhaustive and that in addition to these two principles there may be rules

which seek to ensure fairness in the process of decision-making and can be regarded as part of the principles of natural justice. This view is in consonance with the law laid down by this Court in *A.K. Kraipak v. Union of India* [(1970) 1 SCR 457], wherein it has been held:

“The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (i) no one shall be a judge in his own cause (*nemo debet esse judex propria causa*), and (ii) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that *quasi-judicial* enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice.”

39. The object underlying the rules of natural justice “is to prevent miscarriage of justice” and secure “fair play in action”. As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework where under jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect as those contained in the Administrative Procedure Act, 1946 of U.S.A. and the Administrative Decisions (Judicial Review) Act, 1977 of Australia whereby the orders passed by certain specified authorities are excluded from the ambit of the enactment. Such exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case.

40. For the reasons aforesaid, it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision.

41. We may now come to the second part of the question, namely, whether the confirming authority is required to record its reasons for confirming the finding and sentence of the court martial and the Central Government or the competent authority entitled to deal with the post-confirmation petition is required to record its reasons for the order passed by it on such petition. For that purpose it will be necessary to determine whether the Act or the Army Rules, 1954 (the Rules’) expressly or by necessary implication dispense with the requirement

of recording reasons. We propose to consider this aspect in a broader perspective to include the findings and sentence of the court martial and examine whether reasons are required to be recorded at the stage of (i) recording of findings and sentence by the court martial ; (ii) confirmation of the findings and sentence of the court martial ; and (iii) consideration of post-confirmation petition.

42. Before referring to the relevant provisions of the Act and the Rules it may be mentioned that the Constitution contains certain special provisions in regard to members of the Armed Forces. Article 33 empowers Parliament to make law determining the extent to which any of the rights conferred by Part III shall, in their application to the members of the Armed Forces be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline amongst them. By clause (2) of Article 136 the appellate jurisdiction of this Court under Article 136 of the Constitution has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. Similarly clause (4) of Article 227 denies to the High Court's the power of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces. This Court under Article 32 and the High Court's under Article 226 have, however, the power of judicial review in respect of proceedings of courts martial and the proceedings subsequent thereto and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record.

43. Reference may now be made to the provisions of the Act and the Rules which have a bearing on the requirement to record reasons for the findings and sentence of the court martial. Section 108 of the Act makes provision for four kinds of courts martial, namely, (a) general courts martial ; (b) district courts martial ; (c) summary general courts martial and (d) summary courts martial. The procedure of court martial is prescribed in Chapter XI (Sections 128 to 152) of the Act. Section 129 prescribes that every general court martial shall, and every district or summary general court martial may, be attended by a judge-advocate, who shall be either an officer belonging to the department of the Judge-Advocate General, or if no such officer is available, an officer approved of by the Judge-Advocate General or any of his deputies. In sub-section (1) of Section 131 it is provided that subject to the provisions of sub-sections (2) and (3) every decision of a court martial shall be passed by an absolute majority of votes, and where there is an equality of votes on either the finding or the sentence, the decision shall be in favour of the accused. In sub-section (2) it is laid down that no sentence of death shall be passed by a general court martial without the concurrence of at least two-thirds of the members of the court and sub-section (3) provides that no sentence of death shall be passed by a summary general court martial without the concurrence of all the members. With regard to the procedure at trial before the general and district courts martial further provisions are made in Rules 37 to 105 of the Rules. In Rule 60 it is provided that the judge-advocate (if any) shall sum up in open court the evidence and advise the court upon the law relating to the case and that after the summing up of the judge-advocate no other address shall be allowed. Rule 61 prescribes that the court shall deliberate on its findings in closed court in the presence of the judge-advocate and the opinion of each member of the court as to the

finding shall be given by word of mouth on each charge separately. Rule 62 prescribes the form, record and announcement of finding and in sub-rule (1) it is provided that the finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in these rules, shall be recorded simply as a finding of “Guilty” or of “Not guilty”. Sub-rule (10) of Rule 62 lays down that the finding on charge shall be announced forthwith in open court as subject to confirmation. Rule 64 lays down that in cases where the finding on any charge is guilty, the court, before deliberating on its sentence, shall, whenever possible take evidence in the matters specified in sub-rule (1) and thereafter the accused has a right to address the court thereon and in mitigation of punishment. Rule 65 makes provision for sentence and provides that the court shall award a single sentence in respect of all the offences of which the accused is found guilty, and such sentence shall be deemed to be awarded in respect of the offence in each charge and in respect of which it can be legally given, and not to be awarded in respect of any offence in a charge in respect of which it cannot be legally given. Rule 66 makes provisions for recommendation to mercy and sub-rule (1) prescribes that if the court makes a recommendation to mercy, it shall give its reasons for its recommendation.

Sub-rule (1) of Rule 67 lays down that the sentence together with any recommendation to mercy and the reasons for any such recommendation will be announced forthwith in open court. The powers and duties of judge-advocate are prescribed in Rule 105 which, among other things, lays down that at the conclusion of the case he shall sum up the evidence and give his opinion upon the legal bearing of the case before the court proceeds to deliberate upon its finding and the court, in following the opinion of the judge-advocate on a legal point may record that it has decided in consequence of that opinion. The said rule also prescribes that the judge-advocate has, equally with the presiding officer, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance or incapacity to examine or cross-examine witnesses or otherwise, and may, for that purpose, with the permission of the court, call witnesses and put questions to witnesses, which appear to him necessary or desirable to elicit the truth. It is further laid down that in fulfilling his duties, the judge-advocate must be careful to maintain an entirely impartial position.

44. From the provisions referred to above it is evident that the judge-advocate plays an important role during the course of trial at a general court martial and he is enjoined to maintain an impartial position. The court martial records its findings after the judge-advocate have summed up the evidence and have given his opinion upon the legal bearing of the case. The members of the court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of “guilty” or of “not guilty”. It is also required that the sentence should be announced forthwith in open court. Moreover Rule 66(1) requires reasons to be recorded for its recommendation in cases where the court makes a recommendation to mercy. There is no such requirement in other provisions relating to recording of findings and sentence. Rule 66(1) proceeds on the basis that there is no such requirement because if such a requirement was there it would not have been necessary to make a specific provision for recording of reasons for the recommendation to mercy. The said provisions thus negative a requirement to give reasons

for its finding and sentence by the court martial and reasons are required to be recorded only in cases where the court martial makes a recommendation to mercy. In our opinion, therefore, at the stage of recording of findings and sentence the court martial is not required to record its reasons and at that stage reasons are only required for the recommendation to mercy if the court martial makes such a recommendation.

45. As regards confirmation of the findings and sentence of the court martial it may be mentioned that Section 153 of the Act lays down that no finding or sentence of a general, district or summary general, court martial shall be valid except so far as it may be confirmed as provided by the Act. Section 158 lays down that the confirming authority may while confirming the sentence of a court martial mitigate or remit the punishment thereby awarded, or commute that punishment to any punishment lower in the scale laid down in Section 71. Section 160 empowers the confirming authority to revise the finding or sentence of the court martial and in sub-section (1) of Section 160 it is provided that on such revision, the court, if so directed by the confirming authority, may take additional evidence. The confirmation of the finding and sentence is not required in respect of summary court martial and in Section 162 it is provided that the proceedings of every summary court martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held or to the prescribed officer; and such officer or the Chief of the Army Staff or any officer empowered in this behalf may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed. In Rule 69 it is provided that the proceedings of a general court martial shall be submitted by the judge-advocate at the trial for review to the deputy or assistant judge-advocate general of the command who shall then forward it to the confirming officer and in case of district court martial it is provided that the proceedings should be sent by the presiding officer, who must, in all cases, where the sentence is dismissal or above, seek advice of the deputy or assistant judge-advocate general of the command before confirmation. Rule 70 lays down that upon receiving the proceedings of a general or district court martial, the confirming authority may confirm or refuse confirmation or reserve confirmation for superior authority, and the confirmation, non-confirmation, or reservation shall be entered in and form part of the proceedings. Rule 71 lays down that the charge, finding and sentence, and any recommendation to mercy shall, together with the confirmation or non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct, and if no direction is given, according to custom of the service and until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated.

46. The provisions mentioned above show that confirmation of the findings and sentence of the court martial is necessary before the said finding or sentence become operative. In other words the confirmation of the findings and sentence is an integral part of the proceedings of a court martial and before the findings and sentence of a court martial are confirmed the same are examined by the deputy or assistant judge-advocate general of the command which is intended as a check on the legality and propriety of the proceedings as well as the findings and sentence of the court martial. Moreover we find that in Section 162 an express provision has been made for recording of reasons based on merits of the case in

relation to the proceedings of the summary court martial in cases where the said proceedings are set aside or the sentence is reduced and no other requirement for recording of reasons is laid down either in the Act or in the Rules in respect of proceedings for confirmation. The only inference that can be drawn from Section 162 is that reasons have to be recorded only in cases where the proceedings of a summary court martial are set aside or the sentence is reduced and not when the findings and sentence are confirmed. Section 162 thus negatives a requirement to give reasons on the part of the confirming authority while confirming the findings and sentence of a court martial and it must be held that the confirming authority is not required to record reasons while confirming the findings and sentence of the court martial.

47. With regard to post-confirmation proceedings we find that sub-section (2) of Section 164 of the Act provides that any person subject to the Act who considers himself aggrieved by a finding or sentence of any court martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such orders thereon as it or he thinks fit. Insofar as the findings and sentence of a court martial and the proceedings for confirmation of such findings and sentence are concerned it has been found that the scheme of the Act and the Rules is such that reasons are not required to be recorded for the same. Has the legislature made a departure from the said scheme in respect of post-confirmation proceedings? There is nothing in the language of sub-section (2) of Section 164 which may lend support to such an intention. Nor is there anything in the nature of post-confirmation proceedings which may require recording of reasons for an order passed on the post-confirmation petition even though reasons are not required to be recorded at the stage of recording of findings and sentence by a court martial and at the stage of confirmation of the findings and sentence of the court martial by the confirming authority. With regard to recording of reasons the considerations which apply at the stage of recording of findings and sentence by the court martial and at the stage of confirmation of findings and sentence of the court martial by the confirming authority are equally applicable at the stage of consideration of the post-confirmation petition. Since reasons are not required to be recorded at the first two stages referred to above, the said requirement cannot, in our opinion, be insisted upon at the stage of consideration of post-confirmation petition under Section 164(2) of the Act.

48. For the reasons aforesaid it must be held that reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the court martial as well as for the order passed by the Central Government dismissing the post-confirmation petition. Since we have arrived at the same conclusion as in *Som Datt Datta* case the submission of Shri Ganguli that the said decision needs reconsideration cannot be accepted and is, therefore, rejected.

49. But that is not the end of the matter because even though there is no requirement to record reasons by the confirming authority while passing the order confirming the findings and sentence of the court martial or by the Central Government while passing its order on the post-confirmation petition, it is open to the person aggrieved by such an order to challenge the validity of the same before this Court under Article 32 of the Constitution or before the High

Court under Article 226 of the Constitution and he can obtain appropriate relief in those proceedings.

51. The first contention that has been urged by Shri Ganguli in this regard is that under sub-section (1) of Section 164 of the Act the appellant had a right to make a representation to the confirming authority before the confirmation of the findings and sentence recorded by the court martial and that the said right was denied inasmuch as the appellant was not supplied with the copies of the relevant record of the court martial to enable to him to make a complete representation and further that the representation submitted by the appellant under sub-section (1) of Section 164 was not considered by the confirming authority before it passed the order dated May 11, 1979 confirming the findings and sentence of the court martial. The learned Additional Solicitor General, on the other hand, has urged that under sub-section (1) of Section 164 no right has been conferred on a person aggrieved by the findings or sentence of a court martial to make a representation to the confirming authority before the confirmation of the said findings or sentence. The submission of learned Additional Solicitor General is that while sub-section (1) of Section 164 refers to an order passed by a court martial, sub-section (2) of Section 164 deals with the findings or sentence of a court martial and that the only right that has been conferred on a person aggrieved by the finding or sentence of a court martial is that under sub-section (2) of Section 164 and the said right is available after the finding and sentence has been confirmed by the confirming authority. We find considerable force in the aforesaid submission of learned Additional Solicitor General.

53. In sub-section (1) reference is made to orders passed by a court-martial and enables a person aggrieved by an order to present a petition against the same. The said petition has to be presented to the officer or the authority empowered to confirm any finding or sentence of such court martial and the said authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order or as to the regularity of any proceedings to which the order relates. Sub-section (2), on the other hand, makes specific reference to finding or sentence of a court martial and confers a right on any person feeling aggrieved by a finding or sentence of any court martial which has been confirmed, to present a petition to the Central Government, Chief of the Army Staff or any prescribed officer. The use of the expression "order" in sub-section (1) and the expression "finding or sentence" in sub-section (2) indicates that the scope of sub-section (1) and sub-section (2) is not the same and the expression "order" in sub-section (1) cannot be construed to include a "finding or sentence". In other words insofar as the finding and sentence of the court martial is concerned the only remedy that is available to a person aggrieved by the same is under sub-section (2) and the said remedy can be invoked only after the finding or sentence has been confirmed by the confirming authority and not before the confirmation of the same. Rule 147 of the Rules also lends support to this view. In the said rule it is laid down that every person tried by a court martial shall be entitled on demand, at any time after the confirmation of the finding and sentence, when such confirmation is required, and before the proceedings are destroyed, to obtain from the officer or person having the custody of the proceeding a copy thereof, including the proceedings upon revision, if any. This rule envisages that the copies of proceedings of a court martial are to be supplied only after confirmation of the finding and sentence and that there is no right to obtain the copies of the proceedings till the finding and

sentence have been confirmed. This means that the appellant cannot make a grievance about non-supply of the copies of the proceedings of the court martial and consequent denial of his right to make a representation to the confirming authority against the findings and sentence of the court martial before the confirmation of the said finding and sentence. Though a person aggrieved by the finding or sentence of a court martial has no right to make a representation before the confirmation of the same by the confirming authority, but in case such a representation is made by a person aggrieved by the finding or sentence of a court martial it is expected that the confirming authority shall give due consideration to the same while confirming the finding and sentence of the court martial.

54. In the present case the representation dated December 18, 1978 submitted by the appellant to the confirming authority was not considered by the confirming authority when it passed the order of confirmation dated May 11, 1979. According to the counter-affidavit filed on behalf of Union of India this was due to the reason that the said representation had not been received by the confirming authority till the passing of the order of confirmation. It appears that due to some communication gap within the department the representation submitted by the appellant did not reach the confirming authority till the passing of the order of confirmation. Since we have held that the appellant had no legal right to make a representation at that stage the non-consideration of the same by the confirming authority before the passing of the order of confirmation would not vitiate the said order.

55. Shri Ganguli next contended that the first and the second charge levelled against the appellant are identical in nature and since the appellant was acquitted of the second charge by the court martial his conviction for the first charge cannot be sustained. It is no doubt true that the allegations contained in the first and the second charge is practically the same. But as mentioned earlier, the second charge was by way of alternative to the first charge. The appellant could be held guilty of either of these charges and he could not be held guilty of both the charges at the same time. Since the appellant had been found guilty of the first charge he was acquitted of the second charge. There is, therefore, no infirmity in the court martial having found the appellant guilty of the first charge while holding him not guilty of the second charge.

56. Shri Ganguli has also urged that the findings recorded by the court martial on the first and third charges are perverse inasmuch as there is no evidence to establish these charges. We find no substance in this contention.

57. The first charge was that the appellant on or about December 25, 1975, having received 60.61 meters woollen serge from M/s Ram Chandra & Brothers, Sadar Bazar, Jhansi for stitching 19 coats and 19 pants for Class IV civilian employees of his unit with intent to defraud got 19 altered ordnance pattern woollen pants issued to the said civilian employees instead of pants stitched out of the cloth received. To prove this charge the prosecution examined Ram Chander PW 1 and Triloki Nath PW 2 of M/s Ram Chandra & Brothers, Sadar Bazar, Jhansi who have deposed that 60.61 meters of woollen serge cloth was delivered by them to the appellant in his office in December 1975. The evidence of these witnesses is corroborated by B.D. Joshi, Chowkidar, PW 3, who has deposed that in the last week of December 1975, the appellant had told him in his office that cloth for their liveries had been received and they should give their measurements. As regards the alteration of 19 ordnance

pattern woollen pants which were issued to the civilian employees instead of the pants stitched out of the cloth that was received, there is the evidence of N/Sub. P. Vishwambharam PW 19 who has deposed that he was called by the appellant to his office in the last week of December 1975 or the first week of January 1976 and that on reaching there he found ordnance pattern woollen pants lying by the side of the room wall next to the appellant's table and that the appellant had called Mohd. Sharif PW 15 to his office and had asked him to take out 19 woollen trousers out of the lot kept there in the office. After Mohd. Sharif had selected 19 woollen trousers the appellant told Mohd. Sharif to take away these pants for alteration and refitting. The judge-advocate, in his summing up, before the court martial, has referred to this evidence on the first charge and the court martial, in holding the appellant guilty of the first charge, has acted upon it. It cannot, therefore, be said that there is no evidence to establish the first charge levelled against the appellant and the findings recorded by the court martial in respect of the said charge is based on no evidence or is perverse.

58. The third charge, is that the appellant having come to know that Capt. Gian Chand Chhabra while officiating OC of his unit, improperly submitted wrong Contingent Bill No. 341/Q dated September 25, 1975 for Rs 16,280 omitted to initiate action against Capt. Chhabra.

59. In his summing up before the court martial the judge-advocate referred to the CDA letter M/IV/191 dated November 20, 1975 (Ex. 'CC') raising certain objections with regard to Contingent Bill No. 341/Q dated September 25, 1975 for Rs 16,280 and pointed out that the said letter was received in the unit on or about November 28, 1975 and bears the initials of the appellant with the aforesaid date and remark "Q Spk with details". This would show that the appellant had knowledge of the Contingent Bill on November 28, 1975. It is not the case of the appellant that he made any complaint against Captain Chhabra thereafter. It cannot, therefore, be said that the finding recorded by the court martial on the third charge is based on no evidence and is perverse.

60. In the result we find no merit in this appeal and the same is accordingly dismissed.

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Supply of Inquiry Report before Taking Action

Managing Director, ECIL, Hyderabad v. B. Karunakar
(1993) 4 SCC 727

By an order dated August 5, 1991 in *Managing Director, Electronic Corporation of India v. B. Karunakar* [(1992) 1 SCC 709], a three Judge Bench of the Supreme Court referred the matter to the Chief Justice for being placed before a larger Bench, for the Bench found a conflict in the two decisions of this Court, viz., *Kailash Chander Asthana v. State of U.P.* [(1988) 3 SCC 600] and *Union of India v. Mohd. Ramzan Khan* [(1991) 1 SCC 588], both delivered by the Benches of three learned Judges. This group of matters was at the instance of various parties, viz., Union of India, Public Sector Corporations, Public Sector Banks, State Governments and two private parties.

P.B. SAWANT, J. - 2. The basic question of law which arises in these matters is *whether the report of the enquiry officer/authority who/which is appointed by the disciplinary authority to hold an inquiry into the charges against the delinquent employee, is required to be furnished to the employee to enable him to make proper representation to the disciplinary authority before such authority arrives at its own finding with regard to the guilt or otherwise of the employee and the punishment, if any, to be awarded to him.* This question in turn gives rise to the following incidental questions:

(i) Whether the report should be furnished to the employee even when the statutory rules laying down the procedure for holding the disciplinary inquiry are silent on the subject or are against it?

(ii) Whether the report of the enquiry officer is required to be furnished to the delinquent employee even when the punishment imposed is other than the major punishment of dismissal, removal or reduction in rank?

(iii) Whether the obligation to furnish the report is only when the employee asks for the same or whether it exists even otherwise?

(iv) Whether the law laid down in *Mohd. Ramzan Khan* Case will apply to all establishments — Government and non-Government, public and private sector undertakings?

(v) What is the effect of the non-furnishing of the report on the order of punishment and what relief should be granted to the employee in such cases?

(vi) From what date the law requiring furnishing of the report, should come into operation?

(vii) Since the decision in *Mohd. Ramzan Khan* case has made the law laid down there prospective in operation, i.e., applicable to the orders of punishment passed after November 20, 1990 on which day they said decision was delivered, this question in turn also raises another question, viz., what was the law prevailing prior to November 20, 1990?

3. In this country, the law on the subject has developed along two paths, viz., the statute and the principles of natural justice.

24. Since the Government of India Act, 1935 till the Forty-second Amendment of the Constitution, the Government servant had always the right to receive the report of the enquiry officer/authority and to represent against the findings recorded in it when the enquiry officer/authority was not the disciplinary authority. This right was however, exercisable by him at the second stage of the disciplinary proceedings viz., when he was served with a notice to show cause against the proposed penalty. The issuance of the notice to show cause against the penalty necessarily required the furnishing of a copy of the enquiry officer's report since, as held by the Courts, the right to show cause against the penalty also implied the right to represent against the findings on the charges. This was considered to be an essential part of the 'reasonable opportunity' incorporated earlier in Section 240(3) of the GOI Act and later in Article 311(2) of the Constitution as originally enacted. The right to receive the enquiry officer's report and to show cause against the findings in the report was independent of the right to show cause against the penalty proposed. The two rights came to be confused with each other because as the law stood prior to the Forty-second Amendment of the Constitution, the two rights arose simultaneously only at the stage when a notice to show cause against the proposed penalty was issued. If the disciplinary authority after considering the enquiry officer's report had dropped the proceedings or had decided to impose a penalty other than that of dismissal, removal or reduction in rank, there was no occasion for issuance of the notice to show cause against the proposed penalty. In that case, the employee had neither the right to receive the report and represent against the finding of guilt nor the right to show cause against the proposed penalty. The right to receive the report and to represent against the findings recorded in it was thus inextricably connected with the acceptance of the report by the disciplinary authority and the nature of the penalty proposed. Since the Forty-second Amendment of the Constitution dispensed with the issuance of the notice to show cause against the penalty proposed even if it was dismissal, removal or reduction in rank, some courts took the view that the Government servant was deprived of his right to represent against the findings of guilt as well. The error occurred on account of the failure to distinguish the two rights which were independent of each other.

25. While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty-second Amendment.

26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary

authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it.

27. It will thus be seen that where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached. The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings.

28. The position in law can also be looked at from a slightly different angle. Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty

proposed”, it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee’s reply to the enquiry officer’s report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer’s report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges.

29. Hence it has to be held that when the enquiry officer is not the disciplinary authority; the delinquent employee has a right to receive a copy of the enquiry officer’s report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee’s right to defend himself against the charges levelled against him. A denial of the enquiry officer’s report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30. Hence the incidental questions raised above may be answered as follows:

[i] Since the denial of the report of the enquiry officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.

[ii] The relevant portion of Article 311(2) of the Constitution is as follows:

“(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.”

Thus the article makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in

awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all-India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded and when the enquiry officer is not the disciplinary authority the delinquent employee will have the right to receive the enquiry officer's report notwithstanding the nature of the punishment.

[iii] Since it is the right of the employee to have the report to defend himself effectively and he would not know in advance whether the report is in his favour or against him, it will not be proper to construe his failure to ask for the report, as the waiver of his right. Whether, therefore, the employee asks for the report or not, the report has to be furnished to him.

[iv] In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in *Mohd. Ramzan case* should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

[v] The next question to be answered is what the effect on the order of punishment is when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of

justice to illogical and exasperating limits. It amounts to an “unnatural expansion of natural justice” which in itself is antithetical to justice.

31. Hence, in all cases where the enquiry officer’s report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law.

33. Questions (vi) and (vii) may be considered together. As has been discussed earlier, although the furnishing of the enquiry officer’s report to the delinquent employee is a part of the reasonable opportunity available to him to defend himself against the charges, before the Forty-second Amendment of the Constitution, the stage at which the said opportunity became available to the employee had stood deferred till the second notice requiring him to show cause against the penalty, was issued to him. The right to prove his innocence to the disciplinary authority was to be exercised by the employee along with his right to show cause as to why no penalty or lesser penalty should be awarded. The proposition of law that the two rights were independent of each other and in fact belonged to two different stages in the inquiry came into sharp focus only after the Forty-second Amendment of the Constitution which abolished the second stage of the inquiry, viz., the inquiry into the nature of

punishment. As pointed out earlier, it was mooted but not decided in *E. Bashyan* case by the two learned Judges of this Court who referred the question to the larger Bench. It has also been pointed out that in *K.C. Asthana* case no such question was either raised or decided. It was for the first time in *Mohd. Ramzan Khan* case that the question squarely fell for decision before this Court. Hence till November 20, 1990, i.e., the day on which *Mohd. Ramzan Khan* case was decided, the position of law on the subject was not settled by this Court. It is for the first time in *Mohd. Ramzan Khan* case that this Court laid down the law. That decision made the law laid down there prospective in operation, i.e., applicable to the orders of punishment passed after November 20, 1990. The law laid down was not applicable to the orders of punishment passed before that date notwithstanding the fact that the proceedings arising out of the same were pending in courts after that date. The said proceedings had to be decided according to the law prevalent prior to the said date which did not require the authority to supply a copy of the enquiry officer's report to the employee. The only exception to this was where the service rules with regard to the disciplinary proceedings themselves made it obligatory to supply a copy of the report to the employee.

34. However, it cannot be gainsaid that while *Mohd. Ramzan Khan* case made the law laid down there prospective in operation, while disposing of the cases which were before the Court; the Court through inadvertence gave relief to the employees concerned in those cases by allowing their appeals and setting aside the disciplinary proceedings. The relief granted was obviously per incuriam. The said relief has, therefore, to be confined only to the employees concerned in those appeals. The law which is expressly made prospective in operation there cannot be applied retrospectively on account of the said error. It is now well settled that the courts can make the law laid down by them prospective in operation to prevent unsettlement of the settled positions, to prevent administrative chaos and to meet the ends of justice. In this connection, we may refer to some well-known decisions on the point.

44. The need to make the law laid down in *Mohd. Ramzan Khan* case prospective in operation requires no emphasis. As pointed out above, in view of the unsettled position of the law on the subject, the authorities/managements all over the country had proceeded on the basis that there was no need to furnish a copy of the report of the enquiry officer to the delinquent employee and innumerable employees have been punished without giving them the copies of the reports. In some of the cases, the orders of punishment have long since become final while other cases are pending in courts at different stages. In many of the cases, the misconduct has been grave and in others the denial on the part of the management to furnish the report would ultimately prove to be no more than a technical mistake. To reopen all the disciplinary proceedings now would result in grave prejudice to administration which will far outweigh the benefit to the employees concerned. Both administrative reality and public interests do not, therefore, require that the orders of punishment passed prior to the decision in *Mohd. Ramzan Khan* case without furnishing the report of the enquiry officer should be disturbed and the disciplinary proceedings which gave rise to the said orders should be reopened on that account. Hence we hold as above.

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JUDICIAL REVIEW
Grounds for issue of Writ of Certiorari
Syed Yakoob v. K.S. Radhakrishnan
(1964) 5 SCR 64

The State Transport Authority, Madras, (“Authority”) issued a notification on July 4, 1956 under Section 57(2) of the Motor Vehicles Act, 1939 calling for applications for the grant of two stage carriage permits to run as an express service on the route Madras to Chidambaram. 107 applications were received. On May, 8, 1957, the Authority found that Provincial Transport (Private) Ltd., Madras, was the most suitable amongst the applicants and granted one permit to it. As regarding the second permit, the authority held that the other applicants were not suitable and it refused to grant the said permit to anyone of them; it decided to call for applications afresh under Section 57(2) of the Act.

Against that order, appeals were preferred by 18 claimants for permits before the State Transport Appellate Tribunal (“the Appellate Tribunal”); amongst them was the appellant Syed Yakoob and Respondent 1 K.S. Radhakrishnan. The Appellate Tribunal confirmed the grant of the first permit to the Provincial Transport (Pvt.) Ltd; and so far as the second permit was concerned, it allowed the appeal preferred by the appellant and directed that the said second permit should be issued to him; Respondent 1’s claim for the said permit was rejected.

The validity of this order was challenged by Respondent 1 by WP No. 44 of 1959 filed in the High Court of Madras. Srinivasan, J. who heard the writ petition held that the Appellate Tribunal had overlooked material considerations in deciding the question of the grant of the second permit and allowed considerations not germane to the question to vitiate its order. This order was challenged by the appellant before a Division Bench of the High Court by filing a Letters Patent Appeal. The Division Bench has held that the order passed by Srinivasan J. could be sustained on the ground that the Appellate Tribunal had overlooked material considerations in favour of Respondent 1, and so, it has affirmed the decision of the learned Single Judge on that ground alone. In regard to the finding of the Single Judge that an irrelevant consideration had vitiated the finding of the Appellate Tribunal, the Division Bench held that the consideration in question was not irrelevant, and so, it differed from the view taken by Srinivasan, J. In the result, the appeal preferred by the appellant before the Division Bench was dismissed.

P.B. GAJENDRAGADKAR, J. - The short question which this appeal raises for our decision relates to the limits of the jurisdiction of the High Court in issuing a writ of certiorari while dealing with orders passed by the appropriate authorities granting or refusing to grant permits under the provisions of the Motor Vehicles Act, 1939 (“the Act”).

7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued *for correcting errors of jurisdiction* committed by inferior courts or tribunals: where orders are passed by inferior courts or tribunals *without jurisdiction*, or is *in excess of it*, or as a result of *failure to exercise jurisdiction*. A writ can similarly be issued in exercise of jurisdiction conferred on it,

the Court or Tribunal *acts illegally or properly*, as for instance, it decides a question *without giving an opportunity to be heard* to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is *not entitled to act as an appellate Court*. This limitation necessarily means that *findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings*. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. *The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal*, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 is to issue a writ of certiorari can be legitimately exercised

8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the *conclusion of law recorded by an inferior Court or Tribunal is based on an obvious miss-interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law*, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and

upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened.

9. In the present case, the question raised by the appellant presents no difficulty whatever. The point which was raised before the High Court by Respondent 1 lies within a very narrow compass; it is a very short and simple question of fact. It appears that in dealing with the rival claims of the appellant and Respondent 1 for the second permit on the route in question, the Appellate Tribunal was ultimately influenced by the fact that the appellant had a workshop at Madras which is one terminus of the route in question, whereas Respondent 1 had a workshop and a place of business only at Cuddalore which is an intermediate station of the route and did not possess a workshop at either of the termini of the route; the other terminus being Chidambaram. In fact, that appears to be the effect of the finding made by the Authority also. Respondent 1 urged before the High Court that in coming to the conclusion that he had no workshop at Chidambaram, the Appellate Tribunal had failed to consider material evidence adduced by him. It is on this narrow ground that a writ has been issued in favour of Respondent 1. Mr. Setalvad contends that the question as to whether Respondent 1 had a workshop at Chidambaram is a pure question of fact and the High Court had no jurisdiction to interfere with the finding recorded by the Appellate Tribunal and seek to correct it by issuing a writ of certiorari. In this connection, he relies on the fact that both the Authority and the Appellate Tribunal have, in substance, found that Respondent 1 had no workshop at either of the two terminations of the route and the fact that no reasons have been given in support of the said finding would not justify the interference of the High Court in its jurisdiction under Article 226. It may be conceded that it would have been better if the Appellate Tribunal had indicated why it rejected the case of Respondent 1 in regard to his alleged workshop at Chidambaram, but we do not think that the failure of the Appellate Tribunal to give a reason in that behalf, or to refer specifically to the evidence adduced by Respondent 1, would, by itself, constitute such an error in its decision as to justify the issue of a writ of certiorari under Article 226. In this connection, we ought to add that it has been suggested by Respondent 1 that in dealing with his claim for a permit, admissible evidence which he wanted to adduce had been excluded by the Tribunal from the record; the argument that some evidence was not duly considered by the Tribunal, would normally pertain to the realm of the appreciation of evidence and would, as such be outside the purview of an enquiry in proceedings for a writ of certiorari under Article 226.

10. It appears that when Respondent 1 applied for the permit, he sent a letter dated July 11, 1956 in which he has stated that he had a workshop at Chidambaram and that he was running it in order to maintain the service efficiently and without any breakdown whatsoever. The argument is that this letter has not been challenged by any party to the proceedings and has been completely ignored by the Authority and the Appellate Tribunal when they reached the conclusion that Respondent 1 did not possess a workshop at Chidambaram. As we have already pointed out, neither the Authority nor the Appellate Tribunal has given reasons in support of the findings of fact recorded by it; but the said fact alone does not, in our opinion, justify the conclusion of the High Court that the letter in question had not been considered by the said Authorities, and so, the High Court was not right in issuing a writ of certiorari on that basis alone.

11. But apart from this aspect of the matter, the record shows that the assertion of Respondent 1 that he had a workshop at Chidambaram was contradicted by one of the claimants for a permit and is entirely inconsistent with the reports submitted to the Authority and the Appellate Tribunal by the department. D. Kanuiah Pillai, one of the applicants for the permit, had specifically averred in his application that the other applicants amongst whom Respondent 1 was included, were all far away from the Headquarters having no workshop at Chidambaram. Thus, it would not be right to assume that the claim made by Respondent 1 that he had a workshop at Chidambaram was not disputed by any other competitor. What is more significant, however, is the evidence supplied by the report made by the Regional Transport Officer, South Arcot. This report is made under different columns. Column 4 speaks about the possession of workshop or repair or maintenance facilities and its location. The report is made in respect of each one of the applicants. In regard to Respondent 1 under column 4, the report shows that he was maintaining a workshop as per Government Order at Cuddalore, and column 5 speaks about, the location of his residence or place of business as Cuddalore. A similar report has been submitted about the appellant and that shows that the appellant had workshop facilities at Madras and that he had a residence and place of business at the terminus.

12. When the present dispute went before the Appellate Tribunal, a fresh report appears to have been called for, and this report which has been made by the Secretary, State Transport Authority, also shows that Respondent 1 had a workshop at Cuddalore on the route, whereas the appellant had a workshop at Madras. It would thus be clear that on the question as to whether Respondent 1 had a workshop at Chidambaram, there was his own assertion stating that he had such a workshop, and there were the two reports made by the Transport Officers which contradicted the said assertion; the said was also challenged by one of the applicants. On this state of the record, it was, we think, not permissible to the High Court to consider these questions of fact and to hold that the finding recorded by the Appellate Tribunal was a finding without any evidence. To say that material considerations were ignored by the Appellate Tribunal in holding that Respondent 1 did not own a workshop at Chidambaram would be plainly unreasonable when it is remembered that the evidence disclosed a sharp conflict between the versions of the parties, and the version of Respondent 1 was inconsistent with the reports made by the Transport Officers which must have been treated as more reliable by the Appellate Tribunal. There can be little doubt that if Respondent 1 had owned a workshop at Chidambaram, it would have been mentioned in column 4, because the said column is obviously intended to indicate all places where the claimant owns a workshop and possesses repair facilities.

13. It appears that before Srinivasan, J, the appellant's learned counsel conceded that the allegation made by Respondent 1 that he owned a workshop at Chidambaram had not been challenged before the Transport Authorities, and naturally Srinivasan, J. was considerably impressed by the said concession; but as the Division Bench which heard the letters patent appeal has pointed out, the said concession was not correctly made; in fact, the record distinctly shows that the claim made by Respondent 1 was challenged by one of the applicants for permit and was plainly inconsistent with the reports to which we have just referred. Therefore, the concession on which Srinivasan, J. relied has been properly left out of account

by the Division Bench in dealing with the appeal. The Division Bench thought that apart from the said concession, it did appear that the Appellate Tribunal had overlooked the claim made by Respondent 1 in his letter of July 11, 1956. As we have already indicated, we find it difficult to sustain this finding. In our opinion, apart from the fact that the plea raised by Respondent 1 could not be validly raised under Article 226, even on the merits the said plea is not well-founded. The question on which Respondent 1 sought for the intervention of the High Court under Article 226 was a simple question of fact, and we are satisfied that on that question of fact, the Appellate Tribunal was justified in coming to the conclusion that the claim made by respondent; No. 1 about the existence of a workshop at Chidambaram was not well-founded; but even if the said finding did not appear to the High Court to be satisfactory, that would be no reason for issuing a writ under Article 226. There was evidence in support of the finding of the Appellate Tribunal and it is not a case where the finding based on no evidence at all. We ought also to add that though the Division Bench was satisfied that the concession on which Srinivasan J. substantially acted had been wrongly made before him, its attention does not appear to have been drawn to the reports made by the Transport Officers to which we have just referred. We have no doubt that if the Division Bench had taken into account these reports, it would have hesitated to confirm the finding made by Srinivasan J.

14. It appears that Srinivasan, J. was inclined to take the view that the decision of the Appellate Tribunal was vitiated by the fact that it took into account certain irrelevant considerations. The Division Bench has held that the said considerations cannot be said to be irrelevant. These considerations centre round the question as to whether preference should be given to the applicant for permit who has his headquarters at the terminus as against another who has only a branch office at the said terminus. The practice usually followed by the Tribunals under the Act appears to be to give one mark under column 3 to the applicant who has his H.Qrs. at the terminus and give only 1/2 mark to an applicant who has only a branch office at the terminus. Having held that the consideration on which marks are thus allotted cannot be said to be irrelevant, the Division Bench has indicated that the policy underlying the said practice may be open to doubt. In our opinion, it would have been better if the Division Bench had not expressed any opinion on this aspect of the matter, particularly when it came to the conclusion that the said matter was primarily for the decision of the Appellate Tribunal.

15. Mr. Pathak for Respondent 1 argues that the Appellate Tribunal was under an obligation, in considering the question about the grant of a permit to take into account the interests of public generally under Section 47(a) and inasmuch as the Appellate Tribunal has ignored the fact that Respondent 1 owns a workshop at Chidambaram and thereby has refused his application for a permit the interests of the public generally have been sacrificed. This argument prima facie appears to be far-fetched and fanciful; but Mr. Pathak urges that the observations made by the Court in the case of K.M. Shanmugam are in his favour. In our opinion, the said decision does not lend any assistance to Mr. Pathak's contention. In that case, this Court was satisfied that "the Tribunal made a clear error of law inasmuch as it held that in the case of the first respondent, as it had a branch at Kumbakonam, its other branch at Mannargudi should be ignored". The judgment shows that this Court took the view that it was obviously an untenable proposition to hold that even if a company has a well-equipped office

on a route in respect of which a permit is applied for, it shall be ignored if the company has some other branch somewhere unconnected with that route, and it was observed that that was precisely what Appellate Tribunal had held and that, according to the Court, clearly was an error apparent on the face of the record. It is in that connection that this Court referred to the mandatory provisions of Section 47. We do not think that this decision can be legitimately pressed into service by Mr Pathak in the present case. It is only after it is proved that Respondent 1 had a workshop at Chidambaram that any subsequent question about the interests of the public generally can possibly arise. If, as in the present; case, the Appellate Tribunal has held that Respondent 1 did not own a workshop at Chidambaram, no consideration of public interests can arise at all, and it is with this question that the present writ proceedings are concerned. We ought, to add that the decision in the case of K.M. Shanmugam cannot justify a party whose application for permit has been rejected by the authorities under the Act, to move the High Court under Art. 226 and invite it to consider all questions of fact on the plea that the decision on the said questions of fact may assist him to invoke the provisions of Section 47. That clearly is not the effect of the said decision.

16. Mr Pathak has also urged that even if we come to the conclusion that the High Court was not competent to issue a writ in the present proceedings, having regard to the nature of the questions raised before it by Respondent 1, we should not reverse the decision of the High Court under Article 136 of the Constitution. The jurisdiction of this Court under Article 136, though very wide, is exercised by the Court in its discretion, says Mr Pathak, and he contends that where the order under appeal furthers the ends of justice, *We* should not reverse the said order on technical grounds. We are not impressed by this plea. It may be conceded that in a proper case this Court may refuse to exercise its jurisdiction under Article 136 where the interests of justice patently indicate the desirability of adopting such a course; but we do not see how a plea of such a kind can be entertained where it is clearly shown that the impugned orders passed by the High Court are without jurisdiction. If Mr. Pathak's argument were to be accepted, in a majority of cases if the High Court interfered with questions of fact in issuing writs of certiorari against the decisions of special Tribunals, it may always be urged that what the High Courts have done is in the interests of justice and this Court should not interfere with the decisions of the High Courts. In the circumstances of the present case, we do not see how considerations of justice can really arise. The Tribunals of fact have found that Respondent 1 does not own a workshop at Chidambaram and having regard to the other relevant circumstances which the Tribunals have considered, the fact that he does not own a workshop at Chidambaram has ultimately proved decisive against Respondent 1 and in favour of the appellant. If that be so, a decision based on facts found by the Tribunal cannot be reopened on the plausible plea that a further enquiry should be made because that would be just. If findings of fact were allowed to be disturbed by High Courts in such writ proceedings, that may lead to an interminable search for correct findings and would virtually convert the High Courts into appellate courts competent to deal with questions of fact. That is why we think, in entertaining petitions for writs of certiorari, it is necessary to remember that findings of fact recorded by special Tribunals which have been clothed with jurisdiction to deal with them, should be treated as final between the parties, unless, of course, it is shown that the impugned finding is based on no evidence. Therefore, we do not think the plea made by Mr. Pathak that

in the interests of justice we should refrain from setting aside the order under appeal, can be upheld,

18. The result is, the appeal is allowed, the order passed by the High Court is set aside and the writ petition filed by Respondent 1 is dismissed.

K. SUBBA RAO, J. - I have had the advantage of perusing the judgment of my learned Brother, Gajendragadkar, J. I cannot agree.

23. The first respondent has a fundamental right to carry on business in transport. The Motor Vehicles Act is a law imposing reasonable restrictions in public interests on such right. Under Section 47 of the said Act the Regional Transport Authority shall, in considering an application for a stage carriage permit, have regard, inter alia to the interests of the public generally. The fact that the first respondent has a separate workshop or at any rate has the necessary repair and maintenance facilities at one of the termini of the route viz. at Chidambaram, is certainly a consideration germane to the question of public interests. Indeed, the scheme of marking system suggested by the Government also recognizes the importance of such facilities at either of the termini of the route. If the first respondent had placed before the authorities concerned the said circumstance in support of his claim for a permit and if that was ignored or not investigated into by the said authorities, the High Court would certainly have jurisdiction under Article 226 of the Constitution to quash the order of the authorities and direct them to ascertain whether the claim of the first respondent was true and if it was true to take that into consideration before issuing the permit to one or other of the claimants before them. In such an event the High Court would not be interfering with the finding of fact arrived at by the Appellate Tribunal based on the material placed before it, but would only be quashing the order on the ground that an important and material circumstance was ignored or not investigated into by the Tribunal. If a Tribunal ignores or fails to investigate a material circumstance put forward by a claimant and gives a finding against him, the said finding can certainly be said to be vitiated by an error of law apparent on the face of the record.

24. In the present case, the State Transport Authority was considering the competing claim of 107 persons for two permits. The said Authority gave its decision on May 8, 1957. The first respondent filed his application for a permit on July 11, 1956. On the same day he addressed a letter to the said Authority to the following effect:

64 “Chidambaram is one of the termini of this proposed route. A separate office and workshop are located at Chidambaram in order to maintain the service efficiently and without any breakdown or whatsoever.”

None of the innumerable applicants in his application denied specifically the claim of the first respondent that he had a separate office and workshop at Chidambaram. This fact was conceded before Srinivasan J. though the learned Judge put the concession somewhat higher than was actually made. Nor did the learned counsel for the appellant go back on the limited concession before the Division Bench. But one Kanuiah Pillai, who was Applicant 43-D, stated in his application thus:

“Applicant 43, 57, 69, 78 and 81 are residents of Chidambaram but No. 57 is a fleet owner. Nos. 69 and 78 have no workshop. No. 81 is a new entrant. The rest all are far away from the headquarters having no workshop at Chidambaram.”

Except this vague and implied denial by Kanuiah Pillai there is nothing on the record to suggest that any other applicant denied the claim of the first respondent. The fact remains that the appellant did not at any stage of the proceedings refute the claim of the first respondent.

25. With this background let me first look at the order of the State Transport Authority. The said Authority has ignored the said letter of the first respondent claiming to have a workshop at Chidambaram, but it stated in an omnibus clause that the first respondent and some of the other applicants were residents either in the middle or off the route and they were not so well situated as an applicant who had facilities at one end of the route with all the necessary facilities. It may be stated that this is an implied finding against the first respondent, but the complaint of the first respondent is that it is made in utter disregard of his claim. So too, the Appellate Tribunal observed in its order disposing of the 18 appeals before it that the first respondent, who had secured the highest number of marks, including those in Column 1 of the mark list, had his workshop and place of business en-route at Cuddalore and not at either of the termini of the route. This observation was also made in after disregard of the claim made by the first respondent that he had a workshop at Chidambaram, one of the termini of the route, and though the other applicants, except one, had not denied the said fact. The High Court, therefore, found on the material placed before it that the said Authority as well as the Tribunal had failed to consider the specific claim made by the first respondent in regard to his workshop at Chidambaram and, therefore, rightly set aside the order of the Appellate Tribunal so that the Appellate Tribunal might consider the claim made by the first respondent. I do not see any flaw in the reasoning of the High Court. Nor can I say that it has exceeded its jurisdiction under Article 226 of the Constitution. But, Mr Setalvad contended that there was material before the Tribunal and that the Tribunal gave its finding on the basis of that material. He relied upon an extract from the report of the Regional Transport Authority, South Arcot, dated January 31, 1957. That was a report sent by the said Authority to the State Transport Authority Against the name of the first respondent in column 4 under the heading “possession of workshop or repair or maintenance facilities and its location” it is stated, “maintaining a workshop at per *G. O.* at Cuddalore.” Again in the report sent by the State Transport Authority to the State Transport Appellate Tribunal, against the name of the first respondent in column 8 under the heading “Place of residence or principal place of business and the nearest distance” the entry is “Cuddalore on the route.” This information given by the Transport Authority is presumably gathered from the earlier report of the Regional Transport Authority. Reliance is placed upon a letter dated January 10, 1957 written by the first respondent to the Secretary, State Transport Authority, in support of the contention that even the first respondent, though on July 11, 1956, he claimed to have had a workshop at Chidambaram, did not mention it therein.

But a perusal of that letter shows that he did mention that he had the sector and terminal qualifications. Basing the argument on the said documents, it was contended that there was material on which the Appellate Tribunal could have come to the finding which it did viz. that the first respondent had no workshop at either the termini of the route. Firstly, these

documents were not expressly relied upon by the Tribunal for holding that the first respondent had no workshop at Chidambaram. Secondly, these documents were not relied upon by the appellant either before Srinivasan, J. or before the Division Bench to the effect that the Appellate Tribunal gave a finding on the basis of the said material. Thirdly, one of the said documents viz. the letter of the first respondent does not support the contention. The other two reports did not say that the first respondent had no workshop at Chidambaram. The officers who made the report did not make any enquiry as regards the fact whether first respondent had a workshop at Chidambaram on the basis of claim-made by him. There is therefore, absolutely no evidence to controvert the first respondent's claim and that is the reason why the appellant did not place the said documents before the High Court in support of his contention that there was material before the State Transport Authority and the State Transport Appellate Tribunal for holding that the first respondent had no workshop at Chidambaram. A perusal of the two orders shows that presumably in view of the of the innumerable applications, the specific claim of the first respondent was completely missed by the Transport Authority and the Appellate Tribunal. This is, therefore, a clear case of a finding made by the Tribunal without any evidence to support it and by ignoring a specific claim made before it. I am, therefore, of opinion that the High Court rightly set aside the order of the Appellate Tribunal.

26. The next question is whether this is a fit case for interference under Article 136 of the Constitution in exercise of this Court's extraordinary jurisdiction thereunder. Srinivasan J. and on appeal the Division Bench on the basis of the material placed and the concession made before them, came to the conclusion that the Appellate Tribunal had ignored the specific claim set up by the first respondent. The first respondent had secured the highest number of marks. His claim, if substantiated, would certainly tilt the balance in his favour. The material placed before us was not relied upon by the appellant before the High Court. The High Court gave a farther opportunity to the Appellate Tribunal to consider the claim of the first respondent. Though the High Court quashed the order of the Tribunal, the observation in the judgment clearly shows that the Tribunal could reconsider the matter. Indeed, learned counsel for the first respondent conceded that fact. The appellant would have every opportunity to establish that the first respondent has no workshop at Chidambaram. Instead of following the straight course, he is trying to shut out further enquiry to arrive at the truth. In the circumstances I am of the view that this is not a case which calls for the exercise of this Court's extraordinary jurisdiction to set aside the order of the High Court.

ORDER

In accordance with the opinion of the majority, the appeal is allowed and the Writ Petition filed by Respondent 1 is dismissed.

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Surya Dev Rai v. Ram Chander Rai

AIR 2003 SC 3044 : (2003) 6 SCC 675

R.C. LAHOTI, J. - 3. This appeal raises a question of frequent occurrence before the High Courts as to what is the impact of the amendment in Section 115 CPC brought in by Act 46 of 1999 w.e.f. 1-7-2002, on the power and jurisdiction of the High Court to entertain petitions seeking a writ of certiorari under Article 226 of the Constitution or invoking the power of superintendence under Article 227 of the Constitution as against similar orders, acts or proceedings of the courts subordinate to the High Courts, against which earlier the remedy of filing civil revision under Section 115 CPC was available to the person aggrieved. Is an aggrieved person completely deprived of the remedy of judicial review, if he has lost at the hands of the original court and the appellate court, though a case of gross failure of justice has been occasioned, can be made out?

4. Section 115 of the Code of Civil Procedure, as amended, does not now permit a revision petition being filed against an order disposing of an appeal against the order of the trial court whether confirming, reversing or modifying the order of injunction granted by the trial court. The reason is that the order of the High Court passed either way would not have the effect of finally disposing of the suit or other proceedings. The exercise of revisional jurisdiction in such a case is taken away by the proviso inserted under sub-section (1) of Section 115 CPC. The amendment is based on the Malimath Committee's recommendations. The Committee was of the opinion that the expression employed in Section 115 CPC, which enables interference in revision on the ground that the order if allowed to stand would occasion a failure of justice or cause irreparable injury to the party against whom it was made, left open wide scope for the exercise of the revisional power with all types of interlocutory orders and this was substantially contributing towards delay in the disposal of cases. The Committee did not favour denuding the High Court of the power of revision but strongly felt that the power should be suitably curtailed. The effect of the erstwhile clause (b) of the proviso, being deleted and a new proviso having been inserted, is that the revisional jurisdiction, in respect of an interlocutory order passed in a trial or other proceedings, is substantially curtailed. A revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied.

5. As a prelude to search for answer to the question posed, it becomes necessary to recollect and restate a few well-established principles relating to the constitutional jurisdiction conferred on the High Court under Articles 226 and 227 of the Constitution in the backdrop of the amended Section 115 CPC.

Writ of certiorari

6. According to *Corpus Juris Secundum* (Vol. 14, page 121) certiorari is a writ issued from a superior court to an inferior court or tribunal commanding the latter to send up the record of a particular case.

7. H.W.R. Wade and C.F. Forsyth define certiorari in these words:

“Certiorari is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass

the test, it is quashed - that is to say, it is declared completely invalid, so that no one need respect it.

The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. This is the concern of the Crown, for the sake of orderly administration of justice, but it is a private complaint which sets the Crown in motion.” [Administrative Law, 8th Ed., p. 591].

8. The learned authors go on to add that problem arose on exercising control over justices of the peace, both in their judicial and their administrative functions as also the problem of controlling the special statutory body which was addressed to by the Court of King’s Bench.

“The most useful instruments which the Court found ready to hand were the prerogative writs. But not unnaturally the control exercised was strictly legal, and no longer political. Certiorari would issue to call up the records of justices of the peace and commissioners for examination in the King’s Bench and for quashing if any legal defect was found. At first there was much quashing for defects of form on the record i.e. for error on the face. Later, as the doctrine of ultra vires developed, that became the dominant principle of control.”

9. The nature and scope of the writ of certiorari and when can it issue was beautifully set out in a concise passage, quoted hereafter, by Lord Chancellor Viscount Simon in *Ryots of Garabandho v. Zamindar of Parlakimedi* [AIR 1943 PC 164]:

“The ancient writ of certiorari in England is an original writ which may issue out of a superior court requiring that the record of the proceedings in some cause or matter pending before an inferior court should be transmitted into the superior court to be there dealt with. The writ is so named because, in its original Latin form, it required that the King should ‘be certified’ of the proceedings to be investigated, and the object is to secure by the exercise of the authority of a superior court, that the jurisdiction of the inferior tribunal should be properly exercised. This writ does not issue to correct purely executive acts, but, on the other hand, its application is not narrowly limited to inferior ‘courts’ in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, certiorari will lie. The remedy, in point of principle, is derived from the superintending authority which the Sovereign’s superior courts, and in particular the Court of King’s Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King’s dominions, and operates, within certain limits, in British India.”

10. Article 226 of the Constitution of India preserves to the High Court the power to issue writ of certiorari amongst others. The principles on which the writ of certiorari is issued are well settled. It would suffice for our purpose to quote from the seven-Judge Bench decision of this Court in *Hari Vishnu Kamath v. Ahmad Ishaque* [AIR 1955 SC 233]. The four propositions laid down therein were summarized by the Constitution Bench in *Custodian of Evacuee Property v. Khan Saheb Abdul Shukoor* [AIR 1961 SC 1087], as under:

“[T]he High Court was not justified in looking into the order of 2-12-1952, as an appellate court, though it would be justified in scrutinizing that order as if it was

brought before it under Article 226 of the Constitution for issue of a writ of certiorari. The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by this Court in *Hari Vishnu Kamath v. Ahmad Ishaque* and the following four propositions were laid down -

- (1) Certiorari will be issued for correcting errors of jurisdiction;
- (2) Certiorari will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;
- (3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous;
- (4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision.”

11. In the initial years the Supreme Court was not inclined to depart from the traditional role of certiorari jurisdiction and consistent with the historical background felt itself bound by such procedural technicalities as were well known to the English Judges. In later years the Supreme Court has relaxed the procedural and technical rigours, yet the broad and fundamental principles governing the exercise of jurisdiction have not been given a go-by.

12. In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a court which has jurisdiction over a subject-matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an appellate court and step into reappreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court.

13. In *Nagendra Nath Bora v. Commr. of Hills Division and Appeals* [AIR 1958 SC 398], the parameters for the exercise of jurisdiction, calling upon the issuance of writ of certiorari were so set out by the Constitution Bench:

The common law writ, now called the order of certiorari, which has also been adopted by our Constitution, is not meant to take the place of an appeal where the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction. Where the errors cannot be said to be errors of law apparent on the face of the record, but they are merely errors in appreciation of documentary evidence or affidavits, errors in drawing inferences or omission to draw inference or in other words errors which a court sitting as a court of appeal only, could have examined and, if necessary, corrected and the Appellate Authority under the statute in question has unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction and it

has not been shown that in exercising its powers the Appellate Authority disregarded any mandatory provisions of the law but what can be said at the most was that it had disregarded certain executive instructions not having the force of law, there is no case for the exercise of the jurisdiction under Article 226.

14. The Constitution Bench in *T.C. Basappa v. T. Nagappa* [AIR 1954 SC 440], held that certiorari may be and is generally granted when a court has acted (i) without jurisdiction, or (ii) in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the court itself may not have been legally constituted or suffering from certain disability by reason of extraneous circumstances. Certiorari may also issue if the court or tribunal though competent has acted in flagrant disregard of the rules or procedure or in violation of the principles of natural justice where no particular procedure is prescribed. An error in the decision or determination itself may also be amenable to a writ of certiorari subject to the following factors being available if the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law but a mere wrong decision is not amenable to a writ of certiorari.

15. Any authority or body of persons constituted by law or having legal authority to adjudicate upon questions affecting the rights of a subject and enjoined with a duty to act judicially or quasi-judicially is amenable to the certiorari jurisdiction of the High Court. The proceedings of judicial courts subordinate to the High Court can be subjected to certiorari.

16. While dealing with the question whether the orders and the proceedings of a subordinate court are amenable to certiorari writ jurisdiction of the High Court, we would be failing in our duty if we do not make a reference to a larger Bench and a Constitution Bench decision of this Court and clear a confusion lest it should arise at some point of time. *Naresh Shridhar Mirajkar v. State of Maharashtra* [AIR 1967 SC 1] is a nine-Judge Bench decision of this Court. A learned Judge of the Bombay High Court sitting on the original side passed an oral order restraining the press from publishing certain court proceedings. This order was sought to be impugned by filing a writ petition under Article 226 of the Constitution before a Division Bench of the High Court which dismissed the writ petition on the ground that the impugned order was a judicial order of the High Court and hence not amenable to a writ under Article 226. The petitioner then moved this Court under Article 32 of the Constitution for enforcement of his fundamental rights under Articles 19(1)(a) and (g) of the Constitution. During the course of majority judgment Chief Justice Gajendragadkar quoted the following passage from Halsbury's *Laws of England* (Vol. 11, pages 129, 130) from the footnote:

“In the case of judgments of inferior courts of civil jurisdiction it has been suggested that certiorari might be granted to quash them for want of jurisdiction (*Kemp v. Balne* (1844) 13 LJ QB 149, Dow & L at p. 887), inasmuch as an error did not lie upon that ground. But there appears to be no reported case in which the judgment of an inferior court of civil jurisdiction has been quashed on certiorari, either for want of jurisdiction or on any other ground.”

His Lordship then said:

“The ultimate proposition is set out in the terms: ‘Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction.’ These observations would indicate that in England the judicial orders passed by civil courts of plenary jurisdiction in or in relation to matters brought before them are not held to be amenable to the jurisdiction to issue writs of certiorari.”

17. A perusal of the judgment shows that the above passage has been quoted “incidentally” and that too for the purpose of finding authority for the proposition that a Judge sitting on the original side of the High Court cannot be called a court “inferior or subordinate to the High Court” so as to make his orders amenable to writ jurisdiction of the High Court. Secondly, the above said passage has been quoted but nowhere the Court has laid down as law by way of its own holding that a writ of certiorari by the High Court cannot be directed to a court subordinate to it. And lastly, the passage from Halsbury quoted in *Naresh Shridhar Mirajkar* case is from the third edition of Halsbury’s *Laws of England* (Simond’s Edn., 1955). The law has undergone a change in England itself and this changed legal position has been noted in a Constitution Bench decision of this Court in *Rupa Ashok Hurra v. Ashok Hurra* (2002) 4 SCC 388. Justice S.S.M. Quadri speaking for the Constitution Bench has quoted the following passage from Halsbury’s *Laws of England*, 4th Edn. (Reissue), Vol. 1(1):

“103. Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King’s Bench for review or to remove indictments for trial in that court; mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty. All three were called prerogative writs;

109. Certiorari lies to bring decisions of an inferior court, tribunal, public authority or any other body of persons before the High Court for review so that the Court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition are employed for the control of inferior courts, tribunals and public authorities.”

18. *Naresh Shridhar Mirajkar* case was cited before the Constitution Bench in *Rupa Ashok Hurra* case and considered. It has been clearly held: (i) that it is a well-settled principle that the technicalities associated with the prerogative writs in English law have no role to play under our constitutional scheme; (ii) that a writ of certiorari to call for records and examine the same for passing appropriate orders, is issued by a superior court to an inferior court which certifies its records for examination; and (iii) that a High Court cannot issue a writ to another High Court, nor can one Bench of a High Court issue a writ to a different Bench of the High Court; much less can the writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. The High Courts are not constituted as inferior courts in our constitutional scheme.

19. Thus, there is no manner of doubt that the orders and proceedings of a judicial court subordinate to the High Court are amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.

20. Authority in abundance is available for the proposition that an error apparent on the face of record can be corrected by certiorari. The broad working rule for determining what is a patent error or an error apparent on the face of the record was well set out in *Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale* [AIR 1960 SC 137]. It was held that the alleged error should be self-evident. An error which needs to be established by lengthy and complicated arguments or an error in a long-drawn process of reasoning on points where there may conceivably be two opinions cannot be called a patent error. In a writ of certiorari the High Court may quash the proceedings of the tribunal, authority or court but may not substitute its own findings or directions in lieu of the one given in the proceedings forming the subject-matter of certiorari.

21. Certiorari jurisdiction though available is not to be exercised as a matter of course. The High Court would be justified in refusing the writ of certiorari if no failure of justice has been occasioned. In exercising the certiorari jurisdiction the procedure ordinarily followed by the High Court is to command the inferior court or tribunal to certify its record or proceedings to the High Court for its inspection so as to enable the High Court to determine whether on the face of the record the inferior court has committed any of the preceding errors occasioning failure of justice.

Supervisory jurisdiction under Article 227

22. Article 227 of the Constitution confers on every High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction excepting any court or tribunal constituted by or under any law relating to the armed forces. Without prejudice to the generality of such power the High Court has been conferred with certain specific powers by clauses (2) and (3) of Article 227 with which we are not concerned hereat. It is well settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. Else the parameters invoking the exercise of power are almost similar.

23. The history of supervisory jurisdiction exercised by the High Court, and how the jurisdiction has culminated into its present shape under Article 227 of the Constitution, was traced in *Waryam Singh v. Amarnath* [AIR 1954 SC 215]. The jurisdiction can be traced back to Section 15 of the High Courts Act, 1861 which gave a power of judicial superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court. Section 107 of the Government of India Act, 1915 and then Section 224 of the Government of India Act, 1935, were similarly

worded and reproduced the predecessor provision. However, sub-section (2) was added in Section 224 which confined the jurisdiction of the High Court to such judgments of the inferior courts which were not otherwise subject to appeal or revision. That restriction has not been carried forward in Article 227 of the Constitution. In that sense Article 227 of the Constitution has width and vigour unprecedented.

Difference between a writ of certiorari under Article 226 and supervisory jurisdiction under Article 227

24. The difference between Articles 226 and 227 of the Constitution was well brought out in *Umaji Keshao Meshram v. Radhikabai* [1986 Supp SCC 401]. Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this article to tribunals as well. Though, the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when: (i) the court or tribunal has assumed a jurisdiction which it does not have; (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice; and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.

25. Upon a review of decided cases and a survey of the occasions, wherein the High Courts have exercised jurisdiction to command a writ of certiorari or to exercise supervisory jurisdiction under Article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labelling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions. Firstly, the writ of certiorari is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate, revisional or corrective jurisdiction. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, maybe, by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being

exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well.

26. In order to safeguard against a mere appellate or revisional jurisdiction being exercised in the garb of exercise of supervisory jurisdiction under Article 227 of the Constitution, the courts have devised self-imposed rules of discipline on their power. Supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved. The High Court may have regard to legislative policy formulated on experience and expressed by enactments where the legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of the proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceedings to judicial review by way of appeal or revision. So long as an error is capable of being corrected by a superior court in exercise of appellate or revisional jurisdiction, though available to be exercised only at the conclusion of the proceedings, it would be sound exercise of discretion on the part of the High Court to refuse to exercise the power of superintendence during the pendency of the proceedings. However, there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error committed by the inferior court or tribunal would be incapable of being remedied once the proceedings have concluded.

27. In *Chandrasekhar Singh v. Siya Ram Singh* [(1979) 3 SCC 118], the scope of jurisdiction under Article 227 of the Constitution came up for the consideration of this Court in the context of Sections 435 and 439 of the Criminal Procedure Code which prohibits a second revision to the High Court against decision in first revision rendered by the Sessions Judge. On a review of earlier decisions, the three-Judge Bench summed up the position of law as under:

(i) that the powers conferred on the High Court under Article 227 of the Constitution cannot, in any way, be curtailed by the provisions of the Code of Criminal Procedure;

(ii) the scope of interference by the High Court under Article 227 is restricted. The power of superintendence conferred by Article 227 is to be exercised sparingly and only in appropriate cases, in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors;

(iii) that the power of judicial interference under Article 227 of the Constitution is not greater than the power under Article 226 of the Constitution;

(iv) that the power of superintendence under Article 227 of the Constitution cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as the court of appeal; the High Court cannot, in exercise of its jurisdiction under Article 227, convert itself into a court of appeal.

28. Later, a two-Judge Bench of this Court in *Baby v. Travancore Devaswom Board* [(1998) 8 SCC 310] clarified that in spite of the revisional jurisdiction being not available to the High Court, it still had powers under Article 227 of the Constitution of India to quash the orders passed by the Tribunals if the findings of fact had been arrived at by non-consideration of the relevant and material documents, the consideration of which could have led to an

opposite conclusion. This power of the High Court under the Constitution of India is always in addition to the revisional jurisdiction conferred on it.

Does the amendment in Section 115 CPC have any impact on jurisdiction under Articles 226 and 227?

29. The Constitution Bench in *L. Chandra Kumar v. Union of India* [(1997) 3 SCC 261] dealt with the nature of power of judicial review conferred by Article 226 of the Constitution and the power of superintendence conferred by Article 227. It was held that the jurisdiction conferred on the Supreme Court under Article 32 of the Constitution and on the High Courts under Articles 226 and 227 of the Constitution is a part of the basic structure of the Constitution, forming its integral and essential feature, which cannot be tampered with much less taken away even by constitutional amendment, not to speak of a parliamentary legislation. A recent Division Bench decision by the Delhi High Court (Dalveer Bhandari and H.R. Malhotra, JJ.) in *Govind v. State (Govt. of NCT of Delhi)* [(2003) 6 ILD 468 (Del)] makes an in-depth survey of decided cases including almost all the leading decisions by this Court and holds:

“74. The powers of the High Court under Article 226 cannot be whittled down, nullified, curtailed, abrogated, diluted or taken either by judicial pronouncement or by the legislative enactment or even by the amendment of the Constitution. The power of judicial review is an inherent part of the basic structure and it cannot be abrogated without affecting the basic structure of the Constitution.”

The essence of constitutional and legal principles, relevant to the issue at hand, has been correctly summed up by the Division Bench of the High Court and we record our approval of the same.

30. It is interesting to recall two landmark decisions delivered by the High Courts and adorning the judicial archives. In *Balkrishna Hari Phansalkar v. Emperor* [AIR 1933 Bom. 1] the question arose before a Special Bench: whether the power of superintendence conferred on the High Court by Section 107 of the Government of India Act, 1915 can be controlled by the Governor-General exercising his power to legislate. The occasion arose because of the resistance offered by the State Government to the High Court exercising its power of superintendence over the Courts of Magistrates established under the Emergency Powers Ordinance, 1932. Chief Justice Beaumont held that even if the power of revision is taken away, the power of superintendence over the courts constituted by the Ordinance was still available. The Governor-General cannot control the powers conferred on the High Court by an Act of Imperial Parliament. However, speaking of the care and caution to be observed while exercising the power of superintendence though possessed by the High Court, the learned Chief Justice held that the power of superintendence is not the same thing as the hearing of an appeal. An illegal conviction may be set aside under the power of superintendence but - “we must exercise our discretion on judicial grounds, and only interfere if considerations of justice require us to do so” (AIR p. 7).

31. In *Manmatha Nath Biswas v. Emperor* [AIR 1933 Cal 132], a conviction based on no legal reason and unsustainable in law came up for the scrutiny of the High Court under the power of superintendence in spite of the right of appeal having been allowed to lapse.

Speaking of the nature of power of superintendence, the Division Bench, speaking through Chief Justice Rankin, held that the power of superintendence vesting in the High Court under Section 107 of the Government of India Act, 1915, is not a limitless power available to be exercised for removing hardship of particular decisions. The power of superintendence is a power of known and well-recognised character and should be exercised on those judicial principles which give it its character. The mere misconception on a point of law or a wrong decision on facts or a failure to mention by the court in its judgment every element of the offence, would not allow the order of the Magistrate being interfered with in exercise of the power of superintendence but the High Court can and should see that no man is convicted without a legal reason. A defect of jurisdiction or fraud on the part of the prosecutor or error on the “face of the proceedings” as understood in Indian practice, provides a ground for the exercise of the power of superintendence. The line between the two classes of case must be, however, kept clear and straight. In general words, the High Court’s power of superintendence is a power to keep subordinate courts within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner.

32. The principles deducible, well-settled as they are, have been well summed up and stated by a two-Judge Bench of this Court recently in *State v. Navjot Sandhu* [(2003) 6 SCC 641]. This Court held:

- (i) the jurisdiction under Article 227 cannot be limited or fettered by any Act of the State Legislature;
- (ii) the supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with an interlocutory order;
- (iii) the power must be exercised sparingly, only to keep subordinate courts and tribunals within the bounds of their authority to see that they obey the law. The power is not available to be exercised to correct mere errors (whether on the facts or laws) and also cannot be exercised “as the cloak of an appeal in disguise.

33. In *Shiv Shakti Coop. Housing Society v. Swaraj Developers* [(2003) 6 SCC 659], another two-Judge Bench of this Court dealt with Section 115 CPC. The Court at the end of its judgment noted the submission of the learned counsel for a party that even if the revisional applications are held to be not maintainable, there should not be a bar on a challenge being made under Article 227 of the Constitution for which an opportunity was prayed to be allowed. The Court observed: “If any remedy is available to a party ... no liberty is necessary to be granted for availing the same.”

34. We are of the opinion that the curtailment of revisional jurisdiction of the High Court does not take away - and could not have taken away - the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court nor is the power of superintendence conferred on the High Court under Article 227 of the Constitution taken away or whittled down. The power exists, untrammelled by the amendment in Section 115 CPC, and is available to be exercised subject to rules of self-discipline and practice which are well settled.

35. We have carefully perused the Full Bench decision of the Allahabad High Court in *Ganga Saran* case relied on by the learned counsel for the respondent and referred to in the impugned order of the High Court. We do not think that the decision of the Full Bench has

been correctly read. Rather, vide para 11, the Full Bench has itself held that where the order of the civil court suffers from patent error of law and further causes manifest injustice to the party aggrieved, then the same can be subjected to a writ of certiorari. The Full Bench added that every interlocutory order passed in a civil suit is not subject to review under Article 226 of the Constitution but if it is found from the order impugned that fundamental principle of law has been violated and further, such an order causes substantial injustice to the party aggrieved, the jurisdiction of the High Court to issue a writ of certiorari is not precluded. However, the following sentence occurs in the judgment of the Full Bench:

“Where an aggrieved party approaches the High Court under Article 226 of the Constitution against an order passed in civil suit refusing to issue injunction to a private individual who is not under statutory duty to perform public duty or vacating an order of injunction, the main relief is for issue of a writ of mandamus to a private individual and such a writ petition under Article 226 of the Constitution would not be maintainable.”

36. It seems that the High Court in its decision impugned herein formed an impression from above-quoted passage that a prayer for issuance of injunction having been refused by the trial court as well as the appellate court, both being subordinate to the High Court and the dispute being between two private parties, issuance of injunction by the High Court amounts to issuance of a mandamus against a private party, which is not permissible in law.

37. The above-quoted sentence from *Ganga Saran* case cannot be read torn out of the context. All that the Full Bench has said is that while exercising certiorari jurisdiction over a decision of the court below refusing to issue an order of injunction, the High Court would not, while issuing a writ of certiorari, also issue a mandamus against a private party. Article 227 of the Constitution has not been referred to by the Full Bench. Earlier, in this judgment we have already pointed out the distinction between Article 226 and Article 227 of the Constitution and we need not reiterate the same. In this context, we may quote the Constitution Bench decision in *T.C. Basappa v. T. Nagappa* and *Province of Bombay v. Khushaldas S. Advani* [AIR 1950 SC 222] as also a three-Judge Bench decision in *Dwarka Nath v. ITO* [AIR 1966 SC 81], which have held in no uncertain terms, as the law has always been, that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine questions affecting the rights of subjects and obliged to act judicially. We are therefore of the opinion that the writ of certiorari is directed against the act, order or proceedings of the subordinate court, it can issue even if the lis is between two private parties.

38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:

(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are

nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid (above said) two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst (there against) and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

39. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a strait-jacket formula or rigid rules. Not less than often, the High Court would be faced with a dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where “a stitch in time would save nine”. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge.

40. The appeal is allowed. The order of the High Court refusing to entertain the petition filed by the appellant, holding it not maintainable, is set aside. The petition shall stand restored on the file of the High Court, to be dealt with by an appropriate Bench consistently with the rules of the High Court, depending on whether the petitioner before the High Court is seeking a writ of certiorari or invoking the supervisory jurisdiction of the High Court.

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***Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav
Smarak Trust v. V.R. Rudani***

(1989) 2 SCC 691 : AIR 1989 SC 1607

[Can the writ of mandamus be issued against any individual or private body?]

Article 226 of the Constitution of India reads:

“226. *Power of High Courts to issue certain writs* - (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose....”

Appellant 1 was a public trust with other appellants as trustees. The trust was running a science college at Ahmedabad. The college had affiliation under the Gujarat University Act. The University teachers and employees were paid in the pay scale recommended by the University Grants Commission. There was some dispute between the University Area Teachers’ Association and the University about the implementation of certain pay scales. That dispute was referred to the Chancellor who gave his award in the following terms:

“(1) That the revised pay scales as applicable to teachers who joined before 1-4-1966, should similarly be applicable to those who joined after 1-4-1966 and they be continued even after 1-4-1971.

(2) That these pay scales be exclusive of dearness allowance. Therefore, fixing the pay of the teachers who joined after 1-4-1966, no portion of existing dearness allowance would be merged. However, with effect from 1-4-1971 in respect of both the categories of teachers i.e. pre-1966 and post-1966 teachers, dearness allowance was to be merged with the salary.

(3) That arrears for the period from 1-4-1966 to 31-3-1970 accruing due under the award were to be paid (without interest) in ten equal installments beginning from 1-4-1971.

(4) The award was to be given effect to from 1-4-1970.”

This award of the Chancellor was accepted by the State Government as well as by the University. The latter issued direction to all affiliated colleges to pay their teachers in terms thereof. The appellants instead of implementing the award served notice of termination upon 11 teachers on the ground that they were surplus and approached the University for permission to remove them. But the Vice-Chancellor did not accede to their request. He refused the permission sought for. There then the management (the trust) took a suicidal decision to close down the college to the detriment of teachers and students. The affiliation of the college was surrendered and the University was informed that the management did not propose to admit any student from the academic year 1975-76. The college was closed with effect from 15-6-1975 with the termination of services of all the academic staff.

The academic staff under law were entitled to terminal benefits which the management did not pay. The teachers waited with repeated representations only to get a negative reply and ultimately, they moved the High Court with writ petitions. The trust resisted the writ petitions on every conceivable ground. The objections raised by the trust were: (i) The trust was not a statutory body and is not subject to the writ jurisdiction of the High Court; (ii) the Resolution of the University directing payment to teachers in the revised pay scales was not binding on the trust; (iii) the University had no power to burden the trust with additional financial liability by retrospectively revising the pay scales; (iv) the claim for gratuity by retrenched teachers was untenable. The same was payable only to teachers retiring, resigning, or dying and not to those removed on account of closure of the college; and (v) Ordinance 120-E prescribing closure compensation was *ultra vires* the powers of the syndicate and at any rate not binding on the trust since it was enacted prior to affiliation of the college.

The High Court rejected all these submissions, and accepted the writ petitions by delivering a lengthy judgment. The High Court thus directed the trust to make payments.

K. GANNATHA SHETTY, J. - 9. Counsel for the appellants mercifully concedes the just right of the teachers to get salary for the period of two and a half months from 1-4-1974 to 14-6-1974. He has also no objection to pay provident fund dues. He, however, says that the trust is entitled to get reimbursement from the government and that question must be determined in these appeals. As regards the arrears of salary payable under the Chancellor's award, the counsel contends that it is the liability of the government and not of the management of the college. As regards the closure compensation payable under the Ordinance, he repeats the contention taken before the High Court. He also maintains that the trust is a private body and is not subject to the writ jurisdiction under Article 226.

10. Having heard the counsel for both parties, we are left with an impression that the appellants are really trying to sidetrack the issue and needlessly delaying the legitimate payments due to the respondents. The question whether the State is liable to recompense the appellants in respect of the amount payable to the respondents was not considered by the High Court and indeed could not have been examined since the State was not a party to the proceedings. However, by the persuasive powers of the counsel in this Court, the State has been impleaded as a party in these appeals. Perhaps, this Court wanted to find out the reaction of the State on the appellants' assertion for reimbursement. We heard counsel for the State. He disputes the appellants' claim. In fact, he challenges the claim on a number of grounds. He says that the State is under no obligation to pay the appellants as against the sum due to the respondents. We do not think that we need rule today on this controversy. It is indeed wholly outside the scope of these appeals. We are only concerned with the liability of the management of the college towards the employees. Under the relationship of master and servant, the management is primarily responsible to pay salary and other benefits to the employees. The management cannot say that unless and until the State compensates, it will not make full payment to the staff. We cannot accept such a contention.

11. Two questions, however, remain for consideration: (i) The liability of the appellants to pay compensation under Ordinance 120-E and (ii) The maintainability of the writ petition for mandamus as against the management of the college. The first question presents no

problem since we do not find any sustainable argument. The power of the Syndicate to enact the Ordinance is not in doubt or dispute. What is, however, argued is that the Ordinance is not binding on the management since it was enacted before the college was affiliated to the University. This appears to be a desperate contention overlooking the antecedent event. The counsel overlooks the fact that the college had temporary affiliation even earlier to the Ordinance. That apart, the benefits under the Ordinance shall be given when the college is closed. The college in the instant case was closed admittedly after the Ordinance was enacted. The appellants cannot, therefore, be heard to contend that they are not liable to pay compensation under the Ordinance.

12. The essence of the attack on the maintainability of the writ petition under Article 226 may now be examined. It is argued that the management of the college being a trust registered under the Bombay Public Trust Act is not amenable to the writ jurisdiction of the High Court. The contention in other words, is that the trust is a private institution against which no writ of mandamus can be issued. In support of the contention, the counsel relied upon two decisions of this Court: (a) *Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain* [(1976) 2 SCR 1006] and (b) *Deepak Kumar Biswas v. Director of Public Instructions* [(1987) 2 SCC 252]. In the first of the two cases, the respondent institution was a Degree College managed by a registered cooperative society. A suit was filed against the college by the dismissed principal for reinstatement. It was contended that the Executive Committee of the college which was registered under the Cooperative Societies Act and affiliated to the Agra University (and subsequently to Meerut University) was a statutory body. The importance of this contention lies in the fact that in such a case, reinstatement could be ordered if the dismissal is in violation of statutory obligation. But this Court refused to accept the contention. It was observed that the management of the college was not a statutory body since not created by or under a statute. It was emphasised that an institution which adopts certain statutory provisions will not become a statutory body and the dismissed employee cannot enforce a contract of personal service against a non-statutory body.

13. The decision in *Vaish Degree College* was followed in *Deepak Kumar Biswas* case. There again a dismissed lecturer of a private college was seeking reinstatement in service. The Court refused to grant the relief although it was found that the dismissal was wrongful. This Court instead granted substantial monetary benefits to the lecturer. This appears to be the preponderant judicial opinion because of the common law principle that a service contract cannot be specifically enforced.

14. But here the facts are quite different and, therefore, we need not go thus far. There is no plea for specific performance of contractual service. The respondents are not seeking a declaration that they be continued in service. They are not asking for mandamus to put them back into the college. They are claiming only the terminal benefits and arrears of salary payable to them. The question is whether the trust can be compelled to pay by a writ of mandamus?

15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated

that the appellants-trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character (See *The Evolving Indian Administrative Law* by M.P. Jain (1983), p. 226). So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

16. The law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, Lord Gardiner (the Lord Chancellor) in pursuance of Section 3(1)(e) of the Law Commission Act, 1965, requested the Law Commission “to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure”. The Law Commission made their report in March 1976 (Law Commission Report No. 73). It was implemented by Rules of Court (Order 53) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act, 1981. It combined all the former remedies into one proceeding called Judicial Review. Lord Denning explains the scope of this “judicial review”

“At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery, and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a judge.

The statute is phrased in flexible terms. It gives scope for development. It uses the words “having regard to”. Those words are very indefinite. The result is that the courts are not bound hand and foot by the previous law. They are to ‘have regard to’ it. So the previous law as to who are - and who are not - public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may be granted. This means that the judges can develop the public law as they think best. That they have done and are doing.”

17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The ‘public authority’ for them means everybody which is created by statute - and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all ‘public authorities’. But there is no such limitation for our High Courts to issue the writ ‘in the nature of mandamus’. Article 226 confers wide powers on the

High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to “any person or authority”. It can be issued “for the enforcement of any of the fundamental rights and for any other purpose”.

19. The scope of this article has been explained by Subba Rao, J., in *Dwarkanath v. ITO* [(1965) 3 SCR 536]:

“This article is couched in comprehensive phraseology and it ex-facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression “nature”, for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself.”

20. The term “authority” used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words “any person or authority” used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

21. In *Praga Tools Corporation v. C.A. Imanul* [(1969) 3 SCR 773], this Court said that a mandamus can issue against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body. It was observed:

“It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities.”

22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." *Judicial Review of Administrative Action*, 4th Edn., p. 540. We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.

23. In the result, the appeals fail and are dismissed but with a direction to the appellants to pay all the amounts due to the respondents as per the judgment of the High Court.

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Common Cause v. Union of India

AIR 2003 SC 4493

[No mandamus for exercise of discretionary power]

The question whether the Court can issue a mandamus directing the Executive to notify the Act / Amendment came up for consideration in this case. In relation to the Delhi Rent Act, 1995, the Supreme Court held that when the legislature itself had vested the power in the Central Government to notify the date from which the Act would come into force, then, the Central Government is entitled to take into consideration various facts while considering when the Act should be brought into force and no mandamus can be issued to the Central Government to issue the notification bringing the Act into force.

Rupa Ashok Hurra v. Ashok Hurra and Another
AIR 2002 SC 177

Question before the Constitution Bench: “Whether the judgement of this Court dated 10-3-1997 in Civil Appeal No. 1843 of 1997 (Ashok Hurra v. Rupa Bivin Zaveri, (1997) 4 SCC 226 can be regarded as a nullity and whether a writ petition under Article 32 of the Constitution can be maintained to question the validity of a judgement of this Court after the petition for review of the said judgement has been dismissed are, in our opinion, questions which need to be considered by a Constitution Bench of this Court.”

SYED SHAH MOHAMMED QUADRI, J. – A perusal of the article, quote above, shows it contains four clauses, Clause (1) guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III fundamental rights. By clause (2) the Supreme Court is vested with the power 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 right conferred by Part III. Without prejudice to the powers (powers) of the Supreme court in the aforementioned clauses (1) and (2), Parliament is enabled, by clause (3), to empower by law any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). The constitutional mandate embodied in clause (4) is that Article 32 shall not be suspended except as otherwise provided for by the Constitution.

16. In fairness to the learned counsel for the parties, we record that all of them at the close of the hearing of these cases conceded that the jurisdiction of this Court under Article 32 of the Constitution cannot be invoked to challenge the validity of a final judgment/order passed by this Court after exhausting the remedy of review under Article 137 of the Constitution read with Order XL Rule 1 of the Supreme Court Rules 1966.

17. However, all the learned counsel for the parties as also the learned Attorney-General who appeared as amicus curiae, on the notice of this Court, adopted an unusual unanimous approach to plead that even after exhausting the remedy of review under Article 137 of the Constitution, an aggrieved person might be provided with an opportunity under inherent powers of this Court to seek relief in cases of gross abuse of the process of the Court or gross miscarriage of justice because against the order of this Court the affected party cannot have recourse to any other forum.

These contentions pose the question, whether an order passed by this Court can be corrected under its inherent powers after dismissal of the review petition on the ground that it was passed either without jurisdiction or in violation of the principles of natural justice or the to unfair procedure giving scope for bias which resulted in abuse of the process of the court or miscarriage of justice to an aggrieved person.

29. The law existing in other countries is aptly summarized by Aaron Barak in his treatise thus:

“The authority to overrule exists in most countries, whether of civil law or common law tradition. Even the House of Lords in the United Kingdom is not bound any more by its precedents. The Supreme Court of the United States was never bound by its own decisions, and neither are those of Canada, Australia, and Israel.”

30. To what extent the principle of stare decisis binds this Court, was considered in the case of **Keshav Mills Co. Ltd.**(supra). The question before a Constitution Bench of Seven learned Judges of this Court was: to what extent the principle of stare decisis could be pressed into service where the power of this Court to overrule its earlier decisions was invoked. The Court expressed its view thus:

“When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions.”

31. In **Maganlal Chhaganlal’s case** (supra), a Bench of seven learned Judges of this Court considered, inter alia, the question: whether a judgment of the Supreme Court in **Northern India Caterers’ case** was required to be overruled. Khanna, J. observed:

“At the same time, it has to be borne in mind that certainty and continuity are essential ingredients of rule of law. Certainty in law would be considerably eroded and suffer a serious set back if the highest court of the land readily overrules the view expressed by it in earlier cases, even though that view has held the field for a number of years. In quite a number of cases which come up before this Court, two views are possible, and simply because the Court considers that the view not taken by the Court in the earlier case was a better view of the matter would not justify the overruling of the view. The law laid down by this Court is binding upon all courts in the country under Article 141 of the Constitution, and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the view taken by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the basis of which numerous cases have been decided and many transactions have taken place is held to be not the correct law.”

32. In the case of **The Indian Aluminium Co. Ltd.** (supra), the question before a Constitution Bench of five learned Judges was: when can this Court properly dissent from a previous view?

33. In regard to the effect of an earlier order of this Court Sawant, J. speaking for the Constitution Bench observed in **Cauvery Water Disputes Tribunal’s case** (supra) as follows:

“The decision of this Court on a question of law is binding on all courts and authorities. Hence under the said clause the President can refer a question of law only when this court has not decided it. Secondly, a decision given by this Court can be reviewed only under Article 137 read with Rule 1 of Order XL of the Supreme Court Rules, 1966 and on the conditions

mentioned therein. When, further, this Court overrules the view of law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and productive of public mischief. [See, **Bengal Immunity Company Ltd. v. State of Bihar** [1955] 2 SCR 603]"

34. In the cases of **Ramdeo Chauhan** (supra) and **Lily Thomas** (supra), the question before the Court was, the scope of the power of review of a judgment of this Court under Article 137 of the Constitution read with Section 114, Order XLVII of the C.P.C. and Order XL Rule 1 of the Supreme Court Rules, 1966.

35. In the case of **Ex parte Pinochet Ugarte (No 2)** (supra), on November 25, 1998 the House of Lords by majority 3 : 2 restored warrant of arrest of Senator Pinochet who was the Head of the State of Chile and was to stand trial in Spain for some alleged offences. It came to be known later that one of the Law Lords (Lord Hoffmann), who heard the case, had links with Amnesty International (A.I.) which had become a party to the case. This was not disclosed by him at the time of the hearing of the case by the House. Pinochet Ugarte, on coming to know of that fact, sought reconsideration of the said judgment of the House of Lords on the ground of an appearance of bias not actual bias. On the principle of disqualification of a judge to hear a matter on the ground of appearance of bias it was pointed out,

36. "The principle that a judge was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the judge's decision would lead to the promotion of a cause in which the judge was involved together with one of the parties. That did not mean that judges could not sit on cases concerning charities in whose work they were involved, and judges would normally be concerned to reuse themselves or disclose the position to the parties only where they had an active role as trustee or director of a charity which was closely allied to and acting with a party to the litigation. In the instant case, the facts were exceptional in that AI was a party to the appeal, it had been joined in order to argue for a particular result and the Law Lord was a director of a charity closely allied to AI and sharing its objects. Accordingly, he was automatically disqualified from hearing the appeal. The petition would therefore be granted and the matter referred to another committee of the House for rehearing per curiam."

37. On the point of jurisdiction of the House to correct any injustice in an earlier order, it was observed:

"In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In **Cassell & Co. Ltd. V. Broome (No.2)** 1972 (2) All ER 849 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point."

And it was held,

"An appeal to the House of Lords will only be reopened where a party through no fault of its own, has been subjected to an unfair procedure. A decision of the House of Lords will not be varied or rescinded merely because it is subsequently thought to be wrong."

39. The petitioners in these writ petitions seek re-consideration of the final judgments of this Court after they have been unsuccessful in review petitions and in that these cases are different from the cases referred to above. The provision of Order XL Rule 5 of the Supreme Court Rules bars further application for review in the same matter. The concern of the Court now is whether any relief can be given to the petitioners who challenge the final judgment of this Court, though after disposal of review petitions, complaining of the gross abuse of the process of Court and remedial injustice. In a State like India, governed by rule of law, certainty of law declared and the final decision rendered on merits in a lis between the parties by the highest court in the country is of paramount importance. The principle of finality is insisted upon not on the ground that a judgment given by the apex Court is impeccable but on the maxim “Interest republicae ut sit finis litium.”

40. At one time adherence to the principle of stare decisis was so rigidly followed in the courts governed by the English Jurisprudence that departing from an earlier precedent was considered heresy. With the declaration of the practice statement by the House of Lords, the highest court in England was enabled to depart from a previous decision when it appeared right to do so. The next step forward by the highest court to do justice was to review its judgment inter partem to correct injustice. So far as this Court is concerned, we have already pointed out above that it has been conferred the power to review its own judgments under Article 137 of the Constitution. The role of judiciary merely to interpret and declare the law was the concept of bygone age. It is no more open to debate as it is fairly settled that the courts can so mould and lay down the law formulating principles and guidelines as to adapt and adjust to the changing conditions of the society, the ultimate objective being to dispense justice. In the recent years there is a discernable shift in the approach of the final courts in favour of rendering justice on the facts presented before them, without abrogating but by-passing the principle of finality of the judgment. In **Union of India and Anr. etc. v. Raghbir Singh** (Dead) by Lrs. etc. etc. [1989]178ITR548(SC) : [1989] 178 ITR 548 (SC) Pathak, CJ. speaking for the Constitution Bench aptly observed:

“But like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for re-adjustment in a changing society, a re-adjustment of legal norms demanded by a changed social context. This need for adapting the law to new urges in society brings home the truth of the Holmesian aphorism that “the life of the law has not been logic it has been experience” (Oliver Wendell Holmes, *The Common Law*, p.5), and again when he declared in another study (Oliver Wendell Holmes, *Common Carriers and the Common Law*, 388) that, (1943) 9 CLT 387 “the law is forever adopting new principles from life at one end”, and “sloughing off” old ones at the other. Explaining the conceptual import of what Holmes had said, Julius Stone elaborated that it is by the introduction of new extra-legal propositions emerging from experience to serve as premises, or by experience-guided choice between competing legal propositions, rather than by the operation of logic upon existing legal propositions, that the growth of law tends to be determined (Julius Stone, *Legal Systems & Lawyers Reasoning*, pp.58-59)”

41. The concern of this Court for rendering justice in a cause is not less important than the principle of finality of its judgment. We are faced with competing principles – ensuring certainty and finality of a judgment of the Court of last resort and dispensing justice on

reconsideration of a judgment on the ground that it is vitiated being in violation of the principle of natural justice or apprehension of bias due to a Judge who participated in decision making process not disclosing his links with a party to the case, or abuse of the process of the court. Such a judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice - a concept which is not disputed but by a few. We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in public interest that a final judgment of the final court in the country should not be open to challenge yet there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and cause perpetuation of irremediable injustice. It may be useful to refer to the judgment of the Supreme Court of United States in **Ohio Power Company's case** (supra). In that case the Court of Claims entered judgment for refund of tax, alleged to have been overpaid, in favour of the tax payer. On the application of the Government a writ of certiorari against that judgment was declined by the Supreme Court of United States in October 1955. The Government sought re-hearing of the case by filing another application which was dismissed in December 1955. A second petition for hearing was also rejected in May 1956. However, in June 1956 the order passed in December 1955 was set aside of its own motion and that case was ordered to be heard along with two other pending cases in which the same question was presented. In those two cases the Supreme Court held against the tax payer and, on the authority of that judgment, reversed the judgment of the Court of Claims. Four learned members of the Court, in per curiam opinion, rested the decision "on the ground of interest in finality of the decision must yield where the interest of justice so required". Three learned members dissented and held that denial of certiorari had become final and ought not to be disturbed. Two learned members, however, did not participate.

42. This Court in **Harbans Singh's case** (supra), on an application under Article 32 of the Constitution filed after the dismissal of special leave petition and the review, reconsidered its judgment. In that case, among others, the petitioner and another person were convicted under Section 302 of I.P.C. and sentenced to death. In the case of one of the remaining two convicts, the Supreme Court commuted the death sentence to life imprisonment. While staying the death sentence of the petitioner, A.N. Sen, J. in his concurring opinion, noticed the dismissal of the petitioner's special leave, review petitions and the petition for clemency by the President and observed:

"Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Articles 32 and 136 of the Constitution, I am of the opinion that this Court retains and must retain an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This

power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice.”

44. In **Supreme Court Bar Association’s case** (supra), on an application filed under Article 32 of the Constitution of India, the petitioner sought declaration that the Disciplinary Committees of the Bar Councils set up under the Advocates Act, 1961, alone had exclusive jurisdiction to inquire into and suspend or debar an advocate from practising law for professional or other misconduct and that the Supreme Court of India or any High Court in exercise of its inherent jurisdiction had no such jurisdiction, power or authority in that regard. A Constitution Bench of this Court considered the correctness of the judgment of this Court in **Re Vinay Chandra Mishra**, 1995 Cri LJ 3994. The question which fell for consideration of this Court was: whether the punishment of debaring an advocate from practice and suspending his licence for a specified period could be passed in exercise of power of this Court under Article 129 read with Article 142 of the Constitution of India. There an errant advocate was found guilty of criminal contempt and was awarded the punishment of simple imprisonment for a period of six weeks and was also suspended from practice as an advocate for a period of three years from the date of the judgment of this Court for contempt of the High Court of Allahabad. As a result of that punishment all elective and nominated offices/posts then held by him in his capacity as an advocate had to be vacated by him. Elucidating the scope of the curative nature of power conferred on the Supreme Court under Article 142, it was observed:

“The plenary powers of the Supreme Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as an eparate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which the Supreme Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. It is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Supreme Court to prevent ‘clogging or obstruction of the stream of justice’.”

45. In spite of the width of power conferred by Article 142, the Constitution Bench took the view that suspending the advocate from practice and suspending his licence was not within the sweep of the power under the said Article and overruled the judgment in **Re V.C. Mishra’s case** (supra).

46. In **M.S. Ahlwat’s case** (supra), the petitioner, who was found guilty of forging signatures and making false statements at different stages before this Court, was inflicted punishment under Section 193 IPC in **Afzal v. State of Haryana**, 1996 Cri LJ 1679. He filed an application under Article 32 of the Constitution assailing the validity of that order. Taking note of the complaint of miscarriage of justice by the Supreme Court in ordering his

incarceration which ruined his career, acting without jurisdiction or without following the due procedure, it was observed that to perpetuate an error was no virtue but to correct it was a compulsion of judicial conscience. The correctness of the judgment was examined and the error was rectified.

48. The upshot of the discussion in our view is that this Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may re-consider its judgments in exercise of its inherent power.

49. The next step is to specify the requirements to entertain such a curative petition under the inherent power of this Court so that floodgates are not opened for filing a second review petition as a matter of course in the guise of a curative petition under inherent power. It is common ground that except when very strong reasons exist, the Court should not entertain an application seeking reconsideration of an order of this Court which has become final on dismissal of a review petition. It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained.

50. Nevertheless, we think that a petitioner is entitled to relief *ex debito justitiae* if he establishes (1) violation of principles of natural justice in that he was not a party to the *lis* but the judgment adversely affected his interests or, if he was a party to the *lis*, he was not served with notice of the proceedings and the matter proceeded as if he had notice and (2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

51. The petitioner, in the curative petition, shall aver specifically that the grounds mentioned therein had been taken in the review petition and that it was dismissed by circulation. The curative petition shall contain a certification by a Senior Advocate with regard to the fulfilment of the above requirements.

52. We are of the view that since the matter relates to re-examination of a final judgment of this Court, though on limited ground, the curative petition has to be first circulated to a Bench of the three senior-most Judges and the Judges who passed the judgment complained of, if available. It is only when a majority of the learned Judges on this Bench conclude that the matter needs hearing that it should be listed before the same Bench (as far as possible) which may pass appropriate orders. It shall be open to the Bench at any stage of consideration of the curative petition to ask a senior counsel to assist it as *amicus curiae*. In the event of the Bench holding at any stage that the petition is without any merit and vexatious, it may impose exemplary costs on the petitioner.

53. Insofar as the present writ petitions are concerned, the Registry shall process them, notwithstanding that they do not contain the averment that the grounds urged were specifically taken in the review petitions and the petitions were dismissed in circulation.

54. The point is accordingly answered.

Secretary General, Supreme Court of India v. Subhash Chandra Agarwal
166 (2010) DLT 305 (FB)

AJIT PRAKASH SHAH, C.J. - This appeal is directed against the judgment dated 2nd September, 2009 of the learned single Judge (S. Ravindra Bhat, J) in the writ petition filed by the Central Public Information Officer, Supreme Court of India ("the CPIO") nominated under the Right to Information Act, 2005 ("the Act") questioning correctness and legality of the order dated 6th January, 2009 of the Central Information Commission ("the CIC") whereby the request of the respondent No.1 (a public person) for supply of information concerning declaration of personal assets by the Judges of the Supreme Court was upheld.

PREFACE

2. The subject matter at hand involves questions of great importance concerning balance of rights of individuals and equities against the backdrop of paradigm changes brought about by the legislature through the Act ushering in an era of transparency, probity and accountability as also the increasing expectation of the civil society that the judicial organ, like all other public institutions, will also offer itself for public scrutiny. A citizen demanded information about asset declarations by the Judges. In this context, questions have been raised and need to be answered as to whether a "right to information" can be asserted and maintained within the meaning of the expression defined in Section 2(j) of the Act. Equally important are the questions requiring interpretation of the expressions "fiduciary", as in Section 8(1)(e) and "privacy" as in Section 8(1)(j), both used but not defined specifically by the statute.

3. When the learned single Judge set about the task of hearing submissions on the writ petition, the Attorney General for India appearing for the appellant clarified at the outset that the learned Judges of the Supreme Court are "not opposed to declaring their assets, provided that such declarations are made in accordance with due procedure laid down by a law which would prescribe (a) the authority to which the declaration would be made (b) the form in which the declaration should be made, with definitional clarity of what are „assets., and (c) proper safeguards, checks and balances to prevent misuse of information made available." After the learned single Judge had concluded the hearing and had reserved his judgment on the writ petition, certain events supervened. The Full Court of the Supreme Court resolved to place the information on the court website after modalities are duly worked out. Some High Courts, including Delhi High Court, also resolved similarly to make public the information about the declaration of assets by the Judges. The learned single Judge in the impugned judgment had given certain directions about disclosure. In the course of hearing on 7th October, 2009, on CM No.14043/2009, the learned Attorney General for India informed that the operative part in the judgment under appeal had been complied with. The appeal has been pursued on the ground that fundamental questions of law with regard to scope and applicability of the Act with specific reference to declarations of assets by the Judges of High Courts and Supreme Court persist and need to be addressed.

FACTS

4. The genesis of the dispute at hand relates to two resolutions; first, resolution dated 7th May, 1997 of the Full Court of the Supreme Court (hereinafter, "the 1997 Resolution") and

second, the "Re-statement of Values of Judicial Life (Code of Conduct)" adopted unanimously in the Conference of the Chief Justices of all High Courts convened in the Supreme Court on 3rd and 4th December, 1999 (hereinafter, "the 1999 Resolution"). Through the 1997 Resolution, Hon'ble Judges of the Supreme Court, inter alia, resolved that "every Judge should make a declaration of all his/her assets in the form of real estate or investment" held in own name or in the name of spouse or any person dependent within a reasonable time and thereafter make a disclosure "whenever any acquisition of a substantial nature is made". The 1999 Resolution, inter alia, referred to the 1997 Resolution and the draft re-statement of values of judicial life prepared on the basis, amongst others, inputs received from various High Courts and an earlier committee as also resolutions passed in the Chief Justices Conference held in 1992. The Code of Conduct, thus finalized, came to be adopted and may also be called 1999 Judicial Conference Resolution.

5. The facts of the case, briefly stated, are that the respondent (hereinafter, "the applicant") made an application to the CPIO on 10th November, 2007 under the Act making two-fold request; viz.,

- (i) to furnish a copy of the 1997 resolution of the Full Court of the Supreme Court, and
- (ii) information on any such declaration of assets etc. ever filed by Hon.ble Judges of the Supreme Court and further information if High Court Judges are submitting declaration about their assets etc. to respective Chief Justices in States.

6. The first request was granted by the CPIO and a copy of the 1997 resolution was made available to the applicant. The CPIO vide order dated 30th November, 2007, however, informed the applicant that the information sought under the second head was not held or under the control of the registry (of the Supreme Court) and, therefore, could not be furnished. The applicant preferred an appeal before the nominated appellate authority.

7. The Appellate Authority remanded the matter to CPIO, inter alia, observing that "the appellant is justified in contending that if the CPIO was not holding the information, he should have considered the question of Section 6(3). Regarding the respective States, if the CPIO was not holding information, he should have considered whether he should have invoked the provision under Section 6(3) of the Right to Information Act". The CPIO, after the said remand order, once again declined the relief, now stating that the request could not be appreciated since it was against the spirit of Section 6(3) inasmuch as the applicant had been very well aware that the information sought related to various High Courts and yet had taken a "short circuit procedure" by approaching the CPIO, Supreme Court of India, "and getting it referred to all the public authorities at the expense of one Central Public Information Officer".

8. The applicant then filed an appeal before the CIC, the apex appellate authority under the Act. The contention raised was that the CPIO had not followed the directions of the appellate authority, which originally remanded the case for decision as to whether the application had to be sent to another authority. It was also submitted before the CIC that the order of CPIO maintained a studied silence about disclosure of information regarding asset declaration by Judges of the Supreme Court to the Chief Justice of India (hereinafter, "the CJI"), in accordance with the 1997 Resolution.

9. In the appeal before the CIC, the CPIO took several defences including the submission that the Registrar of the Supreme Court did not hold the information; the information sought related to a subject matter which was "an in-house exercise" and pertained to material held by the CJI in his personal capacity. It was also submitted that the declarations made by the Judges of the Supreme Court had been made over by them to the CJI on voluntary basis in terms of the 1997 Resolution in a "fiduciary relationship". On the basis of the last said submission, it was also contended before the CIC that the disclosure of such information would be in breach of the fiduciary character attached to the material and, therefore, contrary to the provisions of Section 8(1) of the Act.

10. Before the CIC the issue concerning transfer of the request under Section 6(3) of the Act was not pressed. The CIC vide its order dated 6th January, 2009 rejected the contentions of the CPIO. He reasoned that Supreme Court is a "public authority" within the meaning of Section 2(h) of the Act since it has been established by the Constitution of India. He referred to Section 2(e)(i) to hold that the CJI is a "competent authority" empowered to frame rules under Section 28 to carry out the provisions of the Act and thus concluded that the CJI and the Supreme Court cannot disclaim being public authorities. The CIC pointed out that the information in question is maintained like any other official information available for perusal and inspection to every succeeding CJI and, therefore, cannot be categorized as "personal information" held by the CJI in his "personal capacity". It was argued before the CIC that CJI and Supreme Court of India are two distinct public authorities. This contention was repelled with further observation that the Registrar and CPIO of the Supreme Court are part of the said institution and thus not independent or distinct authorities. On this finding, it was held by CIC that the CPIO is obliged to provide the information to a citizen making an application under the Act unless the disclosure was exempt. The CIC noted that neither the CPIO nor the first appellate authority had claimed that the information asked for is exempt on account of "fiduciary relationship" or it being "personal information". He further noted that the applicant was apparently not seeking a copy (or inspection) of the declaration or the contents thereof or even the names etc. of the Judges giving the same. He concluded that the exemptions under Sections 8(1)(e) or 8(1)(j) were not attracted to the case.

11. The CIC, vide order dated 6th January, 2009 thus directed the CPIO "to provide the information asked for by the appellant in his RTI application as to whether such declaration of assets etc. has been filed by the Hon'ble Judges of the Supreme Court or not within ten working days from the date of receipt of this decision notice".

PROCEEDINGS BEFORE THE SINGLE JUDGE

12. The writ petition was preferred by the CPIO challenging the said directions of CIC in the impugned order. The applicant was impleaded as a respondent.

17. The learned single Judge proceeded to consider the rival submissions. He culled out the points for consideration (in para 27 of the impugned judgment) as under:

- (1) Whether the CJI is a public authority;
- (2) Whether the office of CPIO of the Supreme Court of India, is different from the office of the CJI; and if so, whether the Act covers the office of the CJI;

(3) Whether the asset declarations by Supreme Court judges, pursuant to the 1997 Resolution is "information", under the Right to Information Act, 2005;

(4) If such asset declarations are "information" does the CJI hold them in a "fiduciary" capacity, and are they therefore, exempt from disclosure under the Act;

(5) Whether such information is exempt from disclosure by reason of Section 8(1)(j) of the Act;

(6) Whether the lack of clarity about the details of asset declaration and about their details, as well as lack of security renders asset declarations and their disclosure, unworkable.

18. Upon consideration of the submissions made before him, the learned single Judge concluded against point Nos.1 and 2 that the CJI is a public authority under the Right to Information Act and holds the information pertaining to asset declarations in his capacity as the Chief Justice. It was also held that the office of the Chief Justice of India is "public authority" under the Act and is covered by its provisions.

19. On point No.3, it was held by the learned single Judge that the second part of the respondents application (which relates to declaration of assets by the Supreme Court Judges) is "information" within the meaning of the expression defined in Section 2(f) of the Act and further that the information pertaining to declarations given to the CJI and the contents of such declarations are "information" which is subject to the provisions of the Right to Information Act.

20. The plea of the appellant, founded on Section 8(1)(e), that the information contained in said asset declarations are held by the CJI in "fiduciary capacity" and, therefore, exempt from disclosure was held to be "insubstantial". Answering point No.4, it was held that the CJI does not hold such declarations in a fiduciary capacity or relationship.

21. The learned single Judge further held, in the context of point No.5, that the contents of asset declarations, pursuant to the 1997 Resolution, as also 1999 Resolution, are entitled to be treated as personal information which are "not otherwise subject to disclosure" but "may be accessed in accordance with the procedure prescribed under Section 8(1)(j)." On the specific information sought by the applicant in the case at hand (i.e. whether the declarations were made pursuant to 1997 Resolution), it was held that the procedure under Section 8(1)(j) is "inapplicable".

22. The appellant had also raised the issue of lack of clarity about the asset declaration and details thereof as well as lack of security, claiming further that these aspects (lack of clarity and security) rendered asset declaration and the disclosure "unworkable". This was the subject-matter of point No.6 (mentioned in para 27 of the impugned judgment). Learned single Judge observed that these are not insurmountable obstacles. In his view, the CJI, if he deems it appropriate, may in consultation with the Supreme Court Judges, evolve uniform standards, devising the nature of information, relevant formalities, and if required, the periodicity of the declarations to be made. In this context, learned single Judge referred to the forms evolved as well as the procedures followed in the United States (including the "redaction" of the norms) under the Ethics in Government Act, 1978, reports of the US Judicial Conference, as well as the Judicial Disclosure Responsibility Act, 2007 (which

amended the Ethics in Government Act, 1978). Learned single Judge suggested that cue can be taken from the above norms or procedures in vogue in USA to:

- (i) restrict disclosure of personal information about family members of judges whose revelation might endanger them;
- (ii) extend the authority of the Judicial Conference to redact certain personal information of Judges from financial disclosure.

23. In view of the above findings, the learned single Judge, vide the impugned judgment, directed the appellant CPIO to reveal the information sought by the respondent applicant, about the declaration of assets (and not the contents of the declarations, as that was not sought for) made by Judges of the Supreme Court, within four weeks.

CHALLENGE IN APPEAL 2

4. This appeal was preferred by the CPIO and the Registrar of the Supreme Court impleading the applicant and the CIC as respondents. Vide order dated 7th October, 2009 of the Division Bench, upon a request by the learned Attorney General for India, CPIO and CIC were deleted from the array of parties with the further direction that Secretary General, Supreme Court of India will be the appellant. Considering the importance of the question involved, the appeal was directed to be heard by a larger Bench of three Judges.

25. It may be mentioned here that the findings to above effect returned by the learned single Judge in the context of point Nos. 1 & 2 referred to above are no longer an issue of controversy or debate. It has been fairly conceded on behalf of the appellant that the conclusions arrived at by the learned single Judge in the impugned judgment and the reasons therefore are correct and thus, do not deserve to be disturbed.

26. Notwithstanding the fact that the correctness of the findings respecting point Nos. 1 & 2 have been fairly conceded by the learned Attorney General for India, we have given our careful consideration to the matter in the overall facts and circumstances of these proceedings. We find ourselves in full agreement with the reasoning set out in the impugned judgment. The expression "public authority" as used in the Act is of wide amplitude and includes an authority created by or under the Constitution of India, which description holds good for Chief Justice of India. While providing for Competent Authorities under Section 2(e), the Act specifies Chief Justice of India as one such authority in relation to Supreme Court, also conferring upon him the powers to frame rules to carry out the purposes of the said law. Chief Justice of India besides discharging the prominent role of "head of judiciary" also performs a multitude of tasks specifically assigned to him under the Constitution or various enactments. As said in the impugned judgment, these varied roles of the CJI are directly relatable to the fact that he holds the office of Chief Justice of India and heads the Supreme Court. In absence of any indication that the office of the CJI is a separate establishment with its own Public Information Office under the Act, it cannot be canvassed that the office of the CPIO of the Supreme Court is different from the office of the CJI. Thus, the answer to point Nos. 1 & 2 referred to above has been correctly given in the impugned judgment which findings are hereby confirmed.

27. In this quest, both the sides did not seek to make any submissions on the issue of "unworkability" on account of "lack of clarity" or "lack of security" vis-à-vis asset

declarations by the Judges, which form part of the discourse on point No.6 (para 27 of the impugned judgment).

28. The prime submission of the learned Attorney General for India appearing for the appellant is that the learned single Judge has failed to properly formulate or answer the question, which was fundamental and central to the adjudication of the issues arising, viz. that the applicant had no "right to information" under Section 2(j). It is contended that the "right to information" under Section 2(j) applies only when the information sought is in public domain. The learned Attorney General submits that the learned single Judge failed to consider or appreciate the submission about absence of "right to information" and instead had proceeded to examine whether the asset declaration pursuant to the 1997 resolution was "information", which issue was not even raised. It is argued that the Resolution dated 7th May, 1997 has no force of law and even the "in-house procedure in the judiciary has its basis only of moral authority and not any exercise of power under any law". It is urged that the words "held by" or "under the law" necessarily implied the legal sanction behind the holding of or controlling of such sanction. It is argued that the plea about information sought not being in public domain was a sequitor to the Section 2(j) argument. The argument based on Sections 8(1)(e) and 8(1)(j) are reiterated.

THE ISSUES

29. The controversy thus subsists on point Nos. 3,4 & 5, formulated for consideration by the learned single Judge. Having regard to the submissions at the stage of appeal, the points for consideration need to be recast as under:-

(1) Whether the respondent had any "right to information" under Section 2(j) of the Act in respect of the information regarding making of declarations by the Judges of the Supreme Court pursuant to 1997 Resolution?

(2) If the answer to question (1) above is in affirmative, whether CJI held the "information" in his "fiduciary" capacity, within the meaning of the expression used in Section 8(1)(e) of the Act?

(3) Whether the information about the declaration of assets by the Judges of the Supreme Court is exempt from disclosure under the provisions of Section 8(1)(j) of the Act?

RIGHT TO INFORMATION

30. Information is currency that every citizen requires to participate in the life and governance of the society. In any democratic polity, greater the access, greater will be the responsiveness, and greater the restrictions, greater the feeling of powerlessness and alienation. Information is basis for knowledge, which provokes thought, and without thinking process, there is no expression. "Knowledge" said James Madison, "will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it is but a prologue to farce or tragedy or perhaps both". The citizens right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world.

RELEVANT INTERNATIONAL LAW

31. The Charter of the United Nations, which was set up in 1945, in its preamble clearly proclaims that it was established in order to save succeeding generations (of humanity) from the scourge of war and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person. The right to information was recognised at its inception in 1946, when the General Assembly resolved that: "freedom of information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated". [UN General Assembly, Resolution 59(1), 65th Plenary Meeting, 14th December, 1946].

32. The Universal Declaration of Human Rights of 1948 adopted on 10th December in Article 19 said: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

33. The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1968. Article 19 of the Convention reads as follows: (1) Everyone shall have the right to hold opinions without interference; (2) Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice." India has ratified the ICCPR. Section 2(d) read with 2(f) of the Protection of Human Rights Act, 1993 clarifies „human rights to include the rights guaranteed by the ICCPR.

34. The Convention of the Organisation of American States and European Convention on Human Rights also incorporate specific provisions on the right to information.

RIGHT TO INFORMATION AS A CONSTITUTIONAL RIGHT

35. The development of the right to information as a part of the constitutional law of the country started with petitions by the print media in the Supreme Court seeking enforcement of certain logistical implications of the right to freedom of speech and expression such as challenging government orders for control of newsprint, bans on distribution of paper etc. It was through the following cases that the concept of the people right to know developed.

36. In *Benett Coleman v. Union of India* [AIR 1973 SC 106], the Court held that the impugned Newsprint Control Order violated the freedom of the press and therefore was *ultra vires* Article 19(1)(a) of the Constitution. The Order did not merely violate the right of the newspapers to publish, which was inherent in the freedom of the press, but also violated the right of the readers to get information which was included within their right to freedom of speech and expression. Chief Justice Ray, in the majority judgment, said: "It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of the press embodies the right of the people to read." (para 45)

37. In a subsequent judgment in *Indian Express Newspaper (Bombay) Private Ltd. v. Union of India* [AIR 1986 SC 515], the Court held that the independence of the mass media was essential for the right of the citizen to information. In *Tata Press Ltd. v. Maharashtra Telephone Nigam Ltd.* [(1995) 5 SCC 139], the Court recognized the right of the public at large to receive commercial speech.

38. The concept of the right to information was eloquently formulated by Mathew, J. in *The State of UP v. Raj Narain* [AIR 1975 SC 865], in the following words: (para 74)

"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security, see *New York Times Co. v. United States* [(1971) 29 Law Ed. 822 : 403 U.S. 713]. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption."

39. In the case of *S.P. Gupta v. Union of India* [1981 (Supp) SCC 87 (para 65)], Bhagwati, J (as he then was) emphasising the need for openness in the government, observed:

65. The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government - an attitude and habit of mind. But this important role people can fulfil in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government."

40. In *Association for Democratic Reforms v. Union of India* [AIR 2001 Delhi 126], the Delhi High Court held that voters have a right to receive information about the antecedents of the candidates who stood for election. The Court held that the Election Commission had the duty to inform the voters about the candidates and therefore, it can direct the candidates filing nominations for election to give details about their assets and liabilities, past criminal cases ending in acquittals or convictions and pending criminal prosecution if any. The Union Government appealed against that decision to the Supreme Court which upheld the Delhi High Court decision in *Union of India v. Association for Democratic Reforms* [(2002) 5 SCC 294] and directed the Election Commission to seek such information from the candidates filing nominations. The Government after consulting various political parties arrived at the conclusion that the Election Commission should not have such power and it brought forth an Ordinance under Article 123 of the Constitution to amend the Representation of People Act, 1951 and withdrew from the Election Commission such powers requiring information to the extent mandated by the above decision of the Supreme Court. Constitutional validity of that amendment was challenged in the Supreme Court. The Supreme Court held the amendment to

be unconstitutional and void in *PUCL v. Union of India* [(2003) 4 SCC 399]. Justice M.B. Shah delivering the majority opinion of the Supreme Court said:

"Firstly, it should be understood that the fundamental rights enshrined in the Constitution such as, right to equality and freedom have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since the last more than 50 years, this court has interpreted art. 14, 19 and 21 and given meaning and colour so that nation can have a truly republic democratic society."

41. Justice P. Venkatarama Reddi in his concurring opinion reiterated the same view as follows:

"We must take legitimate pride that this cherished freedom (freedom of speech) has grown from strength to strength in the post independent era. It has been constantly nourished and shaped to new dimensions in tune with the contemporary needs by the constitutional courts."

42. Professor S.P. Sathe, in his brilliant work on right to information ("*Right to Information*": Lexis Nexis Butterworths, 2006) stated that there are certain disadvantages of treating the right to information as situated exclusively in Article 19(1)(a) of the Constitution. According to the learned author, the right to information is not confined to Article 19(1)(a) but is also situated in Article 14 (equality before the law and equal protection of law) and Article 21 (right to life and personal liberty). The right to information may not always have a linkage with the freedom of speech. If a citizen gets information, certainly his capacity to speak will be enhanced. But many a time, he needs information, which may have nothing to do with his desire to speak. He may wish to know how an administrative authority has used its discretionary powers. He may need information as to whom the petrol pumps have been allotted. The right to information is required to make the exercise of discretionary powers by the Executive transparent and, therefore, accountable because such transparency will act as a deterrent against unequal treatment. In *S.P. Gupta* case, the petitioners had raised the question of alleged misuse of power of appointing and transferring the Judges of the High Court by the Government. In order to make sure that the power of appointment of Judges was not used with political motives thereby undermining the independence of the judiciary, the petitioners sought information as to whether the procedures laid down under Articles 124(2) and 217(1) had been scrupulously followed. Here the right to information was a condition precedent to the rule of law. Most of the issues, which the Mazdoor Kisan Shakti Sangathan of Rajasthan had raised in their mass struggle for the right to information, were mundane matters regarding wages and employment of workers, such information was necessary for ensuring that no discrimination had been made between workers and that everything had been done according to law. The right to information is thus embedded in Articles 14, 19(1)(a) and 21 of the Constitution.

THE RIGHT TO INFORMATION ACT, 2005

43. After almost 55 years since the coming into force of the Constitution of India, a national law providing for the right to information was passed by both Houses of Parliament on 12/13th May, 2005. It is undoubtedly the most significant event in the life of Indian

Democracy. Prime Minister Manmohan Singh, while speaking on the Right to Information Bill in the Lok Sabha, said:

"The Legislation would ensure that the benefits of growth would flow to all sections of people, eliminate corruption and bring the concerns of the common man to the heart of the all processes of governance." [The Hindu, 12.5.2005, pg.1]

44. The preamble to the Act says that the Act is passed because „democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and hold Governments and their instrumentalities accountable to the governed. The Act restricts the right to information to citizens (Section 3). An applicant seeking information does not have to give any reasons why he/she needs such information except such details as may be necessary for contacting him/her. Thus, there is no requirement of locus standi for seeking information [Section 6(2)].

INFORMATION EXPLAINED

45. Section 2(f) of the Act defines "information" as any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force. As per Section 2(i), "record" includes (i) any document, manuscript and file; (ii) any microfilm, microfiche and facsimile copy of a document; (iii) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and (iv) any other material produced by a computer or any other device. "Right to information" is defined by Section 2(j) to mean the right to information accessible under the Act which is held by or under the control of any public authority and includes the right to (i) inspection of work, documents, records; (ii) taking notes, extracts, or certified copies of documents or records; (iii) taking certified samples of material; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

LIABILITY TO PROVIDE INFORMATION

46. Every public authority is liable to provide information. "Public authority" has been defined by Section 2(h) as any authority or body or institution of self-government established or constituted - (a) by or under the Constitution; (b) by any other law made by Parliament; (c) by any other law made by State Legislature; (d) by notification issued or order made by the appropriate Government, and includes any -- (i) body owned, controlled or substantially financed; (ii) non-Government Organisation substantially financed, directly or indirectly by funds provided by the appropriate Government. By virtue of Section 24, the Act does not apply to the Intelligence and Security Organisations specified in the Second Schedule. However, the information pertaining to the allegations of corruption and human rights violations shall be required to be given by such authorities subject to the approval of the Central Information Commissioner.

47. The Act does not merely oblige the public authority to give information on being asked for it by a citizen but requires it to suo moto make the information accessible. Section

4(1)(a) of the Act requires every public authority to maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under the Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated. Section 4 spells out various obligations of public authorities and Sections 6 and 7 lay down the procedure to deal with request for obtaining information.

EXEMPTIONS

48. Exemptions from disclosure of information are contained in Section 8 of the Act and that provision starts with a non-obstante clause. Section 8(1) states that notwithstanding anything contained in the Act, there shall be no obligation to give any citizen information relating to following matters:

(a) Information, the disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) Information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) Information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) Information received in confidence from foreign government;

(g) Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) Information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers. However, the decision of the Council of Ministers, the reasons thereof and the material on the basis of which the decisions were taken shall be made public after the decision has been taken and the matter is complete, or over and exception to this is further provided in the second proviso which says that "those matters which come under exemptions specified above shall not be disclosed;

(j) Information which relates to personal information the disclosure of which has no relation to any public activity or interest, or which would cause unwarranted invasion of the

privacy of the individual unless the CPIO or the SPIO, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information. (emphasis supplied)

OVER-RIDING EFFECT OF THE ACT

49. Section 22 of the Act provides that the provisions of the Act shall have effect notwithstanding anything inconsistent contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act.

POINT 1: WHETHER THE RESPONDENT HAD ANY "RIGHT TO INFORMATION" UNDER SECTION 2(J) OF THE ACT? APPELLANT'S CONTENTIONS:

50. The gravamen of the submissions of the learned Attorney General is that the respondent had no „right to information under Section 2(j) of the Act. He submitted that Section 2(j) contemplates two essential ingredients to constitute a right to information under the Act i.e. (i) the information should be accessible under the Act and (ii) such information should be held by or under the control of any public authority. It is his submission that the second mandatory requirement is not fulfilled in the instant case. According to him, the phrases held by or under the control of. necessarily imply a legal sanction behind the holding of or controlling such information. If there is no legal sanction behind holding of or controlling such information, there cannot be any right in respect of such information under Section 2(j). In other words unless public authority has dominion or control over the information, there is no right to information under the Act. The second limb of his argument is that the Resolutions have no force of law and that there is no legal or constitutional requirement for filing the assets declaration. As such declarations filed pursuant to 1997 Resolution cannot be the subject matter of disclosure under the Act. Therefore, the finding of the learned single Judge that the 1997 Resolution is binding merely because it was passed at the Chief Justices Conference is entirely unjustified. According to him, the observations of the learned single Judge failed to answer the further question as to how the Resolution is to be implemented, by whom, to what extent and in what manner.

51. In support of the above submissions, learned Attorney General relied upon the decision in (i) *In re. Coe's Estate*, 2002 Pacific Reporter 2nd Series, 1022 in which the term „held. was construed as "being invested with legal title or right to hold such claim or possession". In this context, he also referred to the decisions of the *Supreme Court in Bhudan Singh v. Nabi Bux* [(1969) 2 SCC 481 (para 12)], *Kailash Rai v. Jai Jai Ram* [(1973) 1 SCC 527 (para 11)]. The observations of Evershed M.R. in *Dollfus Mieg et Compagnie S.A. v. Bank of England* [1 Ch. 333] that "Control would..... cover the right to tell the possessor what is to be done with the property" were relied upon. A reference was made to Blacks Law Dictionary 8th ed. where the word control is defined as to exercise power or influence over and also to P. Ramanatha Aiyars Advanced Law Lexicon that the expression control connotes power to issue directions regarding how a thing may be done by a superior authority to an inferior authority. Certain passages in Philip Coppels book "Information Rights" were also relied upon.

52. Learned Attorney General further submitted that the Resolution of 1997 was in two parts. The first part related to the creation of an in-house mechanism for taking remedial

action against Judges who do not follow the universally accepted values of judicial life, the second part related to the declaration of assets, and no sanction/in-house procedure was contemplated in the event of non-filing of declaration. He placed heavy reliance on the decision in the case of *Indira Jaising v. Registrar General* [(2003) 5 SCC 294], in which the Supreme Court has held that even the in-house procedure in the judiciary has its basis only on moral authority and not in exercise of power under any law. Learned Attorney General argued that a plethora of information is available within the judiciary, for example, notes of Judges or draft judgments. If the only requirement is possession then all such information would also have to be brought under Section 2(j) of the Act. Therefore, according to him, a restricted meaning will have to be given to the term held as information held by a public authority in its functioning as a public authority and not merely in its possession.

RESPONDENT'S CONTENTIONS

53. In reply, Mr. Prashant Bhushan submitted at the outset that the respondent is not seeking the enforcement of the Resolutions. The non-enforcement of the Resolutions is an entirely different issue altogether, and it may be argued that a citizen cannot compel either the Judges or the Chief Justice to comply with the same. He submitted that when information is provided to the CJI under the Resolutions, the same constitutes information held and under the control of the CJI as a public authority and would thus be amenable to the provisions of the Act. The Code of Conduct, according to him, establishes a mechanism and an in-house procedure for inquiring into complaints by a committee constituted by the CJI for taking action against Judges found to have violated the Code of Conduct. The Code also prescribes certain consequences that arise out of non-adherence to the Code. The information provided to the CJI is consciously retained by the office of the CJI in his capacity as the CJI and as a repository of such information, prescribed by the Resolutions. It is not as if such information is held unlawfully or casually or even by accident. It is in fact maintained in the office as record for successive Chief Justices. According to Mr. Bhushan if the interpretation suggested by the learned Attorney General is accepted, it would lead to subversion of the Act and would render it totally ineffective.

54. Mr. Bhushan submitted that the CJI has implemented this mechanism in several past instances, which reveals that Judges have considered that these are binding standards. The 1997 Resolution cannot be disclaimed, as it was a conscious decision taken by Judges, who hold high public office, under the Constitution of India. Therefore, it was submitted that the Resolution has the force of law, and alludes to the 1999 Conference Resolution, which states that it is a "restatement of pre-existing and universally accepted norms, guidelines and conventions...." It was argued that the binding nature of either resolution cannot be undermined, and that it is for the CJI or the individual High Court Chief Justice, to take such appropriate measures as are warranted to ensure that declaration of assets takes place.

55. Mr. Bhushan submitted that the passages relied upon by the learned Attorney General from the commentary of Philip Coppel would rather support a liberal interpretation of the terms held or under the control of under Section 2(j) of the Act. The rest of the authorities relied upon by the learned Attorney General are related to property, which imply an entirely different nature of title and holding. With regard to the draft notes and judgments, learned

counsel submitted that whether they constitute information within the meaning of the Act will have to be determined on case to case basis, in the manner all RTI applications are decided.

SECTION 2(j) "RIGHT TO INFORMATION"

56. Two definitions are crucial for answering the first issue i.e. "Information" [Section 2(f)] and "Right to Information" [Section 2(j)]. Information is defined to mean any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models. Also, data held in any electronic form such as FAX, micro film, microfiche etc. It also includes information relating to any private body which can be accessed by a public authority under any other law for the time being in force. The definition thus comprehends all matters which fall within the expression "material in any form". In absence of any specific exclusion, asset declarations by the Judges held by the CJI or the CJs of the High Courts as the case may be, are information. under Section 2(f). This position is not disputed by the learned Attorney General. But according to him, the term held under the Act necessarily requires a Public Authority to have the right to call for the information, or impose on a person an obligation to provide such information to the public authority.

57. As defined in Section 2(j), the term right to information. means the right to information accessible under the Act which is held by or under the control of any public authority and includes the right to inspect, take notes, certified copies etc. „Accessible. shall mean the information being readily available or reachable or which can be obtained from the document, file, record etc. It is mandatory for each public authority to give this information to the citizen except where the information is exempt under the provisions of Section 8(1) of the Act. However, a public authority may allow access to every information in public interest if disclosure outweighs the harm to the protected interest irrespective of the provisions under Section 8(1). Further, where the information is exempt from disclosure, Section 10 lays down that access may be provided to that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be secured from any part that contain exempt information.

58. Philip Coppel in his monumental work "*Information Rights*" (2nd Edition, Thomson, Sweet & Maxwell 2007) explains the holding requirement in the context of Freedom of Information Act, 2000 (UK), thus:

"When information is "held" by a public authority For the purposes of the Freedom of Information Act 2000, information is "held by a public authority if it is held by the authority otherwise than on behalf of another person, or if it is held by another person on behalf of the authority. The Act has avoided the technicalities associated with the law of disclosure, which has conventionally drawn a distinction between a document in the power, custody or possession of a person. Putting to one side the effects of s. 3(2) (see para.9-009 below), the word "held" suggests a relationship between a public authority and the information akin to that of ownership or bailment of goods. Information: - that is, without request or arrangement, sent to or deposited with a public authority which does not hold itself out as willing to receive it and which does not subsequently use it; - that is accidentally left with a

public authority; - that just passes through a public authority; or - that "belongs" to an employee or officer of a public authority but which is brought by that employee or officer onto the public authority premises, - will, it is suggested, lack the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before it can be said that the public authority can be said to "hold" the information. The position under the Environmental Information Regulations 2004 is clearer, those regulations expressly providing that environmental information must have been produced or received by the public authority if it is to be information "held" by that public authority. Under both regimes, information sent to a public authority without invitation and knowingly kept for any material length of time can probably be said to be held by the public authority. In short, information will not be "held" by a public authority, it is suggested, where that information neither is nor has been created, sought, used or consciously retained by it. Thus, in the example given by the explanatory notes to the legislation, a Ministers constituency papers would not be held by the department just because the Minister happens to keep them there. It is quite possible for the same information to be held by more than one public authority. For example, if a document is sent by one public authority to another, but the first keeps a copy for itself, both public authorities will be holding the information comprised in the document. There is nothing to stop an applicant making a request to either or both public authorities for the same information."

59. Therefore, according to Coppel the word "held" suggests a relationship between a public authority and the information akin to that of an ownership or bailment of goods. In the law of bailment, a slight assumption of control of the chattel so deposited will render the recipient a depository [see *Newman v. Bourne and Hollingsworth* (1915) 31 T.L.R. 209]. Where, therefore, information has been created, sought, used or consciously retained by a public authority will be information held within the meaning of the Act. However, if the information is sent to or deposited with the public authority which does not hold itself out as willing to receive it and which does not subsequently use it or where it is accidentally left with a public authority or just passes through a public authority or where it belongs to an employee or officer of a public authority but which is brought by that employee or officer unto the public authority premises it will not be information held by the public authority for the lack of the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before the public authority can be said to hold the information. Coppel refers to the decision in *Canada Post Corp. v. Canada (Minister of Public Works)* [(1995) 2 F.C. 110] where the Federal Court has held that the notion of control was not limited to the power to dispose of a record, that there was nothing in the Act that indicated that the word "control" should not be given a broad interpretation, and that a narrow interpretation would deprive citizens of a meaningful right of access under the Act.

60. The decisions cited by the learned Attorney General on the meaning of the words held or control. are relating to property and cannot be relied upon in interpretation of the provisions of the Right to Information Act. The source of right to information does not emanate from the Right to Information Act. It is a right that emerges from the constitutional

guarantees under Article 19(1)(a) as held by the Supreme Court in a catena of decisions. The Right to Information Act is not repository of the right to information. Its repository is the constitutional rights guaranteed under Article 19(1)(a). The Act is merely an instrument that lays down statutory procedure in the exercise of this right. Its overreaching purpose is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed. In construing such a statute the Court ought to give to it the widest operation which its language will permit. The Court will also not readily read words which are not there and introduction of which will restrict the rights of citizens for whose benefit the statute is intended.

61. The words held by or under the control of under Section 2(j) will include not only information under the legal control of the public authority but also all such information which is otherwise received or used or consciously retained by the public authority in the course of its functions and its official capacity. There are any numbers of examples where there is no legal obligation to provide information to public authorities, but where such information is provided, the same would be accessible under the Act. For example, registration of births, deaths, marriages, applications for election photo identity cards, ration cards, pan cards etc. The interpretation of the word held, suggested by the learned Attorney General, if accepted, would render the right to information totally ineffective.

NOTES, JOTTINGS AND DRAFT JUDGMENTS

62. The apprehension of the learned Attorney General that unless a restrictive meaning is given to Section 2(j), the notes or jottings by the Judges or their draft judgments would fall within the purview of the Information Act is misplaced. Notes taken by the Judges while hearing a case cannot be treated as final views expressed by them on the case. They are meant only for the use of the Judges and cannot be held to be a part of a record "held" by the public authority. However, if the Judge turns in notes along with the rest of his files to be maintained as a part of the record, the same may be disclosed. It would be thus retained by the registry. Insofar as draft judgments are concerned it has been explained by *Justice Vivian Bose in Surendra Singh v. State of UP* [AIR 1954 SC 194]:

Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the Court. That is what constitutes the „judgment....

The above observations though made in a different context, highlight the status of the proceedings that take place before the actual delivery of the judgment. Even the draft judgment signed and exchanged is not to be considered as final judgment but only tentative view liable to be changed. A draft judgment therefore, obviously cannot be said to be information held by a public authority.

BINDING NATURE OF THE 1997 RESOLUTION AND THE 1999 JUDICIAL CONFERENCE RESOLUTION.

63. The narration of the background as stated in "Restatement of Values of Judicial Life" adopted in the Chief Justices. Conference in December, 1999 would show that as far back as on September 18-19, 1992, the Chief Justices. Conference resolved to restate the pre-existing and universally accepted norms, guidelines and conventions reflecting the high values of judicial life to be observed by Judges during their tenure in office. A draft restatement of values was circulated on 21st November, 1993 to the Chief Justices of the High Courts for discussion with their colleagues. This draft prepared by a duly constituted committee was considered and adopted after approval in the Full Court meeting of the Supreme Court held on 7th May, 1997. This provided for an in-house procedure for remedial action against erring Judges and also declaration by individual Judges of all his/her assets in the form of real estate or investments held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her. The Resolution adopted in the Full Court meeting of the Supreme Court on 7th May, 1997 reads as follows:

"RESOLVED that an in-house procedure should be devised by the Honble Chief Justice of India to take suitable remedial action against Judges who by their acts of omission or commission do not follow the universally accepted values of judicial life including those indicated in the "Restatement of Values of Judicial Life."

RESOLVED FURTHER THAT every Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting Judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be to the Chief Justice of the Court. The Chief Justice should make a similar declaration for the purpose of the record. The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential."

64. On 3rd and 4th December, 1999, the Conference of Chief Justices of all High Courts was held in the Supreme Court premises in which the Chief Justices unanimously resolved to adopt the "Restatement of Values of Judicial Life" (Code of Conduct). It is a complete code of canons of judicial ethics and is extracted below:

"(1) Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people faith in the impartiality of the judiciary. Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.

(2) A Judge should not contest the election to any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.

(3) Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.

(4) A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a

member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.

(5) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.

(6) A Judge should practice a degree of aloofness consistent with the dignity of his office.

(7) A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.

(8) A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.

(9) A Judge is expected to let his judgments speak for themselves; he shall not give interview to the media.

(10) A Judge shall not accept gifts or hospitality except from his family, close relations and friends.

(11) A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.

(12) A Judge shall not speculate in shares, stocks or the like.

(13) A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business).

(14) A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.

(15) A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.

(16) Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held. These are only the "Restatement of the Values of Judicial Life" and are not meant to be exhaustive but only illustrative of what is expected of a Judge."

JUDICIAL ACCOUNTABILITY

83. The 1997 Resolution and the 1999 Judicial Conference Resolution emphasise that any code of conduct or like expression of principles for the judiciary should be formulated by the judiciary itself. That would be consistent with the principle of judicial independence and with the separation of powers. High integrity and independence is fundamental and inherent, notwithstanding any specific code having been provided in the constitution or by a statute. If the judiciary fails or neglects to assume responsibility for ensuring that its members maintain high standards of judicial conduct expected of them, public opinion and political expediency may lead the other two branches of government to intervene. When that happens, the

principle of judicial independence upon which the judiciary is founded and by which it is sustained, is likely to be undermined to some degree, perhaps seriously.

84. The second Judges case witnessed an assertion by the Supreme Court of the independence of the Judiciary forming part of the basic structure of the Constitution. The need to insulate judiciary from interference by the Executive in the matter of appointments of Judges was seen as a necessary concomitant of its very functioning within the scheme of the Constitution. The Judiciary was also asserting as a part of that independence, that as an institution it believed in self-regulation. In other words, it was believed that the Judiciary as an institution could itself regulate conduct of Judges without requiring any enacted law for that purpose. The 1997 and 1999 Resolutions have to be viewed in the background of the above assertion of the independence of judiciary.

85. The text of the two Resolutions focuses on two different aspects of accountability. One touching on the conduct of Judges for which the Resolutions speak of an in-house mechanism. The other concerns declaration of assets which is also seen as a facet of accountability.

86. That Judges have to declare their assets is a requirement that is not being introduced for the first time as far as subordinate Judges are concerned. They have for long been required to do that year after year in terms of the Rules governing their conditions of service. As regards accountability and independence, it cannot possibly be contended that a Judicial Magistrate at the entry level in the judicial hierarchy is any less accountable or independent than the Judge of the High Court or the Supreme Court. If declaration of assets by a subordinate judicial officer is seen as essential to enforce accountability at that level, then the need for such declaration by Judges of the constitutional courts is even greater. While it is obvious that the degree of accountability and answerability of a High Court Judge or a Supreme Court Judge can be no different from that of a Magistrate, it can well be argued that the higher the Judge is placed in the judicial hierarchy, the greater the standard of accountability and the stricter the scrutiny of accountability of such mechanism. All the Judges functioning at various levels in the judicial hierarchy form part of the same institution and are independent of undue interference by the Executive or the Legislature. The introduction of the stipulation of declaring personal assets, is to be seen as an essential ingredient of contemporary accepted behaviour and established convention.

87. Questioning of the binding nature of the Resolutions is, therefore, contrary to the assertions of judicial independence. To contend that there has to be a law enacted by the Parliament to compel Judges to disclose their assets is to undermine the independence that has been asserted in the second Judges case.

88. It can hardly be imagined that Resolutions which have been unanimously adopted at a conference of Judges would not be binding on the Judges and its efficacy can be questioned. In fact, the understanding of successive CJIs and the institution as a whole since the passing of these Resolutions has been otherwise. Letters have been written by the CJI to each of the Chief Justices of the High Courts enclosing copies of the Resolutions and requiring the Chief Justice of every High Court to draw the attention of individual Judges to the text of the resolutions and to ask for information pertaining to assets possessed by each of them, his/her

spouse and dependent persons. At no point in time has there been any questioning of the need to comply with the requirements of the Resolutions.

EXTENT AND MANNER OF DECLARATION

89. It is indeed strange that it is sought to be contended that unless and until the Resolutions themselves provide for a sanction or penalty for non-compliance of disclosure of assets by an individual Judge to the CJI or the CJ, as the case may be, the Resolutions would not have any binding effect and that would not be in the nature of „law.. The question posed by the learned Attorney General and reiterated in the written submissions is that unless the question "as to how the Resolution is to be implemented, by whom, to what extent and in what manner" is answered, it cannot be said that the Resolutions have a binding effect.

90. Since the impugned judgment of the learned single Judge, a resolution has been passed on the administrative side by the Full Court of the Supreme Court, deciding to place information relating to assets on the website. Four High Courts have decided to disclose the assets of their Judges publicly. Two of the High Courts have placed the information on their respective websites. Although it was sought to be contended by the learned Attorney General that even such resolutions would not have a binding effect of law, such a contention cannot be accepted if the proper functioning of the judiciary as an institution has to be ensured. The consequence of accepting such an argument would mean that individual Judges will simply declare that they are not bound by any of the resolutions of the Court and they are free to act according to their whim. Such a position is wholly untenable and unacceptable for the proper functioning of the judiciary as a self regulatory independent mechanism of State, accountable to the people and to the Constitution of India.

91. The disclosure on the website of information pertaining to assets of Judges is a complete answer to the question posed by the learned Attorney General. The disclosure of assets by Judges, their spouses and dependent persons on the website of the Supreme Court, Kerala High Court and Madras High Courts provides the answer as to how the Resolutions can be implemented, in what manner, by whom and to what extent. This, therefore, cannot be the reason for denying the binding nature of the Resolutions. Much has been said of where one should draw a line on how much should be disclosed. This is entirely for the Judges to decide consistent with their perception of their accountability to the judiciary as an institution. It can be seen from the assets disclosure of the Judges which are available on website that the uniform standards have been evolved regarding the nature of the information and the periodicity of the declarations to be made. The above development shows that the Judges have perfectly understood how much information should be disclosed and in what manner they have to put the information on the website.

INDIRA JAISING'S CASE DISTINGUISHED

92. The reliance placed by the learned Attorney General on Indira Jaising's case is rather misconceived. In that case, a petition was filed under Article 32 of the Constitution in public interest primarily for the publication of the inquiry report made by a Committee consisting of two Chief Justices and a Judge of different High Courts in respect of certain allegations of alleged involvement of sitting Judges of the High Court of Karnataka in certain incidents and also for a direction to any professional and independent investigating agency having expertise

to conduct a thorough inquiry into the said incident and to submit a report on the same to the Supreme Court. Rajendra Babu, J (as he then was) writing the judgment pointed out that a Judge cannot be removed from his office except by impeachment by a majority of the House and a majority of not less than two-third present and voting as provided by Articles 124 and 217 of the Constitution of India. The Judges (Inquiry) Act, 1968 has been enacted providing for the manner for conducting inquiry into the allegation of judicial conduct upon a motion of impeachment sponsored by at least hundred Lok Sabha Members or fifty Rajya Sabha Members. No other disciplinary inquiry is envisaged or contemplated either in the Constitution or under the Act. On account of this lacuna, in-house procedure has been adopted for inquiry to be made by the peers of Judges for report to the Chief Justice of India in case of a complaint against the Chief Justices or Judges of the High Court in order to find out the truth of the imputation made in the complaint and that in-house inquiry is for the purpose of his own information and satisfaction. The report of the Inquiry Committee is purely preliminary in nature, ad hoc and not final. If the Chief Justice of India is satisfied that no further action is called for in the matter, the proceeding is closed. If any further action is to be taken as indicated in the in-house procedure itself, the Chief Justice of India may take such further steps as he deems fit. In case of breach of any rule of the Code of Conduct, the Chief Justice can choose not to post cases before a particular Judge against whom there are acceptable allegations. It is possible to criticise that decision on the ground that no inquiry was held and the Judge concerned had no opportunity to offer his explanation particularly when the Chief Justice is not vested with any power to decide about the conduct of a Judge. The Court was of the opinion that a report made on such inquiry if given publicity will only lead to more harm than good to the institution as Judges would prefer to face inquiry leading to impeachment. In such a case, the only course open to the parties concerned if they have material is to invoke provisions of Article 124 or Article 121(7) of the Constitution, as the case may be. It is in this context it was observed that the only source or authority by which the Chief Justice of India can exercise this power of inquiry is moral or ethical and not in exercise of powers under any law. The obligation of the Judges to declare assets in terms of the Resolutions was not in issue before the Court. It is not even remotely suggested that the Code of Conduct is not binding on the Judges or they are free to ignore the Code of Conduct. Indeed the Court distinguished the decisions in S.P. Gupta, Raj Narain etc., relating to the right to information. We must bear in mind that this decision was rendered prior to the enactment of the Right to Information Act and may not serve as a useful guide in interpreting the provisions of the said Act.

93. The learned single Judge thus rightly concluded that the Resolutions are meant to be adhered to and that the fact that there is no objective mechanism to ensure its implementation is of little consequence because the consequence of not complying with the Resolutions is linked to the faith in the system; that thought alone is sufficient to incentivise compliance. Justice J.B. Thomas sums up this position aptly in the following manner:

"Some standards can be prescribed by law, but the spirit of, and the quality of the service rendered by a profession depends far more on its observance of ethical standards. These are far more rigorous than legal standards.... They are learnt not by precept but by the example

and influence of respected peers. Judicial standards are acquired, so to speak, by professional osmosis. They are enforced immediately by conscience."

94. In view of the above discussion, it is held that the respondent had right to information under Section 2(j) of the Act in respect of the information regarding making of declarations by the Judges of the Supreme Court pursuant to the 1997 Resolution.

POINT 2: WHETHER THE CJI HELD THE "INFORMATION" IN HIS "FIDUCIARY" CAPACITY

95. The submission of the learned Attorney General is that the declarations are made to the CJI in his fiduciary capacity as pater familias of the Judiciary. Therefore, assuming that the declarations, in terms of the 1997 Resolution constitute "information" under the Act, yet they cannot be disclosed - or even particulars about whether, and who made such declaration, cannot be disclosed - as it would entail breach of a fiduciary duty by the CJI. He relies on Section 8(1)(e) to submit that a public authority is under no obligation to furnish "information available to a person in his fiduciary relationship". He argues that the voluntary information given by the Judges is not information in the public domain. He emphasizes that the Resolution crucially states:

"The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential".

denied merely on the classification of a document or on a plea of confidentiality, if the document is otherwise covered by the Act.

FIDUCIARY RELATIONSHIP

97. As Waker defines it: "A „fiduciary. is a person in a position of trust, or occupying a position of power and confidence with respect to another such that he is obliged by various rules of law to act solely in the interest of the other, whose rights he has to protect. He may not make any profit or advantage from the relationship without full disclosure. The category includes trustees, Company promoters and directors, guardians, solicitors and clients and other similarly placed." [*Oxford Companion to Law*, 1980 p.469]

98. "A fiduciary relationship", as observed by Anantnarayanan, J., "may arise in the context of a jural relationship. Where confidence is reposed by one in another and that leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence." [see *Mrs. Nellie Wapshare v. Pierce Lasha & Co. Ltd.*, AIR 1960 Mad 410]

99. In *Lyell v. Kennedy* [(1889) 14 AC 437], the Court explained that whenever two persons stand in such a situation that confidence is necessarily reposed by one in the other, there arises a presumption as to fiduciary relationship which grows naturally out of that confidence. Such a confidential situation may arise from a contract or by some gratuitous undertaking, or it may be upon previous request or undertaken without any authority.

100. In *Dale & Carrington Invt. (P) Ltd. v. P.K. Prathaphan* [(2005) 1 SCC 212] and *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.* [(1981) 3 SCC 333], the Court held that the directors of the company owe fiduciary duty to its shareholders.

In *P.V. Sankara Kurup v. Leelavathy Nambier* [(1994) 6 SCC 68], the Court held that an agent and power of attorney can be said to owe a fiduciary relationship to the principal.

101. Section 88 of the Indian Trusts Act requires a fiduciary not to gain an advantage of his position. Section 88 applies to a trustee, executor, partner, agent, director of a company, legal advisor or other persons bound in fiduciary capacity. Kinds of persons bound by fiduciary character are enumerated in Mr.M. Gandhi.s book on "Equity, Trusts and Specific Relief" (2nd ed., Eastern Book Company) "

- (1) Trustee,
- (2) Director of a company,
- (3) Partner,
- (4) Agent,
- (5) Executor,
- (6) Legal Adviser,
- (7) Manager of a joint family,
- (8) Parent and child,
- (9) Religious, medical and other advisers,
- (10) Guardian and Ward,
- (11) Licensees appointed on remuneration to purchase stocks on behalf of government,
- (12) Confidential Transactions wherein confidence is reposed, and which are indicated by
(a) Undue influence, (b) Control over property, (c) Cases of unjust enrichment, (d) Confidential information, (e) Commitment of job,
- (13) Tenant for life,
- (14) Co-owner,
- (15) Mortgagee,
- (16) Other qualified owners of property,
- (17) De facto guardian,
- (18) Receiver,
- (19) Insurance Company,
- (20) Trustee de son tort,
- (21) Co-heir,
- (22) Benamidar."

102. The CJI cannot be a fiduciary vis-à-vis Judges of the Supreme Court. The Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. The declarations are not furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest. In these circumstances, it cannot be held that the asset information shared with the CJI, by the Judges of the Supreme Court, are held by him in the capacity of fiduciary, which if directed to be revealed, would result in breach of such duty.

CONFIDENTIALITY

103. The Act defines which information will be in the public domain and includes within the definition "any material in any form, including records, documents, memos, e-mails,

opinions, advices, etc." Irrespective of whether such notes, e-mails, advices, memos etc. were marked confidential and kept outside the public domain, the Act expressly places them in the public domain and accessible to the people subject to exclusionary clauses contained in Section 8 of the Act. Section 11(1) of the Act provides that where the authority intends to disclose any information which relates to and was supplied by a third party and has been treated confidential by third party, it shall give a clear notice of five days to such third party inviting him to make a submission in writing or orally whether such information should be disclosed and such submission shall be kept in view while taking a decision regarding the disclosure of such information. Except in the case of trade and commerce secrets, protected by law, disclosure may be allowed in public interest if disclosure outweighs in importance any possible harm or injury to the interest of the third party. The disclosure of such information regarding a third party is, however, further subject to the provisions providing for non-disclosure of information relating to privacy of a person under Section 8(j) of the Act.

104. In U.K., the Freedom of Information Act 2000 exempts the information from disclosure where it was obtained by a public authority from any other person and the disclosure of the information to the public by the public authority would constitute an actionable breach of confidence. Similar provisions are made in the information laws of USA, New Zealand, Australia, Canada etc. However, as pointed out by Phillip Coppel, a public interest defence is available to a claim of breach of confidence. Therefore, a consideration of the public interest is required to determine whether disclosure would constitute an actionable breach of confidence. In addition, so far as government secrets are concerned, the Crown is not entitled to restrain disclosure or to obtain redress on confidentiality grounds unless it can establish that disclosure has damaged or would be likely to damage the public interest.

105. In *Attorney General v. Guardian Newspapers Limited* [(No.2) (1990) 1 AC 109], Lord Goff identified three limiting concepts to the principles of breach of confidence. The first that the principle of confidentiality does not apply to information that is so generally accessible that, in all the circumstances, it cannot be regarded as confidential. The second is that the duty of confidence does not apply to information that is useless or trivial. The third limiting concept identified by Lord Goff is that in certain circumstances the public interest in maintaining confidence may be outweighed by the public interest in disclosure. Lord Goff summed up the matter as follows: (pg.282)

"The third limiting principle is of far greater importance. It is that, although the basis of the laws protection of confidence is that there is a law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure. Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made „the confidant of a crime or a fraud.: see *Gartside v. Outram* per Sir William Page Wood V.C. But it is now clear that the principle extends to matters of which disclosure is required in the public interest: see *Beloff v. Pressdram Ltd*, per

Ungoed Thomas, *J and Lion Laboratories Ltd v. Evans per Griffiths L.J.* It does not however follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required: see *Francome v. Mirror Group Newspapers Ltd*. A classic example of a case where limited disclosure is required is a case of alleged iniquity in the Security Services."

DUTY TO DENY OR CONFIRM

106. In the present case, the only information that was sought by the respondent was whether such declaration of assets were filed by Judges of the Supreme Court and also whether High Court Judges have submitted such declarations about their assets to respective Chief Justices in States. The respondent had not sought a copy of the declaration or the contents thereof or even the names etc., of the Judges providing the same. Release of this information would not amount to actionable breach of any confidentiality. The duty to confirm or deny would not amount to breach of confidentiality unless the request is so specific that the mere confirmation that information is held (without a disclosure of that information) would be to disclose the gist of the information. Philip Coppel explains the legal position as follows:

"The duty to confirm or deny" "The duty to confirm or deny does not arise if, or to the extent that, a confirmation or denial that the public authority holds the information specified in the request would (apart from the Act) constitute an actionable breach of confidence. This is an absolute exclusion of duty. As a matter of practice, other than where the request is so specific that the mere confirmation that the information is held (without a disclosure of that information) would be to disclose the gist of the information, it is difficult to contemplate circumstances in which a public authority could properly refuse to confirm or deny that it held information under S.41(2)".

107. In our opinion, the learned single Judge has summed up the position correctly in para 58:

"From the above discussion, it may be seen that a fiduciary relationship is one whereby a person places complete confidence in another in regard to a particular transaction or his general affairs or business. The relationship need not be "formally" or "legally" ordained, or established, like in the case of a written trust; but can be one of moral or personal responsibility, due to the better or superior knowledge or training, or superior status of the fiduciary as compared to the one whose affairs he handles. If viewed from this perspective, it is immediately apparent that the CJI cannot be a fiduciary vis-à-vis Judges of the Supreme Court; he cannot be said to have superior knowledge, or be better trained, to aid or control their affairs or conduct. Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. In these circumstances, it cannot be held that asset information shared with the CJI, by the judges of the Supreme Court, are held by him in the capacity of a fiduciary, which if directed to be revealed, would result in breach of such duty. So far as the argument that the 1997 Resolution had imposed a confidentiality obligation on

the CJI to ensure non-disclosure of the asset declarations, is concerned, the court is of opinion that with the advent of the Act, and the provision in Section 22 -- which overrides all other laws, etc. (even overriding the Official Secrets Act) the argument about such a confidentiality condition is on a weak foundation. The mere marking of a document, as "confidential", in this case, does not undermine the overbearing nature of Section 22. Concededly, the confidentiality clause (in the 1997 Resolution) operated, and many might have bona fide believed that it would ensure immunity from access. Yet the advent of the Act changed all that; all classes of information became its subject matter. Section 8(1)(f) affords protection to one such class, i.e. fiduciaries. The content of such provision may include certain kinds of relationships of public officials, such as doctor-patient relations; teacher-pupil relationships, in government schools and colleges; agents of governments; even attorneys and lawyers who appear and advise public authorities covered by the Act. However, it does not cover asset declarations made by Judges of the Supreme Court, and held by the CJI."

108. For the above reasons, we hold that Section 8(e) does not cover asset declarations made by Judges of the Supreme Court and held by the CJI. The CJI does not hold such declarations in a fiduciary capacity or relationship.

POINT 3: WHEHTER INFORMATION ABOUT DECLARATION OF ASSETS BY JUDGES IS EXEMPT UNDER SECTION 8(1)(j)

109. The learned Attorney General argued that the information which is sought for by the respondent is purely and simply personal information, the disclosure of which has no relationship to any public activity. He emphasized that access to such information would result in unwarranted intrusion of privacy. The submission is that such information is exempt under Section 8(1)(j) of the Act. On the other hand, Mr.Prashant Bhushan argues that information as to whether declarations have been made, to the CJI can hardly be said to be called "private" and that declarations are made by individual judges to the CJI in their capacity as Judges. He submitted that the present proceeding is not concerned with the content of asset declarations.

RIGHT TO INFORMATION VIS-À-VIS RIGHT TO PRIVACY

110. The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which the new cause of action for damages resulting from unlawful invasion of privacy was recognized. This right has two aspects: (i) The ordinary law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (ii) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful government invasion. Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The first decision of the Supreme Court dealing with this aspect is *Kharak Singh v. State of UP* [AIR 1963 SC 1295]. A more elaborate appraisal of this right took place in later decisions in *Gobind v. State of MP* [(1975) 2 SCC 148], *R.Rajagopal v. State of T.N.* [(1994) 6 SCC 632] and *District Registrar and Collector v. Canara Bank* [(2005) 1 SCC 496].

111. The freedom of information principle holds that, generally speaking, every citizen should have the right to obtain access to government records. The underlying rationale most

frequently offered in support of the principle are, first, that the right of access will heighten the accountability of government and its agencies to the electorate; second, that it will enable interested citizens to contribute more effectively to debate on important questions of public policy; and third, that it will conduce to fairness in administrative decision-making processes affecting individuals. The protection of privacy principle, on the other hand, holds in part at least that individuals should, generally speaking, have some control over the use made by others, especially government agencies, of information concerning themselves. Thus, one of the cardinal principles of privacy protection is that personal information acquired for one purpose should not be used for another purpose without the consent of the individual to whom the information pertains. The philosophy underlying the privacy protection concern links personal autonomy to the control of data concerning oneself and suggests that the modern acceleration of personal data collection, especially by government agencies, carries with it a potential threat to a valued and fundamental aspect of our traditional freedoms.

112. The right to information often collides with the right to privacy. The government stores a lot of information about individuals in its dossiers supplied by individuals in applications made for obtaining various licences, permissions including passports, or through disclosures such as income tax returns or for census data. When an applicant seeks access to government records containing personal information concerning identifiable individuals, it is obvious that these two rights are capable of generating conflict. In some cases this will involve disclosure of information pertaining to public officials. In others, it will involve disclosure of information concerning ordinary citizens. In each instance, the subject of the information can plausibly raise a privacy protection concern. As one American writer said one man's freedom of information is another man's invasion of privacy.

PROTECTION OF PERSONAL INFORMATION UNDER SECTION 8(1)(j)

113. The right to information, being integral part of the right to freedom of speech, is subject to restrictions that can be imposed upon that right under Article 19(2). The revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information and, therefore, with a view to harmonize these conflicting interests while preserving the paramountcy of the democratic ideal, Section 8 has been enacted for providing certain exemptions from disclosure of information. Section 8 contains a well defined list of ten kinds of matters that cannot be made public. A perusal of the aforesaid provisions of Section 8 reveals that there are certain information contained in sub-clause (a), (b), (c), (f),(g) and (h), for which there is no obligation for giving such an information to any citizen; whereas information protected under sub-clause (d), (e) and (j) are protected information, but on the discretion and satisfaction of the competent authority that it would be in larger public interest to disclose such information, such information can be disclosed. These information, thus, have limited protection, the disclosure of which is dependent upon the satisfaction of the competent authority that it would be in larger public interest as against the protected interest to disclose such information.

114. There is an inherent tension between the objective of freedom of information and the objective of protecting personal privacy. These objectives will often conflict when an

applicant seeks access for personal information about a third party. The conflict poses two related challenges for law makers; first, to determine where the balance should be struck between these aims; and, secondly, to determine the mechanisms for dealing with requests for such information. The conflict between the right to personal privacy and the public interest in the disclosure of personal information was recognized by the legislature by exempting purely personal information under Section 8(1)(j) of the Act. Section 8(1)(j) says that disclosure may be refused if the request pertains to "personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual." Thus, personal information including tax returns, medical records etc. cannot be disclosed in view of Section 8(1)(j) of the Act. If, however, the applicant can show sufficient public interest in disclosure, the bar (preventing disclosure) is lifted and after duly notifying the third party (i.e. the individual concerned with the information or whose records are sought) and after considering his views, the authority can disclose it. The nature of restriction on the right of privacy, however, as pointed out by the learned single Judge, is of a different order; in the case of private individuals, the degree of protection afforded to be greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake. This is so because a public servant is expected to act for the public good in the discharge of his duties and is accountable for them.

115. The Act makes no distinction between an ordinary individual and a public servant or public official. As pointed out by the learned single Judge "... an individuals or citizens fundamental rights, which include right to privacy - are not subsumed or extinguished if he accepts or holds public office." Section 8(1)(j) ensures that all information furnished to public authorities -- including personal information [such as asset disclosures] are not given blanket access. When a member of the public requests personal information about a public servant, - such as asset declarations made by him -- a distinction must be made between personal data inherent to the person and those that are not, and, therefore, affect his/her private life. To quote the words of the learned single Judge "if public servants ... are obliged to furnish asset declarations, the mere fact that they have to furnish such declaration would not mean that it is part of public activity, or "interest".... That the public servant has to make disclosures is a part of the systems endeavour to appraise itself of potential asset acquisitions which may have to be explained properly. However, such acquisitions can be made legitimately; no law bars public servants from acquiring properties or investing their income. The obligation to disclose these investments and assets is to check the propensity to abuse a public office, for a private gain." Such personal information regarding asset disclosures need not be made public, unless public interest considerations dictates it, under Section 8(1)(j). This safeguard is made in public interest in favour of all public officials and public servants.

116. In the present case the particulars sought for by the respondent do not justify or warrant protection under Section 8(1)(j) inasmuch as the only information the applicant sought was whether 1997 Resolution was complied with. That kind of innocuous information does not warrant the protection granted by Section 8(1)(j). We concur with the view of the learned single Judge that the contents of asset declarations, pursuant to the 1997 Resolution, are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); that they are not otherwise subject to disclosure.

Therefore, as regards contents of the declarations, information applicants would have to, whenever they approach the authorities, under the Act satisfy them under Section 8(1)(j) that such disclosure is warranted in "larger public interest".

DISCLOSURE OF ASSETS INFORMATION OF JUDGES - INTERNATIONAL TRENDS

117. "Although Judges often balk at the invasion of privacy that disclosure of their private finances entails, it is almost uniformly considered to be an effective means of discouraging corruption, conflicts of interest, and misuse of public funds..." [Guidance for Promoting Judicial Independence and Impartiality, 2001, USAID, Technical Publication]. Income and Asset Disclosure is generally perceived to be an essential aid towards monitoring whether judges perform outside work, monitoring conflicts of interests, discouraging corruption, and encouraging adherence to the standards prescribed by judicial code of conduct. In countries where disclosure is mandatory, "the Guidance Principle" suggests that list of judges, assets and liabilities must be declared at appointment and annually thereafter. "Guidance Principle" further stipulates that the information disclosure must be accurate, timely and comprehensive. Furthermore, security and privacy concerns of judges should be respected, oversight body monitoring the register must be credible and the public should have proper access to the public portion of the register.

118. Keith E. Henderson in his article "Asset and Income Disclosure for Judges: A Summary Overview and Checklist" states that even though the OAS Convention created the legal basis for income and asset disclosure of public officials, the legal question as to whether Judges are deemed to be public officials remains unclear or is being debated on in a number of countries. In some countries, Judges have raised issues of constitutional separation of powers and have taken the position that the judicial branch itself must pass and enforce its own disclosure laws and rules. This is exactly what is achieved by the 1997 and 1999 Resolutions. Other unresolved issues relate to how to effectively and fairly implement and enforce disclosure laws and how much of this personal information should be publicly available and in what form. The author has pointed out that there are three basic sources of the assets declaration obligation:

a) Constitutional Obligation: Some constitutions impose an obligation to disclose assets of public officials e.g. Colombia, Constitution Article 122.

(b) Legislative Obligation: Some countries regulate asset disclosure by statute, although there are different types of Acts creating this obligation e.g. Poland, El Salvador, etc.

c) Court rules: In some countries, such as United States, Argentina, the judiciary itself regulates the conduct of Judges. According to the author, while addressing the issue of assets disclosure, it is fundamental to find a balance between the kind of information that must be available to the public and the rights to privacy and security of the official or Judge. Corrupt "information keepers" or weak information systems and institutions can result in serious information leaks that could have serious human rights implications -- particularly in transition countries. A cursory review of existing laws reveals that there is no one model law or policy regarding exactly the range of assets Judges should disclose. To some degree, it depends, inter alia, on the development context of the country in question. Regarding the kind of assets to be disclosed, different countries have likewise adopted different models

depending on the development context: Broad Disclosure - In the United States, there is an obligation to make a broad accounting of financial holdings, including a list of gifts, lecture fees or other outside incomes. However, there has been some criticism of some judges not fully disclosing their having received trip expenses from private sources and these rules are still under debate. Medium-size disclosure - In Argentina, judges are exempt from declaring some kinds of property if it might jeopardize their security. For example, judges are not obligated to submit details of the place where they live or their credit card numbers. Narrow disclosure - In many transition countries, judges must declare only incomes -- assets are exempt.”

119. The Ethics in Government Act, 1978 of United States requires that federal judges disclose personal and financial information each year. Under the Act, federal judges must disclose the source and amount of income, other than that earned as employees of the United States government, received during the preceding calendar year. Judges must also disclose the source description and value of gifts, for which the correct value is more than certain minimal amount, received from any source other than a relative; the source and description of reimbursements; the identity and category of value of property and interests; the identity and category of values of liabilities owed to creditors other than certain immediate family members; and other financial information. The Act allows judges to redact information from their financial disclosure request under certain circumstances. A report may be redacted

- “(i) to the extent necessary to protect the individual who files the report; and
- (ii) for so long as the danger to such individual exists”.

The Act further charges the US Judicial Conference Committee with the task of submitting to the House and Senate Committee on the Judiciary an annual report documenting redactions. When a member of the public requests for a copy of judges financial disclosure report, the Committee sends a notification of the request to the judge in question asking the judge to respond in writing whether he would like to request new or additional redactions of information. If the judge does not request redaction from his/her report, a copy of the report is released to the requester. However, if the judge requests redaction upon receiving the request for a copy of the report, the Committee then votes on the redaction request, with a majority needed to approve or deny the request, and finally a copy of the report is released, with approved redactions, if any.

120. It will be useful to note certain developments which led to the federal judges. asset information being placed on the internet. In September, 1999, APBnews.com ("APB"), a site focused on criminal justice news, requested for financial disclosure reports filed by federal judges in 1998. The Judicial Conference Committee denied this request in December, 1999 ruling that the disclosure reports should not be turned over to APB because posting the reports on the internet would contravene the statutory requirement that all report registers identify themselves by name, occupation and address. After the Judicial Conference Committee denied APB.s request, APB filed suit in the US District Court for southern districts of New York to obtain the report. But on March 14, 2000, the Judicial Conference Committee voted to reverse its decision and allowed the reports to be available on the internet, recognizing that the statutory language did not permit withholding the reports in their entirety from news organizations. Though the Act generally prohibits obtaining or using a report for commercial

purposes, it contains an exemption for "news and communication media" involved in "dissemination to the general public". Thus APB could not be refused access to the reports. Before the forms were released to the APB, however, the Committee removed some personal information submitted by judges but not required by the Act, such as home addresses and names of spouses and dependants.

EPILOGUE

121. It was Edmund Burke who observed that "All persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust and that they are to account for their conduct in that trust." Accountability of the Judiciary cannot be seen in isolation. It must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent, accessible and effective. Behind this notion is a concept that the wielders of power – legislative, executive and judicial – are entrusted to perform their functions on condition that they account for their stewardship to the people who authorize them to exercise such power. Well defined and publicly known standards and procedures complement, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society. Sunlight is the best disinfectant."

122. We are satisfied that the impugned order of the learned single Judge is both proper and valid and needs no interference. The appeal is accordingly dismissed.

L. Chandra Kumar v. Union of India and Others

AIR 1997 SC 1125

1. 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, 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 323A or under Article 323B 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?

5. Part XIVA of the Constitution was inserted through Section 46 of the Constitution (42nd Amendment) Act, 1976 with effect from March 1, 1977. It comprises two provisions, Articles 323A and 323B, which have, for the sake of convenience, been fully extracted hereunder:

PART XIVA TRIBUNALS

323A. Administrative tribunals.

- (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.
- (2) A law made under clause (1) may—
 - (a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;
 - (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

- (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
 - (d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);
 - (e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
 - (f) repeal or amend any order made by the President under clause (3) of article 371D;
 - (g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.
- (3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

323B. Tribunals for other matters.

- (1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.
- (2) The matters referred to in clause (1) are the following, namely:
 - (a) levy, assessment, collection and enforcement of any tax;
 - (b) foreign exchange, import and export across customs frontiers;
 - (c) industrial and labour disputes;
 - (d) land reforms by way of acquisition by the State of any estate as defined in article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;
 - (e) ceiling on urban property;
 - (f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in article 329 and article 329A;
 - (g) production, procurement, supply and distribution of food-stuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;
 - (h) rent, its regulation and control and tenancy issues including the right, title and interest of landlords and tenants;
 - (i) offences against laws with respect to any of the matters specified in sub-clauses (a) to (h) and fees in respect of any of those matters;
 - (j) any matter incidental to any of the matters specified in sub-clauses (a) to (i).
- (3) A law made under clause (1) may—

- (a) provide for the establishment of a hierarchy of tribunals;
 - (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
 - (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
 - (d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals;
 - (e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
 - (f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.
- (4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Explanation.—In this article, “appropriate Legislature”, in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI.

7. In pursuance of the power conferred upon it by Clause (1) of Article 323A of the Constitution, Parliament enacted the Administrative Tribunals Act, 1985 (Act 13 of 1985) [hereinafter referred to as "the Act"]. The Statement of Objects and Reasons of the Act indicates that it was in the express terms of Article 323A of the Constitution and was being enacted because a large number of cases relating to service matters were pending before various Courts; it was expected that "the setting up of such Administrative Tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of the various courts and thereby giving them more time to deal with other cases expeditiously but would also provide to the persons covered by the Administrative Tribunals speedy relief in respect of their grievances."

8. Pursuant to the provisions of the Act, the Central Administrative Tribunal, with five Benches, was established on November 1, 1985. However, even before the Tribunal had been established, several writ petitions had been filed in various High Courts as well as this Court challenging the constitutional validity of Article 323A of the Constitution as also the provisions of the Act; the principal violation complained of being the exclusion of the jurisdiction of this Court under Article 32 of the Constitution and of that of the High Courts under Article 226 of the Constitution. Through an interim order dated October 31, 1985, reported as *S.P. Sampath Kumar v. Union of India* (1985)4SCC458, this Court directed the carrying out of certain measures with a view to ensuring the functioning of the Tribunal along constitutionally-sound principles. Pursuant to an undertaking given to this Court at the interim

stage by the erstwhile Attorney General, An amending Act (Act 19 of 1986) was enacted to bring about the changes prescribed in the aforesaid interim order.

10. We may now analyse the scheme and the salient features of the Act as it stands at the present time, inclusive as it is of the changes suggested in Sampath Kumar's case. The Act contains 37 Sections which are housed in five Chapters. Chapter I ("Preliminary") contains three Sections; Section 3 is the definition clause.

11. Chapter II ("Establishment of Tribunals and Benches thereof) contains Sections 4 - 13. Section 4 empowers the Central Government to establish : (1) a Central Administrative Tribunal with Benches at separate places; (2) an Administrative Tribunal for a State which makes a request in this behalf; and (3) a Joint Administrative Tribunal for two or more States which enter into an agreement for the purpose. Section 5 states that each Tribunal shall consist of a chairman and such number of Vice-Chairmen and Judicial and Administrative Members as may be deemed necessary by the appropriate Government. Sub-section (2) of Section 5 requires every Bench to ordinarily consist of one Judicial Member and one Administrative Member. Sub-section (6) of Section 5, which enables the Tribunal to function through Single Member Benches is the focus of some controversy, as will subsequently emerge, and is fully extracted as under:

Section 5(6) - Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other Member authorised by the Chairman in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction powers and authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or special order specify:

Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members the case or matter may be transferred by the chairman or, as the case may be, referred to him for transfer to such Bench as the Chairman may deem fit.

12. Section 6 deals with the qualifications of the personnel of the Tribunal. Since the first few sub-sections of Section 6 are required to be considered subsequently, they may be reproduced hereunder:

6. Qualifications for appointment of Chairman, Vice- Chairman or other Members. -

(1) A person shall not be qualified for appointment as the Chairman unless he-

(a) is, or has been, a Judge of a High Court; or

(b) has, for at least two years, held the office of Vice-Chairman;

(c)

(2) A person shall not be qualified for appointment as the Vice-Chairman unless he--

(a) is, or has been, or is qualified to be a Judge of a High Court; or

(b) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India; or

(bb) has for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(c) has, for a period of not less than three years, held office as a Judicial Member or an Administrative Member.

(3) A person shall not be qualified for appointment as a Judicial Member unless he--

(a) is, or has been, or is qualified to be, a Judge of a High Court; or

(b) has been a member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years.

(3-A) A person shall not be qualified for appointment as an Administrative Member unless he--

(a) has, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(b) has, for at least three years, held the post of a joint Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India.

and shall, in either case, have adequate administrative experience.

13. Sub-sections (4), (5) and (6) of Section [6](#) provide that all the Members of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals shall be appointed by the President; in the case of the State Administrative Tribunals and the Joint Administrative Tribunals, the President is required to consult the concerned Governor(s). Sub-section (7) stipulates that the Chief Justice of India is also to be consulted in the appointment of the Chairman, Vice-Chairman and Members of all Tribunals under the Act.

14. Section 8 prescribes the terms of office of the personnel of the Tribunal as being for a duration of five years from the date of entering into office; there is also provision for reappointment for another term of five years. The maximum age limit permissible for the Chairman and the Vice-Chairman is 65 years and for that of any other Member is 62 years. Section 10 stipulates that the salaries, terms and conditions of all Members of the Tribunal are to be determined by the central Government; such terms are, however, not to be varied to the disadvantage of any Member after his appointment.

15. Chapter III ("Jurisdiction, powers and authority of Tribunals") consists of Sections 14 - 18. Sections 14, 15 and [16](#) deal with the jurisdiction, powers and authority of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals respectively. These provisions make it clear that except for the jurisdiction of this Court, the Tribunals under the Act will possess the jurisdiction and powers of every other Court in the country in respect of all service-related matters. Section 17 provides that the

Tribunals under the Act will have the same powers in respect of contempt as are enjoyed by the High Courts.

16. Chapter IV ("Procedure") comprises Section 19 - 27. Section 21 specifies strict limitation periods and does not vest the Tribunals under the Act with the power to condone delay.

17. Chapter V ("Miscellaneous"), the final Chapter of the Act, comprising Sections 28 - 37, vests the Tribunals under the Act with ancillary powers to aid them in the effective adjudication of disputes. Section 28, the "exclusions of Jurisdiction" clause reads as follows:

28. Exclusion of Jurisdiction of courts.-- On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except--

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force,

Shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters.

18. A facet which is of vital relevance to the controversy before us, and consequently needs to be emphasised, is that Section 28, when originally enacted, was in the express terms of Clause (2) (d) of Article 323A of the Constitution and the only exception made in it was in respect of the jurisdiction of this Court under Article 136 of the Constitution. However, before the final hearing in Sampath Kumar's case the provision was further amended to also save the jurisdiction of this Court under Article 32 of the Constitution; this aspect has been noted in the judgment of Mishra, J. in Sampath Kumar's case (at para 14). Since the Court in Sampath Kumar's case had restricted its focus to the provisions of the Act, it expressed itself to be satisfied with the position that the power of judicial review of the Apex Court had not been tampered with by the provisions of the Act and did not venture to address the larger issue of whether Clause (2)(d) of Article 323A of the Constitution also required a similar amendment.

19. Section 29 provides for the transfer to the Tribunals under the Act, of all service matters pending in every existing form before their establishment. The only exception carved out is in respect of appeals pending before High Courts. Section 35 vests the Central Government with rule-making powers and Section 36 empowers the appropriate Government to make rules to implement the provisions of the Act and the matters specified in it. By virtue of Section 37, the rules made by the Central Government are required to be laid before Parliament and, in the case of rules made by State Governments, before the concerned State Legislature (s).

20. The Act and its provisions will be analysed in the course of this judgment. However, a preliminary appraisal of the framework of the Act would indicate that it was intended to provide a self-contained, almost wholly exclusive (the exceptions being specified in Section 28) forum for adjudication of all service related matters. The Tribunals created under the Act were intended to perform a substitution role as opposed to - and this distinction is of crucial significance-a supplemental role with regard to the High Courts.

90. In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. That the various Tribunals have not performed upto expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

91. 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 Article 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 Article 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.

92. 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 Tribunals under Article 227 of the Constitution. In R.K. Jain's case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunals 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 afore-stated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B 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.

93. 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.

94. 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 setup, 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 concerned High Court 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 concerned Tribunal.

95. The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered.

96. We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times, IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases.

97. 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. The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of experts bodies like the LCI and the Malimath Committee in this regard. We, therefore, recommend that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.

99. 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's case, 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.

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Union of India v. R. Gandhi, President, Madras Bar Association

2010 (5) SCALE 514

Judgement

R. V. Raveendran, J.

1. These appeals arise from the order dated 30.3.2004 of the Madras High Court in WP No. 2198/2003 filed by the President of Madras Bar Association (MBA for short) challenging the constitutional validity of Chapters 1B and 1C of the Companies Act, 1956 ('Act' for short) inserted by Companies (Second Amendment) Act 2002 ('Amendment Act' for short) providing for the constitution of National Company Law Tribunal ('NCLT' or 'Tribunal') and National Company Law Appellate Tribunal ('NCLAT' or 'Appellate Tribunal').

2. In the said writ petition, Madras Bar Association ('MBA') raised the following contentions:

(i) Parliament does not have the legislative competence to vest intrinsic judicial functions that have been traditionally performed by the High Courts for nearly a century in any Tribunal outside the Judiciary.

(ii) The constitution of the National Company Law Tribunal and transferring the entire company jurisdiction of the High Court to the Tribunal which is not under the control of the Judiciary is violative of the doctrine of separation of powers and independence of the Judiciary which are parts of the basic structure of the Constitution.

(iii) Article 323B of the Constitution enables the appropriate Legislature to provide for adjudication or trial by Tribunals of disputes, complaints or offences with respect to all or any of the matters specified in clause (2). Clause (2) enumerates the matters in regard to which Tribunals can be constituted. The said list is exhaustive and not illustrative. The list does not provide for constitution of Tribunal for insolvency, revival and restructuring of the company. In the absence of any amendment to Article 323B providing for a National Tribunal for revival of companies and winding up companies, there is no legislative competence to provide for constitution of NCLT and NCLAT.

8. Union of India contends that the High Court having held that the Parliament has the competence and power to establish NCLT and NCLAT, ought to have dismissed the writ petition. It is submitted that some of the directions given by the High Court to reframe and recast Parts 1B and 1C of the Act amounts to converting judicial review into judicial legislation.

9. On the other hand, MBA in its appeal contends that the High Court ought not to have upheld the constitutional validity of Parts 1B and 1C of the Act providing for establishment of NCLT and NCLAT; that the High Court ought to have held that constitution of such Tribunals taking away the entire Company Law jurisdiction of the High Court and vesting it in a Tribunal which is not under the control of the Judiciary, is violative of doctrine of separation of powers and the independence of Judiciary which are parts of the basic structure of the Constitution. MBA also contends that the decisions of this Court in *Union of India vs.*

Delhi High Court Bar Association – 2002 (4) SCC 275, with reference to constitutional validity of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 providing for constitution of the Debt Recovery Tribunals and *State of Karnataka vs. Vishwabharathi House Building Co-op., Society* – 2003 (2) SCC 412 in regard to the constitutional validity of Consumer Protection Act, 1986 providing for constitution of consumer fora require reconsideration.

10. When these civil appeals came up for hearing before a three-Judge Bench of this Court, the Bench was of the view that the decisions in *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261, *Union of India v. Delhi Bar Association* (2002) 4 SCC 275 and *State of Karnataka v. Vishwa Bharati Housing Building Cooperative Societies & Anr.* (2003) 2 SCC 412 holding that Parliament and State legislatures possessed legislative competence to effect changes in the original jurisdiction in the Supreme Court and High Court, had not dealt with the following issues:

- (i) To what extent the powers and judiciary of High Court (excepting judicial review under Article 226/227) can be transferred to Tribunals?
- (ii) Is there a demarcating line for the Parliament to vest intrinsic judicial functions traditionally performed by courts in any Tribunal or authority outside the judiciary?
- (iii) Whether the “wholesale transfer of powers” as contemplated by the Companies (Second Amendment) Act, 2002 would offend the constitutional scheme of separation of powers and independence of judiciary so as to aggrandize one branch over the other?

Therefore the Three Judge Bench, by order dated 13.5.2007 directed the appeals to be heard by a Constitution Bench, observing that as the issues raised are of seminal importance and likely to have serious impact on the very structure and independence of judicial system.

Difference between Courts and Tribunals

12. The term ‘Courts’ refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora). Some Tribunals are manned exclusively by Judicial Officers (Rent Tribunals, Motor Accidents Claims Tribunal, Labour Courts and Industrial Tribunals). Other statutory Tribunals have Judicial and Technical Members (Administrative Tribunals, TDSAT, Competition Appellate Tribunal, Consumer fora, Cyber Appellate Tribunal, etc).

13. This court had attempted to point out the difference between Court and Tribunal in several decisions. We may refer a few of them.

13.1) In *Harinagar Sugar Mills Ltd. vs. Shyam Sundar Jhunjhunwala* – (1962) 2 SCR 339, Hidayatullah J., succinctly explained the difference between Courts and Tribunals, thus:

“All Tribunals are not courts, though all courts are Tribunals”. The word “courts” is used to designate those Tribunals which are set up in an organized state for the administration of justice. By administration of justice is meant the exercise of juridical power of the state to maintain and uphold rights and to punish “wrongs”. Whenever there is an infringement of a right or an injury, the courts are there to restore the *vinculum juris*, which is disturbed.....When rights are infringed or invaded, the aggrieved party can go and commence a *querela* before the ordinary Civil Courts. These Courts which are instrumentalities of Government are invested with the judicial power of the State, and their authority is derived from the Constitution or some Act of Legislature constituting them. Their number is ordinarily fixed and they are ordinarily permanent, and can try any suit or cause within their jurisdiction. Their numbers may be increased or decreased, but they are almost always permanent and go under the compendious name of "Courts of Civil Judicature". There can thus be no doubt that the Central Government does not come within this class.

With the growth of civilization and the problems of modern life, a large number of administrative Tribunals have come into existence. These Tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil Judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to Courts, but are not Courts. When the Constitution speaks of 'Courts' in Articles 136, 227, or 228 or in Articles 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not Tribunals other than such Courts. This is the reason for using both the expressions in Articles 136 and 227.

By "Courts" is meant Courts of Civil Judicature and by "Tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. *Broadly speaking, certain special matters go before Tribunals, and the residue goes before the ordinary Courts of Civil Judicature. Their procedures may differ, but the functions are not essentially different.* What distinguishes them has never been successfully established.”

In my opinion, a Court in the strict sense is a Tribunal which is a part of the ordinary hierarchy of Courts of Civil Judicature maintained by the State under its constitution to exercise the judicial power of the State. *These Courts perform all the judicial functions of the State except those that are excluded by law from their jurisdiction.*

The word "judicial", be it noted, is itself capable of two meanings. They were admirably stated by Lopes, L.J. in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* [1892] 1 Q.B. 431, in these words:

"The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind - that is, a mind to determine what is fair and just in respect of the matters under consideration."

That an officer is required to decide matters before him "judicially" in the second sense does not make him a Court or even a Tribunal, because that only establishes that he is following a standard of conduct, and is free from bias or interest. Courts and Tribunals act "judicially" in both senses, and in the term "Court" are included the ordinary and permanent Tribunals and in the term "Tribunal" are included all others, which are not so included".

(emphasis supplied)

13.3) In *Associated Cement Companies Ltd. vs. P. N. Sharma* – (1965) 2 SCR 366, another Constitution Bench of this Court explained the position of Tribunals thus:

"The expression "court" in the context denotes a Tribunal constituted by the State as a part of the ordinary hierarchy of courts which are invested with the State's inherent judicial powers. A sovereign State discharges legislative, executive and judicial functions and can legitimately claim corresponding powers which are described as legislative, executive and judicial powers. Under our Constitution, the judicial functions and powers of the State are primarily conferred on the ordinary courts which have been constituted under its relevant provisions. The Constitution recognised a hierarchy of courts and their adjudication are normally entrusted all disputes between citizens and citizens as well as between the citizens and the State. These courts can be described as ordinary courts of civil judicature. They are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which is described as judicial process. The powers which these courts exercise are judicial powers, the functions they discharge are judicial functions and the decisions they reach and pronounce are judicial decisions.

In every State there are administrative bodies or authorities which are required to deal with matters within their jurisdiction in an administrative manner and their decisions are described as administrative decisions. In reaching their administrative decisions, administrative bodies can and often do take into consideration questions of policy. It is not unlikely that even in this process of reaching administrative decisions, the administrative bodies or authorities are required to act fairly and objectively and would in many cases have to follow the principles of natural justice; but the authority to reach decision conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on courts, and the decisions pronounced by administrative bodies are similarly distinct and separate in character from judicial decisions pronounced by courts. Tribunals which fall under the purview of Article 136(1) occupy a special position of their own under the scheme of our Constitution. Special matters and questions are entrusted to them for their decision and in that sense, they share with the court one common characteristic; both the courts and the Tribunals are constituted by the state and are invested with judicial as distinguished from purely administrative or executive functions (vide *Durga Shankar Mehta v. Raghuraj Singh* - 1955 (1) SCR 267). They are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the courts is

regularly prescribed and in discharging their functions and exercising their powers, the courts have to conform to that procedure. *The procedure which the Tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the courts and the Tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of courts, so in the case of Tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge.*"

(emphasis supplied)

In *S.P. Sampath Kumar vs. Union of India* – (1987) 1 SCC 124, this Court expressed the view that the Parliament can without in any way violating the basic structure doctrine make effective alternative institutional mechanisms or arrangements for judicial review.

14. Though both Courts and Tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and Tribunals. They are:

(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are Tribunals. But all Tribunals are not courts.

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions.

(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act.

41. The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one or more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative act cannot be challenged on the ground it violates the basic structure of the constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of Rule of Law, separation of power and independence of Judiciary.

44. We may summarize the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.

(c) Whenever there is need for 'Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals; the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.

45. We may now attempt to examine the validity of Part 1B and 1C of the Act by applying the aforesaid principles. The issue is not whether judicial functions can be transferred from courts to Tribunals. The issue is whether judicial functions can be transferred to Tribunals manned by persons who are not suitable or qualified or competent to discharge such judicial powers or whose independence is suspect. We have already held that the Legislature has the competence to transfer any particular jurisdiction from courts to Tribunals provided it is understood that the Tribunals exercise judicial power and the persons who are appointed as President/Chairperson/ Members are of a standard which is reasonably approximate to the standards of main stream judicial functioning. On the other hand, if a Tribunal is packed with members who are drawn from the civil services and who continue to be employees of different Ministries or Government Departments by maintaining lien over their respective posts, it would amount to transferring judicial functions to the executive which would go against the doctrine of separation of power and independence of judiciary.

46. Legislature is presumed not to legislate contrary to rule of law and therefore know that where disputes are to be adjudicated by a Judicial Body other than Courts, its standards should approximately be the same as to what is expected of main stream Judiciary. Rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions.

When the legislature proposes to substitute a Tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment of Judicial Members.

57. We therefore dispose of these appeals, partly allowing them, as follows:

(i) We uphold the decision of the High Court that the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional.

(ii) We declare that Parts 1B and 1C of the Act as presently structured are unconstitutional for the reasons stated in the preceding Para. However, Parts 1B and 1C of the Act may be made operational by making suitable amendments, as indicated above, in addition to what the Union Government has already agreed in pursuance of the impugned order of the High Court.

Rojer Mathew v. South Indian Bank Ltd. & Ors.
(2020) 6 SCC 1

Ranjan Gogoi, C.J.: (*for himself, Ramana, Chandrachud, Deepak Gupta, and Khanna, JJ.: Chandrachud, J. and Deepak Gupta, J. supplementing and partly dissenting as well*)

3. The Madras Bar Association has preferred Writ Petition (Civil) No. 267 of 2012 seeking the following reliefs:

“i. A writ of mandamus, directing the Union of India, to implement the directions of this Hon’ble Court in ***Union of India v. R. Gandhi*** [(2010) 11 SCC 1, para 96 at pg. 310] and ***L. Chandra Kumar v. Union of India*** [(1997) 3 SCC 261], paras 120 and 121 at page 65 to 67], where Ministry of Law and Justice, Govt. Of India was ordered to take over the administration of all tribunals created by Parliament and streamline the functioning of the same.

ii. A writ of mandamus directing the Ministry of Law & Justice to promptly carry out a ‘Judicial Impact Assessment’ on all tribunals created by Parliament and submit a report on the same to this Hon’ble Court.”

7. During the pendency of the aforementioned writ petition, the present lead matter bearing SLP(C) No. 15804/2017 was filed by Rojer Mathew, assailing the final judgment and order of the High Court of Kerala. The Petitioner had originally approached the High Court challenging the constitutional validity of Section 13 (5-A) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 which permits secured creditors to participate in auction of immoveable property if it remained unsold for want of reserve bid in an earlier auction. Rojer Mathew claimed that the aforementioned provision violated his rights Under Article 300A and Article 14 of the Constitution, besides being in contravention of the Code of Civil Procedure which prohibits mortgagees from participating in auction of immovable property without prior Court permission.

63. The foremost contention on behalf of the Petitioners is that Part-XIV could not and ought not to have been made part of the Finance Act, 2017 as the said part is not classifiable as a ‘money bill’. Emphasis was placed on the wordings of Article 110 which allows those bills which contain “only” provisions which fall within the metes and bounds of Clauses (a) to (g) thereof, to be treated as ‘money bill’. By virtue of inclusion of Part XIV, the entirety of the Finance Act, 2017 was contended to have lost its colour as a ‘money bill’ Under Article 110 and hence its passage without the assent of the Rajya Sabha as required Under Article 107 renders it ultra vires the legislative scheme contemplated in the Constitution.

64. Learned Counsels vehemently placed reliance on the Constituent Assembly Debates to lend strength to the importance of the expression “only” under Article 110(1). They seek to make out a case that such phraseology was deliberately incorporated in the Constitution by making a conscious departure from Section 37 of the Government of India Act, 1935. Inclusion of Part XIV in the Finance Act, 2017 is shown as being an act of camouflage and a

colourable exercise and Petitioners assert that such indirect manner of bypassing of the Rajya Sabha is impermissible. A larger narrative was presented before this Court, that is, of the Central Government undermining the character and essence of a bicameral legislature as envisaged under the Constitution; and interference of this Court was sought through examination of the substance of the legislation and not mere acceptance of the nomenclature accorded by the Lok Sabha Speaker under Article 110(3).

92. In light of these arguments put forth by learned Counsels and the suggestions of by the Amicus Curiae, the following issues arise for our consideration:

I. Whether the 'Finance Act, 2017' insofar as it amends certain other enactments and alters conditions of service of persons manning different Tribunals can be termed as a 'money bill' Under Article 110 and consequently is validly enacted?

II. If the answer to the above is in the affirmative then Whether Section 184 of the Finance Act, 2017 is unconstitutional on account of Excessive Delegation?

III. If Section 184 is valid, Whether Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 are in consonance with the Principal Act and various decisions of this Court on functioning of Tribunals?

IV. Whether there should be a Single Nodal Agency for administration of all Tribunals?

V. Whether there is a need for conducting a Judicial Impact Assessment of all Tribunals in India?

VI. Whether judges of Tribunals set up by Acts of Parliament Under Articles 323-A and 323-B of the Constitution can be equated in 'rank' and 'status' with Constitutional functionaries?

VII. Whether direct statutory appeals from Tribunals to the Supreme Court ought to be detoured?

VIII. Whether there is a need for amalgamation of existing Tribunals and setting up of benches.

Issue I: *Whether the 'Finance Act, 2017' insofar as it amends certain other enactments and alters conditions of service of persons manning different tribunals can be termed as a 'money bill' under Article 110 and consequently is validly enacted?*

116. Upon an extensive examination of the matter, we notice that the majority in **K.S. Puttaswamy (Aadhaar-5)** (2019) 1 SCC 1 pronounced the nature of the impugned enactment without first delineating the scope of Article 110(1) and principles for interpretation or the repercussions of such process. It is clear to us that the majority dictum in **K.S. Puttaswamy (Aadhaar-5)** did not substantially discuss the effect of the word 'only' in Article 110(1) and offers little guidance on the repercussions of a finding when some of the provisions of an enactment passed as a "Money Bill" do not conform to Article 110(1)(a) to (g). Its interpretation of the provisions of the Aadhaar Act was arguably liberal and the Court's satisfaction of the said provisions being incidental to Article 110(1)(a) to (f), it has been argued is not convincingly reasoned, as might not be in accord with the bicameral Parliamentary system envisaged under our constitutional scheme. Without expressing a firm

and final opinion, it has to be observed that the analysis in ***K.S. Puttaswamy (Aadhaar-5)*** makes its application difficult to the present case and raises a potential conflict between the judgements of coordinate Benches.

117. Given the various challenges made to the scope of judicial review and interpretative principles (or lack thereof) as adumbrated by the majority in ***K.S. Puttaswamy (Aadhaar-5)*** and the substantial precedential impact of its analysis of the Aadhaar Act, 2016, it becomes essential to determine its correctness. Being a Bench of equal strength as that in ***K.S. Puttaswamy (Aadhaar-5)***, we accordingly direct that this batch of matters be placed before Hon'ble the Chief Justice of India, on the administrative side, for consideration by a larger Bench.

118. There is yet another reason why we feel the matter should be referred to a Constitution Bench of seven judges. ***L. Chandra Kumar*** (1997) 3 SCC 261, which was decided by a Bench of seven Judges, had also interpreted on the ambit of supervision by the High Courts under Article 227(1) of the Constitution to observe that the Constitutional scheme does not require all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction, as the idea is to divest the High Courts of their onerous burden. Consequently, adding to their supervisory functions vide Article 227(1) cannot be of assistance in any manner. Thereafter, it was observed that different tribunals constituted under different enactments are administered by the Central and the State Governments, yet there was no uniformity in administration. This Court was of the view that until a wholly independent agency for 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, the Court observed that the Ministry of Law would be the appropriate ministry. The Ministry of Law in turn was required to appoint an independent supervisory body to oversee the working of the Tribunals. As noticed above, this has not happened. In these circumstances, it would be appropriate if these aspects and questions are looked into by a Bench of seven Judges.

Issue II: whether Section 184 of the Finance Act, 2017 is unconstitutional on account of excessive delegation?

119. The second challenge against Part XIV of the Finance Act, 2017 is predicated on the assertion that this is a case of excessive delegation as it falters on the anvil of "essential legislative functions" and "policy and guidelines" tests.

139. The objects of the parent enactments as well as the law laid down by this Court in ***R.K. Jain v. Union of India*** (1993) 4 SCC, ***L. Chandra Kumar v. Union of India*** (1997) 3 SCC 261, ***Madras Bar Assn.*** (2010) 11 SCC 1, ***Madras Bar Assn.*** (2014) 10 SCC 1 and ***Gujarat Urja Vikas*** (2016) 9 SCC 103 undoubtedly bind the delegate and mandatorily requires the delegate Under Section 184 to act strictly in conformity with these decisions and the objects of delegated legislation stipulated in the statutes. It must also be emphasised that the Finance Act, 2017 nowhere indicates that the legislature had intended to differ from, let alone make

amendments, to remove the edifice and foundation of such decisions by enacting the Finance Act. Indeed, the learned Attorney General was clear in suggesting that Part XIV was inserted with a view to incorporate the changes recommended by this Court in earlier decisions.

144. On examining the Constitutional scheme, the statutes which had created tribunals and the precedents of this Court laying down attributes of independence of tribunals in different facets, we do not think that the power to prescribe qualifications, selection procedure and service conditions of members and other office holders of the tribunals is intended to vest solely with the Legislature for all times and purposes. Policy and guidelines exist. Subject to aforesaid, the submission of learned Attorney General that Section 184 was inserted to bring uniformity and with a view to harmonise the diverse and wide-ranging qualifications and methods of appointment across different tribunals carries weight and, in our view, needs to be accepted.

145. Cautioning against the potential misuse of Section 184 by the executive, it was vehemently argued by the learned counsel for the petitioner(s) that any desecration by the Executive of such powers threatens and poses a risk to the independence of the tribunals. A mere possibility or eventuality of abuse of delegated powers in the absence of any evidence supporting such claim, cannot be a ground for striking down the provisions of the Finance Act, 2017. It is always open to a Constitutional court on challenge made to the delegated legislation framed by the Executive to examine whether it conforms to the parent legislation and other laws, and apply the “policy and guideline” test and if found contrary, can be struck down without affecting the constitutionality of the rule making power conferred under Section 186 of the Finance Act, 2017.

***Issue III:** If section 184 is valid, whether Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017 are in consonance with the principal act and various decisions of this court on functioning of tribunals?*

148. Composition of a Search-cum-Selection Committee is contemplated in a manner whereby appointments of Member, Vice-President and President are predominantly made by nominees of the Central Government. A perusal of the Schedule to the Rules shows that save for token representation of the Chief Justice of India or his nominee in some Committees, the role of the judiciary is virtually absent.

149. We are in agreement with the contentions of the Learned Counsel for the petitioner(s), that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain. The doctrine of separation of powers has been well recognised and re-interpreted by this Court as an important facet of the basic structure of the Constitution, in its dictum in *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 and several other later decisions. The exclusion of the Judiciary from the control and influence of the Executive is not limited to traditional Courts alone, but also includes Tribunals since they are formed as an alternative to Courts and perform judicial functions.

153. We are of the view that the Search-cum-Selection Committee as formulated under the Rules is an attempt to keep the judiciary away from the process of selection and appointment of Members, Vice-Chairman and Chairman of Tribunals. This Court has been lucid in its ruling in *Supreme Court Advocates-on-Record Assn. v. Union of India* (2016) 5 SCC 1 (*Fourth Judges Case*), wherein it was held that primacy of judiciary is imperative in selection and appointment of judicial officers including Judges of High Court and Supreme Court. Cognisant of the doctrine of Separation of Powers, it is important that judicial appointments take place without any influence or control of any other limb of the sovereign. Independence of judiciary is the only means to maintain a system of checks and balances on the working of Legislature and the Executive. The Executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in judicial appointments.

154. We are in complete agreement with the analogy elucidated by the Constitution Bench in *Fourth Judges case* (2016) 5 SCC 1 for compulsory need for exclusion of control of the executive over quasi-judicial bodies of tribunals discharging responsibilities akin to courts. The Search-cum-Selection Committees as envisaged in the Rules are against the constitutional scheme inasmuch as they dilute the involvement of judiciary in the process of appointment of Members of tribunals which is in effect an encroachment by the executive on the judiciary.

164. The stature of the people manning an institution lends credibility and colour to the institution itself. There is a perceptible signalling effect in having retired Supreme Court justices as presiding officers of a particular Tribunal of National importance. The same instils an inherent fairness, dignity and exalted status in the Tribunal. Permitting such institutions to be also occupied by persons who have not manned an equivalent position or those with lesser judicial experience, does not bode well for the Tribunal besides discouraging competent people from offering their services. On the same analogy, it would be an anathema to say that High Court judges and District Court judges can both occupy the same position in a Tribunal.

165. It is clear from the Scheme contemplated under the Rules that the government has significantly diluted the role of the Judiciary in appointment of judicial members. Further, in many Tribunals like the NGT, the role of the Judiciary in appointment of non-judicial members has entirely been taken away. Such a practice violates the Constitutional scheme and the dicta of this Court in various earlier decisions already referred to. It is also important to note that in many Tribunals like the National Green Tribunal where earlier removal of members or presiding officer could only be after an enquiry by Supreme Court Judges and with necessary consultation with the Chief Justice of India, under the present Rules it is permissible for the Central Government to appoint an enquiry committee for removal of any presiding officer or member on its own. The Rules are not explicit on who would be part of such a Committee and what would be the role of the Judiciary in the process. In doing so, it significantly weakens the independence of the Tribunal members. It is well understood across the world and also under our Constitutional framework that allowing judges to be removed by

the Executive is palpably unconstitutional and would make them amenable to the whims of the Executive, hampering discharge of judicial functions.

172. This Court criticised the imposition of short tenures of members of Tribunals in *Union of India v. Madras Bar Association, (2010)* and a longer tenure was recommended. It was observed that short tenures also discourage meritorious members of Bar to sacrifice their flourishing practice to join a Tribunal as a Member for a short tenure of merely three years. The tenure of Members of Tribunals as prescribed under the Schedule of the Rules is anti-merit and attempts to create equality between unequals. A tenure of three years may be suitable for a retired Judge of High Court or the Supreme Court or even in case of a judicial officer on deputation. However, it will be illusory to expect a practising advocate to forego his well-established practice to serve as a Member of a Tribunal for a period of three years. The legislature intended to incorporate uniformity in the administration of Tribunal by virtue of Section 184 of Finance Act, 2017. Nevertheless, such uniformity cannot be attained at the cost of discouraging meritorious candidates from being appointed as Members of Tribunals.

174. In the light of the discussion as aforesaid, we hold that the Rules would require a second look since the extremely short tenure of the Members of Tribunals is anti-merit and has the effect of discouraging meritorious candidates to accept posts of Judicial Members in Tribunals.

175. On the contentions of parties and in the light of the aforementioned discussion, the Bench has observed following contradictions in the Rules:

175.1. There is an inconsistency within the Rules with regard to the tenure prescribed for the Members of Tribunals insofar as a fixed tenure of three years for both direct appointments from the Bar and appointment of retired judicial officers or judges of High Court or Supreme Court. It is also discriminatory to the extent that it attempts to create equality between unequal classes. The tenure of Members, Vice-Chairman, Chairman, etc. must be increased with due consideration to the prior decisions of the Court.

175.2. The difference in the age of superannuation of the Members, Vice-Chairmen and Chairmen, as formulated in the Rules is contrary to the objectives of the Finance Act, 2017 viz., to attain uniformity in the composition of the Tribunal framework. There should be a uniform age of superannuation for Members, Vice-Chairmen, Chairmen, etc. in all Tribunals.

175.3. Rule 4(2) of the Rules providing that the Secretary to the Government of India in the Ministry or Department under which the Tribunal is constituted shall be the convener of the Search-cum-Selection Committee, is in direct violation of the doctrine of Separation of Powers and thus contravenes the basic structure of the Constitution. Corollary to the dictum of this Court in the *Fourth Judges Case*, judicial dominance in appointment of members of judiciary cannot be diluted by the Executive.

175.4. Rule 7 accords unwarranted discretion to the Central Government insofar as it merely directs and not mandates the Central Government to consider the recommendation of Committee for removal of a Member of a Tribunal. The Central Government shall mandatorily consider the recommendation of the Committee before removal of any Member of Tribunal. Furthermore, the proviso to Rule 7 creates an unjust classification between National Company Law Appellate Tribunal (NCLAT) and other fora inasmuch as the removal of Chairperson or member of NCLAT alone is to be in consultation with the Chief Justice of India

175.5. Moral turpitude is a term well defined by this Court in numerous decisions. Rule 7(b) cannot be allowed to survive as it allows the Executive to interpret the meaning of ‘moral turpitude’, which is an encroachment on the judicial domain.

175.6. The power of relaxation of rules with respect to any class of persons shall be vested with the Search-cum-Selection Committee and not with the Central Government as provided under Rule 20. As ruled by this Court earlier in *Madras Bar Association* (2014) 10 SCC 1, the Central Government cannot be allowed to have administrative control over the Judiciary without subverting the doctrine of separation of powers.

Issue IV: Whether there should be a single nodal agency for administration of all tribunals?

177. This Court in *L. Chandra Kumar v. Union of India* (supra), envisaged the administration of the entire Tribunal Framework in the country to be monitored by a single nodal agency/ministry. It was observed not to be advisable to allow supervision of a Tribunal by a department/ministry which is a party before it. This Court recommended constitution of an independent agency by the concerned Ministry, to oversee the working of Tribunals. The independent agency when constituted, may also prescribe a uniform code for appointment, qualification, condition of service, manner of allocation of fund, etc. of the Tribunals. This will, the Court suggested, minimise the influence of the parent ministry of the Tribunal, in addition to ensuring uniformity in the entire Tribunal framework....

180. What appears to be of paramount importance is that every Tribunal must enjoy adequate financial independence for the purpose of its day to day functioning including the expenditure to be incurred on (a) recruitment of staff; (b) creation of infrastructure; (c) modernisation of infrastructure; (d) computerisation; (e) perquisites and other facilities admissible to the Presiding Authority or the Members of such Tribunal. It may not be very crucial as to which Ministry or Department performs the duties of Nodal Agency for a Tribunal, but what is of utmost importance is that the Tribunal should not be expected to look towards such Nodal Agency for its day to day requirements. There must be a direction to allocate adequate and sufficient funds for each Tribunal to make it self-sufficient and self-sustainable authority for all intents and purposes. The expenditure to be incurred on the functioning of each Tribunal has to be necessarily a charge on the Consolidated Fund of India. Therefore, hitherto, the Ministry of Finance shall, in consultation with the Nodal Ministry/Department, shall earmark separate and dedicated funds for the Tribunals. It will not only ensure that the Tribunals are

not under the financial control of the Department, who is a litigant before them, but it may also enhance the public faith and trust in the mechanism of Tribunals.

Issue V: Whether there is a need for conducting a Judicial Impact Assessment of all tribunals in india?

183. The American principle of 'Judicial Impact Assessment' was first borrowed by this Court in its dictum in *Salem Advocate Bar Assn. (II) v. Union of India* (2005) 6 SCC 344, whereby it was observed that it is imperative for the Legislature to perform a Judicial Impact Assessment of the enactment passed to assess its ramifications on the judiciary. This Court had directed for a committee to be constituted to assess the need for Judicial Impact Assessment in the Indian context. Pursuant thereto the *Jagannadha Rao Committee Report* was submitted. The *Report* suggested that by way of Judicial Impact Assessment, the legislature must analyse the budgetary requirement of the staff that would require to be created by the statute and additional expenditure arising out of the new cases consequent to the enactment. Further, the financial memorandum, as prepared by the legislature, must specifically include the number of civil and criminal cases expected to arise from the new enactment, requirement of more judges and staff for adjudication of these cases and the necessary infrastructure. The requisite paragraphs of the decision in *Salem Advocate Bar Assn.* (supra) are reproduced as follows:

49. The Committee has also suggested that: Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many courts are necessary, how many judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such judicial impact assessment has never been made by any legislature or by Parliament in our country.

50 . Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report to this Court within four months.

184. In the present case, we are of the view that the legislature has not conformed to the opinion of this Court with respect to 'Judicial Impact Assessment' and thus, has not made any attempt to assess the ramifications of the Finance Act, 2017. It can be legitimately expected that the multifarious amendments in relation to merger and reorganisation of Tribunals may result in massive increase in litigation which, in absence of adequate infrastructure, or budgetary grants, will overburden the Judiciary.

185. In the fitness of things, we deem it appropriate to direct the Union of India to carry out financial impact assessment in respect of all the Tribunals referable to Sections 158 to 182 of the Finance Act, 2017 and undertake an exercise to assess the need based requirements and make available sufficient resources for each Tribunal established by the Parliament.

***Issue VI:** Whether judges of tribunals set up by acts of parliament under articles 323-A and 323-B of the constitution can be equated in 'rank' and 'status' with constitutional functionaries?*

191. This Court in *L. Chandra Kumar* (1997) 3 SCC 261 observed that Tribunals are not substitutes of Superior Courts and are only supplemental to them. Hence, the status of members of such Tribunals cannot be equated with that of the sitting judges of Constitutional Courts else, as V.R. Krishna Iyer, J. aptly pointed in his article titled 'Why Stultify Judges' Status?', "Creating deemed Justices of High Courts with equal status and salaries suggests an oblique bypassing of the Constitution....". The relevant extract of *L. Chandra Kumar* (supra) is reproduced as follows:

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional power 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...."

192. We would further point out that the Warrant of Precedence is a mere self-serving executive decision and not a law in itself. It is a reflection of the inter-se hierarchy amongst functionaries for the purposes of discharge of important ceremonial functions and other State duties. It cannot either confer rights or alter the status accorded by law. It would further be clearly abhorrent to use such an instrument to undermine the order of precedence clearly accorded under the Constitution.

193. It is hence essential that the Union of India, takes note of the observations of this Court herein and abide by the spirit of the Constitution in respecting the aforementioned difference between constitutional functionaries and statutory authorities. It is important for the Union of India to ensure that judges of High Courts and the Supreme Court are kept on a separate pedestal distanced from any other Tribunal or quasi-judicial Authority.

***Issue VII:** Whether direct statutory appeals from tribunals to the Supreme Court ought to be detoured?*

198. The ambit of appellate jurisdiction is clear from a perusal of Articles 132 to 136 of the Constitution. Article 132 provides that an appeal may be instituted before the Supreme Court against any order of the High Court where a substantial question of law arises for

consideration. Article 133(3) specifies that there shall be no appeal from the order of a single judge of the High Court unless the contrary is provided through a law by the Parliament. Further, Article 134 delineates the jurisdiction of the Supreme Court in criminal matters restricting it primarily to cases where the High Court has awarded death sentence either in trial before it or in reversal of an earlier acquittal by the trial court. In addition to this, Article 134(2) is lucid in its wording to provide that in absence of any specific legislation by the Parliament to enlarge the criminal appellate jurisdiction of this Court, no routine appeal lies before the Supreme Court in criminal matters. The extract from Article 134(2) has been reproduced below:

“(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.”

207. It is evident that this Court has also lost its original character owing to the routine hearing of appeals through invocation of the discretionary jurisdiction under Article 136. It is apposite to hold that Article 136 was never meant to be used in this manner as was very aptly remarked by Dr. B.R. Ambedkar before the Constituent Assembly, who noted that:

“The Supreme Court is not likely to grant special leave in any matter whatsoever unless it finds that it involves a serious breach of some principle in the administration of justice, or breach of certain principles which strike at the very root of administration of justice as between man and man.”

215. It is hence clear post *L. Chandra Kumar (supra)* that writ jurisdiction under Article 226 does not limit the powers of High Courts expressly or by implication against military or armed forces disputes. The limited ouster made by Article 227(4) only operates qua administrative supervision by the High Court and not judicial review. Article 136(2) prohibits direct appeals before the Supreme Court from an order of armed forces tribunals, but would not prohibit an appeal to the Supreme Court against the judicial review exercised by the High Court under Article 226.

218. It is apparent that the Legislature has not been provided with desired assistance so that it may rectify the anomalies which arise from provisions of direct appeal to the Supreme Court. Considering that such direct appeals have become serious impediments in the discharge of Constitutional functions by this Court and also affects access to justice for citizens, it is high time that the Union of India, in consultation with either the Law Commission or any other expert body, revisit such provisions under various enactments providing for direct appeals to the Supreme Court against orders of Tribunals, and instead provide appeals to Division Benches of High Courts, if at all necessary. Doing so would have myriad benefits. In addition to increasing affordability of justice and more effective Constitutional adjudication by this Court, it would also provide an avenue for High Court Judges to keep face with contemporaneous evolutions in law, and hence enrich them with adequate experience before

they come to this Court. We direct that the Union undertake such an exercise expeditiously, preferably within a period of six months at the maximum, and place the findings before Parliament for appropriate action as may be deemed fit.

Issue VIII: Whether there is a need for amalgamation of Existing tribunals and setting up of benches

220. As noted by this court on numerous occasions, including in *Madras Bar Association* 2014 10 SCC 1, although it is the prerogative of the Legislature to set up alternate avenues for dispute resolution to supplement the functioning of existing Courts, it is essential that such mechanisms are equally effective, competent and accessible. Given that jurisdiction of High Courts and District Courts is affected by the constitution of Tribunals, it is necessary that benches of the Tribunals be established across the country. However, owing to the small number of cases, many of these Tribunals do not have the critical mass of cases required for setting up of multiple benches. On the other hand, it is evident that other Tribunals are pressed for resources and personnel.

221. This ‘imbalance’ in distribution of case-load and inconsistencies in nature, location and functioning of Tribunals require urgent attention. It is essential that after conducting a Judicial Impact Assessment as directed earlier, such ‘niche’ Tribunals be amalgamated with others dealing with similar areas of law, to ensure effective utilisation of resources and to facilitate access to justice.

222. We accordingly direct the Union to rationalise and amalgamate the existing Tribunals depending upon their case-load and commonality of subject-matter after conducting a Judicial Impact Assessment, in line with the recommendation of the Law Commission of India in its 272nd Report. Additionally, the Union must ensure that, at the very least, circuit benches of all Tribunals are set up at the seats of all major jurisdictional High Courts.

Conclusion

223. light of the above discussions and our analysis, it is held that:

223.1. The issue and question of Money Bill, as defined under Article 110(1) of the Constitution, and certification accorded by the Speaker of the Lok Sabha in respect of Part-XIV of the Finance Act, 2017 is referred to a larger Bench.

223.2. Section 184 of the Finance Act, 2017 does not suffer from excessive delegation of legislative functions as there are adequate principles to guide framing of delegated legislation, which would include the binding dictums of this Court.

223.3. The Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 suffer from various infirmities as observed earlier. These Rules formulated by the Central Government under Section 184 of the

Finance Act, 2017 being contrary to the parent enactment and the principles envisaged in the Constitution as interpreted by this Court, are hereby struck down in entirety.

223.4. The Central Government is accordingly directed to re-formulate the Rules strictly in conformity and in accordance with the principles delineated by this Court in *R.K. Jain (supra)*, *L. Chandra Kumar (supra)*, *Madras Bar Association (supra)* and *Gujarat Urja Vikas Ltd. (supra)* conjointly read with the observations made in the earlier part of this decision.

223.5. The new set of Rules to be formulated by the Central Government shall ensure non-discriminatory and uniform conditions of service, including assured tenure, keeping in mind the fact that the Chairperson and Members appointed after retirement and those who are appointed from the Bar or from other specialised professions/services, constitute two separate and distinct homogeneous classes.

223.6. It would be open to the Central Government to provide in the new set of Rules that the Presiding Officers or Members of the Statutory Tribunals shall not hold ‘rank’ and ‘status’ equivalent to that of the Judges of the Supreme Court or High Courts, as the case may be, only on the basis of drawing equal salary or other perquisites.

223.7. There is a need-based requirement to conduct ‘Judicial Impact Assessment’ of all the Tribunals referable to the Finance Act, 2017 so as to analyse the ramifications of the changes in the framework of Tribunals as provided under the Finance Act, 2017. Thus, we find it appropriate to issue a writ of mandamus to the Ministry of Law and Justice to carry out such ‘Judicial Impact Assessment’ and submit the result of the findings before the competent legislative authority.

223.8. The Central Government in consultation with the Law Commission of India or any other expert body shall re-visit the provisions of the statutes referable to the Finance Act, 2017 or other Acts as listed in para 174 of this order and place appropriate proposals before the Parliament for consideration of the need to remove direct appeals to the Supreme Court from orders of Tribunals. A decision in this regard by the Union of India shall be taken within six months.

223.9. The Union Government shall carry out an appropriate exercise for amalgamation of existing Tribunals adopting the test of homogeneity of the subject matters to be dealt with and thereafter constitute adequate number of Benches commensurate with the existing and anticipated volume of work.

Interim Relief

224. As the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and other Conditions of Service of Members) Rules, 2017 have been struck down and several directions have been issued vide the majority judgment for framing of fresh set of Rules, we, as an interim order, direct that appointments to the Tribunal/Appellate Tribunal and the terms

and conditions of appointment shall be in terms of the respective statutes before the enactment of the Finance Bill, 2017. However, liberty is granted to the Union of India to seek modification of this order after they have framed fresh Rules in accordance with the majority judgment. However, in case any additional benefits concerning the salaries and emoluments have been granted under the Finance Act, they shall not be withdrawn and will be continued. These would equally apply to all new members.

Dr. Dhananjaya Y Chandrachud, J. (*Supplementing and partially dissenting*):

240. Chief Justice A M Ahmadi noted that the Constitution provides elaborate provisions dealing with terms of appointments of judges of higher courts. The learned judge observed that the same safeguards are not available to the subordinate judiciary or members of tribunals. Hence, they can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation: (*L. Chandra Kumar case* (1997) 3 SCC 261, p.301, para 78)

“78...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...”

The Court struck down Articles 323A(2)(d) and 323B(3)(d) as unconstitutional. It was also held that an —exclusion of jurisdiction clause enacted in any legislation, under the aegis of Articles 323A(2)(d) and 323B(3)(d) is unconstitutional.

246. Pursuant to the enactment of the Companies Act 2013, a Constitution Bench of this Court in *Madras Bar Association v. Union of India* (2015) 8 SCC 583 dealt with the contention that despite the directions issued in *Madras Bar Assn.*, (2010) 11 SCC 1 in respect of the provisions concerning the NCLT and the NCLAT, analogous provisions had been inserted in the 2013 Act without complying with those directions. The Court embarked on a comparison of various provisions of the Companies Act 2013 with the directions issued in *Madras Bar Assn.* and observed that many discrepancies persisted which were in contravention of the directions issued by this Court in the earlier round of litigation concerning the qualifications, appointments, eligibility, and composition of the Selection Committees. The Court affirmed the directions issued in *Madras Bar Assn.* including the direction on the composition of the Selection Committee and held that once remedial measures are taken to bring the provisions in conformity with the directions issued, the NCLT and the NCLAT may commence operations.

253. At its core, the present reference before the Constitution Bench raises the issue of whether a law which seeks to substitute existing statutory provisions governing the appointment, selection and conditions of service of diverse tribunals can validly be enacted as

a Money Bill as a component of the Finance Act. The answer to this question must in turn depend upon two facets:

(i) Whether judicial review can extend to determining the constitutional validity of a decision of the Speaker of the Upper House to certify the passage of a Bill as a Money Bill under Article 110 of the Constitution; and

(ii) Whether the statutory modification of the procedure for appointment and selection of members and their conditions of service is destructive of judicial independence and hence *ultra vires*.

Between the universes represented by these two issues, lie the shades of argument upon which the decision of this case will turn.

262. This is a clear indicator of the constitutional position that what makes a Bill a Money Bill for the purposes of Chapter II of Part V of the Constitution is that it deals only with matters falling under the description provided in clauses (a) to (g) of Article 110 (1). Clause (g) of Article 110 (1) covers —any matter incidental to what is specified in clauses (a) to (f). Clause (g) must not be understood as a residuary provision or a catch-all-phrase encompassing all other matters which are not specified in clauses (a) to (f). If this construction were to be placed on clause (g), the distinction between an Ordinary Bill and a Money Bill would vanish. Hence, to be incidental within the meaning of clause (g), the Bill must cover only those matters which fall within the ambit of clauses (a) to (f). It is only a matter which is incidental to any of the matters specified in clauses (a) to (f) which is contemplated in clause (g).

302. The Rajya Sabha reflects the pluralism of the nation and ensures a balance of power. It is an indispensable constitutive unit of the federal backbone of the Constitution. Potential differences between the two houses of the Parliament cannot be resolved by simply ignoring the Rajya Sabha. In a federal polity such as ours, the efficacy of a constitutional body created to subserve the purpose of a deliberate dialogue, cannot be defeated by immunising from judicial review the decision of the Speaker to certify a Bill as a Money Bill.

341. Part XIV of the Finance Act 2017 could not have been enacted in the form of a Money Bill. The rules which have been framed pursuant of the rule making power under Section 184 are held to be unconstitutional. However, since during the pendency of these proceedings, certain steps were taken in pursuance of the interim orders and appointments have been made, we direct that those appointments shall not be affected by the declaration of unconstitutionality. The terms and conditions governing the personnel so appointed shall however abide by the parent enactments. Upon the declaration of unconstitutionality, the conditions specified in all corresponding aspects in the parent enactments shall continue to operate.

343. It is imperative that an overarching statutory organisation be constituted through legislative intervention to oversee the working of tribunals. We recommend the constitution of an independent statutory body called the —National Tribunals Commission (NTC) to

oversee the selection process of members, criteria for appointment, salaries and allowances, introduction of common eligibility criteria, for removal of Chairpersons and Members as also for meeting the requirement of infrastructural and financial resources. The legislation should aim at prescribing uniform service conditions for members. The Commission should comprise the following members:

- (i) Three serving judges of the Supreme Court of India nominated by the Chief Justice of India;
- (ii) Two serving Chief Justices or judges of the High Court nominated by the Chief Justice of India;
- (iii) Two members to be nominated by the Central Government from amongst officers holding at least the rank to a Secretary to the Union Government: one of them shall be the Secretary to the Department of Justice who will be the exofficio convener; and
- (iv) Two independent expert members to be nominated by the Union government in consultation with the Chief Justice of India.

The senior-most among the Judges nominated by the Chief Justice of India shall be designated as the Chairperson of the NTC.

346. Though the present judgment analyses the ambit of the word “only” in Article 110(1) and the interpretation of sub-clauses (a) to (g) of clause (1) of Article 110 and concludes that Part XIV of the Finance Act 2017 could not have been validly enacted as a Money Bill, I am in agreement with the reasons which have been set out by the learned Chief Justice of India to refer the aspect of money bill to a larger Bench and direct accordingly.

347. I am in agreement with the observations of brother Justice Deepak Gupta that the qualifications of members to tribunals constitute an essential legislative function and cannot be delegated. Tribunals have been conceptualized as specialized bodies with domain-specific knowledge expertise. Indispensable to this specialized adjudicatory function is the selection of members trained in their discipline. Keeping this in mind, the prescription of qualifications for members of tribunals is a legislative function in its most essential character.

348. The qualifications for appointment to adjudicatory bodies determine the character of the body. The adjudicatory tribunals are intended to fulfil the objects of legislation enacted by Parliament, be it in the area of consumer protection, environmental adjudication, industrial disputes and in diverse aspects of economic regulation. Defining the qualifications necessary for appointment of members constitutes the core, the very essence of the tribunal. This is an **essential legislative function and cannot be delegated** to the rule making authority of the central government. It is for the legislature to define the conditions which must be fulfilled for appointment after assessing the need for domain specific knowledge.

Deepak Gupta, J. (*Supplementing and partially dissenting*)

365. I am in total agreement with the Chief Justice in as much as he has held that the decision of the Hon'ble Speaker of the House of People under Article 110 (3) of the Constitution is not beyond judicial review. I also agree with his views that keeping in view of the high office of the Speaker, the scope of judicial review in such matters is extremely restricted. If two views are possible then there can be no manner of doubt that the view of the Speaker must prevail. Keeping in view the lack of clarity as to what constitutes a Money Bill, I agree with the Hon'ble Chief Justice that the issue as to whether Part XIV of the Finance Act, 2017, is a Money Bill or not may be referred to a larger Bench.

366. As far as *Issue No.2* is concerned, I am unable to agree with the conclusion of Chief Justice. There can be no doubt that Parliament is not expected to deal with all matters and it can delegate certain "non-essential" matters to the executive. Every condition need not be laid down by the Legislature.

371. In *Ramesh Birch v. Union of India*, 1989 Supp (1) SCC 430 a Bench of this Court clearly held that the legislature cannot wash their hands of their essential legislative functions. It held as follows.

"19...A different way in which the second of the above views has been enunciated — and it is this view which has dominated since — is by saying that the legislatures cannot wash their hands of their essential legislative function. Essential legislative function consists in laying down the legislative policy with sufficient clearness and in enunciating the standards which are to be enacted into a rule of law. This cannot be delegated. What can be delegated is only the task of subordinate legislation which is by its very nature ancillary to the statute which delegates the power to make it and which must be within the policy and framework of the guidance provided by the legislature."

By the Finance Act, 2017 the number of tribunals were reduced to 19. It is the case of the Government that the tribunals are necessary so that technically qualified people can man the tribunal. The nature of work done by different tribunals is totally different. The essential qualifications for filling up the posts of members of administrative tribunals, company law tribunals or the National Green Tribunal would be totally different. This function, in my opinion, being an essential legislative function, could not have been delegated especially without laying down any guidelines.

377. I am in respectful disagreement with the Chief Justice that the objects of the parent enactments and the law laid down by this Court in *R. K. Jain v. Union of India* (1993) 4 SCC 119, *L. Chandra Kumar* (supra), *Union of India v. Madras Bar Association* (2010) 11 SCC 1, *Madras Bar Association v. Union of India* (2014) 10 SCC 1, *Madras Bar Association v. Union of India* (2015) 8 SCC 583, *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.* (2016) 9 SCC 103 in essence should be read as the guidelines. One would expect the Union Government to abide by the directions of this Court. However, this expectation has been belied by this very enactment which violates every principle of law laid down by this Court and, as held in the judgments of both my brothers, the Rules framed by the delegatee are

violative of the law laid down by this Court. In this background, it is apparent that both the delegator and the delegatee felt that they were not bound by these judgments. This is also apparent from the fact that the Rules framed by the delegatee have not been brought in consonance with the law by the delegator.

379. There being no guidelines, unfettered and unguided powers have been vested in the delegatee and, therefore, in my opinion, there is excessive delegation. As such, I would hold that Section 184 of the Finance Act, 2017 insofar as it delegates the powers to lay down the qualifications of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule, suffers from the vice of excessive delegation and is accordingly struck down.

Issue III & VI

380. I agree with the Chief Justice and I do not want to add anything.

Issue IV, V, VII & VIII

381. I agree with the Chief Justice both on the reasoning and conclusions on these issues. However, as already pointed out above, I am of the view that since nobody has raised a challenge to the correctness of the law laid down by 7-Judge Bench in ***L. Chandra Kumar*** (supra) that there should be one wholly independent agency for the administration of all the tribunals. There is no need to refer this issue to a Bench of 7 Judges.

392. The litigants cannot wait for judicial impact assessment and action by the Government which may or may not take place. Experience has shown that the judgments right from ***L. Chandra Kumar*** (supra) to ***Madras Bar Association, 2010*** (supra) have not been complied with by the Union in letter and spirit. Citizens of this country cannot be denied justice which is the first promise made in the Preamble. Therefore, I am of the view that in whichever State/Union Territory the bench of a particular tribunal is not established or functioning, the litigants of that State will have a right to invoke the extraordinary writ jurisdiction of the jurisdictional High Court under Article 226 of the Constitution for redressal of their grievances. They cannot be expected to go to far off distant places and spend huge amounts of money, much beyond their means to ventilate their grievances. The alternative remedy of approaching a tribunal is an illusory remedy and not an efficacious alternative remedy. The self-imposed bar or restraint of an alternative efficacious remedy would not apply. Such litigants are entitled to file petitions under Article 226 of the Constitution of India before the jurisdictional High Court. In ***L. Chandra Kumar*** (supra) it was clearly held that the right of judicial review is a part of the basic structure of the Constitution and this right must be interpreted in a manner that it is truly available to the litigants and should not be an illusory right.

THE END