Supreme Court of India
The Secretary To Govt. Of Kerala . vs James Varghese . on 4 May, 2022
Author: B.R. Gavai
Bench: L. Nageswara Rao, B.R. Gavai

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6258 OF 2014

THE SECRETARY TO GOVT. OF KERALA,
IRRIGATION DEPARTMENT AND OTHERS
...APPELLANT(S)

VERSUS

JAMES VARGHESE AND OTHERS
...RESPONDENT(S)

WITH

CIVIL APPEAL NO. 9236 OF 2014
CIVIL APPEAL NO. 9241 OF 2014
CIVIL APPEAL NO. 9226 OF 2014
CIVIL APPEAL NO. 6268 OF 2014
CIVIL APPEAL NO. 6264 OF 2014
CIVIL APPEAL NO. 6265 OF 2014
CIVIL APPEAL NO. 6266 OF 2014
CIVIL APPEAL NO. 6260 OF 2014
CIVIL APPEAL NO. 6262 OF 2014
CIVIL APPEAL NO. 6259 OF 2014
CIVIL APPEAL NO. 6267 OF 2014
CIVIL APPEAL NO. 295 OF 2015
CIVIL APPEAL NO. 6261 OF 2014
CIVIL APPEAL NO. 8995 OF 2014

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CIVIL APPEAL NO. 9022 OF 2014
CIVIL APPEAL NO. 9016 OF 2014
CIVIL APPEAL NO. 9005 OF 2014
CIVIL APPEAL NO. 8998 OF 2014
CIVIL APPEAL NO. 9009 OF 2014
CIVIL APPEAL NO. 8997 OF 2014
CIVIL APPEAL NO. 9002 OF 2014
CIVIL APPEAL NO. 8996 OF 2014
CIVIL APPEAL NO. 8999 OF 2014
CIVIL APPEAL NO. 9007 OF 2014
CIVIL APPEAL NO. 9004 OF 2014
CIVIL APPEAL NO. 9003 OF 2014

CIVIL APPEAL NO. 9008 OF 2014
CIVIL APPEAL NO. 9017 OF 2014
CIVIL APPEAL NO. 9000 OF 2014
CIVIL APPEAL NO. 9001 OF 2014
CIVIL APPEAL NO. 9215 OF 2014
CIVIL APPEAL NO. 9213 OF 2014
CIVIL APPEAL NO. 9018 OF 2014
CIVIL APPEAL NO. 9217 OF 2014
CIVIL APPEAL NO. 9006 OF 2014
CIVIL APPEAL NO. 9019 OF 2014
CIVIL APPEAL NO. 9219 OF 2014
CIVIL APPEAL NO. 9237 OF 2014
CIVIL APPEAL NO. 9225 OF 2014
CIVIL APPEAL NO. 9221 OF 2014
CIVIL APPEAL NO. 9238 OF 2014
CIVIL APPEAL NO. 9023 OF 2014

CIVIL APPEAL NO. 9243 OF 2014
CIVIL APPEAL NO. 9244 OF 2014
CIVIL APPEAL NO. 9224 OF 2014
CIVIL APPEAL NO. 9212 OF 2014
CIVIL APPEAL NO. 9211 OF 2014
CIVIL APPEAL NO. 9222 OF 2014
CIVIL APPEAL NO. 9020 OF 2014
CIVIL APPEAL NO. 9210 OF 2014
CIVIL APPEAL NO. 9239 OF 2014
CIVIL APPEAL NO. 3010 OF 2017
CIVIL APPEAL NO. 2824 OF 2022
CIVIL APPEAL NO. 2825 OF 2022
CIVIL APPEAL NO. 2826 OF 2022

JUDGMENT

B.R. GAVAI, J.

1. Two important questions of law, with regard to the legislative competence of the Kerala State Legislature to enact the Kerala Revocation of Arbitration Clauses and Reopening of Awards Act, 1998 (hereinafter referred to as the “State Act”) and as to whether the State Act encroaches upon the judicial power of the State, are involved in the present appeals.

BACKGROUND:

2. The High Court of Kerala at Ernakulam, by the impugned judgment dated 9th July 2013 delivered in O.P. No.4206 of 1998 and companion matters, has held the State Act to be beyond the legislative competence of the Kerala State Legislature and as such, held the same to be unconstitutional. The High Court has also held that the State Act had an effect of annulling the awards of the arbitrators and the judgments and decrees passed by the courts. It was therefore held that the State Act

encroaches upon the judicial power of the State. Being aggrieved thereby, the State of Kerala has approached this Court by filing various appeals.

3. The State of Kerala had started the construction of Kallada Irrigation Project (hereinafter referred to the "said Project") in the year 1961. The said project was proposed to be executed with the financial assistance from the International Bank for Reconstruction and Development (for short "World Bank") from June 1982 to March 1989. As required by the World Bank, a special condition namely, the Local Competitive Bidding Specification (hereinafter referred to as "LCBS") as envisaged by the World Bank Authorities was included in the agreements relating to the works connected with the said Project. Clauses 51 and 52 of the LCBS provided for the settlement of matters in dispute or difference through arbitration. The same was provided with a view to enable speedy settlement of matters in dispute or difference in a just and equitable manner. The State of Kerala found that on account of various disputes and differences, the arbitration references did not have the desired effect inasmuch as several arbitrators had wrongly and arbitrarily awarded unconscionable amounts against the provisions of agreements and without material on record, in collusion with the claimant contractors and officials of the department, thereby causing heavy losses to the State. As such, the State of Kerala considered it necessary, in public interest, to cancel the arbitration clauses in the agreements executed in terms of LCBS, to revoke the authority of the arbitrators appointed thereunder and to enable the filing of appeals against the awards or decrees already passed in certain arbitration references in respect of which the period of limitation had expired. As such, the State Act came to be enacted with effect from 14th November 1997.

4. The State Act is a short Act and therefore, we deem it appropriate to reproduce the same in its entirety as under:

> "Kerala Revocation of Arbitration Clauses and Reopening of Awards Act, 1998
> Preamble .....
>
> .....
>
> Section 1 ☐Short title, extent, commencement and application (1) This Act may be called the Kerala Revocation of Arbitration Clauses and Reopening of Awards Act, 1998.
>
> (2) It extends to the whole of the State of Kerala. (3) It shall be deemed to have come into force on the 14th day of November, 1997.
>
> (4) It shall apply to all agreements executed in terms of the local competitive bidding specification.
>
> Section 2 ☐Definitions (1) In this Act, unless the context otherwise requires,
>
> (a) "agreement" means an agreement executed in terms of the local competitive bidding specification for various works of the Government of Kerala;

(b) "local competitive bidding specification" means the local competitive bidding specification adopted by the Government in their Order G.O. (Ms) No. 3/81/I&R dated the 20th January, 1981.

(2) Words and expressions used but not defined in this Act and defined in

(a) the Arbitration Act, 1940 (Central Act 10 of 1940); or

(b) the Arbitration and Conciliation. Act, 1996 (Central Act 26 of 1996), in relation to arbitration proceedings commenced on or after the 25th day of January, 1996, shall have the meanings, respectively, assigned to them in those Acts.

Section 3 ☐Cancellation of arbitration clauses and revocation of authority of arbitrator (1) Notwithstanding anything contained in the Indian Contract Act, 1872 (Central Act 9 of 1872) or in the Arbitration Act, 1940 (Central Act 10 of 1940) or in the Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996) or in any other law for the time being in force or in any judgement, decree or order of any court or other authority or in any agreement or other instrument,

(i) the arbitration clauses in every agreement shall stand cancelled;

(ii) the authority of an arbitrator appointed under an agreement referred to in clause (i) shall stand revoked; and

(iii) any agreement referred to in clause (i) shall cease to have effect in so far as it relates to the matters in dispute or difference referred, with effect on and from the date of commencement of this Act.

(2) Nothing in sub☐section (1) shall be a bar for any party to a agreement to file a suit in the court having jurisdiction in the matter to which the agreement relates and all questions regarding the validity or effect of the agreement between the parties to the agreement or persons claiming under them and all matters in dispute or difference between the parties to the agreement shall be decided by the court, as if the arbitration clauses had never been included in the agreement. Section 4 ☐ Period of limitation for filing suits Notwithstanding anything contained in the Arbitration Act, 1940 (Central Act 10 of 1940) or in the Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996) or in the Limitation Act, 1963 (Central Act 36 of 1963), a suit under sub☐section (2) of section 3 may be filed within six months from the date of commencement of this Act or within such period as is allowed by the provisions of the Limitation Act, 1963 (Central Act 36 of 1963), in relation to such suits, whichever is later. Section 5 ☐Power of Government to file appeal against certain awards Notwithstanding anything contained in the Arbitration Act, 1940 (Central Act 10 of 1940) or in the Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996) or in the Limitation Act, 1963 (Central Act 36 of 1963) or in any other law for the time being in force or in any judgement, decree or order of any court or other authority or in any agreement or other instrument, where it appears to the Government that any award passed is not in accordance with the terms of the agreement or there was failure to produce relevant data or other particulars before the Arbitrator before passing

the award or the award passed is of unconscionable amounts, they may file appeal against such award within ninety days of the date of commencement of this Act.

Section 6 □Procedure before court For the removal of doubts, it is hereby clarified that the provisions of the Code of Civil Procedure, 1908 (Central Act 5 of 1908), shall apply to all proceedings before court and to all appeals under this Act.

Section 7 □Arbitration Act not to apply The provisions of this Act shall apply to any proceedings instituted under this Act notwithstanding anything inconsistent herein with the provisions of the Arbitration Act, 1940 (Central Act 10 of 1940) or the Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996) or any other law for the time being in force.

Section 8 □Repeal and saving (1) The Kerala Revocation of Arbitration Clauses and Reopening of Awards Ordinance, 1998 (6 of 1998), is hereby repealed.

(2) Notwithstanding such repeal, anything done or deemed to have been done or any action taken or deemed to have been taken under the said Ordinance shall be deemed to have been done or taken under this Act."

5. Section 3 of the State Act provides for "Cancellation of arbitration clauses and revocation of authority of arbitrator". Sub□section (1) of Section 3 of the State Act provides that notwithstanding anything contained in the Indian Contract Act, 1872 or in the Arbitration Act, 1940 (hereinafter referred to as "1940 Act") or in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Act") or in any other law for the time being in force or in any judgment, decree or order of any court or other authority or in any agreement or other instrument, the arbitration clauses in every agreement shall stand cancelled; the authority of an arbitrator appointed under an agreement referred to in clause (i) shall stand revoked; and any agreement referred to in clause (i) shall cease to have effect insofar as it relates to the matters in dispute or difference referred. The same shall be with effect on and from the date of commencement of the State Act. Sub□section (2) of Section 3 of the State Act provides that nothing provided in sub□section (1) of Section 3 of the State Act shall be a bar for any party to an agreement to file a suit in the court having jurisdiction in the matter to which the agreement relates and all questions regarding the validity or effect of the agreement between the parties to the agreement or persons claiming under them and all matters in dispute or difference between the parties to the agreement shall be decided by the court, as if the arbitration clauses had never been included in the agreement.

6. Section 4 of the State Act enables a party to file a suit under sub□section (2) of Section 3 of the State Act within a period of six months from the date of commencement of the State Act or within such period as is allowed by the provisions of the Limitation Act, 1963 (hereinafter referred to as "1963 Act"), in relation to such suits whichever is later. This is notwithstanding anything contained in the 1940 Act or in the 1996 Act or in the 1963 Act.

7. Section 5 of the State Act enables the State Government to file an appeal against any award within a period of 90 days from the date of commencement of the State Act, where it appears to the State

Government that any award passed is not in accordance with the terms of the agreement or there was failure to produce relevant data or other particulars before the Arbitrator before passing the award or the award passed is of unconscionable amounts. Again, this is notwithstanding anything contained in the 1940 Act or in the 1996 Act or in the 1963 Act or in any other law for the time being in force or in any judgment, decree or order of any court or other authority or in any agreement or other instrument.

8. Section 6 of the State Act clarifies that the provisions of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") shall apply to all proceedings before the court and to all appeals under the State Act.

9. Section 7 of the State Act provides that the provisions of the State Act shall apply to any proceedings instituted under the State Act notwithstanding anything inconsistent therein with the provisions of the 1940 Act or the 1996 Act or any other law for the time being in force.

10. Sub-section (1) of Section 8 of the State Act repeals the Kerala Revocation of Arbitration Clauses and Reopening of Awards Ordinance, 1998. Sub-section (2) of Section 8 of the State Act provides that notwithstanding such repeal, anything done or deemed to have been done or any action taken or deemed to have been taken under the said Ordinance shall be deemed to have been done or taken under the State Act.

11. Immediately after the enactment of the State Act, several petitions came to be filed before the High Court of Kerala challenging the validity thereof. By the impugned judgment, the High Court of Kerala allowed the petitions and held and declared the State Act to be unconstitutional, being beyond the legislative competence of the State Legislature.

12. It will be relevant to note that the State Act was reserved for the consideration of the President of India and had received his assent as required under Article 254 (2) of the Constitution of India.

13. The reasons that weighed with the High Court of Kerala for holding the State Act to be unconstitutional, are as under:

(i) That the 1940 Act, Arbitration (Protocol and Convention) Act, 1937 (hereinafter referred to as "1937 Act") and the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as "1961 Act") had become outdated. As such, the Parliament found it expedient to make a law with respect to arbitration and conciliation, taking into account the United Nations Commission on International Trade Law (for short "UNCITRAL") Model Law and Rules. The 1996 Act was enacted with the clear intention of harmonizing concepts on arbitration and conciliation of different legal systems of the world on the basis of UNCITRAL Model Law and Rules. As such, the matters dealt with by the 1996 Act were not the matters merely falling under Entry 13 of List III of the Seventh Schedule to the Constitution of India but also falling within Entries 10 to 14 of List I of the Seventh Schedule to the Constitution of India;

(ii) Since Entries 10 to 14 of List I of the Seventh Schedule to the Constitution of India deal with foreign affairs, relationship with foreign countries, United Nations Organization, participation in international conferences, associations and other bodies and implementing of decisions made thereat, entering into treaties and agreements and implementing of treaties, agreements and conventions, the issue of applicability of Article 253 of the Constitution of India would arise. As such, the Union Parliament had an overriding legislative power to make any law for the whole or any part of the territory of India. Once a Central Legislation referable to Article 253 of the Constitution of India comes into being, then the State Act cannot be said to be valid only in view of the Presidential assent received under Article 254 (2) of the Constitution of India;

(iii) That the executive power of the Union is coextensive with the legislative power of the Parliament under Article 73(1)(b) of the Constitution of India. As such, the 1996 Act is enacted by the Central Legislation in order to give effect to the executive power of the Government of India, to give effect to the decisions taken at the international conference. As such, if it is held that the Presidential assent under Article 254 (2) of the Constitution of India would validate the State Act, then the very purpose of Article 253 of the Constitution of India would be destroyed;

(iv) That LCBS can be traced only to entries in the Union List, in particular, to Entry 37, as also, Entries 10 and 14 of List I of the Seventh Schedule to the Constitution of India. Entry 37 in List I of the Seventh Schedule to the Constitution of India deals with foreign loans. That Article 292 of the Constitution of India specifically deals with the borrowing by the Government of India. That the assistance provided by the World Bank also primarily falls within the executive power of the Union referable to Article 73 (1)(b) of the Constitution of India and as such, the State Act was beyond the legislative competence of the State Legislature;

(v) That the proceedings which were made subject matter of the State Act, could have been dealt with only within the Judicial power of the State through the courts in terms of the provisions of the 1940 Act and 1996 Act. As such, the impugned legislation was an encroachment into the Judicial power of the State which was exercised through the courts in terms of the laws already made and in force. It infracts the quality doctrine and the avowed constitutional principles insulating the Judicial function which is cardinal to deliverance of justice as part of the seminal constitutional values, including separation of powers; and

(vi) That there was nothing on record to show that any relevant material had gained the attention of the legislature except the superfluous statements in the Preamble to the State Act with regard to misconduct by arbitrators. As such, the State Act suffers on the said count also.

14. We have extensively heard Shri Jaideep Gupta, and Shri Pallav Shishodia, learned Senior Counsel appearing on behalf of the appellants. Shri Krishnan Venugopal, learned Senior Counsel led the arguments on behalf of the respondents. The arguments of Shri Venugopal were concisely supplemented by Shri P.C. Sen, learned Senior Counsel, Shri C.N. Sreekumar, learned Senior Counsel, Smt. Haripriya Padmanabhan, learned counsel, Shri Kuriakose Varghese, learned counsel, Shri John Mathew, learned counsel and Shri Roy Abraham, learned counsel. SUBMISSIONS ON BEHALF OF THE APPELLANTS:

15. Shri Gupta, learned Senior Counsel submitted that the impugned judgment of the High Court of Kerala suffers on various grounds. Shri Gupta further submitted that the High Court of Kerala committed a basic error in holding that the 1996 Act is universally applicable. He submitted that the 1996 Act would be applicable only when there is an agreement between the parties, whereby they have agreed to refer their dispute to arbitration. It is therefore submitted that what has been done by the State Act is a cancellation of contract by a statute and as such, the State Act or a part thereof would be referable to Entry 7 of List III of the Seventh Schedule to the Constitution of India.

16. Shri Gupta submitted that the rest of the legislation deals with the consequences of cancellation of the Arbitration clause in the Agreement. It is submitted that on cancellation of an agreement, sub□section (2) of Section 3 of the State Act provides an opportunity to any party to the agreement to file a suit in a competent civil court. He submitted that Section 4 of the State Act extends the period of limitation for filing of the suit. Section 5 of the State Act enables the State Government to challenge the award on various grounds stated therein, within a specified period. It is, therefore, submitted that the State Act is referable to Entries 7 and 13 of List III of the Seventh Schedule to the Constitution of India and as such, within the legislative competence of the State Legislature.

17. Shri Gupta further submitted that the legislative competence of the State Legislature can only be circumscribed by the express prohibition contained in the Constitution of India itself. It is submitted that unless and until there is any provision in the Constitution of India expressly prohibiting legislation on the subject either absolutely or conditionally, there can be no fetter or limitation on the plenary power which the State Legislature enjoys to legislate on the topic enumerated in Lists II and III of the Seventh Schedule to the Constitution of India. In support of this proposition, he relies on the judgment of this Court in the case of Maharaj Umeg Singh and Others v. State of Bombay and Others1.

18. Shri Gupta further submitted that there is no repugnancy between the 1996 Act and the State Act. He submitted that the 1996 Act would apply where there is an arbitration clause in the agreement. If there is no arbitration clause in the agreement, the 1996 Act would not apply. He submitted that the 1996 Act itself is a legislation enacted with reference to Entry 13 of List III of the Seventh Schedule to the Constitution of India. In support of this proposition, he relies on the judgments of this Court in the cases of G.C. Kanungo v. State of Orissa2, State of Gujarat through Chief Secretary and Another v. Amber Builders 3, Madhya Pradesh Rural Road Development Authority and Another 1 [1955] 2 SCR 164 2 (1995) 5 SCC 96 3 (2020) 2 SCC 540 v. L.G. Chaudhary Engineers and Contractors 4 (hereinafter referred to as “MP Rural 2012”), Madhya Pradesh Rural Road Development Authority and Another v. L.G. Chaudhary Engineers and Contractors 5 (hereinafter referred to as “MP Rural 2018”).

19. Shri Gupta submitted that assuming, but without accepting, that there is some conflict between the 1996 Act and the State Act, the State Act having been reserved for the consideration of the President of India and having received his assent, will prevail over the provisions of the 1996 Act, in view of Article 254 (2) of the Constitution of India.

20. Shri Gupta submitted that the State Act does not relate to any Entry in List I of the Seventh Schedule to the Constitution of India. He submitted that the approach of the High Court of Kerala has been totally erroneous. It is submitted that since all the three Lists of the Seventh Schedule to the Constitution of India contain a number of entries, some overlapping is bound to happen. In such a 4 (2012) 3 SCC 495 5 (2018) 10 SCC 826 situation, the doctrine of pith and substance is required to be applied to determine as to which entry does a given piece of legislation relate to. He submitted that regard must be had to the enactment as a whole, to its main object and to the scope and effect of its provisions. He submitted that when a legislation is traceable, in pith and substance, to an entry with regard to which a State is competent to legislate, then incidental and superficial encroachments on the other entry will have to be disregarded. Reference in this respect is made to the judgments of this Court in the cases of Hoechst Pharmaceutical Ltd. and Others v. State of Bihar and Others6 and State of West Bengal v. Kesoram Industries Ltd. and Others7. It is therefore submitted that since the impugned legislation is in pith and substance a legislation in the field covered by Entries 7 and 13 of List III of the Seventh Schedule to the Constitution of India, the same would not invalidate the State Act.

21. Shri Gupta submitted that the High Court of Kerala has also erred in holding that the 1996 Act is referable to 6 (1983) 4 SCC 45 7 (2004) 10 SCC 201 Article 253 of the Constitution of India. He submitted that the UNCITRAL Model Law which was adopted by the General Assembly of the United Nations, recommended that all the countries give due consideration to it while enacting the laws governing international commercial arbitration practices. He submitted that, in any case, the Model Law is neither a treaty nor an agreement, convention, decision within the meaning of Article 253 of the Constitution of India or for that matter Entries 13 and 14 of List I of the Seventh Schedule to the Constitution of India. He submitted that following the principle of ejusdem generis, the word 'decision' will have to be construed as one which will mean a binding obligation on the States. In this respect, he relies on the judgment of this Court in the case of Kavalappara Kottarathil Kochuni @ Moopil Nayar v. States of Madras and Kerala and Others8.

22. Shri Gupta also relies on the rule of construction known as Noscitur a sociis, that is, the meaning of a word is to be judged by the company it keeps. In this respect, he 8 [1960] 3 SCR 887 relies on the judgment of this Court in the case of M.K. Ranganathan v. Government of Madras and Others9.

23. Shri Gupta further submitted that it is a settled rule of construction of the Constitution, that every attempt should be made to harmonize apparently conflicting provisions and entries, not only of different lists, but also of the same list and to reject the construction that would rob one of the entries of its entire content and make it nugatory. In this respect, he relies on the judgments of this Court in the cases of Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal and Others10 and Sri Venkataramana Devaru and Others v. State of Mysore and Others11.

24. Shri Gupta further submitted that since the provisions of Article 253 of the Constitution of India have the effect of restricting the power of the State Legislature, the said Article should be given the narrowest possible meaning in order to harmonize it with the Entries in Lists II and III of 9 [1955] 2 SCR 374 10 1962 Supp (3) SCR 1 11 [1958] SCR 895 the Seventh Schedule to the Constitution of India. He submitted that this can be done by interpreting that only the legislations enacted to give

effect to binding obligation are covered by the said Article.

25. Shri Gupta further submitted that the Model Law is a suggested pattern for law makers which only recommends the practices to be adopted in the international arbitration and not for the domestic arbitration and as such, it cannot be held that it has any binding obligation insofar as domestic arbitration is concerned.

26. Shri Shishodia, learned Senior Counsel submitted that in the earlier statutory scheme prior to the 1996 Act, the 1940 Act governed the domestic arbitration, whereas the 1937 Act and the 1961 Act governed international commercial arbitrations. He submitted that in the 1996 Act, the domestic arbitrations are governed by Part I, whereas Part II governs international commercial arbitrations with separate specific provisions for Geneva Convention Awards and New York Convention Awards. He submitted that however, even in the 1996 Act, the historical as well as contemporary distinction between an international commercial arbitration and domestic arbitration remains. In this respect, he relies on the judgment of this Court in the case of Fuerst Day Lawson Limited v. Jindal Exports Limited12. He submitted that the 1996 Act actually consolidates, amends and puts together three different enactments.

27. Shri Shishodia further submitted that after the Presidential assent was received under Article 254 (2) of the Constitution of India, the test to be applied to the State Law to be held repugnant to Central Law is that "there is no room or possibility for both Acts to apply". He submitted that no such repugnancy has been pointed out by the respondents in the State Act vis□a□vis the 1940 Act and 1996 Act. In this respect, he relies on the judgment of this Court in the case of Rajiv Sarin and Another v. State of Uttarakhand and Others13.

12 (2011) 8 SCC 333 13 (2011) 8 SCC 708

28. Shri Shishodia as well as Shri Gupta submitted that merely because some part of the said Project is financed by the World Bank, it cannot be a ground to invalidate the State Act which is referable to Entry 13 of List III of the Seventh Schedule to the Constitution of India.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

29. Per contra, Shri Venugopal, learned Senior Counsel appearing on behalf of some of the respondents submitted that the State Act is wholly arbitrary and violative of Article 14 of the Constitution of India. He submitted that the State Act arbitrarily singles out the said Project started in the year 1961 out of all the projects in Kerala, for revocation of arbitration clauses in agreements. He submitted that the High Court of Kerala has rightly held that no material was placed by the State Government to show that collusive awards had been made because of a nexus between arbitrators and claimant contractors.

30. Learned Senior Counsel submitted that the State Act is traceable to Entries 12, 13, 14 as well as Entry 37 of List I of the Seventh Schedule to the Constitution of India. He submitted that Entries 12 to 14 relate to United Nations Organization, participation in international conferences, associations

and other bodies and implementing of decisions made thereat and entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries. He submitted that the State has enacted a legislature which is related to these entries, which are exclusively within the domain of the Union Legislature. He further submitted that Entry 37 deals with foreign loans. He submitted that since the State Act attempts to deal with the loans taken from the World Bank, it will be an encroachment on the legislative field reserved for the Union Legislature. It is therefore submitted that the State Act is enacted by the State Legislature in respect of entries which are exclusively within the jurisdiction of the Central Legislation and as such, beyond the competence of the State Legislature. He submitted that the question of Presidential assent under Article 254 (2) of the Constitution of India would arise only when the legislation is in respect of items covered in List III, i.e., the Concurrent List. Since the State Act deals with the entries exclusively in List I, the Presidential assent would be of no consequence to save the State Act.

31. Shri Venugopal submitted that the 1996 Act is clearly referable to the decision taken at international conference, i.e., the General Assembly of United Nations held on 11th December 1985. In support of the said submission, he relies on the judgment of this Court in the case of Maganbhai Ishwarbhai Patel Etc. v. Union of India and Another14. Relying on the judgment of this Court in the case of S. Jagannath v. Union of India and Others15, he submitted that Article 253 of the Constitution of India would also be applicable to the legislations enacted for giving effect to the decisions taken at the international conference, which are not binding in nature.

32. Shri Venugopal submitted that a law passed under Article 253 of the Constitution of India would denude the State Legislature of its competence to make any law on the 14 (1970) 3 SCC 400 15 (1997) 2 SCC 87 same subject matter regardless of whether the subject matter falls in List II or List III. He therefore submitted that since the 1996 Act has been enacted by the Parliament in exercise of Legislative power under Article 253 of the Constitution of India, the State Legislature would not have the power to make a law which is repugnant thereto, even with regard to subjects falling in List II or List III. A reference is again made to the judgment of this Court in the case of Maganbhai Ishwarbhai Patel (supra). In this regard, the learned Senior Counsel also relies on the judgments of this Court in the cases of Mantri Techzone Private Limited v. Forward Foundation and Others16, State of Bihar and Others v. Bihar Chamber of Commerce and Others17 and Jayant Verma and Others v. Union of India and Others18.

33. Shri Venugopal further submitted that the State Act is also discriminatory inasmuch as the State Government has been given an absolute discretion as to against which award, it will prefer an appeal and against which, it will not 16 (2019) 18 SCC 494 17 (1996) 9 SCC 136 18 (2018) 4 SCC 743 prefer an appeal. He relies on the judgments of this Court in the cases of Suraj Mall Mohta and Co. v. A.V. Visvanatha Sastri and Another19 and B.B. Rajwanshi v. State of U.P. and Others20.

34. Shri Venugopal further submitted that the State Act interferes with the doctrine of “separation of powers” and encroaches upon the powers of the judiciary, inasmuch as the State Act empowers the State to interfere with the awards. He submitted that this is not permissible in view of the law laid down by this Court in the case of B.B. Rajwanshi (supra).

35. Shri Venugopal would further submit that assuming, but without admitting that the State Act was not arbitrary when it was originally passed, but by passage of time, it has become arbitrary and unreasonable. He submitted that much earlier to the enactment of the State Act, not only the awards have become final but the amount awarded has already been paid to the claimants. As such, if the State Act 19 [1955] 1 SCR 448 20 (1988) 2 SCC 415 is permitted to operate now, it will amount to arbitrariness and unreasonableness. He therefore submitted that the present appeals deserve to be dismissed.

36. Shri P.C. Sen, learned Senior Counsel appearing on behalf of some of the respondents submitted that the State Act has the effect of depriving the respondents' settled right of property under Article 300□A of the Constitution of India which has been acquired as per law. He submitted that the awards passed, create a right in the property and are enforceable when the same are made a decree of the court. In this regard, he relies on the judgment of this Court in the case of Satish Kumar and Others v. Surinder Kumar and Others21.

37. Shri Sen further submitted that in the present case, the awards have been acted upon and payments have been made. Therefore, vested rights have been crystalized in favour of the respondents. He submitted that such vested rights cannot be taken away by the State Act. Reliance in this respect is placed on the judgment of this Court in the 21 [1969] 2 SCR 244 case of Andhra Pradesh Dairy Development Corporation Federation v. B. Narasimha Reddy and Others22.

38. Shri Sen further submitted that a unilateral alteration of contract is violative of the fundamental principle of justice. It is submitted that what has been sought to be done by the State Act is unilateral addition or alteration of the contract and foisting the same on unwilling parties. It is submitted that the same would not be permissible. Reliance in this respect is placed on the judgment of this Court in the case of Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)23.

39. Shri Sen further submitted that the impugned legislation encroaches upon the judicial power and judicial functions and in turn, amounts to infringement of the basic structure of the Constitution of India. Reliance in this respect is placed on the judgment of this Court in the case of SREI Infrastructure Finance Limited v. Tuff Drilling 22 (2011) 9 SCC 286 23 (2019) 15 SCC 131 Private Limited24. He further submitted that the judgment of this Court in the case of G.C. Kanungo (supra), rather than supporting the case of the appellants, would support the case of the respondents.

40. Shri Sen, relying on the judgment of this Court in the case of S. Jagannath (supra), would submit that the 1996 Act is referable to Article 253 of the Constitution of India and as such, the State Act which is repugnant thereto, would not be valid in law.

41. Shri C.N. Sreekumar, learned Senior Counsel appearing on behalf of some of the respondents submitted that the State Act is liable to be declared invalid on the ground of manifest arbitrariness. It is submitted that the State Act has been enacted, which acts to the prejudice of the private parties and undoubtedly favours the State Government. It is submitted that Section 34 (2A) of the 1996 Act

came into effect on 23rd October 2015, i.e., much after the enactment of the State Act. It is therefore submitted that assuming that the State Act was validly enacted, however 24 (2018) 11 SCC 470 upon introduction of Section 34 (2A) of the 1996 Act on 23 rd October 2015, the State Act has been impliedly repealed. Reliance in this respect is placed on the judgments of this Court in the cases of Saverbhai Amaidas v. State of Bombay25 and T. Barai v. Henry Ah Hoe and Another26.

42. Smt. Padmanabhan, learned counsel appearing on behalf of some of the respondents submitted that the assent of the President of India under Article 254(2) of the Constitution of India is not a matter of idle formality. She submitted that unless the State satisfies that relevant material was placed before the President of India and he was made aware about the grounds on which the Presidential assent was sought, the Presidential assent would not save the State Act from being invalid. In this respect, she relies on the judgment of this Court in the case of Gram Panchayat of Village Jamalpur v. Malwinder Singh and Others27.

43. Smt. Padmanabhan submitted that the State Act is also arbitrary and violative of Article 14 of the Constitution of 25 [1955] 1 SCR 799 26 (1983) 1 SCC 177 27 (1985) 3 SCC 661 India. She submitted that the State Act treats unequals equally by failing to make a distinction between the cases where there is a fraud and where there is no fraud. In this respect, she relies on the judgment of this Court in the case of State of Maharashtra v. Mrs. Kamal Sukumar Durgule and Others28.

44. Relying on the judgments of this Court in the cases of Ashok Kumar alias Golu v. Union of India and Others29, S.S. Bola and Others v. B.D. Sardana and Others30 and Madras Bar Association v. Union of India and Another31, Smt. Padmanabhan submitted that the legislature does not have the competence to enact a legislation which sets aside the judgment or an award passed by a court.

45. Shri John Mathew, learned counsel appearing on behalf of some of the respondents submitted that the State Act is discriminatory in nature. He submitted that the State, 28 (1985) 1 SCC 234 29 (1991) 3 SCC 498 30 (1997) 8 SCC 522 31 2021 SCC OnLine SC 463 out of 343 cases, has chosen to file an appeal only insofar as 55 claims/cases are concerned. He also submitted that the State Act has sought to alter the rights and remedies in the contracts executed with the State nearly a decade before the State Act was brought into effect. He submitted that certain claimants are being denied the equal treatment as is available to large number of similarly situated claimants who are getting benefits under the 1996 Act.

46. Shri Mathew submitted that if the legislative power is exercised by the State Legislature in transgression of Constitutional limitations with respect to Article 13(2) of the Constitution of India which prohibits the State from making any law which takes away or abridges the rights conferred by Part□III of the Constitution of India, such an exercise of power would be invalid in law. In this regard, he relies on the judgment of this Court in the case of State of Kerala and Others v. Mar Appraem Kuri Company Limited and Another32.

32 (2012) 7 SCC 106

47. Shri Mathew further submitted that the State Act is not only in conflict with the 1996 Act but is also in conflict with the Commercial Courts Act, 2015 (hereinafter referred to as "2015 Act"). He submitted that all the disputes involved in the present matters are commercial disputes as defined under Section 2(c) of the 2015 Act. He submitted that the 2015 Act is a subsequent Central enactment and therefore, the State Act being an earlier Act enacted by the State Legislature and repugnant to the Central enactment, cannot exist. It is submitted that the enactment of the 2015 Act would amount to a pro tanto repeal of the State Act. Reliance in this respect is placed on the judgments of this Court in the cases of T. Barai (supra) and Mar Appraem Kuri Company Limited and Another (supra).

48. Shri Mathew further submitted that only when the proceedings went against the State, they illegally enacted the State Act in order to either deny payments or delay them by compelling the respondents to face or to undergo an altogether different remedy for the very same cause of action. In this regard, he relies on the judgments of this Court in the cases of State of Tamil Nadu and Others v. K. Shyam Sunder and Others33 and Deep Chand and Others v. State of Uttar Pradesh and Others34.

49. Shri Kuriakose Varghese, learned counsel appearing on behalf of some of the respondents submitted that apart from making the bald allegation that there was collusion between the contractors and the officials, no material is placed on record. He submitted that the State Act which has been enacted, in the absence of sufficient material, would not be sustainable in law. Reliance in this respect is placed on the judgment of this Court in the case of Ladli Construction Co. (P) Ltd. v. Punjab Police Housing Corpn. Ltd. and Others35.

50. Shri Varghese submitted that though the State Act is purportedly enacted in public interest, rather than it being in public interest, it is contrary to the public interest. It is submitted that this Court in the case of Hindustan 33 (2011) 8 SCC 737 34 [1959] Supp (2) SCR 8 35 (2012) 4 SCC 609 Construction Co. Ltd. and Another v. Union of India and Others36, has held that reasonableness, adequate determining principle and public interest have to march hand in hand. He submitted that the State Act derogates from the principle of speedy settlement of disputes in an arbitrary and selective manner and therefore, is not valid being contrary to public interest.

51. Shri Roy Abraham, learned counsel appearing on behalf of some of the respondents also made submissions which are on similar lines as are made by other counsel for respondents.

SUBMISSIONS ON BEHALF OF THE APPELLANTS IN REJOINDER:

52. Shri Gupta, learned Senior Counsel, in rejoinder, submitted that the reliance placed by the respondents on the judgment of this Court in the case of Kesoram Industries Ltd. (supra) is misplaced inasmuch as the paragraphs which are relied on by the respondents are from the minority judgment. He submitted that, on the contrary, the majority 36 (2020) 17 SCC 324 judgment upholds the validity of the State Legislation. He submitted that insofar as the reliance placed by the respondents on the judgments of this Court in the cases of S. Jagannath (supra) and Mantri Techzone Private Limited (supra) are concerned, the same nowhere held that the State Legislature

would be denuded of the field altogether, beyond what the treaty and/or the Parliamentary legislation covered. He submitted that merely because the said Project was, in part, financed by the World Bank, it cannot be said that the State Act is, in pith and substance, a legislation in the field of foreign loans and is therefore, beyond the competence of the State Legislature.

53. Shri Gupta refuted the allegations with regard to arbitrary and discriminatory nature of the State Act. He submitted that the correctness of the reasons stated by the State Legislature cannot be the subject matter of judicial review. Reliance in this respect is placed on the judgment of this Court in the case of K. Nagaraj and Others v. State of Andhra Pradesh and Another37.

37 (1985) 1 SCC 523

54. Shri Gupta submitted that Section 9 of the CPC provides for the plenary jurisdiction of the civil courts to decide disputes of civil nature unless excluded by law. He submitted that so long as the parties are governed by an arbitration agreement, the civil courts, though having jurisdiction to entertain civil suits in respect of disputes arising out of the contract between the parties, are required to refer the disputes, if any, to arbitration under Sections 8 and 11 of the 1996 Act and Sections 20 and 34 of the 1940 Act. However, once the arbitration agreement stands cancelled, all fetters would stand removed and the civil courts will have the jurisdiction to entertain the disputes. It is submitted that the argument with regard to the forum to which an appeal would lie, being not provided is without substance. He submitted that by virtue of Section 6 of the State Act, CPC is applicable to all the proceedings and an appeal will lie to the court, based on the court which is rendering the judgment or award and/or passing the decree on award. As such, the argument regarding vagueness is without substance.

55. Insofar as the argument with regard to the State having the right to pick and choose cases in which appeals are to be filed, Shri Gupta submitted that every litigant has a choice to accept the judgment and order of a trial court or to challenge the same. He submitted that it is not the case where alternative proceedings are available to the State to take administrative action against different parties, some of which are more onerous than others. In this regard, he relies on the judgments of this Court in the cases of Nagpur Improvement Trust and Another v. Vithal Rao and Others38 and State of Kerala and Others v. T.M. Peter and Others39. He further submitted that Section 5 of the State Act itself provides sufficient guidelines regarding the cases in which the State would be empowered to file an appeal. As such, it cannot be said that the power given to the State to file an appeal is unguided.

56. Shri Gupta concluded by submitting that the argument that the State Act interferes with the judicial power of the State is also devoid of any substance. The State Act 38 (1973) 1 SCC 500 39 (1980) 3 SCC 554 merely provides for an appeal against the decree which will be tested in the appeal and as such, the final word still remains with the judiciary. He therefore submitted that all the contentions raised on behalf of the respondents are without merit.

CONSIDERATION:

LEGISLATIVE COMPETENCE OF THE STATE LEGISLATURE TO ENACT THE STATE LAW:

57. We first propose to consider the question as to whether the State Act is within the legislative competence of the State Legislature as contended by the appellants or as to whether it is beyond the legislative competence of the State Legislature as contended by the respondents. For that, the question that will have to be answered is as to whether the source of the impugned legislation (State Act) is Entry 13 of List III of the Seventh Schedule to the Constitution of India or as to whether the impugned legislation (State Act) is referable to Entries 12, 13, 14 and 37 of List I of the Seventh Schedule and Article 253 of the Constitution of India. We will also have to examine the scope of clause (2) of Article 254 of the Constitution of India.

58. It will be relevant to reproduce Entries 12, 13, 14 and 37 of List I of the Seventh Schedule to the Constitution of India as under:

> "Seventh Schedule (Article 246) List I – Union List .....
>
> 12. United Nations Organization.
>
> 13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.
>
> 14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
>
> .....
>
> 37. Foreign loans.
>
> ....."

59. It will also be apposite to refer to Entry 13 of List III of the Seventh Schedule to the Constitution of India, which reads thus:

> "Seventh Schedule (Article 246) List III – Concurrent List .....
>
> 13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.
>
> ....."

60. Article 253 of the Constitution of India reads thus:

> "253. Legislation for giving effect to international agreements. – Notwithstanding anything contained in the foregoing provisions of this Chapter, Parliament has power

> to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

61. For considering the question in hand, it will be apposite to seek guidance from the precedents of this Court. It will be relevant to refer to the following observations of this Court in the case of G.C. Kanungo (supra):

> "10. ..... Subject of arbitration finds place in Entry 13 of List III, i.e., the Concurrent List of Seventh Schedule to the Constitution on which the legislation could be made either by Parliament or the State Legislature. When there is already the legislation of Parliament made on this subject, it operates in respect of all States in India, if not excepted. Since it is open to a State Legislature also to legislate on the same subject of arbitration, in that, it lies within its field of legislation falling in an entry in the Concurrent List and when a particular State Legislature has made a law or Act on that subject for making it applicable to its State, all that becomes necessary to validate such law is to obtain the assent of the President by reserving it for his consideration. When such assent is obtained, the provisions of the State Law or Act so enacted prevails in the State concerned, notwithstanding its repugnancy to an earlier Parliamentary enactment made on the subject. It was not disputed that insofar as the 1991 Amendment is concerned, it has been assented to by the President of India after it was reserved for his consideration. Hence, the Orissa State Legislature's enactment, the 1991 Amendment Act is that made on a subject within its legislative field and when assent of the President is obtained for it after reserving it for his consideration it becomes applicable to the State of Orissa, notwithstanding anything contained therein repugnant to what is in the Principal Act of Parliament, it cannot be held to be unconstitutional as that made by the Orissa State Legislature without the necessary legislative competence."

62. It could thus be seen that this Court has observed that the subject of arbitration finds place in Entry 13 of List III, i.e., the Concurrent List of the Seventh Schedule to the Constitution of India. It has been held that the legislation pertaining to the said entry could be made either by the Parliament or the State Legislature. It has been held that since the subject of arbitration is in the Concurrent List, the State can also make a law with regard to the same. The only requirement is that to validate such a law, it is necessary to reserve the same for consideration of the President of India and obtain his assent. When such an assent is obtained, the provisions of the State Law or Act so enacted would prevail in the State concerned, notwithstanding its repugnancy with an earlier Parliamentary enactment made on the subject. It is not in dispute that in the present case also, the State Act was reserved for consideration of the President of India and the assent of the President of India has been obtained. As such, the State Act so enacted would prevail in the State of Kerala.

63. It will further be pertinent to note that in the case of MP Rural 2012, the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (State enactment) provided for mandatory statutory arbitration in the State of M.P. irrespective of the arbitration agreement in respect of works contracts in the State of

M.P. or its instrumentalities. An argument was sought to be made on behalf of the claimants that the State Act was repugnant to the 1996 Act and that in view of Section 85 of the 1996 Act, the M.P. Act, 1983 stood impliedly repealed. There was a difference of opinion between the two learned Judges on the Bench. A.K. Ganguly, J., on the Bench, observed thus:

> "38. The argument of repugnancy is also not tenable. Entry 13 of the Concurrent List in the Seventh Schedule of the Constitution runs as follows:
>
> "13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration." In view of the aforesaid entry, the State Government is competent to enact laws in relation to arbitration.
>
> 39. The M.P. Act of 1983 was made when the previous Arbitration Act of 1940 was in the field. That Act of 1940 was a Central law. Both the Acts operated in view of Section 46 of the 1940 Act.

The M.P. Act, 1983 was reserved for the assent of the President and admittedly received the same on 17□10□1983 which was published in the Madhya Pradesh Gazette Extraordinary dated 12□10□1983. Therefore, the requirement of Article 254(2) of the Constitution was satisfied. Thus, the M.P. Act of 1983 prevails in the State of Madhya Pradesh. Thereafter, the AC Act, 1996 was enacted by Parliament repealing the earlier laws of arbitration of 1940. It has also been noted that the AC Act, 1996 saves the provisions of the M.P. Act, 1983 under Sections 2(4) and 2(5) thereof. Therefore, there cannot be any repugnancy. (See the judgment of this Court in T. Barai v. Henry Ah Hoe [(1983) 1 SCC 177 : 1983 SCC (Cri) 143 : AIR 1983 SC 150] .)

40. In this connection the observations made by the Constitution Bench of this Court in M. Karunanidhi v. Union of India [(1979) 3 SCC 431 : 1979 SCC (Cri) 691] are very pertinent and the following observations are excerpted: (SCC p. 450, para 37) "37. ... It is, therefore, clear that in view of this clear intention of the legislature there can be no room for any argument that the State Act was in any way repugnant to the Central Acts.

We have already pointed out from the decisions of the Federal Court and this Court that one of the important tests to find out as to whether or not there is repugnancy is to ascertain the intention of the legislature regarding the fact that the dominant legislature allowed the subordinate legislature to operate in the same field pari passu the State Act."

41. It is clear from the aforesaid observations that in the instant case the latter Act made by Parliament i.e. the AC Act, 1996 clearly showed an intention to the effect that the State law of arbitration i.e. the M.P. Act should operate in the State of Madhya Pradesh in respect of certain specified types of arbitrations which are under the M.P. Act, 1983. This is clear from Sections 2(4) and 2(5) of the AC Act, 1996. Therefore, there is no substance in the argument of repugnancy and is accordingly rejected."

64. Since Gyan Sudha Mishra, J. disagreed with A.K. Ganguly, J. in the said case, the matter was referred to a larger Bench.

65. The Bench consisting of three learned Judges in the case of MP Rural 2018, agreed with the view expressed by Ganguly, J.

66. It could be seen that this Court in the case of G.C. Kanungo (supra) as well as in the case of MP Rural 2018, has held that the source of the enactment of the 1940 Act, 1996 Act so also the State Acts legislated by Orissa and MP Legislatures is Entry 13 of List III of the Seventh Schedule to the Constitution of India. Ordinarily, if there is any conflict between the Central law and the State law, in view of clause (1) of Article 254 of the Constitution of India, the Central law would prevail. However, in view of clause (2) of Article 254 of the Constitution of India, the State law would prevail when it is reserved for consideration and receives assent of the President of India.

67. Recently, this Court, in the case of G. Mohan Rao and Others v. State of Tamil Nadu and Others40, has observed thus:

> "47. Article 254(2) is produced again for ready reference thus:
>
> "254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States. — (1) ... (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:" (emphasis supplied)
>
> 48. The basic ingredients for the application of Article 254(2) can be noted thus:

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(i) A law made by the legislature of the State (the 2019 Act in this case);

(ii) Such law is made on a subject falling in the concurrent list (Entry 42 of the Concurrent List in this case);

(iii) Such law is repugnant to the provisions of an earlier/existing law made by the Parliament (the 2013 Act in this case); and

(iv) The State law is reserved for the assent of the President and has received the same.

49. Upon fulfilment of the above conditions, such State law would prevail in the State despite there being a law made by the Parliament on the same subject and despite being repugnant thereto. The most peculiar feature of Article 254(2) is the recognition of existence of repugnancy between the law

made by the Parliament and State law and rendering that repugnancy inconsequential upon procurement of Presidential assent. In this case, the State legislature duly passed the 2019 Act (State law) on a subject of the concurrent list in the presence of a law made by the Parliament (2013 Act) and obtained the assent of the President to the same on 02.12.2019 after duly placing the State law before the President and duly stating the reason for reserving it for his assent. A priori, we hold that this is in compliance of Article 254(2).

50. This understanding of Article 254(2) is well settled and reference can be usefully made to the following paragraph of Pt. Rishikesh40:

> "15. Clause (2) of Article 254 is an exception to clause (1). If law made by the State Legislature is reserved for consideration and receives assent of the President though the State law is inconsistent with the Central Act, the law made by the Legislature of the State prevails over the Central law and operates in that State as valid law. If Parliament amends the law, after the amendment made by the State Legislature has received the assent of the President, the earlier amendment made by the State Legislature, if found inconsistent with the Central amended law, both Central law and the State Law cannot coexist without colliding with each other. Repugnancy thereby arises and to the extent of the repugnancy the State law becomes void under Article 254(1) unless the State Legislature again makes law reserved for the consideration of the President and receives the assent of the President. Full Bench of the High Court held that since U.P. Act 57 of 1976 received the assent of the President on 30□12□ 1976, while the Central Act was assented on 9□9□1976, the U.P. Act made by the State Legislature, later in point of time it is a valid law." (emphasis supplied)

51. The petitioners have advanced lengthy arguments as to how the 2019 Act is repugnant to the 2013 Act. We are constrained to observe that the whole exercise of pointing out any repugnancy after a validating Act has obtained the assent of the President is otiose. For, the whole purpose of Article 254(2) is to resuscitate and operationalize a repugnant Act or repugnant provisions in such Act. For, the Constitution provides concurrent powers to the states as well on subjects falling in List□III. After duly complying with the requirements of Article 254(2), the Court is left with nothing to achieve by identifying repugnancy between the laws because the same has already been identified, accepted and validated as per the sanction of the Constitution under Article 254(2). To indulge in such an exercise would be intuitive. Moreover, the Court ought not to nullify a law made in compliance with Article 254(2) on the sole ground of repugnancy. For, repugnancy, in such cases, is said to have been constitutionalized. To put it differently, the very purpose of engaging in the exercise, in terms of clause (2) of Article 254, presupposes existence of repugnancy and is intended to overcome such repugnancy.

Therefore, the endeavour of the petitioners in the present matter to highlight repugnancy, is misdirected, flimsy and inconsequential."

68. As such, once the State Act was reserved for consideration and received the assent of the President of India, it would prevail. Once that is the position, any endeavour to find out any

repugnancy between the two, would be futile. No doubt, that it is sought to be urged on behalf of the appellants that there is no repugnancy between the State Act and the Central Act and that applying the principle of harmonization, both can exist. We find that in view of the State Act receiving the Presidential assent, it will not be necessary to consider the said issue.

69. It is next sought to be urged on behalf of the respondents that the State Act is essentially within the legislative competence of the Union. It is submitted by the respondents that the State legislation is with respect to Entries 12, 13, 14 and 37 of List I of the Seventh Schedule to the Constitution of India and as such, exclusively within the competence of the Central Legislation. Entry 12 deals with United Nations Organization. Entry 13 deals with participation in international conferences, associations and other bodies and implementing of decisions made thereat. Entry 14 deals with entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries. Entry 37 deals with foreign loans.

70. It will be apposite to refer to the following observations of the Constitution Bench in the case of Kesoram Industries Ltd. and Others (supra). In the said case, R.C. Lahoti, J., speaking for the majority, has observed thus:

> "31. Article 245 of the Constitution is the fountain source of legislative power. It provides — subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State. The legislative field between Parliament and the legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the "Union List". Subject to the said power of Parliament, the legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the "Concurrent List". Subject to the abovesaid two, the legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the "State List". Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarised and restated by a Bench of three learned Judges of this Court on a review of the available decision in Hoechst Pharmaceuticals Ltd. v. State of Bihar [(1983) 4 SCC 45 : 1983 SCC (Tax) 248] . They are:
>
> (1) The various entries in the three lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.

> (2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation.

The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

(4) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest□possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence.

The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over Lists III and II and List III has priority over List II.

However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.

(emphasis supplied)

71. It could thus be seen that the Constitution Bench has held that when the legislative competence of a State Legislature is questioned on the ground that it encroaches upon the legislative competence of the Parliament, since some entries are bound to be overlapping, in such a situation, the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate to. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The true character of the legislation has to be ascertained. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. It has been held that incidental and superficial encroachments are to be disregarded. It has been held that the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II, though it may incidentally affect any item in List I.

72. If we look at the scheme of the State enactment, the subject matter of the enactment is arbitration. As has been held by the Constitution Bench in the case of Kesoram Industries Ltd. and Others (supra), if the State is competent to legislate on the subject, any incidental encroachment on any item in List I would not affect the State Legislature. In any case, as already observed hereinabove, this Court, in the cases of G.C. Kanungo (supra) and MP Rural 2018, has specifically held that the 1940 Act, the 1996 Act and the State Acts legislated by the Orissa and M.P. Legislatures are referable to Entry 13 of List III of the Seventh Schedule to the Constitution of India. As such, in view of the Presidential assent under clause (2) of Article 254 of the Constitution of India, the State Legislature would prevail.

73. Shri Venugopal, learned Senior Counsel has strongly relied on paragraphs 234, 238, 239 and 293 in the case of Kesoram Industries Ltd. and Others (supra), in support of the proposition that the State Act is not within the legislative competence of the State Legislature, which read thus:

> "234. The Constitution□makers found the need for power□sharing devices between the Centre and the State having regard to the imperatives of the State's security and stability and, thus, propelled the thrust towards centralisation by using non obstante clause under Article 246 so as to see that the federal supremacy is achieved. .....

238. It can be seen that Article 253 contains non obstante clause. Article 253, thus, operates notwithstanding anything contained in Article 245 and Article 246. Article 246 confers power on Parliament to enact laws with respect to matters enumerated in List I of the Seventh Schedule to the Constitution. Entries 10 to 21 of List I of the Seventh Schedule pertain to international law. In making any law under any of these entries, Parliament is required to keep Article 51 in mind.

239. Article 253 of the Constitution provides that while giving effect to an international treaty, Parliament assumes the role of the State Legislature and once the same is done the power of the

State is denuded.

.....

293. Parliament in enacting the Tea Act has exercised its superior power in the matter in terms of Article 253 of the Constitution of India. Such superior power in certain situations can also be exercised in terms of Entry 33 List III as also overriding powers of Parliament during national emergency including those under Articles 249, 250, 251 and 252 of the Constitution of India. (See ITC Ltd. [(2002) 9 SCC 232])"

74. It is to be noted that the aforesaid paragraphs are from the minority view expressed by Sinha, J. As such, the view expressed by the learned Judge, contrary to the majority judgment in the Constitution Bench, would not support the case of the respondents any further.

UNCITRAL MODEL LAW – A DECISION OR RECOMMENDATION? :

75. That leaves us to consider the contention on behalf of the respondents that the 1996 Act is enacted by the Parliament under Article 253 of the Constitution of India and since the said Act has been enacted in accordance with the decision taken at the international conference to implement the UNCITRAL Model law, the State Legislature is not competent to enact the State Law.

76. It is submitted that since the 1996 Act has been enacted in accordance with the decision taken by the General Assembly of the United Nations, the same would be referable to Article 253 of the Constitution of India.

77. In this respect, it is to be noted that the Preamble of the 1996 Act would reveal that the recommendation of the General Assembly of the United Nations is for adopting UNCITRAL Model Law insofar as international commercial arbitrations are concerned. It will further be relevant to refer to paragraphs (2) and (3) of the Statement of Objects and Reasons of the 1996 Act:

"Statement of Objects and Reasons

1. .....

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted din 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases

where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said UNCITRAL Model Law and Rules is that they have harmonized concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

....."

78. A perusal thereof would clearly reveal that the General Assembly of the United Nations has recommended that all countries give due consideration to the UNCITRAL Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practices are concerned.

79. It could thus be seen that there is no binding decision at the General Assembly of the United Nations to implement the UNCITRAL Model Law. In any case, that recommendation is with regard to only international commercial arbitration practices. No doubt that the Parliament, with certain modifications, has given due consideration to the UNCITRAL Model Law for legislation on the domestic arbitration. However, that cannot by itself be said to be binding on the Parliament to enact the law in accordance with UNCITRAL Model Law.

80. It will also be relevant to refer to the Resolution dated 11th December 1985 passed by the United Nations General Assembly, which reads thus:

"40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations, Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations, Noting that the Model law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration, Convinced

that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. Requests the Secretary-General to transmit the text of the Modern Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the travaux preparatoires from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. Recommends that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice." [emphasis supplied]

81. A perusal of the aforesaid Resolution would clearly reveal that what has been done by the United Nations General Assembly vide the aforesaid Resolution is to recommend to all the States to give due consideration to the Model Law on international commercial arbitration. However, a perusal of the Resolution itself would reveal that it does not create any binding obligation on the States to enact the UNCITRAL Model Law as it is.

82. Shri Venugopal, in support of his contention, has strongly relied on the following observations of this Court in the case of S. Jagannath (supra):

> "48. At this stage we may deal with a question which has incidentally come up for our consideration. Under para 2 of the CRZ Notification, the activities listed thereunder are declared as prohibited activities. Various State Governments have enacted coastal aquaculture legislations regulating the industries set up in the coastal areas. It was argued before us that certain provisions of the State legislations including that of the State of Tamil Nadu are not in consonance with the CRZ Notification issued by the Government of India under Section 3(3) of the Act. Assuming that be so, we are of the view that the Act being a Central legislation has the overriding effect. The Act (the Environment Protection Act, 1986) has been enacted under Entry 13 of List I Schedule VII of the Constitution of India. The said entry is as under:
>
> "Participation in international conferences, assessment and other bodies and implementing of decisions made thereat." The preamble to the Act clearly states that it was enacted to implement the decisions taken at the United Nations' Conference on the Human Environment held at Stockholm in June 1972. Parliament has enacted the Act under Entry 13 of List I Schedule VII read with Article 253 of the Constitution of India. The CRZ Notification having been issued under the Act shall have overriding effect and shall prevail over the law made by the legislatures of the States."

83. Shri Venugopal further relied on the following observations of this Court in the case of Mantri Techzone Private Limited (supra):

"40. The Tribunal has been established under a constitutional mandate provided in Schedule VII List I Entry 13 of the Constitution of India, to implement the decision taken at the United Nations Conference on Environment and Development. The Tribunal is a specialised judicial body for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment. The right to healthy environment has been construed as a part of the right to life under Article 21 by way of judicial pronouncements. Therefore, the Tribunal has special jurisdiction for enforcement of environmental rights."

84. At this juncture, it will be relevant to note that the Preamble to the Environment (Protection) Act, 1986 (hereinafter referred to as the "1986 Act") would itself reveal that it refers to the decision taken at United Nations Conference on the Human Environment held at Stockholm in June 1972, in which India participated and wherein, a decision was taken to take appropriate steps for the protection and improvement of human environment. It further states that it was considered necessary to implement the decisions aforesaid insofar as they relate to the protection and improvement of environment and the prevention of hazards to human beings and other living creatures. So also, the National Green Tribunal Act, 2010 (hereinafter referred to as the "NGT Act") refers to India being a party to the decision taken at the United Nations Conference on the Human Environment held at Stockholm in June 1972, in which India had participated and the decisions were taken to call upon the States to take appropriate steps for the protection and improvement of human environment. It further refers to the decision taken at the United Nations Conference on Environment and Development held at Rio de Janeiro in June 1992, in which India had participated. The States were called upon to provide effective access to judicial and administrative proceedings including redress and remedy, and to develop national laws regarding liability and compensation for the victims of pollution and other environment damage. It further observes that it is considered expedient to implement the decision taken at the aforesaid conferences.

85. It is thus clear that whereas, the 1986 Act and the NGT Act have been enacted specifically to implement the decisions taken at the international conferences, the 1996 Act is enacted on the basis of the Resolution passed by the General Assembly of the United Nations in 1985, whereby the General Assembly only recommended the adoption of UNCITRAL Model Law insofar as international commercial arbitration practices are concerned. As such, the 1986 Act and the NGT Act are directly referable to Entry 13 of List I of the Seventh Schedule and Article 253 of the Constitution of India. Therefore, reliance on the above referred judgments, in our view, would not be of any assistance to the case of the respondents, inasmuch as the Resolution of the General Assembly of the United Nations is only recommendatory in nature and there is no binding decision taken thereat. STATE LEGISLATURE'S ENCROACHMENT ON JUDICIAL POWERS:

86. We next consider the finding of the High Court that since the State Act, in effect, annuls the awards passed by the Arbitrators and/or the judgments or decrees passed by the courts, it will amount to encroachment on judicial powers of the courts and as such, is hit by the doctrine of

separation of powers.

87. A perusal of the list containing details of the Kerala arbitration cases involved in the present matters would reveal that in most of the cases, the awards were passed prior to the year 1992 and the awards were made rule of the court prior to the year 1993. In some of the matters, on the date of the enactment of the State Act, the appeals preferred by the State under Section 39 of the 1940 Act were pending before the competent courts.

88. The appellants have heavily relied on the judgment of this Court in the case of G.C. Kanungo (supra), wherein this Court has observed thus:

> "15. What is of importance and requires our examination is, whether such court when makes an award of the Special Arbitration Tribunal filed before it, a "Rule of Court" by its judgment and decree, as provided under Section 17 of the Principal Act, does such award of the Special Arbitration Tribunal merge in the judgment and decree, as argued on behalf of the petitioners. We find it difficult to accede to the argument. What cannot be overlooked is, that the award of a Special Arbitration Tribunal, as that of an award of an arbitrator, is, as we have already pointed out, a decision made by it on the claim or cause referred for its decision by way of arbitral dispute. When the court makes such award of a Special Arbitration Tribunal a "Rule of Court" by means of its judgment and decree, it is not deciding the claim or cause as it would have done, if it had come before it as a suit for its judgment and decree in the course of exercise of its ordinary civil jurisdiction. Indeed, when such award is made to come by a party to the dispute before court for being made a "Rule of Court" by its judgment and decree, it is to obtain the superadded seal of the court for such award, as provided for under the Principal Act, to make it enforceable against the other party through the machinery of court. Therefore, the judgment and decree rendered by the civil court in respect of an award is merely to superadd its seal thereon for making such award enforceable through the mechanism available with it for enforcement of its own judgments and decrees.

The mere fact that such judgments or decrees of courts by which the awards of Special Arbitration Tribunals are made "Rules of Court" or are affirmed by judgments and decrees of superior courts in appeals, revisions or the like, cannot make the awards the decisions of courts. Hence, when the awards of Special Arbitration Tribunals are made by the judgments and decrees of court, "Rules of Court" for enforcing them through its execution process, they (the awards) do not merge in the judgments and decrees of courts, as would make them the decisions of court. The legal position as to non□merger of awards in judgments and decrees of courts, which we have stated, receives support from certain observations in the decision of this Court in Satish Kumar v. Surinder Kumar [(1969) 2 SCR 244 : AIR 1970 SC 833] . There, this Court was confronted with the question, whether an award made by an arbitrator which had become unenforceable for want of registration under the Registration Act, ceased to be a decision of the arbitrator, which binds the parties or their privies. In that context, this Court observed that an award is entitled to that respect which is due to the judgment and decree of last resort. And if the award which had been pronounced between the

parties has become final, a second reference of the subject of the award becomes incompetent. It further observed that if the award is final and binding on the parties, it can hardly be said that it is a waste paper unless it is made a “Rule of Court”. Hegde, J. who agreed with the above observations of Sikri, J. (as his Lordship then was) while speaking for Bachawat, J. also observed that the arbitration has the first stage which commences with arbitration agreement and ends with the making of the award, and then a second stage which relates to the enforcement of the award. He also observed that it was one thing to say that a right is not created by the award but it is an entirely different thing to say that the right created cannot be enforced without further steps.

16. Therefore, our answer to the point is that the awards of Special Arbitration Tribunals did not merge in judgments and decrees of the courts even though the courts by their judgments and decrees made such awards “Rules of Court” for their enforceability through the courts availing their machinery used for execution of their decisions, that is, their own judgments and decrees.

17. It is true, as argued on behalf of the petitioners, that a legislature has no legislative power to render ineffective the earlier judicial decisions by making a law which simply declares the earlier judicial decisions as invalid or not binding, for such power if exercised would not be a legislative power exercised by it but a judicial power exercised by it encroaching upon the judicial power of the State exclusively vested in courts. The said argument advanced, since represents the correct and well□settled position in law, we have thought it unnecessary to refer to the decisions of this Court cited by learned counsel for the petitioners, in that behalf and hence have not referred to them.

18. For the 1991 Amendment Act to become unconstitutional on the ground that it has rendered judgments and decrees of courts by which the Special Arbitration Tribunals' awards are made “Rules of Court”, invalid or ineffective, such judgments and decrees must be decisions of courts rendered by them in exercise of their judicial power of decision□making in respect of the subjects of dispute before them and not where they render judgments and decrees to make the awards of the Special Arbitration Tribunals “Rules of Court” so that they could be made enforceable through the machinery of courts. Thus, the awards of the Special Arbitration Tribunals when get the superadded seals of courts for such awards, by the courts making them “Rules of Court” by their judgments and decrees, such awards do not get merged in judgments and decrees of courts so as to make them the decisions of courts, rendered in exercise of State's judicial power of decision□making, as it happens in the causes directly brought before them by way of suits for their decisions. As we have already pointed out, question of claim or cause of a party which gets merged in the award of a Special Arbitration Tribunal, in turn, getting merged in judgment and decree made by civil court, for the purpose of making the award a “Rule of Court”, so as to make it enforceable, cannot arise. What needs to be noted is, that courts even if render their judgments and decrees for making the awards “Rules of Court”, those judgments and decrees cannot substitute their own decisions for the decisions of Special Arbitration Tribunals contained in their awards. This situation makes it clear that power exercised by the civil courts in making the awards of Special Arbitration Tribunals “Rules of Court” by their judgments and decrees is not their judicial power exercised in rendering judgments and decrees, as civil courts exercise their powers vested in them for resolving disputes between parties. To be precise, judgments and decrees made by civil courts in making the awards of the Special Arbitration Tribunals the “Rules of Court” for the sole purpose of their enforceability

through the machinery of court, cannot make such judgments and decrees of civil court, the decisions rendered by civil courts in exercise of judicial power of the State exclusively invested in them under our Constitution. Thus, when the judgments and decrees made by civil courts in making the awards of Special Arbitration Tribunals "Rules of Court" are not those judgments and decrees of courts made in exercise of judicial power of State vested in them under our Constitution, the 1991 Amendment Act when nullifies the judgments and decrees of courts by which awards of Special Arbitration Tribunals are made "Rules of Court", cannot be regarded as that enacted by the Orissa State Legislature encroaching upon the judicial powers of State exercisable under our Constitution by courts as sentinels of Rule of Law, a basic feature of our Constitution. Hence, the 1991 Amendment Act insofar as it nullifies judgments and decrees of courts by which awards of Special Arbitration Tribunals are made "Rules of Court", even where they are affirmed by higher courts, cannot be regarded as that made by the Orissa State Legislature transgressing upon the judicial power of State vested in courts as would make it unconstitutional." [emphasis supplied]

89. It could be seen that this Court has observed that the judgments and decrees made by the civil courts in making the awards of the Special Arbitration Tribunals the "Rules of Court" are for the sole purpose of their enforceability through the machinery of courts and therefore, cannot be such judgments and decrees of civil courts made in exercise of the judicial power of the State exclusively vested in them under the Constitution of India. This Court, therefore, held that the 1991 Amendment Act, which nullifies the judgments and decrees of the court by which awards of Special Arbitration Tribunals are made "Rules of Court", cannot be said to be an encroachment upon the judicial powers of the State exercisable by the courts under the Constitution of India.

90. However, it is to be noted that in the very same judgment, this Court observed thus:

"28. Thus, the impugned 1991 Amendment Act seeks to nullify the awards made by the Special Arbitration Tribunals constituted under the 1984 Amendment Act, in exercise of the power conferred upon them by that Act itself. When the awards made under the 1984 Amendment Act by the Special Arbitration Tribunals in exercise of the State's judicial power conferred upon them which cannot be regarded as those merged in Rules of Court or judgments and decrees of courts, are sought to be nullified by the 1991 Amendment Act, it admits of no doubt that legislative power of the State Legislature is used by enacting the impugned 1991 Amendment Act to nullify or abrogate the awards of the Special Arbitration Tribunals by arrogating to itself, a judicial power. [See Cauvery Water Disputes Tribunal, Re [1993 Supp (1) SCC 96 (2) : AIR 1992 SC 522 : 1991 Supp (2) SCR 497]]. From this, it follows that the State Legislature by enacting the 1991 Amendment Act has encroached upon the judicial power entrusted to judicial authority resulting in infringement of a basic feature of the Constitution — the Rule of Law. Thus, when the 1991 Amendment Act nullifies the awards of the Special Arbitration Tribunals, made in exercise of the judicial power conferred upon them under the 1984 Amendment Act, by encroaching upon the judicial power of the State, we have no option but to declare it as unconstitutional having regard to the well□settled and undisputed legal position that a legislature has no legislative power to render ineffective the earlier judicial decisions by making a law which simply declares the earlier judicial decisions as invalid and not binding, for such powers, if exercised, would not be legislative power exercised by it, but judicial power exercised by it encroaching upon the judicial power of the State vested in a judicial tribunal as

the Special Arbitration Tribunal under the 1984 Amendment Act. Moreover, where the arbitral awards sought to be nullified under the 1991 Amendment Act are those made by Special Arbitration Tribunals constituted by the State itself under the 1984 Amendment Act to decide arbitral disputes to which State was a party, it cannot be permitted to undo such arbitral awards which have gone against it, by having recourse to its legislative power for grant of such permission as could result in allowing the State, if nothing else, abuse of its power of legislation." [emphasis supplied]

91. The court further held that under the 1984 Amendment Act, the Special Arbitration Tribunals were constituted by the State itself to decide arbitral disputes. It held that the State was a party before such Tribunals and therefore, it cannot be permitted to undo such arbitral awards which had gone against it. It further held that if such an exercise is permitted to be done, by having recourse to its legislative power, it would result in nothing else but allowing the State, abuse of its power of legislation.

92. The Court goes on to hold that the awards made under the 1984 Amendment Act by the Special Arbitration Tribunals are sought to be nullified by the 1991 Amendment Act. As such, the legislative power of the State Legislature is used by enacting the impugned 1991 Amendment Act to nullify or abrogate the awards of the Special Arbitration Tribunals by abrogating to itself a judicial power. In this respect, the Court relied on the judgment of this Court in the case of Cauvery Water Disputes Tribunal41. This Court further goes on to hold that the State Legislature by enacting the 1991 Amendment Act has encroached upon the judicial power vested in judicial authorities and as such, infringed the basic feature of the Constitution of India the "Rule of Law". As such, this Court held the 1991 Amendment Act to be unconstitutional on the ground that the arbitral awards passed by the Special Arbitration Tribunals under the 1984 Amendment Act are sought to be nullified by the 1991 Amendment Act.

41 1993 Supp (1) SCC 96 (2)

93. A perusal of the aforesaid observations made in the case of G.C. Kanungo (supra) would reveal that on one hand, this Court goes on to hold that the judgments and decrees by which the civil courts make the awards "Rules of Court" are not passed in exercise of its judicial powers. As such, the awards do not merge in the judgments and decrees of the court. But on the other hand, the Court goes on to hold that the awards passed by the Special Arbitration Tribunals are the awards passed by the Tribunals exercising the judicial power and as such, when the State nullifies such awards, it abrogates to itself a judicial power and the Statute which annuls it, is unconstitutional being encroachment on the judicial power of the State.

94. Since G.C. Kanungo (supra) has ultimately held the 1991 Amendment Act to be unconstitutional on the ground that it annuls the awards passed by the Special Arbitration Tribunals, it may not be necessary to consider the question as to whether G.C. Kanungo (supra) was right in holding that the judgments and decrees vide which the awards are made "Rules of Court", are not passed in exercise of judicial power. However, the perusal of paragraph 17 in the case of G.C. Kanungo (supra) would reveal that this Court recorded the submissions made on behalf of the petitioners therein that, a Legislature has no legislative power to render ineffective the earlier judicial decisions by making a

law which simply declares the earlier judicial decisions as invalid or not binding. It also recorded that if such a power is exercised, it will not be legislative power exercised by it but a judicial power, encroaching upon the judicial power of the State exclusively vested in courts. It further appears that various decisions of this Court were cited by the counsel for the petitioners therein, however, this Court did not find it necessary to refer to the said decisions, since this Court found that the said submissions represent a correct and well-settled position in law. It will be worthwhile to note that in the said case, this Court was considering the provisions of the 1940 Act as against the provisions of the Orissa State Act. In the present case also, all the awards so also the judgments and decrees passed by the civil courts making such awards "Rules of Court" have been passed under the 1940 Act. We, therefore, find that it will be appropriate to examine the correctness of the said finding.

95. It will be necessary to consider the scheme of the 1940 Act as will be found in Sections 15, 16, 17 and 30 thereof, which read thus:

> "15. Power of Court to modify award.—The Court may by order modify or correct an award—
>
> (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
>
> (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
>
> (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

16. Power to remit award.—(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit —

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it. (2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub□section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

17. Judgment in terms of award.—Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award. .....

30. Grounds for setting aside award.— An award shall not be set aside except on one or more of the following grounds, namely—

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid."

96. A perusal of Section 15 of the 1940 Act would reveal that the court, by an order, may modify or correct an award, where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred. The Court may also modify or correct the award, where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision. The power under Section 15 of the 1940 Act could also be exercised, where the award contains a clerical mistake or an error arising from an accidental slip or omission.

97. Section 16 of the 1940 Act empowers the court to remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration, where it finds that the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred. Such power can also be exercised, where the award is so indefinite as to be incapable of execution. So also, where an objection to the legality of the award is apparent upon the face of it, the court would be empowered to remit the award.

98. Section 30 of the 1940 Act provides the grounds on which an award could be set aside. It provides that the award could be set aside when an arbitrator or umpire has misconducted himself or the proceedings. It could be set aside when it is found that the award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35. The award could also be set aside when the court finds that the award has been improperly procured or is otherwise invalid.

99. Section 17 of the 1940 Act empowers the court to pronounce a judgment according to the award, and upon the judgment so pronounced a decree is to follow. It further provides that no appeal shall lie on such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award. However, prior to pronouncing the judgment, the court is required to be satisfied that no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, is made out. The Court is also required to wait till the time for making an application to set aside the award has expired, or such application having been made, has been refused.

100. The perusal of the scheme of the 1940 Act would itself reveal that the passing of the judgment and decree under Section 17 of the 1940 Act is not a mere formality. The judgment can be pronounced only when the court is satisfied that no cause is made out for remitting the award or setting aside the award. The court is also entitled to remit or modify the awards. As such, it cannot be said that the court, while passing a judgment, which is followed by a decree, does not exercise judicial power. The court is not supposed to act mechanically and be a Post Office.

101. A Constitution Bench of this Court in the case of Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala and Others42, had an occasion to consider the scope of Section 111 of the Companies Act, 1956. It was sought to be urged before this Court that the authority of the Central Government under Section 111 of the Companies Act, 1956 was an administrative authority. Rejecting the said submission, J.C. Shah, J. observed thus:

> ".....But that in an appeal under Section 111 clause (3) there is a lis or dispute between the contesting parties relating to their civil rights, and the Central Government is invested with the power to determine that dispute according to law i.e. it has to consider and decide the proposal and the objections in the light of the evidence, and not on grounds of policy or expediency. The extent of the power which may be exercised by the Central Government is not delimited by express enactment, but the power is not on that account unrestricted. The power in appeal to order registration of transfers has to be exercised subject to the limitations similar to those imposed upon the exercise of the power of the court in a petition for that relief under Section 155: the restrictions which inhere the exercise of the power of the court also apply to the exercise of the appellate power by the Central Government i.e. the Central Government has to 42 [1962] 2 SCR 339 decide whether in exercising their power, the directors are acting oppressively, capriciously or corruptly, or in some way mala fide. The decision has manifestly to stand those objective tests, and has not merely to be founded on the subjective satisfaction of the authority deciding the question. The authority cannot proceed to decide the question posed for its determination on grounds of expediency: the statute empowers the Central Government to decide the disputes arising out of the claims made by the transferor or transferee which claim is opposed by the company, and by rendering a decision upon the respective contentions, the rights of the contesting parties are directly affected. Prima facie, the exercise of such authority would be judicial. It is immaterial that the statute which confers the power upon the Central Government does not expressly set

> out the extent of the power: but the very nature of the jurisdiction requires that it is to be exercised subject to the limitations which apply to the court under Section 155. The proviso to sub-section (8) of Section 111 clearly indicates that in circumstances specified therein reasonable compensation may be awarded in lieu of the shares.

This compensation which is to be reasonable has to be ascertained by the Central Government; and reasonable compensation cannot be ascertained except by the application of some objective standards of what is just having regard to all the circumstances of the case.

In The Province of Bombay v. Kusaldas S.

Advani [(1950) SCR 621] this Court considered the distinction between decisions quasi-judicial and administrative or ministerial for the purpose of ascertaining whether they are subject to the jurisdiction to issue a writ of certiorari, Fazl Ali, J. at p. 642 observed:

> "The word 'decision' in common parlance is more or less a neutral expression and it can be used with reference to purely executive acts as well as judicial orders.

The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference, and the real test is: Is there any duty to decide judicially?" The Court also approved of the following test suggested in King v. London County Council [(1931) 2 KB 215, 233] by Scrutton, L.J.:

> "It is not necessary that it should be a court in the sense in which this Court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari." In Bharat Bank Ltd., Delhi v. Employees [(1950) SCR 459] the question whether an adjudication by an Industrial Tribunal functioning under the Industrial Tribunals Act was subject to the jurisdiction of this Court under Article 136 of the Constitution fell to be determined: Mahajan, J. in that case observed:
>
> "There can be no doubt that varieties of Administrative Tribunals and Domestic Tribunals are known to exist in this country as well as in other countries of the world but the real question to decide in each case is as to the extent of judicial power of the State exercised by them. Tribunals which do not derive authority from the sovereign power cannot fall within the ambit of Article 136. The condition precedent for bringing a tribunal within the ambit of Article 136 is that it should be constituted by the State. Again a tribunal would be outside the ambit of Article 136 if is not invested with any part of the judicial functions of the State but discharges purely administrative or executive duties. Tribunals however which are found invested with certain functions of a court of justice and have some of its trappings also would fall within the ambit of Article 136 and would be subject to the appellate control of this

> Court whenever it is found and necessary to exercise that control in the interests of justice." It was also observed by Fazi Ali, J. at p.
>
> 463, that a body which is required to act judicially and which exercises judicial power of the State does not cease to be one exercising judicial or quasi-judicial functions merely because it is not expressly required to be guided by any recognised substantive law in deciding the disputes which come before it.

The authority of the Central Government entertaining an appeal under Section 111(3) being an alternative remedy to an aggrieved party to a petition under Section 155 the investiture of authority is in the exercise of the judicial power of the State. Clause (7) of Section 111 declares the proceedings in appeal to be confidential, but that does not dispense with a judicial approach to the evidence. Under Section 54 of the Indian Income Tax Act (which is analogous) all particulars contained in any statement made, return furnished or account or documents produced under the provisions of the Act or in any evidence given, or affidavit or deposition made, in the course of any proceedings under the Act are to be treated as confidential; but that does not make the decision of the taxing authorities merely executive. As the dispute between the parties relates to the civil rights and the Act provides for a right of appeal and makes detailed provisions about hearing and disposal according to law, it is impossible to avoid the inference that a duty is imposed upon the Central Government in deciding the appeal to act judicially." [emphasis supplied]

102. It has been held by this Court that the restrictions which inhere the exercise of the power of the court also apply to the exercise of the appellate power by the Central Government. It has been held that the Central Government has to decide whether in exercising their power, the directors are acting oppressively, capriciously or corruptly, or in some way mala fide. The decision has manifestly to stand those objective tests, and has not merely to be founded on the subjective satisfaction of the authority deciding the question. It has been held that the very nature of the jurisdiction requires that it is to be exercised subject to the limitations which apply to the court under Section 155 of the Companies Act, 1956. It could be seen that this Court has held that since the dispute between the parties relates to the civil rights and the Act provides for a right of appeal and makes detailed provisions about hearing and disposal according to law, it is impossible to avoid the inference that a duty is imposed upon the Central Government in deciding the appeal to act judicially.

103. M. Hidayatullah, J., in a separate but concurring judgment, observed thus:

> "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. Now, the matter would have been simple, if the Companies Act, 1956 had designated a person or persons whether by name or by office for the purpose of hearing an appeal under Section 111. It would then have been clear that though such person or persons were not "courts" in the sense explained, they were clearly "tribunals". The Act says that an appeal shall lie to the Central Government. We are, therefore, faced with the question whether the Central Government can be said to be a tribunal.

Reliance is placed upon a recent decision of this Court in Shivji Nathubai v. Union of India [(1960) 2 SCR 775] where it was held that the Central Government in exercising power of review under the Mineral Concession Rules, 1949, was subject to the appellate jurisdiction conferred by Article 136. In that case which came to this Court on appeal from the High Court's order under Article 226, it was held on the authority of Province of Bombay v. Kushaldas S. Advani [(1950) SCR 621] and Rex v. Electricity Commissioners [(1924) 1 KB 171] that the action of the Central Government was quasi□ judicial and not administrative. It was then observed:

> "It is in the circumstances apparent that as soon as Rule 52 gives a right to an aggrieved party to apply for review a lis is created between him and the party in whose favour the grant has been made.

Unless therefore there is anything in the statute to the contrary it will be the duty of the authority to act judicially and its decision would be a quasi□judicial act." This observation only establishes that the decision is a quasi□judicial one, but it does not say that the Central Government can be regarded as a tribunal. In my opinion, these are very different matters, and now that the question has been raised, it should be decided.

The function that the Central Government performs under the Act and the Rules is to hear an appeal against the action of the Directors. For that purpose, a memorandum of appeal setting out the grounds has to be filed, and the company, on notice, is required to make representations, if any, and so also the other side, and both sides are allowed to tender evidence to support their representations. The Central Government by its order then directs that the shares be registered or need not be registered. The Central Government is also empowered to include in its orders, directions as to payment of costs or otherwise. The function of the Central Government is curial and not executive. There is provision for a hearing and a decision on evidence, and that is indubitably a curial function.

Now, in its functions the Government often reaches decisions, but all decisions of the Government cannot be regarded as those of a tribunal. Resolutions of the Government may affect rights of parties, and yet, they may not be in the exercise of the judicial power. Resolutions of the Government may be amenable to writs under Articles 32 and 226 in appropriate cases, but may not be subject to a direct appeal under Article 136 as the decisions of a tribunal. The position, however, changes when Government embarks upon curial functions, and proceeds to exercise judicial power and decide disputes. In those circumstances, it is legitimate to regard the officer who deals with the matter and even Government itself as a tribunal. The officer who decides, may even be anonymous; but the decision is one of a tribunal, whether expressed in his name or in the name of the Central Government. The word "tribunal" is a word of wide import, and the words "court" and "tribunal" embrace within them the exercise of judicial power in all its forms. The decision of the Government thus falls within the powers of this Court under Article 136." [emphasis supplied]

104. M. Hidayatullah, J. proceeded to consider as to whether the Central Government, while exercising its powers under Section 111 of the Companies Act, 1956, can be said to be a "Tribunal". On perusal of the scheme of Section 111 of the Companies Act, 1956, His Lordship has observed that

the function of the Central Government under the said section is curial and not executive. There is a provision for a hearing and a decision on evidence, and that is indubitably a curial function. His Lordship further held that in its various functions, Government often reaches a decision, but all decisions of the Government cannot be regarded as those of a tribunal. However, when Government embarks upon curial functions, and proceeds to exercise judicial power and decide disputes, it is legitimate to regard the officer who deals with the matter and even Government itself as a tribunal. His Lordship further goes on to hold that the officer who decides, may even be anonymous; but the decision is one of a tribunal, whether expressed in his name or in the name of the Central Government.

105. A Constitution Bench of this Court in the case of Shankarlal Aggarwala and Others v. Shankarlal Poddar and Others43, was considering a question as to whether the order passed by the Company Judge confirming the sale was an administrative order or a judicial order. Answering the said question, this Court, speaking through N. Rajagopala Ayyangar, J., observed thus:

> "On the basis of these provisions, we shall proceed to consider whether the confirmation of the sale was merely an order in the course of administration and not a judicial order. The sale by the liquidator was, of course, effected in the course of the realisation of the assets of the company and for the purpose of the amount realised being applied towards the discharge of the liabilities and the surplus to be distributed in the manner provided by the Act. It would also be correct to say that when a liquidator effects a sale he is not discharging any judicial function. Still it does not follow that every order of the Court merely for the reason that it is 43 [1964] 1 SCR 717 passed in the course of the realisation of the assets of the company must always be treated as merely an administrative one. The question ultimately depends upon the nature of the order that is passed. An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely a ministerial order, for before confirming the sale the Court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realisation.

The next question is whether such an order could be classified as an administrative order. One thing is clear, that the mere fact that the order is passed in the course of the administration of the assets of the company and for realising those assets is not by itself sufficient to make it an administrative, as distinguished from a judicial order. For instance, the determination of amounts due to the company from its debtors which is also part of the process of the realisation of the assets of the company is a matter which arises in the course of the administration. It does not on that account follow that the determination of the particular amount due from a debtor who is brought before the Court is an administrative order.

It is perhaps not possible to formulate a definition which would satisfactorily distinguish, in this context, between an administrative and a judicial order. That the power is entrusted to or wielded by

a person who functions as a Court is not decisive of the question whether the act or decision is administrative or judicial. But we conceive that an administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the Court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a Court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective, consideration, it would be a judicial decision. It has sometimes been said that the essence of a judicial proceeding or of a judicial order is that there should be two parties and a lis between them which is the subject of adjudication, as a result of that order or a decision on an issue between a proposal and an opposition. No doubt, it would not be possible to describe an order passed deciding a lis before the authority, that it is not a judicial order but it does not follow that the absence of a lis necessarily negatives the order being judicial. Even viewed from this narrow standpoint it is possible to hold that there was a lis before the Company Judge which he decided by passing the order. On the one hand were the Claims of the highest bidder who put forward the contention that he had satisfied the requirements laid down for the acceptance of his bid and was consequently entitled to have the sale in his favour confirmed, particularly so as he was supported in this behalf by the official liquidators. On the other hand there was the 1st respondent and not to speak of him, the large body of unsecured creditors whose interests, even if they were not represented by the 1st respondent, the Court was bound to protect. If the sale of which confirmation was sought was characterised by any deviation from the conditions subject to which the sale was directed to be held or even otherwise was for a gross undervalue in the sense that very much more could reasonably be expected to be obtained if the sale were properly held in view of the figure of Rs 3,37,000 which had been bid by Nandlal Agarwalla, it would be the duty of the Court to refuse the confirmation in the interests of the general body of creditors and this was the submission made by the 1st respondent. There were thus two points of view presented to the Court by two contending parties or interests and the Court was called upon to decide between them. And the decision vitally affected the rights of the parties to property. In this view we are clearly of the opinion that the order of the Court was, in the circumstances, a judicial order and not an administrative one and was therefore not inherently incapable of being brought up in appeal.

[emphasis supplied]

106. The Constitution Bench in the case of Shankarlal Aggarwala and Others (supra) held that the question as to whether the order passed by a court is administrative or judicial, would depend upon the nature of the order that is passed. The order undoubtedly involves a discretion and cannot be termed merely a ministerial order. His Lordship distinguished an administrative order to be one which is directed to the regulation or supervision of matters as against an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the court. It has further been held that one of the tests for deciding whether the power exercised is administrative or judicial, would be whether a matter, which involves the exercise of discretion, is left for the decision of the authority, particularly if that authority were a court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective, consideration, it would be a judicial decision.

107. We have, hereinabove, elaborately considered the scheme under Sections 15, 16 and 17 of the 1940 Act. The perusal of the said scheme would clearly reveal that before making an award "Rule of Court" by passing a judgment and decree, the court is required to take into consideration various factors, apply its mind and also exercise its discretion judicially. We find that the aforesaid provisions have not been considered in the case of G.C. Kanungo (supra). The perusal of the aforesaid provisions, as has been considered by us hereinabove, would clearly show that the power exercised by the court under Section 17 of the 1940 Act is a judicial power. We are therefore of the view that the findings in this respect as recorded by this Court in paragraphs 15 to 18 in the case of G.C. Kanungo (supra) would be per incuriam the provisions of the 1940 Act.

108. We further find that the two Constitution Benches in the cases of Harinagar Sugar Mills Ltd. (supra) and Shankarlal Aggarwala and Others (supra) have elaborately considered as to what could be construed as judicial power of a court. In the case of Harinagar Sugar Mills Ltd. (supra), though the power to be exercised was by the Central Government, the Constitution Bench, upon examining the scope of Section 111 of the Companies Act, 1956, held the said power to be a judicial one. In the case of Shankarlal Aggarwala and Others (supra), the Constitution Bench distinguished between the administrative and judicial powers of the court. This Court in paragraph 17 in the case of G.C. Kanungo (supra) rightly observed that the State Legislature has no legislative power to render ineffective the earlier judicial decisions by making a law. It cannot simply declare the earlier decisions invalid or not binding. However, observing this, in paragraph 18, this Court held that the power exercised by the court in making the awards of the Special Arbitration Tribunals the "Rules of Court", is not a judicial power. We are of the considered view that the aforesaid finding is not only per incuriam the provisions of the 1940 Act but also the two judgments of the Constitution Bench in the cases of Harinagar Sugar Mills Ltd. (supra) and Shankarlal Aggarwala and Others (supra).

109. A seven❑Judge Bench of this Court in the case of Bengal Immunity Company Limited v. State of Bihar and Others44, was considering the question as to whether the majority decision in the case of State of Bombay and Another v. United Motors (India) Limited and Others 45 laid down a correct law. The authority of the court to go beyond the majority decision was questioned. While 44 [1955] 2 SCR 603 45 [1953] SCR 1069 considering the said objection, before going into the merits of the matter, S.R. Das, Acting C.J., observed thus:

> ".....Learned counsel for some of the interveners question our authority to go behind the majority decision. It is, therefore, necessary at this stage to determine this preliminary question before entering upon a detailed discussion on the question of construction of Article 286.
>
> In England, the Court of Appeal has imposed upon its power of review of earlier precedents a limitation, subject to certain exceptions. The limitation thus accepted is that it is bound to follow its own decisions and those of courts of Coordinate jurisdiction, and the "full" court is in the same position in this respect as a division Court consisting of three members. The only exceptions to this Rule are: (1) the court is entitled and bound to decide which of the two conflicting decisions of its own it will follow; (2) the Court is bound to refuse to follow a decision of its own which, though

> not expressly overruled, cannot, in its opinion stand with a decision of the House of Lords; and (3) the court is not bound to follow a decision of its own, if it is satisfied that the decision was given per incuriam e.g. where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court. [See Young v. Bristol Aeroplane Co.

Ltd. [LR 1944 KB 718 CA] which, on appeal to the House of Lords, was approved by Viscount Simon in LR 1946 AC 163 at p. 169]. A decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent case. An erroneous decision of the House of Lords can be set right only by an Act of Parliament. [See Street Tramways v. London County Council [1898 AC 375] This limitation was repeated by Lord Wright in Radcliffe v. Ribble Motor Services Ltd. [1939 AC 215 at p. 245]"

110. In the case of State of U.P. and Another v. Synthetics and Chemicals Ltd. and Another46, this Court observed thus:

> "40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd. [(1944) 1 KB 718 : (1944) 2 All ER 293]). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey [(1962) 2 SCR 558 : AIR 1962 SC 83] this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It 46 (1991) 4 SCC 139 has been explained as rule of sub□silentio. "A decision passes sub□silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153).

In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. [(1941) 1 KB 675, 677 : (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. [(1989) 1 SCC 101] The bench held that, 'precedents sub□silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article

141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondicherry [AIR 1967 SC 1480 : (1967) 2 SCR 650 : 20 STC 215] it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

111. This Court further in the case of Sundeep Kumar Bafna v. State of Maharashtra and Another47, observed thus:

> "19. It cannot be overemphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co□ equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar.

We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam." 47 (2014) 16 SCC 623

112. The perusal of the judgment in the case of G.C. Kanungo (supra) would reveal that though the court has recorded the submissions of the counsel for the petitioners therein, that the Legislature has no power to render ineffective the earlier judicial decisions by making a law and though judgments were cited in support of the said proposition, the court did not consider it necessary to refer to the said decisions. However, without considering the provisions of the 1940 Act or the two judgments of the Constitution Bench in the cases of Harinagar Sugar Mills Ltd. (supra) and Shankarlal Aggarwala and Others (supra), it went on to hold that the powers exercised by a court while making an award "Rule of Court", are not judicial powers. We find that the finding to that effect in the case of G.C. Kanungo (supra), apart from being per incuriam the provisions of the 1940 Act and the law laid down by the Constitution Bench in the cases of Harinagar Sugar Mills Ltd. (supra) and Shankarlal Aggarwala and Others (supra), would also be hit by the rule of sub silentio.

113. The perusal of the subsequent judgments of this Court would also fortify the position that the powers exercised by the court under the provisions of the 1940 Act are judicial powers and that the power to make an award "Rule of Court" is not a mechanical power.

114. In the case of Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor48, this Court observed thus:

> "17. .....Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court....." [emphasis supplied]

115. While considering the discretion to be exercised by the court under Section 16 of the 1940 Act, this Court, in the case of Ramachandra Reddy & Co. v. State of A.P. and Others49, observed thus:

> "5. Under the Arbitration Act, Section 16 is the provision under which the court may remit the award for reconsideration of an arbitrator and necessity for remitting the award arises when there 48 (1999) 8 SCC 122 49 (2001) 4 SCC 241 are omissions and defects in the award, which cannot be modified or corrected. Remission of an award is in the discretion of the court and the powers of the court are circumscribed by the provisions of Section 16 itself. Ordinarily, therefore, a court may be justified in remitting the matter if the arbitrator leaves any of the matters undetermined or a part of the matter which had not been referred to and answered and that part cannot be separated from the remaining part, without affecting the decision on the matter, which was referred to arbitration or the award is so indefinite as to be incapable of execution or that the award is erroneous on the face of it. Discretion having been conferred on the court to remit an award, the said discretion has to be judicially exercised and an appellate court would not be justified in interfering with the exercise of discretion unless the discretion has been misused. What is an error apparent on the face of an award which requires to be corrected, has always been a subject□matter of discussion. An error of law on the face of the award would mean that one can find in the award or a document actually incorporated thereto stating the reasons for a judgment some legal propositions which are the basis of the award and which can be said to be erroneous. Documents not incorporated directly or indirectly into the award cannot be looked into for the purpose of finding out any alleged error. The courts are not to investigate beyond the award of the arbitrators and the documents actually incorporated therein and, therefore, when there would be no patent error on the face of the award, it would not be open for the court to go into the proceedings of the award. If the application for remittance filed by the claimants invoking jurisdiction of the court under Section 16 is examined from the aforesaid standpoint and if the order of the learned civil court, remitting Claim Item 1 is tested in the light of the discussions made above, the conclusion is irresistible that no case for remittance had been made out and the learned trial Judge exercised his discretion on the grounds which do not come within the four corners of the provisions of Section 16 of the Arbitration Act. In fact no reasons had been ascribed for interference with the award, rejecting Claim Item 1 and for remittance of the same. The High Court being the court of appeal, was therefore, fully justified in exercise of its appellate power in correcting the error made by the Civil Judge in remitting Claim

Item 1." [emphasis supplied]

116. A seven□Judge Bench of this Court, in the case of SBP & Co. v. Patel Engineering Ltd. and Another 50, was considering the question as to whether the powers of the Chief Justice of High Court or Chief Justice of India under Sections 11(6) and 8 of the 1996 Act are administrative or judicial.

117. After referring to the earlier decisions, P.K. Balasubramanyan, J., delivering a majority judgment, observed thus:

> "36. Going by the above test it is seen that at least in the matter of deciding his own jurisdiction and in the matter of deciding on the existence of an arbitration agreement, the Chief Justice when confronted with two points of view presented by the 50 (2005) 8 SCC 618 rival parties, is called upon to decide between them and the decision vitally affects the rights of the parties in that, either the claim for appointing an Arbitral Tribunal leading to an award is denied to a party or the claim to have an arbitration proceeding set in motion for entertaining a claim is facilitated by the Chief Justice. In this context, it is not possible to say that the Chief Justice is merely exercising an administrative function when called upon to appoint an arbitrator and that he need not even issue notice to the opposite side before appointing an arbitrator.

37. It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an arbitrator or an Arbitral Tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the party concerned had certified that he had no further claims against the other contracting party. In other words, there have been occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuance of notice. Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the arbitration clause concerned at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by Ridge v. Baldwin [(1963) 2 All ER 66 : 1964 AC 40 : (1963) 2 WLR 935 (HL)] are well known. Therefore, to the extent, Konkan Rly. [(2002) 2 SCC 388] states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be not sustainable."

118. It could thus be seen that this Court in unequivocal terms has held that the powers exercised by the Chief Justice of the High Court or Chief Justice of India under Section 11(6) of the 1996 Act are not administrative but are judicial powers. It would thus not sound to reason, that when a power under Section 11(6) of the 1996 Act for appointment of an arbitrator has been held to be a judicial power, the power to make an award a "Rule of Court", which can be made only upon the satisfaction of the court on the existence of the eventualities set out in Section 17 of the 1940 Act, is not an exercise of judicial power.

119. A Constitution Bench of this Court in the case of State of Tamil Nadu v. State of Kerala and Another 51, after an elaborate survey of all the earlier judgments, has summed up the Law on "separation of powers doctrine" under the Constitution of India, as under:

> "Summary of separation of powers doctrine under the Indian Constitution
>
> 126. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between the legislature, executive and judiciary may, in brief, be summarised thus:

126.1. Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs—legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of powers, the separation of powers between the legislature, 51 (2014) 12 SCC 696 executive and judiciary is not different from the Constitutions of the countries which contain express provision for separation of powers. 126.2. Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.

126.3. Separation of powers between three organs— the legislature, executive and judiciary—is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article

14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution.

126.4. The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State Legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

126.5. The doctrine of separation of powers applies to the final judgments of the courts. The legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. 126.6. If the legislature has the power over the subject□matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject□matter and whether in making the validation law it removes the defect which the courts had found in the existing law. 126.7. The law enacted by the legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. In such situation, the legal effect of the law on a judgment or a judicial proceeding must be examined closely, having regard to legislative prescription or direction. The questions to be asked are:

> (i) Does the legislative prescription or legislative direction interfere with the judicial functions?
>
> (ii) Is the legislation targeted at the decided case or whether impugned law requires its application to a case already finally decided?
>
> (iii) What are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality?

If the answer to Questions (i) and (ii) is in the affirmative and the consideration of aspects noted in Question (iii) sufficiently establishes that the impugned law interferes with the judicial functions, the Court may declare the law unconstitutional."

120. It could thus be seen that the Constitution Bench in the aforesaid case held that, though a law enacted by the Legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. The Constitution Bench stipulated three questions to be asked in such a situation, which are reproduced hereinabove.

121. We have already held that since the State Act is referable to Entry 13 of List III of the Seventh Schedule to the Constitution of India, it is within the competence of the State Legislature. The question that will have to be considered is whether it is an attempt to interfere with the judicial process. For that, we will have to consider the three questions framed by the Constitution Bench in the case of State of Tamil Nadu v. State of Kerala and Another (supra). A perusal of the various provisions of the State Act would clearly show that the State Act has been enacted since the State Government was aggrieved by various awards passed against it. It was therefore found expedient, in the public interest, to cancel the arbitration clause in the agreement, to revoke the authority of the arbitrators appointed thereunder and to enable the filing of appeals against the awards or decrees.

As already discussed hereinabove, most of the awards were made "Rules of Court" prior to 1993. In many of the cases, appeals were also preferred by the State Government. As such, we find that the legislative prescriptions and legislative directions in the State Act undoubtedly interfere with the judicial functions. It is also clear that the legislation is targeted at the awards passed which have become "Rule of Court". As already discussed hereinabove, the powers exercised by the courts under Section 17 of the 1940 Act are judicial powers of the State. As such, we are of the considered view that question Nos. 1 and 2 as framed by the Constitution Bench in the case of State of Tamil Nadu v. State of Kerala and Another (supra) are required to be answered in the affirmative. Upon consideration of the terms of the State Act, the issues with which it deals, it is clear that the State Act interferes with the judicial functions.

122. We are therefore of the considered view that the State Act, which has the effect of annulling the awards which have become "Rules of Court", is a transgression on the judicial functions of the State and therefore, violative of doctrine of "separation of powers". As such, the State Act is liable to be declared unconstitutional on this count.

123. We may also gainfully refer to the observations of this Court in the case of P. Tulsi Das and Others v. Govt. of A.P. and Others52. In the said case, this Court, while considering the legislative power of the State to enact a law, which amounted to taking away the rights, which are already accrued to the parties long back, has observed thus:

> "14. On a careful consideration of the principles laid down in the above decisions in the light of the fact situation in these appeals we are of the view that they squarely apply on all fours to the cases on hand in favour of the appellants. The submissions on behalf of the respondent State that the rights derived and claimed by the appellants must be under any statutory enactment or rules made under Article 309 of the Constitution of India and that in 52 (2003) 1 SCC 364 other respects there could not be any acquisition of rights validly, so as to disentitle the State to enact the law of the nature under challenge to set right serious anomalies which had crept in and deserved to be undone, does not merit our acceptance. It is by now well settled that in the absence of rules under Article 309 of the Constitution in respect of a particular area, aspect or subject, it is permissible for the State to make provisions in exercise of its executive powers under Article 162 which is coextensive with its legislative powers laying conditions of service and rights accrued to or acquired by a citizen would be as much rights acquired under law and protected to that extent.

The orders passed by the Government, from time to time beginning from February 1967 till 1985 and at any rate up to the passing of the Act, to meet the administrative exigencies and cater to the needs of public interest really and effectively provided sufficient legal basis for the acquisition of rights during the period when they were in full force and effect. The orders of the High Court as well as the Tribunal also recognised and upheld such rights and those orders attained finality without being further challenged by the Government, in the manner known to law. Such rights, benefits and perquisites acquired by the teachers concerned cannot be said to be rights acquired otherwise than in accordance with law or brushed aside and trampled at the sweet will and pleasure of the

Government, with impunity. Consequently, we are unable to agree that the legislature could have validly denied those rights acquired by the appellants retrospectively not only depriving them of such rights but also enact a provision to repay and restore the amounts paid to them to the State. The provisions of the Act, though can be valid in its operation "in futuro" cannot be held valid insofar as it purports to restore status quo ante for the past period taking away the benefits already available, accrued and acquired by them. For all the reasons stated above the reasons assigned by the majority opinion of the Tribunal could not be approved in our hands. The provisions of Sections 2 and 3(a) insofar as they purport to take away the rights from 10□2□1967 and obligate those who had them to repay or restore them back to the State are hereby struck down as arbitrary, unreasonable and expropriatory and as such are violative of Articles 14 and 16 of the Constitution of India. No exception could be taken, in our view, to the prospective exercise of powers thereunder without infringing the rights already acquired by the appellants and the category of the persons similarly situated whether approached the courts or not seeking relief individually. The provisions contained in Section 2 have to be read down so as to make it only prospective, to save the same from the unconstitutionality arising out of its retrospective application." [emphasis supplied]

124. It could be seen that this Court has held that the provisions of Sections 2 and 3(a) of the Andhra Pradesh Education Service Untrained Teachers (Regulation of Services and Fixation of Pay) Act, 1991 insofar as they purport to take away the rights accrued in favour of the citizens and requiring them to repay or restore them back to the State, are arbitrary, unreasonable and expropriatory. It has, therefore, been held that the said provisions are violative of Articles 14 and 16 of the Constitution of India.

125. As already discussed hereinabove, what has been done by the State Act, is annulling the awards and the judgments and decrees passed by the court vide which the awards were made "Rule of Court". As such, the rights which accrued to the parties much prior to the enactment of the State Act have been sought to be taken away by it.

126. Though, elaborate arguments have been advanced before us on various other issues, since we have held that the State Act is liable to be held unconstitutional on the ground of encroachment upon the judicial powers of the State, we do not find it necessary to deal with the submissions made on behalf of the parties with regard to other issues. CONCLUSION:

127. In the result, we hold as under:

(i) That the State Act in pith and substance is referable to Entry 13 of List III of the Seventh Schedule to the Constitution of India and not to the Entries 12, 13, 14 and 37 of List I of the Seventh Schedule nor to Article 253 of the Constitution of India. The State Act, therefore, is within the legislative competence of the State Legislature. In any case, in view of the Presidential assent under Article 254(2) of the Constitution of India, the State Act would prevail within the State of Kerala. The finding of the High Court of Kerala, to the contrary, is erroneous in law;

(ii) That the finding in the case of G.C. Kanungo (supra) to the effect that the powers exercised by the courts in passing judgments and decrees for making the arbitration awards "Rule of Court" is

not an exercise of judicial power, is per incuriam the provisions of the 1940 Act and the judgments of the Constitution Bench in the cases of Harinagar Sugar Mills Ltd. (supra) and Shankarlal Aggarwala and Others (supra); and

(iii) That the High Court of Kerala is right in law in holding that the State Act encroaches upon the judicial power of the State and is therefore liable to be struck down as being unconstitutional.

128. The present appeals are accordingly disposed of. Pending application(s), if any, shall stand disposed of in the above terms. No order as to costs.

129. Before we part with the judgment, we place on record our deep appreciation for the valuable assistance rendered by the learned counsel appearing on behalf of the parties.

.....J.

[L. NAGESWARA RAO] .....J.

[B.R. GAVAI] NEW DELHI;

MAY 04, 2022.