Committee Of Administrators Pendente ... vs Laneseda Agents Limited And Ors on 25 May, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT
NEW DELHI
(APPELLATE JURISDICTION)
COMPANY APPEAL (AT) No. 67 of 2022

In the matter of :

1. Committee of Administrators Pendente Lite
of the Estate of Late Priyamvada Devi Birla
Through Justice Mohit Shantilal Shah (Retired)
and A.C. Chakrabortti (Majority Members)
Birla Building, 9/1, R.N. Mukherjee Road, Kolkata - 700001

2. The PUNJAB PRODUCE,
9/1, R.N. Mukherjee Road, Kolkata - 700001 ..... Appellants

V

1. INSILCO AGENTS Limited
9/1, R.N. Mukherjee Road, Kolkata - 700001

2. VINDHYA TELELINKS Limited
27-B, Camac Street, 5th Floor, Kolkata - 700016

3. SHRI. RAKESH PURI
9/1, R.N. Mukherjee Road, Kolkata - 700001

4. DR. ARAVIND SRINIVASAN
Birla Building, 9/1, R.N. Mukherjee Road, Kolkata - 700001

5. SHRI. SHIV DAYAL KAPUR
9/1, R.N. Mukherjee Road, Kolkata - 700001

6. SHRI. KRISHNA DAMANI
9/1, R.N. Mukherjee Road, Kolkata - 700001

7. HARSH VARDHAN LODHA
13, Loudon Street, National Tower, Kolkata - 700017 .....Respondents

Company Appeal (AT) No. 67 of 2022
Company Appeal (AT) No. 68 of 2022
Company Appeal (AT) No. 69 of 2022

With
COMPANY APPEAL (AT) No. 68 of 2022

In the matter of :

1. Committee of Administrators Pendente Lite
   of the Estate of Late Priyamvada Devi Birla
   Through Justice Mohit Shantilal Shah (Retired)
   and A.C. Chakrabortti (Majority Members)
   Birla Building, 9/1, R.N. Mukherjee Road, Kolkata - 700001

2. The PUNJAB PRODUCE,
   9/1, R.N. Mukherjee Road, Kolkata - 700001 ..... Appellants

V

1. AUGUST AGENTS Limited
   9/1, R.N. Mukherjee Road, Kolkata - 700001

2. VINDHYA TELELINKS Limited
   27-B, Camac Street, 5th Floor, Kolkata - 700016

3. SHRI. RAKESH PURI
   9/1, R.N. Mukherjee Road, Kolkata - 700001

4. DR. ARAVIND SRINIVASAN
   Birla Building, 9/1, R.N. Mukherjee Road, Kolkata - 700001

5. SHRI. SHIV DAYAL KAPUR
   9/1, R.N. Mukherjee Road, Kolkata - 700001

6. SHRI. KRISHNA DAMANI
   9/1, R.N. Mukherjee Road, Kolkata - 700001

7. HARSH VARDHAN LODHA
   13, Loudon Street, National Tower, Kolkata - 700017 .....Respondents

With
COMPANY APPEAL (AT) No. 69 of 2022

Company Appeal (AT) No. 67 of 2022
Company Appeal (AT) No. 68 of 2022
Company Appeal (AT) No. 69 of 2022

In the matter of :

1. Committee of Administrators Pendente Lite
   of the Estate of Late Priyamvada Devi Birla
   Through Justice Mohit Shantilal Shah (Retired)
   and A.C. Chakrabortti (Majority Members)
   Birla Building, 9/1, R.N. Mukherjee Road, Kolkata - 700001

2. The PUNJAB PRODUCE,
   9/1, R.N. Mukherjee Road, Kolkata - 700001 ..... Appellants

V

1. LANESEDA AGENTS Limited
   9/1, R.N. Mukherjee Road, Kolkata - 700001

2. VINDHYA TELELINKS Limited
   27-B, Camac Street, 5th Floor, Kolkata - 700016

3. SHRI. RAKESH PURI
   9/1, R.N. Mukherjee Road, Kolkata - 700001

4. DR. ARAVIND SRINIVASAN
   Birla Building, 9/1, R.N. Mukherjee Road, Kolkata - 700001

5. SHRI. SHIV DAYAL KAPUR
   9/1, R.N. Mukherjee Road, Kolkata - 700001
6. SHRI. KRISHNA DAMANI
   9/1, R.N. Mukherjee Road, Kolkata - 700001

7. HARSH VARDHAN LODHA
   13, Loudon Street, National Tower, Kolkata - 700017 .....Respondents

Present:

For Appellants : Mr. Joy Saha, Senior Advocate, Mr. Avishek Guha,
Mr. Rajat Gupta, Mr. Ishaan Saha, Mr. Chitresh Saroigi,
Advocates for Appellant No. 1

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Mr. Jishnu Saha, Senior Advocate, Mr. Soumya Dutta,
Ms. Somali Mukhopadhyay, Mr. Ritoban Sarkar,
Advocates for Appellant No. 2

For Respondents: Mr. Arun Kathpalia, Senior Advocate, Mr. Saubhik
Chowdhury, Advocate for R1
Mr. P.S. Raman, Senior Advocate for R2, Ms. Maithreyi
Sharma, Lakshana Viravalli, Mr. Madhurpeetha Elano,
Mr. Saubhik Chowdhury, Advocates for R-2
Mr. Ramji Srinivasan, Senior Advocate, Mr. Saubhik
Chowdhury for R-3
Mr. Ranjan Bachawat, Senior Advocate, Mr. Sayan
Roy Chowdhury, Mr. Satyaki Mukherjee, Mr. Paritosh
Sinha, Mr. Saubhik Chowdhury, Advocates for R4
Ms. Manju Bhuteria, Mr. Saubhik Chowdhury,
Advocates for R5
Mr. Abhrajit Mitra, Senior Advocate, Mr. Debanjan
Mandal, Mr. Kunal Vajani, Mr. Soumya Ray
Chowdhury, Mr. Sarvapriya Mukherjee, Mr. Sanjiv
Trivedi, Mr. Kunal Mimani, Mr. Iram Hasan,
Mr. Kartikey Bhatt, Mr. Sanket Sawargi, Mr. Mahima

Cholera, Mr. Shubhang Tandon, Mr. Rajarshi Dutta,
Mr. Sankarsan Sarkar, Mr. Shwetaank Nigam,
Advocates for R-7.

ORDER

(Virtual Mode) Justice M. Venugopal, Member (Judicial) :

Introduction:

According to the Appellants, the CP No.112/KB/2021 was filed by the majority members of APL Committee and PPT, complaining of the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 interference by 7th Respondent Mr. H.V. Lodha through 2nd Respondent Vindhya Telelinks Limited, in the exercise of rights and powers by the APL Committee in regard to the control of the 1 st Respondent/Insilco Agents Limited inter alia, praying for, among other reliefs, an order of Permanent Injunction restraining the Respondent No.1 and/or Vindhya Telelinks Limited from holding any purported `Extra Ordinary General Meeting' of the 1st Respondent, proposed to be held at Kolkatta on 19.06.2021 or on any other date.

2. Likewise, CP No.113 of 2021 and CP No. 114 of 2021 were filed by the Appellants in respect of August Agents Limited and Laneseda Agents Limited.

3. On behalf of the Appellants that a common judgment and an order dated 02.07.2021 (in all three Company Petitions) was passed, giving a split verdict, wherein one Hon'ble Member had granted certain `Interim Injunction' and another Hon'ble Member dismissed the Company Petitions as not maintainable. Hence, the President of the `National Company Law Tribunal, New Delhi, was pleased to refer the Company Petitions to the Hon'ble Third Member on decided the points for difference, in the split verdict dated 02.07.2021.

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4. It is projected on the side of the Appellants that by virtue of an `impugned order' dated 11.02.2022, the Hon'ble Member (Judicial) and the Hon'ble Member (Technical) of National Company Law Tribunal, Kolkata, were pleased to state the `point of difference' arising out of their judgment and order dated 02.07.2021 confining such point of difference only to one aspect on the `issue of maintainability' of the said Company Petitions.

5. The point of difference formulated by the Hon'ble Members of the `NCLT', Kolkatta, Bench I, in CP No.112/KB/2021, CP No. 113/KB/2021 and CP No. 114/KB/2021 on 11.02.2022, runs as under:

(a) "Whether the petition filed by Insilco Agents Limited & Ors. in C.P. No. 112/KB/2021, by August Agents Limited & Ors. in C.P. No. 113/KB/2021 and

> Laneseda Agents Limited in C.P. No. 114/KB/2021 in their alleged capacity as the Significant Beneficial Owners of the shares of the Respondent No.1 Company in each of the CPs, is at all maintainable before this Tribunal, in view of the fact that there is no registered shareholding of any of the Petitioner Companies in Respondent No.1 Company"
>
> and the above was required to be communicated to the `Registrar', NCLT, New Delhi, for further action.

6. According to the Appellants, the following points are required to be added in addition to and modification of the point of difference earlier Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 framed by the Hon'ble Members of the Special Bench, `National Company Law Tribunal' Kolkata, dated 11.02.2022 and they run to the following effect:

> (A) "Whether the Petition filed by Insilco Agents Limited & Ors. in C.P. No. 112/KB/2021, by August Agents Limited & Ors.in C.P.No. 113/KB/2021 and Laneseda Agents Limited in C.P.No. 114/KB/2021 in their alleged capacity as the Significant Beneficial Owners of the shares of the Respondent No.1 Company in each of the CPs, is at all maintainable before this Tribunal, in view of the fact that there is no registered shareholding of any of the Petitioner Companies in Respondent No.1 Company.
>
> (B) When in a Petition under Sections 241, 242 and 244 of the Companies Act, 2013 in respect of a subsidiary company, a company with 10.90% shares in the holding company, is a co-petitioner, in light of the decision of the Hon'ble Supreme Court in the case of Shankar Sundaram vs. Amalgamations Ltd. & Ors. (dated 27.03.2017 - Civil Appeals o. 4574-4575/2017), whether such a Petition can be said to be not maintainable?
>
> (C) When a Petition under Sections 241, 242 and 244 of the Companies Act, 2013 in respect of a subsidiary company is jointly filed by a company with 10.90% shares in the holding company with the Committee of Administrators Pendente Lite for the Estate of a deceased shareholder having control as a Significant Beneficial Owner under Section 90 of the Companies Act, 2013, read with SBO Rules 2018 (as amended in 2019) over 53.89% shareholding in the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 holding company and also over the shareholding in the subsidiary company, whether such a petition can be said to be not maintainable? (D) Whether or not interim reliefs sought in the aforesaid Company Petitions deserve to be granted?

7. It is the stand of the Appellants that the point of difference arising out of the Judgment and Order dated 02.07.2021, passed by the `Tribunal', Kolkata Bench, ought not to have been confined only to the `question of maintainability' of the Company Petitions in question and in fact, other issues

mentioned in the `Memo of Appeal' (including the aspect of whether `Interim Reliefs' ought to be granted or not in three Company Petitions) should also to be included.

8. The other contention of the Appellants is that the Hon'ble Third Member exercising jurisdiction under Section 419 (5) of the Companies Act, 2013, to decide the points of difference arising out of the order dated 02.07.2021 passed by the `Tribunal' ought to be empowered to consider the whole conspectus of the issues which received the consideration of the `Tribunal' resulting in the judgment and order dated 02.07.2021.

> "It is not out of place for this `Tribunal' to make a pertinent mention that the Hon'ble Member (Judicial) of the `National Company Law Tribunal', Kolkatta Bench, on 02.07.2021 had `allowed' all the CAs on maintainability - CA No.81/KB/2021, CA No.82/KB/2021, Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 CA No.83/KB/2021, CA No.84/KB/2021, CA No.85/KB/2021, CA No.86/KB/2021, CA No.87/KB/2021, CA No.88/KB/2021, CA No.90/KB/2021, CA No.91/KB/2021, CA No.92/KB/2021 and CA No.93/KB/2021."

and resultantly, dismissed the CP No.112/KB/2021, CP No.113/KB/2021 and CP No.114/KB/2021.

9. However, the Hon'ble Member (Technical) of `National Company Law Tribunal', Kolkata Bench, on 02.07.2021, opined a prima facie view that `the present `Petition' is very much maintainable, because for granting injunction, the Courts or for that matter this `Tribunal' cannot strictly go by the `Legislated Law', it has the discretion in the specific circumstances, and those circumstances do exist in the present case because there is a long history of litigation between the parties and there are orders subsisting and binding on this Tribunal. Unless and until the whole controversy between the `Member' vs. `Significant Beneficial Owner', which for the present is a grey area and does not have so many binding judicial precedents, views and authorities of the higher courts clinching the issue, is settled in the final hearing of these petitions, the injunction Orders sought by the petitioner have to be granted, etc., and granted the `Interim Reliefs' to the Petitioners in terms of prayers (a), (b) and (d) of the three petitions, Viz., CP/112/KB/2021, Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 CP/113/KB/2021 and CP/114/KB/2021, till the final disposal of the petitions.

10. It is brought to the fore that the `Referral Hon'ble Member' on 20.09.2021 at paragraphs 10 and 11, had observed the following:

> 10.``In my view interim relief sought cannot be considered by this Bench on following grounds:
>
> a. The interim relief sought in the application is not listed today neither it is filed till today before this Bench till hearing. b. No point or points of difference between the dissenting Members of the Original Bench, the NCLT, Kolkata Bench are placed before me, on which I can exercise the jurisdiction under Section 419 (5) of the

Companies Act, 2013. It is not argued that the interim reliefs prayed before me are part of the main petitions in which the Members have deferred while passing respective judgments. c. It cannot be ascertained at this stage that the issues raised in interim prayers in said applications with respect to legality of holding of AGM, the entitlement of the Directors passing resolutions to call AGM, the legality of notice of holding AGM, etc., are the issues, whether arising before after, or the matter was referred to Third Member, or whether interim prayed is part of original petitions, where dissenting judgments were passed.

11. As a sequel of above discussion, the jurisdiction of this Bench is confined to the point/points on which the Original Bench differed. In absence of any such point/points placed before me, no other issue can be heard or adjudicated upon by Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 this Bench as per provisions of Section 419(5) of the Companies Act, 2013, these interim reliefs prayed for are out of domain of powers of this Bench and not granted the same."

11. According to the Appellants in the event that the jurisdiction of the Hon'ble Member exercising jurisdiction under Section 419(5) of the Companies Act, 2013, is limited only to the single point of difference coined by the `Tribunal' through its order dated 11.02.2022, then, even in case of the `Appellants' succeeding on the `aspect of maintainability' before the Hon'ble Member, the `Appellants' will be once again perforced to approach the `Tribunal' seeking grant of `Interim Relief', thereby protracting the prejudice to the `Appellants' and enabling the `Respondents' to continue to take advantage of the `difference in opinion' expressed by the `Tribunal', Kolkata Bench, in its judgment and order dated 02.07.2021.

First Appellant's Submissions:

12. According to the Learned Counsel for the 1st Appellant, the formulation of question made by the Hon'ble Members of the `Tribunal' dated 11.02.2022 is a `Judicial Order' and as per Section 421(1) of the Companies Act, 2013, `any person' aggrieved by the order of the Tribunal may prefer an Appeal to the `Appellate Tribunal'. Furthermore, it is the stand Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 of the 1st Appellant before this `Tribunal' that the word occurring in Section 421(1) of the Companies Act, 2013, `an order' includes `any order' and, as such, the instant `Appeals' are maintainable `Ex facie', before this `Tribunal'.

13. According to the Learned Counsel for the 1st Appellant, the 1st Appellant is denied of his reasonable and legitimate right to ventilate his grievance in an effective and efficacious manner because of the fact that the point of reference made by the Hon'ble Members dated 11.02.2022 is in a limited and restricted fashion.

14. The Learned Counsel for the 1st Appellant refers to Section 98 of the Civil Procedure Code, `Decision' where `Appeal' heard by `two or more Judges', which runs as under:

(1) "Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges. (2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the Bench hearing the appeal is [composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench], and the Judges composing the Bench differ in opinion on a point of Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court."

and puts forward a plea that the `difference of opinion' on a `point of Law' is one of `maintainability'. Furthermore, it is pointed out on behalf of the 1st Appellant Section 98 of the Civil Procedure Code, 2002, is confined to `Point of Law' and that the ambit of Section 419 (5) of the Companies Act, 2013, is very much `wider' and it refers to `on any point or points'.

15. The Learned Counsel for the 1st Appellant submits that the term `an Order' is `wide' and an `expansive one' and not `either restricted or a confined one'. Moreover, the word `an Order' will include both `Judicial' and `an Administrative' Orders. In this connection, the Learned Counsel for the 1st Appellant contends that it can never be the intention of the `Legislature' that `an Order' whether `Judicial' or `an Administrative' one, passed by the `National Company Law Tribunal' would be immune to any challenge or scrutiny, however, wrong or an incorrect one, such `an Order' may be.

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16. Advancing his arguments, the Learned Counsel for the 1 st Appellant comes out with a plea that to contend that `an Order' passed under Section 419 (5) of the Companies Act, 2013, is not an `Appealable' one would render such `an Order' of the `National Company Law Tribunal' cast in a `stone' incapable of either `rectification' or `modification', although such `orders' may be `without jurisdiction', factually `incorrect' or `legally' `an inform one'.

17. The Learned Counsel for the 1st Appellant adverts to the `Order' of this `Tribunal' dated 20.11.2017 in Pankaj Khandelia & Another V Khandelia Oi and General Mills Private Limited & Ors. vide Company Appeal (AT) No. 271 of 2017 and Company Appeal (AT) No. 385 of 2017, reported in (2017) SCC Online NCLAT 593, whereby and whereunder at paragraphs 10 to 15, it is observed as under:

> 10.``Section 419 of the Companies Act, 2013 deals with the 'Benches of the Tribunal'. Sub-Section (5) therein stipulates the manner in which the case is to be decided in case of difference of opinion on any point or points, as quoted below:
>
> "419. Benches of Tribunal __ (1) .....
>
> (5) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it."

11. Though provision has been made to refer the matter to the Hon'ble President and to send the matter to the Third Hon'ble Member, Section 419 is silent on the question as to whether the decision on difference of opinion is to be pronounced in the open Court or not and whether the copy of the same is to be forwarded to the parties. From a plain reading of sub Section (5) of Section 419, however, makes it clear that in case of difference of opinion where the matter to be referred to the Hon'ble President for hearing on the point or points of one or more of the Hon'ble Members of the Tribunal, such point or points required to be decided according to the opinion of the majority of the Members, who have heard the case, including those who first heard the matter.

12. The Tribunal is required to pass order after giving parties in a proceeding before it, a reasonable opportunity being heard, in terms of Section 420 of the Companies Act, 2013. As per sub-Section (3) of Section 420, the Tribunal is required to forward the copy of every order passed under Section 420 to the parties concerned as apparent from said provision and quoted below:

> "420. Orders of Tribunal. -
>
> (1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.
>
> (2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record,amend any order passed by it, and shall make such amendment, if the mistake is brought to the notice by the parties:

> Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.
>
> Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 (3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

13. Section 424 relates to procedure to be followed by the Tribunal and the Appellate Tribunal which reads as follows:

> 424. Procedure before Tribunal and Appellate Tribunal:
>
> "(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure." ....

14. The basic principle of Justice Delivery System is that a Court or a Tribunal, while passing an order is not only required to give reasonable opportunity of being heard to the parties but is also required to give good reasons based on record/evidence. It is also required to show that the order is passed after being satisfied itself on issues raised by the parties.

15. In Indian Judiciary, Justice Delivery System including provisions of Companies Act, 2013, the Tribunal is required to give hearing in an open Court. Once such hearing is given in the open Court, the Court or the Tribunal, while passing an order is also required to pronounce order in the open Court."

18. The Learned Counsel for the 1st Appellant contends that the `Reference' must include `All Points of Differences' and it cannot be a `selective one'. In fact, it is submitted on behalf of the 1 st Appellant that the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 `National Company Law Tribunal', Kolkata had no jurisdiction to pick and choose some points of differences, while ignoring other points of differences.

19. The Learned Counsel for the 1st Appellant projects an argument that when the ingredients Section 419 (5) of the Companies Act, 2013, are `clear', `unambiguous' and `exclusions' cannot be read into the `Statute', the same cannot be interpreted to exclude `Administrative Orders'. In this regard, the Learned Counsel for the 1st Appellant cites the decision of the Hon'ble Supreme Court in S.L. Kapoor V Jagmohan and Ors., reported in (1984) SCC, Page 379, wherein at paragraph 9, it is observed as under:

> 9.`` The old distinction between a judicial act and an administrative act has withered away and we have been liberated from the psittacine incantation of `administrative action'. Now, from the time of the decision of this Court in State of Orissa v. Dr. (Miss) Binapani Devi & Ors. "even an administrative order which involves civil consequences.... must be made consistently with the rules of natural justice". What are civil consequences? The question was posed and answered by this Court in Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors. Krishna Iyer J., speaking for the Constitution Bench said (at p. 308-309):
>
> "But what is a civil consequence, let us ask ourselves, by passing verbal booby-traps? `Civil consequence' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence."

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20. The Learned Counsel for the 1st Appellant adverts to the decision of the Hon'ble Supreme Court in Canara Bank & Ors. V Debasis Das & Ors., reported in (2003) 4 SCC at page 557, wherein at paragraph 19 to 21, it is observed as under:

> 19.`` Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute.

What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non- pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

20. Natural justice has been variously defined by different Judges. A few instances will suffice. In Drew v. Drew and Lebura (1855(2) Macq. page 8, Lord Cranworth defined it as 'universal justice'. In James Dunber Smith v. Her Majesty the Queen (1877-78 (3) AC, p

623) Sir Robort P. Collier, speaking for the judicial committee of Privy council, used the phrase 'the requirements of substantial justice', Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 while in Arthur John Specman v. Plumstead District Board of Works (1884-85, AC P 240), Earl of Selbourne, S.C. preferred the phrase 'the

substantial requirement of justice'. In Vionet v. Barrett (1885(55) LJRD P 41), Lord Esher, MR defined natural justice as 'the natural sense of what is right and wrong'. While, however, deciding Hookings v. Smethwick Local Board of Health (1890(24) QBD 712), Lord Esher, M.R. instead of using the definition given earlier by him in Vionet's case (supra) chose to define natural justice as 'fundamental justice'. In Ridge v. Baldwin (1963(1) QB 539, at page 578), Harman LJ, in the Court of Appeal countered natural justice with 'fair-play in action' a phrase favoured by Bhagawati, J. in Maneka Gandhi v. Union of India (1978 (2) SCR 621). In H.K. (an Infant), Re13 (1967(2) QB617, at page 630,Lord Parker, CJ, preferred to describe natural justice as 'a duty to act fairly'. In fairmount Investments Ltd. v. Secretary to State for Environment (1976 1 WLR 1255) Lord Russell of Killowen somewhat picturesquely described natural justice as 'a fair crack of the whip' while Geoffrey Lane, LJ. In Regina v. Secretary of State for Home Affairs Ex Parte Hosenball (1977 (1) WLR 766) preferred the homely phrase 'common fairness'.

21. How then have the principles of natural justice been interpreted in the Courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 preserve of any particular race or country but is shared in common by all men. The first rule is 'nemo judex in causa sua' or 'nemo debet esse judex in propria causa sua' as stated in (1605) 12 Co.Rep. 114 that is, 'no man shall be a judge in his own cause'. Coke used the form 'aliquis non debet esse judex in propria causa quia non potest esse judex at pars' (Co.Litt. 1418), that is, 'no man ought to be a judge in his own case, because he cannot act as Judge and at the same time be a party'. The form 'nemo potest esse simul actor et judex', that is, 'no one can be at once suitor and judge' is also at times used. The second rule is 'audi alteram partem', that is, 'hear the other side'. At times and particularly in continental countries, the form 'audietur at altera pars' is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely 'qui aliquid statuerit parte inaudita alteram actquam licet dixerit, haud acquum facerit' that is, 'he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' (See Bosewell's case (1605) 6 Co.Rep. 48-b, 52-a) or in other words, as it is now expressed, 'justice should not only be done but should manifestly be seen to be done'. Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon (sic open). All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated."

21. The Learned Counsel for the 1st Appellant cites the decision of the Hon'ble Supreme Court in Shankarlal Aggarwal and Ors. V Shankarlal Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 Poddar and Ors., reported in AIR (1965) Supreme Court at Page 507, wherein at paragraphs 11 to 13, it is observed as under:

> 11.``This interpretation of the scope of Section 202 of the Companies Act has not been accepted by several other High Courts. The leading case in support of the other

view is Bachharaj Factories Ltd. v. The Hiraji Mills Ltd.2 The learned judges were dealing with an appeal against an order of the Company judge adjourning a petition for winding up in order to enable certain shareholders to file a suit for a declaration that certain debentures were not valid in law. The (1) (1927) I.L.R. 55 Cal. 262.

(2) I.L.R. (1955) Bom. 550, Company Judge made the order under Section 170 of the Companies Act which provides that on hearing a petition for winding up the Court may dismiss or r adjourn the hearing conditionally or unconditionally or make any interim order etc. A preliminary objection was taken to the hearing of the appeal on the ground that the order from which the appeal was preferred was not a judgment within the meaning of cl. 15 of the Letters Patent and therefore no appeal lay. It was urged that under Section 202 the right of appeal conferred was subject to "the same conditions" to which appeals might be had from the decision of the Court in cases within its ordinary jurisdiction and since the said condition was not fulfilled the appeal was incompetent. Chagla, C. J. repelled this contention and pointed out that the Courts which dealt with winding up petitions and to whose orders Section 202 applied were not merely the High Courts but also the District Courts. If the construction of the section on whose correctness the preliminary objection was based were upheld it would mean that in the case of an order made by a District Court the appealability of that order would be dependent on its satisfying the conditions of appeal for "decisions" laid down under the Civil Procedure Code. Under the Code "orders or decisions" are classified into two heads-decrees and orders. Whereas an appeal lies by virtue of s. 96 of the Code against every decree which is defined in s. 2 of the Code, only certain types of orders under particular provisions of the Code Which are listed in Section 104 are capable of appeal and Done others. It was, not in dispute that very few of the orders passed in a winding up would amount to decrees within the Code. There was no Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 doubt either that most of the orders or decisions in winding up would not be comprehended within the class of appealable orders specified in Section 104 or 0. 43. r. I. if therefore the contention of the respondent were accepted it would mean that in the case of orders passed by the District Courts appeals would lie only against what would be decrees under the Code as well as appealable orders under Section 104 and 0.43. r.1 and very few of the orders passed in the Courts of the winding up would fall within these categories. On the other hand, the expression "judgment" used in cl. I 5 is wider. The learned judge pointed out that the position would therefore be that a decision rendered or an order passed by a District Court would not be appealable because the conditions laid down by the Civil Procedure Code were not satisfied, yet an exactly identical order or decision by the judge of the High Court would be appealable because it might constitute a judgment within cl.15. The learned judge therefore rejected a construction which would have meant that the same orders passed by District Courts and by a Single judge of a High Court would be subject to different rules as to appealability. The learned judge observed that the right of appeal was conferred by the 1st limb of Section 202 and that the second limb merely dealt with the procedural limitations of that appeal. He further pointed out that the expression "order or decision" used in Section 202 itself indicated that the order or decision was not merely procedural in character but that which affected the rights and liabilities of parties. The learned judge referred to the decisions in Madan Gopal Daga v. Sachindra Nath Sen (1), and the cases following it and expressed his dissent with the reasoning which found favour with the judges of the Calcutta High Court. The decision in Bachhraj Factories Ltd. (2) was later followed by the same Court in Western India Theatres Ltd. v.

Ishwarbhai Somabhai Patel (3). We find ourselves in agreement with the view here expressed. Madan Gopal Daga (1), proceeds wholly on the meaning which could be attributed to the word "conditions" in the expression "subject to the conditions" occurring in s.202 and does not take into account the context in which Section 202 was designed to operate and particularly the fact that more than one grade of Court each governed by different rules as to the nature of the decision (1) (1927) I.L.R. 55 Cal. 262. (2) I.L.R. (1955) Bom, 550. (3) I.L.R. (1959) Bom. 295, which would enable an appeal to be preferred could be vested with jurisdiction under the Act. When by the proviso to Section Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 3 of the Indian Companies Act, 1913 the Indian Legislature enabled Jurisdiction to be vested in District Courts so as to be constituted the "Court having jurisdiction under the Act", knowledge must be imparted to it that the District Courts and the High Courts functioned under different statutory provisions as regards rights of appeal from their orders and decisions. Besides, it would also be fair to presume that they intended to prescribe a uniform law as regards the substantive right of appeal conferred by Section 202. It could not therefore be that an identical order if passed by one class of " court having jurisdiction under the Act" would be final, but that if passed by another Court vested with identical powers and jurisdiction would be subject to an appeal.

12. There is also one another aspect from which the problem could be viewed. Taking first the provisions of the Civil Procedure Code which would govern the orders passed by District Courts; it would be seen that apart from "decrees" which are appealable by reason of s. 96 of the Code, "orders" are appealable in accordance with Section 104. That section after enumerating certain orders which are made appealable, contains a residuary clause (i) conferring a right of appeal in respect of "any order made under rules from which an appeal is expressly allowed by rules"-and the rule referred to is 0. 43. r. 1. Now under s. 122 of the Code each of the High Courts is vested with power "to make rules, to annul, alter or add to all of any of the rules in the 1st Schedule". In exercise of this power High Courts have in respect of the Civil Courts subject to their appellate jurisdiction made alterations and additions in the rules including those in 0. 4 3. r. 1 . either extending or restricting the right of appeal conferred by the Code as originally enacted. The question that arises on this state of circumstances is whether the legislature, when it enacted Section 202 of the Companies Act, intended that the right of appeal should vary from State to State depending on the particular rule in force in that State by reason of the exercise by the High Court of its power under Section 122, Civil Procedure Code.

13. The anomaly created by the construction urged by learned Counsel for the appellant does not stop here. Even taking the case of the High Courts themselves, the construction of the word 'condition' as including the appealability of the decision would lead to rather strange results. The relevant words of Section 202, are:

> Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 "Subject to the same conditions..... to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction"-"ordinary jurisdiction" and not ((ordinary original jurisdiction."

22. The Learned Counsel for the 1st Appellant refers to the decision of Hon'ble Supreme Court in Sahara India (Firm), Lucknow V Commissioner of Income Tax, Central I, reported in (2008) 14 SCC at page 151, wherein at paragraph 29, it is observed as under:

29.``In Rajesh Kumar V Commissioner of Income Tax (2007) 2 SCC 181, it has been held that in view of Section 136 of the Act, proceedings before an Assessing Officer are deemed to be judicial proceedings. Section 136 of the Act, stipulates that any proceeding before an Income Tax Authority shall be deemed to be judicial proceedings within the meaning of Section 193 and 228 of Indian Penal Code, 1860 and also for the purpose of Section 196 of I.P.C. and every Income Tax Authority is a court for the purpose of Section 195 of Code of Criminal Procedure, 1973. Though having regard to the language of the provision, we have some reservations on the said view expressed in Rajesh Kumar's case (supra), but having held that when civil consequences ensue, no distinction between quasi judicial and administrative order survives, we deem it unnecessary to dilate on the scope of Section 136 of the Act. It is the civil consequence which obliterates the distinction between quasi judicial and administrative function. Moreover, with the growth of the administrative law, the old distinction between a judicial act and an administrative act has Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 withered away. Therefore, it hardly needs reiteration that even a purely administrative order which entails civil consequences, must be consistent with the rules of natural justice. (Also see: Mrs. Maneka Gandhi Vs. Union of India & Anr. (1978) 1 SCC 248; and S.L. Kapoor Vs. Jagmohan & Ors. (1980) 4 SCC 379."

23. It is represented on behalf of the 1st Appellant `a Decision' which substantially decides the right of the parties must be deemed to be a `Judicial Order' and refers to the decision in BDR Developers Private Limited V Narsingh Shah (2021) SCC Online Del 3889, wherein at paragraphs 9 to 14, it is observed as under:

"9. That "judgment" and "order" do not mean the same thing is obvious from the fact that the CPC itself defines them separately.

"Judgment" has been defined under Section 2(9) of CPC as below:

" "judgment" means the statement given by the Judge of the grounds of a decree or order."

while an "Order" has been defined under Section 2(14) of CPC as under: -

" "order" means the formal expression of any decision of a Civil Court which is not a decree."

10. It is, therefore, clear that an "order" is something that does not result in a decree or, therefore, a final conclusion of a matter, though a "judgment" may include an "order". The term "judgment" indicates a judicial decision given on the merits of the disputes brought before the Court. It determines the rights of the parties finally. In contrast, an "order" may not be so but could be an interlocutory one, if it does not determine or decide the rights of the parties once and for all. Thus, there are, broadly speaking, two kinds of "orders", one, that is in the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 nature of a final order and the other not determining the main issue with any finality. If such orders have been passed to help with the progress of the case, they may dispose of a specific question finally, but without finally disposing of the dispute. There is yet another category of "orders", which, if decided one way, would result in the determination of the rights of the parties finally, but, if determined in any other way, would result in the continuation of the proceedings. Such orders have been described as "intermediate" or "quasi final orders".

11. The Supreme Court in V.C. Shukla v. State through CBI, 1980 Supp SCC 92, looked into several English cases to consider the nature and attributes of a "final order" and an "interlocutory order". It was observed that in general, a "judgment" or "order", which determines the principal matter in question, would be termed as final, and the others would be "interlocutory". The court summed it up in the following words:-

> "24. To sum up, the essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issues sought but not a final decision or judgment on the matter in issue. An intermediate order is one which is made between the commencement of an action and the entry of the judgment..... "

12. The observations and the tests proposed in V.C. Shukla (supra) to determine whether an "order" is a "final order" or an "interlocutory order" or an "intermediate order", were applied by the Supreme Court in Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8. Though the question before the court related to the maintainability of a Letters Patent Appeal, the court once again considered the meaning of "judgment", "interlocutory orders that would amount to judgment"

> and "interlocutory orders that would not amount to a judgment". A "judgment" which decided all the questions or issues in controversy and left nothing else to be decided was a "final judgment". There were two kinds of "preliminary judgments". One is where the trial judge dismisses the suit without going into the merits of it and only on a preliminary objection raised by the defendant. The second one is where these preliminary objections raised by the defendant are decided against him, and the suit proceeds further. These distinctions Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 were no doubt, drawn in order to answer the question whether a Letters Patent Appeal would lie. The Supreme Court also discussed "intermediary" or "interlocutory" judgment and order, again in order to answer whether a Letters Patent Appeal was maintainable. Depending on the effect of the decision taken by the trial judge, the court held that if

> such an order vitally affected a valuable right of the defendant, "it would be treated as a judgment", such as, where leave to defend is declined. However, where the order, though affecting the plaintiff adversely, does not cause him direct or immediate prejudice, but only remote prejudice, or damage was of a minimal nature as his rights to prove his case and show the defence to be false still remained, the order would not partake of the characteristics of a "judgment".

13. It was further observed that not every "interlocutory order" can be regarded as a "judgment", as there were many orders that were routine in nature, such as, condonation of delay in filing the documents, orders refusing adjournment, orders refusing to summon additional witness, etc., which may involve exercise of jurisdiction in respect of a procedural matter against one party or the other.

14. On the other hand, "interlocutory orders" which would have the effect of depriving a party of a valuable right, though purely discretionary, may contain attributes and characteristics of finality and could be treated as a "judgment". The court referred to the exercise of discretion of the courts in respect of an application for amendment under Order VI Rule 17 of CPC to press home the point of what would constitute a "judgment" or an "interlocutory order in the nature of a judgment" or "an interlocutory order not in the nature of a judgment".

24. The Learned Counsel for the 1st Appellant relies on the decision of the Hon'ble Supreme Court in Shah Babulal Khimji V Jayaben D Kania and Ors., reported in 1981, 4 SCC, at page 8, wherein it is observed as under:

> "Section 104 read with order 43 Rule 1 CPC applies to an appeal against an order of Single Judge of the High Court to the Division Bench. The Concept of the letters patent governing only the internal appeals in the High Courts and the Code of Civil Procedure having Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 no application to such appeals is based on a serious misconception of the legal position. There is no non obstante clause in the provisions of the letters patent to indicate that the provisions of CPC would not so apply either expressly or by necessary intendment. The procedure prevailing in England in the Court of Appeal cannot be relied upon in this context.
>
> (Paras 26, 47, 62, 70 and 78) Even if the letters patent be deemed to be a special law, as contemplated by Section 4 CPC, the provisions of appeals under the letters patent are not inconsistent with nor they exclude nor contained in Section 4 is not applicable. Section 104 read with Order 43 Rule 1 expressly authorises larger Bench of the High Court without at all disturbing or interfering with the letters patent jurisdiction. Section 104 only gives an additional jurisdiction apart from the letters patent which is in no way unconstitutional with the letters patent.
>
> (Paras 21, 28, 33 and 62) Even if it be assumed that Order 43 Rule 1 does not apply to letters patent Appeals, the principles governing these provisions would apply by process of analogy. Having regard to the nature of the orders contemplated in the

> various clauses of Order 43 Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes of character of finality so as to be judgments within the meaning of clause 15 of the letters patent and hence, appealable to a larger bench.
>
> (Para 78) There is also no force in the contention that while Order 43 makes Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 provision for appeal from one court to another, it is not intended to apply to an appeal from one Judge of the High Court to a Bench of the same Court. If Order 43 Rule 1 were to apply to orders passed by the Single Judge (trial Judge), the order would be one passed by only one Judge of the High Court and, therefore, in the context of the original jurisdiction exercised by a Single Judge of the High Court, the appellate jurisdiction would lie with the Division Bench as contemplated by the letters patent and the Rules framed by the High Court.
>
> (Paras 64 and 65) The scope of Sections 96 to 100 CPC is quite different from that of Section 104 which is couched in very general terms and cannot be limited to appeals against orders passed by the courts contemplated in Section 96 to 100. Moreover, Section 104 does not deal with appeal against a decree at all but provides a forum for appeal against orders under Order 43, Rule 1 which are mainly orders of a final or quasi- final nature passed during the pendency of a suit."

(Para 67)

25. The Learned Counsel for the 1st Appellant seeks in aid of the decision of the Hon'ble Supreme Court in Babita Lila and Another V Union of India, reported in (2016) 9 SCC at page 647, wherein at paragraph 39, it is observed as under:

> 39.``The decision in Rajesh Kumar pertains to the decision of the authorities under the Act to conduct a special audit of the account of the petitioner assessee in terms of Section 142 (2-A) of the Act. This Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 was subsequent to a raid conducted in the premises of the assessee in course whereof some documents including its books of accounts had been seized. The assessee questioned this decision of appointment of a special auditor principally on the ground of want of fairness in action as no opportunity of hearing was given to it, prior thereto.

The interpretation and application of Section 142(2A) of the Act in the textual facts thus fell for consideration in this case. It is in this context that this Court ruled that an assessment proceeding under the Act, is in terms of Section 136 thereof, a judicial proceeding and that when a statutory power is exercised by the assessing authority in exercise of judicial function which is detrimental to the assessee, the same is not and cannot be administrative in nature. In the extant facts and circumstances, the challenge of the assessee was upheld."

26. The Learned Counsel for the 1st Appellant brings it to the notice of this `Tribunal' that the `impugned order' dated 11.02.2022 in CP Nos. 112, 113 and 114/KB of 2021, whereby the `point of difference' was formulated by the two Hon'ble Members of the `National Company Law Tribunal', Kolkata Bench - I (Member-Judicial and Member-Technical) had employed the `term' formulated in at least two places, exhibiting that there was an application of mind and a decision making process involved in framing the `point of Reference'.

27. The Learned Counsel for the 1st Appellant proceeds to point out that framing the `points of difference' as per Section 419 of the Companies, Act, Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 2013, is similar to that of framing of Issues in a `suit' under `Order XIV Rule V of Civil Procedure Code'. Further, it is the plea of the 1st Appellant's side that when framing of `Issues' in a `suit' are considered `Order' there is no reason why a similar exercise of framing the `points of difference' should not be deemed to be `an Order'.

28. Yet another argument advanced on behalf of the 1 st Appellant is that the `Tribunal' considered `impugned order' dated 11.02.2022 in CP Nos.

112, 113 and 114/KB of 2021 (formulation of `point of difference') to be `an Order', it was duly communicated to the parties in accordance with Section 420 (3) of the Companies Act, 2013.

29. The Learned Counsel for the 1st Appellant submits that even pending `Adjudication' on issues of `Maintainability' and `interim relief' can be granted, as per the `settled proposition of law' and the `contra plea' that there can be no question of `granting interim relief' before an `Adjudication of an issue', whether or not the `Petitions' are maintainable is an erroneous one.

30. The Learned Counsel for the 1st Appellant cites the decision of the Hon'ble Supreme Court in the matter of Tayyabhai M. Bagasarwalla and Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 Ors. V Hind Rubber Industries Pvt. Ltd., and Ors., reported in AIR 1997 SC 1240, wherein at paragraphs 15 and 16, it is observed as under:

> 15.`` The next thing to be noticed is that certain interim orders were asked for and were granted by the Civil Court during this period.

Would it be right to say that violation of and disobedience to the said orders of injunction is no punishable because it has been found later that the Civil Court had no jurisdiction to entertain the suit. Mr.Sorabjee suggests that saying so would be subversive of the Rule of Law and would seriously erode the majesty and dignity of the court. It would mean, suggests learned counsel, that it would be open to the defendants-respondents to decide for themselves whether the order was with or without jurisdiction and act upon that belief. This can never be, says the learned counsel. He further suggests that if any party thinks that an order made by the Civil Court is without jurisdiction or is contrary to law, the appropriate course open to him is to approach that court with the plea and ask for vacating the order. But it is no open to him to flout the said order. But it is no open to him to flout the said order assuming that the order is without jurisdiction. It is this principle which has

been recognised and incorporated in Section 9-A of Civil Procedure Code (inserted by Maharashtra Amendment Act No. 65 of 1977), says Mr.Sorabjee. Section 9-A reads as follows:

> "9-A. Where at the hearing of an application relating to interim relief in suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue. __ (1) Notwithstanding anything contained in the Code or any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit. (2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the court may grant such interim Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 relief as it may consider necessary pending determination by it of the preliminary issue as to the jurisdiction."

16. According to this section, if an objection is raised to the jurisdiction of the court at the hearing of an application for grant of, or for vacating, interim relief, the court should determine that issue in the first instance as a preliminary issue before granting or setting aside the relief already granted. An application raising objection to the jurisdiction to the court is directed to be heard with all expedition. Sub-rule (2), however, says that the command in sub-rule (1) does not preclude the court from granting such interim relief as it may consider necessary pending the decision on the question of jurisdiction. In our opinion, the provision merely states the obvious. It makes explicit what is implicit in law. Just because an objection to the jurisdiction is raised, the court does not become helpless forthwith - nor does it become incompetent to grant the interim relief. It can. At the same time, it should also decide the objection to jurisdiction at the earliest possible moment. This is the general principle and this is what Section 9-A reiterates. Takes this very case. The plaintiff asked for temporary injunction. An ad-interim injunction was granted. Then the defendants came forward objecting to the grant of injunction and also raising an objection to the jurisdiction of the court. The court over-ruled the objection as to jurisdiction and made the interim injunction absolute. The defendants filed an appeal against the decision on the question of jurisdiction. While that appeal was pending, several other interim orders were passed both by the Civil Court as well as by the High Court. Ultimately, no doubt, High Court has found that the Civil Court had no jurisdiction to entertain the suit but all this took about six years. Can it be said that orders passed by the Civil Court and the High court during this period of six years were all non-est and that it is open to the defendants to flout them merrily, without fear of any consequence. Admittedly, this could not be done until the High Court's decision on the question of jurisdiction. The question is whether the said decision of the High Court means that no person can be punished for flouting or disobeying the interim/interlocutory orders while they were in force, i.e., for violations and disobedience committed prior to the decision of the High Court on the question of jurisdiction. Holding that by

virtue of the said decision of the High Court [on the question of jurisdiction], no one can be punished thereafter for disobedience or Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 violation of the interim orders committed prior to the said decision of the High Court, would indeed be subversive of the rule of law and would seriously erode the dignity and the authority of the courts. We must repeat that this is not even a case where a suit was filed in the wrong court knowingly or only with a view to snatch an interim order. As pointed out hereinabove, the suit was filed in the Civil Court bonafide. We are of the opinion that in such a case the defendants cannot escape the consequences of their disobedience and violation of the interim injunction committed by them prior to the High Court's decision on the question of jurisdiction."

31. The Learned Counsel for the 1st Appellant takes a stand that even if the Appellants' succeed on the `aspect of maintainability' before the Hon'ble third Member of the `Tribunal', the Hon'ble third Member would be unable to grant any `interim relief' as such question was not referred to her. In such an even, the matter, would have to go back to the `Tribunal' for consideration of grant of `interim relief' by the Hon'ble third Member and in the event of refusal in granting any `interim relief' as fresh reference will have to be made before the Hon'ble third Member to consider the question of `interim relief', which will be a `waste of judicial time' leading to `plurality' and `duplicity' of `judicial proceedings'.

32. The Learned Counsel for the 1st Appellant points out that because of the specific view of the Hon'ble third Member of the `Tribunal' dated 20.09.2019 that only `specific points referred' can be heard by her, it is Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 imperative that the `points of reference' be made `wide' to include every `point of difference' both on `Facts' and `Law'.

33. The Learned Counsel for the 1st Appellant submits that the Hon'ble Judicial Member had rejected the `prayer' for the `grant of interim relief' and the said rejection was not based on `merits' but because of non-

maintainability of the `Company Petition' itself and the said rejection will constitute a `point of difference'.

34. The Learned Counsel for the 1st Appellant forcefully submits that `if the issue' `Are the company petitions maintainable and if so, are the petitioners entitled to interim orders as prayed for? is framed, then, it will enable the Hon'ble third Member comprehensively, to decide all `points of difference'.

Second Appellant's Submissions:

35. The Learned Counsel for the 2nd Appellant contends that the `single point of difference' framed by the `National Company Law Tribunal, Kolkata Bench, on 11.02.2022 is an `Appealable Order', as per Section 421 (1) of the Companies Act, 2013, and there is `non application of mind' by the `Tribunal' in formulating the `point of difference'.

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36. The Learned Counsel for the 2nd Appellant submits that the `word' `Order' is not defined under the Companies Act, 2013, but Section 2 (14) of the Civil Procedure Code, defines the term `Order' as `formal expression' of any decision of the Civil Code, which is not a decree. As such, there can be no doubt that framing of the points or difference between the Hon'ble Members of the Bench of a `Tribunal', as per Section 419 (5) of the Companies Act, 2013, is an `Order'.

37. It is represented on behalf of the 2nd Appellant that Section 421 (1) of the Companies Act, 2013, make no distinction between an `Administrative and Judicial Order' and the `issue of Appealability', as such, depends upon the fact whether an `Appellant' has reason to be `Aggrieved' by the `Order' in question. That apart, it is the plea of the 2nd Appellant that in any event, `an Order' which determines any right of the parties clearly has the trappings of a `Judicial Order' and cannot be said to be an `Administrative Order' simpliciter.

38. The Learned Counsel for the 2nd Appellant refers to the decision of the Hon'ble Supreme Court between Shankarlal Aggarwal& Ors. V Shankarlal Poddar Ors. (vide Civil Appeal No. 214 / 1960 dated Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 24.01.1963), reported in MANU/SC/0026/1963, wherein at paragraphs 13, it is observed as under:

> 13.``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 Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 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 'he interests of the general body of creditors and this was the submission made by the 1st respondent. There were thus two points of view Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 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.

39. The Learned Counsel for the 2nd Appellant points out the decision of the Hon'ble Supreme Court in BDR Developers Private Limited V Narsingh, (2021) SCC Online Del 3889, wherein at paragraphs 9 to 14, it is observed as under:

> "9. That "judgment" and "order" do not mean the same thing is obvious from the fact that the CPC itself defines them separately. "Judgment" has been defined under Section 2(9) of CPC as below:
>
> " "judgment" means the statement given by the Judge of the grounds of a decree or order."

while an "Order" has been defined under Section 2(14) of CPC as under: -

> " "order" means the formal expression of any decision of a Civil Court which is not a decree."

10. It is, therefore, clear that an "order" is something that does not result in a decree or, therefore, a final conclusion of a matter, though a "judgment" may include an "order". The term "judgment" indicates a judicial decision given on the merits of the disputes brought before the Court. It determines the rights of the parties finally. In contrast, an "order" may not be so but could be an interlocutory one, if it does not determine or decide the rights of the parties once and for all. Thus,

there are, broadly speaking, two kinds of "orders", one, that is in the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 nature of a final order and the other not determining the main issue with any finality. If such orders have been passed to help with the progress of the case, they may dispose of a specific question finally, but without finally disposing of the dispute. There is yet another category of "orders", which, if decided one way, would result in the determination of the rights of the parties finally, but, if determined in any other way, would result in the continuation of the proceedings. Such orders have been described as "intermediate" or "quasi final orders".

11. The Supreme Court in V.C. Shukla v. State through CBI, 1980 Supp SCC 92, looked into several English cases to consider the nature and attributes of a "final order" and an "interlocutory order". It was observed that in general, a "judgment" or "order", which determines the principal matter in question, would be termed as final, and the others would be "interlocutory". The court summed it up in the following words:-

> "24. To sum up, the essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issues sought but not a final decision or judgment on the matter in issue. An intermediate order is one which is made between the commencement of an action and the entry of the judgment....."

12. The observations and the tests proposed in V.C. Shukla (supra) to determine whether an "order" is a "final order" or an "interlocutory order" or an "intermediate order", were applied by the Supreme Court in Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8. Though the question before the court related to the maintainability of a Letters Patent Appeal, the court once again considered the meaning of "judgment", "interlocutory orders that would amount to judgment"

> and "interlocutory orders that would not amount to a judgment". A "judgment" which decided all the questions or issues in controversy and left nothing else to be decided was a "final judgment". There were two kinds of "preliminary judgments". One is where the trial judge dismisses the suit without going into the merits of it and only on a preliminary objection raised by the defendant. The second one is where these preliminary objections raised by the defendant are decided against him, and the suit proceeds further. These distinctions Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 were no doubt, drawn in order to answer the question whether a Letters Patent Appeal would lie. The Supreme Court also discussed "intermediary" or "interlocutory" judgment and order, again in order to answer whether a Letters Patent Appeal was maintainable. Depending on the effect of the decision taken by the trial judge, the court held that if such an order vitally affected a valuable right of the defendant, "it would be treated as a judgment", such as, where leave to defend is declined. However, where the order, though affecting the plaintiff adversely, does not cause him direct or immediate prejudice, but only remote prejudice, or damage was of a minimal nature as his rights to prove his case and show the defence to be false still remained, the order would not

partake of the characteristics of a "judgment".

13. It was further observed that not every "interlocutory order" can be regarded as a "judgment", as there were many orders that were routine in nature, such as, condonation of delay in filing the documents, orders refusing adjournment, orders refusing to summon additional witness, etc., which may involve exercise of jurisdiction in respect of a procedural matter against one party or the other.

14. On the other hand, "interlocutory orders" which would have the effect of depriving a party of a valuable right, though purely discretionary, may contain attributes and characteristics of finality and could be treated as a "judgment". The court referred to the exercise of discretion of the courts in respect of an application for amendment under Order VI Rule 17 of CPC to press home the point of what would constitute a "judgment" or an "interlocutory order in the nature of a judgment" or "an interlocutory order not in the nature of a judgment".

40. The Learned Counsel for the 2nd Appellant refers to the decision in Rajeev Bharadwaj V State of Uttar Pradesh, reported in (2020) SCC Online Himachal Pradesh (2105), wherein at paragraphs 48 to 59, 61 and 64, it is observed as under:

ANALYSIS AND CONCLUSION:

48. "Clause 26 of Letters Patent constituting the High Court of Judicature at Lahore, dated 21st March, 1919, reads as follows;

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26. Single Judges and Division Courts.- And we do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Lahore, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but, if the Judges are equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case, including those who first heard it.

49. The Division Bench of this Court heard this matter on Letters Patent Appeals filed under clause 10 of the Letters Patent, against the decision of Ld. Single Judge. Given the dissenting judgments of both Hon'ble Judges, clause 26 defines the scope for the third Judge. However, since the third Judge is to hear the case upon the point(s) of difference the judges so stated when equally divided, while pronouncing their verdicts. Although clause 26 uses the word "shall" while contemplating such equal division, and mentions that "if the Judges are equally divided, they shall state the point upon which they differ," however, may be because the date of the pronouncement of judgment co-incidentally was the last working day of one of the Hon'ble Judges, as such, they probably did not

get time to frame the points of difference.

JUDICIAL PRECEDENTS:

50. Relevant excerpts of the judicial precedents are being extracted to find out whether any of the decision deals with the present situation Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 or otherwise applies to the facts and circumstances or not.

51. In Mussammat Sardar Bibi v. Haq Nawaz Khan & another, AIR 1934 Lah 371, at page 379, the full bench of Lahore High Court observed, In the case before us the points of difference between the learned Judges of the Division Bench have not been stated expressly and to this extent the reference is defective. These points are however apparent from their respective judgments, and counsel for both sides agreed before' us that it was unnecessary to remit the case to the Division Bench to have the question formally drawn up. Accordingly at the commencement of the hearing, the points requiring decision by the Bench were formulated by us, with the concurrence of both parties, as follows:

52. In Firm Ladhuram Rameshwardayal v. Krishi Upaj Mandi Samiti, Shivpuri, AIR 1978 MP 10, full bench of Madhya Pradesh High Court observed as follows, [2] It is thus that the matter has come before us and the two questions which we have to answer are these:__ "(1) When on account of difference of opinion between two Judges constituting a Division Bench, a matter is referred to, under Rule 11 of Chapter I of the High Court Rules, a third Judge nominated by the Chief Justice under Clause 26 of the Letters Patent who, after formulating the point or points of difference between the Judges of the Division Bench, gives his decision, then can any other Division Bench of which one or both the Judges were not members of the Division Bench which originally heard the case, give its decision in accordance with the majority of the opinion of the Judges of the referring Bench as well as of the referee Bench?

Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 (2) When on a difference of opinion between the two Judges constituting the Division Bench, the matter is referred to a third Judge and the third Judge while expressing his opinion on the point of difference passed a final order, disposing of the matter referred to him and does not return the matter to the Division Bench, can the matter be said to be pending and can the Chief Justice suo motu order for its being listed be- fore the referring Division Bench or to some other Division Bench for disposal according to the method provided by Clause 26 of the Letters Patent?

[20] In the result, we answer the two questions referred to us as follows:__ (1) When on account of difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge nominated by the Chief Justice under Rule 11 of Chapter I of the High Court Rules, and the third Judge, after formulating the point or points of difference of the Judges of the Division Bench, returns his opinion under Clause 26 of the Letters Patent, any other Division Bench of which one or both of the Judges were not members of the Division Bench which originally heard the case, can render the decision in accordance with the majority of the opinion of the Judges of the referring

Bench and the referee Bench.

(2) When on a difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge, the third Judge can, only express his 'opinion.' on the 'point' on which the Judges are divided in opinion. However, the third Judge cannot 'decide' that point. (He has to leave to the Division Bench to 'decide' the point as directed under Clause 26 of the Letters Patent). Nor can he enter into any other point on which the Judges of the Division Bench were not divided in opinion. If the third Judge expresses his opinion on any other point or finally decides the case as a whole, the latter part of his opinion (be it styled as 'order' or 'judgment') has to be ignored as without jurisdiction . After the third Judge has Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 recorded his opinion; the case must be laid before the Division Bench for deciding the point or points which were referred to the third Judge according to the method provided by Clause 26 of the Letters Patent and it is at this stage that a Division Bench will finally decide the case before it. It is not the requirement of law that the case must be laid before the same Division Bench which first heard it, after it is returned by the third Judge. When one of the Judges constituting the Division Bench which first heard the case, has retired or is not otherwise available, the Chief Justice can constitute another Division Bench to decide the case according to the method provided by Clause 26 of the Letters Patent.

53. In Amar Pal Singh v. Election Commission of India, AIR 1993 Del 316, Ld. Single Bench of Delhi High Court observed, [12] In this case the Judges were equally divided. They should have specifically stated the point upon which they had differed and the case could be heard on that point only by another Judge. It is obvious that hearing by another Judge is confined to the specific points stated and cannot cover the whole case again. But the order of reference in this case states that the papers may be laid before Hon'ble the Chief Justice and he may designate a third Judge to hear the matter. The learned Judges ought to have stated explicitly as to what was to be decided by a third Judge. The expression 'matter' used in the reference has not been clarified as to the points to be decided by the third Judge; especially in the facts and circumstances of this case and in view of the stand taken by Mr. Bansal. In the absence of the clarification it is not possible to answer the reference.

[13] In view of my above reasoning, this Bench must return the reference unanswered and without any finding. The papers may be laid before Hon'ble the Chief Justice for appropriate orders.

54. In Parmanad Agarwal & ors v. Sudera Enterprises (P) Ltd, 1999 SCC Online Cal 614, Ld. Single bench of Calcutta High Court observed, Although the question of law upon which the learned Judges differed in their opinion could be deciphered from the orders Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 passed by them but keeping in view the aforementioned submissions made at the Bar, this court is of this opinion that it is not possible for this court to formulate the points of difference in the light of a decision of the special bench of this court in Jyoti Prakash Mishra (Supra) [AIR 1965 Calcutta 483].

55. In Neeraj Sharma v. Union of India, Punjab Law Reporter, Vol CXLIV- (2006-3), at page 8, Para 23, Ld. Single B Judge observed, Conclusions: For the reasons recorded above, since no point of

difference seems to emerge, from the two points agitated on behalf of the applicants, on which separate deliberations have been recorded hereinabove, there is no merit in the prayer made in the instant applications, under Rule 31 of Chapter 4(F) of the High Court Rules and Orders, read with Clause 26 of the Letters Patent.

56. In DLF Universal Ltd v. State Bank of India, 2012 SCC OnLine Guj 972, Ld. Single Bench of Gujrat High Court observed that in case of difference of opinion, the point of difference should be decided following the procedure referred in S. 98 of the Code of Civil Procedure and Clause 36 of the Letters Patent Appeal, thus, held the reference as incompetent, and since one of the Hon'ble Judges stood transferred, referred the matter to Hon'ble Acting Chief Justice for considering whether the entire matter needed rehearing.

57. In Amarendra Arya v. State of Bihar & others, LPA No. 1469 of 1995, decided on 25 Sep 2019, the full bench of Patna High Court observed,

60. In view of the aforesaid, it is very much clear that in the event of difference of opinion between the members of the Division Bench, the Division Bench will record its difference of opinion and on the discretion of the Chief Justice the matter will be referred to the third Judge, either Single or Division Bench and the third Judge will confine his opinion on the point which has been referred and will not embark on the point or points not Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 referred, but in a situation if the third Judge gives an opinion apart from the point referred, I am of the opinion that when the matter again goes to the Division Bench for final pronouncement, the majority of the opinion will be the basis for judgment on the point which was referred. But, it is also made clear that on consideration of judgment of different High Courts, it can safely be recorded that when a single issue or several issues have been raised and on few issues the Division Bench agreed and on certain issues they have differed, that issues on which there is difference, will be referred to the third Judge and the third Judge would give his opinion on the point referred, but will not have a jurisdiction to finally pronounce the judgment between the parties, but the referee Judge has only to record his opinion and remit back the same to the Division Bench and the Division Bench will formally declare the majority opinion and then the Division Bench will not start a de novo hearing on the issue which has already been concluded. The majority opinion is to be culled out and final verdict could be pronounced, as it will be a matter of declaration of final verdict, but if on any point, apart from the reference, the referee Judge gives his opinion on such point, the parties will have a liberty to address the Division Bench on new point which was not subject matter of consideration and the Division Bench will decide the new point and give the final decision on that point.

58. Although, in DLF Universal Ltd v. State Bank of India, 2012 SCC OnLine Guj 972, Ld. Single Bench of Gujrat High Court observed that in case of difference of opinion, the point of difference should be decided following the procedure referred in S. 98 of the Code of Civil Procedure and Clause 36 of the Letters Patent Appeal, thus, held the reference as incompetent, however, In Firm Ladhuram Rameshwardayal v. Krishi Upaj Mandi Samiti, Shivpuri, AIR 1978 MP 10, full bench of Madhya Pradesh High Court observed that it is not the requirement of law that the case must be laid before the same Division Bench which first heard it, after it is returned by the third Company Appeal

(AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Judge. When one of the Judges constituting the Division Bench which first heard the case, has retired or is not otherwise available, the Chief Justice can constitute another Division Bench to decide the case according to the method provided by Clause 26 of the Letters Patent. All other decisions mentioned above were on entirely different circumstances and would not apply in the circumstances and factual matrix of this case.

59. None of the decisions mentioned above state what prejudice would it cause if the third Judge also culls out the points. What difference would it actually make if another Division Bench is constituted and they state the points of difference? Authors of Letters Patent did not contemplate the current situation. Moreover, culling out the points of difference is not a herculean task but just a ministerial act, that even the third Judge can also do very comfortably. Lex necessitatis est lex temporis i.e. instantis - In a case of extreme necessity everything is common. The law of necessity is the law of time, that is time present.

61. Now, culling out the points of a difference does not require analysis and forming an opinion on the matter's merits. Hypothetically, even if this job was to be done by a new division bench, this Court can also do the same. In the Application filed under Section 26 of Letters Patent, even the applicant has thrown light on some points of difference. The Doctrine of necessity would empower this Court to cull out the points of difference so that the matter does not linger on, and at least the Courts pronounce the final verdict at the earliest. Given above, I proceed to cull out and state the points of difference from the dissenting verdicts in the Letters Patent Appeals of equally divided bench of two Judges.

Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 DISSENTING EXCERPTS:

> Hon'ble Justice Dharam Chand Hon'ble Justice Sureshwar Thakur Chaudhary
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> 8. As pointed out at the very 6. Even though, the judgment outset, since both the writ petitions have been rendered, by, the learned Single Judge of this dismissed on the grounds of delay and laches, Court, is, rested upon his accepting preliminary acquiescences and also bad on account of objection(s), as, became, reared by the private clubbing of various causes of action, therefore, respondents concerned, hence, in their the arguments heard only qua this part of the respective replies, as, became furnished to the case as learned Single Judge has not touched the respective petitions, (a) objections whereof, merits of the case and in case the findings appertain to the writ petitions, being hit by recorded by learned Single Judge are not vices, of, delay and laches, and, also theirs ultimately found to be legally and factually being permeated with entrenched vices of sustainable on analyzing the arguments to be estoppel, and, acquiescences. However, since, addressed by the parties on both sides, we may the emphatic nuance, of, the afore assigned proceed further to hear this matter on merits reason, is, made dependent, upon, various also because the Apex Court in Roma Sonkar citations, each carrying, a, proposition of law, vs. Madhya Pradesh State Public Service vis-a-vis, rather the completely settled, and,

> Commission & anr., Civil Appeal Nos. 7400- determined apposite inter se seniority, being 7401/2018, decided on 31.7.2018 has unamenable, for re-opening, conspicuously after deprecated the practice of remanding of case to elapsings, of, an unduly procrastinated period Single Judge while holding that the Single of time, since the apt contentious inter se Judge is not subordinate to the Division Bench. seniority, becoming clinched or settled.

Also that the Division Bench in Letters Patent Obviously, hence, when the afore assigned Appeal if sets aside the judgment of the Single reason, by the learned Single Judge, is, also Judge should not remand the same to learned necessarily entwined with the merits, of, the Single Judge and rather decide on merits itself. case, (b) given his necessarily making a concomitant conclusion, vis-a-vis, the contentious inter-se seniority, amongst, the aggrieved appellants, and, the private respondents, hence, becoming finally rested or settled, (c) whereas, for, the reasons to be assigned hereinafter, the contentious inter se seniority amongst them, is, yet in a state of flux or is yet to be formidably clinched, hence, thereupon, it is deemed fit to also decide, the, entire lis engaging the parties at contest, hence, on merits. (d) The further reason for this Court, becoming constrained, to, allow the writ petitions, after, its proceeding, to delve deep Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 into the merits, of, the case, and, to thereafter also obviously make a complete adjudication, vis-a- vis, the contentious competing claims, of, the contesting litigants concerned, is, sparked, by, the factum, that, the Hon'ble Apex Court in Roma Sonkar Vs. Madhya Pradesh State Public Service Commission and another, Civil Appeal Nos.

7400-7401/2018, decided on 31.7.2018 (e) has deprecated the practice of remanding, of, a lis, to, the learned Single Judge, (f) and, has also held that the learned Single Judge, is, not subordinate to the Division Bench, (g) besides with, a, further expostulation of law being bornetherein, that, the Division Bench, in, a, Letters Patent Appeal, if sets aside the judgment, of, the learned Single Judge, (h) thereupon, it should not remand the same, to, the learned Single Judge, rather should proceed to decide the lis on merits, (i) hence, becomes the supplemental principle, for, the undersigned, proceeding to completely rest, the, contentious claim(s), of, the hereat contesting litigants. Moreover, with the undersigned accepting the report, of, the Hon'ble Judges Committee, hence, constituting, the apt facilitator, for, the making, of, a complete adjudication, of, the, extant lis, (j) thereupon, too, upon disapprobation, of, the, verdict, of, the, learned Single Judge, as, has become, untenably anvilled, upon, vices, of, delay, and, laches, rather baulking the respective petitioners, hence, it is deemed fit, to, thereon(s) i.e. the Hon'ble Judges Committee's report, rather finally rest the extant lis.

On analyzing rival submissions, the only question which has arisen for consideration in these appeals is as to whether the claim as laid in the writ petitions is not stale nor is there any delay and laches on their part nor are they guilty of acquiescences as well as fence-sitters ?

25. Now, coming to the above question having 7. The concurrent predominant reason, which arisen for consideration in theseappeals, it would prevailed, upon, the learned Single Judge, and, not be improper to observe that this case has a also, upon, the, Hon'ble Mr. Justice Dharam chequered history becausethe promotee officers Chand Chaudhary, Judge, for, both making a of and on had

been espousing their claims qua conjoint verdict, upon, the afore LPAs, is, seniority vis-à-visdirect recruits since long. We grooved, (ii) upon, a decision of the Hon'ble may refer here CWP No. 61 of 1999 filed by the Apex Court rendered in a case titled as then H.P. Judicial Service Association and its B.S. Bajwa and another v. State of Punjab and members i.e. the subordinate Judicial Officers others, reported in AIR 1999 SC 1510, wherein, at bottomin the seniority list and also the Officers the Hon'ble Apex Court, has expostulated, that, inducted to the cadre of the then Higher Judicial any belated endeavours, as, made by the Service by way of promotion challenging therein aggrieved, in, challenging, the, drawing(s), of, the recruitment of direct recruits to the service. seniority lists, cannot be countenanced, when The said writ petition remained pending in this hence it would untenably beget disturbing(s) or Court till 2005 and it was disposed of vide order unsettling(s), of, a clinched or a finally rested dated 18.4.2005 in the following terms: controversy. Further thereonwards reliance, is, also conjointly placed, by the learned Single "As the hearing was in progress, Mr. Rajiv Judge, and, by one of us (Hon'ble Mr. Justice Dharam Chand Chaudhary, J.), upon, a Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Sharma, learned Senior counsel appearing for judgment of the Hon'ble Apex Court, rendered respondent o. 2 submitted that his client has in a case titled, as, Bimlesh Tanwar vs. State of issued communication No. HHC/GAZ/10- Haryana and others, reported in (2003)5 SCC 17/90-Vol-II-1933-35 dated 28th January, 2005, 604, (i) wherein, it has been propounded, vis-a- (which is hereby taken on record by us), whereby vis, claims, of, seniority not being a fundamental a gradation list of the members of H.P. Judicial right, rather being merely, a, civil right. Service, as it stood on 1.1.2005 was circulated. Furthermore, it has also been expostulated According to Mr. Rajiv Sharma, the petitioners therein, that, inter se seniority, of, all candidates, have not challenged the gradationlist circulated who are appointed, on the same day, would be along with the aforesaid communication. dependent, on, the rules governing the same, Without going into the disputed and, that in the absence of rules governing question whether in the light of various orders seniority, an executive order,may be issued, to, passed by this Court in this case from time to fill up the gap. time, the petitioners were or were not required 8.However, the decision of the Hon'ble Apex to challenge the aforesaid gradation list, we feel Court, as, rendered in a case titled, as, B.S. that in the facts and circumstances of this case, if Bajwa and another v. State of Punjab and others, the petitioners are afforded an opportunity of and, reported in AIR 1999 SC 1510, for, hence filing objections to the aforesaid gradation list detailed/ad nauseam reasons assigned and making representation(s) for suitable hereinafter, is, applicable, only, upon, the placement/replacement of the persons covered contentious seniority becoming finally settled or therein, and if such objections and it becoming conclusively rested, (a) and, representations are considered by respondent obviously it becomes inapplicable, as hereat, No. 2, on their merits and in accordance with upon, the contentious seniority list(s), as law, and disposed of within a reasonable time, prepared, vis-a-vis, the contesting litigants the interests of all the parties shall be suitably concerned, being, yet in a state of flux, or it protected. On this suggestion coming from the remaining unsettled, rather, it remaining not Court, Mr. Mattewal, learned Senior Counsel finally clinched. Moreover, the decision of the appearing for the petitioners submits that the Hon'ble Apex Court rendered, in, a case titled as petitioners are in absolute agreement with this Bimlesh Tanwar vs. State of Haryana and others, suggestion and that they would withdraw this reported in (2003)5 SCC 604, is also rendered Writ petition with liberty to submit inapplicable, vis-a-vis, the factual matrix representation(s) and filing objection to the prevailing hereat, given, the reasons assigned aforesaid gradation list and request the High

hereinafter, rather making palpable disclosures, Court on its administrative side to consider such vis-a-vis, the verdict rendered by the Hon'ble objections/representations on their merits and in Apex Court, in a case titled, as, All India Judges' accordance with law and to order re-location/re-Association & Ors vs. Union of India, reported in placement of the persons concerned in the (2002)4 SCC 247, hence, becoming acquiesced, aforesaid gradation list. Mr. Anand Sharma, to, be breached, (b) whereas, it constitutes the learned counsel appearing for respondent No. 3 settled inflexible, and, inviolable norm(s), for, and Mr. Shrawan Dogra, learned counsel determining the contentious inter se seniority, appearing for respondent No. 4 also have no amongst, all the competing incumbents. Re- objection to this course being adopted. emphasisingly, it,underscores, the, necessity, of, Mr. Rajiv Sharma, submits and induction(s) into service, of, the inductees undertakes before us that if the petitioners indeed concerned, rather only , upon, the apt strictest file objections and submit representations adherence(s) being recoursed, vis-a-vis, the against the aforesaid gradation list, the High therein(s) expostulated norm, of, "post based Court on its administrative side shall roster", and, not in consonance, with, the adopted consider such hereat, invalid norm of, "vacancy based roster". objection(s)/representation(s0 and dispose them Unhesitatingly, and, apart therefrom also of in accordance with law and on their merits uncontrovertedly, uptill now, (c) given, the stand within the shortest possible time, preferably projected, by, the High Court in its reply, and, within 2-3 months. also given the displays made, in, the minutes Based on the aforesaid agreement drawn in the year 2010, by the Hon'ble Judges between the parties, the Writ petition is disposed Committee,displays whereof rather with utmost of as settled. We pass the following order and candour, exemplify vis-a-vis, the, High Court, issue hereinbelow mentioned directions:- explicitly acquiescing, vis-a-vis, the afore

1. Only in so far as the placement of direct regulatory mechanism, for, induction into recruited Additional District Judges in service, to, the post of Addl. District Judge(s)/District Judge(s), hence, becoming Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 the aforesaid gradation list is concerned breached, (d) thereupon, the afore acquiesced (and for no other reason or ground), it factum, does necessarily, beget, a, further shall be open to petitioner No. 1 as well corollary, vis-a-vis, the afore expostulated canon, as other aggrieved Officers, if any, to file being transgressed. The relevant portion,of, the objections or make representations report of the Hon'ble Judges Committee, as, against their alleged improper placement drawn in the 2010, reads as under:

> and for seeking rectification/redressal of "After coming into force of the new Rules, the grievances. Such objections shall be filed cadre strength has got increased to 34. Now as and such representations shall be made, if per extant Rules half of the posts are to be any, latest by 30th April, 2005. manned by promotees, 1/4th by recruitment

2. The High Court on its administrative side from amongst the Civil Judges (Senior Division), shall receive the aforesaid on the basis of Limited Competitive Examination objections/representations, process the and the remaining 1/4th by way of direct same, examine and consider them on recruitment from amongst the practicing their merits and dispose them of in Advocates. The posts are to be manned by the accordance with law. persons from three sources, on Post Based

3. If in the process of consideration, the Roster. 34-point Roster (Annexure-B) is required High Court feels that anyone whose name to be maintained. has been included in the aforesaid As per 34-Point Roster, first two posts gradation list needs to be displaced to a are to be manned by promotees, third by the Civil lower position, an opportunity of being Judge (Senior Division) selected on the basis of heard shall be afforded to such personbut Limited Competitive Examination, and, the only through the mechanism of a written fourth by direct recruitment from amongst the representation. No such person shall have practicing Advocates, and similarly fifth and any right of a personalhearing. sixth posts by the promotees, seven post by the

4. The High Court on its administrative side Civil Judges (Senior Division), on the basis of shall take a final decision in the aforesaid Limited Competitive Examination, and, the matter on its merits and in accordance eighth post by direct recruit from amongst the with law as expeditiously as possible and practicing Advocates, and so on. This way out of in any case by 31st July, 2005. the total cadre of 34, 18 posts are required to be

5. If anyone feels aggrieved by the decision manned by promotees, 8 by members of Judicial of the High Court, it shall be open to such Service, selected on the basis of Limited person to approach this Court again on the Competitive Examination and the remaining 8 by judicial side. direct recruitment from amongst the practicing In view of the aforesaid order, no earlier Advocates. representation filed on the subject by any one However, after coming into force of the shall be entertained. All such earlier extant Rules, we have been following the representations shall be consigned to records vacancy based roster, that is to say that we have without taking any action thereupon. been rotating the vacancies in the ratio of 2:1:1, Since this Writ petition is being amongst the promotees, Officers selected by disposed of as settled in the light of the Limited Competitive Examination, and, direct aforesaid agreement between the parties, we recruits from amongst the practicing Advocates, wish to clearly place on record that we have not correctness of which is doubtful." gone into any question relating to the merits of 9. Succor and support is also drawn, by one, the controversy between the parties nor have of, us (Hon'ble Mr. Justice Dharam Chaudhary, expressed any opinion with regard thereto. All J.), for, his concluding, that, the questions and issues are left open." petitioners/appellants' belated apposite challenge, rather warranting its being

26. Consequent upon this order, representations discountenanced, hence, from, a decision, of,the were made by the members of Hon'ble Apex Court, rendered in a case titled as H.P. Subordinate Judicial Service including the K.R. Mudgal and others vs. R.P. Singh and Judicial Officers similarly situated to the others, reported in AIR1986 SC 2086, besides petitioners, which were considered by the also from a decision, of, the Hon'bleApex Court Judges' Committee and recommended to be rendered, in, a case titled as Shiba Shankar rejected. The High Court has accepted the report Mohapatra and others vs. State of Orissa and of the Judges' Committee in its meeting others, reported in (2010)12 SCC 471, (i) held on 21.9.2017. Subsequently, the order of wherein, it has been expostulated, that, the controversy appertaining to the seniority, of, the litigants therein, was amenable rather for declinings, as, the apposite agitations happened, Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 rejection was also conveyed to the hence, at a belated stage, and, further that the representationists. Though, in the order ibidpassed Courts exercising public law jurisdiction, rather in CWP No. 61 of 1999, liberty was granted to the not encouraging

agitations, of, stale claims, representationists in case their representations especially where the right of third parties hence rejected by the High Court on administrative side, crystallise, in, the interregnum. However, with however, they opted for not challenging the order all firmness, and, formidability, the afore of rejection of their representation(s). verdicts are again applicable only qua settled, and, finally determined seniority lists, as, made in consonance, with, the then prevailing rules, guidelines or executive instructions, and, reiteratedly are inapplicable hereat, as, the apposite lis remains extantly both unsettled, and, unclinched. Even further thereonwards, in a verdict rendered, by, the Hon'ble Apex Court in Shiba Shankar Mohapatra's case (supra), the Hon'ble Apex Court, dehors, any statutory Rules, for, determining the inter-se seniority, of, the contesting litigants therein, had deemed it, not to disturb the uninterrupted practice, of, the State, in, preparing, the, inter-se seniority list, of, the officers concerned, and, obviously hence had thereafter concluded, that, when, the, reckoning(s) or the concomitant rankings, in,the seniority list, of, the contesting litigants therein, hence, remained unchallenged rather within, a, reasonable period, of, time, hence since its drawing, (ii) thereupon, the aggrieveds' challenge, became hit by, the, baulkings vices, of, delay, and, laches, (iii) especially when no good and tangible ground, was, coming forth, in, explication, of, the delay, in, challenging the seniority list, (iv) necessarily hence, both the afore verdicts, cannot supersede, the, verdict, of, the Hon'ble Apex Court rendered, in, a case titled as All India Judges' Association & Ors vs. Union of India, reported in (2002)4 SCC 247, and, also cannot withstand the clout, of, the, apposite mandatory governing rules, hence, wherefrom, the, inter se disputed seniority, of, the contesting litigants, has, yet to bedetermined. The gravamen of the afore conclusion is formed obviously, upon, the factual matrix prevailing, in, the afore alluded judgment(s), as, rendered by the Hon'ble Apex Court, and, with the factual contentious matrix borne, in, the extant case, hence being completely and diametrically contradistinct, rather therefrom, inasmuch, as, it being fully dependent solitarily, upon, the verdict (supra), thereupon, also it would be unbefitting, to, draw any succor therefrom.

36. Anyhow, the application IA 10. The Hon'ble Apex Court, in, No. 334 of 2014 when ultimately came to be a verdict rendered in a case titled, as, Direct listed before the apex Court on 13.3.2018 after Recruit Class II Engineering Officers' the High Court filed the report and also the Association vs. State of Maharashtra and others, affidavit in terms of order dated 9.10.2017, reported in (1990)2 SCC 715, has in paragraphs following order (Annexure P-15) came to be No. 47 (D) and 47(E) thereof rather held:-

> passed therein: "47. To sum up, we hold that:-
>
> "The issue raised in I.A. No. 334 of 2014 in .....
>
> Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Writ Petition (Civil) No. 1022 of 1989, as it (D) If it becomes impossible to adhere to the appears to us from the materials on record, exising quota rule, it should be substituted by an relates to the disputes inter se between the appropriate rule to meet the needs of the individuals/groups, which, in our considered situation. In case, however, the quota rule is not view, would not be appropriate for determination followed continuously for a number of years by this Court in an I.A. (No. 334 of 2014)

> filed because it was impossible to do so the inference in W.P. (C) No. 1022/1989 (All India Judges is irresistible that the quota rule had broken Association and others v. Union of India and down. other). We, therefore, decline to entertain the (E) Where the quota rule has broken down and I.A. any further leaving the parties to have resort the appointments are made from one source in to such remedies as may be available to them in excess of the quota, but are made after following law. the procedure prescribed by the Rules for the I.A. No. 334 of 2014 in Writ Petition (Civil) appointment, the appointees should not be No. 1022/1989 is disposed of in the above pushed down below the appointees from the terms." other source inducted in the service a later date."

Though, with immense fortifying vigour,

37. It is thus seen from the order dependence, is, made thereon, by, the private ibid that the apex Court has declined to entertain respondents concerned, to, contend qua even, if the interim application keeping in view the their induction into service, is, in excess, of, the disputes inter se between the individuals/groups afore norms, as, become prescribed, in, a case raised therein and it was left open to the parties titled as All India Judges' Association & Ors vs. to resort to remedies available to them in Union of India, reported in (2002)4 SCC 247, accordance with law. Therefore, I.A. No. 334 of (i) yet they are not amenable, for, theirs being 2014 was unsuccessfully pursued by the pushed down below, the, appointees drawn from petitioners in the Hon'ble Apex Court. other valid source(s), hence subsequent, to their

38. Now if coming to the order induction into service. However, even the afore dated 14.7.2016 (Annexure R-3/F) passed in this dependence, as, made thereon, is, rendered application and reproduced hereinabove though extremely frail, and, also becomes completely it was observed that in view of CWP No. 696 of enfeebled, through, the imperative diktat 2010 pending in this Court, the apex Court rendered, by, the Hon'ble Apex Court, in, a case deemed it proper to relegate the parties to work titled as All India Judges' Association & Ors vs. out their remedy in the said writ petition and Union of India, reported in (2002)4 SCC 247, await the outcome thereof. The petitioners, besides, through, categorical directionsrendered, however, have not opted for pursuing the writ upon, the High Court, of, H.P., by the Hon'ble petition any further or approached the High Apex Court, in, IA No. 17/2011 in IA Court with a prayer to hear the same at an early No.244/2009 and IA Nos. 1 & 2 in IA Nos. date and rather sought the permission to 17/2011 in IA No.244/2009 and IA Nos. withdraw the same on 4.11.2016. The order 334/2014, IA Nos. 335, 336, 337, 338/2015 and annexure R-3/K to the reply filed on behalf of IA No. 339 & 341/2016, on 28.4.2016, the respondents No. 3 to 6 reveals that learned relevant portion whereof reads, as, under:-

> counsel representing the petitioners on "In as much as, 34 point roster having beendrawn instructions had sought the permission by the High Court and the relevant rules relating unconditionally to withdraw the writ petition to seniority, namely, Rule-13 has also come into and the permission so sought was opposed by effect, the only other question to be decided is as the private respondents herein on the groundthat to how it should be implemented as from certain rights have accrued

in their favourin 31.3.2003, as directed by us in the judgment view of the orders passed by this Court from time referred to above. While drawing the 34 point to time. This Court, however, without going into roster, the High Court has mentioned that the such contentions permitted the petitioners to same would be followed after 31.3.2010. withdraw the writ petition and rightly so because Having regard to the specific direction the same was sought to be withdrawn of this Court in the judgment referred to above unconditionally. Therefore, irrespective of the in paragraph 23, we are of the view that it is apex Court directed the petitioners to pursue their required to ascertain as to how the 34 pointroster remedies in accordance with law. Instead of for the three different channel are to be worked doing so, they did not opt to do so and even writ out. The High Court is, therefore, directed to petition No. 696 of 2010 was also withdrawn apply Rule 13 which prescribes as to how the lateron unconditionally. seniority to be drawn by applying the

39. After the Apex Court declined said Rules, ascertain the roster point for the to entertain I.A. No. 334 of 2014 and disposed Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 of the same vide order Annexure P-15 dated three different categories of promotees and direct 13.3.2018 by leaving it open to the parties to recruits and carry out the said exercise from resort to such remedies as may be available to 31.3.2003." them in accordance with law. It is these writ (a) wherein the Hon'ble Apex Court, has, cast an petitions which have now been filed only by the inflexible mandate, upon, this Court, to, apply the petitioners and as regards the Officers similarly afore Rule 13, strictly in consonance, with, the situated and identically placed to them in the verdict of the Hon'ble Apex Court, rendered in a cadre, they have not joined them (the writ case titled as All India Judges' Association & Ors petitioners) as party in these writ petitions. The vs. Union of India, reported in (2002)4 SCC 247, similarly situated Officers in the cadre are either to, hence for therefrom, it making satisfied with the seniority assigned to them or determination(s), of, the inter se seniority, of, the may approach after final outcome of these writ inductees, into, the rank or post of Addl. District petition if need for them to do so arises because Judge(s)/District Judge(s), and, who become the discussion hereinabove reveals that different drawn thereinto, from, the afore contemplated set of the Judicial Officers/promotees have streams or channels. The inviolability of the challenged the direct recruitment to the cadre and afore imperative diktat, as afore stated, has been also the inter se seniority in this Court and also acquiesced, to be breached, in, the afore report, the Apex Court as per their convenience, of of, Hon'bleJudges Committee, and, when rather course, unsuccessfully. In the given facts and in pursuance thereto, the other Two Hon'ble circumstances as discussed hereinabove if it is Judges Committee of this Court, comprising not a case of acquiescence of claims, what else Hon'ble Mr. Justice Sandeep Sharma, J., and, is any other inference which can be drawn Hon'ble Mr. Justice Vivek Singh Thakur, J., has, therefrom. The present is, therefore, a case where in completest deference thereto, hence, made the petitioners have acquiesced their claims and anad nauseam prescription, for, determining or as such, have no right to claim the seniority over settling the inter se seniority, of, the inductees, to, and above the privaterespondents. the posts of Addl. District Judge(s)/District Judge(s), (i) whether appointed, from, the direct recruits, (ii) or from amongst the Civil Judges (Senior Division), (iii) besides from the category(ies) appertaining, to, the Limited Competitive Examination, (iv) thereupon, the afore report, of, the abovesaid committee, does

warrant, qua hence the deepest deference being meted thereto.

40. Now, if coming to the second 4. Shri S.C. Kainthala belongs, limb of arguments addressed on behalf of the writ to, the apposite feeder category of Civil Judge petitioners, no doubt the apex Court in All India (Senior Division), qua wherewith a 50% quotais Judges' Association & ors. vs. Union of India, prescribed, for, promotion, to, the post District (2002) 4 SCC 247 has held as under: Judge/ Additional District Judge , hence, on the

41. One of the method of avoiding apposite contemplated principle, of, merit-cum- the seniority dispute, as per directionof the Apex seniority, (a) and, also upon the passing(s), of, Court is to apply quota in relation toposts and not suitability test(s), as may be prescribed, and, in relation to vacancies. Further direction to the conducted, by, the High Court, in, accordance High Courts was to frame proper rules and with the regulations. However, Mr. Rajeev methods by 31.3.2003. It is consequent upon Bhardwaj, belongs to the category, of, limited such direction of the Apex Court, respondent No. competitive examination(s), as, ordained to be 1 in consultation with the High Court of conducted, from, amongst the cadre, of, Civil Himachal Pradesh has framed Judges (Sr. Division), vis-a-vis, the promotional H.P. Judicial Service Rules, 2004. post, of, District Judge/Addl. District Judge, and,

42. On and after coming into force qua wherewith, a, 25% quota is prescribed. the Rules, the recruitment to the Judicial Service However, the private respondents, belong to the in the cadre of District/Addl. District Judges is category, of, direct recruitees or from the being made strictly in terms thereof. True it is envisaged stream(s), of, eligible advocates, and, that instead of following "post based roster" as qua wherewith, a, 25% quota is prescribed, for directed by the Apex Court in Judges' their induction(s), as, Additional District Association case, respondent No. 2 continued to Judge(s)/District Judge(s). follow "vacancy based roster" up to 31.3.2010. 5. Apart from the afore The matter with regard to following the "post imperative necessity, hence, of extracting the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 based roster" or "vacancy based roster" came to afore apposite Rule, for, therethrough making be considered by a Committee of the Judges of determination, vis-a-vis, the competing claim(s), this Court which has given its report dated of, the writ petitioners, and, of, the private 30.3.2010, Annexure P-9 to CWP No. 2061 of respondents concerned, and, as, appertaining to 2018. It has been noticed in the report that after their inter se seniority, (a) also, the appositeRule coming into force 2004 Rules, respondent No. 2 13, of, the Rules and Regulations, of, H.P. is still following "vacancy based roster" i.e. the Judicial Services, rather, besides therealongwith rotation of the vacancies in the ratio of 2:1:1 regulating, the, hereat res controversia, hence, amongst promotee, selection made by limited for, therethrough(s) reckoning their inter se competitive examination and direct recruitment seniority, does necessarily, enjoins its extraction. from amongst the practicing Advocates. The The apt underlined portion, of, Rule 13, of, the Judges' committee, therefore, had every Rules and Regulations of the H.P. Judicial suspicion qua the correctness of following Services, reads as under:-

> "vacancy based roster" and as such "13. Seniority:- (1) Where officer are recruited to recommended that in future respondent No. 2 a cadre by promotion and direct

recruitment, should follow the "post based roster". The seniority shall be regulated by the roster vacancies in existence on 30.3.2010 when the maintained for such recruitment. Officer report Annexure P-9 was submitted was, appointed against higher point of roster shallrank therefore, recommended to be filled by way of senior to the officer appointed a lower point. applying the "post based roster". The report Provided that no person appointed to a Annexure P-9 when taken up for consideration cadre by direct recruitment shall for the purpose by the Full Court was approved and as such on of fixation of his seniority claim any particular and w.e.f. 31.3.2010, respondent No. 2 is place in seniority unconnected with the date of following the "post based roster". his actual appointment.

43. True it is that respondent No. (2) where more than one Officers are promoted 2 was following "vacancy based roster" contrary to cadre at the same time inter-se seniority of to the direction of the Apex Court in Judges' persons so promoted shall be determined by their Association case (supra), however, respondent inter-se seniority in the lower cadre. No. 2 when detected such mistake has taken a (3). Where direct recruitment is made to a cadre, decision to follow the "post based roster" in the the inter-se seniority of persons sorecruited shall matter of recruitment to the cadre of be in the order in which their names are arranged District/Addl. District & Sessions Judges and in the select list. even stopped the recruitment from direct (4) Every year in the month of January seniority category candidates till the promotees and the Sr. list of officers in all cadres shall be prepared and Civil Judges eligible for accelerated promotion published by the High Court and the lists so gets their quota fulfilled. Now, respondent no. 2 published shall be issued for the purpose of is following the "post based roster". All the 3 making promotions to the next higher cadres."

categories i.e. promotees, eligible Sr. Civil Moreover, the verdict rendered by the Hon'ble Judges under the limited competitive Apex Court in a case titled, as, All India Judges' examination and the direct recruits are being Association & Ors vs. Union of India, reported provided their respective quota and there is no in (2002)4 SCC 247, also is the prima donna complaint in this regard. reckoner, for, the requisite purpose. In the verdict supra, the hon'ble Apex Court has rendered explicit directions, upon, all the High Courts concerned, to specify the quotas, in, relations to posts, and, not in relation to vacancies. Further thereonwards it has also been mandated therein, that, the afore quotas shall constitute, the, regulatory mechanism, hence, for settling all disputes arising, amongst, the competing litigants' claims, vis-a-vis, their contentious inter-se seniority, upon, theirs respectively becoming inducted against the post, of, Additional District Judge(s)/District Judge(s), from amongst, the stream, of, direct recruits, and, from the afore apposite alternative thereto channels or streams, of, Civil Judges (Senior Division). However, the afore expostulation of law borne in All India Judges' Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 Association & Ors vs. Union of India, reported in (2002)4 SCC 247, has been directed, to, hold only prospective effect, and, also a further mandate, is, borne therein, vis-a-vis, the seniority of the apposite inductees, into, service, as, Addl. District Judge(s)/District Judge(s), especially prior to 31st March, 2003, even if, their respective inductions

thereto, is, in excess of the apposite quota, rather not ordaining any disturbances or unsettling(s). The relevant paragraphs No.27, 28 and 29, of, the verdictsupra rendered, by, the Hon'ble Apex Court, reads as under:-

> "27. Another question which falls for consideration is the method of recruitment to the posts in the cadre of higher judicial service i.e., District Judges and Additional District Judges. At the present moment, there are two sources for recruitment to the higher judicial service, namely, by promotion from amongst the members of the sub-ordinate judicial service and by direct recruitment. The subordinate judiciary is the foundation of the edifice of the judicial system. It is, therefore, imperative, like any other foundation, that it should become as strong as possible. The weight on the judicial system essentially rests on the subordinate judiciary. While we have accepted the recommendation of the Shetty Commission which will result in the increase in the pay scales of the subordinate judiciary it is at the same time necessary that the judicial officers, hardworking as they are, become more efficient. It is imperative that they keep abreast of knowledge of law and the latest pronouncements, and it is for this reason that the Shetty Commission has recommended the establishment of a judicial academy which isvery necessary. At the same time, we are of the opinion that there has to be certain minimum standards, objectively adjudged, for officers who are to enter the higher judicial service as Additional District Judges and District Judges. While we agree with the Shetty Commissionthat the recruitment to the higher judicial service i.e., the District Judge cadre from amongst the advocates should be 25 per cent and the process of recruitment is to be by a competitive examination, both written and viva voce, we are of the opinion that there should be an objective method of testing the suitability of the subordinate judicial officers for promotion tothe higher judicial service. Furthermore, there should also be an incentive amongst the relatively junior and other officers to improve and to compete with each other so as to excel and get quicker promotion. In this way, we expect that the calibre of the members of the higher judicial service will further improve. In order to achieve this, while the ratio of 75 per Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 cent appointment by promotion and 25 per cent by direct recruitment to the higher judicial service is maintained, we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned : 50 per cent of the total post in the higher judicial services must be filled by promotion on the basis of principle of merit-cum-seniority. For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case law. The remaining 25 per cent of the posts in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (senior division) should be not less than five years. The High Courts will have to frame a rule in this regard.

28. As a result of the aforesaid, to recapitulate, we direct that recruitment to the higher judicial service i.e., the cadre of District Judge will be:

[1](a) 50 per cent by promotion from amongst the Civil Judges (senior division) on the basis of principle of merit-cum-seniority and passing a suitability test;

(b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (senior division) having not less than five years qualifying service; and

(c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.

[2] Appropriate rules shall be framed as above by the High Courts as early as possible.

29. Experience has shown that there has been a constant discontentment amongst the members of the higher judicial service in regard to their seniority in service. For over three decades, large number of cases have been instituted in order to decide the relative seniority from the officers recruited from the two different sources, namely, promotees and direct recruits. As a result of the decision today, there will, in a way, be three ways of recruitment to higher judicial service. The quota for promotion which we have prescribed is 50 percent by following the principle "merit-cum-seniority" 25 percent strictly on merit by limited departmental competitive examination and 25 per cent by direct recruitment. Experience has also shown that the least amount of litigation in the country, where quota system in recruitment exists, in so far as seniority is concerned, is where a roster system is followed. For example, there is, as per the rules of the Central Government, a 40-point roster which has been prescribed which deals Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 with the quotas for Scheduled Castes and Scheduled Tribes. Hardly, if ever, there has been a litigation amongst the members of the service after their recruitment as per the quotas, the seniority is fixed by the roster points and irrespective of the fact as to when a person is recruited. When roster system is followed, there is no question of any dispute arising. The 40- point roster has been considered and approved by this Court in R.K. Sabharwal and Ors. v. State of Punjab . One of the methods of avoiding any litigation and bringing about certainty in this regard is by specifying quotas in relation to posts and not in relation to the vacancies. This is the basic principle on thebasis of which the 40- point roster works. We direct the High Courts to suitably amend and promulgate seniority rules on the basis of the roster principle as approved by this Court in R.K. Sabharwal's case (supra) as early as possible. We hope that as a result thereof, there would be no further dispute in the fixation of seniority. It is obvious that this system can only apply prospectively except where under the relevant rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the higher judicial service has to be protected but the roster has to be evolved for the future.

Appropriate rules and methods will be adopted by the High Courts and approved by the States, wherever necessary by 31st March, 2003."

44. There is no quarrel so as to 14. Emphasisingly, the, contra law laid down by the Apex Court and cited on therewith rather hence decision, rendered, by, the behalf of the petitioners in M.S. Sandhu & Hon'ble Apex Court, in, a, case titled, as,All another vs. State of Punjab & others (2014) 6 India Judges' Association & Ors vs. Unionof SCC 514, Narinder Singh vs. Surjit Singh (1984) India, reported in (2002)4 SCC 247, hence 2 SCC 402, M/S Shenoy & Co. represented by its prescribing, the, adoption, of, a "Post Based partner Bele Srinivasa Raoa Street Bangalore and Roster", rather than, of a "Vacancy Based others vs. Commercial Tax Officer, Circle II, Roster", for, all relevant purposes, is, the Bangalore and others, (1985(2) SCC 512, perennial governing rule, for the contentious Spencer & Company Ltd. And another vs. purpose, (a) whereas, the latter inappropriate Vishwadarshan Distributors Pvt. Ltd. & others mechanism becoming acquiesced, to become (1995)1 SCC 259, M/S Bayer India Ltd. And recoursed, by, this Court, for assigning, the, inter others vs. State of Maharashtra& others (1993) se seniority amongst, the, contesting litigants 3 SCC 29 and U.P. Pollution Control Board & concerned, thereupon, adoption(s) thereof, ors. vs. Kanoria Industrial Ltd. And another become wholly unvindicable. Moreover, with (2001) 2 SCC 549, that thejudgments/orders the verdict supra constituting, a,judgment in rem, passed by the Apex Court are binding on all the also bolsters an inference, qua, it purveying, a Courts, including the High Courts in India. recurring, and, continuous cause(s), of, action, Therefore, the judgment passed by the Apex vis-a-vis, all the aggrieved concerned, to, ensure Court in Judges' Association case is binding on qua, the, mechanism contemplated therein, this Court and in compliance thereto, respondent hence, for the requisite purpose, becoming No. 2 has framed 2004 Rules accordingly. The completely recoursed, by, the High Court, (b) said respondent even is following the Rules in the thereupon, upon, its evident acquiesced non- matter of recruitment to the H.P. Judicial Service recoursing, and, also dehors, the earlier comprising Civil Judges, Sr. Civil Judges and unsuccessful challenges, as, raised by the District/Addl. District & Sessions Judges on and petitioners, through, the Judicial Officers' w.e.f. Association, rather not begetting against them, Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 20.3.2004. However, in the matter of any, estopping inference(s), of, waivers, recruitment to the cadre of District/Addl. acquiescence, and, abandonments, (c) nor also District & Sessions Judges, "vacancy based the hereat belated challenge, vis-a-vis, the roster" continued to be followed by way of an gradation lists, wherein, theirs names occur inadvertent mistake till 31.3.2010. When such below, the private respondents, would mistake came to the notice of the said adversarially work against them, merely on anvil respondent, it has been rectified and on and of vices, of, delay, and, laches, hence purportedly w.e.f. 31.3.2010, the said respondent isfollowing operating against them. the "post based roster". In order to bring the Immense fortification, to, the afore view, is, quota meant for direct recruits as prescribed garnered, from, a, decision of the Hon'ble Apex under the Rules at par the recruitment from this Court, rendered, in, a case titled as Fazlunbi vs. category was stopped and the posts in existence K. Khader Vali and another, reported in (1980)4 as on 31.3.2010 have been filled up by way of SCC 125, the relevant paragraphs No.7 to 10 promotion from amongst eligible Sr. Civil whereof, stand extracted hereinafter:-

> Judges/by way of accelerated promotion. "7. We need not labour the point because this Therefore, the loss on account of inadvertent Court has already interpreted Section 127(3)(b) mistake attributed to respondent No. 2 either in Bai Tahira and no judge in India, except a caused to promotee or the eligible Sr. Civil larger bench of the Supreme Court without a Judges by way of accelerated promotion has now departure from judicial discipline can whittle been made good. The direct recruits had also to down, wish away or be unbound by the ratio suffer as their recruitment stopped till each thereof. The language used is unmistakable, the category gets its quota. logic at play is irresistible, the conclusion reached is inescapable, the application of thelaw as expounded there is an easy task. And yet, the Division Bench, if we may with respect say so, has, by the fine art of skirting the real reasoning laid down 'unlaw' in the face of the law in Bai Tahira which is hardly a service and surely a mischief, unintended by the Court may be, but embarrassing to the subordinate judiciary.
>
> 8. There is no warrant whatever for the High Court to reduce to a husk a decision of thisCourt by its doctrinal gloss. The learned judges observe, to our bafflement-

The decision in Bai Tahira v. Ali Hussain Fassalli, (supra) is to be confined only to the facts of that case. It falls to be distinguished for the following reasons : (i) the compromise of 1962 referred to therein was construed as not affecting the rights of a Muslim divorced wifein seeking to recover maintenance Under Section 125 Cr.

P.C., (ii) what was considered tohave been paid to the Muslim divorced wife wasonly the Mahar amount and not the maintenance amount payable for the Iddat period, (iii) The Mahar amount paid revealed a rate of interest which for a person residing in Bombay was held to be wholly inadequate to do duty for maintenance allowance, (iv) there was nothingin that case to show that the amount of Rs. 130/-paid towards Iddat represented the payment of a sufficient maintenance amount for the three months period of Iddat and (v) the husband in that case did not raise any plea based on Section127(3)(b) Cr. P.C.

9. Let us quote a few passages from this Court's ruling in Bai Tahira (supra) to express the untenability of the excuse not to follow the binding ratio:

> Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 Nor can Section 127 rescue the respondent, from his obligation, payment of mehar money, as a customary discharge, is within the cognizance of that provision. But what was the amount of mehar ? Rs. 5000/-, interest from which could not keep the woman's body and soul together for a day, even in that city where 40% of the population are reported to live on pavements, unless she was ready to sell her body and give up her soul The point must be clearly understood that the scheme of the complex of provisions in Chapter IX has a social purpose. III-used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of Section, 127. Where the husband, by customary payment at the time of

divorce, has adequately provided for the divorce, a subsequent series of recurrent doles is contraindicated and the husband liberated. This is the teleological interpretation, thesociological decoding of the text of Section 127. The keynote though is adequacy of payment: which will take reasonable care of her maintenance.

The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate the rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation, not by a ritual exercise rooted in custom. No construction which leads to frustration of thestatutory project can secure validation if the court is to pay true homage to the Constitution. The only just construction of the section is that Parliament intended divorcees should not derive a double benefit. If the payment by any mehar or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the order Under Section 125 not mathematically but fairly-then Section 127(3)(b) subserves the goal and relieves the obliger, not pro tanto but wholly. The purpose of the payment 'under any customary or personal law' must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole scheme of Section 127(3)(b) is manifestly to recognise the substitute maintenance arrangement by lump sum so paid and is potential as provision for maintenance to interpret otherwise is to stultify the project. Law is dynamic and its meaning cannot be pedantic but purposeful. The proposition, therefore, is that no husband can claim Under Section 127(3)

(b) absolution from his obligation Under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance.

9. Granville Williams in his "Learning the Law"

(pp. 77-78) gives one of the reasons persuading judges to distinguish precedents is "that the earlier decision is altogether unpalatable to the court in the later case, so that the latter court wishes) to interpret it as narrowly as possible".

The same learned author notes that some judges may "in extreme and unusual circumstances, be apt to seize on almost any factual difference between this previous case and the case before him in order to arrive at a different decision. Some precedents are continually left on the shelf in this way, as a wag observed, they become very "distinguished". The limit of the process is reached when a judge says that the precedent is an authority only "on its actual facts".

We need hardly say that these devices are not permissible for the High Courts when decisions of the Supreme Court are cited before them not merely because of the jurisprudence of precedents, but because of the imperatives of Article 141."

(i) wherein a trite principle of law stands expounded, vis-a-vis, verdicts rendered, by the Hon'ble Apex Court, being unamenable, for, being departed from, by the High Courts, hence, in tandem therewith, the, acquiesced departure(s), from, the verdict, of, the Hon'ble Apex Court rendered in All India Judges' Association & Ors vs. Union of India, reported in (2002)4 SCC 247, and, also from, the, in consonance therewith Rule 13, borne in the H.P. Judicial Rules, can neither be brooked nor can be countenanced, irrespective, of any purported delay, and, laches, arising from any belated challenges, being made by the writ petitioners, vis-a-vis, the gradation list(s) concerned, wherein, their names occur, below, the names, of, the private respondents.

45. In the matter of seniority, as 11. The acceptance, by, one of us per the settled legal principles, the seniority (Hon'ble Mr. Justice Dharam Chand Chaudhary, already settled cannot be unsettled even if a J.), of, the submission addressed, by Mr. R.L. particular category has exceeded its quota. It has Sood, learned Senior Counsel, for, the private been held by the Apex Court in Hon'ble Punjab respondent, that, for want of further successful & Haryana High Court at Chandigarh vs. State challenges, being made by the petitioners, vis-a- of Punjab & ors., AIR 2018 SC 5284 that in case vis, the judgment recorded, upon, CWP No. 61 of any category has exceeded its quota in the cadre 1999, (a) and, also the further acceptance, by one and the appointment made as perthe Rules, the of us (Hon'ble Mr. Justice Dharam Chand promotees who have exceeded the quota neither Chaudhary, J.), of, a further submission have to be pushed down in the seniority nor their addressed, by the afore counsel, (b) that, with seniority has to be downgraded. However, the the rejected representations made, in conduct of the petitioners and the other consequence thereto, also remaining similarly situated unsuccessfully unchallenged, or remaining officers in the cadre of District/Addl. District & unchallenged, hence, by the petitioners, Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 Sessions Judges in not approaching the Court in thereupon, they render themselves rather guilty accordance with law and pursuing their of vices, of, delay and laches, and, also hence grievances in a manner to bring the same to the concomitant stain, of, acquiescence(s), logical end and rather withdrawn the claims they permeating the writ petition(s), (c) necessarily brought to this Court and also the Apex Court also cannot become countenanced, by, the time and again without taking the same to its undersigned, as, the afore verdict was made logical end lead to the only conclusion that they prior, to, the verdict recorded by the Hon'ble had acquiesced their claims and also these writ Apex Court, in, a case titled, as, All India Judges' petitions having been filed in the year 2018 are Association & Ors vs. Union of India, reported in definitely barred by delay and laches. (2002)4 SCC 247, (i) and also was rendered prior to the consequent therewithhence drawn rather In support of such findings, support can also be the apposite hereat validly hence operating Rule drawn from the judgment of the Apex Court in 13, rule whereof does extantly govern(s), and, Union of India & ors. vs. Tarsem Singh, (2008) regulate(s), the, determination(s), of, inter se 8 SCC 648. The relevant text of the judgment seniority, of, various contemplated inductees, reads as follows: into, the, rank of Addl. District Judge(s)/District "7. To summarise, normally, a belated service Judge(s), and, who become drawn, from, various related claim will be rejected on the ground of streams or channels. Moreover, also when, any delay and laches (where remedy is sought by deviation from the afore, are, condoned upto filing a writ petition) or limitation (where remedy 31.03.2003. is sought by an application to the Administrative (ii) Emphasisingly also, whereas, the afore Tribunal). One of the exceptions to the said rule verdict, and, consequent therewith drawn Rule is cases relating to a continuing wrong.

Where a 13, does reiteratedly constitute, the, solitary service related claim is based on a continuing parameter, and, also the governing regimen, for, wrong, relief can be grantedeven if there is a long the contentious purpose. Moreover, any delay in seeking remedy, with reference to the rejection(s), of, the apposite representations, as, date on which the continuing wrong commenced, made by the petitioner, hence, by the High Court, if such continuing wrong creates a continuing on its administrative side, also subsequent to the source ofinjury. But there is an exception to the decision, rendered in All India Judges' exception. If the grievance is in respect of any Association & Ors vs. Union of India, reported in order or administrative decision which related to (2002)4 SCC 247, is also both an unworthy, and, or affected several others also, and if the re- also an inefficacious ground, for, effacing the opening of the issue would affect the settled binding, and, conclusive diktat, of, law, as, rights of third parties, then the claim will not be recorded by the Hion'ble Apex Court,in, the entertained. For example, if the issue relates to afore case, and, nor also can either blunt or payment or re-fixation of pay or pension, relief reduce the vigour, of, the apposite Rule 13,as, may be granted in spite of delay as it does not has been incorporated, in, the H.P. Judicial affect the rights of third parties. But if the claim Services Rules, hence, in pursuance to the involved issues relating to seniority or decision, of, the Hon'ble Apex Court, as, promotion etc., affecting others, delay would rendered, in, the afore case. render the claim stale and doctrine of 12. One of us (Hon'ble Mr. Justice laches/limitation will be applied. In so far as the D.C. Chaudhary, J.) has strenuously emphasised, consequential relief of recovery of arrears for a upon, the factum qua with both the writ past period, the principles relating to petitioners or one of them, in, contemporaneity, recurring/successive wrongs will apply. As a vis-a-vis, their induction into service, and, of, the consequence, High Courts will restrict the private respondents, rather being not borne, in, consequential relief relating to arrears normally the cadre of District Judge/Additional District to a period of three years prior to the date of filing Judge, hence, theirsbeing barred, to, at this stage, of the writ petition." hence, stake any claim, for, theirs securing, a,

46. The ratio of the judgment of rank in the seniority list, rather above the private the Apex Court in State of Himachal Pradesh & respondents, (a) especially in contemporaneity, ors. vs. Rajesh Chander Sood (2016) 10 SCC vis-a-vis, the, induction(s) into service, of, the 77, is that in service matters, delay and laches or private respondents. However, the afore limitation may not thwart the claim so long as it submission is also unworthy, for acceptance, (b) may be, however, if such claim if allowed does as, the apt suitable aspirants, vis-a-vis, the not have any adverse repercussions on the settled contentious post of judicial officers, are those, third party rights. The present is a case where the who were to be legitimately drawn, from, the seniority list of 2005 and also 2018 stream or feeder channel of Civil Judges (Senior (Annexures P-2 & P-16, respectively) have Division), for, hence, their claim, for, Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 been sought to be quashed. In case such relief is promotion thereto, being considered, at, the granted at such a belated stage, it will certainly requisite phase, by the High Court, (c) whereas, amount to unsettle the seniority of the officers when their valid induction thereinto, rather in the cadre settled long back which is not legally become acquiesced, to, be untenably substituted, permissible. The arguments that S.C.Kainthla, by the private respondents, hence, inacquiesced petitioner in CWP No. 2061 of2018 was inducted detraction, and, also in transgression, of, the to the cadre in the year 2006 whereas Rajeev mandate, of, the Hon'ble Apex Court, as, Bhardwaj in CWP No. 2292 of 2018 in the year rendered in a case titled as All India

Judges' 2009 and as such the cause of action accrued to Association & Ors vs. Union of India, reported in them from the said date(s) is again without any (2002)4 SCC 247, and,besides also, obviously, help to the writ petitioners as they wake up from upon, the afore alluded hence acquiesced breach deep slumber for the first time only in the year of Rule 13, as, became promulgated, in 2014 when I.A. No. 334 of2014 was filed in the consonance therewith, (d) whereas, they were Apex Court and thereafter when these writ necessarily available, for induction/promotion, petitions in the year 2018 in thisCourt. to the post of District Judge/Additional District

47. In a case where the impugned Judge, (e) and, who,as explicitly echoed, in, the seniority list was published at least 12 times was report of the Hon'ble Judges Committee, rather sought to be quashed, the apex Court in were untenably declined, their right for being V.Bhasker Rao & others vs. State of A.P. & ors. considered for promotion, vis-a-vis, the, (1993) 3 SCC 307 has held as under: apposite promotional post(s). Since the afore declinings, are not grooved, in any further "10. Mr. Madava Reddy then contended that the reason, qua theirs being either unsuitable, for, petitioners were appointed in the years 1981 and promotion, to, the rank of District since then till the year 1988 twelve seniority lists Judge/Additional District Judge, given theirs have been published showing the petitioners thereat facing proceedings, of, mis-conduct (f) below respondents 4 to 16. At no point of time or theirs being otherwise unsuitable or theirs not they challenged the seniority lists in the Court. passing any prescribed suitability test, for, the Even when the writ petitions filed by Chalapathi relevant purpose nor when the High Court, in its and others were pending they did not intervene reply, hence, projects any further reason, qua, before the High Court. Thepetitioners, according hence, any dire exigencies, of, service or for any to Mr. Madava Reddy, areguilty of gross delay other scribed well reasoned circumstances, their and latches and as such are not entitled to get non induction, to, the promotional post, of, relief by way of this petition under Article 32 of District Judge/Additional District Judge, rather the Constitution of India. becoming necessitated, (g) thereupon, the non consideration, of the afore contemplated stream, of, valid inductees, as, Additional District

11. We see considerable force in both the Judge/District Judge, or their non contentions raised by Mr. Madava Reddy. We consideration, for, promotion thereinto, is, are, however, of the view that it would be in the wholly impermissible, and, also is arbitrary, (h) larger interest of the Service to dispose of this rather the seniority list, as, drawn by the Hon'ble petition on merits."

Judges Committee, hence, in consonance with the expostulation of law, declared in All India In such circumstances, the Judges' Association & Ors vs. Union of India, petitioners were held not entitled to invoke reported in (2002)4 SCC 247, and also in Article 32 to claim seniority over therespondents. consonance with Rule 13, as, became drawn in

51. The crux of the case law so concurrence therewith, is enjoined to berevered. cited, therefore, is that there should be no delay (I) Preeminently also for, the preeminent factum, to challenge the seniority. The seniority fixed qua, hence only thereupon, the dilution, of, the, long ago should not be disturbed. apposite Rule hence extantly governing, the, contentious inter se seniority, of, the writ petitioners, and, of the private respondents, and, encapsulating, the, trite canon, vis-a-vis, throughouts rather rigorous adoption(s), by the High Court(s), rather for, the afore requisite

purpose, hence the, norm of "Post Based Roster", than, the acquiesced invalidly adopted norm, inasmuch, as, " Vacancy Based Roster" by the High Courts, hence, would become aptly precluded.

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13. On anvil of the H.P. Judicial Officers' Association, rather unconditionally, withdrawing on 4.11.2016, CWP No.696 of 2010, as also, with Writ Petition(C) No.532 of 2009 becoming withdrawn, on 18.03.2010, despite, an order being recorded, on, 14.7.2016, by the Hon'ble Apex Court, as, embodied in Annexure R-3/F, that, the parties be relegated, to, work out their remedy, in, the said writ petition, and, also, to, await the outcome, of, the said writ petition, (i) thereupon, also, on anvil of the writ petitioners herein, not joining, in the array of petitioner, hence all the aggrieved officers concerned, who had become earlier arrayed, through, the H.P. Judicial Officers' Association, in, the afore CWPs, ratherinstituted by the latter, and, CWPS whereof, stood unconditionally withdrawn, hence,Hon'ble Mr. Justice Dharam Chand Chaudhary, J., has concluded, (a) that, with purportedly similarly situate, and, identically aggrieved, vis- a-vis, the, petitioners herein hence, accepting the drawing, of, the gradation list(s) concerned,

(b) thereupon, it begetting the apt corollary, vis- a-vis, the afore visible acquiescence, as, arose, from, the petitioners omitting to, hence join them, along with them, in, the extant petition(s),

(c) also making operational, the, estopping principles, of, waivers, and, abandonments, against, the writ petitioners, and,the latters being concomitantly baulked, to, re- agitate a controversy, rather acquiesced, by the H.P. Judicial Officers' Association, as evident, from, the H.P. Judicial Officers' Association, unconditionally withdrawing CWP No. 696 of 2010, to be finally, and, conclusively, hence earlier rested. However, the, effects, of, the afore estopping inference(s), of, acquiescence or waivers, and, abandonments, as, hence become drawn, by one of us (Hon'ble Mr. Justice Dharam Chand Chaudhary, J.), does also rather hence become emaciated, vis-a-vis, its vigour,

(d) inasmuch as, the verdict of the Hon'ble Apex Court, as, rendered in a case titled, as, All India Judges' Association & Ors vs. Union of India, reported in (2002)4 SCC 247, is, a judgment in rem, hence within, the, domain, of, the trite postulations, as, are borne, in, relevant paragraphs No. 21 to 23, of, a decision of the Hon'ble Apex Court rendered, in, a case titled, as, State of Uttar Pradesh and others vs. Arvind Kumar Sribastava and others, reported in (2015)1 SSC, the, afore relevant paragraphs whereof, read as under:-

> "21. Holding that the respondents had also acquiesced in accepting the retirements, the appeal of U.P. Jal Nigam was allowed with the following reasons(Jaswant Singh Case,(2006) 11 SCC 464):
>
> "13. In view of the statement of law as Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would

have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be veryslow in granting the relief to the incumbent.Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whetherother parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged theirretirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"

22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:

22.1 Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did notapproach the Court earlier, they are not to be treated differently.

22.2. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

22.3 However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject

matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma & Ors. v. Union of India (supra).

On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence.

23. Viewed from this angle, in the present case, we find that the selection process tookplace in the year 1986. Appointment orders were issued in the year 1987, but were alsocancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancelleation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."

wherein, a, candid expostulation of law occurs, vis-a-vis, (i) that upon, a, particular set of employees, being, accorded relief, by the court concerned, thereupon, all other identically, and, similarly situated therewith persons, also becoming enjoined to be treated alike therewith, rather through, theirs being extended similar Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 benefits; (ii) as otherwise it would tantamount, to, discrimination, and, would be violative of Article 14, of, the Constitution of India. Though, delay and laches or acquiescences hence bar the slumbering litigants, to, raise claim(s), earlier reared and granted, vis-a-vis, the peers concerned, who rather successfully agitated them through courts, yet an exception thereto, is, also carved therein inasmuch, as qua, upon, any judgment pronounced by courts oflaw, being, a, judgment in rem, hence, with an intention, to, give benefit to all, (iii) thereupon, the estopping inference(s), of, delay and laches or of acquiescence, rather not working against other purportedly identical, and, similarly situated persons, hence, along with their apposite peers, and, who subsequently claim an alike relief, vis- a-vis, the ones granted earlier qua their peers, preeminently rather the afore estopping vices becoming denuded, vis-a-vis, their vigour, and, force. Necessarily hence the fulcrum, of, the reasoning, assigned by one of us (Hon'ble Mr. Justice Dharam Chand Chaudhary, J.) while concurring, with an alike therewith inference, as, became earlier drawn, by the learned Single Judge of this Court, qua, with the, purported immense procrastinated delay hereat, and, also with an immense hiatus elapsing, in, theirs challenging, the, purportedly settled gradation lists, as, became much earlier thereto hence drawn, hence, naturally attracting against the petitioners, the, estopping vices, of, delay, laches, and, acquiesces (a) and, therealongwith reiteratedly also the afore immediately prior hereto alluded, conclusion, as, drawn,

by one of us (Hon'ble Mr. Justice Dharam Chand Chaurdhary, J.), rather becomes completely unhinged, (b) conspicuously, given, the verdict rendered by the Hon'ble Apex Court, in, a case titled as All India Judges' Association & Ors vs. Union of India, reported in (2002)4 SCC 247, hence, for the reasons aforestated, holding a perennial immense inviolable legal command, and, clout, (c) and, also the rules drawn in consonance therewith also enjoying, an, alike perennial command, and, fiat, (d) and, when an acquiesced breach thereof, by, H.P.High Court, is, evident, upon, the afore allusion, as, made to the afore report of the Hon'ble Judges Committee, as, drawn, in, the year 2010,

(e) wherein, the rigor, of, the afore imperative judicial diktat, and, also of the apposite therewith rules, hence, being infringed, is,openly echoed,

(f) thereupon, necessarily hence apart, from, the judgment (supra) rendered by the Hon'ble Apex Court, becoming a judgmentin rem, rather also makes it amenable, to be cast, in a legal mold, rendering, it hence, to, become amenable, to, a, construction qua it throughout(s) imposing, an, exacting legal Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 obligation, upon, the High Court, to, ensure the meteings, of, the completest deference thereto. Obviously, the afore valid perennial diktat, has been acquiesced, to, become breached.

Moreover when the direction(s) rendered, by,the Hon'ble Apex Court, in, I.A. No.17 of 2011 in IA No.244 of 2009 and IA Nos. 1 & 2 in IA Nos.

17/2011 in IA No. 244/2009, and IANo.334/2014, IA Nos. 335, 336, 337, 338/2015 and IA No. 339 & 341/2016 in Writ Petition (Civil) No. 1022/1989, on 28.4.2016, as, aforestated, has also become revered, by the Hon'ble Two Judges' Committee, of, this Court, besides when the report, of, the Committee, is, drawn in consonance, with, the apt relevant Rule 13, thereupon, no irreverence thereto, can be brooked. Reiteratedly, thereat alone i.e. in the year 2016, hence, the contentious dispute, has been given, a, complete quietus, and, not earlier, hence thereupon, also all the afore verdicts, are inapplicable hereat. Even though, one of us (Hon'ble Mr. Justice Dharam Chand Chaudhary) has alluded, to, the recorded minutes, as, made by the Full Court, in its meeting held in the year 2017, wherethrough, the report Annexure P-12, became disapprobated, on anvil, of, a Judgement, of, theHon'ble Apex Court, rendered, in, a case titled as Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and others, reported in (1990)2 SCC 715.

However, the afore drawn minutes, by the Full Court, wherethrough, it declined to accept Annexure P- 12, also cannot weigh, with this Court, as, they are anchored, upon, a verdict, of, the Hon'ble Apex Court rendered, in , Direct Recruit Class II Engineering Officers' Association's case (supra), verdict whereof, for the reasons assigned hereinabove, is, grossly in applicable, vis-a-vis, the factual matrix prevailing hereat.

15. One of us (Hon'ble Mr. Justice Dharam Chand Chaudhary, J.) has also expressed, a, view, that, since subsequent to 2010, the, stream or feeder category of Civil Judges (Senior Division), became compensated rather for earlier purported errors or departures, from, the verdict, of, the Hon'ble Apex Court rendered in a case titled as All India Judges' Association & Ors vs. Union of India,

reported in (2002)4 SCC 247, and, also from theconsonant therewith incorporated Rule 13, (i)inasmuch, as their services became regularised, from their hitherto adhoc basis service(s), as, Presiding Officer, Fast Track Court, hence, into/as, Addl. District Judges/District Judges,

(ii) whereupon, with the afore candid wrong(s) or error(s), if any, arising from depatures, if any, from, the verdict of the Hon'ble Apex Court in Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 case supra, becoming undone, (iii) thereupon, the writ petitioners rather not holding any valid surviving, and, subsisting grievance, and, the verdict recorded, by, the learned Single Judge, being, well merited, and, warranting vindication. However, for fathoming, the,vigour, of, the afore view expressed, by, one, of, us (Hon'ble Mr. Justice Dharam Chand Chaudhary), the undersigned, had, elicited the records appertaining, to the induction into service, of, Judicial Officers or those who become drawn from the stream, of, Civil Judges (Senior Division), (iv) and, has noticed, that, two Fast Track Courts, hence, on an adhoc basis, had come to be created in the year 2003,

(v) and, also, a, notification in the afore regard was issued, on, 16.08.2003/6.8.2003, (vi) and, thereafter, through, the recorded minutes of the Full Court, held, on, 29.8.2003, certain judicial officers, holding the rank of the Civil Judge (Senior Division), were, appointed, as, Presiding Officer(s) (Fast Track Court), hence, on, an adhoc basis. However subsequently, through, a notification issued, by the Government of Himachal Pradesh, on 30thMarch, 2013, wherethrough, the hitherto adhoc Fast Track Courts, became converted into permanent courts, of, Additional District and Sessions Judges, (vii) hence, in pursuance thereto, through, the, recorded minutes of the Hon'ble Judges Committee, the, hitherto adhoc services, of, the judicial officers, as, became drawn, from, the stream or channel, of, Civil Judges (Senior Divisions), hence were declared to be regularised, as, District Judges/Additional District Judges. However, since 2003 upto 2013, all the afore judicial officers, as, become drawn, from, the stream/channel of Civil Judges (Senior Division), rather become continued to be reflected, as holding, the, posts concerned, merely on an adhoc basis, (viii) and, conspicuously since 2003, and, upto 2013, all, the afore adhoc posts of Presiding Officers, of, Fast Track Courts, were not en-cadred post(s), rather throughout, the afore period, hence, were ex-cadred post(s). Hence, the, sequel thereof, is, that, a, 34 point roster, was applicable, hence, with all its absolutest clout, and, command, (ix) only vis-a-vis, the en-cadred posts of Additional District Judge(s)/District Judge(s), and, not vis- a-vis, the apposite ex-cadred posts, (x) besides, the, further corollary thereof, is, qua when in commensuration, with, the, canonised 34 point roster, hence, operative upto 2013, whereat the hitherto afore ex-cadred posts, were en-cadred , rather thereupto, only the, co-equal thereto hence en-cadred posts, became available, for,operating thereons rather the commensurate thereto, number(s), of, roster points, for, therethroughs, hence, determining, the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 validities, of, all the apposite contentious inductions, conspicuously at the apposite disputed phase(s), and, also for, concomitantly reckoning, the, contentious inter se seniority. In other words, the, operation, of, the 34 point roster, does solitarily, vis-a-vis, the compatible therewith encadred posts, rather becomes, the, governing or the apposite regulating parameter. Consequently, only after the encadrement hence after 2013, the hitherto adhoc posts, of, Presiding Officer, Fast Track Courts, into, permanent posts, of Additional District and Sessions Judges, the working, of, a 34 point roster, would halt, and, not earlier, (xi)

conspicuously nor when the apposite regularizations were not given any retrospective effects, nor also when any concomitant restrospectively operating additions, vis-a-vis, the roster point(s), were hence made through validly made rule(s). Necessarily, upon, increase, in, the strength, of, the apposite cadre hence after 2013, also, the requisite rules, hence, require/required, an, amendment, if, not already made.

16. Moreover, "the effect of the acquiescence", as, made by the Hon'ble Judges Committee, in the report drawn, in the year 2010, also has the necessary sequeling effect, especially, and, inasmuch, as, despite, the officers, hence manning the temporary Fast Track Courts, merely, on an adhoc basis, rather since 2004, and, upto 2010, and also despite, the afore ex-cadre posts, being donned, by the officers drawn, from, the, stream, of, Civil Judges (Senior Division), yet the Hon'ble Judges Committee, rather propounding, a, candid view that there still exist breaches ordepartures, from, the verdict of the Hon'ble Apex Court rendered, in, a case titled, as, All India Judges' Association & Ors vs. Union of India, reported in (2002)4 SCC 247, (a) "is, qua hence," the High Court, acquiescing, to, the operation, of, a 34 point roster, vis-a-vis, the apposite encadred posts, and, not qua ex-cadre posts. Reiteratedly, the afore acquiescence also obviously estops, the, High Court, to, contend qua the afore adhoc posts, existing prior to 2013, becoming unamenable or baulking the play(s), of, a 34 point roster vis-a-vis, the thereupto i.e. from 31.3.2003 upto 2013, hence, the co-equal thereto rather en-cadred posts. Emphasisingly, hence, also the afore expressed view, by one, of, us(Hon'ble Mr. Justice Dharam Chand Chaudhary, J.) becomes benumbed, and, also become blunted, vis-a-vis, its vigour, if any, and, nor it can be befittingly concluded, that, the afore purported compensatory measures, hence, mitigate the grievance(s), of, the writ petitioners.

17. Now at, the preeminent reason, Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 which prevail(s), upon, the undersigned to validate, the, report, of, Hon'ble Judges Committee, report borne in Annexure P-12, is, grooved in (a) the verdict of the Hon'ble Apex Court rendered in a case titled, as, All India Judges' Association & Ors vs. Union of India, reported in (2002)4 SCC 247, holding perennial force, and, applicability, and, also, its purveying a continuous, and, also, a, repeated cause, of, action to the aggrieved concerned. (b) the perenniality, of, the verdict, of, the Hon'ble Apex Court, as, rendered in the afore case, necessarily can not be deemed, to, ever slumber or become redundant, and, nor also any purported, slumbering(s), and, acquiescences, or delays and laches, if any, on the part, of, the writpetitioners, also cannot concomitantly, render halted, the, ever awakened or never slumbering, rather, the absolutest command, and, diktat of the expostulation, of, law, as, pronounced, in, the verdict rendered by the Hon'ble Apex Court, in, a case titled as All India Judges' Association& Ors vs. Union of India, reported in (2002)4 SCC 247.

Moreso, when it has becomeacquiesced, by, the afore alluded report, of, Hon'ble Judges' Committee, to be untenably departed from.

52. No doubt in the case in hand, the subordinate Judicial Officers, including the member of the then H.P. Higher Judicial Service raked up the issue of excess quota of direct category candidates in the Higher Judicial Service and inter se seniority, however, either unsuccessfully or without taking such dispute to its logical end. In a case titled Rabindranath Bose & ors. vs. The Union of India &

ors., (1970) 1 SCC 84, where the dispute of seniority was brought to Court after about 15 years, it has been held by the Apex Court that petitioners are not entitled to the relief sought without there being any reasonable explanation as to why they approached the Court after such an inordinate delay.

and on behalf of the petitioners also, reliance has been placed on the judgment of the Apex court in Punjab & Haryana High Court vs. State of Punjab, 2018 SCC Online SC 1728. In this case, the direct recruits and superior JudicialOfficers of Punjab Judicial Service had assailed the seniority list dated 24.12.2015 by filing different set of writ petitions in the High Court of Punjab and Haryana in the year 2016. The writ petitions were filed and the impugned seniority list dated 24.12.2015 was set aside with the observation that promotion of officers under Rule 7(3) (a) (regular promotion) under Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 2007 Punjab Rules made beyond the quota was held as adhoc and the promotees also not held entitled to get benefit of that service for the purpose of seniority and rather they wereordered to be placed at the bottom of the seniority after direct recruitment. Similarly, the direct recruits were also not held entitled for being considered as members of the cadre from the date of their recommendation by the High Court to the State for appointment and as a result thereof their seniority was ordered to be recast.

61. Aggrieved by the judgment passed by the Division Bench of Punjab and Haryana High Court, Civil Appeal Nos. 5518-23 of 2017 came to be filed in the Apex Court. The Apex Court has held as under:

> "70. In view of the foregoing discussion, we come to the following conclusions:
>
> 1) Promotion of fifteen officers under Rule 7(3)(a) cannot be held beyond their quota.
>
> 2) The promotion of fifteen officers cannot be s aid to be ad-

hoc nor they can be directed to be put at the bot tom of the seniority list.

3) The High Court even though accepted the pri nciple that roster is applicable in the seniority but in the operative portion of the judgment in paragraph 208 did not issue any direction to recast the seniorit y as per the roster given in the Appendix--

B which is an apparent error committed by the High Court.

4) Rule 2007 having been brought in place to gi ve effect to the judgment of this Court in All India Judges association case, (2002) 4 SCC 247, while interpreting the Rules 2007 the direction issued by this courthave to be kept in mind and rules cannot be interpreted in a manner so as to violate the directions issued by this Court in the above judgment.

5) Rule 7(4) read with Appendix-B has to be re ad in the light of direction of this Court in All India's cas e and harmonious construction of the rule clearly indicates that roster which has been expressly made appli cable for filling the post of all the three streams shall be applicable while determining the

seniority."

Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 And granted the following reliefs:

> "71.
>
> In view of foregoing discussion, the seniority lis t dated 24.12.2015 is to be set aside.
>
> After setting aside the seniority list, two courses are open. Firstly, to re mit this matter to the High Court again to re-
>
> cast the seniority list as per our direction and secondly, to finalize sen iority list in this judgment itself. We choose to a dopt the second course for two reasons:
>
> a) Already period of three years has elapsed when the tentative seniority list was published. Finalization of seniority as early as possible is essential and ne cessary for administration of justice.
>
> b) There is no dispute regarding interse -
>
> seniority of the promotees under Rule 7(3)
>
> (a) and issue pertaining to interseseniority of out of turn promotees and direct recruits have already been finalized by us. Only exercise which is to be undertaken is to place officers of three streams inaccordance with the roster as indicated in Appendix-

B. After placing the officers of three streams, the seniority position as per roster comes as foll ows: ..... "

> 62. It is thus seen from the conclusion drawn by the Apex Court that 15 officers promoted under Rule 7(3)(a) were not held to be promoted beyond their quota andrather as per rules and neither their promotion was held to be adhoc nor they were required to be placed at the bottom of the seniority list.
>
> 63. On the ratio of this judgment, Mr. K.D.Sood, learned Sr. Advocate has argued that the recruitment made prior to 31.3.2010 being under the Rules need no interference nor the direct recruits to be pushed down and assigned the seniority below the petitioners. However, to place reliance on this judgment would amount to touch the merits which in the case in hand cannot be done in view of the findings hereinabove that the claim of the petitioners is stale and the writ petitions are barred by the principle of delay and laches.

Otherwise also, in the judgment (supra), the seniority list of 4.12.2015 was challenged without any delay i.e. in the year 2016 whereas in the case in hand all the seniority lists w.e.f. 2005 onwards till 2018 have been sought to be quashed. The relief so sought in view of the findings hereinabove is, therefore, highly time barred.

64. Not only this, the private respondents in the case in hand have been selected and appointed to the cadre consequent Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 and the selection process in accordance with the Rules followed. They have been selected on the basis of their merit long back i.e. respondentNo. 3 on 18.5.2004 and respondent No. 4 on 17.12.2006. The said respondents being not at any fault can neither be pushed down nor the seniority can be assigned to them below the petitioners, at this belated stage, that too when the petitioners opted for not challenging their selection and appointment during all theseyears. The judgment of the Apex court in Ajit singh & others (II) vs. State of Punjab & ors. (1999) 7 SCC 209 & Maharashtra Vikrikar Karamchari Sangathan vs. State of Maharashtra & another (2000) 2 SCC 552 cited on behalf of petitioners are not applicable for the reason that ratio thereof would have been of some help to the case of the petitioners on merits. The claim of the petitioners, however, herein has been rejected being barred by delay and laches and they having acquiesced their claims as is apparent from the acts and deeds attributed to them and their conduct. There cannot be any quarrel to the law laid down by the Apex Court in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. And another,(1997) 6 SCC 450.

In terms of the law laid down by the Apex court in Judges' Association case, "post based roster"

in the matter of recruitment to the cadre of District/Addl. District & Sessions Judges was required to be followed after the Rules framed in the year 2004. Respondent No. 2 has started following "post based roster" on and w.e.f.

31.3.2010, as discussed in detail hereinabove. Therefore, there may be delay which as per the discussion hereinabove is on account of respondent No. 2 was inadvertently following the "vacancy based roster". The writ petitioners, however, failed to explain their conduct in not agitating the matter if not from an early date at least immediately ontheir induction to the service in the cadre ofDistrict/Addl. District & Sessions Judges. The interim application I.A. No. 334 of 2014 in which they were also applicants was ultimately declined to be entertained by the Apex court andaccordingly disposed of. Therefore, any order passed during the pendency of the application ceases to exist on its dismissal by the ApexCourt.

66. In view of what has been said hereinabove, it is held that the petitioners have laid stale claims in the writ petitions which certainly are barred by delay and laches.

Therefore, allowing the writ petitions would certainly amount to unsettle the seniority position long back. The seniority lists w.e.f. 2005 onwards cannot also be quashed at this stage. Learned Single Judge, therefore, has not Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 committed any illegality or irregularity while arriving at a conclusion that the claims laid by the petitioners in the writ petition being stale and also barred by delay and laches and also time barred cannot be accepted nor the settled seniority position can be unsettled at this belated stage.

67. The present is rather a case 18. Much emphasis has been laid, where the petitioners on account of their acts, upon, the factum, that, with the purported deeds and conduct as well as acquiescences are breaking down, of, the relevant, norm, of "Post not entitled to the relief sought in the writ Based Roster" by the High Court, for, petition. Learned Single Judge has also rightly determining, the inter se seniority, of, the held that the writ petitions are bad on account of inductees, into service, as, District clubbing of multiple causes of action for the Judge/Additional District Judge, and, who reason that when no relief has been claimed became drawn, from, the contemplated against respondents No. 5 & 6 who were streams/channels, and, in the per centum appointed to the cadre on 27.9.2007 and contemplated therein, rather becoming 23.10.2009, respectively, their inclusion in the condoned, (a) hence, in, compliance, vis-a-vis, writ petitions is obviously for an obliquepurpose the verdict, of, the Hon'ble Apex Court, as, and extraneous consideration to show that the become cited in the report made, by, the Hon'ble writ petitions have been filed within a reasonable Judges', in their meeting convened, in, the year time. It is, however, not so for the reasons in 2016, minutes whereof also became placed, detail recorded hereinabove. before the Hon'ble Apex Court. The further argument, which, has been strived to be erected thereon, is, hence the High Court, rather concomitantly, accepting, the, validity of the application hereat, of, the verdict supra, of, the Hon'ble Apex Court, in its, meeting held, in, the year 2016. Furthermore, it is also canvassed,that, in consonance therewith, there cannot, yet, be any adoption, of, the principle of "pushing down". However, even the afore submission, apart from, the hitherto assigned reason, does, further falter and also stagger(s), (i) as, the apt expostulated therewithin hence special circumstance(s), for, hence, validating, the, departing(s) therefrom, remain unpropounded,in the reply furnished, to, the writ petition, by the High Court, (ii) besides, the, stark factum that in case the High Court, had deemed it fit, to, mete, the, completest condoningcompliance(s) thereto, or to derive, the fullest vigour therefrom, (iii) thereupon, it became both imperative and incumbent, upon, the HighCourt, to apart, from, purveying, the afore drawn apposite minutes, before the Hon'ble Apex Court, to also ensure, that, submission(s) inconsonance therewith, besides also a concurrent therewith order hence occurred, in, the order(s) rendered, on, 28.4.2016, by the Apex Court, upon, I.A. No.17 of 2011 in IA No.244 of 2009, and, IA Nos. 1 & IA No.334/2014, IA Nos. 335, 336, 337, 338/2015, and, IA No. 339 & 341/2016 instituted in Writ Petition (Civil) No. 1022/1989 or in the subsequent thereto proceedings embarked,upon, by the Hon'ble

Apex Court. However, neither the afore submission exists, in, the order rendered by the Hon'ble Apex Court, nor any Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022 condonation or validation, of, the afore submission(s), is, echoed therein, nor in any other order(s) rendered, by, the Hon'ble Apex Court, (a) rather with the Hon'ble Apex Court, making an order, upon, the High Court, to, retrospectively adopt, the, 34 point roster, hence, with its absolutest vigour, rather from 31.3.2003, does bringforth, a, conclusion, that, the doctrine of "pushing down", has become countenanced, by the Hon'ble Apex Court, and, also hence, a further inference, is, drawable qua breaches, if any, vis-a-vis, the vindicable adoptable norms, of, a "Post based Roster", are,uncondonable, as any condonation thereof, would beget breaches, of, the inflexible mandate, of, Hon'ble Apex Court, as, rendered in a case titled as All India Judges' Association & Ors vs. Union of India, reported in (2002)4 SCC 247, and, also, vis-a-vis, the afore orders pronounced, in the afore I.As. The afore conclusion gathers strength, from, the striking factum qua rather the afore orders, as, made, upon, the afore I.As, being not strived to bereviewed, upon, anvil, of, the citations, relied, upon, by the Hon'ble Full Court, in, its minutes, hence, drawn, in the year 2016, (a) whereupon, it becomes necessary to conclude, vis-a-vis, the High Court abandoning, the afore ground, and, also its accepting, the afore diktat, as carried, in the orders made in the afore I.As , orders whereof became complied with, by the Hon'ble Judges Committee. Paramountly, also the rule or norm, as, propounded, in the minutes, of, the meeting of the Full Court, held in the year 2016, is, applicable only, vis-a-vis, statutory rules, however, it is not applicable, vis-a-vis, the hereat finally, conclusively or completely enforceable verdict, as, became rendered by the Hon'ble Apex Court, in, All India Judges' Association & Ors vs. Union of India, reported in (2002)4 SCC 247, nor is applicable, vis-a-vis, the order rendered, on, 28.4.2016, by, the, Apex Court, upon, I.A. No.17 & 2, in, IA Nos. 17/2011, in, IA NO. 244/2009, and, IA No.334/2014, IA Nos. 335, 336, 337, 338/2015 and IA No. 339 & 341/2016, instituted, in Writ Petition (Civil) No. 1022/1989, as, thereuponthe law declared, by, the Hon'ble Apex Court, would become untenably breached.

Contrarily, the afore condonatory reliances anvilled, upon, the verdict supra are deemed, to be waived or abandoned, with, a concomitant estoppel quatherewith hence working against the High Court. Paramountly, for, all afore reasons, all the afore strived condonations, of, all the afore acquiesced departures, is, also deemed, to, be not Company Appeal (AT) No. 67 of 2022 accepted, by, the Hon'ble Apex Court. Company Appeal (AT) No. 68 of 2022 Company Appeal (AT) No. 69 of 2022

67. The present is rather a case where the petitioners on account of their acts, deeds and conduct as well as acquiescences are not entitled to the relief sought in the writ petition. Learned Single Judge has also rightly held that the writ petitions are bad on account ofclubbing of multiple causes of action for thereason that when no relief has been claimedagainst respondents No.

5 & 6 who were appointed to the cadre on 27.9.2007 and 23.10.2009, respectively, their inclusion in the writ petitions is obviously for an obliquepurpose and extraneous consideration to show that the writ petitions have been filed within a reasonable time. It is, however, not so for the reasons in detail recorded hereinabove.

64. After an analysis of the dissenting opinions, I go ahead and state the following points of difference:

> a) Whether the High Court can ignore the directions of Hon'ble Supreme Court passed in All India Judges' Association & Ors. v. Union of India, (2002) 4 SCC 247, merely on the principles of delay, latches, and acquiescence?.
>
> b) Whether, similar to the judgment authored by Hon'ble Justice Sureshwar Thakur, following the principles of remand laid down in Roma Sonkar v. Madhya Pradesh State Public Service Commission and Civil Appeal Nos. 7400-7401/2018, decided on 31.7.2018, the judgment authored by Hon'ble Justice Dharam Chand Chaudhary was also a decision on the merits or not?"
>
> 41. The Learned Counsel for the 2nd Appellant projects a plea that since the `points of difference' framed by the `Tribunal' really and clearly ignores the `real differences' in the opinion of the two Hon'ble Learned Members, especially in the context of arguments advanced by the parties, as recorded in their respective Judgments or Orders, the same are required to be reframed Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 either by the Hon'ble Appellate Tribunal or by the Hon'ble third Member of the `Tribunal', based on the directions of the `Appellate Tribunal'.
>
> 42. The Learned Counsel for the 1st Respondent (Mr. Arun Kathpalia) submits that for `an order' of a `Tribunal', there must be some kind of determination of `LIS' and in the instant case there is `no order' which determines the `issues' because of the fact that the Hon'ble Members of the `Tribunal' had rendered a divergence opinion in the subject matter in issue.
>
> 43. The Learned Counsel for the 1st Respondent comes out with a plea that `statement of point' is not `an Order' and therefore, it is not `an Appealable' one. Further, the Hon'ble Judicial Member of the `Tribunal', had not examined the `interim orders'.
>
> 44. The Learned Counsel for the 1st Respondent points out that Section 419 (5) of the Companies Act, 2013, speaks of the `Members of a Bench' `differs in opinion' on `any point' or `points' only. Moreover, according to the Learned Counsel for the 1st Respondent, the point of difference between the Hon'ble Member (Judicial) and the Hon'ble Member (Technical) of the `NCLT', Kolkata Bench, revolves around only on the `question of maintainability'.

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45. The Learned Counsel for the 1st Respondent submits that the Hon'ble Member (Judicial) of the `Tribunal' has not adjudicated the `aspect of injunction' and the formulation of point by the Hon'ble Tribunal is not `an order' and that the ingredients Section 98 of the Civil Procedure Code, 2002, does not apply to the facts of the case in three `Appeals'. As such, the instant three `Appeals' preferred by the `Appellants' are not maintainable.

46. The other argument projected on the side of the 1 st Respondent is that Section 98 of the Civil Procedure Code, 2002, is not to supplement the Companies Act, 2013, and as such, Section 98 of the Civil Procedure Code, 2002, does not apply.

47. The Learned Counsel for the 1st Respondent points out that Section 419 (5) of the Companies Act, 2013, speaks of the `Members of a Bench' differing in opinion of on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ and in this regard, there is `no decision' especially when Section 419 (5) of the Companies Act, 2013, is conspicuously silent on the term `Order'. As such, `invocation of Section 419 (5) of the Companies Act, 2013, by the `Appellants' is an incorrect one', in the `eye of Law'.

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48. The Learned Counsel for the 1st Respondent (Mr. Aryama Sundaram) submits that there is a point of difference in the interim order passed by the `Tribunal' and that there are three points of difference between the Hon'ble Members of the `Tribunal' and that the Hon'ble Members of the Tribunal had framed three issues and a decision was made on three issues.

49. The Learned Counsel for the 1st Respondent points out that Section 419 (5) of the Companies Act, 2013, does not require the `Hon'ble Original Members' of the `Bench', to provide any opportunity of hearing to the parties, while stating the `point(s) of difference' nor does it mandate supply of copy of such `point or points of difference' to the parties.

50 The Learned Counsel for the 1st Respondent points out that the `Appellants' in the `Appeals' admitted that the `point of difference' was not supplied to the parties and the same is quite clear from Para 5 of the communication dated 11.02.2022 in regard to the `point of difference'.

51. The Learned Counsel for the 1st Respondent submits that as per Section 419 (5) of the Companies Act, 2013, the `Hon'ble Referral Member' is to decide only to the `point(s) of difference' referred to by the `Hon'ble Members' and not power is vested on the `Hon'ble Member' to `add' or `modify' any `point of difference'.

Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 1st Respondent's Decisions:

52. The Learned Counsel for the 1st Respondent cites the decision of Hon'ble High Court of Gujarat in Colourtex V Union of India, reported in (2006) SCC Online Gujarat 478, wherein at paragraphs 17 and 19, it is observed as under:

17.``The provision is therefore comprised of two parts. In a case where the Bench consists of two or more than two members and there is difference of opinion amongst the members who constitute the Bench, the point of difference has to be decided according to the opinion of the majority, where there is a majority. While the latter part of the provision stipulates that where the Bench consists of two members or more than that but of even number, and the members are equally divided, it is incumbent upon such members to set out the point, or points on which they differ. Upon such point or points of difference being stated a reference is required to be made to the President who, on the administrative side, is required to pass an order for placing the case for hearing either before himself or before any other member or other members, as the facts and circumstances of the case may require, but the case, upon such a reference being made, can be heard by the President or the Member or Members only appeal. The President or the Third Member does not derive any independent jurisdiction and has no powers to decide the appeal in entirety.

19. Therefore, the members who expressed dissenting opinions are bound by the statute to state the point or points of difference and make Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 reference after making such a statement. To use the words of the learned President "an omnibus order" cannot take place of the statement on point or points of difference between the members. The entire appeal(s) cannot be referred."

53. The Learned Counsel for the 1st Respondent refers to the decision of this `Tribunal' in JM Financial Asset Reconstruction Company Limited V Samay Electronics Private Limited, reported in (2020) SSC Online NCLAT 658 , wherein at paragraph 2-3, it is observed as under:

"Mr. Sonal Jain, learned counsel representing the Appellant submits that mandate of Section 419 (5) of the Companies Act was not followed as the two Members of the Bench had conflicting views on the vital issues resulting in disposal of application in two different ways viz. one allowing admission of application under Section 7 and other rejecting it. He is accordingly beseeching this Appellate Tribunal to direct the Adjudicating Authority to follow the mandate of Section 419 (5) of the Companies Act.

After hearing learned counsel for the Appellant, we deem it appropriate to dispose of this appeal with direction to the same Bench of the Adjudicating Authority, which passed two conflicting orders, to make a reference to Hon'ble President, NCLT, if not already made, in terms of Section 419 (5) of the Companies Act, 2013, for hearing on the issues and points on which the two Members of the Bench had divergent view in

> the split verdict so that the matter is placed before a Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 third Member for hearing and the Company Petition is decided in accordance with the opinion of the majority of the Members who heard the case including the member before whom it is placed. The appeal is accordingly disposed of."

54. The Learned Counsel for the 1st Respondent adverts to the decision of the Hon'ble High Court of Allahabad in Jan Mohammed, Nainital V The Commissioner of Income Tax, reported in (1953) All 119, wherein at paragraphs 5, 6, 7 and 8, it is observed as under:

> 5.`` The third Member could, therefore, decide only the point that had been referred to him, and he could not formulate a new point for himself on which he could base his decision. It appears to us to be further clear from a reading of the sub-section quoted above that after the decision of the point or points referred to him by the third Member, the case should go back to the original Tribunal because so far as we can see, the third Member has not been given any right to decide the appeal. According to Section 5-A (6) of the Income-tax Act, the appeal must be decided by the Tribunal which must consist of a Bench of not less than two Members.
>
> 6. ..... The last part of Section 5-A(7) of the Act provides that the point or points have to be decided according to the opinion of the majority of the Members of the Tribunal who had heard the case including those who had first heard it.

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7. After the opinion of the third Member had been obtained the case should have gone back to the Tribunal for its final orders. We do not know what is the practice followed by the Tribunal. The rules framed by the Tribunal, which have been placed before us by the learned counsel, & which are relevant on this point, throw no light on the point. The rules are as follows:

> "Rule 33 (1) -- The order of the Bench shall be signed and dated by the members constituting it.
>
> "Rule 33 (2) -- Where a case is referred under Sub-section (7) of Section 5-A, the order of the member or members to whom it is referred shall be signed and dated by him or them as the case may be."
>
> "Rule 34 -- The Tribunal shall, after the order is signed, cause it to be communicated to the assessee and to the Commissioner."

8. These rules do not, however, show that it was intended that the third Member should finally dispose of the appeal when only some point or points had been referred to him for decision. In our view, the case with the opinion of the third Member should go back to the Tribunal for final decision. The Tribunal, when finally disposing of the appeal, may, no doubt, allow other points to be

raised before it, if they consider it proper. The third Member, however, can only answer the point or points that were referred to him for decision and on which there was a difference of opinion."

55. The Learned Counsel for the 1st Respondent submits that the Order Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 dated 20.09.2021 passed by the Hon'ble Third Member was not assailed by the Appellants and the same had attained finality. Hence, the Appellants are estopped from taking a `contrary view' and further that the issue is barred by the `Principle of Res judicata' from being reopened.

56. The Learned Counsel for the 1st Respondent points out that there can be no `point of difference' on the `issue of interim relief'. Both the Hon'ble Members of the `Tribunal' had mutually and correctly agreed that the sole point of difference between them in their judgments `whether the Company Petitioners are maintainable or not'? In short, the `Appellants' are making an endeavour to expand the scope of reference to the `Referral Member' in an `unjustified manner'.

57. The Learned Counsel for the 1st Respondent contends that there is no valid authorization by the `Board of Directors' of the `1st Respondent companies' to and in favour of Learned Senior Counsel Mr. C. Aryama Sundaram and further that the said Learned Senior Counsel with his instructing Learned Counsel have been illegally instructed by the former delinquent Directors of the 1st Respondent, who no longer are Directors of the 1st Respondent to appear on behalf of the 1st Respondent.

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58. It is the clear cut stand of the 1st Respondent that on behalf of the 1st Respondent / Company, Learned Senior Counsel Mr. Arun Kathpalia is validly authorised to `appear' and to `advance' arguments for the 1st Respondent.

59. The Learned Counsel for the 1st Respondent refers to the decision in Hanutram Chandamul V Commissioner of Income Tax (Reference under IT Act, 1922), reported in (1953) Vol. 23 ITR at Page 445, Spl pgs: 446 to 451, wherein, on a `difference of opinion' between Members of the Income Tax Appellate Tribunal, the case was referred to the President of the `Tribunal' for decision without formulating the `point or points of difference', it was among other things observed and held as under:

> "..... Section 5A of the Income-tax Act requires that if the members of the Tribunal are equally divided they should state the point on which they differ and the case shall be referred to the President of the Tribunal for hearing on such point by one or more of the other members of the Tribunal and "such point shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case including those who first heard it"

In the present case it is manifest that as regards quantum of assessment not only two members of the Appellate Tribunal but also the President Company Appeal (AT) No. 67 of 2022 Company

Appeal (AT) No. 68 of 2022 have each of them taken a different view. It is manifest that there is no majority opinion in favour of any particular figure of assessment. In a matter of this description where there is difference of opinion as to the quantum of assessment, we think that the President or the third member to whom the case is referred is legally bound to agree with the figure of assessment either according to the Accountant Member or according to the Judicial Member. It is not open to the President or the third member to take a different view as to the quantum of assessment. The only course open to him is to agree with the figure of assessment according to the opinion of the Judicial Member or the opinion of the Accountant Member. The reason is that if the President takes a different view as to the quantum of assessment there is no majority opinion in favour of any particular figure of assessment and the machinery provided by Section 5A(7) would become unworkable. It was suggested by Mr. Gopal Prasad during the course of argument that the majority opinion in this case is for the assessment of Rs. 8,143. This argument proceeds on the basis that when there is a judgment for Rs.8,143, the judgment must for the purpose of Section 5A(7) be regarded as given in respect of each rupee or groups of tens or hundreds of rupees. If the judgment of the three members of the Tribunal is so dissected, it was argued that there is a majority opinion in favour of Rs.8,143 which was the quantum of assessment according to the view taken by the President. We are unable to accept this view. It is not permissible on a correct interpretation of Section 5A(7) to divide the opinions of the Members of the Tribunal into compartments Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 and to make apportionment piecemeal of the figure of assessment which each of the members of the Tribunal has adopted. There is of course an obvious difficulty in applying the principle of the section in a case where there is difference of opinion between the members as regards quantum of assessment. In this respect there is a lacuna in the statute. But it is not the function of a Court to fill in the gap left in an Act of the Legislature, and to speculate with what material the legislature would if it had discovered the gap, filled it in. As section 5A(7) stands at present, we think that the correct interpretation is that the President or the third member to whom the case is referred may only agree with the quantum of assessment taken by one or other of the two differing members and it is not open to him to take a third view as regards quantum of assessment."

For these reasons we think that the opinion of the President in this case is not legally valid and that the assessment cannot be legally completed in accordance with the direction contained in the order of the President of the Appellate Tribunal. The two questions formulated in the statement of the case must be answered to the above effect. The result therefore is that the reference under Section 5A(7) to the President of the Tribunal is incompetent and the case must now go back to the Income-tax Appellate Tribunal for being dealt with and disposed of in accordance with law."

60. The Learned Counsel for the 1st Respondent (Mr. Aryama Sundaram) contends that the point of reference is `vital' and it affects the 1st Respondent Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 right and therefore the right to agitate in `law' is very much available to the 1st Respondent. In this connection, the Learned Counsel for the 1st Respondent submits that if something affects the right of a `Litigant' in a `Judicial proceedings', then, it is a `Judicial Order', which can be questioned before a "Judicial / Quasi-judicial Fora". Before an `Administrative Authority', `an Administrative Order' can be assailed.

61. The Learned Counsel for R1 (Mr. Aryama Sundaram) comes out with a plea that the Hon'ble Members had differed on four points and there was a `wrongful exercise of jurisdiction', and as such, the 1st Respondent in Law as a right to correct or set right the same in an `Appeal'.

62. The Learned Counsel for R1 (Mr. Aryama Sundaram) points out that the difference between the two Hon'ble Members had arose at prima facie stage itself and the wings of the 1st Respondent were clipped by the `Tribunal' in not making a proper reference. In this connection, on behalf of the 1st Respondent Mr. Aryama Sundaram, the Learned Counsel points out that the Hon'ble Bench of the Tribunal was considering an application for an `Interim Relief' and in fact, the Hon'ble Member of the Judicial had said that `no locus', laches for Annual General Meeting.

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63. On behalf of the 1st Respondent, the Learned Counsel Mr. Aryama Sundaram submits that he is authorised and instructed to `appear' on behalf of the 1st Respondent points out that the jurisdiction of the `Tribunal' under Section 241 and 242 of the Companies Act, 2013, is an `Equitable Jurisdiction' and further that the `point of reference' is vital and it affects the `right' of the 1st Respondent. Moreover, there are three `points of difference', all the three `issues' are to be determined and tat the `Order of Reference' made by the `two Members' of the `Hon'ble Tribunal' is a `Judicial Order'.

Besides these, the Learned Counsel for the 1st Respondent (Mr. Aryama Sundaram) points out that there is a wrongful exercise of the jurisdiction by the `Hon'ble Members' in formulating the `point of difference' dated 11.02.2022, in CP Nos. 112, 113 and 114/KB of 2021 on the file of `National Company Law Tribunal', Kolkata Bench. In short, according to the Learned Counsel for the 1st Respondent (Mr. Aryama Sundaram) that the `Tribunal' had clipped the wings of the 1st Respondent by not making a reference.

64. The Learned Counsel for the 2nd Respondent (in all three `Appeals') submits that the `point of difference' between the `two Hon'ble Members' of Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 the `Tribunal' is on the `aspect of maintainability' and in fact, the reliefs (B) and (C) are covered with relief (C) and they are identical issues and that the single point of difference formulated by the `Tribunal' on 11.02.2022 in Law, is not a matter of an `Appeal' before this `Appellate Tribunal', since there was `no adjudication of LIS' between the parties.

> "The Learned Counsel for the 2nd Respondent cites the decision in Commissioner of Income Tax Appellate Tribunal V Sahara India Limited (vide Income Tax Appeal Nos. 118 to 123 of 2005, decided on 24.01.2017 (with regard to the dissenting orders passed by the Income Tax Appellate Tribunal, wherein reference was made to Section 254 read with Section 255 (4) of the Income Tax Act, 1961, whereby and whereunder at paragraph 8, it is observed as under:
>
> Para 8. "In other words, we can say, when specific points of dissent were referred to be answered by Third Member, it was not open to him to sit in appeal over the matter

> and decide some questions and leave some questions unanswered in his own way. The Third Member ought to have endeavoured to answer the question referred to him in a specific manner so that the matter ultimately could have been decided by Regular Bench in the light of majority opinion but that has not been done in the case in hand. Therefore, we find that the Third Member as well as the Regular Bench have not acted in the manner, as contemplated in law."

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65. The Learned Counsel for the 2nd Respondent cites the order of the Hon'ble Madras High Court dated 23.05.2018 in the matter of STAR India Private Limited, Chennai, and Vijay Television Pvt Ltd., Chennai, (Petitioners in W.P.Nos. 44126 and 44127 of 2016) V Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, New Delhi and 3 Ors., wherein at paragraphs 4.1 and 4.2, it is observed as under:

> 4.1. "Before venturing into the case in detail, it would be appropriate to define the role of this Court as the boundary lines are to be defined, drawn and marked. Clause 36 of the Letters Patent of the Madras High Court defines and delineates the contours of the power to be exercised by the learned single Judge, when a reference is made as to the decision given on any point of difference . Apropos Clause 36:-
>
> "36. Single Judges and Division Courts:-
>
> And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, (in pursuance of Section 108 of the Government of India Act, 1915), and if such Division Court is composed of two or more Judges, and the Judges Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided (they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case included who those first heard it).
>
> 4.2. The role required to be played by a single Judge is accordingly distinctly marked. This specific role assigned is to confirm either of the decisions on a point of difference. Even in a case where the exact point of difference is not indicated, the Reference Court can formulate and proceed to answer it on a reading of the respective views. Such a role would encompass both fact and law. For concurring with a view of one as against another, the Reference Court can give its own reasons by supplementing it. On the same score, if the ultimate decision is one and the same, but

> reasons being different, the Reference Court cannot go beyond it. The power available cannot be equated with that of a review nor an exercise resulting in sitting in judgment over the other."

66. The Learned Counsel for the 3rd Respondent submits that the `point(s) Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 of difference' formulated by the `Hon'ble Members of the Tribunal' is not `an Order' because of the fact that the same is neither `an expression of any decision' nor `there being determination of any right or liability of the parties'. As such, the `point of difference' formulated by the `Tribunal' is not an `Appealable Order' and hence the `Appeals are `ex facie', `not maintainable' in `law'. In this connection, the Learned Counsel for the 3 rd Respondent adverts to Section 2 (14) of the Civil Procedure Code, which defines `an Order' meaning the `formal expression of any decision of a Civil Code which is not a decree'.

67. The Learned Counsel for the 3rd Respondent proceeds to submit that as per Section 419 (5) of the Companies Act, 2013, `no power is vested on the Referral Member to `add' or `modify' any `point of difference'.

68. The Learned Counsel for the 4th Respondent contends that when the `point of difference' was framed by the `Hon'ble Tribunal on 11.02.2022, there was no `point of merit' that was decided and the same is not an `Appealable Order' and in fact, the Hon'ble `Tribunal' had only stated about the point of difference between the Members, which was to be communicated to the Registrar, `National Company Law Tribunal' New Delhi, for further action.

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69. The Learned Counsel for the 4th Respondent points out that the `point of difference `A', framed by the `Hon'ble Tribunal' on 11.02.2022 is a `wider one' and that Section 98 of the CPC will not apply. Furthermore, the `Letters Patent Appeal' applies to the `Chartered High Court'. Added further, the Learned Counsel for the 4th Respondent refers to the decision in Rajeev Bharadwaj V State of Uttar Pradesh, reported in (2020) SCC Online Himachal Pradesh (2105). wherein at paragraph 59, it is observed as under:

> 59. "None of the decisions mentioned above state what prejudice would it cause if the third Judge also culls out the points. What difference would it actually make if another Division Bench is constituted and they state the points of difference? Authors of Letters Patent did not contemplate the current situation. Moreover, culling out the points of difference is not a herculean task but just a ministerial act, that even the third Judge can also do very comfortably. Lex necessitatis est lex temporis i.e. instantis - In a case of extreme necessity everything is common. The law of necessity is the law of time, that is time present."

and comes out with a plea that it is a `ministerial act' to glean the `points of difference' in the subject matter in issue.

70. The Learned Counsel for the 4th Respondent submits that the Civil Procedure Code is not attracted and in fact, in the present subject matter, only a resort to the Companies Act, 2013, can be made.

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71. The Learned Counsel for the 5th Respondent informs this `Tribunal', that he adopts the arguments of the Learned Counsel for Respondent No.1 Mr. Arun Kathpalia, the arguments of the Learned Counsel for Respondent No.3 Mr. Ramji Srinivasan.

72. The Learned Counsel for the 6th Respondent informs this `Tribunal', that he adopts the arguments of the Learned Counsel of R1 Mr. Aryama Sundaram.

73. The Learned Counsel for the 7th Respondent submits that the `maintainability issue' formulated by the `Hon'ble Tribunal' on 11.02.2022 covers all the four issues touching upon the `aspect of maintainability' and in reality this `Tribunal' is not an `Advance Tribunal'. Furthermore, only when the `Hon'ble Third Member' says something, then an `Appeal' will lie against the same.

74. It is the plea of the 7th Respondent if the instant three `Appeals' are not `maintainable' then, nothing can be decided and in fact, there is no `Appeal' being filed from the `Order of the Third Member' dated 20.09.2021. In fact, the `Appellants' ought to have preferred the `Appeals' against the `Order' of Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 the `Hon'ble Third Member' dated 20.09.2021. In fact, only the `Hon'ble Third Member' decision is an `Appealable' one.

75. Moreover, it is the contention of the 7th Respondent that the order of the `Tribunal' dated 11.02.2022 (where the `point of difference' was formulated) which was ordered to be communicated to the `Registrar', `National Company Law Tribunal', New Delhi, for further orders is only an `internal communication' and this is not an `Order' as per Section 420 of the Companies Act, 2013.

76. This `Tribunal' has heard the Learned Counsels appearing for the `respective Parties' on the `aspect of Maintainability' of Company Appeal (AT) Nos. 67, 68 and 69 of 2022 and noticed their contentions.

77. Section 419 (5) of the Companies Act, 2013, reads as under:

> (5) "If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it."

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78. It is pointed out that Rule 60, `matters relating to the `judgments' or `orders' of the Tribunal' (of NCLT, Rules, 2016), under Part V, `issuance of `orders' and `disposal of cases', Sub Rule 2 and 3, reads as under:

> (2) "Any Member differing as to the grounds upon which the judgment was based or some of its conclusions, or dissenting from the judgment, may append a separate or dissenting opinion. (3) In case the members who have heard the case are equally divided in passing the order or judgment, then the President shall constitute a Bench as referred in sub-section (5) of Section 419 of the Act."

Absence of pari materia provision:

79. Like Section 419 (5) of the Companies Act, 2013 (under the caption `Benches' of `Tribunal'), and Rule 60 (2) and (3) of NCLT, Rules 2016 (under the head `Matters relating to the Judgments or Orders of the Tribunal'), there is no corresponding specific provision under the Companies Act, 2013, or in NCLAT Rules, 2016, in regard to `Constitution of Bench' when Members are equally divided in passing an `Order' or `Judgment' in a given case. However, for `Removal of difficulties' and `issue of directions', Rule 104 of NCLAT Rules, 2016, enjoins that `Notwithstanding anything contained in the rules, wherever the rules are silent or not provisions is made, the Chairperson may issue appropriate directions to remove difficulties and issue such orders or circulars to govern the situation or contingency that may Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 arise in the working of the `Appellate Tribunal'. It is palatable / desirable in the interest of `Stakeholders', `Litigant Public', `Advocates', Professionals, etc., and quite in the fitness of things, that a suitable provision be brought in under the `Companies Act, 2013', and in `National Company Law Appellate Tribunal Rules, 2016', to deal with a situation of happening of `Contingency'.

80. Section 420 of the Companies Act, 2013, enjoins that;

(1) "The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit."

Section 420 (3) of the Companies Act, 2013, provides that (3) "the `Tribunal' shall send a copy of every order passed under this section to all the parties concerned."

81. Section 421 (1) of the Companies Act, 2013, says that "(1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal."

82. It is to be pointed out that Section 421 (1) of the Companies Act, 2013, corresponds to Section 10 FQ of the Companies Act, 1956, which provided that an `Appeal' could be filed only by a `person' who is `aggrieved' by an `Order' or `decision' of a `Tribunal'.

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83. Indeed, the meaning of Section 10 F of the Companies Act, 1956, provided that an `Appeal' shall lie against `any decision' or `order' passed by the Company Law Board. However, the Companies Act, 2013, provision uses the `word' in sub-section 1 of Section 421 of the Companies Act, 2013, `an Order' of the `Tribunal', which ordinarily means that an `Appeal' against `an Order' passed by the `Tribunal', shall lie even if the `Order' passed by the `Tribunal', does not finally determine the `right of parties'. It cannot be gain said that in `Law', the `Right of Appeal' is a `valuable Statutory Right'.

84. National Company Law Tribunal, Rules, 2016:

> Rule 45 (1) of the NCLT, Rules, 2016, deals with `Rights of a Party to appear before a `Tribunal' `Every party may appear before a `Tribunal' in person or through an Authorised Representative, duly authorised in writing in this behalf'.

85. National Company Law Appellate Tribunal, Rules, 2016:

> (i) To be noted that, Part III 'INSTITUTION OF APPEALS' - Procedure of the NCLAT, Rules, 2016, prescribes the Procedure for `filing of an Appeal' (vide Section 19 to 32). As a matter of fact, the `term' `Appeal' is defined in these Rules, to mean an `Appeal' filed under Section 421 (1) of the Companies Act, 2013.
>
> (ii) Rule 63 (1) of NCLAT Rules, 2016 under Part X `Deals with appearance of Authorised Representative.

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(iii) Rule 64 (1) pertains to `Proof of Engagement in respect of an Advocate who is engaged to `appear' for and on behalf of the parties, he shall submit vakalatnama'.

(iv) Rule 65 of NCLAT, Rules, 2016, `Restriction on party's right to be heard', says that `the Party who has engaged a Authorised Representative to `appear' for him before the `Appellate Tribunal', shall not be entitled to heard in person, unless permitted by the `Appellate Tribunal'.

Code of Criminal Procedure, 1973 :

86. Section 392 of the Code of Criminal Procedure under the caption `Procedure where Judges of Court of appeal are equally divided.'__ "When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion: Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re- heard and decided by a larger Bench of

Judges." Pleader:

87. It is to be pointed out that the `Lawyers' / `Advocates' / `Vakils' or `Pleaders' stand on the same footing in regard to their power to act on behalf of their clients. As per Section 2 (15) of the Civil Procedure Code, `Pleader' Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 means any person entitled to `appear' and `plead' for another in Court and includes `an Advocate', a `Vakil' and an `Attorney' of `High Court'. The privilege of a `Pleader' is to plead and claim audience. In fact, the Lawyers / Advocates, Vakils or Pleaders stand on the same footing in regard to their power to act on behalf of their clients.

Assessment:

88. It comes to be known that in CP Nos. 112, 113 and 114/KB of 2021, on the file of `National Company Law Tribunal', Kolkata Bench-I, the `two Hon'ble Members' of the `Tribunal', after hearing these matters, had given their `dissenting judgments' and hence the matter was referred to the `Hon'ble President' of the National Company Law Tribunal, Principal Bench, New Delhi, who had nominated the third Member and that the `Hon'ble Third Member' of the `Tribunal' had observed in the `Order' dated 20.09.2021, that the `points of difference' between the `Hon'ble Dissenting Members', were not placed on record and proceeded to make an `observation' that `the jurisdiction of this Bench was confined to the point/point(s) on which the Original Bench differed and the absence of any such point/point(s) placed, no other issue could be heard or adjudicated upon by this Bench, as per Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 provisions of Section 419 (5) of the Companies Act, 2013', and had not granted the interim relief, prayed for.

89. It is brought to the notice of this `Tribunal' that in the `Order' dated 22.12.2021, the `Hon'ble third Member' of the `Tribunal' (when the matter was listed) had observed that `points of difference' between the Members for `dissenting judgements' were not placed on record and hence directed the Learned Counsels to take steps to ensure the availability of all pleadings on `E-portal', before the Bench and also directed the `Registry' to take steps for completing the `E-records' of the matter and listed the matter for further consideration on 17.02.2022.

90. On 27.12.2021, the matter was mentioned before the `Hon'ble two Members' of the `Tribunal' and a request was made to frame the `points of difference' in terms of Section 419 (5) of the Companies Act, 2013, so that they can decide the matters on such `point or points of difference', as framed by them.

91. By an order dated 11.02.2022, the `Hon'ble two Members' of the `Tribunal' was pleased to formulate the `point of difference' in CP Nos. 112, 113 and 114/KB of 2021 regarding the `aspect of maintainability' of each of Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 the Company Petitions before the `Tribunal', in view of the fact that `there is no Registered Shareholding of any of the Petitioner Companies in Respondent No.1 company'.

92. As a matter of fact, the `Hon'ble Judicial Member of the Tribunal', by an `Order' dated 02.07.2021 had allowed the separate demurrer Company Application Nos. 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92 and 93/KB/2021, projected by the Respondent Nos. 1 to 3 and 7 and consequently dismissed the CP Nos. 112, 113 and 114/KB/2021.

93. However, the `Hon'ble Technical Member of the Tribunal', through an `Order' dated 02.07.2021, had observed the `issue of maintainability' should be decided after completion of pleadings at a later stage but opined that `prima facie' that the Company Petitions were `maintainable' and granted certain `interim reliefs' claimed therein.

`Order' under Civil Procedure Code:

94. Section 2 (14) of the Civil Procedure Code, 2013, defines `Order', meaning `the formal expression of any decision of a Civil Court which is not a decree'. As a matter of fact, an `Order' must be read, as it is, and the Courts' Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 intention cannot be `inferred' on the basis of an `extraneous', `evidence' and `conjecture'. Further, an `Order' must be clear, logical and is not to create confusion in the minds of the parties. It is to be remembered that if the Court passes an `Order', adjourning the hearing of the case, the same is not an `Order' as per Section 2 (14) of the Civil Procedure Code and it is not a `case' decided.

95. Be it noted, that an `Order' is a `formal Order' in contra-distinction to a `Decree'. A `Decree / Order' can come into existence only if there is an `Adjudication' of relevant `issues' which conclusively determines the `right' of the `parties'. A `Judicial Order' must contain discussions of question of issue and reasons therefor.

Order:

96. In fact, the `term' `Order' is not defined under the Companies Act, 2013. It is to be remembered that an `Order' must cause a `legal grievance' by wrongfully depriving him of something as per decision of Hon'ble Supreme Court in Adipheroz Shah Gandhi V H.M. Seervai, reported in AIR (1971) SC Page 385.

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97. At this stage, this `Tribunal' worth recalls and recollects observation made by Lord Bramwell in the case of Sanback Charity Trustee V North Stafford Shire Railway Company (1877), LR 3 Q.B.D.1 to the effect that `An Appeal does not exist in the nature of things'. A `Right' of an `Appeal' from the `Tribunal' must be given by an `express enactment' and there is no `implied right'.

98. It cannot be brushed aside that `an Order' does not necessarily mean that it should contain either a `direction' or `command'. In this connection, this `Tribunal' aptly points out that in Ramanatha Aiyar's Law Lexicon (1940 Edn) at Page 918, wherein, it is mentioned that the `word' `Order' is no doubt defined as a `mandate' or `command', but it is stated that the `word' `Order'

would mean `Judgment' or `Conclusion'.

Meaning of `Proceedings' :

99. The `term' `Proceedings' (occurring in Section 420 (1) of the Companies Act, 2013) means any proceedings pending before the `Tribunal'. It means a prescribed cause of action for enforcing a `legal right'. It includes a prescribed mode in which judicial business is conducted.

Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Meaning of `Aggrieved':

100. This `Tribunal' relevantly points out that the `term' `Aggrieved' under Section 421 (1) of the Companies Act, 2013, means a `substantial grievance', a `denial of some personal or pecuniary or private right or imposition upon a person in respect of a `Burden' or an `Obligation'.

101. It cannot be forgotten that if a `person' or a `company' is `Aggrieved'/`Affected', by `an Order' of the `Tribunal' fails / omits to prefer an `Appeal' before the `Appellate / Competent Forum', then, it amounts to `acceptance of such an Order' and in `law' cannot be permitted to `assail the Order' in the proceedings filed by the other side.

Inapplicability of Section 98 (2) of Civil Procedure Code:

102. The ingredients of Section 98 (2) of Civil Procedure Code is inapplicable to High Courts, e.g. Punjab and Haryana High Court is governed by `Letters Patent', must be referred a `Third Judge', on a `difference of opinion', between the two Judges even on a `point of fact'. In fact, Section 98 of Civil Procedure Code does not apply to the `Letters Patent Appeal', as per decision 1921 Privy Council 6.

Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Task of Third Judge:

103. It is significantly pointed out by this `Tribunal' that where the conflicting `opinion of two Hon'ble Members, are placed before the `Hon'ble Third Member or Judge', he would consider the `two opinions' and `render' his `opinion'. No wonder the `Third Judge' is completely free in resolving the `difference' as he thinks fit as per the decision of the Hon'ble Supreme Court in Babu and Three Ors. V State of Uttar Pradesh, reported in AIR 1965 SC 1467, wherein it is held as under:

> (i) "Section 429 of the Criminal Procedure Code contemplates that it is for the third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit."

104. Further, in the decision of Hon'ble Supreme Court in Hethubha Alias Jithuba Madhuba and .... V The State of Gujarat, reported in AIR 1970 SC 1266, wherein under the Caption `Headnote' and Held, it is observed as under:

Headnote:

"The three appellants were charged with offences under ss. 302 and 323 read with s. 34 of the Penal Code and appellants 1 and 2 were charged with the individual offences under ss. 302 and 323 for intentionally causing the death of A, mistaking him for V and for causing simple hurt to V. The Sessions Judge acquitted all the three Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 accused under Section 302 read with Section 34 but convicted them under Section 304 Part II read with Section 34 and sentenced them to suffer rigorous imprisonment for five years. Appellants 1 and 2 were also convicted for the offence under Section 323 and appellant 3 was convicted for the offence under Section 323 read with Section 34. All three were sentenced for these convictions to rigorous imprisonment for terms to run concurrently.

On appeal to a Division Bench of the High Court one learned Judge held, that the first appellant alone was responsible for the fatal injury on A and found him guilty under Section 302, while the second and third appellants were found guilty under Section 324 read with Section

34. The second learned Judge was of the view that all the accused must be acquitted as he was not satisfied with, the evidence and proof of the identity of the accused. The case was then placed - before a, the third learned Judge under Section 429 Cr. P.C. who held that the first appellant must `be convicted under Section 302 while the second and third appellants must be convicted, under Section 302 read with Section 34 and all of them must be sentenced to suffer rigorous prisonment for life. The conviction of the first and second appellants under Section 323 and of the third appellant under Section 323 read with Section 34 was upheld.

In appeal to this Court it was contended (i) that the third learned Judge under Section 429 Cr. P.C. could only, deal with the differences between the two learned Judges and not with the whole case; and (ii) that there was no committee intend on within the meaning of supp I.P.C. on the part of the three appellants to kill A as he was attacked by, mistake.

Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 HELD : Dismissing the appeal.

(i) Section on of the Criminal Procedure Code, states `that when the judges comprising the Court of Appeal are equally divided in opinion the case with their opinion thereon shall be laid before another Judge of the same Court and such Judge, after hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such before another Judge, and, secondly, the Judgment and order will follow the, opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case.

> (i) Section on of the Criminal Procedure Code, states "that when the judges comprising the Court of Appeal are equally divided in opinion the case with their opinion thereon shall be laid before another Judge of the same Court and such Judge, after hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such before another Judge, and, secondly, the Judgment and order will follow the, opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case. [35 D-F]"

105. It cannot be lost sight of that although the `third opinion' is rendered after considering the `earlier opinion', the `third opinion' cannot be equated to an `Appeal', in the considered opinion of this `Tribunal'. In reality, the `Third Member'/`Third Judge' based on strong grounds can `differ' from the Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 `Referring Judges' on a `point' which both the `Members'/`Judges' had agreed. The opinion of Hon'ble Third Judge is held to be a decision of a `Case', as per decision AIR 1968 Cal 220. As a matter of fact, the `Hon'ble Third Member' is to exercise discretion informed by legal traditions, arranging in an orderly and systematic manner, of course, disciplined by the `Judicial System'. Besides these, where the Judges of the Division Bench do not agree about the true effect of opinion of the Third Judge, it is open to them to obtain a clarification from the Third Judge as to what exactly he intended to convey his opinion as per decision AIR 1956 All Pg : 529.

Not a `Civil Court':

106. It is to be pointed out that the `Company Law Board' (now the `Tribunal'), exercising `jurisdiction' under Sections 397 and 398 under the Companies Act, 1956, is not a `Civil Court', as per decision AIR 2004 Bom

384. Not a case Decided:

> 107. It must be borne in mind that a `Court's Order' adjourning the `hearing of the case', is not an `Order' as per Section 2 (14) of the Civil Procedure Code and `not a case is decided', as opined by this `Tribunal'.

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108. It is to be pointed out that the `Award' given by the `Tribunal' under the Motor Vehicles Act, Section 168 does not have to be the `status of a Judgment', `Decree' or `Order' contemplated by the Civil Procedure Code as per decision AIR 1994 Raj Pgs 44, 49 (DB).

Bench Discretion:

109. It is relevantly pointed out that it is `Discretionary for the Bench' hearing an `Appeal' to state `the Point of Law', on which, they differ as per decision AIR 1938 All Pg : 641.

110. In the instant case on hand before this `Tribunal', the `point of difference' `stated / formulated' by the `Hon'ble Members of the National Company Law Tribunal' dated 11.02.2022 in CP Nos. 112, 113 and 114/KB of 2021 is a mere statement upon a `Ministerial Act' and it is neither a `preliminary order' nor `an interlocutory order' and does not partake the character and status of `an Order', as per Section 421 (1) of Companies Act, 2013. Further, the `point of difference' formulated by the `Hon'ble Members of the `Tribunal' on 11.02.2022 does not finally and conclusively determine the `Right of Parties', in quite earnest, as opined by this `Tribunal'.

111. Although, in the instant case, it is argued on the side of the `Appellants' that an `Appeal' lies against `any Order' passed by the `Tribunal' and Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 therefore, the instant Company Appeal Nos. 67, 68 and 69 of 2022 are preferred before this `Tribunal' as against the `Order' dated 11.02.2022 made in CP Nos. 112, 113 and 114 of KB of 2021, because of the fact that the `term' `any proceedings' before the `Tribunal' occurring in Section 420 (1) of the Companies Act, 2013, is wider than `Judicial Proceedings', this `Tribunal' is of the earnest opinion that the said `impugned order' dated 11.02.2022 of the `Tribunal' in CP Nos. 112, 113 and 114 of KB of 2021 cannot be termed by no stretch of imagination as `an Order', in the teeth of culling out of `the point of difference' (between the `Hon'ble Two Members of the Tribunal') and formulating the same, is just a `Ministerial Act' (`on Administrative Side') of the `Tribunal', without an entry upon any `Adjudicatory Process'. It does not effectively determine any `Right' or `Obligation' of the `Parties' to the `LIS'.

Apart from that, the `impugned order' dated 11.02.2022, passed by the `Hon'ble Members' is nothing but a `part and parcel' of their `Statutory Duty' because of their `occupational status' enjoined upon them, in referring the `matter' to the `Hon'ble President' of the Principal Bench of National Company Law Tribunal, to resolve the `impasse' in regard to the `point of difference' formulated by them and `no opportunity' is to be provided to the `Parties' for the `purpose of hearing', when Section 419 (5) of the Companies Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Act, 2013, is conspicuously silent in this regard, of `Hearing the Parties' and also there is no requirement of `supply of formulation of the `point of difference' framed by the `Hon'ble Members' of the `Tribunal' on 11.02.2022 to the `Parties'. Viewed in that perspective and looking at from any angle, the `Company Appeal Nos. 67, 68 and 69 of 2022 filed by the Appellants (against the `impugned order' dated 11.02.2022 in CP Nos. 112, 113 and 114 / KB of 2021) before this `Appellate Tribunal' are per se `not maintainable' in the `eye of law' and they are `otiose' one, because of the crystalline fact that the formulation of `point of divergence' is not an `Appealable Order', pending rendering of an `opinion'/`decision' by the `Hon'ble Third Member' (on the `aspect of maintainability' of CP Nos. 112, 113 and 114/KB of 2021 on the file of the `Tribunal') in embarking upon the `aspect of resolving the differences/controversies centering around the subject matter in issue. Resultantly, the instant `Appeals' fail.

Disposition:

> In fine, the instant Company Appeal Nos. 67, 68 and 69 of 2022 are dismissed. No costs. The IA No.1253 of 2022 in Comp. App (AT) No. 67 of 2022, IA Nos.1254 and 1255 of 2022 in Comp. App (AT) No. 68 of 2022 and IA Nos.1256 and 1257 in Comp.

App (AT) No. 69 of 2022 are closed.

Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022 Before parting with these Appeals, this `Tribunal', makes it lucidly clear that the `Hon'ble Third Member of the `Tribunal' is completely free in resolving the `differences'/`controversies' between the `Parties' as he thinks fit (vide decision of Hon'ble Supreme Court AIR 1965 SC 1467), (of course, keeping in mind of the fact that if the `point of difference' is not stated), it will be for the Third Judge (or) Judges to whom the case is referred to ascertain the same and to give his/their opinion, as per decision AIR 1996 Allahabad, (Pages 135 and 164) in the subject matter in issue, as deems fit and proper. No wonder, it is the primordial duty of the `Hon'ble Third Member' / `Third Judge' to whom the matter is referred to consider `all points involved' revolving around the controversies, not confined to the point formulated by the `Hon'ble Members of the Tribunal' dated 11.02.2022, prior to the deliverance of his `opinion'/`decision', ofcourse with utmost `care', `caution', `circumspection', and with a view to prevent an `aberration of justice' and to secure the `ends of justice'.

[Justice M. Venugopal] Member (Judicial) [Dr. Ashok Kumar Mishra] Member (Technical) 25/05/2022 SR Company Appeal (AT) No. 67 of 2022 Company Appeal (AT) No. 68 of 2022