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CONSTITUTIONAL LAW –II
(NON-FUNDAMENTAL RIGHTS)

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I INTRODUCTION

THE YEAR 2008 saw a deep schism in the Supreme Court on its powers under article 136 of the Constitution of India.The manner of raising and dealing with this issue, especially in appeals from the high courts, raised a serious question of judicial discipline in the apex court itself. But then the use by the apex court of its constitutional power under article 142 of the Constitution seemed problematic. However, it seems that much of the time of the Supreme Court was spent in using its article 136 extraordinary power to correct the high courts concerning what they cannot do under article 226 of the Constitution of India.

II JUDICIAL DISCIPLINE IN SUPREME COURT

Divisional Manager, Aravali Golf Club v. *Chander Hass & Another*[1] was an ordinary labour law case. It had started with a suit by the gardeners for being regularized and appointed to the post of tractor driver since for several years the work of tractor drivers had been taken from them, the need for use of tractors continued because maintenance of the large golf area required tractors and hence a gardener's work required him to use a tractor. The problem was that admittedly there was no post of a tractor. An exuberant high court dismissed the first and second civil appeals of the club and directed the creation of the post of tractor driver against the well laid down law repeatedly by the Supreme Court that courts cannot order the creation of a post. The club appealed to the Supreme Court. Its two judge bench held that the order of the court was without jurisdiction.Acordingly the high court order was set aside and the suit of the gardeners was dismissed.

The problem arose that instead of stopping at this point by deciding what needed to be decided, the two judge bench from paras 17 to 41 of the judgment took off on a *suo motu* flight into separation of powers, its views on various orders passed by the Supreme Court and the Delhi High Court and what politicians could do to a judiciary passing such orders. Ignoring

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1 (2008) 1 SCC 683.

completely the repetitive judgments of the Supreme Court that a smaller bench cannot hold as incorrect the earlier judgment of a larger bench, the two judge bench in this case held that the constitution bench judgments/orders in the *U.P. Legislative Assembly* case[2] and the *Jharkand Assembly* case[3] deviated from the constitutional scheme of separation of powers. These cases had nothing to do with the labour law case before the two judge bench and were not at all before this bench for consideration by way of any argument in this case. Even if these came up for consideration by way of argument and the two judge bench disagreed with the judgment/orders passed in these constitution bench cases, then the same had to be referred to the Chief Justice of India for being placed before a larger bench. Judicial discipline was whole heartedly breached by a wholly irrelevant *obiter* which had nothing to do with the case before the bench.

Similarly, the Delhi High Court orders in several cases were *suo motu* taken cognizance of and declared to have been passed without jurisdiction. Paras 26 and 27 of the judgment makes an omnibus declaration of illegality concerning several orders of the Delhi High Court, which of course have nothing to do with the labour case before the two judge bench. This free wheeling judicial flight continued to cite only one set of Supreme Court judgments which hold that judges cannot legislate without mentioning the other set of judgments of the apex court like *Vishaka* v. *State of Rajasthan*[4] (three judges) wherein it was clearly held that the court will lay down guidelines till Parliament legislates for the effective enforcement of the basic human right of gender equality.

But the sting in this tale of judicial fizz comes from the warning issued to the courts and judges by way of a "moral of this story", which is best given in the words of the two judge bench : " If the judiciary does not exercise restraint and overstretches its limits there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers, or even the independence, of the judiciary …. The judiciary should therefore confine itself to its proper sphere, realizing that in a democracy many matters and controversies are best resolved in non-judical setting."[4*a*]

These "observations", ignore the entire constitutional reasoning given by a constitution bench in *S.P. Gupta* v. *Union of India*.[5] They hark back to the then persistent argument of the late Attorney General L.N. Sinha that article 21 of the Constitution being negatively worded the judiciary could only issue negative or prohibitory orders and not positive orders. The argument stood rejected by the constitutional evolution of the apex court in the post emergency period. Is it judicial independence to exercise article 136 jurisdiction to spin "observations" of this nature in this manner in a case arising from a second civil appeal based on a labour law suit?

2 *Jagdambika Pal* v. *Union of India,* (1999) 9 SCC 95.
3 (2007) 8 SCC 279.
4 (1997) 6 SCC 241.
4a *Supra* note 1 at 695.
5 1981 Supp SCC 87.

The split in the Supreme Court on the nature of the powers of a high court under article 226 of the Constitution or even its own powers under article 32, came to the fore once again in *Common Cause (A Regd Society)* v. *Union of India*.[6] The presiding judge of the two judge bench disagreed with the observations of the puisne judge in the *Divisional Manager, Aravali Golf Club* v. *Chander Hass* and the puisne judge's view that on the basis of the doctrine of separation of powers, it is illegal and unconstitutional for high courts under article 226 to outsource judicial functions by appointing committees and giving those committees power to issue orders to the authorities or to the public. The presiding judge held that "if there is a buffer zone unoccupied by the legislature or executive which is detrimental to the public interest, judiciary must occupy the field to subserve the public interest." But the presiding judge created confusion because when he mentioned the specific paras of the *pusine* judge's judgment from which he dissociated himself, he did not dissociate from para 54 which stated : "The problems facing the people of India have to be solved by the people themselves by using their creativity and by scientific thinking and not by using judicial crutches like PILs." Which way should high courts go while exercising article 226 jurisdiction?

The issue of judicial discipline came to a boil in *Official Liquidator* v. *Dayanand & Ors.*[7] A three judge bench of the Supreme court had to firmly declare that a two judge bench of this very court in *UPSEB* v.*Pooran Chand Pandey*,[8] could not upset the judicial toil of a constitution bench in *State of Karnataka* v. *Umadevi*[9] by which the menace of illegal and backdoor appointments by the state had been legally ended concerning the regularization of *ad hoc*, temporary or casual employees. The three judge bench noted that in some cases high courts were ignoring the law laid down by the Supreme Court and there were several instances where they had not followed the decisions of their own coordinate or larger benches. Further, "likewise there have been instances in which smaller benches of the Supreme Court have either ignored or by passed the ratio of the judgments of the larger benches including the Constitution benches."Accordingly, the bench distressingly held that these cases are illustrative of non adherence to the rule of judicial discipline which is the *sine qua non* for sustaining the system and concluded, *inter alia*, that "disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation." The three judge bench held that the observations by the two judge bench, pitting the seven judge apex court decision in *Maneka Gandhi*[10] against the five judge decision in *Umadevi*[11] case were not called for.

6 (2008) 5 SCC 331.
7 (2008) 10 SCC 1.
8 (2007) 11 SCC 92.
9 (2006) 4 SCC 1.
10 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.
11 *Supra* note 9.

III IMPLIDELY OVERRULED

In *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat*,[12] the Supreme Court under article 136 civil appeals, on the basis of "we are one nation and must respect each other and should have tolerance", upheld the validity of two resolutions by the Ahmedabad Municipal Corporation, Gujarat, under section 466(1)(D)(b) of the Bombay Municipal Provincial Corporation Act, closing the municipal slaughter houses in Ahmedabad for eight days (19.8.98 to 26.8.98) and ten days (27.8.98 to 5.8.98), respectively. The resolutions had been passed to enable two Jain sects, the Shwetamber and the Digambar, to celebrate the *Paryushan* festival on the basis of their religious principle of *ahimsa*. The Muslim registered organization had impugned these resolutions since they would not be able to take their animals to these slaughter houses for selling and eating meat during these periods. The court did not advert to any fundamental duty in the Constitution of India even though articles 51A(e), (f) and (g) of the fundamental duties chapter were directly relevant in terms of the 18 paras it devoted to the history of India to emphasize the sentiment of tolerance for India to remain united in its diversity. While the Supreme Court may be said to have relied on the spirit of the Constitution instead of any of its specific provisions, the judgment seemed to proceed on a factual error that the closure of the slaughter houses was for a period of nine days — a short period during which, according to the court, non-vegetarians can be vegetarians given the large Jain population in Gujarat and Rajasthan.The closure was first for ten days and then for eight days successively, that is, for a total period of 18 days. Hence the spirit of the Constitution as generally reflected in fundamental duties or the directive principles and the country's history is a valid basis for not only deciding such issues but also for a two judge bench to declare that observations of a constitution bench[13] stand "impliedly overruled" by a decision of a subsequent constitution bench.[14]

IV ARTICLE 136: EXTRA ORDINARY EQUITABLE JURISDICTION

In *Southern Steel Ltd & Ors* v. *Jindal Vijayanagar Steel Ltd*[15] the Supreme Court held that its discretionary power under article 136 of the Constitution cannot be availed of by a person whose conduct negates its availability. Hence a company which suppresses the fact that it has been declared sick while making huge purchases after being so declared, cannot avail of article 136 of the Constitution.

12 (2008) 5 SCC 33.
13 (1969) 1 SCC 853.
14 (2005) 8 SCC 534.
15 (2008) 5 SCC 762.

In *Anand Sharadchandra Oka* v. *University of Mumbai*[16] the Supreme Court declared that under article 136 it will examine the merits of a contention raised by the appellant even after upholding that the high court's decision to dismiss the writ petition of the appellant under article 226 of the Constitution, on the ground that the appellant was not aggrieved by the decision of the university to enrol as voters for elections to the senate only those who had graduated from that very university. This was so because the appellant was actually a graduate of that university but had raised the contention that post graduates of that university are also graduates from that university even though they have not obtained their graduate degree from that university. The Supreme Court examined on merits the issue raised by the appellant and held that the university was right in giving a literal interpretation to the word graduate and therefore in refusing enrolment to those who were not its graduates but were its post-graduates.

V ARTICLE 137: FRIVOLOUS REVIEW BUT NO COSTS

In *UCO Bank and Another* v. *Rajinder Lal Capoor*[17] the issue arose as to whether the Supreme Court should impose costs on a public sector bank which did not produce the relevant regulations of the bank till the day of the judgment, then sought a review of the judgment on the basis of such regulations and the review petition was finally rejected by the court on the ground that the regulations did not apply to the case before it. In the face of the well settled law that disciplinary proceedings cannot be continued against an employee after his superannuation unless there is a statutory rule which permits so, the bank initiated disciplinary proceedings after its official had reached the superannuation age and issued a charge sheet two years later. The appellant bank wanted to show that it could initiate the disciplinary proceedings under its 1979 Regulations. The court asked for these regulations, but the bank did not produce these. On the day the judgment was to be delivered, the bank prayed for deferment of the pronouncement so as to enable it to place the regulations. After admitting the bank's review petition the court found that the 1979 Regulations were not applicable to the case. But the court did not order any costs against the bank for the manner in which it had taken up the public time and resources of the apex court. The Supreme Court also did not ask for the file, if any, of the bank's legal department to find out whether the bank had in the first place been advised by its own legal department not to proceed in the matter. Such a step by the court would at least have strengthened the legal departments of public sector banks by letting them know that they can be called to account.

16 (2008) 5 SCC 217.
17 (2008) 5 SCC 257.

VI ARTICLE 142 : COMPLETE JUSTICE CASE TO CASE

In *T. Jayakumar* v. *A. Gopu & Anr.*,[18] the Supreme Court while upholding the rejection of the petitioner's applications (one was without his signature and the other with his signature but time barred) by the departmental authorities, nevertheless took into account the facts and that for eight years the petitioner had been pursuing the matter in the courts to call these "special facts". Accordingly it directed the postal authorities concerned to find out a suitable vacant position against which the first respondent could be adjusted. In case no suitable post was available at present he should be accommodated in the next vacancy of extra departmental branch post master arising in future. There is no mention in the judgment even of article 142 as being the basis for this relief. The relief is simply ordered. The judicial heart has its own reasons.

In *Puttaswamy* v. *State of Karnataka*[19] article 142 was specifically mentioned as also judgments of the apex court delivered in the special facts of their respective cases to hold that even if an offence is not compoundable within the scope of section 320 of the Code of Criminal Procedure, 1973 the court may, in view of the compromise arrived at between the parties, reduce the sentence imposed while maintaining the conviction. Article 142 could be invoked to give quietus to a litigation demanding a "pragmatic solution." The judgment leaves hanging in the air the question as to whether orders passed under article 142 in the special facts of the case can be used as a precedent and whether such orders can be passed by stating that these are not to be treated as a precedent.

In *Monica Kumar(Dr.)* v. *State of U.P.*[20] the Supreme Court held that articles 136 and 32 read with article 142 gave it the power to quash criminal proceedings even where a *prima facie* case was made out and charge sheet was filed in the competent court, if the court was satisfied that the proceedings fell under any of the following categories: an abuse of the process of court, or the cases are being used for oblique purposes; or are being continued on false or manufactured evidence; or if no case is made out on the admitted facts. While directing the medical students involved to file a written apology in the court where the cases were pending against them and quashing the charges /proceedings under sections 452, 323, 504, 506 and 427 IPC, the court did not spell out as to which of the categories laid down by it covered the case before it.

A leap in doing complete justice

In *Arvind Barsaul (Dr.)* v. *State of M.P*[21] the Supreme Court while deciding an article 136 criminal appeal, held that it will allow the

18 (2008) 9 SCC 403.
19 (2009) 1 SCC 711.
20 (2008) 8 SCC 781.
21 (2008) 5 SCC 794.

compromise of a non compoundable offence like section 498-A IPC, (husband or his relative subjecting a wife to cruelty) even after conviction of the husband under this section, when the wife tells the Supreme Court that she is not interested in prosecuting the husband and his parents and when "even otherwise also, in the peculiar facts and circumstances of the case and in the interest of justice continuation of criminal proceedings would be an abuse of the process of law." The peculiar facts and circumstances were that the couple, both medical doctors, had divorced by mutual consent and the husband's old parents were suffering from multiple ailments.

In *Yogesh Ramachandra Naikwadi* v. *State of Maharashtra & Ors.*[22] there was a leap in the discretionary powers of the Supreme Court when it held that past decisions under article 142 of the Constitution permitting a scheduled tribe or a scheduled caste candidate to retain the benefit of their degree and /or practice/post obtained on their being a scheduled tribe or caste, after it had been held judicially that they were not entitled to the certificates for such a tribe or caste, would not mean that in every case where the caste verification committee has rejected the certificate, the candidate should invariably be permitted to retain the benefit of the admission and the consequential degree irrespective of the facts. What has precedential value is the *ratio decidendi* and not the relief moulded under article 142. Having said that the Supreme Court marked out cases in which the same relief of retention of benefits of the degree and/or practice/post would not be available. These are cases where a forged or fake caste certificate has been produced to get a seat in an educational institution, or where knowingly a false claim of being a SC /ST has been made, when even before the date of admission the caste /tribe certificate has been invalidated by the scrutiny committee or where the admissions are pursuant to interim orders of a court subject to final decision so that the candidate cannot claim any equities by reason of such admission.

But many of these categories specified by the court, even while saying that the relief under article 142 has no precedential value, have become doubtful because in the case in hand the court granted relief to the petitioner even after finding that the scrutiny committee had rejected his caste ceritificate even before his admission to the engineering college and he was admitted and continued to study in the college due to an interim order of the high court which made it clear that the admission was provisional so that he would not be entitled to the benefit of the degree he may obtain in case he loses finally in the petition. The appellant had finally lost in the high court. However, the Supreme Court took into account the 13 years that had passed since the admission, the four years that had passed since he took the engineering degree, that nobody will benefit since his seat cannot now be given to anybody else and that there is no allegation that the caste certificate was forged or fake. On this basis it permitted the appellant to retain the

22 (2008) 5 SCC 652.

benefit of the degree subject to refunding the financial benefits he had by virtue of the tribe certificate and that he would no longer claim anything on the basis of belonging to the scheduled tribe.

VII ARTICLE 226: WHAT CANNOT BE DONE BY HIGH COURTS

The Supreme Court had to list out in the year under survey a number of cannots for the high courts under their constitutional article 226 jurisdiction.

In *Balakrishna Behera & Anr* v. *Satya Prakash Dash*[23] the Supreme Court pointed out that a high court cannot direct the appointment of a person against a post which has been abolished.But the key question as to whether the abolition of the post took place during the pendency of the litigation and without the prior permission or even information to the high court, remained unasked and therefore unanswered. The question touched directly the power of the courts and the power of the executive to render an article 226 jurisdiction infructuous by simply abolishing the post while the case is pending.

In *State of Madhya Pradesh* v. *Sanjay Kumar Pathak*[24] concerning the mass literacy programme of operation blackboard recruitments, the Supreme Court held that a high court cannot direct the filling up of a post since this is a policy decision which cannot be assailed unless infected with the vice of arbitrariness. The Supreme Court held that there was no place for sympathy but still directed that relaxation of age be done for the respondents if they appeared for future recruitment.

In *Indian Overseas Bank* v. *P. Ganesan & Ors*[25] the Supreme Court had to remind the Madras High Court that under article 226 the pendency of criminal proceedings does not entail an automatic stay of departmental proceedings. Further the discretionary writ jurisdiction should be exercised keeping in view the conduct of the parties before it.

In *R. K. Mobisana Singh* v. *KH Temba Singh & Ors*[26] the Supreme Court had to tell the Gauhati High Court that under article 226 it cannot direct the setting up of a monitoring committee to examine whether one category of PWD assistant engineers had encroached upon the quota for the other, even if the state government has failed to place the correct factual position.

In *Swapan Kumar Pal* v. *Achintya Kumar Nayak*[27] the Supreme Court reminded the Calcutta High Court that in the allotment of a ration shop by the district collector, a high court under article 226 cannot intervene to

23 (2008) 1 SCC 318.
24 (2008) 1 SCC 318.
25 (2008) 1 SCC 650.
26 (2008) 1 SCC 748.
27 (2008) 1 SCC 382.

enter into the merits of the decision except when a legal error has been committed.

The Supreme Court in *Everest Wools Pvt Ltd* v. *U.P Financial Corporation*[28] had to lay down that a high court while exercising article 226 jurisdiction cannot ignore the role of a 'bailee" and then of a "trustee" which has to be exercised by state financial corporations under the State Financial Corporations Act, 1951 when taking over the possession of an ongoing plant of a company without taking over its management for the recovery of dues for the company. The high court was told that a person aggrieved by the action of the state must have a remedy and the person's petition cannot be dismissed merely by saying that an attempt is being made to evade payments, especially in the light of the report of the judicial officer appointed to prepare the inventory at the time of the taking over of possession of the unit.However, ten years after the impugned high court order the Supreme Court sent the petitioner company back to the high court for a fresh decision in the interests of justice without stating how the interests of justice are met by such remand.

The Punjab and Haryana High Court in *Director, Horticulture, Punjab & Ors* v. *Jagjivan Prasad*[29] had to be reminded of the basic discipline, oft repeated by the Supreme Court, that reasons must be given for its decision. The Supreme Court held that the case, which did not address even the contention as to whether the appellant should be considered to be an industry, was a classic case of non-application of mind. Given the frequency of such judgments coming before it from various high courts, the Supreme Court ought at least to start giving in its judgment the names of the high court judges involved.

In *Rajasthan State Electricity Board* v. *Union of India & Ors*, [30] the Supreme Court had to state that where there is admitted liability and hence no disputed questions of fact are involved, the high court cannot dismiss a writ petition under article 226 of the Constitution on the ground of alternative remedy. In this case the Union of India admitted that it had by mistake collected money from the appellant for coal rakes and hence the appellant was entitled to the refund without being asked to resort to the alternative remedy under the Railway Claims Tribunal Act, 1987.

The Supreme Court had to step in with its supervisory power to tell the Kerala High Court in *Syndicate Bank* v. *New Look Rubbers (P)Ltd & Others*[31] that it cannot under article 226 of the Constitution interfere in a case where a property of the judgment debtor has already been sold in execution of a decree based on reasoned findings of the trial court, on the ground that the state owned Kerala Financial Corporation had agreed to

28 (2008) 1 SCC 643.
29 (2008) 5 SCC 539.
30 (2008) 5 SCC 632.
31 (2008) 5 SCC 274.

revive the industrial unit of the judgment debtor.The Supreme Court held that the high court had clearly overstepped its jurisdiction.

In *Bihar Finance Service House Construction Coop Society Ltd* v. *Gautam Goswami*[32] the Supreme Court held that clerical or typographical errors in a high court judgment, if any, can be corrected only by the high court concerned and not by the Supreme Court.

In *S.S. & Company* v. *Orissa Mining Corporation Ltd.*[33] the Supreme Court had to state that a person whose position is not adversely affected by an amendment to the tender because he is not eligible under the unamended provisions, cannot maintain a writ petition under article 226 of the Constitution before the high court.

State of Bihar & Ors v. *Bokaro & Ramgur Ltd & Ors*.[34] showed that the Supreme Court's task of correcting high courts never seems to end. In this case the Supreme Court had to point out that after reversing the judgment of the trial court in the appeal before it, the high court cannot conclude that the appeal is dismissed. Similarly, in *Ashish Sahkari Grih Nirman Samiti* v. *State of Bihar & Ors*[35] the Supreme Court had to do a hand holding job by telling the high court that in a batch matter concerning section 6, Land Acquisition Act, 1894 matters, it must individualise justice to mould the relief to arrive at an equitable solution in the exercise of its equitable jurisdiction under article 226 of the Constitution of India.

In its equitable and discretionary jurisdiction under article 226 a high court cannot entertain a petition against the recovery of sums from a retiring or a retired employee, for the financial loss attributable to the employee's negligence or carelessness.[36]

In *Sakiri Vasu* v. *State of Uttar Pradesh*[37] the Supreme Court held that high courts under article 226 and the Supreme Court under article 136 have the power to order investigation by the CBI, This should, however, be done in rare and exceptional cases. The high court have also been asked by the Supreme Court not to entertain writ petition under article 226 for the registration of an FIR where the Cr PC remedies of having it registered by approaching the superintendent of police and then the magistrate concerned have not been availed of.

In *Seema Dhamdhere* v. *State of Maharashtra*,[38] the Supreme Court reiterated that no PIL lies in service matters and asked the high courts to throw out such PILs after expressing that strangely such PILs are being entertained by the high courts despite the apex court having ruled against these in *Duryodhan Sahu* v. *Jitendra Kumar Mishra*.[39]

32 (2008) 5 SCC 339.
33 (2008) 5 SCC 772.
34 (2008) 5 SCC 384.
35 (2008) 5 SCC 350.
36 *U.P. State Sugar Corporation Ltd.* v. *Kamal Swaroop Tondon,* (2008) 2 SCC 41.
37 (2008) 2 SCC 409.
38 (2008) 2 SCC 290.
39 AIR 1999 SC 114.

In *Divine Retreat Centre* v. *State of Kerala*[40] the Supreme Court emphasized that under article 226 no individual judge can receive letters for public interest litigation since it is the prerogative of the Chief Justice alone to assign work and organize the roster.Further, under article 226 no action can be taken on an anonymous letter since the bona fides of the letter writer cannot be verified

In *Vishnu Dev Sharma* v. *State of Uttar Pradesh*[41] the Supreme Court had to reiterate that high courts under article 226 must pass reasoned orders.

VIII ARTICLE 300A AND HUMAN RIGHTS

In *Karnataka State Financial Corporation* v. *N. Narasimahaiah*[42] while holding that section 29 of the State Financial Corporations Act did not permit the corporation to proceed against the director-guarantors of a defaulting corporation but only against the industrial concern, the Supreme Court declared that property disputes also fell within the contours of human rights since article 300A giving a constitutional right to property was also a human right. The court shall not lean in favour of depriving a person of his property in the absence of any provision either expressly or by necessary implication permitting such deprivation. Is the right to property on a judicial track of being recognized as a fundamental right after having been dethroned by a constitutional amendment by Parliament from its status of a fundamental right, since human rights are fundamental rights?

IX ARTICLE 324 – ELECTION DUTY AND EDUCATION

In *Election Commission of India* v. *St. Mary's School*,[43] the Supreme Court held that the legal requirement to provide staff to the Election Commission to discharge its functions must receive a restricted meaning to using teachers for such purposes since the holding of an election should not result in the neglect of the education of children due to the absence of teachers from the schools because of election duty. Agreeing with the Election Commission's proposal the court directed that all teaching staff shall be put on the duties of roll revision and election work on holidays and non teaching days. Non teaching staff, however, may be put on duty on any day at any time as permissible under law.

40 (2008) 5 SCC 542.
41 (2008) 3 SCC 172.
42 (2008) 5 SCC 176.
43 (2008) 3 SCC 390.