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CONSTITUTIONAL LAW – II

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I INTRODUCTION

CONSTITUTIONAL GOVERNANCE is a cardinal principle for an effective democracy. The idea of constitutionalism is simply to put restriction on exercising constitutional powers to govern the state. In another words, the authority of the government depends on how best it observes the constitutional limitations. Constitution being a living organ, primary duty of ensuring such constitutional governance plummets on the judiciary. In a liberal political theory legislative supremacy is almost synonymous to popular self-government. However, Constitution of India confers wide powers to the judiciary as a check on such popular governance. But conferring such wide powers to judiciary (consisting of un-elected judges) by Indian Constitution in constitutional governance may have the effect of undermining the idea of democracy. Therefore, judicial restraint in the wake of wide powers enjoyed by the judiciary is also important. Constitution being supreme law of the land it is pertinent to see how far judiciary balances between these two contradictions. Judicial interpretation of constitutional provisions thus becomes important. This year's survey focuses on how far judiciary diligently carried out this constitutional duty and also on various developments in constitutional interpretation.

II PRESIDENTIAL ELECTION AND OFFICE OF PROFIT: ARTICLES 58(2) AND 102

Disqualification on the ground of 'office of profit' to several constitutional positions is aimed at avoiding the conflict between the duties and interest of the constitutional functionaries.[1] To exercise constitutional powers and discharge the duties freely and fairly such a restriction was given constitutional status. However, in the absence of a definition, the meaning 'office of profit' has became highly contentious and led to several constitutional litigations in India. Two important

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1 See art. 102 (members of Parliament), art. 191 (members of state legislature), art. 243 F (members of panchayat and art. 243 V (members of Municipalities) apart from arts. 58 and 66 which deal with President and Vice-President respectively.

cases relating to office of profit came before the Supreme Court during the year under survey.

In *Purno Agitok Sangma* v. *Pranab Mukherjee*[2] the election of Pranab Mukherjee to the office of the President of India was challenged by the petitioner on the ground that at the time of filing the nomination papers, the respondent held the office of the chairman of the Council of Indian Statistical Institute (ISI), Calcutta, which, was an '*office of profit*', hence disqualified from contesting the election under article 58(2) of the Constitution. The petitioner also alleged that the respondent held the post of the Leader of House in Lok Sabha which is an 'office of profit'. Petitioner also raised serious doubts about the respondent's contention that he has already resigned from both the posts before filing the nomination alleging that the resignation letter is forged, fabricated and brought into existence to counter the case as the signature of the respondent is different on resignation letters.

The basic contention in the case was whether it deserves regular hearing under rule 20[3] of order XXXIX of the Supreme Court Rules, 1966 and, in particular, rule 13[4] thereof.

In a 3:2 majority ruling, the court held that the election petition did not deserve regular hearing under rule 20 of order XXXIX of the said rules and the same was dismissed under rule 13 of order XXXIX. While delivering the majority judgment, the Chief Justice observed that the logic behind office of profit being a disqualification is to assess whether such office is incompatible with the position and such office may compromise the independence, may affect his/her loyalty to the Constitution and may be unduly influenced by the executive.

The office of the chairman of the Indian Statistical Institute is excluded from the ambit of article 102 of the Constitution by the provisions of the Parliament (Prevention of Disqualification) Act, 1959, as amended in 2006. However, there was a doubt whether the said amendment would apply to the office of profit under article 58(2) which exclusively deals with the disqualifications of the President of India.

Relying upon *Shibu Soren*[5] and *Jaya Bachchan*[6] the majority judgment opined that the office of chairman of the institute did not provide for any amenities mentioned in above cases and in fact, the said office was also not capable of yielding profit or pecuniary gain, hence is not an office of profit. Further, the post of Chairman of the Institute has been excluded from office of profit by the 2006 amendment to section 3 of the Parliament (Prevention of Disqualification) Act, 1959, therefore, in the facts and circumstances of the case the election petition does not deserve a

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2 2012(11) SCALE 509: AIR 2013 SC 372.

3 Rule 20: Every petition calling in question an election shall be posted before and be heard and disposed of by a bench of the court consisting of not less than five judges.

4 Rule13: Upon presentation of a petition the same shall be posted before a bench of the court consisting of five Judges for preliminary hearing and orders for service of the petition and advertisement thereof as the court may think proper and also appoint a time for hearing of the petition. Upon preliminary hearing, the court, if satisfied, that the petition does not deserve regular hearing as contemplated in rule 20 of this order may dismiss the petition or pass any appropriate order as the court may deem fit.

5 *Shibu Soren* v. *Dayanand Sahay* (2001) 7 SCC 425.

6 (2006) 5 SCC 266.

full and regular hearing under rule 20 of order XXXIX. As far as the Office of the Leader of the House is concerned tendering the resignation to the membership of the House before he filed his nomination papers would suffice hence there is no reason to go into merits.

Ranjan Gogoi J while delivering the dissenting opinion explained the scope of order XXXIX rule 13 that under the rule 13 the court must exclude matters that may fall within the domain of regular hearing under rule 20. Rule 13 basically provide for preliminary hearing and such a hearing must necessarily be restricted to the questions whether the election petition has a clear cause of action and would such petition raises triable issues. An election petition could be dismissed without regular hearing if the court is satisfied that the totality of facts on which the petitioner relied even if true, would not have any bearing on the result of the election. Accordingly if the court did not find such satisfaction then election petition must be given regular hearing under rule 20 order XXXIX.

Keeping the scope of rule 13 in view whether the Office of Chairman of the Council of Indian Statistical Institute is an office of profit, whether the respondent had resigned from the said office before filing the nomination, the issue of forgery and application of 2006 amendment to Parliament (Prevention of Disqualification) Act, 1959 (which excludes the Office of Chairman of Council of Indian Statistical Institute from the ambit of office of profit under article 102 of the Constitution) to presidential election under article 58 (2) are all important questions and some of them could be decided only on the basis of evidence produced by the parties. Therefore, these questions cannot be addressed during the preliminary hearing. As a result the existing petition cannot be terminated at the preliminary stage under rule 13 and requires a regular hearing under order XXXIX rule 20.

By looking at both the judgments, it is clear that at the preliminary stage the question whether the respondent was holding an office of profit at the time of nomination and several doubts about date of resignation from the post and the signature on the resignation could not be decided and they would require a regular hearing. Based on the facts one may conclude that the majority judgment which held that such a regular trial is not required seems to be erroneous. The issue being very important and having great public significance as the matter is relating to the highest post in the country, the dissenting opinion makes more legal sense. Apart from its significance it may have several ramifications on interpretation of office of profit. As Rajeev Dhavan said "(A)part from the simple idea that all successful candidates should be treated equally, this was the election for the post of President of India. Not even a needle of doubt should exist regarding the authenticity of what Mukherjee, put forward to defend himself. … Justice has to be done and appear to be done. It wasn't."[7]

In *Gajanan Samadhan Lande* v. *Sanjay Shyamrao Dhotre,*[8] the question arose whether the election of a returned candidate can be held invalid under section 10 of

7 Rajeev Dhavan, "Flawed Verdict on Sangma plea", *available at:* http://m.indiatoday.in/story/p-sangma-president-election-pranab-mukherjee/1/238113.html (Visited on May 15, 2013).

8 (2012) 2 SCC 64.

the Representation of the People Act, 1951 and article 102(1) (a) of the Constitution of India as he was an elected Director of the Maharashtra Seeds Corporation at the time of election.

Under article 102(1) (a) a person would be disqualified to be a member of Parliament if is a holder of 'office of profit' under the Government of India or the Government of any state. To decide whether a person is holding an office of profit the mode of appointment is decisive. In the instant case the respondent was holding an elected office of director from growers' constituency on Board of Corporation.

The government has no role in the election and further the respondent cannot be removed as he is not appointed by the government. Moreover, other essential necessity for declaring the office of profit is that such office must carry remuneration in form of either pay or commission. However, in this case he is not receiving any remuneration. The amount received by him by way of allowances could not be treated as remuneration.

Section 10 of the Representation of Peoples Act, 1951 prohibits persons from becoming a member of Parliament if such person is a managing agent, manager, or secretary of any company or corporation where in government has minimum 25% of share. It was rightly held that though Maharashtra Government has more than 25% of share in the said corporation an elected director from the growers' constituency on the Board of Corporation falls in none of the above category under section 10.

III POWER OF COURT OF RECORDS TO PUNISH CONTEMPT OF COURT

Article 129 expressly confers the status of court of record to the Supreme Court and empowers it with power to punish for its contempt. At the same time entry 77 of list 1 of the Constitution of India enables Parliament to enact law on powers of the Supreme Court including contempt of such court. The controversy aroused in view of entry 77 of list 1 read with article 142 (2) was that can Parliament control the power of the Supreme Court under article 129 in punishing the persons for its contempt. The earlier observations of the Supreme Court was that entry 77 list 1 only enables the parliament to prescribe procedure, punishment and appeal in matters of contempt but it has no competency to interfere with the jurisdiction and powers of the Supreme Court exercised by virtue of court of record under article 129.[9] In *Sahara India Real Estate Corpn. Ltd.* v. *SEBI,*[10] the court while dealing with the question on restriction of reporting court proceeding by media held that the contempt jurisdiction under article 129 is independent of contempt law enacted by the Parliament.

In this case while a matter was pending before the court and when the parties were engaged in a private negotiation on the directions of the court, a private TV channel telecasted the detailed proposal made by the appellant to SEBI thereby hampering the progress of the case. The question that was raised was can the court

9 See *Delhi Judicial Services Association Tis Hazari Courts* v. *State of Gujarat,* AIR 1991 SC 2716.

10 (2012) 10 SCC 603.

restrict the media reporting of the court proceedings? Answering in the positive, the court held that the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice.

While delivering the judgment the court held that courts of record under articles 129 and 215 of the Constitution have inherent powers to prohibit such publication of court proceedings or the evidence of a witness. Such a restriction would not violate freedom of speech and expression under article 19(1) (a). The court opined that the constitutional framers were aware that administration of justice can be protected and preserved and furthered only by way of law of contempt and hence specifically mentioned contempt of court as a ground on which one's speech could be restricted. Therefore, articles 129 and 215 save the pre-existing powers of the courts as courts of record and such power includes power to punish for contempt. Further, the fact that such power under articles 129 and 215 cannot be taken away by any law made by the Parliament though subjected to limited extent mentioned in article 142 (2) conferring powers on the high courts and the Supreme Court to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with.

Such a power also enables the Supreme Court/high court to prohibit the media from reporting the proceedings of the court which would prejudice or obstruct or interfere with administration of justice when such case is pending before the Supreme Court or the high court or even in the subordinate courts. Thus, courts of record under articles 129 and 215 have inherent powers to prohibit publication of court proceedings or the evidence of the witness.

IV SCOPE OF ORIGINAL JURISDICTION: ARTICLE 131

Indian Constitution being federal, an independent dispute settlement mechanism to settle intergovernmental disputes is necessary. The Constitution gives such power to the Supreme Court under article 131. Though the Supreme Court being the highest court and acts mostly as a highest appellate court, it also enjoys original jurisdiction in certain matters like intergovernmental disputes and presidential election. However, challenging constitutional validity of legislation could be raised both in high courts and Supreme Court; such litigation could be raised before the Supreme Court under article 32 and before the high court under article 226 if the impugned legislation is challenged on the grounds of violation of Part III of the Constitution. The question that arises is if a state government challenges the constitutional validity of a central legislation on the ground of violation of part III of the Constitution, could it be raised under article 131 as intergovernmental dispute or should it be raised under article 32. In *State of Madhya Pradesh* v. *Union of India*[11] two issues were raised: (i) can leave to amend the plaint is allowed when issues raised are totally different, new and inconsistent with the original plaint? (ii) can constitutionality of the Central legislation be challenged under article 131 of the Constitution? The plaintiff challenged the two notifications/orders issued under sections 58(3) and 58 (4) of the Madhya Pradesh Re-organisation Act, 2000 (MPR Act) by the Union of India

11 AIR 2012 SC 2518.

as arbitrary and unfair and unjust. It was challenged in the year 2004 and at the time of filing the plaint, the challenge was only the manner of exercising the power by the Union of India under sections 58(3) and 58(4) of the MPR Act but not the provisions of the said sections. Further, no question of constitutionality of the said provisions was raised in the original plaint. However, in 2009 the plaintiff made an application to amend the plaint so as to include the challenge of constitutionality of the said provisions under article 14.

After analyzing order VI rule 17 of the CPC, 1908 and several foreign cases, Indian and English the Supreme Court identified the following principles to take into consideration for allowing or rejecting the application for amendment of plaint:[12]

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;
(2) whether the application for amendment is *bona fide* or *malafide*;
(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

The court opined that by allowing the plaintiff to challenge the constitutional validity of the Act, the said provision would go against the very basis of the plaintiff's claim in the original plaint and would render the entire suit in-fructuous. Further, as a matter of law the parties are not allowed to introduce a totally different, new and inconsistent contentions that would challenge the very fundamental character of the suit. However, the court felt that the plaintiff may be given an opportunity in the interest of justice to do so. At the same time the court clarified that it neither accepts nor concludes the claims of the plaintiff.

The case was filed in 2004, all formalities were completed by 2007 and issues were also framed by that time. The plaintiff waited till 2009 to amend the plaint. It is also pertinent to note that Madhya Pradesh Electricity Board, a necessary party to the case had filed a separate writ petition in 2004 before the Supreme Court under article 32 of the Constitution. Similar pleadings and prayers were made. However, on constitutional validity of the said provision no plea was raised in spite that the present plaintiff was also a party. In spite of all these, the judgment allowing the amendment to the plaint made the court to wonder as to what extent the Supreme Court could go in the name of justice.

Delay in justice being a prime concern and the Supreme Court itself expressed concern over it, allowing such kind of amendment will have serious ramifications in delivery of justice. Even though the court said that it neither accepted nor concluded the claim of the plaintiff but allowing the plaintiff to raise such objections would in fact in reality amount to accepting the claims of the plaintiff.

12 *Id.* at 2522.

V POWER OF SUPREME COURT TO GRANT SPECIAL LEAVE: ARTICLE 136

The Supreme Court being the highest court of the country enjoys several appellate jurisdictions. However, article 136 empowers the Supreme Court to grant special leave from any judgment, decree, sentence or order from any court or tribunal. But granting such a leave is purely the discretion of the court. Therefore, exercising of such power in the absence of any express guidelines in the Constitution always been subject of judicial interpretation.

In *Vice Chancellor, Guru Ghasidas University* v. *Craig Mcleod,*[13] the Supreme Court held that there is a self-imposed limited discretion for interference available to apex court under article 136 against a discretionary interim order passed by the high court. It could interfere only in rare cases, for example, in cases where grave ramifications or grounds for passing the interim order are unclear or when there is a miscarriage of justice or when it is essential to exercises its corrective jurisdiction.[14]

The more appropriate remedy for an aggrieved litigant in such a situation is to rectify any error that might have committed by the high court while passing or declining to pass an interim order would be to approach the same high court for rectifying any error. However, the court said that in an emergent and appropriate situation it is always open to a litigant to approach the apex court in its remedial jurisdiction.

The power of the Supreme Court to extend its order of acquittal to non appealing accused came for discussion in *Sahadevan* v. *State of Tamil Nadu.*[15] In this case, three accused were prosecuted for committing murder under section 302 read with section 120 (B) of IPC. The trial court based on the circumstantial evidence and relying on extrajudicial confession found the accused guilty under section 302 only and convicted for life imprisonment. On appeal, the high court dismissed the appeal and confirmed the trial court's judgment. Accused nos. 2 and 3 appealed to the Supreme Court on special leave under article 136. The Supreme Court reversed the decision of trial court and the high court. However, the question arose in this case was whether this decision would apply only to the two accused who appealed to the Supreme Court or can it be applied to the accused no. 1 who did not appeal to the Supreme Court.

The court said that where it cannot believe the entire incident of the occurrence or if the role of the accused who did not appeal is identical with the other appealing accused, the court is duty bound to dispense justice in accordance with law. While explaining the interrelation between articles 136 and 142 on one hand the rights of the accused under article 21 on the other hand the court said that the powers exercised by the court under these articles are wide enough to deliver complete justice to the parties. Such important powers cannot be restricted by any technical aspects.

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13 AIR 2012 SC 3356.

14 See *Union of India* v. *Swadeshi Cotton Mills Company Ltd.* (1978) 4 SCC 295; *Joginder Nath Gupta* v. *Satish Chander Gupta* (1983) 2 SCC 325 and *Kishor Kirtilal Mehta* v. *Lilavati Kirtilal Mehta Medical Trust* (2007) 10 SCC 21.

15 (2012) 6 SCC 403.

Therefore, the court said that if the entire case of the prosecution suffers from material contradictions, crucial evidence is not reliable and there are material flaws in the case of the prosecution, it would be difficult for the court to leave the non-appealing accused to his fate. When the prosecution failed to prove its case beyond reasonable doubt and the court finds favour to the appellants then the similar benefit should confer to all the accused persons irrespective of the fact whether the accused appealed or not.

To do complete justice under article 142, the court is of the opinion that the powers under article 136 can be exercised by it even *suo motu* and extend such reliefs to non appealing accused. However the court cautioned about applying such relief universally. Such kind of relief can be granted in deserving cases based on facts and circumstances.

The contention in *H.G. Rangangoud* v. *State Trading Corporation of India Ltd.*[16] was can the Supreme Court interfere with the contempt proceedings initiated by the high court *suo motu*. In this case a special leave petition was filed by the petitioner challenging the order passed by the division bench of Karnataka High Court initiating proceedings for contempt by exercising its *suo motu* power under article 215 of the Constitution and section 2(c) (ii) of Contempt of Courts Act, 1971. As the facts state, an order of grant of mining lease for iron ore to the respondent was quashed by a single judge and an appeal was preferred by the respondent to the division bench of the high court. However, before the judgment could be pronounced, the State Trading Corporation, the appellant before the high court, brought to its notice that when the matter was *sub judice*, Government of Karnataka has sent a recommendation to the Union of India for mining lease in favour of the appellant. The division bench of the high court on its *prima facie* finding that the aforesaid conduct 'amounts to interference with the due course of judicial process', initiated *suo motu* a criminal contempt proceeding.

Answering the question whether the Supreme Court under article 136 can interfere with an order initiating a contempt proceeding by the high court, the Supreme Court held that usually it would not interfere and ordinarily relegate the person charged with contempt to file a show cause before the court which had initiated the proceeding. But the court said that in the present case to avoid unnecessary harassment to the appellants a special leave is granted as the court comes to the conclusion that the allegation made, even if not denied do not constitute contempt.

Looking at the facts of the case, the apex court held that, mere sending recommendations does not prejudice or interfere or tends to interfere with the due course of any judicial proceeding. Therefore neither it will influence the outcome of the matter to the prejudice to the parties therein nor amount to contempt.

When an appeal is preferred under article 136 can the court entertain the appeal even though the appellant has no *locus standi*? Answering in positive the Supreme Court in *Ashish Chadha* v. *Asha Kumari*[17] held that when the allegations made in dispute are serious and of public importance and there is a *prima facie* case against

16 (2012) 1 SCC 297.

17 AIR 2012 SC 431.

the respondents, in the larger public interest the appeal could be allowed. Relying on its earlier judgment in *PSR Sadhanantham* v. *Arunachalam*[18] the court while explaining the scope of article 136, held that this article confers no right to appeal to the party but confers wide discretionary power to the Supreme Court to interfere.

VI TRANSFER OF CASES: ARTICLE139A

In *L.K. Venkat* v. *Union of India*[19] the petitioners sought transfer of writ petitions pending before the Madras High Court to the Supreme Court on the grounds that there was no congenial atmosphere to hear the petitions in Madras High Court and also that the question which arose for consideration in these were similar to one raised in cases filed by Devender Pal Singh Bhullar and Mahendra Nath Das pending before Supreme Court. The petitioners were convicted and sentenced to death for assassinating the former Prime Minister Rajiv Gandhi. Their mercy petitions were rejected by the President of India. The petitioners challenged the rejection before Madras high court. The petitioners sought to transfer the cases to Supreme Court due to politically charged atmosphere and similar questions were raised before the Supreme Court.

The court stated that since the question was of substantial general importance and because several persons who had been convicted and sentenced to death and their mercy petitions are pending for years before the President of India, the transfer of these cases would be desirous in the interest justice under article 139A of the Constitution. Further on the question of *locus standi* of the petitioners, the court stated that under clause (1) of article 139A of the Constitution, power to transfer particular case or cases could be exercised by the apex court either on its own motion or on an application made by Attorney General of India or by a party to such case.

VII BINDING NATURE OF LAW DECLARED BY THE SUPREME COURT: ARTICLE 141

Article 141 of the Constitution gives precedent a constitutional status. As per article 141 the decision of Supreme Court would be binding on all other courts. However in, *Rattiram* v. *State of Madhya Pradesh*[20] Supreme Court had an opportunity to decide on binding effect of decision rendered *per incurium*. The court held that under article 141 the judgments of larger bench would automatically binding on smaller bench and the same rule shall also apply to the judgment of co-equal bench. Hence a division bench judgment would be binding on another division bench even the strength of the both benches are same.

Explaining the concept of *per incurium* the court held that the English courts have developed this principle to relax the rule of *stare decisis*. *Per incurium* decisions are those decisions which were given in ignorance of earlier binding judgments. It is a settled principle in law that if a decision is given *per incurium*, the court can ignore it.

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18 AIR 1980 SC 856.
19 (2012) 5 SCC 292.
20 AIR 2012 SC 1485.

Effect of non-compliance of directions of Supreme Court under article 141

Higher education, particularly admission to professional courses like engineering and medicine has become highly contentious over the past two decades. From the decision in *Mohini Jain,* educational litigation had grown leaps and bounds and become integral part of fundamental rights. Education being a vehicle for higher socio-economic status, admission to these lucrative courses became source of arbitrariness. Supreme Court over the years has developed a separate jurisprudence on education by issuing several directions regarding reservations, admission procedure, all India quotas, management quota, fee structure and counseling of candidates for admission.

Coming heavily on practices of irregularities in prescribing the schedule for admissions Supreme Court in *Mridul Dhar* v. *Union of India*[21] approved the schedule notified by the Medical Council of India in appendix 'E' of the Graduate Medical Education (Amendment) Regulations, 2004 and directed its strict adherence. Further the court issued directions to all chief secretaries and heads of the ministries/ departments of each state and union territories directing them to adhere to the schedule issued by the Medical Council of India and also conduct qualifying exams in time to ensure the compliance of the said schedule. The same thing was reiterated by the Supreme Court in *Priyadarshini Dental College and Hospital* v. *Union of India.*[22]

However, what action could be taken if these directions were not adhered was not considered by the court in any one of these cases. Answering this question becomes imperative as favouritism in admission necessarily violate these directions. The court in *Priya Gupta* v. *State of Chhattisgarh*[23] held that the schedule prepared by Medical Council of India under the Graduate Medical Education (Amendment) Regulations, 2004 is a part of its judgment and hence it would be deemed as declared law of the land under article 141 of the Constitution of India. Therefore, no authority has discretion to alter the same. The court further held that "keeping in view the contemptuous conduct of the relevant stakeholders, their cannonade on the rule of merit compels us to state, with precision and empathetically, the action that is necessary to ameliorate the process of selection. Thus, we issue … directions in rem for their strict compliance, without demur and default, by all concerned."[24]

The court gave exhaustive guidelines to be complied with by all concerned, including Union of India, Medical Council of India, Dental Council of India, state governments, universities and medical and dental colleges and the management of the respective universities or dental and medical colleges. Any deviation would invite the following consequences:[25]

a) Whoever violate these directions shall be liable for action under the Contempt of Courts Act.
b) Any interested party may initiate contempt proceedings before the

21 (2005) 2 SCC 65.
22 (2011) 4 SCC 623.
23 AIR 2012 SC 2413.
24 *Id.* at 2427.
25 *Id.* at 2426 .

respective high court.

c) Departmental action could be taken against the person and be punished in accordance with the rules.
d) Such person or authority could also be liable for personal liability to third parties who might have suffered losses.

Though the efforts of the Supreme Court is laudable, it remains a question that how far these guidelines be called as law declared by the Supreme Court and its binding nature under article 141. The plain reading of the article 141[26] enables us to understand that the law declared by the Supreme Court is binding only on all courts within the territory of India. The principle behind article 141 seems to be giving constitutional status to the doctrine of *stare decisis* whose purpose is to ensure consistency and stability in interpretation of law. on plain reading of article 141, it is clear that: (i) it is only law declared but not made by the court that is binding and (ii) binding only on other courts but not on authorities other than court.

However, article 144[27] of the Constitution may give some authority to the Supreme Court in this regard. But such an expansive interpretation of making all civil authorities under the control of Supreme Court may have a potential danger of undermining the constitutional scheme of checks and balances on each organ of the state and may disparage the idea of separation of powers and rule of law.

VIII SUPREME COURT'S POWER TO DO COMPLETE JUSTICE: ARTICLE 142

Article 142 confers very wide powers to Supreme Court to do complete justice in any case. Over a period of time article 142 was raised to "the status of new source of substantive power for itself".[28] As there are no limitations on exercising of such powers it is interesting to see how Supreme Court exercises such powers.

In *Ashok Sadarangani* v. *Union of India*[29] the issue was whether by virtue of inherent power vested in the Supreme Court under article 142 of the Constitution, a non compoundable offence can be compounded. The court stated that there was no restriction on power or authority vested in Supreme Court in exercising powers under article 142 of Constitution but, such an exercise of inherent powers would depend entirely on facts and circumstances of each case. Further, "in exercising such powers, court had to be circumspect, and had to exercise such power sparingly in facts of each case."[30] The courts should not try to take over function of Parliament or executive. A non compoundable offence is therefore not compoundable.

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26 Art.141: Law declared by Supreme Court to be binding on all courts: The law declared by the Supreme Court shall be binding on all courts within the territory of India.

27 Art. 144. Civil and judicial authorities to act in aid of the Supreme Court: All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

28 Jain M.P., *Indian Constitutional Law* 281 (6th Edn., Lexis Butterworth Wadhwa, Nagpur, 2012).

29 AIR 2012 SC 1563.

30 *Id.* at 1568.

However, the court said that though it cannot declare non-compoundable offence as compoundable it is still open to the Supreme Court under article 142 to quash the proceedings if it feels that continuation of a criminal proceedings after a compromise between the parties would amount to abuse of the process of court and an exercise in futility, and ultimately may conclude in a decision which may be of any consequence to any of the parties. However, it is not a general rule. The court may quash the criminal proceedings keeping in mind the facts and circumstances of the case. But, it cannot invoke its inherent power to make a non-compoundable offence as compoundable.

Narendra Champaklal Trivedi v. *State of Gujarat*[31] raised an important question that whether power under article 142 of Constitution, can be invoked to reduce a minimum sentence prescribed under the Prevention of Corruption Act, 1988. Analysing the scope of article 142 the Supreme Court held that though it is true that the powers under article 142 cannot be controlled by any provisions of statute but article 142 cannot be used in direct contradiction with the express provisions of a statute. Using article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the provisions of substantive or statutory enactments pertaining to the case.[32] Therefore, by relying on its earlier decision in *Keshabhai Malabhai Vankar* v. *State of Gujarat*[33] the apex court held that when a statute prescribes minimum sentence, it would not be appropriate at all to reduce the sentence by exercising jurisdiction under article 142 of the Constitution. Even on the ground of so-called mitigating factors, reduction would amount to replacing express provisions of statute. The court reminded that corruption at any level does not deserve either sympathy or leniency and reduction of the sentence would be adding a premium.

In this context one must understand that the power under article 142 being curative in the nature, exercising such power should be a supplement to the substantive law rather than superseding it.

IX SCOPE OF WRIT JURISDICTION OF HIGH COURT: ARTICLE 226

Entertaining private dispute under article 226

Can a dispute in private nature be entertained under article 226 if one of the parties to the dispute is a state? Answering in negative the Supreme Court in *Pradeep Kumar Sharma* v. *Uttar Pradesh Finance Corporation*[34] says dispute regarding the title of a property acquired by a sale deed may not be entertained by high court under article 226. Consistent to its earlier view[35] Supreme court held that though the high court has vide powers under article 226, a dispute in private nature between a state entity and a citizen cannot be adjudicated in the domain of public law. Particularly when no contention of illegality in actions of a state entity as an

31 (2012) 7 SCC 80.

32 See *Laxmidas Morarji (Dead) by L.Rs.* v**.** *Behrose Darab Madan* (2009) 10 SCC 425.

33 (1995) Supp (3) SCC 704.

34 (2012) 10 SCC 424.

35 *Godavari Sugar Mills Ltd.* v. *State of Maharashtra* (2011) 2 SCC 439 and *Kisan Sahkari Chini Mills Ltd.* v. *Vardan Linkers* (2008) 12 SCC 500.

instrumentality of state was raised, public law remedy under article 226 cannot be entertained.

Delay and laches

In *Leela Wanti* v. *State of Haryana*[36] the Supreme Court considered whether the state government was under an obligation to return acquired land to owners after the purpose of acquisition has already been accomplished and whether appellants were entitled to seek direction of mandamus under article 226 of the Constitution for return of acquired land on ground that purpose for which land was acquired had already been achieved. The division bench of Punjab and Haryana High Court did not entertain the appellants' challenge to the acquisition of land because they did not offer any explanation for the long time gap of more than three decades between the issue of notifications under sections 4 and 6 of Land Acquisition Act, 1894. Holding that high court committed no error, the division bench of the Supreme Court stated that even though no period of limitation has been prescribed for filing a petition under article 226 of the Constitution, the high court can non-suit the petitioner who is guilty of laches.

Quoting precedents, the court said that when a petition filed under article 226, the court can consider the maximum period fixed by the legislature for claiming the relief as a reasonable standard in determining the delay. But the time period so fixed by the statute does not preclude the court from considering the delay as unreasonable even if it is less than the time so fixed by the statute. If the delay is more than the period prescribed by the statute it is almost be proper for the court to presume the delay is unreasonable. Thus it may be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus.[37]

Dealing with the question whether the appellants are entitled to seek a direction for return of the acquired land on the ground that the purpose for which land was acquired has already been achieved, the court by referring to the paragraph 493 of Land Administration Manual, noted that it no where suggests that the state government is duty bound to restore the acquired land to the owners after the purpose of acquisition is accomplished. There is merely a mention that as a matter of grace the government is usually willing to restore agricultural and pastoral land to the owners on their refunding the amount of compensation. Otherwise in all the cases the acquired land will have to be returned to the owners irrespective of the time gap between the date of acquisition and the date on which the purpose of acquisition is achieved under section 4 of Land Acquisition Act.

Such an interpretation would also be against the language of section 16 of the Act which states that the acquired land vests in the state government free from all encumbrances and the law laid down by the court that lands acquired for a particular public purpose can be utilized for any other public purpose.

36 (2012) 1 SCC 66.

37 See, *State of Madhya Pradesh* v. *Bhailal Bhai* (1964) 6 SCR 261.

Scope of article 226 in departmental proceedings

Registrar General, Patna high court v. *Pandey Gajendra Prasad*[38] is another case where the Supreme Court had the opportunity to define the scope of judicial review of a high court under article 226 of the Constitution. In a case of disciplinary action taken against a railway judicial magistrate on allegations of misconduct, a proper enquiry was conducted by satisfying the principles of natural justice and the recommendations of the committee was approved by the Full court and accepted by the Governor and there upon the respondent was dismissed from the service. Upon writ petition filed by the respondent before the Patna High Court, a division bench quashed the dismissal on merits. In a special leave petition the Supreme Court held that the jurisdiction of the high court under article 226 in matters of punishment imposed based on departmental proceedings was extremely limited. The court held that while exercising such jurisdiction, high court could interfere only if the proceedings before the disciplinary authorities are in violation of principles of natural justice or in violation of statutory regulations or if such decision was vitiated by consideration extraneous to evidence on merits of case, or on grounds that the decision of the disciplinary authority, was wholly arbitrary or capricious on face of it and that no reasonable person could have arrived at such a conclusion.

High courts' power in staying investigation, framing of charges and trial of criminal cases

The Supreme Court was concerned with high courts' power under article 226 in staying investigation, and framing of charges or trial in criminal cases in *Imtiyaz Ahmad* v. *State of Uttar Pradesh*.[39] In a special leave petition, the Supreme Court found that the matters remained pending as long as six to eight years. After issuing directions to the registrar's general/registrars of all the high courts in the country the court found that, the numbers of cases pending before several high courts are staggering, 41% of the cases are pending for 2-4 years and 8% (approximately 1 out of every 12 cases) are pending for more than six years.[40]

Exercising the power under article 226 in such a manner would have a direct impact on justice delivery and undermine the principle of rule of law which is a cardinal principle of Indian Constitution. The court observed that staying the investigation for such a long time would have serious ramifications on both investigation and trial as evidence may disappear, difficulties such as locating and producing witnesses may arise and in some cases even parties may not survive. All these factors may have bearing on access to justice and may result in unhealthy practices of parties approaching extra judicial forums for settlement.

After detailed study of the available data, the Supreme Court gave certain directions to the high courts for better maintenance of the Rule of Law and better administration of justice. The court observed:[41]

While analyzing the data in aggregated form, this Court cannot overlook the

38 (2012) 6 SCC 357.
39 (2012) 2 SCC 688.
40 *Id.* at 696.
41 *Id.* at 706.

most important factor in the administration of justice. The authority of the high court to order stay of investigation pursuant to lodging of FIR, or trial in deserving cases is unquestionable. But this Court is of the view that the exercise of this authority carries with it the responsibility to expeditiously dispose of the case. The power to grant stay of investigation and trial is a very extraordinary power given to high courts and the same power is to be exercised sparingly only to prevent an abuse of the process and to promote the ends of justice. It is therefore clear that:

i. Such an extraordinary power has to be exercised with due caution and circumspection.
ii. Once such a power is exercised, high court should not lose sight of the case where it has exercised its extraordinary power of staying investigation and trial.
iii. High court should make it a point of finally disposing of such proceedings as early as possible but preferably within six months from the date the stay order is issued.

On the question regarding the power of the Supreme Court to supervise high courts, it was rightly held that Supreme Court does not have similar power like the high court has over subordinate courts under article 227 of the Constitution. Further, high courts are Superior Court of Record with plenary jurisdiction like Supreme Court and in that sense they are equal. Under our Constitution high court is not a court subordinate to the Supreme Court. Though, the Supreme Court has appellate powers over high court and also some other incidental powers, high courts are not subordinate to Supreme Court. If this being true, to what extent the Supreme Court is justified in giving above directions to all the high courts. When the Supreme Court was empowered by the Constitution to do complete justice giving such directions in the interest of improving the administration of justice would undoubtedly be justified. The court justified such directions on the ground of retaining the common man's faith on administration of justice and the rule of law in this country.

Increasing number of seats in professional colleges

The Supreme Court found fault with the usual practice of increasing number of seats in professional colleges by the high court by interim orders in *Medical Council of India* v. *JSS Medical College*.[42] A division of bench of Karnataka High Court passed an interim order increasing the seats for MBBS Course from 150 to 200 and the same was challenged by the appellant in this case. The Supreme Court held that in normal cases intake of students in the colleges cannot be increased by the court by issuing interim orders. The court clarified that such an order would have a bearing on the final order of the court as welfare and the plight of the students are projected to get the sympathy. If at the final stage the court feels that increasing of the strength is not permissible it would be destructive of the rule of law when such student's admissions, who were initially admitted at the behest of the court order, would

42 AIR 2012 SC 726.

become illegal by the court's subsequent order. Therefore, increasing the number of seats is the power given to the board of governors and the courts would not ordinarily interfere with particularly by way of interim orders.

Whether a statutory tribunal is a court

Whether a statutory tribunal is a court and the officers there of could be judicial officers? This question was raised in *State of Gujarat* v. *Gujarat Revenue Tribunal Bar Association*[43] for consideration when an administrative officer was appointed as a president of Gujarat Revenue Tribunal (constituted under Bombay Revenue Tribunal Act, 1957) by State of Gujarat. The said appointment was challenged in a writ petition before the High Court of Gujarat, wherein the high court held that the said office is a judicial in nature and hence a judicial officer of the rank of district judge could be appointed only with the concurrence of the high court and struck down the rule 3(1) (iii) (a) of the Gujarat Revenue Tribunal Rules, 1982 which permits the state government to appoint any person qualified as Secretary to the Government of Gujarat to the said post.

In a normal connotation 'court' may be understood as an adjudicating authority whose decision is binding on the parties to the dispute. Further, exercising such adjudicating power must have been transferred by the state. As far as tribunals are concerned they are established to adjudicate specific matters. Therefore, the Act under which it was established would determine whether the functions of the tribunal are akin to those of courts.

Tribunals may be called as quasi judicial authority when they satisfy the following conditions:

a) a statutory authority is empowered under a statute to do any act;
b) the order of such authority would adversely affect the subject; and
c) although there is no *lis* or two contending parties, and the contest is between the authority and the subject; and
d) the statutory authority is required to act judicially under the statute.

One of the tests to determine whether a tribunal is a court or not, is to verify whether the high court has revisional jurisdiction over the judgments and orders passed by the concerned tribunal. In the present case, the Bombay Land Revenue Code provides for reference of certain matters to the tribunal for its opinion and the tribunal has also been conferred with the power to adjudicate disputes. Further while deciding appeals the Tribunal shall exercise all the powers which a court has and follow the same procedure which a court follows in deciding appeals from the decree or order of an original court under CPC.

Further the judgments and orders passed by the tribunal can be challenged under article 227 of the Constitution. Therefore, the high court has supervisory control over the tribunal. As a result the Government must consult high court before the appointment of the president of the tribunal.

43 (2012) 10 SCC 353.

High court's power to superintendence over all courts

In *Chitra* v. *Pankaj Kashyap*[44] explaining the scope of article 227 the Delhi High Court held that the power under article 227 of the Constitution of India is to keep the lower courts and tribunals within their powers and see that they exercise their duty in a legitimate manner. It says that the court can interfere in the orders of lower courts if they were passed on erroneous assumption, errors apparent on the face of record, arbitrary or capricious exercise of discretion, a patent error in procedure or arriving at a finding based on no material. In the present case family court has dismissed an application made by a wife under section 24 of Hindu Marriage Act merely on a ground that she failed to state in her application that she is not earning anything or her earnings are not sufficient to support her. Upon application under article 227 by the wife, the Delhi High Court held that it is a fit case to exercise its jurisdiction under article 227 and observed that the approach of the family court is totally insensitive.

X REPUGNANCY: ARTICLE 254(2)

Article 254 deals with repugnancy between state and central legislations. Under the article 254(1), repugnancy arises when both state and centre enacts a law in the same field. However, mere enacting legislation in the same field does not automatically invalidate either of the law. Invalidation of law occurs only when both are in direct conflict and there is no chance of reconcilement between them. Therefore, it is necessary to see whether both law operate in the same field, are in direct conflict with each other and absolutely irreconcilable. Article 254 (2) is an exception to article 254(1) as it saves state law when it is inconsistent with existing central legislation in entries of concurrent list. The Presidential consent to such state law would make state law to prevail over central law with in the territory of the state. In spite of such constitutional protection to the state law which obtained necessary presidential consent, the provision became highly contentious and lead to development of several principles in deciding the repugnancy.

One of such controversy was raised in *Krishi Upaj Mandi Samiti, Narsinghpur* v. *Shiv Shakti Khansari Udyog*.[45] The Madhya Pradesh Krishi Upaj Mandi Adhiniyam, (the Market Act) was enacted to regulate the sale and purchase of agricultural produce. It was enacted to prevent exploitation of farmers and also for better administration of agricultural produce markets in State of Madhya Pradesh. Two provisions of the said Act, *i.e.,* sections 36 and 37 are in direct conflict with the provisions of clauses (3), (4), (5) (5A) and (6) of the Control Order made by the central government. The Control Order was issued under section 3 of the Essential Commodities Act, 1955. The said provisions of the Market Act in conflict with Sugarcane Act were passed by the State of Madhya Pradesh.

When the validity of the sections 36 and 37 Market Act were challenged before Madhya Pradesh High Court, the division bench held that both Control Order by the central government and Sugarcane Act made by the State of Madhya Pradesh

44 AIR 2012 Delhi 91.
45 AIR 2012 SC 3511.

being special legislations would prevail over Market Act pertaining to supply and purchase of sugarcane. In an appeal to the Supreme Court it was contended that the Market Act and the Sugarcane Act operate in different field further even though the Market Act is inconsistent with Control Order which has been framed under a central legislation, the Control Order cannot override the Market Act as the Market Act was enforced after receiving presidential assent under article 254(2).

However, at the time of referring the Market Act for the Presidential assent sugarcane was not treated as an agricultural produce and was not included in schedule appended to the Market Act. Therefore, at the time of reference the Market Act deals with agricultural produce other than sugarcane, it is obvious that the state has not referred it to President on ground of repugnancy. Hence, the question was when an Act was reserved for Presidential consent in general terms would such assent be a valid for all future purposes?

Answering negatively the Supreme Court held that article 254(2) would not be available to make Market Act to prevail over the Control Order for transactions involving the purchase of sugarcane. The court reached such a conclusion relying on a decision by the Constitution bench in *Gram Panchayat of Village Jamalpur* v. *Malwinder Singh*.[46] In this case the court held that the assent of the President is not an empty formality. While applying for Presidential consent, the President must be apprised why his consent was sought. If such an assent was sought for specific purpose then the assent would be limited to that specific purpose and cannot be extended for general purposes. "The assent of the President under article 254(2) of the Constitution is not a matter of idle formality. The President has, at least, to be appraised of the reason why his assent is sought if, there is any special reason for doing so. If the assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise."

While considering the proposition laid down in *Gram Panchayat of Village* case citation in *Kaiser-I-Hind Pvt. Ltd.* v. *National Textile Corporation (Maharashtra North) Ltd*,[47] the apex court held that before obtaining the assent of the President the state government needs to pinpoint by mentioning the exact entry/ entries of the List and further the provisions of its legislation repugnant to laws made by Parliament. Use of the words "reserved for consideration" would certainly signify that the President is required to apply his/her mind to the repugnancy pointed out between the proposed state law and the earlier law made by Parliament. For such an exercise the President needs to be updated with the necessity of having such a law, the facts and circumstances of the matter, which is repugnant to a law enacted by Parliament prevailing in a state.

The transaction regarding sale or purchase of sugar cane is covered by the Sugarcane Act and the Control Order, which are special legislations. The provisions of the Market Act, which generally apply to sale and purchase of agricultural produce specified in the schedule cannot be invoked for compelling any person dealing with sugarcane because the provisions of the Market Act are in direct conflict with the Sugarcane Act and the Control Order. Consent obtained from President in general

46 1985 (3) SCC 661.
47 (2002) 8 SCC 182.

terms when sugarcane is not recognised as a market produce under the Market Act would not get protection under article 254 (2).

The question that was raised in a special leave petition in *M.P. Rural Road Development Authority* v. *L.G. Chaudhary Engineers and Cont*[48] was section 7 of Madhya Pradesh *Madhyasthan Adhikaran Adhiniyam,* 1983, (MPMAA Act) is inconsistent with the provisions of Arbitration and Conciliation Act, 1996 and thus become repugnant under article 254 of the Constitution of India.

A closer look at the provisions of the MPMAA Act would reveal that the provisions of the said Act are inconsistent with the provisions of Arbitration and Conciliation Act 1996. The MPMAA Act provides for mandatory arbitration irrespective of an arbitration agreement whereas such an agreement is a precondition for applicability of Arbitration and Conciliation Act, 1996. Further there are several differences in constitution of arbitration, qualifications of arbitrators, remuneration, and procedure to be followed.

Therefore, the contention was that the MPMAA Act is repugnant to the Arbitration and Conciliation Act, 1996 which being a central legislation and passed after MPMAA Act. Weighing the arguments on repugnancy, the court held that the subject of 'arbitration' incorporated under entry 13 of the concurrent list in the VII schedule of the Constitution. Therefore, both state as well as central government is competent to legislate on the same subject. When the MPMAA Act, was passed the Arbitration Act, 1940 already existed and the MPMAA Act has received President of India's consent. As a result the requirement under article 254 (2) was fulfilled and the MPMAA Act would automatically prevail over Arbitration Act, 1940. When Arbitration and Conciliation Act was passed in the year 1996 repealing Arbitration Act, 1940, by virtue of sections 2 (4) and 2 (5) of the 1996 Act, the MPMAA Act is saved.

Further, in *M. Karunanidhi* v. *Union of India*[49] the Supreme Court held that to ascertain the repugnancy, the court could rely on the fact that the intention of the dominant legislature is to allow the subordinate legislature to operate in the same field. In the instant case it is clear that Arbitration and Conciliation Act by virtue of sections 2(4) and 2(5) clearly showed such an intention to allow the MPMAA Act to operate in state of Madhya Pradesh in certain specified types of arbitrations. Hence there exists no repugnancy.

In *Mohan Madhukar Sudame* v. *State of Maharashtra*[50] the petitioner challenged the validity of section 64 of the Maharashtra Universities Act, 1994 as repugnant to section 30 of Advocates Act, 1961 as well as section 14 of the Indian Bar Councils Act, 1926. Section 64 of the Maharashtra Universities Act, 1994 prohibits legal practitioners to appear before the college tribunal. The petitioner's contention that section 30 of the Advocates Act, empowers advocates a right to practice in all courts, tribunals, and before any person authorised to take evidence, is enacted by Parliament in exercise of its legislative powers under entry 77 and 78 of the union list and entry 26 of concurrent list. Right to practice of advocates thus provided by

48 (2012) 3SCC495
49 (1979) 3 SCC 431.
50 AIR 2012 Bom. 89.

a central legislation, section 64 Maharashtra Universities Act being a state legislation under entry 26 of concurrent list cannot override the central legislation by virtue of article 254. The Bombay High court relying on *H.S.Srinivasa Raghavachar* v. *State of Karnataka*[51] held that section 64 is invalid. In *H.S. Srinivasa* case the Supreme Court held section 48(8) of the Karnataka Land Reforms Act, 1961 which prohibits the legal practitioners from appearing in the proceedings before the land tribunal was repugnant to Advocates Act hence invalid.

Whether section 30 of the Advocate's Act, had been brought into force? Therefore, right to practice before any court or tribunal or any person authorised to take evidence emerges from section 30 of the Advocates Act. As section 64 of the Maharashtra Universities Act, 1994 deals with exclusion of advocate's right to practise before the university and college Tribunal, the provision is repugnant to section 30 of the Advocates Act and consequently void as per article 254(1) of the Constitution of India. Therefore, an advocate does not require obtaining any permission to appear before the tribunal.

XI SERVICE MATTERS: ARTICLE 309

In *State of Gujarat* v. *Arvindkumar T. Tiwari*[52] the court held that power to relax the rules of recruitment on any ground would be the prerogative of the government and the courts have no power to do so. The power of relaxation in recruitment rules are conferred to the government or an authority authorised to recruit. Even in case where an emergency or where injustice have been caused or likely to cause to any person by the existing rules or even such rules become impossible neither courts nor tribunal have power to issue directions to appoint by way of granting relaxation of eligibility.

Relying in its earlier judgment in *State of M.P.* v. *Dharam Bir*[53] this court held that even on the pleas of humanitarian ground or on sympathetic consideration when a person not having essential qualifications should not be allowed in a post. Such an order or directions would amount to amending the statutory provisions made by the government under article 309 of the Constitution.

XII POWER OF NATIONAL COMMISSION FOR SCHEDULED CASTES AND SCHEDULED TRIBES: ARTICLE 338

In *Collector, Bilaspur* v. *Ajit P.K. Jogi*[54] the question which arose was whether National Commission for scheduled castes and scheduled tribes constituted under article 338 of the Constitution had jurisdiction to entertain complaints about genuineness of caste certificate of particular individual and pronounce upon validity of caste certificate and caste status of such person. The first respondent, Ajit P K Jogi was elected twice to Rajya Sabha and also contested twice in parliamentary elections he successfully contested from Marwahi Vidhan Sabha constituency

51 (1987) 2 SCC 692.
52 (2012) 9 SCC 545.
53 (1998)6SCC 165.
54 AIR 2012 SC 44.

reserved for scheduled tribes in 1991. In the year 2000, he became the first chief minister when the State of Chhattisgarh came into existence and served in that capacity till December, 2002.

The appellant complained to National Commission for Scheduled Castes and Scheduled Tribes contending that the respondent was a Christian and that he did not belong to a scheduled tribe; and that he had obtained several false caste certificates showing him as belonging to 'Kanwar' scheduled tribe and had contested elections from a constituency reserved for scheduled tribes. He requested that appropriate action be taken in that behalf.

The National Commission constituted a committee for necessary verification. The commission felt that there was want of co-operation from the Government of Chhattisgarh and instructed its branch at Bhopal to ascertain the correct position and verify the caste claim of the first respondent.

The division bench of Supreme Court noted that the duties under un amended article 338 (5)(b) did not confer on the National Commission any right to either issue of caste/tribe certificate or to revoke or cancel a caste/tribe certificate or to decide upon the validity of the caste certificate. However, there is no doubt that the National Commission could entertain and enquire into any specific complaint about deprivation of any rights and safeguards of scheduled tribes. The plain reading of the said provision enable the National Commission to enquire into such complaint and give a report to the central government or state government for effective implementation of the safeguards and measures for the protection and welfare of scheduled tribes. Therefore, this power did not include the power to enquire into and decide the cast or tribe status of any particular individual. Only scrutiny committee which was constituted as per the direction in *Madhuri Patil* v. *Addl. Commissioner (Tribal Development)*[55] or in terms of any statute made by the appropriate government in that behalf could verify the validity of caste certificates and determine the status accordingly.

Thus the National Commission is not entitled to hold any inquiry regarding the status of any individual nor can summon documents, records to determine the genuineness of his caste certificate under clause 5(b) of article 338 (or under any of the other sub-clauses of clause 5 of article 338 . When such a complaint was received, the National Commission will have to refer the matter to the state government or the authority which was constituted for verification of caste/tribal status, to take necessary action. Though the National Commission may not determine the status but it can certainly follow up the matter with the state government or such authority dealing with the matter further the purpose of ensuring that the appropriate decision may be taken.

In case of failure of such action either by the state government or the authorities the National Commission could, either itself or through the affected persons, initiate legal action to ensure a proper verification of the caste certificate. However, the National Commission cannot undertake the exercise itself, as has been done in this case. When the scope of the duties did not confer the power to inquire or adjudicate regarding the status of case, the fact that there was sufficient material to reach such

55 1994 (6) SCC 241.

a conclusion is not relevant. The court clarified that the position of law is same even under article 338A (which was subsequently inserted) providing for a separate commission for scheduled tribes with identical duties.

Anand v. *Committee for Scrutiny and Verification of Tribe Claims*[56] deals with important issue regarding the parameters for determination of status of schedule tribe. In this case, division bench of the Supreme Court while dealing with the question of parameters to be applied for determining whether an applicant belongs to a notified scheduled tribe specified by the President under article 342 of the Constitution, held that the genuineness of a caste claim has to be considered by not just the examination of the documents submitted in support of the claim but also on the affinity test which includes examination of anthropological and ethnological traits *etc.* of the applicant. By asserting that it is neither feasible nor desirable to lay down an absolute rule which could be mechanically applied to examine a caste claim, court laid down two broad parameters to be kept in mind while dealing with such a claim:

a) Greater reliance has to be placed on the pre-independence documents as they furnish a higher degree of probative value to the declaration of a caste status in comparison to post- independence. In the event of doubt on the credibility of a document, its veracity has to be tested on the basis of oral evidence, for which an opportunity has to be afforded to the applicant.
b) A cautious approach has to be adopted while applying the affinity test, which focuses on ethnological connections with the scheduled tribe. Affinity test could serve as a determinative factor in the times when tribes were immune to cultural development happening around them. However, with the migrations, modernization and contact with other communities, these communities tend to develop and adopt new traits which may not essentially match with the traditional characteristics of the tribe. Thus this test cannot serve as a litmus test for establishing the link of applicant with a Scheduled tribe. It can be used to corroborate the documentary evidence, but should not be the sole criteria for rejecting a claim.

The court added that, burden of proving the caste claim is on the applicant who has to produce all the requisite documents in support of his claim. The role of Caste Scrutiny Committee is merely to verify the claims by scrutinizing the materials and documents produced by the applicant and in a case where material produced by the applicant does not prove his claim, it cannot gather evidence on its own to prove or disprove the claim.

XIII TORTUOUS LIABILITY OF STATE

Sattar Sheikh v. *Municipal Corporation of Delhi* [57] deals with tortuous liability of the state. The Petitioner's nine years old son died when he accidentally fallen in an open manhole in a vacant plot meant for *Sulabh Shauchalaya*. The Respondent contended that they are not responsible as the deceased trespassed on the plot. The

56 (2012) 1 SCC 113.
57 AIR 2012 Del 190.

court held that when the vacant plot was bounded by a wall but without any gate there is every possibility that children would enter such place for playing. The respondents ought to have contemplated such possibility.

Further, the court held that leaving a plot and the manhole uncovered itself is a case negligence on the part of respondent hence they are liable for compensation. Regarding the quantum of compensation the court held that in the absence of any proof of income of the father, minimum wages could be taken into the consideration. While finalizing the amount of compensation the court may also consider the rate of inflation and pecuniary loss of dependency.

XIV RIGHT TO PROPERTY UNDER ARTICLE 300A

Generally right to property was equated with life and liberty. Constitution of United States of America emphatically approved this notion by adding the property with life and liberty under V and XIV amendments. But the constitutional framers of India consciously did not follow the same. The right to property originally formed separate right under part III of the Constitution of India under articles 19 and 31 where as right to life and personal liberty was recognized under article 21. The 44th amendment removed right to property from fundamental rights and given the status of constitutional right under article 300A. After 44th Amendment, articles 31A, 31B and 31C which are part of part III only deals with restrictions on property rather than right to property. Only article 300A confers some protection to right to property but it does not enjoy the status of fundamental right. In this context *Delhi Airtech Services Pvt. Ltd.* v. *State of U.P.*[58] addresses a very important question that the expression 'law' used in article 300A could be equated with the expression of 'law' under article 21.

The question raised in this case is acquiring land without fulfillment of statutory requirements under Land Acquisition Act would amount to violation of right to property under article 300A. The appellant's property was acquired by the state under emergent provisions of section 17 of Land Acquisition Act. Section 17 (3A) mandates that before taking possession of any land under section 17, the collector shall tender payment of eighty per centum of the compensation for such land as estimated by him to the persons interested entitled thereto, and pay it to them, unless prevented by some one or more of the contingencies mentioned in section 31, sub-section (2).

In the present case 80% of the compensation for the land so acquired which should have been paid before the possession of the land was neither tendered nor paid. The appellant contended that payment being a condition precedent for taking possession of the land, non-fulfillment of such mandatory rule the whole acquisition shall be set aside and the land so acquired shall be returned.

Relying upon the earlier judgment of *Satendra Prasad Jain* v. *State of U.P.*[59] Swatanter Kumar J said that nonpayment cannot be a ground to set aside the whole acquisition. In *Satendra Prasad* case the three-judge bench held that the possession

58 AIR 2012 SC 573.
59 (1993) 4 SCC 369.

of the land would not become illegal simply because 80% of the estimated compensation was not paid to the landowners. Therefore, acquisition of land would not be affected by the nonpayment.

Dissenting with Swatanter Kumar J, Asok Kumar Ganguly J held that the requirement of payment under section 17 (3A) is a condition precedent by the Land Acquisition Act; hence the concept of eminent domain is subject to the payment of 80% compensation before taking possession of the land. Therefore, acquiring the possession of land without complying with the requirement of section 17(3A) is illegal. With regards to *Satendra Prasad* case Ganguly J said that a passing observation made be regarded as per *incuriam*, being unnecessary in the facts of the case. Hence, it does not have the effect of binding precedent.

However, the real controversy of the case arises when Ganguly J tries to bring the concept of eminent domain under due process of law. He observes that Constitution protects deprivation of right to property save by authority of law under article 300A. He contends that the expression 'law' in both article 21 and article 300A must be given the same meaning. In both the cases it means a valid law enacted by a competent authority. To be a valid law such law must be just, fair and reasonable as held by Supreme Court in *Maneka Gandhi*[60] case.

This analogy could be drawn considering the fact that both article 21 and 300A are meant to prevent deprivation of rights. In this context the requirement of section 17(3A) constitutes the authority of law within the meaning of article 300A. Therefore, this section shall be viewed as a law which has been enacted to prevent deprivation of right to property guaranteed under article 300A. As a result section 17(3A) shall mean a law that gives a fair, just and reasonable protection of the rights of the land owner's constitutional right to property. In view of different opinions the matter was placed before larger bench.

A closer look at the dispute in the case reveals that the dispute was non compliance of a statutory provision and its effect. One may conclude that dragging article 300A and equating the expression 'law' with the expression in article 21 is uncalled for. Whether payment of 80% compensation is mandatory or discretionary could have been decided without recourse to articles 21 and 300A. By bringing these two articles this case opens several questions that was discussed at length long before. Though, status of right to property need a fresh look particularly in the wake of globalization and large scale land acquisitions leading to mass displacement, this case seems to be not appropriate for such a relook.

XV NEW AMENDMENTS

The 97th amendment to the Constitution of India was passed by the Parliament and received the assent of the President of India on 12.01.2012. The amendment gives co-operative societies not only a constitutional status but also a fundamental right to establish co-operative societies to the citizens.

The amendment made three changes in this Constitution. Firstly, it amended article 19(c) by adding the word 'or co-operative societies'. Secondly, it adds article

60 (1978) 1 SCC 248.

43B to the directive principles of the state policy which imposes an obligation on the sate to promote co-operative societies. Thirdly, it inserts part IX B dealing with intricacies of co-operative societies in terms of composition, registration, and functioning. Further, part IX B will have an overriding effect on all existing laws and impose limitations on future legislations on co-operative societies.

Explaining the need for such an amendment, the Union Agricultural Minister Shard Pawar in his speech in the Parliament while explaining the role of co-operative societies in Indian economy observed that India is one of the largest country in the world having co-operative movement.[61] The co-operatives in India cover 97% of villages and 71% of rural house hold. With phenomenal increase in agricultural credit to 70,105 crores in 2010-11, these numerical expansions failed to achieve the intended goals.[62] Reforms in co-operative societies did not gain desired momentum; as a result a need was felt to give co-operative societies a constitutional status. Such a facelift is required to insulate the co-operatives from political and bureaucratic interference.

Though the idea behind 97th amendment is laudable, inserting the word co-operative societies in article 19(c) does not change any thing substantial as co-operative societies are covered under the expression "associations or unions" in the original article. Further, giving constitutional status to governance of co-operative societies which are voluntary bodies is debatable as constitution is a fundamental law of the country. Only the time would tell whether 97th amendment would boost the co-operative movement to the desired level.

XVI CONCLUSION

Granville Austin describes the Constitution of India as a 'Corner stone of the Nation'.[63] Such an expression is justified as the nation has not only survived for several decades but also contributed to the development of several healthy constitutional practices. Constitutional governance though signifies the complex relation between power and accountability, the current year under the survey shows how the judiciary played crucial role in balancing such relation. Though cases like *Purno Agitok Sangma, Delhi Airtech Services Pvt. Ltd., Sahara India Real Estate Corpn. Ltd and Priya Gupta* raise several controversies on judicial interpretations, cases such as *Ashok Sadarangani* and *Narendra Champaklal Trivedi* shows judicial restraint. To state the obvious, Indian judiciary continues to be the champion of constitutional governance in India.

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61 Available at : http://164.100.47.5/newdebate/224/28122011/12.00NoonTo13.00pm.pdf (last visited on 26.05.2013).

62 *Ibid.*

63 See, Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (Clarendon Press: Berkeley, 1966).