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CONSTITUTIONAL LAW

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I INTRODUCTION

OBSERVING CONSTITUTIONAL morality is an indispensable requirement for a democratically elected government. Constitutional morality applies to all the stakeholders equally, irrespective of whether they are ruled or rulers. The constitutional scheme empowers the rulers to keep ruled within the boundaries of the constitutional morality. In that sense, the constitution imposes higher responsibility on the rulers. However, observance of constitutional morality is a rarity and not a natural sentiment. Therefore, the question is, if the rulers themselves violate the constitutional morality, how to ensure that they are abide by the constitutional morality? Whom should such power be conferred to ensure the rulers are bound by the constitution?

The constitution expects that the rulers bring constitutional order, and the rule of law should lead the exercising of public power by the rulers to be accountable and answerable. Constitutional morality requires all the constitutional functionaries to exercise their power within the boundaries of the constitution. It mandates allegiance to the core principles of the constitution. Therefore, for constitutional governance, all the constitutional functionaries must function to promote the constitution's true spirit. Keeping these constitutional functionaries under constitutional morality is squarely on the judiciary, and it is the watchdog of the constitutional principles. It's incumbent on the judiciary to check any erosion of constitutional morality. This year's annual survey would exactly reflect this aspect.

II ARTICLE 72

In *Vinay Sharma* v. *Union of India*,[1] the Supreme Court was asked to decide on the court's jurisdiction in reviewing the President's power to commute the death sentence. In this case, a writ petition was filed by the petitioner under article 32 challenging the President's order of rejecting his mercy petition on the following grounds:

(i) Non-furnishing of relevant materials under RTI Act;

(ii) non-consideration of relevant material;

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1 (2020) 3 SCC 161.

(iii) torture;

(iv) mental illness;

(v) consideration of irrelevant material by the respondent authorities; and

(vi) illegal solitary confinement.

The facts of the case show that the petitioner is one of the convicts for death in a rape and murder case. The trial court found him guilty and imposed the death sentence, and the high court confirmed the same. In an appeal to the Supreme Court, the court affirmed the death sentence. After that, the petitioner filed a review petition Supreme Court, after a detailed hearing, rejected the review. Petitioner again approached the Supreme Court under a curative petition, and the same was dismissed.

Finally, the petitioner applied for mercy fromthe President of India. The President of India rejected the mercy petition. Hence, he filed the present writ petition under article 32 on several grounds, such as Lieutenant Governor and Home Minister, NCT of Delhi have not signed the recommendation for rejection of the petitioner's mercy plea, relevant materials like the case records, correct medical status report of the petitioner, Social Investigation Report and the nominal roll of the petitioner were not placed before the President of India. Further, he contended that irrelevant materials were placed before the President of India, which resulted inthe rejection of the mercy petition.

On behalf of the respondent, it was argued that the scope of judicial review on the order of the President is very limited, and the contentions raised by the petitioner do not fall within the grounds of review as laid down by the court in its previous judgments. While responding to the scope of judicial review over the President's order rejecting the mercy petition, the court referring to its earlier decisions,[2] reiterated that the power of the President or Governor under articles 72 and 161 is a constitutional duty hence they shall exercise these powers independent to the observations of the courts. When they were asked to exercise their power, the executive did not act as a court of appeal. The power to grant remission is "an act of grace and humanity in appropriate cases *i.e.,* distinct, absolute and unfettered in its nature." However, the court reminded that such power could be exercised only with the aid and advice of the Council of Ministers.

Regarding the power of judicial review, the court in *Epuru Sudhakar*[3] held the court exercises a very limited judicial review to interfere with the President's order. Such review is restricted to the following grounds:

(i) that the order has been passed without application of mind;

(ii) that the order is *mala fide;*

(iii) that the order has been passed on extraneous or wholly irrelevant considerations;

2 *Satpal* v. *State of Haryana* (2000) 5 SCC 170; *Bikas Chatterjee* v. *Union of India* (2004) 7 SCC 634, and*Shatrughan Chauhan* v. *Union of India* (2014) 3 SCC 1.

3 *Epuru Sudhakar and Another* v. *Govt. of A.P.* (2006) 8 SCC 161.

(iv) that relevant materials have been kept out of consideration;

(v) that the order suffers from arbitrariness.

After identifying the grounds on which judicial review could be exercised on orders of the President, the court reviewed the contentions of the appellant in this case

Non-furnishing of relevant materials under RTI Act

An application under RTI Act was filed before the office of the President of India, Lieutenant Governor, Ministry of Home Affairs, and the Department of Home, Government of NCT of Delhi requesting a copy of records relating to the rejection of the mercy petition of the petitioner. However, he received no response from any one of the offices. In the absence of a copy of the record, the petitioner is not in a position to appreciate the reasons for rejection of his mercy petition. He would also not be able to represent his case before this court in a meaningful manner.

Considering the above contention, the court held that it is not appropriate for the court to decide whether the information should have been given or not as it is beyond the scope of consideration in this petition. The files sought by the petitioner under RTI Act were produced before the court as the court wanted to satisfy itself that the procedure followed was indeed in accordance with the law. The court observed that after verifying the files, it was satisfied that all the procedures were followed. It was also found that the Minister (Home), NCT of Delhi, and Lieutenant Governor, Delhi, have perused the relevant file and have signed the note to reject the mercy petition. So, there is no merit in the contention of non-compliance with procedure and non-application of mind. The court held that the examination of the files establishes that no prejudice is caused to the petitioner because of the non-furnishing of the copy of the documents.

Non-placing of relevant materials before the President of India and the relevant materials were kept out of consideration

File relating to Government of NCT of Delhi, Office of Lieutenant Governor, Delhi, the file relating to the forwarding of the mercy petition of the petitioner from Government. of NCT of Delhi to Ministry of Home Affairs, and the file containing the note put up before the President of India were produced before the court for its examination.

After examining these files and the file notings, Supreme Court held that all the documents necessary for the purpose of enabling the President to deal with the mercy petition were submitted. Therefore, the court held that there is no merit in the contention that the relevant materials were kept out of consideration of the President of India. Further, medical reports and reports relating to the illness of the petitioner were also placed before the President.

Ill-treatment in prison

The court held that the sufferings of the petitioner due to ill-treatment in prison could not be a ground for judicial review of the executive order passed under article 72 of the Constitution of India.

Bias order was passed on irrelevant considerations

The other contention was that the minister's public statements that he was in favour of the death sentence for the accused amount to pre-judging the issue and hence amount to bias. Making such public statements would influence the aid and advice the Council of Ministers of Delhi tendered to the Lieutenant Governor or Council of Ministers in the Central Government to the President. However, again court rejected the contention and held that those public statements cannot be said to have any bearing on the "aid and advice." Supporting this, the court relied upon *Maru Ram,*[4] wherein the court held that it is presumed that constitutional authorities while exercising their power, would act carefully after considering all the aspects objectively. Accordingly, the court dismissed the writ petition.

The *amicus curiae* raised two important aspects of mercy petitions.

i. Is it desirable that the President/Governor indicate reasons in the order granting or rejecting pardon/remission?

ii. Can the President/Governor withdraw the order of granting pardon/remission if materials are placed to show that certain relevant materials were not considered or certain materials of extensive value were kept out of consideration?

While framing these important issues, the *amicus curiae* opined that reasons for granting or refusal of remission should be indicated as the absence of reasons would affect the exercise of judicial review. However, the court did not discuss these two issues in the judgment.

This case raises an issue where the petitioner contend that he cannot represent his case effectively as the copy of the files under RTI Act was provided to him, and hence it is not possible for meaningful representation. Instead of ordering the copy to be supplied to the petitioner, the court itself examines the files and satisfies that the process is fair. Is it a fair trial and satisfies the test of procedure established by law under article 21? By doing so, does the Supreme Court replace the petitioner's right to have a fair hearing? The requirements of article 21 are mandatory for a fair trial, and the procedure established by law mandates that the accused shall be given all facilities to represent himself effectively. The Supreme Court ought to have taken a stand that the necessary files and file notings to be given to the accused. Instead, the court was satisfied by reviewing the files and file notings by itself, thereby acting on behalf of the accused. This will have far-reaching ramifications if the same followed as precedent.

Pyare Lal v. *State of Haryana*[5] is another case where the power to grant pardon was reviewed. The appellant was convicted under section 302, read with section 34 of the Indian Penal Code, 1860. He was sentenced tolife imprisonment.On the eve of Independence Day, state government recommended the Governor to grant special remission to certain classes of prisoners, and accordingly, the Governor, under article

4 *Maru Ram* v. *Union of India* (1981) 1 SCC 107.

5 (2020) 8 SCC 680.

161 of the Constitution, granted the remission. The policy of the State of Haryana under which the remission was given below:

i. The convicts who have been sentenced for life and are 75 years or above in case of male and of 65 years or above in case of females and have completed eight years of actual sentence in case of male convicts and six years of actual sentence in case of female convicts including undertrial period and excluding parole period are entitled for remission. Provided that their conduct has remained satisfactory during confinement and they have not committed any major jail offense in the last two years.

ii. In case of convicts who are sentenced for other than life sentence and are of 75 years and above in case of male and 65 years and above in the case of female and have been completed 2/3rd actual sentence including undertrial period and excluding parole period—provided that their conduct has remained satisfactory during confinement and not committed any major jail offense in the last two years are entitled for remission.

iii. The remission will not be granted to prisoners convicted ofcertain offenses like

   i) persons whose death sentence was commuted to life imprisonment

   ii) Abduction and murder of a child below the age of 14 years.

   iii) Rape with murder. iv) Dacoity or Robbery

   iv) Where the Courts have issued any specific order regarding confinement.

   v) Offenses under certain Acts.

As per the policy, the appellant was released on remission as he had completed eight years of the actual sentence, and he is of 75 years of age. This policy of premature release of convicts before completing the mandatory period of 14 years was challenged. One of the contentions is that remission can be granted prematurely under article 161 without completing the mandatory period in view of section 433-A of the Cr PC. This issue was settled in *Maru Ram* v.*Union of India,*[6] wherein the Constitution Bench,while considering the validity of section 433-A, held that the need for a 14 year gestation for remissionwas not a violation of the constitution.

While discussing the scope of the remission under section 432 and section 433 of the Cr PC and pardoning power of the President and Governor under articles 72 and 161 of the Constitution, the court pointed out that though they look similar in nature, they are sperate powers. The remission power exercised under the constitution cannot be equated with the power under the statute like the Cr PC. An ordinary legislation cannot touch the constitutional power. Therefore, the mandatory gestation period under section 433-a would apply to section 432 and 433 but not on the powers of the President and governor under articles 72 and 161. The correct interpretation would be notwithstanding section 433-A, the President and the Governor can exercise the power of commutation.

6 (1981) 1 SCC 107.

However, one must understand that in reality,this power is exercised by the Central and state governments, not by the President or Governor on their own. President and Governor are bound by the advice given by the respective governments. The advice of the appropriate government binds the head of the state. In *Maru Ram* supreme court held that there is no need for the government to give such advice in each case. A general order which is clear to identify a group of cases to whom the remission can be granted would suffice the test of articles 72 and 161. That does not mean that the court cannot interfere with exercising such power. The judicial review of power to grant pardon is limited to whether such order was the product of extraneous or *mala fide* factors.

In several cases, the Supreme Court categorically said that the decision to grant the pardon by the President and Governor could be challenged on the ground that when the satisfaction of the President and Governor was based on extraneous grounds or not supplying essential materials.[7]As per these cases, all relevant information, such as the seriousness of the crime and how the crime was committed, must be submitted to the Governor to objectively consider the application for remission. In the present case, no such formalities were followed, and no individual facts and circumstances of the case were placed before the Governor.

Therefore, the major contention, in this case, was can a Governor exercise the power of granting a pardon only on the basis of the policy of the government and exercising such power would violate the purpose of article 161. As this issue needs to be decided by a larger bench, the court referred the matter to the registry with a direction to place the matter before the chief justice for constituting a Bench of appropriate strength.

Grant of pardon is a constitutional duty exercised by the executive. It is neither a privilege nor the will of the Executive. Policies framed by the state identifying the group of cases that deserve remission would save time in granting remission. Such policies could not only be for the benefit of the accused but also for society at large. However, a judicial review of such policies can be limited to the rationality of the policy rather than each case.

III ARTICLE 110

Of late, article 110 had become a new constitutional controversy. The power of the Speaker in certifying a bill as a Money Bill had reached the Supreme Court for interpretation. The ruling government could misuse this constitutional protection of the Money Bill as Money Bill does not require the approval of Rajya Sabha once it is certified by the Speaker. *Rojer Mathew* v. *South Indian Bank Ltd.,*[8] raises one such instance.

One of the petitioners filed a public interest litigation (PIL) challenging Part XIV of the Finance Act, 2017, for violating constitutional principles. Part XIV of the

7 *Epuru Sudhakar* v. *Govt. of A.P.* (2006) 8 SCC 161, *Swaran Singh* v. *State of U.P* (1998) 4 SCC 75.

8 (2020) 6 SCC 1.

Act has several provisions relating to qualification, appointment, salaries, and terms of appointments of presiding officers of various tribunals. In effect, it amended 25 enactments relating to statutory tribunals. The fundamental objection raised by the petitioner is that Part XIV should not have been part of the Finance Act, as the provisions of Part XIV cannot be classified as a money bill. When their provisions are not covered under the expression of Money Bill under article 110, passing the Act as a money bill under the certification of the Speaker of the Lok Sabha amounts to a colourable exercise of legislative power. Further, the Tribunals and their constitution, powers, and functions are governed by articles 323 A and B; hence, framing any rules and regulating dealing with them should not be classified as a money bill.

The state contends that more than 40 tribunals and statutory commissions exist in India, varying from status to the conditions of services. As a result, several anomalies have crept into the system of tribunals. The Act brought uniformity and harmonized the rules to end these anomalies. Brining amendment to each enactment under which these tribunals or statutory commissions are established would be impracticable; hence these changes were brought under a single legislation. Further, it was argued that the true interpretation of whether a bill is a Money Bill or not, the provision of article 110 must be interpreted in the broadest amplitude. Once the dominant character of the proposed Act satisfies any of clauses (a) to (g) of article 110(1), all matters which are incidental to the Act would also assume the character of a Money Bill.

In addition, article 110 clause (3) confers on Lok Sabha Speaker to decide whether a bill is a money bill. Such a decision of the speaker is final. Article 122 clause (1) expressly prohibits the courts from adjudicating the validity of the proceedings of the Parliament. The cumulative effect of these two articles is that no judicial review is available against the speaker's decision in deciding a bill as a money bill. Based on the above contention, the issue raised is whether the Finance Act, 2017, insofar as it amends certain other enactments and alters conditions of service of persons manning different tribunals, can be termed a money bill under article 110 and consequently is validly enacted?

Supreme Court observed that in several cases,it was held that such clauses would not preclude the constitutional courts from exercising jurisdiction conferred by the constitution. In *Raja Ram Pal* v. *Lok Sabha*,[9] the immunity under article 122 is only extended to the irregularity of the proceedings but not to substantive illegality or unconstitutionality. Whether it is just an irregularity of illegality is a matter of judicial interpretation; hence the courts are within their judicial power to decide.

The court observed that the provisions of Part XIV could be broken down into three broad categories.

i. Abolition and merger of existing tribunals;
ii. Uniformizing and delegating to the Central Government through the Rules, the power to lay down qualifications; method of appointment and removal, and terms and conditions of service of Presiding Officers and members; and

9 (2007) 3 SCC 184.

iii. Termination of services and payment of compensation to presiding officers and members of certain tribunals that have now become defunct.

Whether these provisions could be as termed money bill? The court said that initially, the court took a position that the decision of the Speaker is final and no judicial inquiry about the correctness of the certification by the Speaker can be entertained in the court.[10] The same stand was vindicated in *Yogendra Kumar Jaiswal* v. *State of Bihar*.[11] However, when the same question was raised in *Justice Puttaswamy* v. *Union of India,*[12] a co-ordinate bench, without going into the merits of the decisions given in *Md. Siddiqui* and *Yogendra Kumar Jaiswal* held that the legislation in question comes within the meaning of a money bill as it satisfies the test under article 110. The minority judgment in *Puttaswamy* overruled *Md. Siddiqui* and *Yogendra Kumar Jaiswal* decisions. The court's decision establishes that even though the wisdom of the speaker must be valued court can review whether the certification of the speaker is a blatant violation of the constitution. In a minority judgment D.Y. Chandrachud, J. opined that to make a bill as a money bill, it must deal with the declaration of charging expenditure from the Consolidated Fund of India as section 7 of the Aadhaar Act did not deal with such declaration it's not a Money Bill as it did not declare the expenditure incurred on services, benefits or subsidies to be a charge on the Consolidated Fund of India.

Given the above contradictions, the court believes that the word used in article 110, 'Only' relating to clauses (a) to (f), required a relook as it was not discussed in *Puttaswamy* case. Further, once the court declares that a bill is not a money bill, what would be the consequences of such declaration by the court need to be assessed. The majority judgment in *Puttaswamy* did not expressly examine the scope of judicial review on the speaker's certification of a bill as a money bill. Therefore, the court felt if they express any opinion regarding the judicial power over the speaker's decision, it may create conflict. Hence, it is recommended to place this matter before the chief justice for the consideration of a larger Bench.

IV ARTICLE 136

In K. *Lubna* v. *Beevi*[13] the question that was raised is when a fact that was never raised before the trial court and high court can such a fact be raised before the Supreme Court under article 136. The court held that a pure question of law could be examined at any stage. That includes before the Supreme Court. While explaining the pure question of law, the court held that "If the factual foundation for a case has been laid and the legal consequences of the same have not been examined, the examination of such legal consequences would be a pure question of law". While appealing, such a question is required to be raised, and it is mandatory for the appellant. However, when the appellant moved a separate application seeking permission for additional grounds, such a mandatory requirement was fulfilled. Once such a requirement is

10 See *Mohd. Saeed Siddiqui* v. *State of Uttar Pradesh* (2014) 11 SCC 415.

11 (2016) 3 SCC 183 26.

12 (2019) 1 SCC 1.

13 (2020) 2 SCC 524.

fulfilled, the only question that needs to be answered is whether this is a question of law and has ramifications in the present case. If the answer is yes, then the court shall allow the same.

V ARTICLE 137: REVIEW

Review in a legal sense means re-examination of the case by the same court. Hence, such power could be exercised to correct the court's errors and prevent miscarriage of justice. *Akshay Kumar Singh* v. *The State NCT of Delhi*[14] is popularly known as the Nirbhaya case. The petitioner filed a review petition under article 137 of the Indian Constitution requesting to review the judgment dated May 5, 2017 passed by Supreme Court in Criminal Appeal confirming the conviction and death penalty. The petitioner requested the court to review the merits of the prosecution case and the findings rendered.

It is a well-established rule that the review cannot be entertained except in cases of error apparent on the face of the record. Article 137 of the Constitution of India empowers the Supreme Court to review any judgment pronounced or made, subject, of course, to the provisions of any law made by the Parliament or any rule made under article 145 of the Constitution of India and Order XLVII Rule 1 of Supreme Court Rules, 2013.[15]

In *Sow Chandra Kante* v. *Sheikh Habib*[16]the Supreme Court clearly explained the scope of the jurisdiction under article 137 "A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition through different counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

The Supreme Court, under article 137, cannot re-appreciate the evidence and reach a different conclusion, even if that is possible.[17] Once the conclusion is arrived by the trial and high court after appreciation of evidence, Supreme Court cannot re-examine the same in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. Under review, the court cannot rehear the appeal over again.

The petitioner raises several grounds that are too general, and the question is whether the Supreme Court can be considered such ground in a review petition. The petitioner raised the following general grounds:

14 (2020) 2 SCC 454.

15 The court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record. As per the Supreme Court Rules, review in the criminal proceedings is permissible only on the ground of error apparent on the face of the record.

16 (1975) 1 SCC 674.

17 *Kamlesh Verma* v. *Mayawati* (2013) 8 SCC 320.

i. Futility of awarding the death sentence in Kalyug, where a person is no better than a dead body.

ii. That the level of pollution in Delhi NCR is so great that life is short anyhow, and everyone is aware of what is happening in Delhi NCR in this regard, and while so, there is no reason why the death penalty should be awarded.

iii. The death penalty is the ultimate denial of human rights, and it violates the right to life; it also goes against the principle of non-violence.

iv. That only the poor and downtrodden are more likely to be sentenced tothe death sentence.

v. That there is improper investigation and manipulation of evidence

The court held that it is unfortunate that such grounds have been raised in a matter as serious as the present case. The review petition cannot raise such general contentions regarding capital punishment. These grounds are too general, and grounds relating to improper investigation and manipulation of evidence were already considered in the trial and appeal. Therefore the same points cannot be raised again. Further, the court pointed out that the co-accused raised the same grounds in their review petitions and the same was considered and rejected.[18] The court rightly dismissed the review.

Kantaru Rajeevaru v. *Indian Young Lawyers Association*[19] is a review petition of the *Indian Young Lawyers Association* v. *State of Kerala*, which allowed the women entry to Sabarimala temple. For the majority, Chief Justice Ranjan Gogoi observed, that practices of restriction of entry of women generally in the place of worship are prevalent in almost all religions. In this case, in addition to review, several writ petitions were filed challenging those restrictions. In view of the Supreme Court not having epistolary jurisdiction, issues relating to religion, including religious practices, need to be decided under articles 32 and 226 in the case of the high court. Therefore, Justice Ranjan Gogoi is of the opinion that the constitutional court shall handle these cases cautiously. Because of these challenges, there is a need to evolve a judicial policy to enunciate the constitutional principles by a larger bench of not less than seven judges. Supporting this, he said that a final decision of a larger bench would also satisfy the requirements under article 145(3) of the Constitution. Though article 145(3) mandates hearing of the case involving substantial question of law as to the interpretation of the Constitution to be heard by a bench of a minimum of five judges of the Supreme Court, he contended that such a provision was made when the maximum number of the judges was seven. So in the context of the present strength of judges, he opines that seven judges would be appropriate. Further, involving more judges would also reflect the plurality of views.

The court also observed that there is a conflict of judgments between *Commissioner, Hindu Religious Endowments*, *Madras* v. *Lakshmindra Tirtha Swamiar*

18 *Mukesh* v. *State (NCT of Delhi)*, (2018) 8 SCC 149, *Vinay Sharma* v. *State (NCT of Delhi)*(2018) 8 SCC 186.

19 (2020) 2 SCC 1.

of Shirur Mutt[20] and *Durgah Committee, Ajmer* v. *Syed Hussain Ali*.[21] Hence a larger bench to decide these matters would be preferable. Accordingly recommended to the chief justice to constitute a seven-judge bench to determine the issues relating to temple entry and other related issues.

While dissenting, R.F. Nariman, and D.Y. Chandrachud J., held that the issue, in this case, is are there any valid grounds on which the judgment in Indian Young Lawyers Association dated September 28, 2018 be reviewed. Therefore, the court had to refer to the earlier judgment and may either apply such judgment, distinguish such judgment, or refer to an issue/issues which arise from the said judgment for determination by a larger bench. This court had to decide a narrow question as to whether there are any reasonable grounds for review of the *Indian Young Lawyers Association* and dispose of the review petitions and writ petitions by deciding whether judicial intervention is needed or not.

Jurisdiction under article 137 of the Constitution of India, read with Order XLVII of the Supreme Court Rules, 2013, is limited. In *Sow Chandra Kante* v. *Sheikh Habib,*[22] the nature of this jurisdiction was well summarized as "A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

In *Kamlesh Verma* v. *Mayawati*[23] Supreme Court of India laid down the following principles on when the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

Similarly, in *Union of India* v. *Sandur Manganese and Iron Ores Ltd*.,[24] the Supreme Court identified the following instances when the review would not be maintainable:

(i) A repetition of old and overruled arguments is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

20 (1954) SCR 1005.
21 (1962) 1 SCR 383.
22 (1975) 1 SCC 674.
23 (2013) 8 SCC 320.
24 (2013) 8 SCC 337.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

After discussing the grounds on which the review petitions and other petitions were filed, Justice Nariman rightly dismissed the review petition holding that there are no new grounds on which such a review petition should be maintained.

V ARTICLE 141

Judicial precedents are based on a principle that the judgments of superior courts would be binding on the subordinate courts. Precedents, in that sense, are an authority that would be binding on future cases. The system of constituting Benches of different strength at constitutional courts sometimes may lead to contradictory opinions. Referring to a larger Bench of such matters to resolve those contradictions is one of the methods used in India. In *Shah Faesal* v.*Union of India,*[25] one such instance was raised.

The President of India issued two Constitutional Orders on August 5, 2019, exercising his powers under article 370. The cumulative effect of these Orders is that the Constitution of India would be applicable to the State of Jammu and Kashmir in its entirety. The constitutionality of these two Orders was challenged before the Supreme Court. One of the contentions raised by the petitioner is that there were contradictory opinions raised by previous benches regarding these provisions; hence the matter required to be referred to a larger Bench. In this case,the court took this contention as a preliminary issue and did not go into the merits of the case of whether the Orders are constitutionally valid.

The observation was that in *Prem Nath Kaul* v. *State of Jammu and Kashmir,*[26] a five-judge Bench held that article 370 was temporary in nature where as in the succeeding judgment of *Sampat Prakash* v. *State of Jammu and Kashmir,*[27] it was held that article 370 is a permanent provision which gives the President the power to regulate the relationship between the Union and the State. Therefore, the petitioner requested the court to resolve this conflict; the court needs to refer the same to a larger Bench. The court framed the following questions for determination.

i. When can a matter be referred to a larger bench?

25 (2020) 4 SCC 1.

26 AIR 1959 SC 749.

27 AIR 1970 SC 1118.

ii. Is there a requirement to refer the present matter to a larger Bench in view of the alleged contradictory views of this Court in the *Prem Nath Kaul* case and *Sampat Prakash* case?

iii. Whether *Sampat Prakash* case is *per incuriam* for not taking into consideration the decision of the Court in the *Prem Nath Kaul* case?

Explaining the importance of precedents, the court held that it is not a practice for the court to overrule the established precedents except when there is a social, constitutional, or economic change mandating such a development. Following precedents is not only a sound practice but also necessary for continuing the uniformity and certainty of law. Precedents play a very important role in maintaining certainty, stability, and continuity of law in society. Once a judgment is delivered, society mends its way to confirm such judgment. Therefore, the courts are usually bound by such precedents once a precedent sets a legal order.

There is no hard and fast rule that its precedents legally bind the courts. However, precedents need to be followed unless previous judgments are manifestinglfy wrong, delivered on the mistaken assumption of law, or contrary to the judgment of a higher court whose judgments are binding. What about a co-ordinate Bench ruling that would bind subsequent co"ordinate Benches? It is a well-settled principle that the Bench's decision would bind other Benches of equal or lesser strength. The same was held in *National Insurance Company Limited* v. *Pranay Sethi*.[28] If the coordinated Bench is unable to agree to an earlier judgment, the case must be referred to a larger Bench as a coordinate Bench of the same strength cannot take a contrary view to what has been held by another coordinate Bench. Two benches of equal number cannot overrule each other. If the subsequent Bench failed to consider or did not follow the judgment of the previously coordinated bench does not mean the followingjudgment is substituted for the previous judgment. They stand side by side. Such contradiction must be addressed and resolved by a larger Bench.

A decision given by the subsequent bench ignoring the previous decision of a coordinate Bench may amount to *per incuriam*. The decision of the bench becomes *per incuriam* only if it cannot reconcile its ratio with the previous judgment of an equal or larger Bench. However, *per incuriam* is strictly applicable to the ratio decidendi but not to obiter dicta; hence unless there is a conflict with the ratio of the previous judgment, the subsequent judgment shall not be declared *per incuriam*.

While explaining what is binding on the subsequent Bench, the court held that the judgments could not be understood in a vacuum. They cannot be separated from the facts and the context in which the judgment was rendered. Mere observations made in earlier judgments cannot be picked selectively to establish the contradictions between two judgments.

Finally, the court held that the rule of *per incuriam* being an exception to the doctrine of precedentsis only applicable to the ratio of the judgment. The rule of *per incuriam* can be applied sparingly and apply when it is irreconcilable between the

28 (2017) 16 SCC 680.

two judgments, and the conflict between the opinions of the two co"ordinate benches cannot be harmonized. Applying these principles, the court held that there are no contrary observations made in the *Sampat Prakash* case to *Prem Nath Kaul's*. Accordingly, the court held that *the Sampat Prakash case was not per incuriam;* there was no reason for referring the matter to a larger Bench.

VI ARTICLE 142

In *Anupal Singh* v. *State Of U.P Through Principal Secretary, Personnel Department,*[29] the Uttar Pradesh Public Service Commission issued an advertisement inviting applications for 6628 posts. In the advertisement,category-wise, vacancies are listed by the government. A written test was conducted for the candidate who applied for these posts. At this point, it was brought to the notice of the state government that there was a wrongful calculation of category-wise vacancies. Upon the inquiry, the government realized that the category of General/Unreserved and OBC were wrongly calculated and accordingly revised the requirement of candidates category-wise. As a result, the number of vacancies in the categories of General, SC, and ST was reduced, and in the category of OBC the vacancies increased though the total vacancies were the same. The government declared the revised requisition for the vacancies for different categories.

Based on the revised vacancies, the government declared the list of successful candidates based on the earlier written test. The government conducted interviews with the successful candidates and declared the selection list of the candidates. To keep the appointment within the permissible limit of reservation,the appointments were issued only to 6599 candidates, and 29 candidates were withheld for want of details. About 906 candidates were not given appointments as it would be beyond the permissible statutory limit of reservation under the Uttar Pradesh Reservation Act, 1994.

The petitioners challenged the change in the number of vacancies in different categories and appointments made after that throughseveral writ petitions before the high court. The high court allowed the writ petitions and held that the selection was tainted; hence entire selection was canceled. Aggrieved by the order,the selected candidates who joined the post filed an appeal before the Supreme Court.

One of the requests is that the Supreme Court, under article 142, issue direction to the state government to appoint the 906 candidates who were successful but could not get an appointment due to revised notification. The 906 candidates were not given the appointment as it would cross 50% of the total reservation. In the exercise of power under article 142 of the Constitution of India, the question was, can the Supreme Court issue direction when such direction would violate the constitutional provisions and the Uttar Pradesh Reservation Act, 1994?

It was argued that a mere technical flaw in the revised requisition was in excess of the prescribed limit of reservation being more than the permissible limits under the Uttar Pradesh Reservation Act, 1994, and the same can be rectified by exercising power under article 142 of the Constitution of India.

29 (2020) 2 SCC 173.

Responding to the request, the Supreme Court clarified that mere selection in the interview does not entitle the candidate to an appointment. Citing the *State of Bihar* v. *Amrendra Kumar Mishra,*[30] the court held that it is a settled principle now. Therefore, a recommendation by the Uttar Pradesh Public Service Commission of the names of 906 candidates would not create any indefeasible right to be appointed. Further, the court said that wrong cannot be corrected by committing another wrong

Regarding article 142 of the Constitution of India, though the court recognizes that the article confers wide power upon the Supreme Court to do complete justice between the parties,the same cannot be exercised to pass an order inconsistent with express statutory provisions of substantive law. Relying on *Ramji Veerji Patel* v. *Revenue Divisional Officer,*[31] the Supreme Court reiterated that under article 142, the power is to be exercised very carefully and sparingly. Based on *Supreme Court Bar Association* v. *Union of India,*[32] though the power under article 142 of the Constitution is plenary,it cannot be exercised to supplant the substantive law. The court rightly pointed out that once the statute limits the reservation to 50%, the court cannot exercise its power under article 142 to order against the statutory provision under Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994.

In *Union of India* v. *The State of Maharashtra*[33] the question that was raised is can a judicial intervention be allowed in the law concerning a field reserved for the legislature, and if so,can the judiciary under article 142 disregard the substantive provisions of a statute and pass orders which are contrary to the provisions of a statute. Union of India filed a review petition against the decision taken by the Supreme Court in *Subhash Kashinath Mahajan* v. *The State of Maharashtra*.[34] In *Subhash* case dealing with complaints under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, the court held that: Our conclusions are as follows:

i) Proceedings in the present case are clear abuse of process of court and are quashed.

ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide.

iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

30 (2006) 12 SCC 561.
31 (2011) 10 SCC 643
32 (1998) 4 SCC 409.
33 (2020) 4 761.
34 (2018) 6 SCC 454.

iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

In the review petition, the Union of India contended that if the court does not agree to any provision of a law passed by the legislature, the court can ordereither strike down those provisions as a violation of fundamental rights or in case of any deficiency may point out to the Legislature for corrective measures. Once the Legislature has the legitimate power to pass a law, such law can be amended only by the legislature, and the court cannot substitute some of its provisions by an order under Article 142 of the Constitution of India. The conclusions that were drawn by the Supreme Court in the *Subhash* case amount to replacing the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act)

Section 18[35] of the Act is expected to provide a sense of protection among the SCs and STs, and the conclusions, particularly (iii) and (iv) would dilute the very purpose of the Act. Accepting the contention, the court held that in *State of M.P.* v. *R.K. Balothia*,[36] the Supreme Court already provided a safeguard for the protection of an innocent person from the arrest under Section 18 of the Act. In this case, the court held that when the court found that there was no prima facie case of attracting the provisions of the Act, the bar created by section 18 of the Act would not apply, and the court has every right to issue anticipatory bail to the accused.

It was contended that the court could not exercise its powers under Article 142 to nullify the statutory provisions. Carrying any changes in the provisions of law is the domain of the Legislature. The following cases were referred to explain the nature of the power of the court under article 142.

a. *Supreme Court Bar Association* v. *Union of India*,[37] "the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorize the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to supplant substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be

35 S. 18: Section 438 of the Code not to apply to persons committing an offence under the Act: Nothing in s. 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.

438. Direction for grant of bail to person apprehending arrest.

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non- bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

36 (1995) 3 SCC 221.

37 (1998) 4 SCC 409.

used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly"

b. *Prem Chand Garg* v. *Excise Commr*.,[38] it has no power to circumscribe fundamental rights guaranteed under Article 32 of Constitution of India.

c. *E.S.P. Rajaram* v. *Union of India*,[39] the Supreme Court under Article 142 of the Constitution could not altogether disregard the substantive provisions of a statute and pass orders concerning an issue, which can be settled only through a mechanism prescribed in another statute.

d. *A.R. Antulay* v. *R.S. Nayak*,[40] it has been observed that though the language of article 142 is comprehensive and plenary, the directions given by the court should not be inconsistent with, repugnant to, or in violation of the specific provisions of any statute.

e. *Bonkya*v. *State of Maharashtra*,[41] Court exercises jurisdiction under Article 142 of the Constitution intending to do justice between the parties, but not in disregard of the relevant statutory provisions.

f. *M.C. Mehta* v. *Kamal Nath,*[42] Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.

g. *State of Punjab* v. *Rajesh Syal,*[43] even in exercising power under Article 142(1), it is more than doubtful that an order can be passed contrary to law.

h. *Textile Labour Association* v. *Official Liquidator*,[44] power under Article 142 is only a residuary power, supplementary and complementary to the powers expressly conferred on this Court by statutes, exercisable to do complete justice between the parties wherever it is just and equitable to do so. It is intended to prevent any obstruction to thestream of justice.

i. *Laxmidas Morarji* v. *BehroseDarab Madan*,[45] it was observed that the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time, these constitutional powers cannot in any way, be controlled by any statutory provisions.

38 AIR 1963 SC 996.
39 (2001) 2 SCC 186.
40 (1988) 2 SCC 602.
41 (1995) 6 SCC 447.
42 (2000) 6 SCC 213.
43 (2002) 8 SCC 158.
44 (2004) 9 SCC 741.
45 (2009) 10 SCC 425.

j. *Manish Goel* v. *Rohini Goel*,[46] courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. The power under Article 142 not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure.

k. *A.B. Bhaskara Rao* v. *CBI*,[47] the power under Article 142 is not restricted by statutory provisions. It cannot be exercised based on sympathy and in conflict with the statute.

l. *State of Punjab* v. *Rafiq Masih*,[48] Article 142 is supplementary and it cannot supplant the substantive provisions. It is a power which gives preference to equity over the law.

While discussing the power of the Supreme Court under article 142, the court explained the distinction between a law made by the legislators and courts. Legislators make the law for the future while the courts make the observations based on an actual dispute before it. Therefore, judicial instructions are incidental to settling disputes. The Constitution created the Legislature, Executive, and Judiciary and demarcated their domains. Consequently, it is a constitutional obligation not to usurp the functions assigned to another. As judiciary being the watchdog of the Constitution, shall exercise judicial restraint and should not encroach into the domains of Legislature and Executive.

Explaining the importance of separation of powers, the courtpointed out that the doctrine of separation of powers shall understand two essential features. One, separation of powers is one of the essential ingredients of the Indian Constitution, and two that in the present contest, a strict separation is neither possible nor desirable. As a result,the Indian Constitution did not envisage the strict adherence to the doctrine of separation of powers. It only envisages checks and balances with some overlap of functions between three organs of the state. However, exercising power by one organ to usurp the powers of the other organ is prohibited.

However, if the Legislature is within its domain in bringing a law, such law interferes with the judicial process, such law could be invalidated. The effect of the legal provisions on courts in delivering justice needs to be assessed based on whether a legislative provision or direction interferes with the judicial functions? And does that law in question impact the court while deciding the dispute? Section 18 of the Act would not have such an impact on the court while taking the decision because the safeguards were provided by the Supreme Court by way of interpretation of the said section. Further, if the directions (iii) and (iv) of the court in Dr. Subhash are accepted would result in a delay in the investigation and may run contrary to the timely schedule framed under the Act/Rules.

Further, no presumption as to misuse of provisions of the Act could be attributed to a class. The court observed that SCs and STs hardly muster the courage to lodge

46 (2010) 4 SCC 393.
47 (2011) 10 SCC 259.
48 (2014) 8 SCC 883.

the complaint. Even if there are any false claims, the court can take necessary actions under s482 of Cr PC Accordingly, the court held that the direction Nos.(iii) and (iv) issued by the Court in *Dr. Subhash* case are recalled and, as a result of direction No. (v), also cease to exist.

VII ARTICLE 226

The status of Tribunals in comparison with high courts was raised in *Balkrishna Ram*v. *Union of India*.[49] The Armed Forces Tribunal Act, 2007 was enacted to establish The Armed Forces Tribunal (AFT). The Act confers jurisdiction to AFT to adjudicate disputes and complaints of personnel belonging to the Armed Forces. Section 34 of the Act provides for the transfer of all the proceedings pending before any court, including High Court, from the day of establishment of AFT. In the present case, the petitioner's case was decided by a single judge of the high court, and the same was appealed to the division bench. When the case was pending before the division bench, AFT was established. The issue raised in this appeal is whether the pending appeal before the division bench relating to Armed Forces shall be transferred to AFT under Section 34?

Are tribunals equivalent to HC and SC

It was contended that tribunals are equivalent to high courts and Supreme Court as they are headed by the retired judges of the High Court and Supreme Court; hence the pending appeal before the high court shall be transferred to AFT. Negating the contention, the court relied on *Rojer Mathew* v. *South Indian Bank Ltd.*[50] In this case, the Constitution Bench of the Supreme Court held that tribunals established under any legislation, including those established under articles 323"A and 323"B of the Constitution, cannot be equated with the high court or the Supreme Court.

It was further held that once the judges retired from high court or the Supreme Court, they seized to enjoy the constitutional status. The status enjoyed by the high court and Supreme Court judges is not based on their salary and perquisites they draw but trust reposed on them by Constitution. The retired judges who occupy the tribunals enjoy only a statutory position. Therefore, constitutional judges' rank, dignity, and position are *sui generis*. Hence no such equivalence can be conferred on the presiding officers of the tribunals. Section 14(1) of the Act provides that the AFT will exercise powers of all courts except the Supreme Court or high court, exercising jurisdiction under articles 226 and 227 of the Constitution of India. Therefore, when a case is pending before either in high court or Supreme Court under its writ jurisdictions cannot be transferred to AFT.

Jurisdiction of the tribunals

The tribunals are competent to adjudicate the disputes even such adjudication requires deciding the vires of the statutory provisions. However, the question is, would such power makes tribunal a substitute for the high court and Supreme Court? The court answered the question negatively by holding that the jurisdiction of the high

49 (2020)2 SCC 442.

50 2019 (15) SCALE 615.

courts and the Supreme Court under articles 226 and 32 are conferred by the constitution. As such powers werespecifically entrusted by the Constitution and the jurisdiction exercised by the tribunals is under a statute, their function is only supplementary, and all such decisions of the tribunals will be subject to scrutiny before the respective high courts.

With regards to the power of the Tribunals to test the vires of subordinate legislation and rules, the Supreme Court held that the Tribunals could adjudicate the virus; however, this power will be subject to the condition that it cannot decide the constitutionality of the parent Act. A tribunal created by the statute cannot declare that very Act unconstitutional. Unconstitutionality needs to be addressed to the concerned high court. Tribunals are courts of the first instance; hence persons cannot directly approach the high court even when the challenge was vires of legislation is involved. The only exception to this rule is when the challenge is the vires of the Act that created the tribunal. The challenge needs to be filed before the high court in such a case.

The court held that the jurisdiction conferred under 226/227 upon the high courts and 32 upon the Supreme Court is a part of the inviolable basic structure of the Constitution. Accordingly, the court held that clause 2(d) of article 323"A and clause 3(d) of article 323"B, to the extent they exclude the jurisdiction of the high courts and the Supreme Court under articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Armed Forces Tribunal Act and the exclusion of jurisdiction clauses in all other legislations enacted under articles 323"A and 323"B would, to the same extent, be unconstitutional.

This judgment raises a serious issue of judicial review by tribunals. It is a general practice that judicial review of the constitutionality of any legislation is a prerogative enjoyed by the constitutional courts. Most of the democratic Constitutions confer such powers to designated courts. Unlike the United States of America, where diffused judicial review is in practice, India follows concentrated judicial review. Constitution empowers Supreme Court and high court expressly to review the constitutionality of the legislation. However, with this judgment, such power was extended to tribunals. On the one hand, the court differentiates tribunals from high court and Supreme Court; on the other hand, it empowers the tribunals with powers, including judicial review of legislation.

While dealing with the equivalence of tribunal with high court and Supreme Court, the court rightly pointed out that no equivalence can be conferred on Tribunals as the constitutional guarantee of the independence of the judiciary is only available to constitutional courts. Further, the safeguards of appointment, termination and other service matters are expressly conferred by the Constitutions to the judges of the higher judiciary. Therefore, the superior judiciary isprovided with such constitutional safeguards as they discharge the function of constitutional interpretation. In view of such a high constitutional position, the judges are expected to discharge their constitutional functions without favour or fear. When such protection is not available to the judges of the tribunals, how far it is desirable to give them the power of judicial

review over legislative and executive actions is debatable. The virus of the legislation should have been restricted to only constitutional courts.

The court observed that if tribunals are not provided with such power, it may result in splitting up proceedings and delay. Further, many litigants raise constitutional issues, which most would have to approach directly to the high courts, and that would result in subverting the jurisdiction of the tribunals. It also stated that in particular service matters, constitutional questions pertaining to articles 14, 15, and 16 are raised on a regular basis. In such a scenario holding that the tribunals have no power to handle constitutional matters may defeat the very purpose for which tribunals are constituted. There may be some truth in such an argument, but the constitution could only confer judicial review. The tribunals could have been empowered with writ jurisdiction in executive matters only to avoid such situations. The dichotomy is that the court held that the tribunals are not equivalent to constitutional courts,yet it confers the powers of the Constitutional courts. Though the constitution permits the extensionof the writ jurisdiction to other courts,such anextension requires the express provision under the law made by the Parliament.[51] Conferring such power to Tribunal by the court without proper debate would be against the very purpose of the Constitution.

In *Chander Mohan Negi* v. *State of Himachal Pradesh,*[52] the Government of Himachal Pradesh framed several policies to fill the vacancies in various teaching posts.[53] Accordingly, posts were filled through these policies, and appointments were made between 2001 and 2003. Three petitioners challenged some of these appointments in 2012 before the High Court of Himachal Pradesh because the appointed candidates did not have the qualifications to be appointed as a teacher. The single Judge Bench allowed the petition and issued several directions to the government.

In an appeal to the division bench, the bench setaside the single bench's order and observed that the petition challenging the appointments was made after 11 years of appointment. Further, the appointments were not illegal as the government framed the scheme when the qualified teachers were not available at the time of appointment. This order was challenged before the Supreme Court. The court held that the state had explained why it appointed unqualified candidates as teachers. The state needs to frame such a policy keeping the fact that the posts in single-teacher schools have been vacant for a long time. In view of the long terms served by those persons regularizing them in the said posts was held not a violation of the law. Further,petitioners also had no rejoinder against the affidavit submitted by the state. In view of these findings, the court held that such petitions could not be considered

51 See art. 32. Remedies for enforcement of rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

52 (2020) 5 SCC 732.

53 The Himachal Pradesh Prathmik Sahayak Adhyapak/Primary Assistant Teacher (PAT) Scheme; The Himachal Pradesh Para Teachers (Lecturer School Cadre), Para Teachers (TGTs) and Para Teachers (C&V) Policy, 2003 and Himachal Pradesh Gram Vidya UpasakYojna, 2001.

the public interest litigation. As there was an unexplained and inordinate delay on the part of the appellants in approaching the high court, and it took more than ten years for them to approach the court, there is no reason why the court should interfere with the decision of the Division Bench.

In *Yashita Sahu* v. *The State of Rajasthan,*[54]an interesting question of honouring the foreign court judgments by Indian courts was raised. In the present case, the plaintiff married Mr. Varun Varma,who is working in the United States of America (US). Plaintiff accompanied the husband to the US, and a daughter was born to them. When the relationship with the husband got strained, the plaintiff approached the Norfolk Juvenile and Domestic Relations District Court (Norfolk Court), seeking protection, and the Court granted an ex parte preliminary protection order against the husband. Subsequently, Plaintiff filed a petition in the same court for the daughter's custody and financial support to her and the daughter. Norfolk Court passed an order in this regard based on the agreement reached by both husband and wife. The court passed an interim order on September 26, 2018; among other things, the court gave specific directions for visiting rights and financial support the husband should provide to the wife. The next hearing was scheduled for October 1, 2018. The plaintiff left the US with her daughter and reached India on 30.09.2018.

The husband filed a motion for emergency relief before the Norfolk Court, and the court issued an ex parte order granting the husband exclusive custody of the daughter and directed the plaintiff to return to the US along with the child. Court also issued a charge against the plaintiff for violating its order. The husband filed a writ of *habeas corpus* before the High Court of Rajasthan with the request forthe production of his daughter. After hearing both the parties, the High Court of Rajasthan directed the plaintiff to return to the US with her daughter within six weeks and directed the husband to make the necessary arrangements for the travel and stay of the Plaintiff.

Plaintiff preferred an appeal to the Supreme Court challenging the order of the high court on the ground that since she is the legal guardian of the child, a writ of habeas corpus can not be issued as there is no illegal detention. The child is too young (Two and a Half years), and being female requires the care and attention of the mother. She contended that in the proceedings before Norfolk Court in the US, she could not understand the process and procedure as they are in English, and also, due to their accent, she had difficulty following. As the husband is working in the US only on a work permit after the expiry of the said permit, he may require to return to India. Another contention raised was that the high court, bya writ of habeas corpus, cannot direct the plaintiff to travel to the US.

The contention that the plaintiff being a natural guardian high court cannot issue a writ of habeas corpus was rejected. The court held that the law relating to a writ of *habeas corpus* in matters of child custody is already settled in *Elizabeth Dinshaw* v. *Arvand M. Dinshaw*,[55] *Nithya Anand Raghavan* v. *State (NCT of*

54 (2020) 3 SCC 67.

55 (1987) 1 SCC 42.

Delhi).[56] And *Lahari Sakhamuri* v. *Sobhan Kodali*[57], the court held that the court could issue a writ of habeas corpus against any parent to protect the child's best interest.

Regarding the enforceability of the judgment ofa foreign court, it was held that the writ of *habeas corpus* could not be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Further, high court should not have ordered the plaintiff to travel to the US. No court can direct an adult to travel and stay in a place where they do not want to stay. As far as the child's custody is concerned, the court has followed any of the following two approaches since the child was moved from the US to India in violation of the orders passed by a court in a foreign country.

(a) Court may conduct summary inquiry; or

(b) Court may conduct an elaborate inquiry on the question of custody.

While conducting a summary inquiry, the court may order to return the child to the US unless such an order would cause any harm to the child. On the contrary, if the court decides to conduct an elaborate inquiry, then the court must consider whether the paramount interests and welfare of the child require following the order of the foreign court. Such an order must consider the totality of facts and circumstances of each case independently.

Regarding the doctrine of comity of courts, it is a very healthy doctrine one must respect the orders passed by foreign courts, and if not, it would lead to contradictory orders. Even though there is no strict rule that courts in India must follow the orders passed by courts of different jurisdictions, each case needsto be decided on the merits of its own facts. The only concern for the courts in India is that they shall act in the child's best interest. The court said in the present case that it would have been in the child's best interest the parties could settle the dispute on their own or through mediation.

After weighing various factors in the case, the court held that if the wife is willing to go back to the US, the husband has to make necessary arrangements. If the plaintiff is not ready to go back to the US, the child must be handed over to the husband. The court also issued several directions to the husband regarding the mother's right to talk to the child through video conferencing.

This case raises the issue of enforceability of orders passed by the court of different jurisdictions in India. Globalization resulted in the free movement of the citizen to different countries. This may result in a conflict of law, particularly the question of which court's orders were binding when the social standards vary. The concept of comity was recognized more out of respect than obligation. Such recognition is founded on the reason that one court should not demean the orders passed by a court of a different jurisdiction. However, such orders may be honoured as long as they are not in direct conflict with the legal regime of India. Supreme Court is right in holding that the orders of the court of different jurisdictions cannot

56 (2017) 8 SCC 454

57 (2019) 7 SCC 311

have automatic enforcement from the Indian Courts. The courts in India need to decide what is in the best interest before enforcing the order of the foreign courts.

Can a high court under article 226 issue directions having pan India effect is the question that was raised in *Union of India* v. *R.Thiyagarajan*.[58] The respondent is employed with the Central Industrial Security Force (CISF). He was sent on deputation to NDRF on April 18, 2008 and returned to CISF on October 7, 2011. He applied to the Director-General of NDRF for a grant of 10% deputation allowance and 25% special allowance during his tenure in NDRF. Subsequently, he filed a writ petition before the High Court of Madras seeking a direction from the court to Union of India, Director General, NDRF, and Director General, CISF to decide on his application for special allowance and deputation allowance. Meanwhile, in *Brij Bhushan* v. *Union of India,*[59] in a similar petition, the High Court of Delhi directed the NDRF to pay the deputation allowance to an employee of CISF who was deputed to NDRF.

The single judge of High Court of Madras, relying on the High Court of Delhi judge, allowed the writ petition and granted both deputation and Special allowance.In an appeal by the Union of India, the division bench partly allowed the appeal by holding that only deputation allowance is allowed and not the special allowance. However, while delivering the judgment, the court held all similarly placed personnel of the NDRF drawn from other forces from January 19, 2006 up to January 13, 2013 would be entitled to be paid deputation allowance. The court directed the Central Government to pay such an amount within six months.

This order was under challenge before the Supreme Court. The appellants contended that the high court exceeded its jurisdiction by extending the relief to all personnel without any prayer. Agreeing with the contention, the court held that first, the single judge acted beyond the relief claimed in awarding the allowances. Further, the division bench erred in extending the allowances to all other persons when the Union of India filed an appeal, and there are no other persons represented before the Division Bench. The court, by giving such an order, exceeded its jurisdiction. A high court will have jurisdiction only over its territory (State in which it is constituted) and has no jurisdiction over the entire country. If such orders are upheld will amount to usurping the jurisdictions of all other high courts. When a similar issue could be raised before the other high courts, they may take a different view. High Courts cannot pass such orders when the repercussions are pan India. In view of these observations, the court held that the respondent should be paid deputation allowance with effect from Sep. 11, 2009 till April 7, 2011.

While discussing the scope of high court's jurisdiction under article 227 in *Mohd. Inam* v Sanjay *Kumar Singhal*[60] the court held that the High Court under article 227 could not act as a court of appeal. The supervisory power of the high court shall be limited to keep the subordinate judiciary within their limits and ensure that they do not disobey the law. Despite the powers under 227 being wide, the high court shall

58 (2020) 5 SCC 201.

59 Writ Petition (C) No.2532 of 2012.

60 (2020) 7 SCC 327.

exercise such powers sparingly and shall not be used to correct the errors. In *Hari Krishna Mandir Trust*v. *State of Maharashtra*[61] again, the Supreme Court explained that usually, High Court does not dwell on the facts of the case under article 226. However, that does not prevent the High Court from entertaining the petition under Article 226 merely because it may require determining the question of fact to decide the petitioners right. The court enumerated the following principles in determining the scope of Article 226.

(i) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(ii) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule;

(iii)A writ petition involving a consequential relief of monetary claim is also maintainable.

The order of the Supreme Court in *M/S Plr Projects Pvt. Ltd*. v. *Mahanadi Coalfields Limited*[62] raised fundamental concerns for the justice delivery system. While dealing with the issue of several subordinate courts being unable to function in certain parts of the State of Odisha, the court observed that the continued absence of lawyers in courts would result in litigants using extrajudicial settlements. Further, the court also dwelled with vacancies in the judiciary as the Attorney General drew the court's attention toward a long-pending demand for an additional High Court Bench.

National data shows the total sanctioned strength of High Court Judges is 1079, out of which currently 669 judges were appointed. Out of 410 vacancies, the recommendation of the appointment of 213 judges was pending with either government or Supreme Court collegium. For the remaining 197 vacancies, the high courts are yet to send the recommendations. The Memorandum of Process (MoP) provides the timeline for filling the vacancies. The High Court collegium is expected to initiate the process at least six months prior to the vacancy that could arise. A six weeks timeis given to the Governor/Chief Minister of the concerned State to process the recommendation and send the same to Union Law Minister. Union Law Minister shall prepare the brief and send it to the Supreme Court collegium within four weeks. Once the Supreme Court collegium clears the names within three weeks, the Union Law Ministry shall send the same to the Prime Minister, who would advise the President on the appointment. There was no timeline prescribed for the action of the Prime Minister and the President. The whole process shows that there is a greater need to have a continuous, collaborative, and integrated process between the government and the judiciary.

The Attorney General stressed the need for introspection of the entire process of appointment of judges. However, the court decided to start with a micro-level analysis and took up the issue of 213 names pending with the Government/Supreme

61 (2020) 9 SCC 356.

62 (2020) 9 SCC 452.

Court collegium. The court asked to submit the data relating to 213 names in the following tabular form to understand the lacunas.

(i) date when the recommendation was made by the High Court collegium;

(ii) date when the recommendation was forwarded to the collegium after consulting with the State Government by the Law Ministry;

(iii) the time period between these two dates;

(iv) the date when the collegium cleared the names;

(v) the time period;

(vi) the date when the names were forwarded to the office of the Prime Minister;

(vii) the time period taken for the same;

(viii) the date when the warrants of appointment were issued;

(ix) the time period taken for the same.

The Attorney General brought to the notice of the court that in Orissa 12 names were recommended by the High Court of Orissa collegium. Supreme Court collegium approved only two names out of twelve. Responding to why the high court and Supreme Court collegiums are not on the same page is an issue worthy of being looked into. The court said when both collegiums agree to the names, the appointment of such persons shall be completed within six months. Failure to fill the vacancies would result in the inability of the courts to deal with cases promptly and may raise dissatisfaction among the litigants and the lawyers. The court said that other aspects would be debated and discussed in the subsequent hearings.

This order raises a serious issue regarding the work of the collegiums and the government in the appointment of the higher judiciary. The collegium system is opaque and overburdened. If the government can fill the vacancies in the legislature within the timeline, one fails to understand why there is so much delay in filling the vacancies in other branches. This order also raises the contention that the appointment of the higher judiciary may require a different mechanism for effective appointments. The criticism of nepotism and lobbying could also be addressed if there is a consensus among the three branches of the government in creating an independent, transparent and neutral mechanism for the appointment of judges to the higher judiciary.

VIII SUBORDINATE JUDICIARY AND ARTICLE 235 AND 236

Hari Niwas Gupta v. *The State of Bihar*[63] raises an important issue relating to the power of the high court to undertake disciplinary action against the subordinate judiciary. The facts of the case are that a local newspaper,Udgosh published a news item that the Nepal police apprehended three judicial officers from the State of Biharas they were found in a compromising position with three Nepali women in a guest house in Nepal.

The High Court of Patna directed the District and Sessions Judge, Purnea, to submit a report on the matter. The said judge submitted a report wherein it was

63 (2020) 3 SCC 153.

mentioned that all the judicial officers denied that they were in Nepal. The report also mentions another news item published by the same daily expressing regret over erroneous reportage. The new report also says that these three judicial officers were released from the police station due to pressure from the higher circles. The High Court asked the Ministry of Home Affairs, Government of India, to inquire into the matter and submit the details.

Information submitted by the Deputy Secretary of the Ministry of Home Affairs shows that mobile phones belonging to the judicial officers were switched off for a long time during the days of the allegation. When switched on, the said mobile phones are within the range of a tower at Forbesganj town, which is near Nepal. It also suggests that all three were together. The hotel bill submitted by one of the judicial officers to show that he was in India, where he was posted, seems to be fabricatedas the handwriting and signature on the bill do not match. It was also reported that the hotel was not the standard where a judicial officer would ordinarily have stayed.

The standing committee of the high court met and resolved to place the judicial officers under suspension. It also further suggested dismissing officers from service without an inquiry under sub-clause (b) of article 311(2) of the Constitution of India, read-with Rules 14 and 20 of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005. At the full court of the high court judges, the standing committee's recommendation was accepted, and a resolution was passed recommending the dismissal of all judicial officers. The Government of Bihar accepted the said recommendation, and all three judicial officers were dismissed.

Aggrieved by the decision,the appellants preferred an appeal before the division bench of the high court. In the appeal, it was contended that the decision of the Full Court to recommend the dismissal without assigning any reason for not holding any inquiry would violate the constitutional scheme under article 311. The division bench, while allowing the petition, dismissed the dismissal order and allowed the full bench to record the reason and follow the procedure prescribed by article 311 and accordingly recommend the course of action.

In an appeal, the court held that dispensing the inquiry without recording the reasons would certainly violate clause (b) of article 311 (2). The order of the division bench clearly recognizes it, and accordingly, the order was quashed. However, the bench allows the high court to apply its mind again and decide whether the disciplinary proceedings need to be initiated or not. Such an order is necessary as the division did not adjudicate the merits of the allegations. Looking at the seriousness of the allegations, the division bench was justified in not barring the high court from the fresh application of mind under clause (b) of article 311(2).

The question is that once the order of the dismissal was set aside, can there be disciplinary proceedings be conducted again and then an order be passed by giving reasons? Referring to several previous judgments[64] the court held that such an action

64 *Mohinder Singh Gill* v.*The Chief Election Commissioner, New Delhi* (1978) 1 SCC 405, *East Coast Railway and Another* v. *Mahadev Appa Rao* (2010) 7 SCC 678, and *Chief Security Officer* v. *Singasan Rabi Das*(1991) 1 SCC 729.

is not against the constitutional provisions. The order setting aside the dismissalfor want of procedure under article (b) of article 311(2) shall not preclude the competent authority from taking action in accordance with the law. Further, it was clarified that the orders like the Division Bench, in this case, could not be construed as a mandate to the high court to initiate the proceeding against the appellant. It is completely left to the discretion of the high court.

The appellant contended that the high court had undertaken a preliminary inquiry and possessed certain materials like the report from the district judge and the Home Ministry, Government of India. Therefore, the court could have framed the charges and proceeded with the departmental inquiry. Only during those proceedings, if the court felt that continuing the inquiry would be difficult, then a decision could have been taken for dispensing with the inquiry by recording the reasons. Explaining the true scope, the Supreme Court held that whether an inquiry can be held or not to be judged based on whether such inquiry could be conducted reasonably practicable. The impracticability need not be total or absolute. The test is whether a reasonable man is of a reasonable view that the inquiry is able to conduct. Hence the authority needs to record the findings with specific reasons why such inquiry could not be continued.

In this case, the high court contended that they couldn't continue the inquiry as the acts and misdeeds of the appellants were carried out in a foreign country. As a result, collecting any direct evidence and any other materials would be impossible. However, the High court did not record these reasons while dispensing the inquiry. Hence, the Division bench did not dwell on the merits of this contention. Therefore, no inference can be drawn that the contention of the High court is either accepted or rejected.

The next contention of the appellants was that the power to dispense the inquiry is vested in the Governor. Hence, the Governor must satisfy personally by recording the reasons that the continuation of the inquiry is not practical. The appellants relied upon *State of West Bengal* v. *Nripendra NathBagchi*.[65] However, while explaining the ratio in the *Nripendra* case, the Supreme Court held that interpreting articles 233 and 235 confers powers to high court to control the subordinate judiciary. Such powers include disciplinary powers. "In the case of the judicial service subordinate to the District judge, the appointment has to be made by the Governor in accordance with the rules to be framed after consultation with the State Public Service Commission and the high court, but the power of posting, promotion, and grant of leave and the control of the courts is vested in the high court. What is vested includes disciplinary jurisdiction. Control is useless if it is not accompanied by disciplinary powers."

Therefore, the court was correct in holding that the high court is competent to decide the question of whether the inquiry is to be dispensed with or not by recording the reasons under clause (b) of article 311(2) of the Constitution.

65 AIR 1966 SC 447.

Dheeraj Mor v. *High Court of Delhi*[66] raises an issue regarding conditions of appointment of judges to subordinate judiciary. Article 233[67] of the Constitution authorizes the Governor to appoint district judges. Clause two deals with the direct appointment of advocates to the post of the district judge. In the present case, there are three categories of persons who are in judicial service claiming eligibility for the post of district judge under direct recruitment under advocates quota. The first category is persons who completed seven years of practice as advocates before joining the judicial services. The second category of petitioners is who had completed seven years of judicial service and claimed that their service as judicial officers should be recognized as seven years of practice in the court of law and be eligible for direct recruitment for the post of district judge. A third category isa person who completed seven years by combining the practice as an advocate and the judicial service. All three categories contend that they are entitled to the appointment under direct recruitment from the advocates' quota.

Article 232 provides two types of recruitment; the first category is from judicial service, and the second category is from Bar. Under article 233(2), an advocate withseven years of experience before the court of law is eligible for direct recruitment as district judge. Further, the article also imposes a bar on persons in Union or state government service for such direct appointment.

Considering the language used in article 233, the court held that once an advocate joins in the judicial service, they cease to be an advocate. Article 233 is clear in its mandate that persons in service are not entitled to direct recruitment as a district judge. Therefore, the only way persons in the judicial service eligible for the district judge post is by promotion or merit promotion as per their service rules. As a result, rules debarring persons in judicial service from direct recruitment to the post of District Judge are not in violation of any provision of the constitution. In view of the above, the court issued the following guidelines

(i) The members in the judicial service of the State can be appointed as District Judges by way of promotion or limited competitive examination.

(ii) The Governor of a State is the authority for the purpose of appointment, promotion, posting, and transfer; the eligibility is governed by the Rules framed under Articles 234 and 235.

(iii) Under Article 232(2), an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or a State.

66 (2020) 7 SCC 401.

67 See art. 233. Appointment of district judges

(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

d. For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than seven years on the cut"off date and at the time of appointment as District Judge.

e. Members of judicial service having seven years of experience of practice before they have joined the service or having a combined experience of 7 years as a lawyer and member of the judiciary are not eligible to apply for direct recruitment as a District Judge.

f. The rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment cannot be said to be ultra vires and are in conformity with Articles 14, 16, and 233 of the Constitution of India.

IX TRIBUNALS

In *Rojer Mathew* v. *South Indian Bank Ltd.,*[68] several issues relating to tribunals were raised. One of the issues is that the appointments to the Debt Recovery Tribunals were not in constitutional spirit and judicial independence. In another petition,the petitioner challenged the constitutionality of Part XIV of the Finance Act, 2017. This part amends 25 different enactments by making several changes relating to qualifications, methods of appointment, terms of office, salaries and allowances, and other conditions of service of the members and presiding officers of different statutory Tribunals. In another petition, a writ of mandamus was requested against the Union of India to implement the directions given in *Union of India* v. *R. Gandhi*[69] and *L. Chandra Kumar* v. *Union of India*.[70] The petition also asked the court to direct the Ministry of Law and Justice to conduct Impact Assessment on all tribunals and submit the report to the Supreme Court.

In *R. Gandhi,* the Constitution Bench,while reviewing the validity of Parts I-B and I-C of The Companies Act, 1956 inserted by the Companies (2nd Amendment) Act, 2002, held that the tribunals are created to substitute the courts; hence they shall enjoy the independence. The said amendment confers the jurisdiction to the tribunal in exclusion of traditional courts. Therefore it was observed that the members/presiding officers of the tribunal should be from the judiciary. The court categorically said that only judges or adovcates are eligible to be appointed as members of the tribunal and only high court judges, or judges who have served in the rank of a district judge for at least five years or a person who has practised as a lawyer for ten years can be considered for appointment as a judicial member.

When a tribunal was constituted to take the matters usually taken by the high court, the members of the tribunals shall have equal status as high court judges. Equal status does not mean only matters of salaries and perks but also rank, experience, and competence. Similarly, suspension of the President/Chairman or member of a tribunal can be carried out only with the consent of the Chief Justice of India. All the support,

68 (2020) 6 SCC 1.
69 (2010) 11 SCC 1.
70 (1997) 3 SCC 261.

either administrative or other facilities, shall be provided by the Ministry of Law and Justice.

In *Madras Bar Association,*[71] the court said that the procedure for appointment and conditions of services to the presiding officer and the members shall be the same as the courts of which the tribunal is substituting. Further, the government, which is a litigating party, shall not participate in the appointment. No automatic reappointment or extension of the service of the members of the tribunal is permissible.

In the present case, section 184(1) of the Finance Act, 2017 empowers the Central Government to make rules regarding service conditions of tribunals established under several legislations. Such power is not only in contravention of the directions issued by the Supreme Court in several judgments but also makes the Tribunals amenable to the Union of India, which is the largest litigant.

On the other hand, it was contended that Part XIV of the Finance Act, 2017 brings uniformity, and thereby, it would rationalize the function of the Tribunals. It was observed that there are about 40 tribunals or statutory commissions with varying differences in terms of service conditions as different legislations govern them. These differences do result in several anomalies and the prominent being some of the members enjoy the status of Supreme Court judges, high court judges, and others have been kept at par with district court judges. This rank and file of the members of the Tribunals equivalent of Constitutional Courts Judges need a relook as Supreme Court had a strength of 31 judges (when the matter was argued), whereas about 50 members of tribunals/statutory commissions enjoy the status of Supreme Court judge. Similarly, more than 150 such members are enjoying the status of high court judges. Therefore, to bring uniformity, several legislations need to be amended. In view of such a gigantic task, the Union of India brought those changes by Fiance Act. Based on the submissions, the court formulated the following issues:

(i) Whether Section 184 of the Finance Act, 2017 suffer from excessive delegation?

The court held that section 184 of the Finance Act, 2017 does not suffer from an excessive delegation of legislative functions as there are adequate principles to guide the framing of delegated legislation, which would include the binding dictums of this Court.

(ii) Whether Tribunal, Appellate Tribunal, and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 are in consonance with the Principal Act and various decisions of this Court on the functioning of Tribunals?

The court found several anomalies, such as in the appointment of President and Vice-President, the proposed composition of a Search-cum-Selection Committee is dominated by the nominees of the Central Government, and the role of the judiciary is either made very trivial or virtually absent. Tribunals are established asa substitute for the courts. Hence the independence of the Tribunals from the Executive is

71 *Madras Bar Association* v. *Union of India* (2014) 10 SCC 1.

mandatory under the principles of separation of powers. The same was already held in In *R.K. Jain and L. Chandra Kumar*. Similarly, in prescribing the qualifications of the technical members, the rules ignore the prior direction of the Supreme Court. The cumulative effect of these Rules diluted the judicial character in adjudicatory positions.

In the removal of the members, the Rules empower the Central Government to appoint an enquiry committee. There are no explicit provisions on who can be part of such a committee and what is the role of the judiciary. This significantly affects the independence of the tribunal members in their functioning. The court also considered several issues like short tenure and contradiction in superannuation and held that the tribunal, appellate tribunal, and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 suffer from various infirmities as observed. As a result, these Rules formulated by the Central Government under section 184 of the Finance Act, 2017,are contrary to the parent enactment and the principles envisaged in the Constitution as interpreted by this court. Accordingly, these Rules were struck down in their entirety. The Union of India was directed to re-frame the Rules in conformity with the guidelines issued by the Supreme Court in *R.K. Jain*,[72] *L. Chandra Kumar,*[73] *Madras Bar Association,*[74] *Gujarat Urja Vikas Ltd*.,[75] and also in this case.

(iii) Is there a need for conducting a Judicial Impact Assessment of all Tribunals in India?

The Court issued a writ of mandamus to the Ministry of Law and Justice to carry out a Judicial Impact Assessment, financial impact assessment, and need-based requirements to provide sufficient resources and submit the result of the findings before the competent legislative authority.

(iv) Whether judges of Tribunals set up by Acts of Parliament under Articles 323-A and 323-B of the Constitution can be equated in rank and status with Constitutional functionaries?

The court relying on *L. Chandra Kumar,* held that the tribunals are not substitutes but only supplemental hence the members of the tribunals cannot be equated with the sitting judges of Constitutional Courts. Therefore, the high courts and the Supreme Court judges are kept on a different pedestal, distanced from members of the Tribunal or quasi-judicial authorities. However, the court made it clear that the Union government may decide whether the Members of the tribunals hold the rank and status equivalent to judges of Supreme Court and high courts only on drawing the equal salary or other perks.

(v) Whether direct statutory appeals from tribunals to the Supreme Court ought to be detoured?

72 R.*K. Jain* v. *Union of India* (1993) 4 SCC 119.

73 L. *Chandra Kumar* v. *Union of India* (1997) 3 SCC 261.

74 (1997) 3 SCC 261.

75 *Gujarat Urja Vikas Ltd*. v. *Essar Power Ltd*. (2016) 9 SCC 103.

The court observed that more than two dozen legislation authorize direct appeals to the Supreme Court from various tribunals and high courts. These provisions take away the discretion of the court in admitting the appeals. The direct appeal to Supreme Court also undermines the high courts and hampers access to justice. High court would be deprived of expertise in dealing with these specialized matters. Further, such provisions result in pendency, accessibility, affordability, and delay. This had resulted in Supreme Court as a Court of Appeals than a Constitutional-Writ court. Statutory appeals directly to the Supreme Court seriously undermine the very purpose of the tribunalization. Hence, the court held that the Central Government may revisit the Rules after consulting with the Law Commission of India or any other expert body and place the new proposals before the Parliament for its consideration. However, the Union of India shall take such a decision within six months.

vi. Is there a need to amalgamate existing Tribunals and set up benches?

The very purpose of the tribunals is to provide easy access to justice. Therefore it is necessary to establish benches of these tribunals across the country. But the issue is that many of such tribunals have a very less number of cases, and issues of workload and resources would arise. Hence the court held that a Judicial Impact Assessment needs to be undertaken, and the Union of India shall identify the homogeneity of different tribunals and constitute an adequate number of benches by amalgamating them.

X ARTICLE 300A

In *Hari Krishna Mandir Trust* v. *State of Maharashtra,*[76] the Supreme Court explained the constitutional status of the right to property. Though the right to property is no more fundamental, it is still a constitutional right under article 300A and a human right. As per article 300A, no person shall be deprived of property except under the authority of law. Therefore no citizen can be deprived of property without following the proper procedure prescribed by the law. The concept of eminent domain mandates following two basic principles. First, the state can acquire property only in the public interest, and the second state shall pay reasonable compensation. Therefore the state cannot deprive a person of his property without any legal authority. These principles are inbuilt in article 300A. The courts have the power to issue a "Writ of Mandamus where the Government or a public authority has failed to exercise or has wrongly exercised discretion conferred upon it by a Statute, or a rule, or a policy decision of the Government or has exercised such discretion malafide, or on irrelevant consideration."

XI ARTICLE 341

In *State of Punjab* v. *Davinder Singh*,[77] the question raised was can a state provide sub-classification within Scheduled Caste reservation? The Punjab Government, by a circular reserved 50% of vacancies in the Scheduled Caste quota for Balmikis and

76 (2020) 9 SCC 356.

77 (2020) 8 SCC 1.

Mazhabi Sikhs. The high court struck down this circular, and the Supreme Court dismissed a special leave petition. The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act was enacted in response to it. Section 4(5) of theAct stipulates that fifty percent of the vacancies available under the Scheduled Caste quota shall be offered to Balmikis and Mazhabi Sikhs in direct recruitment. This provision makes it mandatory to provide first preference to Balmikis and Mazhabi Sikhs amongst the scheduled castes candidates. When challenged, the Division Bench of the Punjab and Haryana High Court held that this provision is unconstitutional by relying upon the decision in *E.V. Chinnaiah*v. *State of Andhra Pradesh.*[78] An appeal was preferred to Supreme Court, raising the following contentions

i) Were the *provisions* contained under Section 4(5) of the Act constitutionally valid?

ii) Whether the State has the legislative competence to enact the provisions contained under Section 4(5) of the Act?

iii) Whether the decision in *E.V. Chinnaiah* required to be revisited?

The basic question that needs to be answered to decide the above issues is whether scheduled caste and Scheduled Tribes are homogenous classes, so no further sub-classification is permissible. Can they be divided as weak and weakest for the purpose of equidistribution of reservations? The court first looked at the need for sub-classification. The idea of sub-classification is to make sure that the benefits of reservations trickle down to the needier. In the absence of such classification, the benefits of the reservation would be utilized by the upper class within the group.

The contention of the state is that Supreme Court in *E.V. Chinnaiah* erroneously interpreted the ratio of *Indra Sawney*[79] and struck down the sub-classification as scheduled castes and Scheduled Tribes being one class. In *Sawney* court permitted sub-classification among the backward classes, but there was no bar on classification within the scheduled castes. On the other hand, it was contended that once the President declared the list of Scheduled Caste, states had no right to further divide the list for giving primacy to a few among the others. They relied on Ambedkar's speech in the Constituent Assembly,wherein he explained the purpose of Articles 341 and 342and said that articles 341 and 342 act as a bar on any political interference from the schedule published by the President. Therefore, the state has no such power of sub-classification as it would amount to disturbing the schedule published by the President. Under article 341 Governor can only recommend to the President for either inclusion or exclusion of any caste from the schedule. The true scope of articles 341(2), 342(2), and 342A(2) is that the only Parliament has the powerto either include or exclude castes/class from the lists of scheduled castes, scheduled tribes, and other backward class in the Central list.

In light of these submissions, the question that needs to be considered is whether preferential treatment within the class amounts to exclusion or inclusion when other castes are not denied the reservations.

78 (2005) 1 SCC 394.

79 *Indra Sawney* v. *Union of India* (1992) supp. (3) SCC 217.

In *E.V. Chinnaih,* the Government of Andhra Pradesh appointed Justice Ramachandra Raju Commission to study and identify the condition of the castes included in the Scheduled Caste list published by the President under article 341. The Commission identified how these casts listed as Scheduled Castes fared in professional education and also in the state's services. Based on the Report, the state government brought the Andhra Pradesh Scheduled Castes (Rationalisation of Reservation) Act, 2000. The Act divided the 57 castes which were listed in Presidential List into four groups. The division was based on inter-se backwardness. Accordingly, the castes were grouped as A, B, C, and D. Out of the total 15% reservations to the Scheduled Castes, the state provided the following scheme notifying the percentage of reservationsfor each group.

1. Group A - 1%
2. Group B - 7%
3. Group C - 6%
4. Group D - 1%

Total : 15%

This legislation was challenged on the ground that the State Legislature has no competence to bifurcate the Presidential List made under article 341. Accepting the contention, the court held that the object of articles 341 and 342 is to provide special provisions for backward classes for their upliftment. The Constitution expressly confers the power to President alone, and theConstitution (Scheduled Castes) Order, 1950, made in terms of Article 341(1), is exhaustive.

The expression "Scheduled Castes" in the constitution refers to the castes that are included only in the President's list. Even though the State has a constitutional power to grant any benefits in terms of reservation in jobs and educational institutions and to bring a policy in this regard, no primacy can be granted within the group. No other constitutional authority has any power to deal with scheduled caste save by Parliament. Even Parliament's power is limited to bring legislation only for exclusion and inclusion. Therefore, the state has no such power to sub-classify or group the caste within the Scheduled Castes list. The castes included in the list become members of one group for the purposed of reservation. When they become one class, such class shall be deemed to be homogenous. Therefore the court held that further classification of the groups to give preference within the group amount to tinkering with the Presidential List under article 341, and such tinkering is not constitutionally permissible; hence the Andhra Pradesh legislation is unconstitutional.

Considering the above decision, the court in the present case opined that the List is preparedto provide the benefits of reservation to the castes included in the List. When *Indra Sawhney* and *Jarnail Sing* permit sub-classifcation in other backward classes, is such classification permissible in scheduled caste? To ensure the benefits of the reservation reach the bottom, can such sub-classification is permissible? If it is permissible, would it amount to tinkering with the Presidental List under article 341 needs to be assessed? As the coordinated bench had already addressed these issues,the

Supreme Court requested the chief justice to place the matter before a larger bench to avoid any conflict of opinions.

There is no doubt that India's constitution is viewed as an effective tool for social transformation. The Constitution was intended to address the issues of inequalities and provide socio-economic and political justice to its citizen. One such endeavour is providing reservations. When a group was identified as backward and deserving,the reservation backwardness of all the members of the group is not similar. When there are disparities within the backward class, how shall such inequality be addressed shall be the prerogative of the state as it is represented by a democratically elected popular government. Further, once the caste was grouped under one label like Scheduled Cast, they became one group for a purpose, but their uniqueness still continued. The mere inclusion of them in a List by itself would not make them homogenous. The fruits of reservation would not be equally distributed to all the castes on the List. The varying degree of effects of reservation would create a creamy layer class within the List. That is one of the reasons why the Supreme Court insisted on the creamy layer policy for other backward classes. The same phenomenon occurs in other reserved groups. Therefore identifying and bringing measures for the upliftment of the weakest among the weak could be permissible if the fruits of reservations reach the lower bottom. The emancipation of the weakest of the weak is the paramount constitutional obligation of the State. The court rightly referred the matter to the larger bench and hoped that the larger bench would consider these issues in the right manner.

XII ARTICLE 352, 355 AND 356

COVID Pandemic had a lasting effect on economic activities. Due to the widespread COVID-19 national lockdown was imposed by the Union Government, which resulted in an unprecedented shortage of labour and the closing of several industries. The Labour and Employment Department of the State of Gujarat issued a notification under Section 5 of the Factories Act to exempt all factories registered under the Act to revive the economic activities. As a result, the following provisions of the Factories Act would not apply in the State of Gujarat till July 2020.

(i) No adult worker shall be allowed or required to work in a factory for more than twelve hours in any day and Seventy Two hours in any week.

(ii) The Periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed six hours and that no worker shall work for more than six hours before he has had an interval of rest of at least half an hour.

(iii) No Female workers shall be allowed or required to work in a factory between 7:00 PM to 6:00 AM.

(iv) Wages shall be in a proportion of the existing wages (e.g. If wages for eight hours are 80 Rupees, then proportionate wages for twelve hours will be 120 Rupees)."

In the month of July, again, the State extended the above exemption till 19 October 2020. These notifications were challenged in *Gujarat Mazdoor Sabha* v.

The State of Gujarat. [80] Section 5 of the Factories Act empowers the state to exempt any factory or class of factories on the ground of public emergency[81] from all or any provisions of the Act except Section 67. The bare reading of section 5 denotes that the existence of a public emergency is a prerequisite for any exemption. To exercise power to exempt the state shall objectively establish the existence of a public emergency. Section 5 mandates that

(i) there must exist a "grave emergency";

(ii) the security of India or of any part of its territory must be "threatened" by such an emergency; and

(iii) the cause of the threat must be war, external aggression or internal disturbance

Based on the above observations, the court opined that the statutory provision requires the state to act on the principle of proportionality while giving any exemption. Relying on the seven-judge bench decision in *Puttaswamy,*[82] the court held that an analysis of the following conditions to satisfy the principles of proportionality when state action could intrude fundamental rights:

i. A law interfering with fundamental rights must be in pursuance of a legitimate state aim;

ii. The justification for rights-infringing measures that interfere with or limit the exercise of fundamental rights and liberties must be based on the existence of a rational connection between those measures, the situation in fact and the object sought to be achieved;

iii. the measures must be necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfill the aim;

iv. Restrictions must not only serve legitimate purposes; they must also be necessary to protect them; and

v. The State should provide sufficient safeguards against the abuse of such interference

The Supreme court drew the similarities of the phrase'public emergency' under section 5 of the Factories Act with articles 352, 355, and 356. In *S.R.Bommai* v. *Union of India,*[83] the court held that a" Proclamation of emergency can be made for internal disturbance only if it is created by armed rebellion, neither such Proclamation can be made for internal disturbance caused by any other situation nor a Proclamation can be issued under Article 356 unless the internal disturbance gives rise to a situation in which the government of the state cannot be carried on in accordance with the provisions of the Constitution. A mere internal disturbance short of armed rebellion cannot justify a proclamation of emergency under article 352 nor such disturbance

80 (2020) 10 SCC 459.

81 S. 5 Explanation.—For the purposes of this section "public emergency" means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance.

82 *K S Puttaswamy* v. *Union of India* (2019) 1 SCC 1.

83 (1994)2 S.C.R.644

can justify issuance of Proclamation under Article 356(1), unless it disables or prevents carrying on of the Government of the State in accordance with the provisions of the Constitution."

In the context of articles 355 and 356, the Sarkaria Commission mentioned that there are different situations that may qualify what it meant to be internal disturbances. However, the Commission categorically said that mere financial exigencies of a State do not qualify as an internal disturbance. Therefore, the question that needs to be answered in this petition is whether the lockdown due to the pandemic, which resulted in an economic slowdown, created a public emergency?

The respondent contended that the pandemic should be treated as a public emergency as the Sarkaria Commission included a natural calamity as a public emergency, and the pandemic paralyzed the administration;hence, providing exemption under the Factories Act does not violate any constitutional provisions.

Refusing the respondents' contention, the court said that the notification issued by the state does not serve the purpose of section 5 of the Act. The impugned notificationsare intended to reduce the overhead cost of manufacturing the products. Further, it is observed that the notification provides a blanket exemption for all the factories. Such exemption could have been justified if it was given only to the production houses producing medical equipment and other necessary products for the pandemic restriction. Even in that situation, just compensation to the workers cannot be exempted. Even if it is accepted that COVID-19 crippled the administration and thereby resulted in internal disturbance, the economic slowdown due to restrictions on pandemicscan not be equated with internal disturbance threatening the security of the state.

The court rightly identified that the Constitution of India was adopted with a transformative vision aiming to achieve social and economic justice. Protection of the labour from exploitation and offering labour welfare is an integral part of the goals of the Constitution. That does not mean health is not part of constitutional goals. Labour welfare and containing pandemics require the state to maintain balance. The provisions of the Factories Act protecting the welfare of the labourare not a charity. They reflect the decades of struggle of laobour class against the employers. They are not just mere legal rights. They are paramount in upholding the dignity of the workers. The court rightly recognized these rights as integral parts of articles 38, 39, 42, and 43 of the Constitution. These provisions ensure decent standards of working conditions and dignity at work and provide a living wage. Violation of these rights would mean violation of rights under articles 21 and 23.

The exemptions under the notification, if held valid, would legitimize the exploitation of workers when their bargaining power is at its lowest due to a pandemic. The state shall not be allowed to use section 5 to permit the employers to exploit the workers. It is ironic that the state uses section 5 in times of pandemic when the state is in the highest constitutional obligation to ensure the welfare of the people.

The court held that the financial exigencies could not be offset with the rights of the workers. The blanket exemption under section 5 exempting all factories from

complying with humane working conditions and adequate compensation is unacceptable. The court issued an order under article 142 of the Constitution, directing the State to pay overtime wages to all workers working since the notifications' issuance.

XIII SCHEDULE VII

In *Pandurang Ganpati Chaugule* v.*Vishwasrao Patil Murgud Sahakari Bank Ltd*.,[84] an important question regarding the scope of Entry 45 of List I, and Entry 32 of List II of the Seventh Schedule was raised. In this case, the applicability of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the SARFAESI Act) to the co"operative banks was asked to be determined.The Parliament's amendment of Section 2(c) of the SARFAESI Act adding sub"clause '(iva) " a multi"State co"operative bank' was also challenged under lack of legislative competency.

The core issue is that the term 'banking company' used under section 5(c) of the Banking Regulation Act, 1949 includes co-operative banks registered under the State law and also multi"State co-operative societies under the Multi"State Co"operative Societies Act, 2002.?

In *Narendra Kantilal Shah* v. *Joint Registrar, Co"operative Societies,*[85] a Full Bench of the Bombay High Court held that co"operative banks are banking companies within the meaning of Section 2(d) of the RDB Act, 1993. Therefore the courts are barred from entertaining any petitions as such jurisdiction was conferred to Debts Recovery Tribunal under RDB Act, 1993. However, this case was overruled by the Supreme Court in *Greater Bombay Coop. Bank Ltd*.[86] held that the cooperative banks do not fall within the meaning of 'banking company' under Banking Regulation Act, 1949. The central legislation cannot include cooperative banks under Entry 45 of List I.

Meanwhile, two petitions were filed challenging the SARFAESI Act before the High Court of Bombay, challenging that the Act is repugnant to the constitutional scheme of distribution of powers between center and State as envisaged under Schedule VII. Both petitions were dismissed, and the proceedings under the SARFAESI Act were upheld. An appeal was preferred to Supreme Court. The appellant Pandurang Ganpati Chouguleraised an objection to the action of Vishwasrao Patil MurgudSahakari Bank Limited under the SARFAESI Act. Further, in a separate writ petition, the initiation of the SARFAESI Act by issuing notices under section 13 by Cooperative banks was also challenged before the Supreme Court. Considering all the petitions and the objections raised, the court framed the following issues:

(1) Whether 'co"operative banks', which are co"operative societies also, are governed by Entry 45 of List I or by Entry 32 of List II of the Seventh Schedule of the Constitution of India, and to what extent?

84 (2020) 9 SCC 215.

85 AIR 2004 Bom 166,

86 *Greater Bombay Coop. Bank Ltd*. v. *United Yarn Tex (P) Ltd* (2007) 6 SCC 236

(2) Whether a banking company, as defined in Section 5(c) of the BR Act, 1949, covers cooperative banks registered under the State Cooperative Laws and multi"State co"operative societies?

(3)Whether co"operative banks at the State level and multi"State level 'banks' for applicability of the SARFAESI Act? Whether provisions of Section 2(c) (iva) of the SARFAESI Act on account of inclusion of multi "State co"operative banks and notification notifying cooperative banks in the State ultra vires?

It was contended that cooperative banks involve in banking activities; hence they shall be treated as 'banking companies' under Banking Regulation Act, 1949. In *RustomCavasjee Cooper* v. *Union of India*[87] the court held that 'banking' under Entry 45[88] did not include 'banker' or 'bank.' Banking is an activity. Therefore, Entry 45 in list one only deals with banking activity only. Further Entry 43[89] of List one empowers the Union to pass legislation dealing with the 'incorporation, regulation, and winding up of a trading corporation, more particularly a banking corporation. But the entry expressly excludes the 'co"operative societies' from the purview of Entry 43 as cooperatives are expressly included in Entry 32[90] of List II. A cooperative society doing any kind of business, including banking business, remains a cooperative society and is covered under Entry 32 of List II. Therefore Parliament has no power to enact laws dealing with cooperative societies/banks.

The court pointed out that cooperative societies may exercise two different functions. First, the society regulates the banking business of the society, and secondly, it may also regulate the non-banking affairs of the society. The first category, i.e., regulating the banking business, comes under Entry 45 of List 1, and in this regard, only Parliament is competent to make legislation. The cooperative banks established under the cooperative society perform all kinds of banking functions such as deposit, withdrawal of money, issuing cheques, lending money, and recovery of money. These services are covered under the term 'banking' and hence come under the purview of Entry 45 of List I.

Recovering the debts is a core activity of banking. The impugned SARFAESI Act provides the process of the recovery of the dues. Under section 13 of the Act, banks can approach the Tribunal and appeal to Debts Recovery tribunal. As a result, the Act comes under the legislative competence of the Union of India and does not encroach into Entry 32 of List II. Hence, not *ultra vires* to the constitutional scheme of distribution of powers under schedule VII.

In view of the above, the court held that the cooperative bank established under the state legislation and multi "State level co" operative societies registered under the

87 AIR 1970 SC 564

88 Entry 45. Banking. ***

89 Entry 43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co" operative societies.

90 Entry 32. Incorporation, regulation and winding up of corporation, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co"operative societies.

MSCS Act, 2002 are governed under Entry 45 of List 1 as far as their activities relating to banking is concerned. The matters of 'incorporation, regulation, and winding up' are governed by Entry 32 of List II. Similarly, cooperative banks are 'Banking Company' under the Banking Regulation Act, 1949; hence they cannot operate in violation of the provisions of the Banking Regulation Act, 1949 and any other legislation enacted by the Union of India relating to banking activities.

XIV SCHEDULE X

In *Shrimanth Balasaheb Patil* v. *Speaker Karnataka,*[91] the power of the speaker in accepting the resignations of the members and their disqualifications were questioned. The Speaker of the Karnataka Legislative Assembly passed five orders regarding the resignation and disqualification of members. These orders were challenged before the Supreme Court. The facts of the case show that in the general Assembly elections to Karnataka State, BJP emerged as the single largest party. However, an attempt to form the government by BJP was unsuccessful. A coalition government by JD(S) and INC formed the Government. About 14 months later, the government fell due to the defection of certain members. Events like the resignation of some of the members to the House, defecting to another party, and refusal to participate in the party meetings despite the whip led to the government's fall.

When the speaker failed to take any action against resignations by members, a writ petition was filed challenging the same. Pending resignation, disqualification proceedings were initiated against those members. The primary issue is whether the Speaker shall give primarcy in deciding the resignation before deciding the disqualification proceedings as the resignation was prior in time to the disqualification petition. In an interim relief, the court directed the Speaker to maintain the status quo of the issue of the resignation of 10 members and not proceed with the issue of disqualification.

Without deciding these questions, the court issued an interim order directing the Speaker to take the issue of resignation of a total of 15 members in view of the antitrust vote against the current government and the speaker to submit the order to the court. The questions raised would be decided later due to want of time. Further, the court held that until further orders by the court, the 15 members whose disqualification cases are pending with the speaker should not be compelled to participate in the proceedings of the House. Participation in the proceedings of the House shall be at the discretion of the Members themselves.

In this backdrop, the trust vote took place, the members were absent from the proceedings, and the coalition government lost the trust vote, resulting in the resignation of the Chief Minister. Later the Speaker passed five orders wherein he rejected the resignation on the ground that they were not voluntary and disqualified all the petitioners. Speaker's role was under severe criticism as the speaker refused to accept the resignations of members, disqualifying the members with short notice and debarring them from contesting the election till the completion of the term of the present House.

91 (2020) 2 SCC 595.

The petitioners preferred an appeal to the Supreme Court under article 32 of the Constitution. The following issues were framed:

1. Whether the Writ Petition challenging the order of the Speaker under Article 32 maintainable?
2. Is the order of the Speaker rejecting the resignation and disqualifying the Petitioners according to the Constitution?
3. Even if the Speakers order of disqualification is valid, does the Speaker have the power to disqualify the members for the rest of the term?
4. Whether the issues raised require a reference to the larger Bench?

Maintainability of writ petition

The basic contention of the respondent is that in the present case, there is no violation of fundamental rights; hence the court does not have jurisdiction under article 32 of the Constitution of India. Addressing the issue, the court held that this issue had been decided long back in several decisions of this court. It is well-settled law that when the law provides for a hierarchy of appeals, it is expected that the parties exhaust the available remedies before resorting to writ jurisdiction under article 32.[92] However, such a rule is not dictated by law, but it is a policy based on convenience. Therefore, when there is a violation of principles of natural justice or for want of jurisdiction, the Supreme Court may entertain an appeal directly under its writ jurisdiction despite the existence of adequate legal remedies.[93]

Kihoto Hollohan v. *Zachillhu*[94] is a landmark judgment in this area wherein the Supreme Court held that the decisions of the speaker/chairman under paragraph 6 of the tenth schedule, the courts can exercise their power of judicial review under Articles 136, 226, and 227 of the Constitution. However, such review shall be confined only to jurisdictional errors such as infirmities based on violation of constitutional mandate, malafides, noncompliance with rules of natural justice, and perversity. This judgment essentially equates the Speaker with the Tribunal in matters of disqualification. Therefore, there is no bar on exercising the jurisdiction under article 32 to review the speaker's orders in this case.

In the present case, the petitioners contended violation of principles of natural justice and, thereby,the right to a fair hearing. As both are integral parts of rights to equality under article 14, the court has the jurisdiction to review the case. But the court also said that it does not appreciate the petitioner approaching directly to Supreme Court in this case. As a co-ordinate bench already issued interim order and substantial time has already passed, the court has no option but to continue the case. The court has jurisdiction to deal with disqualification cases but advised that such cases shall first approach the respective high courts for an effective and speedy remedy.

92 See: U.P. State Spinning Co. Ltd. v. R.S. Pandey, (2005) 8 SCC 264

93 See: State of Uttar Pradesh v. Mohammad Nooh, AIR 1958 SC 86; HarbanslalSahnia v. Indian Oil Corporation Ltd., (2003) 2 SCC 107.

94 1992 Supp (2) SCC 651

Speaker's power to refuse resignations

The second contention was the extent of the power of the Speaker in refusing the resignation. In this regard, it was contended that the court should restrict its enquiry to only whether the Speaker took an appropriate decision considering the bonafidemotives of the resignation by the petitioners. However, the petitioners contended that the enquiry should be restricted under Article 190(3)(b) of the Constitution only to assess whether the resignations were voluntary and genuine, and the Speaker has no jurisdiction to consider the motive or the reason for resignation. Answering the question of whether the court can review the Speaker's subjective satisfaction in the affirmative, the court held that in view of the changes brought by the 33rd Amendment to Article 190, the Speaker is required to exercise his discretion objectively. Once Speaker receives the resignation from a Member, the Speaker may require to conduct an enquiry when he satisfies that such resignation is either involuntary or not genuine. However, such satisfaction must be based on objective material, and hence his satisfaction is subject to judicial review.

The 33rdAmendment simply empowers the Speaker to ensure that the resignation is voluntary. It does not empower the speaker to compel a member to continue as a member against his will. While assessing the voluntariness, the Speaker shall not have the authority to judge the rationality of the decision of the member to resign. Members may resign for different reasons, and it is not for the Speaker to judge whether such a reason is good or bad. Speaker's decision is limited to verifying the voluntariness. The contention that the Speaker can verify the motive behind the resignation to test the voluntariness is not acceptable as article 190 does not sanction such power to Speaker.

Disqualification proceedings after resignation

The next contention raised was once the member resigns from the membership no disqualification proceedings against such member can be started as he is no more member of the House. The purpose of the Tenth Schedule is to curb the menace of floor-crossing for political gains in terms of assurance of office. Strengthening this 91st Amendment imposes further disqualification of the members who defected from appointing a minister or any other political post until members' term expires; however, the Amendment allows such person to be appointed as a minister if he/she re-elected to the House.

Therefore these provisions intend to create certain impediments to the members who defected after their election. If the contention that once a member resigned, no disqualification proceeding can be entertained by the speaker to be accepted, it would defeat the very purpose of the 52nd 91st Amendments. The court observed that such an interpretation making the disqualification petition before the speaker infructuous upon tendering resignation would result in members is about to disqualified would immediately resign from the membership to avoid disqualification.

Referring to the decision in *State (NCT of Delhi)* v. *Union of India*,[95] the court held that the provisions of the constitution to be interpreted "in the light of the spirit

95 (2018) 8 SCC 501,

of the Constitution so that the quintessential democratic nature of our Constitution and the paradigm of representative participation by way of citizenry engagement are not annihilated. The courts must adopt such an interpretation which glorifies the democratic spirit of the Constitution." Further, the court said that once a complaint of disqualification is addressed to the Speaker, the disqualification of the member shall relate to the date of the act of defection takes place. Subsequent resignation by the member shall not have any bearing on the Speaker deciding the disqualification. Therefore, even if a member resigned but the disqualification was raised before such resignation, the proceedings for disqualifications would not automatically seize.

In the present case, the speaker provided for a three-day notice to the petitioners, which is in violation of Rule 7(3)(b) of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, wherein seven days is prescribed. When the Rules mandate seven days' notice, giving only three days' notice violates principles of natural justice? Answering the question in the negative, the court held that observing principles of natural justice does not depend on the number of days. One must see whether the opportunity given for a hearing is sufficient for the petitioners to represent themselves in an effective manner. The principle of natural justice is not a straightjacket formula to say that once the mandated number of days' notice is not given would automatically amount to a violation of natural justice. In the present case, there seems to be no such violation.

Power of the speaker to direct disqualification till the expiry of the term

Article 191(2) of the Constitution, like the Tenth Schedule, does not prescribe the period of duration for disqualification of a member to be operated. When neither the Constitution nor any Act provides any bar on the member to contest in the future election speaker has no such inherent powers to debar the members for any specified period from contesting in the election. Accordingly, the court held that the part of the decision of the speaker disqualifying the members from the date of the order till the expiry of the term of the Legislative Assembly of Karnataka was ultra vires to the constitutional mandate.

This case raises the issue of how constitutional functionaries derogated their offices for political reasons over a period of time. Being constitutional functionaries, they are under the obligation to uphold constitutional values. Persons holding such a high constitutional post are expected to withstand the political pressures and follow constitutional morality. As Ambedkar mentioned, the Constitution is as good as its functionaries. A good constitution may be ineffective when the constitutional functionaries are ineffective. The constitution's effect depends not on the nature of the constitution but on the nature of constitutional functionaries. Constitutions only create systems, but persons must operate the systems. Unless the constitutional values are imbibed and practiced by those who occupy the constitutional positions, the rule of law cannot be achieved.

Speaker is one of such important constitutional functionaries who plays a key role in upholding democratic values in the house. Though belongs to the ruling party, the speaker is expected to act neutral. That is one reason why a person elected as

speaker needs to resign from the political party to which he/she belonged. Constitution expects the speaker to act independently while discharging the duties. His political affiliations and inclinations shall not mar the decisions of the speaker. Several instances of the Speaker being partisan seriously undermine the role of the speaker in a Parliamentary Democracy like India.

XV CONCLUSION

The Constitution is as good as the people who enforce it. The Constitution is just a document, and its effectiveness depends on the mechanisms created by it. The constitutional functionaries breathe life into the constitution. They are the ones who control and operate it. The people in charge of constitutional functions decide the path of the country. The fundamental principle of the rule of law depends on these people. Therefore, inculcating constitutional culture among these functionaries is a paramount task. Functional democracy presupposes adherence to the separation of powers. Legislature and Executive being popularly elected hence reflect the people's collective will. Therefore, these two organs have the highest responsibility to function within the constitutional limitations. On the other hand, the judiciary was given a task not only to interpret the Constitution but also to keep the other constitutional functionaries within their limits.

Vinay Sharma reminds the role of the judiciary in upholding constitutional values. The court should have addressed the issue of denial of information under the RTI Act to enable the appellant to represent his case effectively before the court. One may argue that this is not an appropriate case where the court should have acted liberal, but one cannot forget it may set a precedent. Satisfaction expressed by the court regarding whether the procedure is followed is reasonable in the mercy petition in Vinay Sharma goes against Lord Hewart's words "*Justice must not only be done but must also be seen to be done*." Transparency in the discharge of constitutional duties is a prerequisite for satisfying the test of procedure established by law under Article 21. Justice must be ensured irrespective of its consequences.

Speaker is another constitutional functionary whose role is essential for a functional democracy. The allegations that several legal provisions were clubbed with the money bill to avoid Rajya Sabha scrutiny undermines the privileges conferred upon the Speaker and the Legislatures. In *Rojer Mathew,* a larger bench was asked to constitute to decide the judicial review over Speaker's power to certify a bill as a money bill. We have to wait and see how the larger bench would address this important issue. The jurisdiction of the Supreme Court under 137 was raised in several cases, and the court usually showed a restraint. *Akshay Kumar Singh* is a classic example of misusing the time of the Supreme Court under article 137. In *Kantaru Rajeevaru* the bench had a split verdict regarding the scope of review, and the dissenting opinion expressed by the R.F. Nariman, and D.Y. Chandrachud JJ., seems more rational.

The trend that was observed in this year's survey shows many cases were referred to a larger bench. In *Shah Faesal,* the court explained whenthe court may request for a reference to a larger bench. Supreme Court has shown remarkable restraint in exercising its jurisdiction under article 142. Respecting the supremacy of the

Legislature in law-making is laudable. Another area of concern in this year's survey is the status of tribunals. Supreme Court rightly decided *Rojer Mathew* and the judgment should pay the way in bringing much-needed reforms in the administration of tribunals. Tribunals had become an integral part of justice dispensation in India. They have become as important as traditional courts. Therefore, there is an urgent need to streamline the appointments, service conditions, and removal of the members of the Tribunals and its independence.

Judicial review of constitutionality is a privilege enjoyed by the constitutional courts by virtue of the constitution. Ordinary courts cannot exercise such a power. The judicial review requires certain preconditions like independency, immunity from the interference of service conditions from the executive, and constitutional protection in terms of appointment and removal. When there are no such protections available to Tribunals, the judgment in *Balkrishna Ram* conferring the jurisdiction to the tribunal to determine the vires of the legislation may have far-reaching implications. The directions given in *Rojer Mathew,* if implemented in spirit, may address a few concerns raised above; nevertheless, members of the tribunals cannot be equated with the judges of the constitutional court in terms of privileges and also in the expertise. However, the question remains can such a power be conferred upon tribunals by a judicial interpretation when article 32 (3) in express terms empowers the Parliament to confer such power to other courts by law.

The judgment in *Gujarat Mazdoor Sabha* reinforces the belief that the judiciary in India is the watchdog of the fundamental rights of the citizen. The apex court comes to the rescue of protection of the workers' rights and exhibits the state's insensitivity towards the plight of poor workers.

In the absence of the power of sword and purse judiciary tries its best to control the other two organs. However, judiciary is not infallible. It has its own pitfalls. The enormous responsibility of the judiciary to use its judicial review to provide socio-economic and political justice to more than a billion requires a fine balancing between judicial activism and restraint. The superiority enjoyed by the constitutional courts needs to be guarded. The judicial decisions need to be binding on all other functionaries. What is expected from the judiciary is respect forthe separation of powers, ensuring that the constitutional mechanisms function within their constitutional boundaries, and rationalize the use of judicial review. It is apt to remember the words of Lord Devlin "Judges are the keepers of the law, and the keepers of these boundaries cannot, also, be among outriders."