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CONSTITUTIONAL LAW – II

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I INTRODUCTION

CONSTITUTION REFLECTS the identity of the nation and the values of its citizenry. Constitution being the apex law, it is expected that the state and its citizenry abide by it. Constitutional values cannot be undermined by those who are clothed with powers to run the state. Maintaining constitutional order becomes the paramount obligation of the state. The constitutional functionaries are expected to follow the constitutional norms. Adhering to constitutional order includes the practicing rule of law and internalization of constitutional values by the constitutional functionaries. However, the internalization of constitutional order requires a concerted effort from the political class. Ensuring the constitutional order in public life requires the ability of the Constitution to adapt to human challenges. Constitution being a document, it needs interpretation to adapt to the changing circumstances. The task of making the Constitution relevant to society is given to the judiciary. The judicial task of interpreting the constitution requires balancing between upholding the intention of the legislature and making the Constitutional norms relevant to the changing values of the society. This year's survey would focus on how the judiciary balanced between these two tasks.

Contempt of court

Of late, contempt of court had become contentious. Contempt powers of the judiciary intended to protect the judiciary from vilified and unwarranted criticism. *In Re Prashant Bhushan* v.*Court,*[1] the Supreme Court was asked to decide the contempt of court for the two tweets made by Prashant Bhushan. A petition was filed by one Mahek Maheshwar alleging these tweets were made willfully and deliberately to scandalize the court and the entire judicial system. However, there was no permission obtained from the Attorney General for this petition. Therefore, the Registry placed the said petition on the administrative side of this court, seeking direction as to whether the petition can be heard in absence of any endorsement from the Attorney General. Supreme Court, after examining the matter, directed that the matter be listed before it.

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1 (2021) 1 SCC 745.

Finally, Supreme Court decided to hear the petition on the ground that it took *suo motu* cognizance of the two tweets and issued notice to the Attorney General and to Prashant Bhushan. This raises three contentions:

Firstly, when a contempt petition was made to the court, can the court treat it as a suo motu petition? And can the court consider the petition without the consent of the Attorney General

Secondly, the first tweet[2] was made to address the issue of the court not physically functioning on the ground of COVID fears, and at the same time, CJI of the Court physically engaging in activity against the COVID norm. The tweet merely questions the rationality of the actions of the CJI. Hence any contempt proceedings would violate his freedom of speech and expression under the Constitution.

Thirdly, the second tweet[3] the contention was that it contains three elements and they are his bona fide opinions. In the tweet, he expressed his opinion that the democracy in India was destroyed over the last six years and the Supreme Court failed in its constitutional obligation of protecting democracy. The last four Chief Justices of India played a role in the failure of the Supreme Court. The very essence of democracy is that every citizen of India had a constitutionally protected right to discuss the affairs of the state including the judiciary. Building public opinion by expressing one's own opinion is necessary to reform the institutions of the State. Further, a comment on CJI cannot be construed as a comment on the entire Supreme Court. Therefore, the present petition of contempt of court is not maintainable.

***Suo moto* proceedings**

It was contended that the power of the Supreme Court in dealing with contempt of court is dealt with under articles 129 and 142 of the Constitution of India read with the Contempt of Courts Act, 1971. The Contempt of Courts Act prescribes the procedure for filing a petition for contempt hence Supreme Court is bound by such procedure. In the present case, the petitioner did not follow the procedure (not obtaining permission from the Attorney General of India) hence the proceedings should have been dropped. However, the amicus curiae relying on a number of judgements opined that Supreme Court is not bound by the procedure laid down by the Contempt of Courts Act as the court is a Court of Record and as long as the procedure followed is just fair and in accordance with the principles of natural justice the court can follow its own procedure. Agreeing with the observations of the amicus curiae the court held

2 The tweet is "CJI rides a 50 Lakh motorcycle belonging to a BJP leader at Raj Bhavan Nagpur, without a mask or helmet, at a time when he keeps the SC in Lockdown mode denying citizens their fundamental right to access justice!"

3 Second tweet was published in the Times of India on June 27, 2020, "When historians in future look back at the last 6 years to see how democracy has been destroyed in India even without a formal Emergency, they will particularly mark the role of the Supreme Court in this destruction, & more particularly the role of the last 4 CJIs." We are, prima facie, of the view that the aforesaid statements on Twitter have brought the administration of justice in disrepute and are capable of undermining the dignity and authority of the Institution of Supreme Court in general and the office of the Chief Justice of India in particular, in the eyes of public at large."

that the power of the high courts and Supreme Court to punish for contempt is derived from articles 215 and 129 of the Constitution respectively. Therefore, this power is vested in the courts by the constitution, such power cannot be curtailed or limited by any legislation.

Further, the court pointed out that The Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975 framed by the Supreme Court in the exercise of the powers vested in it under section 23 of the Contempt of Courts Act, 1971 and the President of India approved the same. Rule 3 clearly permits the court to take *suo motu* cognizance of contempt. Hence, in the present case, the court has the power to try for contempt.

Freedom of Speech: **Can the judiciary be immune from criticism**

The other contention raised was whether the judge is immune from criticism and whether any criticism against the judge is part of freedom of speech and expression. The argument raised that the judges, also being human not immune from making errors. Any criticism of the shortcomings of the judge or the judge's behaviour cannot be taken as contempt. Any fair and constructive criticism of the judgement or judge's conduct would not be viewed as undermining the confidence of the public. In fact, such criticism is necessary to bring in systemic corrections. If such attempts are considered as contempt, institutions like Law Commission,Law schools, and research organizations would have to face the risk of contempt proceedings for their comments on the judiciary.

Therefore, in the present case, the intention of the alleged contemnor is to bring to the notice of the court the shortcoming for a correction. Such an attempt cannot be viewed as contempt of the court. However, rejecting the contention, the court opined that the criticism is a clear distortion of the facts and amounts to a misstatement designed to lower the reputation of the judiciary and, by that, destroy the public confidence in the judiciary.

The Supreme Court identified the following broad guidelines relating to contempt based on the precedents.

i. The first rule is a wise economy of use by the Court in contempt matters. Under this rule, the courts would deal with contempt seriously when there is a gross or unfounded attack on the judiciary. However, the court would be willing to ignore, by a majestic liberalism, trifling and venial offences. Courts would not act for every irritable comment made against it.

ii. The second principle is to harmonizethe need for fearless exercising of the duties of the judge with the constitutional values of free criticism. There is a need to maintain the balance between freedom of speech and protection of the integrity of the judge while giving the benefit of the doubt generously against the Judge.

iii. The third principle is to avoid confusion between the personal protection of a judge and the Judiciary as an institution. A mere defamatory attack on a judge cannot be considered as interference with the administration of justice hence no contempt. As the law of contempt is aimed to protect public

confidence in the judiciary a personal attack on the reputation of an individual judge would not be treated as contempt of court.

iv. The fourth principle is that the press is a fourth estate and a channel between the State and its citizen hence it is entitled to have free play with responsible limits.

v. The fifth principle is that contempt jurisdiction cannot be hypersensitive even in cases of some distortions and criticisms overstepping the limits.

vi. The sixth principle is that the court must,after evaluating all the factors together need to verify whether the statements are malicious and scurrilous and would challenge the supremacy of the rule of law.

Court holding the tweets as contempt of the court held that the citizen's right under article 19(1) is not absolute and exceeding its limits while making the stamen to scandalize the court would not get any protection. Both tweets cannot be treated as a fair criticism of the system. Tweet, one criticizes the Chief Justice in his capacity as Chief Justice of India. Analysing the tweet, the court said the tweet gave the impression to a common man that CJI is enjoying a bike ride when the Supreme Court was shut for the common public. In fact, the picture of the CJI was taken when the court is on summer vacation. Lock down of the court is also factually incorrect as the court only suspended physical appearance before the court. The second tweet about the destruction of democracy, his statement that Supreme Court played a substantive role and four chief justices particularly allowed it is a direct attack on the court as an institution. This conveys a meaning that for the last six years, the four CJIs played a key role in the destruction of Indian Democracy is not a fair criticism of the functioning of the judiciary. Both the tweets distorted the facts and amounted to committing criminal contempt; hence Prashant Bhushan was found guilty of committing criminal contempt against the Supreme Court.

Contempt of court is a legal mechanism to punish those who lower the judiciary. However, this power may run contrary to the freedom of speech and expression. Does such power restrict fair criticism? One may get the feeling that they are some truths in it. Prashant Bhushan's case, to some extent, is one such example. The case only dealt with what Bhushan said about the Judges, but it did not reflect on the behaviour of the judges. The first tweet clearly questions the inappropriate action of the CJI both in terms of not following COVID protocol and also the propriety of sitting on a motorbike belonging to a leader of a political party. This case also shows the judicial impropriety of converting the petition for contempt as *suo motu*. It's high time that the proper procedure is prescribed for entertaining contempt petitions.

Review

In *Beghar Foundation* v. *Justice K.S.Puttaswamy* [4]several petitions were filed before the Supreme Court to review the decision in *K.S. Puttaswamy (Aadhaar-5 J.)* v. *Union of India*.[5] Puttaswamy raised two questions. First, whether the decision of

4 (2021) 3 SCC 1.

5 (2019) 1 SCC 1.

the Speaker of the House of People2 under article 110(3) of the Constitution to certify a bill as a 'Money Bill' under article 110(1) is final and binding or can be subject to judicial review; and second if the decision is subject to judicial review, whether the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 had been correctly certified as a 'Money Bill' under Article 110(1) of the Constitution?

The basis for seeking review was upholding the Aadhaar Act as a 'Money Bill', based on the erroneous assumption that section 7 of the Aadhaar Act is its core provision. Declaring Aadhaar Act as a Money Bill eliminated the possibility of discussion before the Rajya Sabha, and the Aadhaar Act also contained provisions which affected the fundamental rights under Part III of the Constitution.

The first question regarding judicial review of the Speaker's decision in declaring a Bill as a Money Bill under article 110, the court held that it is not a mere procedure but a constitutional condition. Explaining the difference between irregularity of procedure and substantive illegality, the court pointed out that when a Bill does not fulfil the essential constitutional condition under article 110(1), the said requirement cannot be said to be evaporated only on certification by Speaker. The Speaker's decision to declare a Bill as a Money Bill is not a mere procedure but a constitutional condition that needs to be followed. Hence in case of any illegality happens in certifying a Bill as a Money Bill would amount to a breach of the constitutional provisions, and as a consequence, the decision is subject to judicial review.

When the review petitions were pending before the court, another coordinated bench of the Supreme Court in *Rojer Mathew* v. *South Indian Bank Ltd,*[6] raised doubts about the majority opinion in Puttaswamy (Aadhaar-5J.) in relation to the second question*, i.e*., whether the Aadhaar Act was a 'Money Bill' under Article 110 and referred the first question to a larger bench. The issue that was involved in this case is when the first question was referred to a larger bench, and the reference is still pending can these review petitions be disposed of?

The majority of the judges, four out of five, while dismissing the reviews, held that change in the law or subsequent decision/judgment of a coordinate or larger Bench by itself cannot be regarded as a ground for review. Justice Dhananjaya Y Chandrachud while delivering the dissenting opinion, held that the dismissal of review petitions when the issue was referred to a larger bench, and it is yet to be constituted, would have serious repercussions. He observed that these review petitions were filed before the decision of the coordinated bench, referring it to a larger bench in the *Rojer Mathew* case. The determination of the larger bench could very well bring finality regarding the validity of the Aadhar Act, and disposing of the review petitions would constitute constitutional error. Justice Chandrachud rightly held that the review petitions are to be kept pending till the decision of the larger bench determines the issue of the validity of the Aadhar Act.

The power of the review is conferred on the court to rectify its orders and avoid abuse of the power and miscarriage of justice. There is no hurry for the court to

6 (2020) 6 SCC 1.

dismiss the review petitions when a larger bench is supposed to be constituted to determine the similar questions that were raised by the petitioners. In a sense, the dismissal of review petitions may convey a meaning that what is decided in Puttaswamy is final and binding. If the larger bench expresses, a different opinion would result not only in judicial indiscipline but also have serious consequences on the ends of justice. Justice Chandrachud aptly concluded his judgement by saying, "I conclude that the constitutional principles of consistency and the rule of law would require that a decision on the Review Petitions should await the reference to the Larger Bench."

Vedanta Ltd. (Formerly Known As Sesa Goa Ltd.) v. *The Goa Foundation*[7] raises a very important issue. This is a review petition with an extraordinary delay of between 600 to 900 days, while ordinarily, reviews are filed within 30 days. Convincing grounds for delay were not provided. The facts show that the review petition was preferred by the State of Goa with a delay of 650 days, and another four review petitions were filed by Vedanta Limited with a delay of 907 days. Further, it was observed that the State of Goa filed review petitions in the month of November 2019, after Justice Madan B Lokur's retirement, whereas Vedanta Limited preferred its four review petitions in the month of August 2020, right after the retirement of Justice Deepak Gupta. The court observed that the delay is to wait till the judges retire. Therefore, the review petitions were dismissed on merits as well as on the ground of limitation. The court opined that such practices should be discouraged as they reduce the sanctity of the court. The court is right in saying that this kind of practice must be firmly disapproved to preserve the institutional sanctity of the decision-making of this court

Article 136

In *Union of India* v. *Jitendra,*[8] a bail order passed in NDPS matter is sought to be assailed on the ground that the high court failed to consider the mandatory requirements of section 37 of the NDPS Act. The order of bail was passed on December 20, 2018, and the appeal was filed after a delay of 607 days.

Court opined that the explanation given is hardly satisfactory and, in fact, is a saga of gross negligence on the part of the concerned officers for prosecuting the remedy. The dates set out in the application show that on February 6, 2019, a proposal to file the special leave petition was sent by the zone to the NCB Headquarters, and the Headquarters asked for additional documents on February 26, 2019. Thereafter, the documents were submitted on July 16, 2019. The saga continues of these delays! We have repeatedly been deprecating the practice of authorities coming before this court after inordinate delays assuming as if the law of limitation does not apply to them.

Repeatedly, reliance is placed on the judgments of vintage when technology is not easily available. No reference is made to the subsequent judgment in the *Office of the Chief Post Master General* v. *Living Media India Ltd.,*[9] which has dealt with the

7 (2021) 7 SCC 206.
8 (2021) 10 SCC 789.
9 (2012) 3 SCC 563

issue that consideration of the ability of the Government to file an appeal in time would have to be dealt with in the context of the technology now available and merely shuffling files from one table to the other would no more be a sufficient reason. The court explained this practice in the following words

> We have also categorized such cases as "certificate cases". We have specified the object to filing such cases to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and, thus, record that nothing could be done because the highest Court has dismissed the appeal. It is a completion of formality with endeavourer to save the skin of the officers who may be in default in following the appropriate legal process in time. The irony is that despite our repeated orders, very little is done at least in taking action against concerned officers who sit on files and do nothing. The presumption is as if this Court will condone the delay for the asking. We refuse to follow such a course.

Court rightly pointed out that this is a fit case for imposing costs for wasting judicial time. Therefore, the court considersit appropriate to impose costs of Rs.25,000/- on the petitioner to be recovered from the officers concerned. The cost be deposited in Supreme Court Advocates on Record Welfare Fund within four weeks, along with the certificate of recovery from the officers concerned.

Article 142

The issue involved in *Rajnesh* v. *Neha*[10] is the uncertainty caused due to multiple statutes dealing with maintenance for wife and minor children. The court felt it is necessary to provide guidelines regarding payment of maintenance in matrimonial cases. The necessity for such guidelines is created due to different enactments occupying the same field,[11] and they are created for different purposes. Despite of time frame framed under different statutes in deciding the maintenance issued due to the multiplicity of legislations, the courts are unable to dispose of the cases. The court clarified that the guidelines are issued as a measure of social justice and to provide speedy disposal of maintenance cases to prevent the dependent wives and children from preventing them from falling into destitution and vagrancy. The guidelines are also necessary for bringing much-needed uniformity and consistency in matters of maintenance. Exercising its jurisdiction under article 142, the Supreme Court provided the following guidelines:

(a) To bring uniformity

> (i) where successive claims for maintenance are made by a party under different statutes, the Court would consider an adjustment or set- off, of the amount awarded in the previous proceeding/s, while determining whether any further amount is to be awarded in the subsequent proceeding;

10 (2021) 2 SCC 324.

11 The Special Marriage Act, 1954; The Hindu Marriage Act, 1955; Hindu Adoptions & Maintenance Act, 1956; s. 125 of the Cr.P.C.; Protection of Women from Domestic Violence Act, 2005.

(ii) it is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding;

(iii) if the order passed in the previous proceeding/s requires any modification or variation, it would be required to be done in the same proceeding.

(b) Payment of Interim Maintenance

The Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III of this judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the concerned Family Court / District Court / Magistrates Court, as the case may be, throughout the country.

(c) Criteria for determining the quantum of maintenance

For determining the quantum of maintenance payable to an applicant, the Court shall take into account the criteria enumerated in Part B – III of the judgment. The aforesaid factors are, however, not exhaustive, and the concerned Court may exercise its discretion to consider any other factor/s which may be necessary or of relevance in the facts and circumstances of a case.

(d) Date from which maintenance is to be awarded

Maintenance in all cases will be awarded from the date of filing the application for maintenance.

(e) Enforcement / Execution of orders of maintenance

For enforcement/execution of orders of maintenance, it is directed that an order or decree of maintenance may be enforced under Section 28A of the Hindu Marriage Act, 1956; Section 20(6) of the D.V. Act; and section 128 of Cr.P.C., as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly sections 51, 55, 58, 60 read with Order XXI.

The court directed that this judgement shall be circulated to all high courts, and all high courts must circulate the same to all the district courts in the States. It shall be displayed on the website of all district courts/family courts/courts of judicial magistrates for awareness and implementation.

The multiple enactments are in operation in cases of maintenance in matrimonial cases. These enactments are passed for different purposes; the reliefs are distinct, independent and vary. Therefore, it is most likely to result in multiple simultaneous proceedings filed in different courts. There is also a likelihood of contradicting orders passed by the different courts as yet times they are unaware of the proceedings of the same matter in other courts. There is a need to address this overlapping of jurisdictions and successive orders of maintenance passed under different enactments. The attempt made by the court to frame guidelines in the exercise of powers under article 136, read with article 142 of the Constitution, is laudable.

Article 161

In *State of Haryana* v. *Rajkumar @Bittu*[12] the subject matter of discussion, in this case, was the Punjab State Government policies on pre-mature release of prisoners

12 (*2021) 9 SCC 292.*

dated 1988, 1991,2000, 2002 and 2008. The first four policies stated that the case of pre-mature release would be considered on an individual basis after review by the State level committee falling within the purview of section 433 of the Code of Criminal Procedure and shall thereafter be put up to the Governor. However, the policy of 2008 did not mention the requirement of placing individual cases before the Governor. The issue in the present appeals regarded the applicability of the policy dated April 12, 2002 or the policy dated August 13, 2008 to the prisoner convicted on March 25, 2010.

The State and the petitioner before the high court were aggrieved by an order passed by the learned single bench of the High Court of Punjab and Haryana whereby the policies of the state government to grant remission to the prisoners were decided, inter alia, directing the state to consider the feasibility of drafting a fresh policy, particularly in respect of the exercise of powers conferred under article 161 of the Constitution. It was also held that the State might also consider the feasibility of having a policy with the retrospective operation, provided the same does not lead to discrimination amongst a substantial number of identically situated prisoners. The court further observed that till such time a decision is taken, the appropriate government could exercise its powers under sections 432 and 433 of the Code of Criminal Procedure, 1973, in terms of policy dated August 13, 2008, but while strictly adhering to the restrictions imposed under section 433-A of the Code.

The apex court made several observations regarding the power of the Governor to grant pardons. It referred to the case of *Maru Ram* v. *Union of India* (1981) 1 SCC 107 while considering the scope of article 161 of the Constitution and the provisions of the Cr. P.C held that 'The power to remit is a constitutional power and any legislation must fail which seeks to curtail its scope and emasculate its mechanics. … the exercise of this plenary power cannot be left to the fancy, frolic or frown of government, State or Central, but must embrace reason, relevance and reformation, as all public power in a republic must. It further stated that the two powers, one Constitutional and one statutory, are co-extensive. However, the power created by the Code cannot be equated by the prerogative created by the Constitution. Constitutional power is 'untouchable' and 'unapproachable'.

It further stated that the power under article 161 of the Constitution could be exercised by the state governments, not by the governor on his own. The advice of the appropriate government binds the head of the state. No separate order for each individual case is necessary, but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group. Therefore, the policies of the State Government are composite policies encompassing both situations under article 161 of the Constitution and sections 432,433 and 433-A of the Code. Their mission under article 161 of the Constitution will override section 433-A of the Code if the state government decides to be governed by its constitutional power.

Thus, a prisoner has to undergo a minimum period of imprisonment of 14years without remission in the case of an offence, the conviction of which carries a death

sentence, to take benefit of the policy of remission framed by an appropriate government under section 432 of the Code in view of the overriding provision of section 433-A of the Code. However, the power of the Governor to commute a sentence or to pardon is independent of any such restriction or limitation. The state government can frame a policy of grant of remissions under section 432 of the Code or article 161 of the Constitution.The Governor continues to exercise the power of commutation and release under Article 161 of the Constitution, notwithstanding section 433-A of the Code. The action of commutation and release can thus be pursuant to a governmental decision, and the order may be issued even without the Governor's approval. However, under the Rules of Business and as a matter of constitutional courtesy, it may seek approval of the Governor if such release is under article161 of the Constitution.

The policy prevalent at the time of conviction shall be taken into consideration for considering the premature release of a prisoner. The apex court set aside the directions issued by the high court and held that the power of remission is to be exercised by the state government, as an appropriate government, if the prisoner has undergone 14 years of actual imprisonment in the cases fallingwithin the scope of section 433-A of the Code and in case the imprisonment is less than14 years, the power of premature release can be exercised by the Governor though on the aid and advice of the state government.

Article 162

The impact of COVID-19 was felt in every aspect of life. There were several demands to the state from the public to ease the burden caused on their lives by the unexpected lockdown and other restrictions. One such demand from parents is to reduce the tuition fee as many of them are not in a position to pay the fee for their children. In *Indian School, Jodhpur* v. *State of Rajasthan*,[13] the Government of Rajasthan responded to such demand, and under the directions of the Chief Minister, the Director of Education issued an order reducing the tuitionfee in schools. The reduction of the fee was issued by the government in view of the reduction of the syllabus by the Central Board of Secondary Education and Rajasthan Board of Secondary Education. 60 per cent of the fee reduction is to be applicable to all the schools that are affiliated withthe Rajasthan Board of Secondary Education and 70 per cent to the schools affiliated with the Central Board of Secondary Education. This impacted about 36,000 private unaided including 220 minority private unaided schools. This order was challenged in the high court, and an appeal was preferred to Supreme Court, challenging the validity of the reduction of fee.

The major contention of the appellants is what is the source of the power under which the impugned order was passed? It was observed by the court that the order had made no reference with regard to the source of power during the submissions, it was found that four different arguments were presented on behalf of the government.

First, it is competent to do so under section 18 of the Rajasthan Schools (Regulation of Fee) Act of 2016. Second, under article 162 of the Constitution, the

13 2021 SCC OnLine SC 359.

state can make a policy and issue executive directions to mitigate the concerns of the parents. Third, such power can be exercised by the state government under the Disaster Management Act, of 2005. Lastly, the such direction could also be issued in exercise of power under the Rajasthan Epidemic Diseases Act, 2020.

The contention was that when there is a specific mechanism was in place under the Act of 2016 can the fee be reduced without following the procedure prescribed under the Act? Answering in negative the court held that the Act clearly mentioned the mechanism and the process for fixing the fee. The fee, once fixed under the Act, is valid for three years and no deviation from the same is allowed. In case of any grievance, it must be dealt with by DFRC. The Act explicitly state that the fee fixed shall be binding on all concerned for three academic years. Therefore, the impugned order is in direct conflict with the Act. If the government wanted to reduce the fee, then it has follow the process fixed by the Act.

With regards to the second contention that such directions can be issued under the executive power exercisable under article 162 of the Constitution, the court held that:

> The executive power of a State under Article 162 of the Constitution extends to the matters upon which the legislature of the State has competency to legislate and is not confined to matters over which legislation has already been passed. It is also well¬settled that the State Government cannot go against the provisions of the Constitution or any law. The subject of determination of fee structure and whether it entails in profiteering, is already covered by the legislation in the form of the Act of 2016 and the Rules framed thereunder. It is not as if there is no enactment covering that subject or any incidental aspects thereof.

In view of the above observation, it was held that the Act of 2016, contains detailed provisions regarding the fixing of fees and declares that it is binding on all for a fixed period. Hence once the fee is finalized, whether to reduce the fee or not is the exclusive right of the management of the private schools. The State cannot exercise executive power under Article 162 when such power is exclusively dealt with by the legislation. The state, in the absence of any legislation, is entitled to make a policy and issue directions. However, once the legislation is passed, the state cannot subvert its provisions under the guise of executive power under article 162. Further, the state cannot use Article 162 to regulate the conduct of two private individuals when the state has no direct relationship.

With regards to the third and fourth contention, the court clearly held that those Acts do not vest any power on the state to issue directions to reduce the fee. The state has no interest in controlling the commercial and economic aspects of private individuals. The court is right in saying the state is not competent in deciding the reduction of fees as it amounts to selective intervention. There are several demands from the public with respect to various aspects during the pandemic. Selecting only one aspect, *i.e.,* fees in schools, does amount to discrimination and violates the rights of private individuals.

The assumption of the government that reducing the syllabus by the Boards would reduce the financial liability of the schools is incorrect. The salaries and other expenditures of the schools would not be reduced. Therefore, the court held that a one-time measure directed the schools to reduce 15% of the fee and categorically held that such a direction was issued to bring finality to the litigation. Further, it was clarified that the 15% reduction is on account of unutilized facilities and not on the basis of the actual data.

There is no doubt that COVID-19 had created a long-lasting effect on the lives of the people, particularly those who are in the unorganized sector. The impact of the pandemic was felt more in small-scale industries and hit hard the daily wage labour. The idea of reducing the school fee to reduce the burden on parents who are unable to cope with the lockdowns and other restrictions is a well-intended measure from the state. However, as the court pointed out that identifying only one sector not only amounts to discrimination but also the impact of such a decision on the other stakeholders should have been considered. The best way of dealing with such a situation baring the reduced fee by the state to ease the burden on parents.

Article 226

Like every year, the jurisdiction of the high court under article 226 draws attention. High court, as a court of first contact, draws several issues. In *Amyra Dwivedi* v. *Abhinav Dwivedi*[14]the High Court of Allahabad grants visiting rights to meet her daughter at the place as agreed by the parties. In the order, the court mentioned that in case the parties are unable to agree on the place, then the mother can meet her daughter at the office of the Secretary, District Legal Services Authority, Lucknow, during office hours for two hours on a day and time agreed into by the parties or as directed by the Secretary, District Legal Services Authority, Lucknow, on any day preferably Saturday, once in a month. The petitioner was not allowed to take her daughter outside the boundaries of the office. This order was challenged by the petitioner. Usually, the courts consider the welfare of the child is the utmost importance in visitation rights. The Supreme Court was asked to decide whether the visiting of the child in the office of the Legal Service Authority is in the best interest of the child. Answering in negative, the court held that the office would not create an atmosphere where the mother and child can be like parent and child. Hence the mother was allowed to take the child to her home.

In *C. Bright* v.*The District Collector*,[15] the question as to the power of the high courts in granting interim relief under article 226 was dealt with. Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act prescribes 30 days time limit to the district magistrate to deliver possession of a secured asset. This could be extended to 60 days. The purpose of the Act is to provide a quick remedy to the secured creditors to take possession of the property and realize their dues. The issue is, can the High Court grant a stay on these proceedings?The Supreme Court relying on *United Bank of India* v. *Satyawati*

14 (*2021) 4 SCC 698.*

15 (*2021) 2 SCC 392.*

Tondon[16]granting a stay would have a serious adverse impact on the financial health of such bodies/institutions. It reiterated that the remedy in such matters is to make an application before the debts recovery tribunal. Invoking jurisdiction under articles 226 and 227 without exploring the alternative remedy would hamper the very purpose of the Act. Supreme Court held that high courts should not pass any such interim orders without hearing the secured creditor as interim orders defeat the very purpose of expeditious recovery of public money.

Arnab Manoranjan Goswami v. *The State of Maharashtra*[17]deals with granting bail. The appellant is the Editor-in-Chief of an English television news channel, Republic TV. He is also the Managing Director of ARG Outlier Media Asianet News Private Limited. An FIR was registered against the appellant in the year 2018 in connection with a suicide where the person who committed suicide alleged that the appellant was responsible for his suicide. Based on the report, the SHO of Alibaug Police Station filed a report in the Court of the Chief Judicial Magistrate stating that the offence was committed, but no substantial evidence was found. The CJM accepted the report. In 2020 the appellant was arrested in connection with FIR 59 of 2018. He was sent to judicial remand by the trial court judge.

The appellant approached the High Court of Bombay under articles 226, and 227, read with Section 482 of the Criminal Procedure Code. The main contention of the appellant was that he was arrested for telecasting news against the government, and as such, his arrest being illegal, he is entitled to the writ of habeas corpus. He also asked the High Court to quash the FIR. Further, the appellant moved an interim application asking the court to release him from custody and stay all future proceedings relating to the FIR.

Addressing the *interim* application high court declined to grant bail as the appellant was in judicial custody; hence it cannot be termed as illegal. However, the court relying on the *State of Telangana* v.*Habib Abdullah Jeelani*,[18] held that the appellant can avail the remedy of bail under section 439 of the CrPC. With regard to the prayer for quashing of FIR, the high court posted the matter for a later date. Aggrieved by the decision of the high court, the appellant approached the Supreme Court. The question raised before the court is what the real scope of article 226 in granting bail. The court held that the following factors emerged from various judgements of this court[19] as important factors to be considered in dealing with bail pleas, and the same shall be considered by the high court under article 226.

(i) The nature of the alleged offence, the nature of the accusation and the severity of the punishment in the case of a conviction;

16 (2010) 8 SCC 110.

17 (2021) 2 SCC 427.

18 *(2017) 2 SCC 779.*

19 *Prahlad Singh Bhati* v. *NCT, Delhi* (*2001) 4 SCC 280*, *Ram Govind Upadhyay* v. *Sudarshan Singh* (2002) 3 SCC 598; *State of UP* v. *Amarmani* (*2005) 8 SCC 21; Prasanta Kumar Sarkar* v. *Ashis Chatterjee* (2010) 4 SCC 496; *Sanjay Chandra* v *CBI* 2012 1 SCC 40; and *P. Chidambaram* v. *Central Bureau of Investigation* (*2020) 13 SCC 337.*

(ii) Whether there exists a reasonable apprehension of the accused tampering with the witnesses or being a threat to the complainant or the witnesses;

(iii) The possibility of securing the presence of the accused at the trial or the likelihood of the accused fleeing from justice;

(iv) The antecedents of and circumstances which are peculiar to the accused;

(v) Whether prima facie the ingredients of the offence are made out, on the basis of the allegations as they stand, in the FIR; and

(vi) The significant interests of the public or the State and other similar considerations.

Further, the court held that it was not their intention that the jurisdiction under article 226 jurisdiction could not substitute for recourse to the remedy of bail under section 439 of the CrPC. However, keeping the above principles in mind, the high court should have scrutinize the contents of the FIR. The high court should have evaluated whether there is any *prima facie* evidence to make out whether the offence has been made out under section 306 of the Indian Penal Code. High court also should have taken the facts that the appellant is an Indian, and there is no flight risk while the investigation is on and no apprehension of tampering evidence into consideration while deciding the bail plea. Not considering all these, the high court disabled itself from exercising the jurisdiction under article 226 in the true sense. The courts must exercise their inherent powers to prevent the abuse of power and to secure the ends of justice. Based on the above observation, the court held that the high court was in error in rejecting the applications for the grant of interim bail; hence the accused was released on interim bail.

The Supreme Court rightly reminded us that bail, not jail is the basic rule of the criminal justice system. When the high court and the lower courts fail to enforce this rule, the doors of the Supreme Court are always opened to the accused. However, one should understand that the other courts shall not forego such duty and leave it to the highest court in this country to intervene at all times. Explaining the relevance of the district judiciary, the court aptly pointed out that the trial courts are wrongly referred to as the subordinate judiciary. They may be subordinate in a hierarchical sense but not in terms of their importance, as they are the first point of contact for the citizens in the dispensation of justice. If the district judiciary failed in its duty to provide bail in deserving cases, it would lead to burdening the high courts, and the failure of the high courts would, in turn, burden the Supreme Court. Meanwhile, the accused would suffer incarceration and particularly those who have no resources to move to the constitutional courts.

In N.N. Global Mercantile v. *Indo Unique Flame Ltd*.,[20] the respondent submitted a tender to the Karnataka Power Corporation Ltd. (KPCL) a work order was issued to the respondent by KPCL. As per the terms of the work order, the respondent provided a bank guarantee for Rs.29.29 crores in favour of KPCL. The respondent entered into a sub-contract with the appellant company. In the work order, clause 10 incorporated

20 (2021) 4 SCC 379.

an arbitration clause. Some dispute arose between Respondent and KPCL, and as a result, KPCL invoked the bank guarantee. As a consequence, the respondent invoked the bank guarantee furnished by the appellant. The appellant filed a civil suit against the respondent before the Commercial Court, Nagpur. In an interim order, the commercial court directed the parties to maintain status-quo with regard to bank guarantee. Meanwhile, the respondent filed an application under section 8 of the Arbitration and Conciliation Act, contending that the commercial bank should not entertain the case as there is an arbitration clause in the agreement. The commercial court held that the arbitration clause in the work order is not general in nature; hence it does not cover the issue of bank guarantee as the bank guarantee was an independent contractor.

Aggrieved by the order, the respondent filed a civil revision petition before the High Court of Bombay, challenging the order of the commercial court. When the maintainability of the civil revision petition was raised before the high court, the high court permitted the respondent to withdraw the petition with the liberty to file a petition under articles 226 and 227 of the Constitution of India. Accordingly, the respondent withdrew the petition and filed a writ petition before the High Court of Bombay to quash the commercial court's order. The high court held that there was an arbitration agreement between the parties, and therefore the application under section 8 was maintainable. The appellant challenged the order of the high court before the Supreme Court. The fundamental question that was raised is when the order of the commercial court could be appealed under section 37(1)(a) of the Arbitration Act, can a writ petition be maintainable? In other words, when an alternative remedy is available, can an appellant, without exhausting the remedy, invoke the jurisdiction under article 226?

It was observed that the respondent has a remedy to appeal to the commercial appellative division of the high court under section 13(1A) of the Commercial Courts Act, 2015.[21]As there is an alternative remedy is available to the respondent, the respondent should have exhausted that remedy before approaching the high court under article 226. Accordingly, the Supreme Court set aside the order of the high court. Regarding the arbitration clause, the court held that when both parties admitted the existence of the arbitration before the high court and also before the Supreme Court, they were directed to appoint a sole arbitrator consensually, and if they fail to

21 S. 13(1A) read as : "13. Appeals from decrees of Commercial Courts and Commercial Divisions.–(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of 60 days from the date of judgment or order.

(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order: Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996)."

do so parties are free to make an application under section 11 for appointment of the arbitrator to the high court.

The Chief Election Commissioner v. *M.R. Vijayabhaskar* [22] raises the issue of media reporting on court proceedings. The judicial proceedings are public in nature. Yet times, courts, while conducting the proceedings, tend to ask several questions and sometimes also make certain observations. All observations and comments made by the judge during the proceedings may not become part of the final judgment. This case deals with the freedom of the press in reporting the judicial proceedings on a daily basis. It also dealt with issues like what are the contours which outline judicial conduct. What are the concerns courts must be alive to in an age defined by the seamless flow of information? What purpose does the media serve in a courtroom? Can a constitutional body like the Election Commission of India set up a plea that constitutional status is immunity from judicial oversight?

The respondent had sent a representation to the Election Commission (EC) requesting to take COVID-19 appropriate measures to ensure the safety and health of officers in the counting booths at Karur Legislative Assembly Constituency in Tamil Nadu. When no response was received from the EC the respondent filed a writ petition under Article 226 before the High Court of Tamil Nadu seeking directions to ensure the COVID protocols in counting the votes.

It appears that during the proceedings, the High Court made a comment to the effect against the EC that "the institution that is singularly responsible for the second wave of COVID-19" and that the EC "should be put up for murder charges". The said comments were highlighted by the print, electronic and tele media. However, when the court decided the matter, this comment was not made part of the order of the court.

Subsequent to this, on an individual complaint, an FIR was registered against the Deputy Election Commissioner and other officials of the EC in Kharadah Police Station, Kolkata. The said FIR was registered under sections 269, 270 and 304, read with section 120-B of the Indian Penal Code, 1860. The complainant did not make any reference to the observations of the High Court of Tamil Nadu.

At this juncture, the EC filed a miscellaneous application seeking the following interim reliefs:

i. The media be directed to publish only what forms part of the record in the present proceedings.

ii. Direct the media to issue necessary clarification in this regard and thus render Justice.

iii. Direct the police authorities notto register any FIR/complaint for the offence of murder on the basis of the media reports of the oral observations of the high court.

The high court, after considering the measures taken by the EC, satisfied that sufficient precautions were already taken by the EC disposed of the case. The court

22 (2021) 9 SCC 770.

also mentioned that the miscellaneous application was also closed in light of this order.

Aggrieved by the order, the EC has approached Supreme Court. The major contention was that the high court failed to evaluate the miscellaneous application, and the same has not been addressed. In the appeal the following submissions were made by the EC.

(i) The High Court ought not to have made disparaging oral observations that the EC is the "the institution that is singularly responsible for the second wave of COVID-19" and that the EC "should be put up for murder charges":

a. These observations bear no relevance to the nature of the controversy before the High Court, which related to the need to make arrangements for safe counting of votes consistent with COVID-19 protocols at the 135- Karur Legislative Assembly Constituency;

b. The polling had already been completed and only the counting of votes remained on 2 May 2021;

c. These observations were made without giving the EC an opportunity to explain the steps it had taken for maintenance of COVID-19 protocols and it had no notice that its conduct of the elections during the campaign would engage attention during the hearing;

d. The High Court has made disparaging oral observations without proof or material; and

e. The High Court disposed of the writ petition without addressing the miscellaneous application filed by the EC;

(ii)The remarks made by the High Court were widely reported in the media and have tarnished the image of the EC as an independent constitutional authority. These remarks have reduced the faith of the people in the EC and undermined the sanctity of its constitutional authority;

(iii) The scope of judicial review over the EC in matters pertaining to the conduct of elections is limited and courts should exercise restraint while PART B making observations about the EC or the electoral process, as it falls within the domain of another expert constitutional authority;

(iv) The EC had conducted various State elections during the pandemic and had taken adequate measures to enforce protocols relating to COVID-19. The actual enforcement of protocols and safety measures on the ground is in the hands of the State machinery. The EC does not take over governance by the States even during elections and has a limited number of personnel at its disposal;

(v) When the decision to conduct elections in Tamil Nadu was taken in February 2021 and during campaigning (which ended on 4 April 2021), the number of cases of COVID-19 was under control and an analysis of the data would indicate that the elections were not a significant factor in the surge of cases.

States where no elections were held such as Maharashtra, Delhi and Karnataka have witnessed a severe surge in cases;

(vi) The EC had formulated adequate guidelines for campaigning during the pandemic and had restricted the scope of electioneering; (vii) The observations of the High Court during the oral hearings, which are not part of the written judicial record, have caused undue prejudice to the EC;

(vii) The observations of the High Court during the oral hearings, which are not part of the written judicial record, have caused undue prejudice to the EC;

(viii) The media must ensure there is accurate reporting of court proceedings and proceedings must not be sensationalized, leading to a loss of public confidence. Directions and guidelines must be framed on the manner of reporting court proceedings

(ix) A balance must be maintained between the conduct of court proceedings and the freedom of the media. Media reporting which suggests that a court has cast aspersions on any person or functionary is incorrect; and

(x) Though the views of a court are reflected through its judgments, oral comments of judges are quoted in the mainstream media which may give an impression of an institutional opinion. This exceeds the boundaries of judicial propriety.

After considering the submissions made by both parties Supreme Court held that the payer to direct the police not to register cases is misconceived. The court pointed out that once an FIR is registered, the person aggrieved by such registration has remedies under the Code of Criminal Procedure, 1973, which includes quashing the FIR under section 482. Hence the court declined to issue any relief on this issue. As far as seeking restraint on media is concerned, the court opined that the Constitution of India guarantees two fundamental principles, *i.e*., court proceedings are public proceedings and reporting the proceedings is a fundamental right to freedom of speech and expression. Under the first principle, all court proceedings are open to the public in both physical and metaphorical sense. Unless the proceedings are in-camera open access to legal proceedings is the hallmark of access to justice.

Regarding the second principle, it was observed that the transformation of media from a printed form of newspapers to digital had reshaped how the information was disseminated. The digital revolution refashioned and revolutionized the access to information. Restricting the media from reporting the court proceedings would do no good. This is particularly true when many countries have live streaming of judicial proceedings. With regard to the comments made by the high court, the Supreme Court opined that they are harsh and that the metaphor used is inappropriate. Therefore the court said that "Having said that, we must emphasize the need for judges to exercise caution in off-the-cuff remarks in open court, which may be susceptible to misinterpretation. Language, both on the Bench and in judgments, must comport with judicial propriety."

With regards to expunging the remarks of the high court, the Supreme Court held that the remarks not being part of the judicial record, the question of expunging

them does not arise. In view of the above observations, the court find no merit in the prayer of the EC, and accordingly, the appeal was dismissed.

The judgement re-established the public right to know. It's indeed necessary that the proceedings of the courts must be available in the public domain. The oral submissions by the parties and the court's remarks are part of ensuring the judicial process to public scrutiny. To maintain transparency and accountability, public access to judicial proceedings is necessary. Such a system reposes the faith of the public in the administration of justice.

In *Vetindia Pharmaceuticals* v. *The State Of Uttar Pradesh*[23] the appellant is in a pharmaceutical business and was blacklisted for allegedly supplying substandard medicines. Aggrieved by the indefinite order of blacklisting approached, the high court. The high court dismissed the writ petition *in limine,* on the ground of a delay of ten years. An appeal was preferred to Supreme Court.

The facts show that Palak Pharmaceuticals Private Limited took certain medicines from the appellant, and the same was supplied to the respondent. Upon founding some misbranding in the medicines supplied, the respondents served a blacklist notice to the appellant. In reply, the appellant informed the respondent that they had never supplied any medicine to them and the misbranding was an inadvertent error. Upon the request of the respondent, the appellant sent more clarifications in this regard. However, no further action was taken by the respondent. The blacklisting prevented the appellant from participating in any tenders, and the state of Rajasthan even rejected their tender on the ground of a pending blacklisting order. Before the high court, the appellant brought all the reasons why there is ten years delay. However, the high court did not consider any of them and, without going into the merits, dismissed the petition. The question raised is whether the court was justified in dismissing the petition *in limine*.

Supreme Court reversing the high court, held that the respondents failed to follow principles of natural justice while issuing the order of blacklisting, and in such circumstances, the delay is irrelevant. Further, the court also observed that the blacklisting was indefinite in nature; hence it continued when the petition was filed. Explaining the power of the high court in dealing with delay the court held that:

> That brings us to the question of delay. There is no doubt that the High Court in its discretionary jurisdiction may decline to exercise the discretionary writ jurisdiction on ground of delay in approaching the court. But it is only a rule of discretion by exercise of self"restraint evolved by the court in exercise of the discretionary equitable jurisdiction and not a mandatory requirement that every delayed petition must be dismissed on the ground of delay. The Limitation Act *strict sensu* does not apply to the writ jurisdiction. The discretion vested in the court under Article 226 of the Constitution therefore has to be a judicious exercise of the discretion after considering all pros and cons

23 (2021) 1 SCC 804.

of the matter, including the nature of the dispute, the explanation for the delay, whether any third"party rights have intervened etc.

In the present case, there is no delay at the time of filing the petition as the appellant explain in the petition that they are pursuing the matter with the authorities, and the delay is from the authorities. The present petition is filed because their tender was rejected by the State of Rajasthan. Hence the court held that the high court erred in dismissing the petition *in limine* only on grounds of delay.

Union Public Service Commission v. *Bibhu Prasad Sarangi*[24] is an appeal arising from the judgement and order of the Division Bench of the High Court of Orissa. The appellants had challenged before the high court, the order of the Central Administrative Tribunal. The issue was whether the first respondent was correctly denied selection to the IAS, having regard to the fact that a disciplinary penalty had been imposed upon him on 29 September 2011. The tribunal had directed the appellants to reconsider the case of the first respondent for promotion to the IAS inaccordance with the vacancies for 2015 by reconvening a meeting of the Selection Committee and, thereafter, to reconsider the first respondent similarly for 2016 and 2017 if the first respondent was found unsuitable for promotion in the year 2015. Consequential benefits were directed to be released in the event that the review selection committee found the first respondent suitable.

The UPSC has submitted that the DOPT Guidelines apply to the constitution of Departmental Promotion Committees for the purpose of promotion, whereas, in matters relating to the selection of officers from the state civil services to the IAS, the UPSC Guidelines, which have been framed in exercise of powers under article 320 of the Constitution would have to be considered. The apex court stated that the high court should have applied its mind and opined on this submission, but it did not do so. The apex court, therefore, set aside the impugned judgment of the high court and restored the writ petition to the file of the high court to be disposed of expeditiously as the respondent had already retired.

A very pertinent observation has been made by the apex court regarding the writing of the judgment by the high court. It noted that the high court had extracted portions of the judgment of the tribunal, stating that the tribunal has elaborately discussed the law. The high court came to the conclusion that the tribunal had committed no jurisdictional error. Based on the reading of the high court judgment, the apex court commented that the high court had not independently applied its mind to the controversy at hand. A very apposite comment was made by the court that the 'cut- copy- paste' function should not become a substitute for substantive reasoning, which, in the ultimate analysis, is the defining feature of the judicial process. It stated that such kind of aberration had become a common phenomenon in judgments, and therefore the National Judicial Academy should take cognizance of the same.

Though the judges have time constraints and a heavy caseload, they cannot deliver judgments devoid of reasoning. The reasoning is the soul of the judgment,

24 (2021) 4 SCC 516.

and therefore what would be desirable is that it should be written in a crisp manner. The apex court observed that the size of the judgment does not always necessarily relate to the reasoned analysis of the core issue. Reasons are the soul of the judgment, without them, one is left with an empty shell which neither provides solace nor satisfaction to the litigant. How the judges communicate through their judgment is also important. The quality of the judgment is as vital as the quick disposal of the case. The apex court very rightly has summarized that the quality of justice brings legitimacy to the judiciary.

M/S Radha Krishan Industries v. *The State Of Himachal Pradesh*[25] is related to the interface between citizens and their businesses with the fiscal administration. Legislation enacted for the levy of goods and services tax confers a power on the taxation authorities to impose a provisional attachment on the properties of the assesse, including bank accounts. The joint commissioner of state taxes and excise attached the appellant's receivables from its customers. This order was issued by invoking section 83 of the Himachal Pradesh Goods and Service Tax Act, 20172 and Rule 159 of Himachal Pradesh Goods and Service Tax Rules, 20173. Aggrieved by the order, the appellant approached the high court under article 226. The high court dismissed the petition on the ground that an alternative remedy of an appeal is available. From the order of the high court, an appeal was filed in the Supreme Court.

The following issues arise in the present case:

(i) Whether a writ petition challenging the orders of provisional attachment was maintainable under article 226 of the constitution before the high court; and

(ii) (ii) If the answer to (i) is in the affirmative, whether the orders of provisional attachment constitute a valid exercise of power

It was observed that the rule of law in a constitutional framework is fulfilled when law is substantively fair, procedurally fair and applied in a fair manner. Each of these three components will need to be addressed in the course of interpreting the tax statute. Under article 226 of the constitution, the high court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. But the exercise has to be based on principles. The Supreme Court summarized the principles of law relating to exercising the jurisdiction under article 226 as under:

> (i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
>
> (ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;
>
> (iii) Exceptions to the rule of alternate remedy arise where:
>
> (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution;

25 (2021) 6 SCC 771.

(b) there has been a violation of the principles of natural justice;

(c) the order or proceedings are wholly without jurisdiction; or

(d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with

After enumerating the principles, the court held that the power of provisional attachment of the property of the taxable person, including a bank account, is draconian in nature. Therefore, to make such an attachment valid, the authority must fulfil all the conditions laid down by the statute. Before any such order is issued the Commissioner must form the opinion on a tangible material that without such attachment protecting the government revenue is impossible. As in the present case, there is no application mind by the joint commissioner; the attachment becomes illegal. The Commissioner, under the impression that giving the opportunity of being heard is at his discretion, is misconceived in law. Accordingly, the high court should have allowed the petition filed under article 226.

The case establishes the norm that the courts must ensure a fair exercise of statutory power. Whenever legislation confers any power on authorities the legitimate concern for the courts is how such authority exercises such power within the legislative framework. The rule of law expects the courts to play a proactive role in keeping the administration within the boundaries of the law.

Disqualification of Member of Legislative Assembly article 191.

An interesting question regarding disqualification was raised in this *Pradeep Kumar Sonthalia* v. *Dhiraj Prasad Sahu*.[26] Amit Kumar Mahto, a Member of the Legislative Assembly, cast his vote at 9.15 A.M. on 23.03.2018 in Rajya Sabha Election. At 2.30 p.m. on the same day, the criminal court delivered a judgment convicting Amit Kumar for different offences. Under one of the offences, he was convicted of two years imprisonment. In the counting of the votes, it was found that

26 (*2021) 6 SCC 523.*

the appellant secured a 2599 value of votes, whereas his opponent Samir Uraon was declared to have secured a 2601 value of votes. The vote value of Dhiraj Prasad Sahu was declared to have secured 2600. If the vote of Amit Kumar Mahto is to be held invalid would change the out of the election as Amit Kumar voted for Dhiraj, and he did not exercise his option of second and third preference. The question is whether the vote cast by the MLA would become invalid as he was disqualified due to the judgement of the criminal court.

The court framed the following two issues

> (i) Whether the vote admittedly (but remains unassailable) cast by Shri Amit Kumar Mahto in favour of Shri Dhiraj Prasad Sahu at 9.15 A.M. on 23.03.2018 should be treated as an invalid vote on account of the disqualification suffered by the voter under Article 191(1)(e) of the Constitution of India read with Section 8(3) of the Representation of the People Act, 1951, by virtue of his conviction and sentence by the Sessions Court in a criminal case, rendered at 2.30 P.M. on the very same date 23.03.2018; and
>
> (ii) Whether, in the event of the first issue being answered in the affirmative, the election petitioner is entitled to be declared as duly elected automatically.

The conviction under any offence causes disqualification under article 191(1)(e), read with section 8(3). Therefore, disqualified member whose seat has become vacant is not entitled to cast his vote. Because article 80(4) provides that the representatives "shall be elected by the elected members". Section 8 (3) states that 'A person convicted …. shall be disqualified from the date of such conviction…'

The court observed that the accused is innocent until proven guilty is the cardinal principle of criminal law. Therefore, it is not correct to displace this principle by the use of merely general words. In *Pierson* v. *Secretary of State for the Home Department,*[27] the House of Lords held that unless there be clearest provision to the contrary, Parliament is presumed not to legislate contrary to the rule of law, which enforces the minimum standard of fairness both substantive and procedural.

Keeping the law of fairness in mind, criminal jurisprudence relies on the necessity to presume the accused innocent till proven guilty. To say that this presumption of innocence would evaporate from 00.01 A.M., though the conviction was handed over at 14.30, would strike at the very root of the most fundamental principle of criminal jurisprudence. In the meantime, it is important to note that cases arising under the law of insurance, have no relevance to cases of disqualification.

In view of the above observations, the court held that the vote cast by Amit Kumar cannot be treated as invalid. Accordingly, the court held that the vote is a valid vote, and the court said to accept the contrary means the court shall agree that the returning officer should have had the foresight at 9:15 a.m. about the outcome of the criminal case in the afternoon.

27 (1997) 3 All ER 577.

Article 342

Jaishri Laxmanrao Patil v. *The Chief Minister*[28] the court was called to decide the constitutional validity of reservations to Maratha. The idea of reservations to the backward class for improving their socioeconomic status has taken a political twist as many forward communities realized the benefit of being labelled as backward class. Marathas in Maharashtra demanded backward class status, and from the early 60s, the demand did not find favour. In 1964 the B.D. Deshmukh Committee did not find Maratha as a backward class. Even the unified list of OBC issued by the State of Maharashtra in 1967 did not include Maratha. The second National Backward Classes (Mandal Commission) mentioned Marathas as a forward Hindu community.

On the demand of Marathas to be considered a backward class, the National Commission for Backward Classes conducted a public hearing to come to the conclusion that Maratha is not a socially and educationally backward class community. In fact, it stated that the Maratha is a socially advanced and prestigious community.

Based on a nine-judge Constitution Bench judgement in *Indra Sawhney* v. *Union of India*[29] State of Maharashtra constituted a permanent body to consider the issues of inclusion and exclusion of communities in the backward class list. In the year 2008 the Maharashtra State OBC Commission, after conducting a detailed survey, again held that Maratha could not be included in the OBC list because it is a forward caste.

In the year 2013, the state of Maharashtra sent a request to the Maharashtra State, Other Backward Classes Commission,to review its earlier report on Maratha. However, the Commission rejected the request of the state government. At this juncture, the Government of Maharashtra appointed a special Committee to study the demand of Martha and submit a detailed report to the government. The Committee is headed by a sitting Minister, Narayan Rane submitted its report in the year 2014. The Committee recognized Maratha as a backward community and recommended special reservations to Maratha under articles 15(4) and 16(4). Accordingly, the government passed an Ordinance providing for 16% reservation in favour of the Maratha caste. The constitutional validity of the ordinance was challenged before the high court. The high court issued a stay order against the implementation of the ordinance. While the case is pending before the High Court, the Legislature of the State of Maharashtra passed the legislation,[30] and the same received the Governor's consent. Again, the High stayed the operation of the legislation.

At this time, the Government asked the State Backward Classes Commission to submit a report on the status of the Maratha in the state of Maharashtra. In 2017 the state-appointed Justice M.G. Gaikwad as Chairman of the State Backward Classes Commission. Meanwhile, the Union of India substituted the National Commission for Backward Classes Act 1993 with the National Commission for Backward Classes

28 (2021) 2 SCC 785.

29 [1992 Suppl. (3) SCC 217].

30 The Maharashtra State Reservation (of seats for appointment in educational institutions in the State and for appointment or posts for public services under the State) for educationally and socially backward category (ESBC) Act, 2014.

(Repeal) Act 2018. The Parliament passed the Constitution (102nd Amendment) Act, 2018. The new amendment added articles 338B, 342A and 366 (26C). article 338, sub-clause (10), was also amended.

The State Backward Classes Commission submitted its report on Maratha, and in the report, it mentioned that the Maratha be declared as the socially and economically backward class and they also not adequately represented in public service. Based on this report, the State enacted the Maharashtra State Reservation for Seats for Admission in Educational Institutions in the State and for appointments in the public services and posts under the State (for Socially and Educationally Backward Classes) SEBC Act, 2018.

This enactment was challenged for lack of legislative competence in view of the 102nd Amendment to the Constitution and also excessive reservation. The high court, while upholding the state legislation, held that the State's legislative competence is not in any way affected by the Constitution (102nd Amendment) Act 2018. An appeal was preferred before the Supreme Court

Among the other contentions, the following questions were raised;

Whether the impugned Act of 2018 is constitutionally invalid on account of a lack of legislative competence on the following sub-heads:-

(a) The subsisting interim order passed by the Bombay High Court in *Sanjeet Shukla* v. *State of Maharashtra* (WP 3151/2014), thereby granting a stay to a similar enactment and ordinance of the State, which is pending adjudication before this Court.

(b) The 102nd (Constitution) Amendment, 2018 deprives the State legislature of its power to enact legislation determining the Socially and Educationally Backward Class and conferring the benefits on the said class in the exercise of its enabling power under Article 15(4) and 16(4) of the Constitution.

The contention that the new article 342A, read with article 366(26c), in essence, takes away the power of the states to legislate on backward classes under articles 15(4) and 16(4), did not find favour. The court pointed out that when the Bill to amend the constitution came before Rajya Sabha, the Bill was referred to the select committee. Before the Committee, the Ministry of Social Justice and Empowerment provided clarification in which it was clarified that other Backward Classes always have two lists, *i.e.,* the Central List and the State List. States always have the freedom to add any castes to their list even though they are not found in Central List, and this privilege would continue even after this amendment.

Further, the word 'Central' used in article 342A (2) shows the purpose and the object of the amended provision. The use of the word 'Central' indicates that article 342A would limit only to the central list issued by the President of India for the Central Services. Article 366(26C), which specifically refers to article 342A, shall be read together, and the reading gives the meaning that State List not be governed by the definition under article 366(26C). As a result, the Supreme Court held that the Constitution's 102nd Amendment does not preclude the State from making its own list of other backward classes for State services. As it does not preclude the state from

legislating there is no violation of the federal structure. Therefore, the court upheld the validity of the Constitution (One Hundred and Second Amendment) Act, 2018.

With regards to the reservations to Maratha, the court held that Indra Sawhney settled two issues that one reservation under article 16(4) should not exceed 50%, and for exceeding reservation beyond 50%, extra-ordinary circumstances, as indicated in paragraph 810 of Justice Jeevan Reddy should exist for which extreme caution is to be exercised. The court, after discussing the submissions of both parties extensively, held that there is noextraordinary situation where the ceiling of 50% needs to be exceeded for providing reservations for the Maratha community; hence Maratha class is not entitled to any reservations.

Schedule VII

In *APJ Abdul Kalam Technological* v. *Jai Bharath College of Management*[31]the issue involved is can a state university prescribe additional requirements over and above those prescribed by the AICTE in granting affiliations to the engineering college. The appellant University was established by the state of Kerala under the State of Kerala and enacted the APJ Abdul Kalam Technological University Act, 2015, to regulate technical education in the State of Kerala. Among the other powers, the University was conferred to provide affiliation to engineering colleges in the State of Kerala.

The respondent college applied for approval from AICTE for a new course along with the renewal of the existing courses. The AICTE granted the approval. The college also applied for affiliation with the appellant University. Before the University could decide about the application for granting affiliation, The Government of Kerala issued a G.O. providing fresh guidelines for permission to start new engineering colleges.[32] Based on the G.O., the Syndicate of the Appellant University fixed new norms for grant of affiliation to engineering colleges for starting new programs.[33] The respondent's application to start the new course was rejected by the appellant as it did not satisfy these guidelines. Aggrieved by the decision, the respondent approached the High Court of Kerala. The High Court of Kerala directed the Chancellor of the Appellant University to reconsider the respondent's application as the AICTE already granted the extension and approval for the new course. The vice-chancellor of the appellant university approached the Supreme Court challenging the direction of the High Court of Kerala. One of the contentions is the power of the University to prescribe the conditions for the affiliation beyond the regulations of the AICTE.

31 (2021) 2 SCC 564.

32 (i) that the college should have NBA accreditation; (ii) that the admission of students in the previous academic years should have been more than 50% of the sanctioned intake; and (iii) that the new course should be innovative.

33 (i) that at least one of the existing programs should have NBA accreditation; (ii) that the average annual intake of the institution for the previous three years should be more than 50% of the sanctioned intake; (iii) that the proposed programme should have AICTE approval and NOC from State Government; and (iv) that the proposed programme should have industry demand/employment potential.

The central legislation, the AICTE Act,was enacted under Entry 66 of List"I of the Seventh Schedule to the Constitution, whereas the A.P.J. Abdul Kalam Technological University Act was enacted by the Kerala State Legislature under Entry 25 of List"III. Hence the contention was that in the case of repugnancy, the AICTE regulations should prevail over the University regulations, and university regulation cannot go beyond the regulations prescribed by the AICTE. Explaining the settled law in this regard, the Supreme Court pointed out that in *R. Chitralekha* v. *State of Mysore*,[34] the conflict between Entry 66 of List"I on Entry"25 of List"III must be determined by a reading of the Central Act and the State Act conjointly.

When State law prescribes any standards "would be struck down as unconstitutional only if the same is found to be so heavy or devastating as to wipe out or appreciably abridge the central field and not otherwise." When state law prescribes any higher standards, they cannot be treated as encroaching on the field of the central legislation. What is not permissible is diluting the standards set by AICTE. The universities always have the power to prescribe additional standards for the improvement of standards in education.

Regarding the power of the university in maintaining the standards of education, the supreme court pointed to the judgement of *Bharathidasan University and Another* v. *All India Council for Technical Education*[35] that though AICTE was established under central legislation, it cannot usurp the role to undermine the authority and autonomous functioning of the Universities. In a number of earlier cases, it was held that the state, as well as the university, has the power to prescribe higher standards than the standards prescribed by the AICTE.[36] Therefore, the court rightly held that the universities could not dilute the standards prescribed by AICTE; however, they can certainly have the power to stipulate enhanced norms and standards.

Forum for People's Collective Efforts v. *The State of West Bengal*[37] deals withrepugnancy between central and state legislations in the area of real estate. The real estate sector experienced tremendous growth post-globalization. However, till 2016 the real estate sector was controlled by the respective state legislations resulting in multiple legislations and regulation mechanisms. In 2013 the Real Estate (Regulation and Development) bill was introduced in Rajya Sabha, and finally, the Real Estate (Regulation and Development) Act (RERA) was passed in the year 2016.

Till the enactment of RERA, the West Bengal (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993 (the "WB 1993 Act") regulates the real estate sector. The state of West Bengal only drafted the rules under RERA. In 2017 however, the State passed *the West Bengal* Housing Industry Regulation *Act*, 2017(WB-HIA) while repealing the WB 1993 Act. The WB-HIA envisages establishing

34 AIR 1964 SC 1823; 2 (2003) 9 SCC 564.

35 (2001) 8 SCC 676.

36 *Association of Management of Private Colleges* v. *All India Council for Technical Education* (2013) 8 SCC 271, *State of T.N.* v. *S.V. Bratheep* 6 (2004) 4 SCC 513, *Visveswaraiah Technological University* v. *Krishnendu Halder* (2011) 4 SCC 606.

37 (2021) 8 SCC 599.

a regulatory body for the housing industry. Most of the provisions of the WB-HIA coincide with RERA. In fact, the majority of the provisions of WB-HIA overlap with the provisions of RERA as they are identical. The state legislation was drafted based on the RERA model.

A tabulated form of the provisions of both legislations shows a verbatim reproduction of several provisions of the state legislation with that of the central legislation. the controversyarose due to section 83 of RERA, which state that "The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force." The question of the constitutionality of the WB-HIA was challenged in Supreme Court on the following points

i. Both WB-HIRA and RERA occupy the same subject domain under Entries 6 and 7 of the Concurrent List hence the WE-HIRA is repugnant to RERA

ii. WB-HIRA has neither been reserved for nor has it received Presidential assent under Article 254(2).

iii. The State enactment contains certain provisions which are either:

a. Directly inconsistent with the corresponding provisions of the Central enactment; or

b. A virtual replica of the Central enactment; and

iv. Parliament having legislated on a field covered by the Concurrent List, it is constitutionally impermissible for the State Legislature to enact a law over the same subject matter by setting up parallel legislation.

The main argument of the petitioner is that the idea of RERA is to bring uniformity in real estate and parallel legislation by the state, which is identical, and some places deviating from the central legislation would create serious confusion, inconvenience and absurdity. However the respondent raised the following defences:

i. though there is a substantial overlap between the State and the Central enactments and both of them govern the same subject matter and field, there is no constitutional prohibition on the State legislature enacting legislation on a subject in the Concurrent List which is virtually identical to central legislation in the same list;

ii. Section 88 of the RERA contains an expression that its provisions shall be in addition to, and not in derogation of any other law for the time in force; this being an indicator that Parliament contemplated that the RERA can co-exist with analogous State legislation;

iii. the inconsistencies between WB-HIRA and RERA are of a minor nature, and wherever the State enactment contains provisions at variance with the Central law, the former will have to yield to the latter,

iv. the provisions of Section 92 of the RERA demonstrate that where Parliament intended to repeal specific State legislation, only Maharashtra Act No II of 2014 was repealed.

Article 254 contains provisions for inconsistencies between laws made by Parliament and by the legislatures of the States. It clearly holds that if a state law is

inconsistent with central law with respect to matters contained in either Union List or Concurrent list, the central legislation will prevail. If a state intended to make legislation that would go against the existing central legislation on a subject of the concurrent list, then such law must be reserved for the consideration of the President. Such law would prevail over central legislation only when it received President's consent. But even in such cases, the constitution is clear that Parliament is not precluded from bringing any law overriding the state legislature even after obtaining the consent of the President. Explaining the established principles regarding repugnancy, the court summarized the following features of article 254:

i. Article 254(1) embodies the concept of repugnancy on subjects within the Concurrent List on which both the State legislatures and Parliament are entrusted with the power to enact laws;

ii. a law made by the legislature of a State which is repugnant to Parliamentary legislation on a matter enumerated in the Concurrent List has to yield to a Parliamentary law whether enacted before or after the law made by the State legislature;

iii. in the event of a repugnancy, the Parliamentary legislation shall prevail and the State law shall "to the extent of the repugnancy" be void;

iv. the consequence of a repugnancy between the State legislation with a law enacted by Parliament within the ambit of List III can be cured if the State legislation receives the assent of the President; and

v. the grant of Presidential assent under clause (2) of Article 254 will not preclude Parliament from enacting a law on the subject matter, as stipulated in the proviso to clause (2).

With regards to RERA encroaching into the state domain, the court observed that the Parliament is sensitive to the position and powers of the local bodies, such as the municipalities and panchayats, relating to construction projects. RERA does not attempt to replace these bodies and thus does not encroach into the Entry 5 of List II[38] dealing with Municipal Corporations and other local bodies. Control of the development activities is still governed by state legislation. The other important feature of the RERA is the power of the constitution of regulatory authority conferred on the State. And further, the power to establish a real estate appellate tribunal is also conferred to the State. As a result, RERA has not encroached on the State powers.

Comparing the provisions of both legislations, the court identifies two striking features first, the overwhelmingly large part of WB-HIRA provisions isa verbatim reproduction of the provision of RERA; secondly, it creates not only parallel legislation but also a mechanism. To answer the question of whether the identical provisions of WB-HIRA with RERA amount to repugnancy under article 254, the court says it can be looked in three different perspectives.

38 5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

i. whether there is a direct conflict between two enactments and, as a result, compliance of one law is not possible without disobedience with the other law.

ii. Whether the central legislation is exhaustive in nature so as to leave no space for legislation by the State.

iii. whether the subject matter of both legislations is identical.

While explaining the third perspective, the court said that repugnancy in the constitutional sense is not restricted to its narrow sense of actual conflict between both legislations. The broader sense is that once the Parliament enacted the law, it operates as a restriction on the state to enact an identical law. In this case, the overlap between the provisions of WB-HIRA and the RERA is so significant that the repugnancy is clearly established. WB-HIRA clearly try to occupy the same field of RERA with identical provisions hence it is not permissible under the constitution. Allowing such an act would create parallel provisions and a parallel regime.

Regarding section 88 of RERA,whether 'law for the time being in force' would also include subsequent legislation, the court held that the provision indicates that the Parliament is not intended to make exclusive legislation and intended to occupy the whole field. RERA is not intended to exclude the states from making cognate or allied subjects. In that sense, the states are competent to make legislation on any areas that are not covered by RERA. Such legislations are valid as long as it is allied to RERA. But WB-HIRA is not an allied legislation but an identical legislation. The state legislation is not only identical but there are several provisions that are directly in conflict with RERA. Further, the safeguards prescribed under RERA were not contained in WB-HIRA. These are the critical provisions under RERA that are omitted by the state legislation. Such an omission amounts to the transgression of its power, and the law is repugnant to RERA. With regards to the consent of the President, the court said that it has already established that WB-HIRA is repugnant to RERA; the issue of consent is irrelevant.

III CONCLUSION

Written constitutions are intended to ensure that the constitutional order is maintained in a country. Citizens need remedies when the decisions of the government are contrary to constitutional norms. Indian Constitution recognizes the power of the constitutional courts in supervising, adjudicating and providing effective remedies against arbitrary governmental actions. One of the primary tasks of the constitutional courts is to keep the state within the limits of the Constitution. The concept of judicial review is aimed at discharging such duty by the courts. Under judicial review, constitutional courts had given the duty of reviewing legislative and executive decisions, therefore this year's survey look at how courts ensure the constitutionality of government action. *In Re Prashant Bhushan* raises the issue of the need for streamlining the contempt proceedings. Contempt proceedings, per se, have a conflict of interest. The case highlights the need for having clarity and proper guidelines on how contempt proceedings should be tried before the courts. *Beghar Foundation* raised the issue of deciding on a review petition when the same issue was referred to a larger Bench. The majority judgement dismissing the reviews does not follow the

sound principle. The very purpose of the review petition is that the petitioner feels some injustice is caused and approaches the court for its rectification. When a similar issue was referred to a larger bench, expect the judicial propriety of waiting till the larger bench brings finality to the matter referred.

Vedanta Ltd. is a classic case of an attempt to Bench shopping. The Supreme Court is right in rejecting the appeals on the ground of not only delay but also on merits that the delay caused is intentional so that certain judges would retire. Jitendra's case is another instance of an attempt to abuse the administration of justice. It's a common practice among the officials to get the certificate from the court by way of dismissal as a formality to save the officials from their mistakes. In Rajnesh Supreme Court addressed the issue of multiple statutes dealing with maintenance and how such multiplicity created confusion and delay in deciding the cases. Providing guidelines to deal with this would certainly bring much-needed relief to the citizens.

Jaishri Laxmanrao Patil exhibits the politics of reservation and how once backward class status being a taboo now become the most sought status. The ever-increasing demand for adding more castes into the backward class would intensify in the coming years. The judgement by the court in denying the backward class status to Maratha shows the court's inclination towards establishing the rule of law. The jurisdiction of the high court under article 226 had gained momentum when as a practice, the Supreme Court insisted the parties first invoke the jurisdiction before invoking article 32. This year's survey shows how high court, in some cases failing to exercise its jurisdiction properly. On the whole one gets a feeling that the constitutional court trying their best to maintain the constitutional order in India.