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**CONSTITUTIONAL LAW II***M. R. K. Prasad\**

## I INTRODUCTION

THE PRIMARY task of the constitution is to provide constitutional governance based on the rule of law. The Constitution, being the supreme law of the land, provides an institutional framework for the State and ensures that this framework works within the limits prescribed by the Constitution. The constitutional limitations act as checks and balances on the power vested in the constitutional functionaries. Accountability, transparency and respect for the constitutional limitations are the hallmarks of a vibrant democracy. In addition to the framework, the constitution's normative ideals aim to legitimise the state's actions. Therefore, the authorities occupying high constitutional positions must uphold the constitution's values and act above partisan considerations. In a parliamentary democracy, political parties play a crucial role, and it is expected that, in a multiparty system like India's, differences over political ideologies will arise. However, once the governments were formed through the constitutional process, they must rise to the occasion, setting aside their political ideologies and working to promote constitutional values. In a Parliamentary system, the Legislature and the Executive are inseparable. As a result, it is incumbent on the judiciary to safeguard constitutional values and act as a check on the legislature and the executive to keep them within the Constitutional framework. This year's annual survey will focus on how the judiciary effectively played this role.

## II ARTICLE 131: ORIGINAL JURISDICTION OF THE SUPREME COURT

Article 131 of the Indian Constitution confers original jurisdiction on the Supreme Court to decide the disputes between the Centre and the State and between States. In *State of Kerala v. Union of India*,<sup>1</sup> the Supreme Court was asked to intervene regarding the Central government's restriction on the State's borrowing power.

A suit was filed under article 131 challenging the Central Government's cap on the State's borrowing power under the Fiscal Responsibility and Budget Management Act. The new amendment to the Act caps the combined debt of the Central Government and the State Government at 60% of total GDP by the end of

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1 (2024) 7 SCC 183.

the financial year 2024-25. Under the new amendment, the Central Government restricted the State's borrowing to a maximum of 3% of Gross State Domestic Product. As a result, the State of Kerala was able to borrow up to 1330 crores in the open market. The State of Kerala moved to the Supreme Court, contending that the impugned rules violate article 293, as the Union has no such power to cap borrowing, and prayed for an interim injunction against the cap imposed. The petitioner also requested the Supreme Court to restore the position of its borrowing before the ceiling was imposed and allow it to borrow Rs 26,226 crores. In considering the request for an interim injunction, the court outlined the following three-part test for issuing such an injunction.

- i. Prima facie case
- ii. Balance of convenience
- iii. Irreparable loss

The State contends that, as per the CAG, the plaintiff has underutilised the borrowings for three years, *i.e.*, 2020 to 2023, to the extent of Rs 24,434 crores. Therefore, even though the standards set by the new amendment have been met, the State has under borrowed by Rs 10,722 crores; hence, the State should be allowed to borrow that amount. However, it is learnt that for the years 2017 to 20, the state had overborrowed beyond the permitted limit, and the same was adjusted in subsequent years. Therefore, the court observed that the State had already exhausted its borrowing limit and that the available fiscal space for Rs 10,722 crores was nonexistent. As a result, the court held that the petitioner failed to establish a prima facie case for underutilization of borrowing. The second test for interim relief is the balance of convenience. The court pointed out that permitting the state to borrow by issuing interim relief would cause greater harm than rejecting the same. If the interim relief is granted and later found to be incorrect, the adverse economic impact on the nation cannot be reversed. On the other hand, if the interim relief is declined and the plaintiff later succeeds, the State can still borrow the permitted amount and pay its dues, though with some additional burden. Therefore, the balance of convenience favours denying the interim relief.

Under the third condition of irreparable loss, the state contends that restricting borrowing power would create a financial hardship, rendering it unable to carry out welfare measures and pension payments, and that such financial hardship would result in irreparable injury. Refusing the contention, the court held that financial damage cannot be equated with irreparable loss, as the court can balance it through equitable relief. The defendant argued that the State's mismanagement of its finances is the cause of the existing financial hardship, and that imposing a ceiling on the State's borrowing power is intended to improve the State's fiscal health. Since the triple test for granting interim relief is not satisfied by the plaintiff, and because, during the pendency of the case, the defendant made an offer that enabled the state to borrow Rs 13068 crores, the plaintiff is not entitled to any interim relief. Regarding the interpretation of article 293, whether the Union Government has the power to restrict the borrowing power of the State,

being a constitutional interpretation and no such interpretation was previously undertaken by the Supreme Court, the court recommended that the matter be referred to a five-judge bench for determination.

In *State of West Bengal v. Union of India*,<sup>2</sup> the Supreme Court was called upon to decide whether a State could sue the central government under article 131 to challenge the actions of the Central Bureau of Investigation (CBI) within the State's territory. The facts establish that the State of West Bengal withdrew its consent under section 6 of the Delhi Special Police Establishment Act, 1946, which allowed the CBI to investigate offences within its territory. Despite such withdrawal, the CBI allegedly continued to register cases and conduct investigations in West Bengal. The State contends that such a move by the CBI amounts to a breach of the statute and an unconstitutional intrusion into its exclusive control over police and public order. The State seeks an injunction restraining the Union from permitting such investigations in the future.

CBI's functioning within the State after withdrawing the consent violates the relations between the Centre and the States envisaged by the Constitution. The Union raised a preliminary objection of maintainability of the present suit. The main contention is that since the CBI was a statutory body deriving its powers from the Delhi Special Police Establishment Act, 1946 (DSPE Act), it was distinct from the "Government of India." Therefore, a State could not bring a suit against it under article 131. However, the court held that the CBI was not an independent entity in the constitutional sense but an organ of the Union, drawing its authority, supervision, and control directly from the Central Government by virtue of the DSPE Act, 1946. Any challenge to its functioning was, in substance, a challenge to the Union's authority. Consequently, the court held that the dispute was between a State and the Union, and the present suit was maintainable.

The second contention of the Union was that article 131, which grants the Supreme Court exclusive original jurisdiction over disputes between the Union and the States, was "Subject to the provisions of this Constitution." Therefore, when the Constitution provides alternative remedies under articles 32, 226, and 136, the State cannot invoke article 131. Again, the Court rejected the contention by clarifying that the words "subject to the provisions of this Constitution" did not mean that article 131 was subordinate to every other constitutional provision. The limitation on article 131 would apply only in cases where the Constitution expressly excluded the court's jurisdiction, such as **article 262** in relation to interstate river water disputes. The existence of general remedies for individuals under articles 32 or 226 could not displace the original jurisdiction under article 131, as this article was designed to resolve disputes between governments in a neutral and exclusive forum.

States under the Constitution are independent entities, and they cannot be treated as mere extensions of the Union. The Constitution provides a scheme for the distribution of powers between the Centre and the States, and their domains

often overlap, thereby creating disputes. To address such issues, article 131 provides a direct and independent mechanism for redress. Procedural or technical hurdles cannot brush aside such a safeguard. Accordingly, the court held that the state of West Bengal has the right to invoke the jurisdiction of the Supreme Court in this matter.

### III ARTICLE 142

In *High Court Bar Association Allahabad v. The State of Uttar Pradesh*<sup>3</sup>, the issue was whether the Constitutional Courts can impose a time limit for the disposal of a case pending in any court. In *Asian Resurfacing of Road Agency Private Limited v. Central Bureau of Investigation*<sup>4</sup>, while explaining the impact of stay on civil and criminal cases, the Supreme Court held that “*in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where a stay is granted in future, the same will end on expiry of six months from the date of such order unless a speaking order grants a similar extension. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalised.*”<sup>5</sup>

As a result, a clarification was later issued to the trial courts that once the said six months have expired, the trial court shall fix the date of hearing without waiting for the high court to vacate the stay. In the present case, on December 1, 2023, the correctness of the judgment of *Asian Resurfacing* was referred to the larger bench for consideration of the following two issues.

(a) Whether this court, in the exercise of its jurisdiction under article 142 of the Constitution of India, can order automatic vacation of all interim orders of the High Courts of staying proceedings of Civil and Criminal cases on the expiry of a specific period?

(b) Whether this court, in the exercise of its jurisdiction under article 142 of the Constitution of India, can direct the high courts to decide pending cases in which interim orders of stay of proceedings have been granted on a day-to-day basis and within a fixed period?

The fundamental contention regarding issue number one is that automatic vacation of the interim order amounts to judicial legislation, and the apex court must refrain from doing so. Doing so under article 142 would amount to restricting the high court’s jurisdiction under article 226, which is a basic structure of the Constitution. Further, in *Abdul Rehman Antulay v. R.S. Nayak*.<sup>6</sup> and *P. Ramachandra Rao v. State of Karnataka*,<sup>7</sup> the Supreme Court previously held that no fixed time can be prescribed by the court to complete a trial.

3 (2024) 6 SCC 267.

4 (2018) 16 SCC 299.

5 *Id.*, para 35.

6 AIR 1992 SC 1701.

7 (2002) 4 SCC 578.

Explaining the purpose of issuing stay orders, the court noted that, while the high court issues a stay order, it always considers three factors: prima facie case, irreparable loss, and the balance of convenience. The high court had the power to either continue, modify, or vacate the stay. A stay order can end when the high court either vacates it or decides the case. Automatic vacation of a stay after expiry of the time limit imposed by any provision would be arbitrary and violate article 14.<sup>8</sup>

Explaining the importance of article 142, the court pointed out that the powers conferred to the Supreme Court under article 142 are no doubt vast, but they are intended to be exercised to provide justice and to secure complete justice. Therefore, such powers cannot be invoked to issue blanket directions imposing a time limit that would affect a large number of lawful interim orders passed by the high court, without even allowing the affected party to be heard. The court explained the true nature of its power under article 142 as follows.

- (i) The jurisdiction can be exercised to do complete justice between the parties before the Court.
- (ii) Under article 142, the Supreme Court cannot ignore the substantive rights of the litigants.
- (iii) Under article 142, the court is empowered to issue directions to the Courts on any procedural aspects to ensure the expeditious and timely disposal of cases.
- (iv) While issuing such directions, the court shall ensure that it does not deny the litigants their substantive rights.
- (v) The right to be heard before an adverse order is passed is a substantive right.
- (vi) Denying such a right would defeat the principles of natural justice, and article 142 cannot be used to effect such a denial.

Moreover, the high court is also a constitutional court and vested with superintendence power over all other courts within its jurisdiction under article 227. A direction of time limit and consequences of such direction under article 142 would limit the jurisdiction of the high court to pass an interim order. Such an order had an impact of restricting the jurisdiction of the high court under article 226, which is a basic structure of the Constitution of India. Accordingly, the court held that under article 142, no such directions imposing a time limit can be issued. The directions issued in the *Asian Resurfacing* case regarding the time limit and the automatic lifting of stay orders are invalid.

#### IV PRIVILEGES OF THE MEMBERS OF THE LEGISLATURE

Members of Parliament and State legislatures enjoy certain privileges. The Constitution conferred these privileges to enable them to discharge their functions without fear or favour. However, one such privilege, *i.e.*, that a member is not liable

8 *Deputy Commissioner of Income Tax v. Pepsi Foods Limited* (2021) 7 SCC 413.

for any vote cast, has been in the eye of the storm several times on account of bribery, popularly known as vote-for-notes. In *Sita Soren v. Union of India*<sup>9</sup>, the issue once again reached the Supreme Court, where it was asked to decide the correct position on this privilege. In this case, the appellant, a member of the Legislative Assembly of Jharkhand belonging to the Jharkhand Mukti Morcha, was allegedly offered a bribe to cast a vote in favour of an independent candidate in the Rajya Sabha election. However, the appellant voted for her own party rather than the bribe-giver. She approached the high court to quash a criminal case initiated against her for receiving a bribe, claiming that, as a member of the Legislative Assembly, she cannot be subjected to any proceedings for casting a vote under article 194(2). She relied on the judgment of *PV Narasimha Rao v. State*.<sup>10</sup>

The high court dismissed her petition on the ground that she did not vote for the candidate who bribed her; hence, she is not entitled to any immunity under the *Narasimha Rao* case. In an appeal, the division bench of the Supreme Court, considering the importance of the issue raised, opined that a larger bench should consider it and accordingly referred the case to a three-judge bench. The three-judge bench expressed its view that the case, having wider ramifications for the privileges of the legislature and being a matter of public importance, needs consideration by a larger bench, as *Narasimha Rao* was decided by a bench of five. Accordingly, the matter was referred to a five-judge bench, which again expressed reservations about the correctness of the majority decision in *Narasimha Rao* and suggested that the matter be referred to a larger bench of seven judges. The seven-judge bench was constituted to consider the matter.

The appellant raised a preliminary objection that overruling *Narasimha Rao* is unwarranted, given the tests laid down by the Supreme Court for overruling precedents. Considering these preliminary objections, the court held that it is a settled principle that a decision of a larger bench is binding on any subsequent bench of lesser or coequal strength. But a Bench of equal strength can question the correctness of the decision of a coordinate bench. In the present case, the bench of five judges specifically raised doubts about the correctness of the coordinate bench judgment in *Narasimha Rao* in a detailed order. This is not the first time doubts about this judgment have been expressed; in several cases, such as *Kalpna Mehta v. Union of India*, *Raja Rampal v. Lok Sabha*, *Kuldip Nayar v. Union of India*, and *Amarinder Singh v. Punjab Vidhan Sabha*, the correctness of *Narasimha Rao*'s judgment has been questioned. However, in these cases, the correctness of the judgment was not the issue; hence, no references for review were sought.

Regarding the doctrine of stare decisis, the court held that reconsidering its previous decisions is necessary for the organic growth of law and for securing justice. Any restriction on such power would result in virtual stagnation of constitutional jurisprudence. When the court finds that its prior interpretation of

9 (2024) 5 SCC 629.

10 1984 (4) SCC 626.

the Constitution proves unsound, unworkable, or contrary to public interest, it must reconsider those interpretations.

Justice H.R. Khanna, in *Maganlal*, explained the need to balance certainty with the desirability of the growth of law. He held that judicial pronouncements should not fossilise legal principles nor “allow revolutionary iconoclasm to sweep away established principles.” Accordingly, the court held that nothing would prevent it from departing from previous decisions if it is convinced that the earlier interpretation harms the public interest. Further, the binding effect of article 141 would apply to all courts in India, except the Supreme Court.

The doctrine of stare decisis cannot be a rigid rule of law. Considering it so would perpetuate any error and would result in significant harm to the general public. Therefore, reviewing its own decisions is logical. Not rectifying an erroneous interpretation would perpetuate the injustice, and the period during which such a decision remained untouched could not be a ground for the court’s non-interference.

The next contention of the appellant was that, on *Facebook*,<sup>11</sup> the Supreme Court refused to decide whether legislative privileges should be restricted, saying that it is left to Parliament to decide. Hence, this issue also should be left to Parliament. However, the court found this contention misconceived, as the issue in the present case is not a restriction on the legislature’s privileges. The problem is the correctness of the interpretation of articles 105 and 194.

The Constitution is a transformative document that contains several provisions that broadly allow the judiciary to interpret to meet future needs. The Constitution is framed for the ages to come. To stand the test of time, it needs to be adopted by interpretation. Therefore, the court correctly held that allegiance to a previous opinion, on the ground that it has been followed for several years, would amount to perpetuating a mistaken interpretation, which cannot be allowed.

Explaining the nature of privileges, the court said that privileges are not enjoyed by members individually; instead, they are tethered to the functioning of the House as a whole. Even a privilege like freedom of speech may, at first glance, seem like an individual freedom; however, a deeper dive reveals that exercising this privilege is essential to the functioning of the House as a collective. Therefore, a member of the House may be able to claim the privileges only when they are connected to the working of the House. If a member wanted to use such a privilege individually, it is necessary to see whether the exercise of such a privilege is essential for the functioning of the House. Neither the House nor its members can claim any privilege that is not connected to the functioning of the House. Extending such a privilege would create members as a special class apart from citizens, and the Constitution has never envisaged creating such a distinct class through privileges. Accordingly, the court proposed the following twofold test to determine whether a member of the House can exercise the privilege individually.

11 *Facebook v. Delhi Legislative Assembly* (2022) 3 SCC 529.

- i. The privilege claimed has to be tethered to the collective functioning of the House.
- ii. Its necessity must bear a functional relationship to the discharge of the essential duties of a legislator.

The burden of proving that an action of a member falls within the privilege and that such privilege is essential to the functioning of the House would be on the person who claims it. After laying down the twin test, the court examined the issue in the present case of bribery to cast a vote: would it immunise the member under the privileges, and would such an act fulfil the above test? The words used in article 105 (2), “anything said or any vote given,” were given the broadest interpretation in *Tej Kiran Jain*, and it was held that the court cannot interfere to check whether the speech was relevant to the subject debated at the time of making the speech. However, in the *State (NCT of Delhi)*,<sup>12</sup> the court held that the word ‘any’ cannot be understood as ‘every’. Similarly, in the *State of Karnataka*<sup>13</sup> and *K. Ajith*,<sup>14</sup> the court held that there is no immunity for a criminal act committed by a member, even if it is engaged in the House during a session. Legislative privilege cannot be used as a gateway of exemption from the general operation of law. Therefore, the immunity can be claimed only if the speech or the vote given is tethered to the collective functions of the House. A vote cast in the House is part of the collective function of the House. In *Narasimha Rao*, the court held that a member who took the bribe and cast the vote is immune from any prosecution; however, such immunity cannot be claimed by a member who took the bribe but did not cast the vote.

The reason for such immunity is to ensure the House’s functioning. The immunity claimed by a member for voting is tethered to the collective functioning of the House, but they need to fulfil the second test of the necessity of such action. Immunity can be claimed by a member who exercises the right to speak or vote; these are absolute rights of members and are hence outside the jurisdiction of the courts. The words used “in respect of” connote a clear relation to speech or vote, but cannot be interpreted as anything which have a remote connection with speech or vote given. Therefore, the court held that it does not concur with the majority of *Narasimha Rao on this aspect*.

The words in respect of’ must be interpreted in the spirit of privileges and immunities, which is to protect the members from the fear of persecution for participating in debate and deliberations. The privilege is to protect the member’s independence in speaking or voting in the house without fear or favour. However, bribing a member to vote in favour of a particular person effectively undermines this by inducing them to vote in a certain way, not because of a genuine belief or position on the issue. Providing immunity to such an action would, in fact, erode the foundations of the parliamentary democracy. Accordingly, the court held that

12 *State (NCT of Delhi) v. Union of India* (2018) 8 SCC 501.

13 *State of Karnataka v. Union of India* 1978 AIR SC 68.

14 *State of Kerala v. K. Ajit* AIR 2021 SC 3954.

there is no immunity against receiving a bribe for speaking or voting in the House. No doubt, accepting a bribe by a member also amounts to a breach of the House's privilege, and the House has the power to punish, but that power does not exclude the jurisdiction of the courts.

The other aspect is that, once the bribe is accepted, the crime is complete, regardless of whether the anticipated favour is carried out. In the present case, the offence under the PC Act is made out once the bribe is accepted, *i.e.*, before the vote is cast. Therefore, the difference recognised by the majority of *Narasima Rao* between members who received the bribe and those who abstained from voting is artificial and irrelevant. The majority in *Narasimha Rao* erroneously linked the offence to the performance of the agreed action. The court rightly pointed out the paradox that the majority in *Narasimha Rao* rewards the members who took the bribe and voted, but punishes the members who took the bribe but decided independently. Such an interpretation defeats the very purpose of the privileges conferred under articles 105 and 194.

Accepting a bribe is an offence, and accepting it is not essential for voting in the House or for protecting the ability to decide which member to vote for. The corruption erodes the probity in public life. Members of the legislature are expected to serve as role models for the citizenry. They are the elected representatives of the public, whose duty is to represent their constituency in the House without fear; this is the essence of democracy. If immunity is permissible for members who are also lawmakers, it would certainly erode the integrity of democracy. Overruling the majority in *Narasimha Rao* is long overdue. This judgment would hold members accountable for their actions and represents a welcome change in constitutional interpretation.

#### V ARTICLE 226

In *Celir LLP v. Bafna Motors (Mumbai) (P) Ltd.*,<sup>15</sup> the Supreme Court considered the scope of the high court's jurisdiction under article 226 when an alternative remedy is available. In the present case, upon the borrower's default, the bank took possession of the borrower's assets under the SARFAESI Act, 2002. To recover the amount, the bank conducted eight auctions without any success. On the ninth attempt, the appellant made the highest bid, and the sale was eventually confirmed in his favour. The borrower filed a redemption application before the DRT. Pending the application, the borrower approached the High Court of Bombay under article 226 seeking redemption. Both the bank and the borrower agreed to such redemption and conveyed their agreement to the high court. Based on the agreement and considering the other facts, the high court allowed the writ petition.

Aggrieved by the high court's decision, the appellant preferred an appeal to the Supreme Court. Among other contentions one of the issues raised by the appellant was that when there is an alternative remedy available under the statute

15 (2024) 2 SCC 1.

and the borrower already invoked the same, without waiting for the decision approached the high court under article 226 and in such situation the high court should not have exercised its discretion in entertaining the writ petition.

Accepting the contention of the appellant, the Supreme Court held that it is an established principle that the high courts do not entertain any writ petition when an adequate alternative remedy is available under the statute. Jurisdiction under article 226 being extraordinary, high courts must exercise it with greater caution, particularly in cases of recovery of taxes, debts, fees, cess, or any other public money.

The Legislature, being competent to enact specific legislation in this regard, becomes a code unto itself, and a comprehensive procedure is provided in the statute for the resolution of such grievances by dedicated bodies. Hence, in such cases, the petitioners are not allowed to invoke the jurisdiction under article 226 without exhausting the remedies available under the statutes. Relying on several judgments,<sup>16</sup> the Supreme Court held that it is wrong on the part of the high court to allow such a petition when a statutory authority is created to redress such grievances.

*PHR Invent Educational Society v. UCO Bank*,<sup>17</sup> is another case in which the exercise of the high court's jurisdiction under article 226 was questioned. The borrower obtained a loan from the Respondent bank, securing it with four properties. Upon default, the respondent bank issued an auction sale notice under the SARFAESI Act. The borrower approached DRT, and the same was dismissed upon the borrower's submission that an out-of-court settlement had been reached between the borrower and the Bank. However, the Bank filed a memo informing DRT that no such settlement had been reached. The Bank sold the properties to the appellant. The borrower filed another application before the DRT seeking restoration of the securitisation application, which was dismissed. The properties were handed over to the appellant, and the sale certificate was registered in favour of the appellant. The borrower filed a writ petition under article 226 of the Constitution before the High Court of Telangana, challenging the DRT's order.

The high court set aside the DRT's order and directed the DRT to proceed with the borrower's securitisation application. Aggrieved by the high court's order, the appellant preferred an appeal before the Supreme Court, challenging it. The central contention of the appellant is that when an alternative remedy is available, the high court ought not to have entertained the writ. The Supreme Court held that it is a settled principle that when an alternative remedy is available and the same was used, the high court should have considered whether there is any issue of fraud or collusion and in the absence of the same, the high court should have refrained from interfering with the order of DRT. The order of the high court would

16 *Thansingh Nathmal* case [AIR 1964 SC 1419]; *Titaghur Paper Mills Co. Ltd. v. State of Orissa*; (1983) 2 SCC 433; *State Bank of Travancore v. Mathew K.C.*, (2018) 3 SCC 85; *Phoenix ARC Private Limited v. Vishwa Bharati Vidya Mandir* (2022) 5 SCC 345.

17 *United Bank of India v. Satyawati Tondon* 2010 (8) SCC 110.

have the effect of reopening an issue that is already settled and has reached finality.

The decision aligns with the apex court's earlier stance that matters concerning debt recovery, taxes, and public money are particularly within its purview. Once the legislature enacted exhaustive procedures and constituted institutions for the redressal of grievances, the high court must insist on exhausting remedies before approaching it and also exercise caution in invoking jurisdiction under article 226. Though the jurisdiction conferred under article 226 is broader than that under article 32, over time, several self-imposed restraints have crystallised through various precedents, and all high courts are expected to respect them. The court summarised the instances mentioned below on which the high court can exercise the jurisdiction under 226, despite the available alternative remedy

- i. where the statutory authority has not acted in accordance with the provisions of the enactment in question;
- ii. It has acted in defiance of the fundamental principles of judicial procedure;
- iii. It has resorted to invoking the provisions that are repealed; and
- iv. When an order has been passed in total violation of the principles of natural justice.

As the present case does not fall within any of the categories specified above, the high court's order was set aside. While setting aside the order, the Supreme Court reminded the high courts of the decision of *Satyawati Tandon*<sup>17</sup>, "It is a matter of serious concern that despite repeated pronouncement of this court, the high courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

*Sanjay Kundu v. Registrar General*<sup>18</sup> is yet another case where the high court's power under article 226 was questioned. The genesis of this case is that an email was addressed to the Chief Justice of High Court of Himachal Pradesh by a complainant that the appellant in this case, who is a Director General of Police, abused his position and harassed him for settling a private civil dispute. The complainant requested the chief justice to intervene in the matter and transfer the appellant to ensure a transparent investigation. The high court, by invoking *suo motu* powers, registered a criminal complaint and directed the transfer of the DGP. The appellant preferred an appeal against the high court's orders, alleging that the high court had failed to give him a fair hearing. This case highlights judicial intervention in administrative actions and the requirement of procedural fairness in judicial decisions.

18 (2024) 3 SCC 723.

The central contention was that the high court ordered the DGP and the SP transferred to another place, and neither was given any notice nor impleaded in the case. When the government transferred both of them, they approached the high court, requesting a recall of the order, but their request was dismissed. A special leave petition was moved before the Supreme Court challenging the dismissal.

The high court had issued the following three directives in its order

- i. The appellant should be shifted out of the post of DGP
- ii. Directed the State Government to consider forming a Special Investigation Team consisting of IG level officers
- iii. Grant protection to the complainant.

Considering the gravity of the situation, the Supreme Court expressed its reservation about the high court's *ex parte* consideration of the matter and its transfer of the appellant. Reaching a decision purely on the status report filed before it and directing the transfer of the appellant, the high court assumed disciplinary jurisdiction, which is not permissible. The disciplinary action could only be taken by the state government. Assuming the high court's exercise of power was improper, and that the order was passed *ex parte*. The court observed that when the appellant filed a recall application, the correct course for the high court was to recall its earlier order and offer both officers an opportunity to present their cases. Instead, the high court merely relied upon the earlier status report. It dismissed the recall application, thereby committing a patent error of exercising jurisdiction under article 226, and the order failed to observe the principles of natural justice. Therefore, the Supreme Court set aside the high court's direction to transfer the officers; however, the remaining directions to appoint an SIT and to protect the complainant would remain valid.

In *Nirmala v. Kulwant Singh*,<sup>19</sup> the Supreme Court was asked to decide the nature of the high court's jurisdiction to issue the *habeas corpus* writ in a child custody matter. After the death of the respondent's wife, the respondent voluntarily handed over the custody of his minor daughter to his mother-in-law and also, by an affidavit, appointed the mother-in-law as guardian of his daughter. Later, he filed a petition before the Child Welfare Committee (CWC) seeking the custody of his daughter, contending that his mother-in-law took the custody of his daughter by cheating and fraud.

After completing the inquiry, the CWC held that the child is "a child in need of care and protection" and granted the custody to the respondent as he is the biological father, employed, and capable of providing the proper care and protection. Aggrieved by the decision of CWC, the appellant (mother-in-law) filed an appeal, and the appellate court set aside the decision of CWC by holding that the child is neither "a child in care of need and protection" nor does CWC have jurisdiction to pass any such order. Thereafter, the respondent filed a writ petition under article

19 (2024) 10 SCC 595.

226 seeking a writ of *habeas corpus*, alleging that the custody of the daughter with the mother-in-law is illegal.

The single judge of the high court, after considering the principle of “welfare of the child is of paramount consideration”, granted the writ in favour of the respondent with visitation rights to the appellant. The appellant filed an appeal with the Supreme Court, challenging the high court’s decision and questioning the propriety of issuing the writ.

Explaining the nature of the writ of *habeas corpus* proceeding for custody of the child, the court held that the writ, being a prerogative, is an extraordinary remedy and such a remedy can be availed only when an ordinary remedy is not available, or the available remedy is ineffective. In matters of child custody, the court has to determine whether the detention of the minor was by a person who has no legal right to the custody.

Further, the court aptly identifies the differences between enquiries under the ordinary law and those under the writ jurisdiction about child custody. Under writ jurisdiction, the court determines custody in the child’s best interests, based on the affidavits. Only in extraordinary situations does the high court exercise its extraordinary jurisdiction for the issuance of *habeas corpus*. If the determination of the custody requires a detailed enquiry, then the proper forum for the determination is a civil court having jurisdiction.

In the present case, the respondent agreed that at the time of the death of his wife, he felt that the child, being very young, needed a family environment; hence, he placed the custody of the child with her grandmother. Therefore, in his own admission, the appellant-grandmother had legal custody of the child, as the respondent himself had placed the child’s custody with the appellant. Considering these circumstances, whether the child custody should be given to her father needs a detailed enquiry, and such an exercise could be carried out only under the Guardian and Wards Act before a civil court. Hence, the high court ought not to have entertained the *habeas corpus* petition, as no *prima facie* case of illegal detention of the child was established; accordingly, the high court’s order was set aside.

In *Somprabha Rana v. State of Madhya Pradesh*,<sup>20</sup> a similar issue was raised where the child was as young as 11 months, was under the custody of the sisters of the mother and grandparents of the child at the time of the death of the mother. The father and paternal grandparents filed a *habeas corpus* writ before the high court, praying for the custody of the child, as the father is the child’s natural guardian. The high court granted the writ in favour of the father.

On appeal, the Supreme Court reiterated the principle that the high court should decide the child’s custody under article 226 in the child’s welfare, not on legal rules governing who is entitled to custody. Further, the Supreme Court observed that the high court can refuse to exercise its jurisdiction under 226 when

it is of the view that the custody cannot be disturbed in the child's best interests. The right of the father as a natural guardian cannot override the welfare of the child. The natural right of the father cannot be decided under article 226, and it shall be left to the competent court to determine under the Guardian and Wards Act. Accordingly, the order of the high court was set aside.

Both child custody cases establish a norm for exercising jurisdiction under article 226: it is not proper to use such authority to decide a parent's legal right to custody. This jurisdiction, being extraordinary, shall be used only when there is an urgent need to protect the interests of the child.

#### VI ARTICLE 229: POWER OF THE HIGH COURT TO FRAME RULES

*State of Uttar Pradesh v. Association of Retired Supreme Court and High Court Judges*<sup>21</sup> raises the issue of the high court's power to frame rules and issue directions to the State Government. In this case, the respondents first approached the High Court of Allahabad in 2011 seeking an increase in the allowances granted to the domestic help of retired judges of the high court. During the pendency of this petition, the Supreme Court, in Rama Krishna Raju, while considering several petitions regarding post-retirement benefits for retired judges, recommended that the States formulate schemes similar to that of the State of Andhra Pradesh, preferably within six months.

In a contempt petition before the Supreme Court for the inaction of the states for not framing the schemes, the court closed the contempt petition against the State of Uttar Pradesh (U.P.) as it has already framed the scheme and observed that slight deviations from the scheme of the State of Andhra Pradesh are permissible, considering the local conditions. Under the new scheme, the state of Uttar Pradesh increased the amount payable to the domestic help to Rs. 20,000 for the retired chief justices and Rs. 15,000 for the other retired judges of the high court, whereas in Andhra Pradesh, it is Rs. 50,000 and Rs. 45,000, respectively. The respondents, by amending their petition before the high court, requested the court to grant parity of the payment with that of Andhra Pradesh.

The Chief Justice of the high court, under article 229 of the Indian Constitution, proposed "Rules for providing Domestic Help to Former Chief Justices and Former Judges of Allahabad High Court." Under these rules, the wages to be paid to the domestic help shall be equivalent to the salary of a Class-IV employee under the high court, including dearness allowance. As the State of U.P. is taking time in notifying these rules, the high court issued directions to the Government of U.P. to inform the proposed regulations before the next hearing. Further, it directed the presence of officials of the Government of U.P. if the order was not complied with. At this point, the State of U.P. applied to the high court to recall its Order. The high court held that the recall petition amounts to contempt of court and initiated criminal contempt proceedings against the officers of the State of U.P. The officers present in court were taken into custody, while bailable warrants were issued for

21 (2024)3 SCC 1.

the chief and the additional secretary of finance, who were absent. On appeal to the Supreme Court, the court stayed the high court's order. The case raises three issues.

- i. Does the chief justice of the high court have the power to prescribe Rules under article 299?
- ii. Can the high court order the state to notify the rules prepared by the chief justice?
- iii. An application to recall a high court order constitutes criminal contempt.
- iv. When courts can compel the attendance of State officials.

Article 229 of the Indian Constitution empowers the chief justice of the high court to make rules regarding the service conditions of the officers and servants of the high court.<sup>22</sup> However, such rules are subject to the laws enacted by the State Legislature, and if they relate to salaries, allowances, leave, or pensions, they require the Governor's approval.

The careful examination of article 229 (2) clearly emphasises the power of the Chief Justice to make rules relating to the service conditions of 'officers and servants' of the high courts. The court held that the expression 'officers and servants' does not include the sitting and retired judges of the high court. Therefore, the chief justice has no power to make rules regarding post-retirement benefits for the former judges of the high court. Making such rules without the backing of any constitutional provisions and purely based on the judgment in *Rama Krishna Raju* is not only erroneous but also an overreach of the directions given in that judgment. The directions given in the above judgment are to the state to consider a framing scheme for the benefit, and not grant any permission to the chief justices of the high courts to frame the rules. Even in the direction the court has recognised the flexibility in framing the scheme, considering the different conditions, and accordingly permitted the States to frame their own rules based on local conditions.

The order passed by the high court under article 226 compelling the State to notify the Rules is nothing but an usurpation of the State's executive functions. Such an order amounts to issuing a writ of *mandamus*, which is impermissible as it directly violates the principles of separation of powers. It is a well-established principle that the judiciary cannot issue a writ of *mandamus* compelling the State to enact any rules on any subject. Policy-making is the prerogative of the State, and it is the State that decides whether to enact any regulations. Therefore, the high court's direction compelling the state to notify the Rules is beyond its jurisdiction under article 226.

22 Art. 229. Officers and servants and the expenses of high courts.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a high court shall be such as may be prescribed by rules made by the chief justice of the court or by some other judge or officer of the court authorised by the chief justice to make rules for the purpose

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.

About criminal contempt, the court held that initiating a legal action to avail of legal remedies by challenging an order cannot ever be treated as criminal contempt. In the first instance, there is no legal basis for complying with the high court's order, as the chief justice has no constitutional authority to make such rules. There is no evidence placed on the record that failure to comply with the order of the high court meets the standards of criminal contempt. Further, the state's objections to the implementation of the rules were never decided by the high court; instead, they were treated as an obstruction of justice, without assigning any reasons. Accordingly, the court held that the recall application does not constitute contempt of court.

While discussing the court's power to summon officials, the court held that summoning officials should not be routine, as officials run the state's administration. Further, the court shall not require the official in the court to undertake any action without the consent of the Advocate General of the State. The Supreme Court issued the following Standard Operating Procedures for summoning any government officials before the court.

*Personal presence of the officers is permitted when pending adjudication of a dispute in the following circumstances*

- a. Evidence-based Adjudication: where the official is required to submit documents or oral statements.
  - b. Summary Proceedings: officials may be called to appear for summary proceedings, based on affidavits, documents, or reports.
  - c. Non-adversarial Proceedings: officials may be called to understand a complex policy or technical matter.
- (i) Other than the above, if the issue can be addressed through affidavits or document submissions, no official should be called.
  - (ii) Officials may also be called when specific information is not provided, intentionally withheld, suppressed or misrepresented.
  - (iii) If the court finds that the official's affidavit differs from its view, it can resolve the issue based on the records rather than summoning the official.

*Procedure before directing personal presence*

- (i) When the personal presence of the official is required, the court's first option shall be to allow the officer to appear by video conference.
- (ii) The official must be given advanced notice so they can prepare to present the facts effectively.

*Procedure during the personal presence of government officials:*

- (i) The court shall schedule a time slot for the official to appear
- (ii) The officials stand before the court only when making a statement or responding to a court question.
- (iii) The court shall not use any oral remarks to humiliate the officials

- (iv) The court shall refrain from commenting on the official's physical appearance, educational background, or social standing.
- (v) Courts create a conducive environment of respect and professionalism.
- (vi) The court must avoid commenting on an official's dress unless the official violates the office's dress code.

*Time period for compliance with judicial orders by the government*

- (i) Before fixing any timeline, the court must consider that the policy matter requires the consent of several officers at different levels. The court must accommodate a reasonable time, considering these aspects.
- (ii) For compliance with any judicial order, the court must conduct a hearing to consider any request by the government for any extension of the time for compliance

*Contempt proceeding*

- (i) The court shall ordinarily issue a notice to the official for any contempt, seeking an explanation before calling the official to appear in person.
- (ii) After that, the court shall consider the official's response and decide the course of the action. If the presence is required, the court shall provide adequate time for the official to prepare and present, and may offer the option to present via video conferencing. While determining the non-compliance, the court must also consider procedural and technical difficulties.

#### VII PER INCURIUM

In *Enforcement Directorate, Government of India v. Kapil Wadhawan*<sup>23</sup> The respondents applied for a default bail on the first day of their remand. The question that was raised was whether the period of remand shall be counted from the day on which the magistrate remands or from the next date. The lower court held that the day on which the Magistrate ordered the demand would be excluded, whereas the high court held that it is included for claiming default bail. There is a difference of opinion among the judicial pronouncements on the same, in *State of M.P. v. Rustam*<sup>24</sup> The Supreme Court held that the date of remand would be excluded, a ruling followed in *Ravi Prakash Singh v. State of Bihar*<sup>25</sup> and *M. Ravindran v. Intelligence Officer, Director of Revenue Intelligence*.<sup>26</sup>

However, there is another set of cases, such as *Chaganti Satyanarayan v. State of Andhra Pradesh*,<sup>27</sup> *CBI v. Anupam J Kulkarni*,<sup>28</sup> *State v. Mohd. Ashrafi*

23 (2024) 7 SCC 147.

24 1995 (Supp) 3 SCC 221.

25 (2015) 8 SCC 340.

26 (2021) 2 SCC 485.

27 (1986) 3 SCC 141.

28 (1992) 3 SCC 141.

*Bhat*<sup>29</sup> and *State of Maharashtra v. Bharati Chandmal Varma*,<sup>30</sup> wherein the Supreme Court asserted that the date of remand must be included in counting sixty days for determining default bail.

These two sets of cases created a judicial conundrum that the court was required to resolve. The court pointed out that the first set of cases, in which *Rustam* ignored the *Chaganti* decision, and the remaining instances merely followed *Rustam*. Accordingly, the court held that the rule laid down in *Rustam* is not a correct interpretation of Section 167 (2) of the Cr.P.C. Explaining the rule regarding *per incuriam*, the court held that “the rule of *per incuriam* is an exception to the doctrine of judicial precedent. Quite literally, it provides that when a judgment is passed in ignorance of a relevant precedent or any other binding authority, it is said to postulate incorrect law. It becomes pertinent to resolve the conflict arising from diverging opinions by taking recourse to the ratio decidendi of the earliest opinion.” Explaining further, the court held that when two coequal benches’ judgments are not possible to reconcile their ratio, the rule of *per incuriam* applies. Accordingly, held that the correct interpretation is the rule laid down in *Chaganti*’s case.

In *Iveco Magirus Brandschutztechnik v. Nirmal Kishore Bhartiya*,<sup>31</sup> the issue raised was when there are two different lines of judgments of the Supreme Court providing opposite views, then which view has precedence? Addressing the issue, the court said technically the high courts are bound by both lines of the judgments. However, when conflicting judgments were delivered by different benches of the Supreme Court, the decision of the Constitution Bench would be binding on other benches of lesser strength. Further, in cases where none of the judgments are passed by a Constitutional Bench, then the larger bench decision would supersede the decision of benches of lesser strength.

However, if the lesser bench expresses its doubt about the decision of the larger bench, then the lesser bench may refer the matter for consideration of a larger bench. If both the benches’ strengths are the same, then an attempt to reconcile the views of both benches shall be carried out or decide whether the two judgments apply to two different fact situations. Another course of action is for the bench to consider the previous decisions and explain and differentiate the case at hand; if not, the earlier decision would be binding. The third way is for the present bench to formulate points of difference between two coequal benches and refer them to a larger bench. In such a situation, the former decision would continue to govern the areas until the larger bench decides the reference.

#### VIII JUDGES APPOINTMENT

In *Chirag Bhanu Singh v. State of Himachal Pradesh*<sup>32</sup>, a writ petition was filed under article 32 by the two senior-most District and Sessions Judges in the

29 (1996) 1 SCC 432.

30 (2002) 2 SCC 121.

31 (2024) 2 SCC 86.

32 (2024) 9 SCC 41.

State of Himachal Pradesh. The high court collegium recommended the names of both petitioners for elevation as judges of the High Court of Himachal Pradesh. However, the Supreme Court Collegium asked for reconsideration of the Chief Justice of the Himachal Pradesh High Court's recommendation. Accordingly, two other names were sent to the Collegium of the Supreme Court. The petitioners contend that, upon resending their names, the High Court did not reconsider them and instead sent the other two names, who are junior to them, and that such a recommendation would amount to ignoring their seniority and unblemished, longstanding service. Accordingly, a notice was issued to the Registrar General of the High Court of Himachal Pradesh.

The high court chief justice never reached the Supreme Court Collegium's resolution. The Chief Justice of the high court individually sent a letter regarding the suitability of the petitioners to the Supreme Court Collegium. It is the contention of the petitioners that any issue regarding the elevation to the high court shall be considered by the high court collegium collectively. Still, in this case, the chief justice acted alone. Addressing the preliminary objection that a writ petition under article 32 is not maintainable, it was argued that the petitioners contend that the present petition raises only the issue of lack of consultation, and that in *Mahesh Chandra Gupta*, it is already established that judicial review is available to check the eligibility and the effectiveness of consultation.

Relying on *Supreme Court Advocates-on-Record Association v. Union of India*, the court concluded that, though judicial review is limited in the appointment of judges, a lack of effective consultation and eligibility are recognised grounds for review; hence, the present petition is maintainable. Regarding the second issue, whether the chief justice could reconsider the elevation of judges individually, the court opined that the appointment of judges is not the prerogative of any one individual. Names can be recommended only by an effective collaborative process involving all the members of the collegium. The appointment process must reflect the collective wisdom of the collegium rather than that of an individual.

Aptly relying on the *Third Judges* case,<sup>33</sup> the court held that the plurality of judges ensures effective consultation and would act as a sufficient check against arbitrariness. Accordingly, the collegium of the high court was directed to reconsider the names of the petitioners for elevation as judges of the high court.

*Kavita Kamboj v. High Court of Punjab and Haryana*<sup>34</sup> the court was asked to decide whether there can be different criteria for the recruitment of additional district and sessions judges between the candidates by promotion and direct recruits is the question raised in the above case. There are three categories for the appointment of additional district and sessions judge proposed by the high court. The first category is 65% of posts by promotion, the second category is 10% of posts by accelerated promotion by merit, and the third category is 25% of the posts by direct recruitment. The bone of contention is that there is a cutoff mark

33 Re (1998) 7 SCC 739.

34 (2024) 7 SCC 103.

for posts to be filled on a promotional basis, whereas there is no such cut-off for direct recruitment.

Articles 233, 234 and 235 deal with the appointment of judges to the lower judiciary. Article 233 empowers the governor to appoint district judges in consultation with the high court. In contrast, article 234 empowers the Governor to appoint judges other than district judges in consultation with the State Public Service Commission and the high court. In numerous cases, the Supreme Court highlighted the high court's high control over the district judiciary. In matters of appointment, the opinion of the high court carries weight, and it cannot be viewed as a mere formality.

The High Court of Punjab and Haryana prescribed 50% as the cut-off marks for both the written test and viva voce, independently, for those recruited by promotion. The reason behind such a rule is that a candidate for the post of district judge not only needs to be able to reproduce the knowledge but also needs to exhibit the practical application of law during the viva. About the absence of a cut-off for direct recruitment and promotion through merit, the court found no violation, as the sources of recruitment are distinct. Though the appointment is for the same post, the different routes the candidates take for the recruitment may necessitate different selection criteria.

Therefore, service candidates seeking the post through promotion cannot be equated with candidates opting for accelerated promotion through merit or for direct recruitment. The classification of recruitment sources into three categories has a reasonable nexus to the object and the purpose sought to be achieved. The court held that the High Court is justified in prescribing cut-off marks only for candidates seeking appointment through promotion.

*Vivek Kaisth v. State of Himachal Pradesh*.<sup>35</sup> is another case in which the appointment of two judges as Civil Judges (Junior Division) was in question. The facts so transpired that, in February 2013, the Himachal Pradesh Public Service Commission ('State Commission'), advertised eight vacancies of which six were 'existing' and two 'anticipated', and in furtherance of which the process of recruitment was undertaken. Neither appellant in the present appeal featured in the final merit list.

Meanwhile, in a subsequent meeting between the State Commission, the State Government, and the High Court of Himachal Pradesh, it was revealed that new vacancies had emerged. Placing reliance upon the case of *Shweta Dhingra v. State of H.P.*<sup>36</sup> where the high court had permitted inclusion of additional candidates on account of future vacancies (the Supreme Court later overruled said decision), it was unanimously decided to include the names of the appellants in the selection list, following which both appellants were appointed and inducted into the Judicial Service of the State of Himachal Pradesh, to the post of Civil Judge (Junior Division) on December 27, 2013. Both the appellants went on to serve the judiciary with an

35 (2024) 2 SCC 269.

36 (2011) SCC OnLine HP 3566.

unblemished record, eventually earning promotion to the rank of Civil Judge (Senior Division).

Almost a decade later, in 2021, another candidate from the same batch of appellants filed a petition before the High Court of Himachal Pradesh, challenging the appellants' appointments. The candidate contended that the posts to which the appellants were initially appointed were never, in fact, correctly advertised, thereby violating the principles of equality and fair opportunity enshrined in articles 14 and 16 of the Constitution. The high court allowed the petition and quashed the appellants' appointments as unconstitutional. Aggrieved by the high court's order, the appellants approached the Supreme Court, contending that they had acted in good faith and could not be punished for a procedural lapse beyond their control. The appellants, therefore, prayed to protect their appointments under Article 142 of the Constitution, citing the precedent of the case of *Sivanandan C.T. v. High Court of Kerala*,<sup>37</sup> wherein on a prior occasion, the Supreme Court had protected judicial officers who had been unfairly affected by procedural irregularities in the recruitment process on the part of the State.

In contrast to the stand the respondents took in the high court, the respondent contended that, since only existing and anticipated vacancies within one year could be advertised and filled, the entire appointment of the appellants, in their opinion, should be rendered *void ab initio*.

The Supreme Court, having heard both parties at length, agreed that while appointments of said appellants did not comply with the rules laid down in *Malik Mazhar Sultan (2)*<sup>38</sup>, and that the authorities had wrongly relied on the already overruled decision in the case of *Shweta Dhingra*, however, the fault did not institutionally lie with the two officers, furthermore the court implied that there is in existence no doubt of the fact, that there exists a presence of a visible mistake, which was institutional, and a result of misinterpretation by the authorities, and in turn not any wrongdoing by the candidates themselves. The court acknowledged that the appellants had followed the process in good faith, cleared every stage of examination, and served the judiciary with dedication for nearly one decade.

The court observed that dismissing the appellants from service at this juncture would not only be deeply unfair but would also harm the judicial system by depriving it of two experienced officers. At the same time, the court threw light on several systemic lapses, as concerns Judiciary in the State of Himachal Pradesh, The court pointed out that the Himachal Pradesh Judicial Service Rules, 2004 had not been updated in line with Supreme Court directions, in addition, no waitlist had been maintained as required; furthermore, all three institutions *i.e* the High Court of Himachal Pradesh, the State Commission, and the state government had gravely erred in the appointment process. Accordingly, the high court's order was quashed. The court also directed that the present litigation, which the appellants have gone through, will not come in their way in any manner, and also, as far as

37 2023 SCC OnLine SC 994.

their judicial career is concerned, they shall be treated at par with the other appointees on the post of Civil Judge (Junior Division) for that year.

#### IX POWERS OF THE GOVERNOR

Controversies surrounding the office of the governor are often at the forefront due to political bias, particularly when different political parties are in power at the Centre and the State. The governor's role in assenting to or withholding bills, summoning the house, and referring bills to the President for assent often undermines the constitutional scheme of rule by elected representatives. *State of Punjab v. Principal Secretary to the Governor*<sup>39</sup> is one such case in which the Supreme Court was asked to decide the Governor's powers. The controversy began when the Council of Ministers requested the Governor of Punjab to summon the Assembly. The Governor refused to summon the house on the pretext that he is seeking legal advice on that aspect. The State filed a petition with the Supreme Court challenging the Governor's decision. In *State of Punjab v. Principal Secretary to the Governor of Punjab*,<sup>40</sup> the court held that the Governor is bound by the advice of the Council of Ministers, and there is no reason for the Governor to seek legal advice. The court categorically held that political differences among the parties cannot undermine the constitutional process or thereby undermine constitutional values.

As per the court's direction, the Governor convened the budget session. After a few days of deliberations, the Speaker adjourned the session sine die. In June, after about two and a half months, the speaker reconvened the Assembly session in accordance with the Rules of the Punjab Assembly. During this session, the Assembly passed four Bills, which were sent to the Governor for Assent. However, the Governor did not take any action on those Bills. Again, the Speaker reconvened the session in October, and three Money Bills were supposed to be introduced during this session. As Money Bills can be introduced only on the Governor's recommendation, the Council of Ministers advised the Governor to recommend their introduction. The Chief Minister sent a letter to the Governor enquiring about the pending Bills for his consent. The Governor replied to the Chief Minister that he had sought legal advice, and that legal advice led him to believe that the session reconvened by the Speaker in June, during which those Bills were passed, was in breach of legal rules and procedure. He would be able to make the decision only after the reconvened session is examined.

In another letter, the Governor informed the Chief Minister that the legal opinion from a constitutional expert clearly stated that the reconvened session in June is patently illegal. Regarding Money Bills, the Governor sent another communication to the Chief Minister saying that, as he had already indicated, the Assembly session has concluded and that reconvening it is patently illegal and against established norms and procedures. The reconvened session being unlawful,

38 *Malik Mazhar Sultan (2) v. U.P. Public Service Commission*, (2009) 17 SCC 2.

39 (2024) 1 SCC 384.

40 Writ Petition (Civil) No 302 of 2023.

any business conducted during the session would also be prohibited and *void ab initio*, and for the same reasons, he is inclined to withhold approval of the Bills. Further, without notifying that the Bills are unlawful, the governor advised the Chief Minister to freshly summon the Assembly and to send him the clear agenda of specific business to be undertaken during the session, to enable him to grant permission.

The State of Punjab approached the Supreme Court under article 32 to challenge the Governor's decision. While the case was pending, the Governor permitted two out of three Money Bills to be introduced before the Assembly. Two fundamental issues arise out of this writ petition. First, can a Governor withhold assent to the Bills passed by the Assembly? Second, can a Speaker reconvene a session that is adjourned but not prorogued?

Addressing the first issue, the court held that, in a Parliamentary democracy, the Governor is a mere constitutional head who is bound by the advice of the Council of Ministers. It is a well-settled principle that as an appointee of the President, the governor is a titular head and acts only on the advice of the Council of Ministers. The real power to make any decision lies squarely with the elected member of the legislature. Once the Bill is passed and sent for the Governor's assent, the Governor has three options: first, he may assent to the Bill; second, he may withhold the Bill; third, he may reserve the Bill for the consideration of the President. Under article 200, the Governor, as soon as possible, may return the Bill (not a money bill) to the assembly for reconsideration. In such a case, the Assembly must reconsider the Bill, and after such reconsideration, if the Bill is passed by the Assembly, with or without amendment, and sent for the Governor's consent, the Governor has no discretion but to assent to the Bill.

The second option of withholding the Bill must be read together with the first option. If the Governor wants to withhold the Bill, the only option is to refer it to the President for consideration. Any other interpretation of such power would confer veto power on the Governor. When the Constitution confers the legislative power to the duly elected members of the legislature, withholding such a law passed by the legislature by the Governor would be contrary to the Parliamentary Democracy envisaged under the Constitution. Accordingly, the court held that the Governor has no power to withhold Bills passed by the Assembly and must act promptly.

The second issue, the power of the Speaker to reconvene the session, the court, after deliberating various provisions, authorities, and cases previously decided, held that the Speaker has the power to reconvene the session if the Governor did not prorogue it. The termination of a session by the Governor is called prorogation, and such prorogation is made only on the request of the Chief Minister. In the usual course, the speaker prorogues the session after the House is adjourned *sine die*. However, it is not unusual not to prorogue the House after adjourning the House *sine die*. There are several instances in which the Speaker reconvened Parliament after adjourning the session *sine die*. Rules of the House

empower the Speaker to adjourn the House, and the Speaker is empowered to reconvene the session earlier than the date of adjournment in the public interest. Hence, the Speaker is within his rights to reconvene the sitting of the House before it is prorogued. As a result, the Speaker in the present case is legally permitted to reconvene the session, as it was adjourned sine die rather than prorogued.

Accordingly, the court declared that the sessions held in June are constitutionally valid and legal. Any other interpretation would cause significant damage to the Parliamentary Democracy. The Constitution recognises the authority of the Speaker to conduct its business. Adjourning and reconvening the session is the prerogative of the speaker; therefore, the Governor has no constitutional authority to cast a doubt on the validity of the session. Recognising the constitutional prerogative of the Speaker to adjourn or reconvene the session, the court held that the session being constituted legitimately, the Governor of Punjab must act on assent to the Bills.

#### X CONCLUSION

The effectiveness of the law depends on the personnel who implement it. Constitutions are not immune to such principles. There is no good or bad constitution; it is the constitutional functionaries who make the difference between good and bad constitutions. *Sita Soren* is a classic example of how constitutional functionaries, like elected representatives, are answerable to their citizenry and cannot escape accountability under the guise of legislative privilege. Raising to the occasion, the apex court, the final frontier to guard against the erosion of constitutional values, ended the unreasonable immunity granted to the legislatures accepting bribes for voting.

*Celir LLP, PHR Invent* and *Sanjay Kundu* exhibit that the high courts are not infallible. Exercising the jurisdiction under article 226, being extraordinary, shall not be used mechanically. The *State of Uttar Pradesh* is a classic case of judicial overreach, violating the fundamental principle of separation of powers. The guidelines issued by the apex court regarding the personal appearance of government officials are long overdue. This would address the agony of officials caught between bureaucratic lethargy and judicial enthusiasm. The *State of Punjab* exemplifies how the office of the Governor had, over time, become political. The Constitution imposes an utmost responsibility on the functionaries occupying the highest constitutional positions to exercise their powers in keeping with the spirit of constitutional values, not to please their bosses. The Governor, being the custodian of the constitutional values, must show true allegiance in upholding them. The governor cannot become a cog in the wheel of administration by his inaction on political differences. When political ideologies take over the functioning of constitutional authorities, it is the judiciary that strives to ensure constitutional compliance. However, the need to eradicate erosion of constitutional values is a joint effort by all three organs of government.