

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE HRISHIKESH ROY
HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE SUDHANSHU DHULIA
HON'BLE MR. JUSTICE J.B. PARDIWALA
HON'BLE MR. JUSTICE MANOJ MISRA
HON'BLE MR. JUSTICE RAJESH BINDAL
HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Civil Appeal No. 1012/2002

PROPERTY OWNERS ASSOCIATION & ORS

Petitioner(s)

VERSUS

STATE OF MAHARASHTRA & ORS

Respondent(s)

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1 **UTTARA BABBAR:** May I please Your Lordships? May I please first trouble you with a
2 judgment in *State of Karnataka versus Ranganatha Reddy*. That's at page 2294 of
3 Volume V.

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5 **JUSTICE HRISHIKESH ROY:** Volume?

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7 **UTTARA BABBAR:** I'm so sorry, 1727 of Volume V. If Your Lordships have that? Please turn
8 to page 1734.

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10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Volume V/1727.

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12 **UTTARA BABBAR:** Yes Your Lordships, Volume V, and if I may draw your attention to
13 paragraph 4 at 1734.

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15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Para 5?

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17 **UTTARA BABBAR:** Para 4, at 1734. These were the points that were argued. That's why I
18 want to place that on record. Para 4, if I may read?

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20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

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22 **UTTARA BABBAR:** We now proceed to state the findings of the High Court on the various
23 points argued before it, not in the order as finally recorded in para 98 of its judgment at page
24 1530, but in the order the points were urged before us by Mr. Lal Narayan Sinha, learned
25 Counsel for the appellants, that is the State of Karnataka. So, they are as follows. So one, these
26 are the points which were argued by the appellants and these are the points on which the High
27 Court had delivered its judgment. And these are the points. One, the acquisition is not for a
28 public purpose. Two, the compensation or the amount provided for, or the principles laid
29 down in the Act for payment in lieu of the various vehicles, permits and other assets is wholly
30 illusory and arbitrary. For the two reasons aforesaid, the Act is violative of Article 31(2) of the
31 Constitution and is a fraud on it. It is therefore null and void. If I may just pause here. At this
32 point of time, Article 31 existed in the Constitution and the entire attack was on the ground of
33 violation of Article 31. Point three, the acquisition of contract carriages with interstate permits
34 and other assets pertaining to such operators is *ultra vires* the legislative power and the
35 competence of the state legislature. Here the argument was it is an extraterritorial legislation.

1 And point number four. Four is important. This is the only issue with respect to Article 31C.
2 Article 31C does not bar the challenge to the Act as being violative of Article 31(2) of the
3 Constitution, as there is no reasonable and substantial nexus between the purpose of the
4 acquisitions and securing the principles specified in Clauses (b) and (c) of Article 39. So, as far
5 as we are concerned, this is the only issue that has a bearing. And it's a very limited argument
6 that, 31C does not bar the challenge because there is no nexus between the purpose of the
7 legislation and the principles of 39(b) and (c). Ultimately, Your Lordships, there is also a
8 passing reference towards the end of para 15 where the four judges, just before paragraph 16,
9 the four lines of para 15, the last few lines, three lines of para 15, where they say, when we say
10 so, we are not taking into account the effect of 31C. This is the majority inserted in the
11 Constitution by the 25th Amendment, leaving out the invalid part. Now, Lordships, please see
12 para 17. The last seven or eight lines of para 17, just before para 18, where the arguments of
13 Mr. Lal Narayan Sinha are noted. So, it would be the 5th, 6th line from the top. Mr. Lal
14 Narayan Sinha learned Counsel for the appellants. Your Lordship has that? Took a very just
15 and proper attitude in advancing an argument before us which would take away the basis of
16 the High Court judgment in this regard. With respect to each and every relevant section on the
17 question of payment of the amount in view of the property acquired, he suggested such a
18 reasonable, harmonious and just construction by the rules of interpretation that we found no
19 difficulty in accepting his argument, rather, were glad to do so. The other side on the
20 interpretation so put, which we are going to mention hereinafter, felt satisfied to a large extent.
21 Mr. Sinha also advanced some argument, argument with reference to the valid part of Article
22 31C read with Clauses (b) and (c) of Article 39, but very wisely did not choose to heavily rely
23 upon it. On the interpretation of the statute as canvassed by him, there hardly remained any
24 necessity of it, 'it' being a reference to Article 31C, read with 39(b) and (c). So, the court here
25 says there is really no need to go into that because we are accepting his interpretation of the
26 statute. And ultimately at para 27...

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28 **JUSTICE HRISHIKESH ROY:** Can you just read the sentence previous to the one that you
29 started off with? That will put the things in perspective.

30

31 **UTTARA BABBAR:** Yes. They would not only be paupers.

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33 **JUSTICE HRISHIKESH ROY:** Something, I think to do with Mr. Sen. Many of them were...

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35 **UTTARA BABBAR:** Many of them were plying their contract carriages, having taken loans
36 of considerable sums of money from the various financiers on hire purchase system for whom
37 also Mr. A.K. Sen appeared and argued before us. They would not only be paupers, but huge

1 liability will remain on their shoulders, if the interpretation put by the High Court were to be
2 correct, and thereafter.

3

4 **JUSTICE HRISHIKESH ROY:** Right.

5

6 **UTTARA BABBAR:** Now paragraph 27. Only to show that here, if I just read paragraph 27.
7 On the interpretations aforesaid, which we have put to the relevant provisions of the Act, it
8 was difficult, rather impossible, to argue that the amount so fixed, will be arbitrary or illusory.
9 In some respects it may be inadequate, but that cannot be a ground for challenge of the
10 constitutionality of the law under Article 31(2). So, they say that the law is not *ultra vires*
11 Article 31(2) and ultimately, this is reiterated in paragraph 32. I don't want to repeat. Para 37.
12 The last few lines of para 37 which Your Lordships have noticed yesterday, but I just want to
13 place it. Where it begins from "since". The first five, six lines really don't have to do with this
14 aspect at all. Since, para 37. Since we have upheld the constitutional validity of the Act on
15 merits by repelling the attack on it, by a reasonable and harmonious construction of the Act
16 we do not consider it necessary to express any opinion with reference to Article 31C, read with
17 Clauses (b) and (c) of Article 39 of the Constitution. Our learned brother Krishna Iyerji has
18 prepared a separate judgment specially dealing with this point. We must not be understood to
19 agree with all that he has said in his judgment in this regard. So, presumably the majority or
20 the four judges wrote their opinion. The opinion of Justice Krishna Iyer was placed before it.
21 And then the four judges have specifically said, "We do not agree with what he has said." As
22 far as Justice Krishna Iyer is concerned, if you compare the questions posed by the majority at
23 para 4 and compare that with para 41 and 50 of Justice Krishna Iyer's judgment. Para 41, this
24 should be at page 1750.

25

26 If I may just straightaway come to the 7th or 8th line from the top of para 41. "Secondly, does
27 a legislation qualify for immunity under Article 31C read with Article 39(b) only where the
28 scheme is to divide and deal out to a plurality of persons to disperse, diffuse or scatter
29 ownership and control of material resources of the community compulsorily taken by the
30 State." That's one meaning. "And/or does it embrace distribution with a wider connotation of
31 removal from the private sector." So, if I may pause here, the two interpretations that he is
32 now looking into, one, where he says, "Is it only to divide and deal?" And the second
33 interpretation, "Or does it embrace distribution, as in including removal from the private
34 sector?" That is acquiring. And this is only in his judgment, nowhere else. "And allocating in
35 the public sector, dividing and arranging, separating and allocating, acquiring from
36 individuals and making over to the collective institutions or state organs, acting for and in the
37 interest of the community, according to the state plan or policy decision on the scheme of

1 distribution and allocation of resources, among the different sectors of economic activity so as
2 best to subserve the public good. How, in short, do we decode, distribute in Article 39(b)
3 illumined by Article 38?" If Your Lordships may just come to the few lines on the next page
4 after **R. C. Cooper** is mentioned. "Can the theory...", third line, "can the theory of illusory
5 compensation be apocryphal or be exaggerated to apply to diminished compensation as a
6 revised reincarnation of adequate compensation still menacing projects of nationalization?
7 How do we conceptualize material resources and public purpose in our current constitutional
8 setting?" And thereafter, Your Lordships may see paragraph 50. This is at page 1753. Just
9 before para 51, there are questions which are now framed by Justice Krishna Iyer. And if Your
10 Lordships were to compare this, most of this is not present in the questions framed or even
11 argued.

12

13 If you see para 4, that was all that was even argued. And these are the questions and if Your
14 Lordships specifically sees question 2, "What are the pervasive ambience and progressive
15 amplitude of Directive Principles in 39(b) and (c), in the context of nationalization of public
16 utilities?

17 2(a), Can State monopoly by taking over private property be a modus operandi of distribution
18 of ownership and control of the material resources of the community to subserve the common
19 good within the framework of Article 39(b)?

20 2(b) Are distribution and nationalization antithetical or overlapping?

21 2(c) What is the connotation of the expression 'material resources'? Can private buses be
22 regarded as material resources of the community?"

23

24 Thereafter, Your Lordships have seen para 80 and 81 yesterday, so I will not repeat that.

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Just quickly, just take us through it, since it'll
27 help you to....

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29 **UTTARA BABBAR:** Yes.

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31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** To put it in context and perspective.

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33 **UTTARA BABBAR:** Yes. So, para 80. This would be at page 1770. "This takes us to the non-
34 negotiable minimum of nexus between the purpose of the acquisition and Article 39(b). Article
35 39(c) was feebly mentioned, but Article 39(b) was forcefully pressed by the appellant. Better
36 read Article 39(b).... better read Article 39(b) before discussing its full import. Article 39(b) is
37 reproduced. The keyword is 'distribute' and the genius of the Article, if we may say so, cannot

1 but be given full play, as it fulfils the basic purpose of restructuring the economic order. Each
2 word in the Article has a strategic role and the whole Article, a social mission. It embraces the
3 entire material resources of the community. Its task is to distribute such resources. Its goal is
4 to undertake distribution as best to subserve the common good. It reorganizes by such
5 distribution the ownership and control.

6

7 81. Resources, is a sweeping expression and covers not only cash resources, but even ability to
8 borrow, credit resources. Its meaning given in Black's legal dictionary is money or any
9 property that can be converted into supplies, means of raising money or supplies capabilities
10 of raising wealth or to supply necessary wants, available means or capability of any kind.

11

12 After quoting the Black's dictionary, now, this is his judgment. "And material resources of the
13 community in the context of reordering the national economy embraces all the national
14 wealth, not merely natural resources, all the private and public resources of meeting material
15 needs, not merely public possessions. Everything of value, or use, in the material world is
16 material resource. And the individual being a member of the community, his resources are
17 part of those of the community. To exclude ownership of private resources from the coils of
18 Article 39(b) is to cipher-ise its very purpose of redistribution the socialist way. A directive to
19 the State with a deliberate design to dismantle feudal and capitalist citadels of property must
20 be interpreted in that spirit and hostility to such a purpose alone can be hospitable to the
21 meaning, which excludes private means of production or goods produced from the
22 instruments of production". Shri AK Sen agrees that private means of production are included
23 in material resources of the community but by some baffling logic, excludes things produced.
24 If a car factory is a material resource, why not cars manufactured? Material may cover
25 everything worldly and resources according to Random House Dictionary takes in the
26 collective wealth of a country or its means of producing wealth, money or any property that
27 can be converted into money assets. No further argument is needed to conclude that Article
28 39(b) is ample enough to rope in buses, the motor vehicles are part of the material resources
29 of the operators. So, number one, Your Lordships, there is no precedent as such. He has relied
30 on the dictionary meanings of various words and come to the conclusion...

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** This is the view only of a plurality, this is not
33 the majority in any case.

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35 **UTTARA BABBAR:** Yes. So, Your Lordships, I have two...

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37 **JUSTICE B. V. NAGARATHNA:** Concurring opinion.

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CHIEF JUSTICE D. Y. CHANDRACHUD: It's a concurring opinion.

JUSTICE B. V. NAGARATHNA: It's a concurring opinion.

UTTARA BABBAR: Yes. It starts by saying it's a concurring.

JUSTICE B. V. NAGARATHNA: Yes.

CHIEF JUSTICE D. Y. CHANDRACHUD: Majority interpreted the provisions of the Act, felt that this had broadly satisfied all parties. Mr. Lal Narayan Sinha's argument was, broadly they said, "It's fair." On the interpretation of the Act it is not necessary to go into the 39(b).

UTTARA BABBAR: Exactly. So, the limited point I'm making is...

CHIEF JUSTICE D. Y. CHANDRACHUD: Justice Krishna Iyer's judgment.

UTTARA BABBAR: Yes, that issues, therefore, the reason why this is important is because, this opinion then gets resurrected, as Your Lordships have seen, in *Sanjeev Coke*, where a bench of five judges now decides that this is the law. So, that would be the next step that I'll show Your Lordships.

JUSTICE B. V. NAGARATHNA: See, the fact remains that in this case the High Court struck down the nationalization issue saying that the one, is on public purpose, which has been reversed by this court. Secondly, that Article 39(b) was not justified in the instant case.

UTTARA BABBAR: Yes.

JUSTICE B. V. NAGARATHNA: That's why the petitioner succeeded in the High Court.

UTTARA BABBAR: Yes.

JUSTICE B. V. NAGARATHNA: It is in the state appeal, that there is a reversal.

UTTARA BABBAR: Yes.

JUSTICE B. V. NAGARATHNA: This is a concurring opinion.

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UTTARA BABBAR: Yes. But while reversing, the majority says we need not go into it because we otherwise find that there is no violation of 31. That was the paragraph I read. Right? If I may now, take Your Lordships to the judgment in *Sanjeev Coke*? I'll only read one para. I don't want to repeat what has been said. This is page 2294 of Volume V. I only want to read para 19. Para 19, at page 2313. May I read?

JUSTICE HRISHIKESH ROY: Which para you said?

UTTARA BABBAR: 19, at page 2313. May I read, Your Lordships? Para 19. The nationalization of the coking coal mines and the coke oven plants was with a view to reorganizing and restructuring such mines and plants for the purpose of protecting, conserving and promoting scientific development of the resources of coking coal, needed to meet the growing requirements of the iron and steel industry and for matters connected therewith or incidental thereto. We do not entertain the slightest doubt, that the nationalization of the coking coal mines and the specified coke oven plants for the above purpose was towards securing, that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. The submission of Shri A. K. Sen was that, neither a coal mine nor a coke oven plant owned by private parties was a material resource of the community. According to the learned Counsel, they would become material resources of the community only after they were acquired by the State and not until then. In order to qualify as material resources of the community, the ownership of the resources must vest in the community, that is the State. A legislation such as the Coking Coal Mines (Nationalization Act) may be a legislation for the acquisition by the State of coking coal mines and coke oven plants belonging to private parties, but it is not a legislation towards securing that the ownership and control of the material resources are so distributed as best to subserve the common good. Shri Sen invited our attention to the emphasis which Justice Krishna Iyer laid on the word distribute occurring in Article 39(b) of the Constitution in *State of Karnataka versus Ranganatha Reddy*. And Justice Krishna Iyer's description of it as the keyword and the dissertation on the genius of the article. Shri Sen urged that, if the word 'distribute' was given its proper emphasis, it would inevitably follow, that material resources must belong to the community as a whole, that is to say, to the State or the public, before they could be distributed as best to subserve the common good. Since those material resources which belonged to the State, only could be distributed by the State. Shri Sen argued that material resources had first to be acquired by the State before they could be distributed. A law providing for acquisition was not a law for distribution. We are unable to appreciate the submission of Shri Sen. The expression, "material resources of the community" means, all

1 things which are capable of producing wealth for the community. There is no warrant for
2 interpreting the expression in so narrow a fashion as suggested by Shri Sen and confine it to
3 public-owned material resources and exclude private-owned material resources. Thereafter, if
4 Your Lordships comes to the next page. Same paragraph 19 in continuation, the 6th or 7th line
5 from the top. When Article 39(b) refers to material resources of the community, it does not
6 refer only to resources owned by the community as a whole, but it refers also to resources
7 owned by individual members of the community. Resources of the community do not mean
8 public resources only, but include private resources as well. Nor do we understand the word
9 'distribute' to be used in Article 39(b) in the limited sense in which Shri Sen wants us to say it
10 is used, that is, in the sense only of retail distribution to individuals. It is used in a wider sense,
11 so as to take in all manner and method of distribution, such as distribution between regions,
12 distribution between industries, distribution between classes and distribution between public,
13 private and joint sectors. The distribution envisaged by Article 39(b) necessarily takes within
14 its stride, the transformation of wealth from private ownership into public ownership and is
15 not confined to that which is already public owned. And this is important Your Lordships. The
16 submissions of Shri Sen are well-answered by the observations of Justice Krishna Iyer. And
17 then, paras 80 and 82. The submission is that there has to first be an acquisition of the
18 property because 39(b) deals only and only with distribution. It cannot be used in aid of
19 statutes where the property of a private individual is being acquired.

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Actually, the philosophical approach of both
22 Justice Krishna Iyer and Justice Chinnappa Reddy is this. If you look at the purely capitalist
23 concept of property, the capitalist concept of property attributes a sense of exclusiveness to
24 property. This is my pen. It's exclusively mine. Nobody else can use my pen. A socialist concept
25 of property is the mirror image, which attributes to property a notion of commonality. Nothing
26 is exclusive to the individual. All property is common to the community. That's the extreme
27 socialist view. Our Directive Principles, you must understand, have their foundation in the
28 Gandhian ethos. The Directive Principles were really in pursuance of the Gandhian ideology.
29 And what is that ethos? Our ethos regards property as something which is held in trust. We
30 don't go as far as to adopt the socialistic model that, there is no private property at all. Of
31 course we have private property. And that concept of trust, which is now being applied in the
32 context of say, sustainable development in the environmental context. Maybe it's in my mind
33 because I was teaching a class this morning on sustainable development and climate change.
34 But our concept of property has undergone a very different, a very subtle change from either
35 the extreme capitalist perspective, or the extreme socialist perspective. We regard property as
36 something which we hold in trust. We hold the property in trust for the succeeding generations
37 in the family. But broadly, we also hold that property and trust for the wider community. That's

1 the whole concept of sustainable development. That property which we have today, as today's
2 generation, we hold in trust for the future of our society. That's what you call as
3 intergenerational equity, right?

4

5 **UTTARA BABBAR:** Yes, Your Lord.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, it would be, to my mind, it would be a little
8 dangerous to have this dichotomy, that 39(b), only, now, one more thing before I come to it.
9 Because I'm sorry to break your link, but I'm getting old and I might miss this half an hour
10 later. Both Justice Krishna Iyer and Justice Chinnappa Reddy, deal with two aspects, when
11 they deal with 39(b), the origin and the beneficiary. The argument before Justice, before the
12 bench in *Ranganatha Reddy* was, that the origin must be in the community for 39(b) and
13 (c) to apply. If something does not originate in the community, then 39(b) cannot, can never
14 apply.

15

16 Second argument was, that distribution postulates that you will distribute it to individuals. If
17 you are not distributing it to individuals, then 39(b) will not apply. They deal with both these
18 arguments at a philosophical level by saying that even if something does not originate in the
19 community, right, if it is property of the nature which has a bearing on the welfare of the
20 community, 39(b) is capable of application. Second, in so.... that is the origin. On the
21 distribution they say, that even if it is not being distributed to individuals, for instance,
22 nationalization. You take over property, vest it in a state corporation, it is not a distribution to
23 an individual. That concept is also within the purview of 39(b). Because why were you
24 nationalizing? You were taking over private property, but using that property for, in trust for
25 the wider society, but it is not being given, it's not being distributed. So, they deal both, with
26 the source or the origin, and they deal with the distribution aspects in these two judgments. It
27 may be a little, it may be a little extreme to suggest that material resources of the community
28 only means resources we do not have their origin in the private property of an individual. I'll
29 tell you why it will be dangerous to take that view. Take simple things like mines, forests, even
30 private forests. For us to, for instance, say that, look, the moment a forest is a private forest,
31 39(b) will not apply, therefore, it's hands off, would be extremely dangerous a proposition. It
32 depends upon context. As Brother Dhulia said yesterday to us, when we were discussing on
33 the bench, it depends on the context, in a given case, a private house.

34

35 **JUSTICE B. V. NAGARATHNA:** Zamindari land.

36

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Exactly. Zamindari lands. That was the whole
2 basis of our agricultural ceiling laws. Whether it was a UPZALR Act or the Maharashtra Ceiling
3 on Agriculture Lands Act. So, we must have regard to, we must put ourselves back in the 1950s
4 when the Constitution was made. So, the Constitution, which was intended to bring about a
5 sense of social transformation, and that was the transformative ideal of the Constitution.
6 Whether this Act is valid is a completely different issue. It's a completely different issue, that
7 will ultimately be decided, but we can't say that 39(b) has no application once properties,
8 privately held property. You know because the societal demands, the societal welfare, the need
9 for redistribution considering the societal perspective. So, it may be air waves, it may be water,
10 it may be forest, it may be mines. In some areas, probably the dividing line becomes very clear.
11 Just taking somebody's flat. Possibly. You may have a point on that. But you must understand
12 that 39(b) has been crafted in a certain Constitutional ethos. That the Constitution was
13 intended to bring about a social transformation. So, for, we shouldn't therefore go as far as to
14 say that the moment private property is private property that 39(b) and (c) will have no
15 application.

16

17 The second thing, which I want to tell you was that, whether 39(b) and (c) can have two
18 consequences in our Constitutional Law. Right? One, the moment a law is enacted to give
19 effect to 39(b) and (c), that law is immune from challenge under Article 31C, unless you come
20 to the conclusion that the law has no nexus to 39(b) and (c) which is struck down in
21 *Kesavananda Bharati*. So, the moment a law is in furtherance of 39(b) and (c) that law
22 has an immunity under 31C. But even if the law does not have an immunity under 31C, right?
23 Even if the law is not immune from 31C for some reason, say some bench comes to a conclusion
24 that 31C does not exist on the statute book today. Even so, the fact that the law has been made
25 in pursuance of 39(b) and (c) may be an index of its reasonableness. That's not just 39(b) and
26 (c). The fact that Parliament or the State Legislature has enacted a law to give effect to any of
27 the Directive Principles is an index of its reasonableness. But 'reasonable' postulates that it's
28 subject to, or, amenable to judicial review. What 39... 31C did was, it completely excluded from
29 judicial review on grounds of 14 and 19, leaving open again other constitutional challenges.

30

31 **UTTARA BABBAR:** Right.

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33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** I think that's where the matter really lies in
34 that sense.

35

36 **UTTARA BABBAR:** Lordships, I'll just...

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Today Mr. Andhyarujina didn't argue on 31C.
2 We'll ask the other side when we are on 31C, because you know one thing which
3 we are thinking aloud, actually, not just for you, but for the other side when they take up their
4 view. The argument that this law has no nexus to 39(b) and (c), right, postulates that 31C is
5 valid, because that whole argument that the law on your side, that the law has no nexus to
6 39(b) and (c) postulates that because it has no nexus to 39(b) and (c), therefore the law is not
7 protected by 31C, which means that 31C is there.

8

9 **UTTARA BABBAR:** Exactly.

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But because the law has no nexus to 39(b) and
12 (c), therefore this law is bad, right? But if 31C does not exist at all.

13

14 **UTTARA BABBAR:** Absolutely.

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16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right? Then the 39(b) and (c) argument will
17 still apply.

18

19 **UTTARA BABBAR:** But independent of 31C.

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21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Independently, on the ground that the law is
22 not immune from challenge under Article 14 and 19, but the law is presumed to be reasonable
23 because it is giving effect to 39(b) and (c). There are two different things. One is an immunity
24 from constitutional challenge. The other is the index of the reasonableness of the law.

25

26 **UTTARA BABBAR:** Absolutely.

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28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, I'm subject to hearing the other side. Now
29 one last thing, Mr. Attorney, Mr. Solicitor and Mr. Dwivedi, look at it this way. The 31C
30 argument, the 31C argument, there are succeeding Constitution Bench Judgments of our
31 Court, which have taken the view that 31C still continues to exist. *Minerva* takes it, *Waman*
32 *Rao* takes it. Subsequent decisions have taken it, though, Mr. Nariman argued in the referral
33 order...

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35 **UTTARA BABBAR:** That is on a concession.

36

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That is only on a concession. That this was on
2 a concession.

3

4 **UTTARA BABBAR:** Yes.

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6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now, therefore, that five, the correctness of the
7 Constitution Bench, implicitly holding that 31C still continues to be on the Constitution, the
8 correctness of it, if it has to be tested, what, which was what Mr. Nariman argued, we'll have
9 to go to seven, we'll have to go to seven judges. Nine, the reference to nine came only because
10 of *Ranganatha Reddy*, Justice Krishna Iyer's judgment, which was then adopted in
11 *Sanjeev Coke*, before the bench felt let's go to nine. But even if we don't go into 31C, 31C will
12 have to be decided. Whether 31C is on the statute book, will have to be decided by a bench of
13 seven judges.

14

15 **UTTARA BABBAR:** Yes, absolutely.

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now the question is whether we should leave
18 it for a future day for some seven-judge bench to decide it or decide it here, because we have,
19 certainly a bench of nine can certainly decide it. Why leave the law in a state of uncertainty?

20

21 **UTTARA BABBAR:** Lordships, on our side, speaking from my side...

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Down the line, for this court to say that 31C
24 does not exist will be a very radical constitutional consequence. So, all the laws which have
25 been predicted under 31C will become vulnerable. Therefore, instead of leaving this to a future
26 litigation before seven judges, you may also reflect on it that perhaps we should resolve it and...
27 We may have to hear them on the 31C argument and we'll allow you to respond to it because
28 leaving things in constitutional uncertainty is also not good thing for the nation.

29

30 **TUSHAR MEHTA:** As far as 31C is concerned, of course, we'll reflect and respond. My
31 immediate response is, there is no uncertainty about 31C.

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Five judges have held, though, according to
34 Mr. Nariman, as he then, Mr. Fali Nariman, that this was on a concession.

35

36 **TUSHAR MEHTA:** Yes. It is not so. But be that as it may, nobody has doubted 31C now.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It is not so, then, is it not really desirable that
2 a bench of nine should put an end to this controversy, because otherwise what happens is, a
3 whole host of laws become just vulnerable to challenge. We are not concerned about the merits
4 of this law which is in challenge before us. That's the least bit of a problem, the least bit of the
5 worry. Whether this law is upheld or struck down does not really, in that sense, alter the
6 nation's constitutional fabric.

7

8 **TUSHAR MEHTA:** Correct. What possibly Mr. Nariman also argued, and what was the point
9 in controversy was, not whether 31C survives or not. The question was, partly 31C having been
10 set aside, whether there would be a revival of what is already gone, that's all.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That's the point.

13

14 **TUSHAR MEHTA:** That's all. Not the validity of 31C.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The revival, because what happens is, 31C in
17 *Kesavananda Bharati* is struck down, only the last part is struck down, which said that
18 whether the declaration, whether the law actually gives effect to 39(b) and (c) would not be
19 inquired into by any court. That was the latter part of...

20

21 **TUSHAR MEHTA:** Judicial review was taken away, which is settled.

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** *Kesavananda Bharati* said no, that part is
24 unconstitutional. Whether the law actually gives effect to 39(b) and (c) is reviewable. So,
25 *Kesavananda Bharati* strikes it down. Therefore the substantive part of Article 31C is
26 upheld by *Kesavananda Bharati*. Now, what Parliament did was in the 25th, in the 42nd
27 Amendment they expanded the ambit of 31C by excluding, by including, not merely excluding
28 not merely challenge on 14 and 19 but on all the Fundamental Rights.

29

30 **TUSHAR MEHTA:** Part III.

31

32 **UTTARA BABBAR:** On all Directive Principles. Instead of only 39(b) and (c).

33

34 **CHIEF JUSTICE D. Y. CHANDRACHUD:** All Directive Principles. Right? Instead of
35 39(b) and (c), they said all Directive Principles. That is struck down in, that is struck down in
36 *Minerva Mills*. Now, what is the consequence of the decision in *Minerva*? Does that only

1 strike down the expansion of the ambit of 31C to all Directive Principles, or does it leave intact
2 39(b) and (c)? Now, your contention is a latter contention.

3

4 **TUSHAR MEHTA:** Yes.

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 39(b) and (c) still continues to be valid. But is
7 it not important that we deal with that and decide it?

8

9 **TUSHAR MEHTA:** The difficulty is My Lord, neither anyone has addressed, that Your
10 Lordship can permit addressing. We have also not examined from that point of view. Because
11 according to us, at the outset, I pointed out that the controversy before this bench is limited.

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But what's going to happen is, this will go back
14 right away before seven judges to argue that. And what we are doing is, we are dealing with
15 the offshoot, namely 39(b) and (c), without dealing with the mother, which is 31C. If 31C, if
16 they are right, for a moment, hypothesis. If they are right, that 31C does not exist on the
17 Constitution today, by virtue of the judgment in *Minerva Mills*, then whether the law is
18 protected under 31C as giving effect to 39(b) and (c) does not arise at all.

19

20 **TUSHAR MEHTA:** My Lord, nobody has doubted that proposition, which may give rise to a
21 re-examination by the larger bench.

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The first referring order, the first referring
24 order specifically raises this as Mr. Nariman's argument. In the second and third referring
25 orders, what happened was, the focus shifted to...

26

27 **TUSHAR MEHTA:** 39(b).

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 39(b) and (c). But the fact that Mr. Nariman,
30 and he is observing us from heaven, the fact that Mr. Nariman raised this issue about 31C, is
31 squarely a part of a referring order. And that will have to be decided by seven judges at the
32 minimum.

33

34 **TUSHAR MEHTA:** Five .. five, My Lord.

35

36 **UTTARA BABBAR:** Seven.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** No, it has to go before seven, because it has
2 been decided by five.

3

4 **TUSHAR MEHTA:** The first reference is three.

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** No, no.

7

8 **JUSTICE B. V. NAGARATHNA:** *Minerva Mills* is five.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** *Minerva Mills* is five. *Waman Rao* is five.

11

12 **UTTARA BABBAR:** This very question has been referred by five to seven.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** My sister, Justice Nagarathna, with her
15 permission, I'll just read out. The first question which Mr. Zal had raised yesterday was,
16 whether 31C of the Constitution survived. After the judgment of this court in *Minerva Mills*
17 reported in so and so, striking down Section 4 of the Constitution, 42nd Amendment Act, 1976.
18 Briefly, what they are arguing, we're not saying that they are right. They say that when a
19 Constitutional Provision is substituted by a Constitutional Amendment, and that substituted
20 Constitutional Amendment is struck down, that does not result in the revival of the original
21 provision.

22

23 **UTTARA BABBAR:** Yes.

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Your answer to that would be, and I presume
26 it, we have not heard you, is that when a Constitutional Provision is substituted by another
27 Constitutional Provision to expand the ambit of that Constitutional Provision, then the
28 striking down of the subsequent Constitutional Amendment on the ground that the expansion
29 was unconstitutional.

30

31 **TUSHAR MEHTA:** The remaining part remains.

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It may not affect the original. Because this was
34 not an absolute substitution. This was an expansion, expansion of the ambit of the protection
35 which Article 31C gave, and the original provision having been upheld in *Kesavananda*
36 *Bharati*, surely the impact of a subsequent smaller bench of five cannot affect the validity of

1 the provision in *Kesavananda* and that's your argument. That's the point that we have to
2 deal with. But honestly...

3

4 **TUSHAR MEHTA:** It was our argument, presuming 31C to be the subject.

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yeah, because your argument on 39(b)
7 presumes that 31C is valid. Now they are raising an issue 31C is not valid, might as well...

8

9 **TUSHAR MEHTA:** They are raising, but the court has never, My Lord....

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** I agree with you.

12

13 **TUSHAR MEHTA:** Your Lordship, I can say one thing.

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But first referring order itself refers to this.

16

17 **TUSHAR MEHTA:** Thereafter, that is given up by every larger benches. Your Lordships, My
18 Lords, sitting in this combination.

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Not given up, actually.

21

22 **TUSHAR MEHTA:** Your Lordships, in one line answer, in this combination, Your Lordships
23 can take up, I am not on that technicality.

24

25 **JUSTICE HRISHIKESH ROY:** Even if the Attorney General and/or the Solicitor General
26 needs to say today that it is still there. Still, there will be a question by somebody, as was done,
27 that is a matter of concession. So should there not be a clarity on what is a very significant part
28 of the Constitutional process?

29

30 **TUSHAR MEHTA:** Now, let us have, My Lord, the...

31

32 **JUSTICE HRISHIKESH ROY:** One thing, of course, the other side, as the Chief Justice has
33 rightly said, they have not had the opportunity. In fact, the discussion which is emerging today,
34 might have taken them a bit of, by a bit of a surprise. So I think that we'll have to....

35

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Actually, what happened was yesterday....
2 yesterday, Mr. Andhyarujina was ready on 31C. Mr. Devrajan was to argue 39(b). We tell...
3 And Sameer. Sameer also. We told them that we are not going into 31C.

4

5 **TUSHAR MEHTA:** And My Lord, we were.... My Lord, I'll just....

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We threw the cat among the pigeons yesterday,
8 so that's why they were...

9

10 **TUSHAR MEHTA:** And I would add, we were ready to persuade Your Lordships that 31C
11 does not arise and we could.

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Mr. Solicitor, we are more than willing
14 amenable to persuasion that, look, 31C does not arise. The argument of Mr. Nariman in
15 Referring Order 1, there's no substance in it, please don't... But then we can at least say, if you
16 are right on that, we will say that the continuation of 31C is now a concluded doctrine in our
17 jurisprudence, so that we lay it down for the future, if you are right, that 31 C, that there is
18 no..., though it was raised by Mr. Nariman, and that was the basis for, one of the reasons for
19 referring it to bench, a larger bench in Referring Order 1, that there is no substance in it. And
20 then that attains finality unless somebody decides to refer that...

21

22 **TUSHAR MEHTA:** Can we, My Lord....

23

24 **CHIEF JUSTICE D. Y. CHANDRACHUD:** you know, in which case....

25

26 **TUSHAR MEHTA:** Can we respond My Lord, after consulting?

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** In which case, after we've heard your
29 submissions on 39(b), we can hear them on 39... 31C. Mr. Andhyarujina has broadly argued it.
30 And then we will hear him intensively for a couple of hours and hear your response on it.

31

32 **R VENKATARAMANI:** One thought process Regardless of the 31C. If 31C has not even
33 invoked 39...

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Sorry.

36

1 **R VENKATARAMANI:** If 31C has not referred to 39 at all. I'm just looking at it. Now the
2 law is that the Directive Principles of state policy, any action, state action taken in pursuance
3 of state policy are presumed to be in public interest.

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But 31C refers to 39(b) and (c).

6

7 **R VENKATARAMANI:** I close my eyes to 31C for a minute. So, 39(b) will still be a support,
8 a framework of support for sustaining this law, without reference to 31C.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That I said when I was explaining it. The two.
11 It has to be reasonable.

12

13 **R VENKATARAMANI:** Exactly.

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That I said... Only if the law is not protected by
16 31C the fact that the law is in furtherance of 39(b) and (c) is an index of its reasonableness.
17 Isn't it?

18

19 **R VENKATARAMANI:** Therefore, whether the Court should go into a 31C argument.

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But 14 and 19 would be excluded if 31C protects
22 the law. Then they will argue everything else. 300A and 21 and all, their nature of the challenge
23 is constricted then, before the regular bench.

24

25 **SAMEER PAREKH:** I can just add. The second Reference Order also mentions the 31C issue,
26 five to seven also.

27

28 **R VENKATARAMANI:** Why going into a 31C, I understand the reason, that why can't they...
29 provide the Court would like put an end to any controversy whatsoever, but I think we need to
30 address the Court at a very larger...

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** As Sameer is saying, the second order refers to
33 31C. Reference to nine comes about only because of *Ranganatha Reddy* being seven
34 judges.

35

36 **R VENKATARAMANI:** That's right.

37

1 **UTTARA BABBAR:** And *Mafatlal*.

2

3 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But therefore part of the challenge...

4

5 **TUSHAR MEHTA:** And *Mafatlal*.

6

7 **UTTARA BABBAR:** *Mafatlal* is nine judges.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** *Mafatlal* being nine. But they didn't refer it
10 to eleven for the reason that *Mafatlal*, that observation is obviously an *obiter*.

11

12 **TUSHAR MEHTA:** No, My Lord, it is not. Please don't say. That's our argument. We will
13 persuade Your Lordships it is not an *obiter*.

14

15 **R VENKATARAMANI:** *Mafatlal* was invited to get into.

16

17 **TUSHAR MEHTA:** Your Lordships have possibly pre-empted our argument. And My Lords,
18 the reasons are simple. The Attorney General argued, findings are recorded, and *obiter* is not
19 dealt with by the conquering or dissenting judgment. Even the dissenting judgment deals with
20 it.

21

22 **R VENKATARAMANI:** So, Attorney General must do justice to it now.

23

24 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Alright. Therefore, we will take your argument
25 that *Mafatlal* concludes it. Therefore nine, therefore, therefore nine will deal with 39(b) and
26 (c), but their argument on 31C will have to be dealt with by whom? Somebody will have to deal
27 with it, by at least seven.

28

29 **TUSHAR MEHTA:** We are before the Hon'ble Chief Justice's bench, presided by the Hon'ble
30 Chief Justice My Lord. No technical arguments can weigh.

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, tomorrow, they can still say, "Look, my
33 argument on 31C has to be... somebody has to answer it." Five can't answer it. After we decide
34 this matter, they'll say, "Now, refer that to seven." So, after this round, again you go back to
35 seven.

36

37 **TUSHAR MEHTA:** Correct My Lord. But thereafter...

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CHIEF JUSTICE D. Y. CHANDRACHUD: We can't prevent them from having their day in court.

TUSHAR MEHTA: Thereafter the benches, larger benches then, My Lord, the one which referred, felt that it is not necessary. It's not that My Lord, without...

CHIEF JUSTICE D. Y. CHANDRACHUD: It's not rejected you see. The seven judges, while referring it to nine, didn't reject the 31C argument which they're making, they just referred to this because...

TUSHAR MEHTA: By non-referring, they've rejected My Lords. They had an option of referring everything.

CHIEF JUSTICE D. Y. CHANDRACHUD: 31C, we'll have to deal with actually.

JUSTICE SUDHANSHU DHULIA: The reference is by implication. We cannot keep on referring to 31C over and over again.

TUSHAR MEHTA: My Lord, there were five issues. They refer four, meaning thereby they have not referred the fifth.

JUSTICE SUDHANSHU DHULIA: We have to settle it. We'll have to deal with it.

TUSHAR MEHTA: Your Lordships can settle several issues which might even incidentally arise academically. Academically My Lord, I can raise five issues.

CHIEF JUSTICE D. Y. CHANDRACHUD: So, we'll have to go through... What was the ground on which *Minerva Mills* struck down 31C? If *Minerva Mills* says, as I believe it does, that this expansion of 31C to include all Directive Principles is unconstitutional, then *Minerva Mills* has left the substratum of original 31C intact.

R VENKATARAMANI: As [UNCLEAR] by *Kesavananda Bharati*.

JUSTICE B.V. NAGARATHNA: No, *Minerva Mills* is subsequent.

CHIEF JUSTICE D. Y. CHANDRACHUD: And look at that consequences of...

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TUSHAR MEHTA: Correct. But *Kesavananda Bharati* is thirteen judges, My Lords.

CHIEF JUSTICE D. Y. CHANDRACHUD: Another thing, Mr. Solicitor, look at the consequence of... suppose you were to accept that submission, that 31C is not in the statute book today. Right? All that it means is what? What is the consequence? That Parliament will have to bring about an amendment, to reinstate the original 31C, which has been upheld by *Kesavananda Bharati*, which is what you are suggesting.

TUSHAR MEHTA: It's not that. Your Lordship knows. On the practical grounds, it's not ...

CHIEF JUSTICE D. Y. CHANDRACHUD: No, no. We are not on the practical aspect, we are on the constitutional aspect. This does not prevent Parliament. Parliament can just revive and restore 31C...

TUSHAR MEHTA: Let us My Lord, confer and respond. But academically...

CHIEF JUSTICE D. Y. CHANDRACHUD: Only a question of the process. Following it again.

TUSHAR MEHTA: Academically, My Lord, we can raise five more grounds. Would the Hon'ble nine judges bench invest time on something which is not referred. But My Lord, we'll respond, My Lord, after...

CHIEF JUSTICE D. Y. CHANDRACHUD: But it's part of the whole, both the questions.

TUSHAR MEHTA: According to us, it is not My Lord. I can again persuade Your Lordships that 31C is not, very consciously referred to the larger bench.

CHIEF JUSTICE D. Y. CHANDRACHUD: All right. What we will do is this. Now they are virtually completing their arguments on 39(b). Now Ms. Babbar is arguing. One or two more Counsel, five minutes, we are giving them. After they have concluded that, you address us on, of course, their submission on 39(b) and please tell us, argue on why the 31C issue does not arise before the nine judge bench. Not on merits. Not on merits.

TUSHAR MEHTA: I already did that, My Lord, and Your Lordships were, according to me, persuaded.

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CHIEF JUSTICE D. Y. CHANDRACHUD: We can take ten minutes. You can argue that.

JUSTICE B. V. NAGARATHNA: No, in other words, what is the consequence of the judgment in *Minerva Mills*? On 31C?

TUSHAR MEHTA: That is not really the question, My Lord, which is troubling the, My Lord, the Chief Justice.

CHIEF JUSTICE D. Y. CHANDRACHUD: I don't know why there is some little reluctance.

TUSHAR MEHTA: There is no reluctance on our part. That means, My Lord few more weeks, that's the only...

CHIEF JUSTICE D. Y. CHANDRACHUD: Not few weeks. Few more weeks. Two hours on their side of.

GOPAL SANKARANARAYANAN: That reference came 27 years ago. Now, the judgment which have come after that have clearly put the reference to rest, tangentially without having taken up the question, but clearly it's been answered.

CHIEF JUSTICE D. Y. CHANDRACHUD: Then tell us that.

GOPAL SANKARANARAYANAN: *NJAC* judgment covers it fully.

TUSHAR MEHTA: Yes.

CHIEF JUSTICE D. Y. CHANDRACHUD: But then, if you are right on that, please tell us that, so that when a bench of nine puts its finality, there's a certain degree of finality in the law which is good for the nation.

TUSHAR MEHTA: We'll, My Lord, I'll first address on that. But *NJAC*, in my note, which I read yesterday, I didn't read it. I have quoted *NJAC* paragraph.

CHIEF JUSTICE D. Y. CHANDRACHUD: That is what we are saying. Please show that, because then there is some degree of finality for that.

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TUSHAR MEHTA: There is no reluctance My Lord, kindly appreciate. There is no reluctance. Before a larger bench that too, presided over by the Hon'ble Chief Justice of India. No, technical please. Referred, not referred, would arise, can be raised.

CHIEF JUSTICE D. Y. CHANDRACHUD: As we told even. Mr. Andhyarujina yesterday, we stopped him in the... We said, look we are not going to reconsider the validity of 31C based on *Coelho* because that is attained finality in *Kesavananda Bharati*. We want that to stand. We don't want to open up the canvas because in constitutional matters just needlessly opening up the canvas can cause great constitutional uncertainty. We'll be the last to do that.

GOPAL SANKARANARAYANAN: Whenever your constitution comes closer to 13 judges, it makes all of us nervous. We'd like to keep that as...

TUSHAR MEHTA: 9 is not very far from 13. That's what he wants.

RAKESH DWIVEDI: [UNCLEAR] some reference to 13. Have to be 15.

CHIEF JUSTICE D. Y. CHANDRACHUD: There is a great deal to be said in the sense of stability and continuance of the same position of law. No position of law is perfect. Stability in a nation is very important, even in the constitutional fabric. So, yes, we'll hear Ms. Babbar now. She'll conclude.

TUSHAR MEHTA: But we will address on.

CHIEF JUSTICE D. Y. CHANDRACHUD: And address us on why the 31C does not arise anymore.

TUSHAR MEHTA: And with a caveat, with a clarification, there is no reluctance to answer that question. Genuinely, it doesn't arise. That's the....

JUSTICE HRISHIKESH ROY: All that will be now necessary is actually, we took away the sail yesterday from the argument that was to be advanced. So, all that will be necessary now is, to take into account that this argument is also being advanced. So, Ms. Babbar is on her legs. She will have to tighten her belts, raise the bar a little bit, like they do in high jump. And then also take in the argument of 31C.

1 **SAMEER PAREKH:** We'll do that.

2

3 **UTTARA BABBAR:** Yes, Your Lordships. We would request...

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now you've shown us both, Justice Krishna
6 Iyer's and Justice Untwalia's...

7

8 **UTTARA BABBAR:** And the fact arguments of Mr. Sen were rejected solely on the strength
9 of the judgment of Justice Krishna Iyer.

10

11 **TUSHAR MEHTA:** In that case, let them finish everything and we argue everything. Rather
12 than doing it..

13

14 **UTTARA BABBAR :** We should have the right to open, as far as 31C is concerned.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Zal is there.

17

18 **ZAL ANDHYARUJINA:** I am here My Lord. I would prefer this matter of great importance
19 to argue in person. I'm very sorry My Lord, I....

20

21 **JUSTICE HRISHIKESH ROY:** The place that you are sitting in...

22

23 **ZAL ANDHYARUJINA:** Yes, Your Lord.

24

25 **JUSTICE HRISHIKESH ROY:** Is it the same chamber that your illustrious father used to
26 sit?

27

28 **ZAL ANDHYARUJINA:** Lord, in fact, the very spot that I'm sitting in, is that spot. So, Your
29 Lordship is absolutely right.

30

31 **JUSTICE HRISHIKESH ROY:** Very important and significant chair, if I might say so, in
32 the judicial [UNCLEAR]

33

34 **ZAL ANDHYARUJINA:** I'm deeply honoured by Your Lordship saying that.

35

36 **TUSHAR MEHTA:** Could be more effective if he addresses from that chair.

37

1 **ZAL ANDHYARUJINA:** I leave it up to Your Lordships, but I am actually heartened to hear
2 that Your Lordships will hear me on the 31C point. My only request would be, since the matter
3 is of such importance, I would prefer to be there physically. I think the schedule would permit
4 that I will be there tomorrow morning.

5
6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** You have fully seized the matter. We've heard
7 the most significant matters online. There's no difficulty in this. If you feel that we have been
8 handicapped or you have been handicapped, we'll give you a little accommodation. No
9 problem.

10
11 **ZAL ANDHYARUJINA:** I'm deeply obliged, Your Lordships. I'll be there first thing in the
12 morning for this argument, if that suits Your Lordships.

13
14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We'll see. As soon as they conclude, you be
15 mentally prepared that we'll start with 31C once Uttara finishes.

16
17 **TUSHAR MEHTA:** 39(b) first and instead...

18
19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Would you like to respond to 39(b) first?

20
21 **TUSHAR MEHTA:** All of us are, *ad idem* is, let them argue everything, we also respond in
22 everything.

23
24 **CHIEF JUSTICE D. Y. CHANDRACHUD:** All right, fair enough, that's better. Yes,
25 anything else now?

26
27 **UTTARA BABBAR:** Yes, just a few short...

28
29 **TUSHAR MEHTA:** But we'll have to update our notes also suitably.

30
31 **GOPAL SHANKARANARAYANAN:** Is it only on orders?

32
33 **ZAL ANDHYARUJINA:** May I just enquire, My Lord, 31C will be after the 39(b) arguments
34 conclude?

35
36 **TUSHAR MEHTA:** No, that would be too piecemeal.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We'll start immediately after the next two
2 lawyers are done. We'll hear you immediately. We'll start with that and... and then Sameer is
3 also there. Sameer Parekh is also there.

4
5 **ZAL ANDHYARUJINA:** Very well.

6
7 **SAMEER PAREKH:** We'll do it. We deleted that 31C arguments from the written notes also.
8 We'll just have to make that adjustment and....

9
10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** In the electronic world, you always leave
11 footprints behind. Yes?

12
13 **UTTARA BABBAR:** I'll just summarize. If Your Lordships please take Article 39, the bare
14 Act.

15
16 **TUSHAR MEHTA:** I am sorry. My yesterday's note, if Your Lordships can just, it's Volume
17 II B, short note on behalf of SG.

18
19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** On 31C is it?

20
21 **TUSHAR MEHTA:** Just have a look at My Lord.

22
23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The moment she finishes, then Zal starts. We'll
24 ask him to read it out.

25
26 **TUSHAR MEHTA:** Please. I'm sorry.

27
28 **UTTARA BABBAR:** May I just read 39(b) once? Article 39(b). May I read Your Lordship?
29 The state shall in particular, direct its policy towards securing (b) that the ownership and
30 control of the material resources of the community are so distributed as best to subserve the
31 common good. So, one emphasis is on the phrase "of the community." Material resources of
32 whom? Of the community. And the second phrase of importance, or word, is the word
33 'distributed'. So, the word, 'community' have to be read as being distinct from of the individual.
34 Otherwise the word 'community' has no meaning. It's rendered absolutely redundant. And are
35 so distributed. The emphasis of the entire provision is on distribution. Distributing what? The
36 resources of the community. If Your Lordship now sees page 840 of Volume IVA, the Black's
37 Law dictionary definition of distribution. Because distribution has always been given an

1 interpretation as distinct from acquisition. Distribution is the giving away of something as
2 opposed to acquiring, vesting of something in someone. 840 of Volume IVA.

3

4 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Ms. Babbar we are interpreting a
5 Constitutional provision.

6

7 **UTTARA BABBAR:** Yes.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And the well settled principle is that
10 Constitutional provision has never interpreted like a statute, let's, like an Income Tax statute.
11 You interpret a Constitutional provision in a very broad sweep. And "of the community" you
12 are saying is distinct from the 'individual.'

13

14 **UTTARA BABBAR:** Yes.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now "of the community" is also capable of a
17 broader Constitutional understanding. Something which bears upon the welfare of the
18 community. Of the community. You don't have to go as far as Justice Krishna Iyer's you know
19 very, very Marxist or Socialistic interpretation of that expression. You don't have to go as far
20 as that. But of the community, even taking a very middle path, can mean something in which
21 the community is interested or which has a bearing on the welfare of the community

22

23 **UTTARA BABBAR:** At the time the Constitution came into force there was also Article 31,
24 which recognized the right of right to property of an individual as a fundamental right. So,
25 39(b) is part of the original Constitution. So, when the origin of the Constitution is with 39(b)
26 in Part IV of the Constitution and Article 31, which is removed subsequently in the 44th
27 Amendment. So Article 31, at the point of time, this was framed by our Constitution makers,
28 they were cognizant of the fact that Article 31 existed and recognized a fundamental right to
29 property of the individual. So, what I am saying is, if you have to today read as what was the
30 intention of the... and the problem is Your Lordships, that there is really no material, there
31 are no judgments except Justice Krishna Iyer's and those that follow Justice Krishna Iyer with
32 respect to Article 39(b). That's the handicap.

33

34 **CHIEF JUSTICE D. Y. CHANDRACHUD:** At the jurisprudential level, this case does
35 require a lot of explanation by the court and what do we understand by the concept of
36 resources for the purpose of the Directive Principles. As I said you have two extreme views.
37 The capitalist view, which regards all resources individualistic. You have the socialistic view

1 which regards all resources as of the community and you have the Gandhian ideals which are
2 imbued in Part IV of the Constitution by which we hold our resources as a matter of trust for
3 others. There is a nuance, which we'll have to, which has no case in law to it. We'll have to do
4 it.

5

6 **UTTARA BABBAR:** Yes. The limited points that I am making Your Lordships are, one, the
7 fact that there are different vesting provisions. 31A exists. So, all the points that I'm making is
8 just this, that the vesting does not happen in terms of 39(b), that's the limited point. So, it
9 doesn't take away from the fact that if the State feels... deems it fit...

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Absolutely right. 39(b) is not a provision for
12 either acquisition of a [UNCLEAR].

13

14 **UTTARA BABBAR:** Yes, that's. The limited point. That's the limited point.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It's only a goal.

17

18 **UTTARA BABBAR:** Secondly, if it does not deal with acquisition, then surely, there can't be
19 a deemed acquisition under 39(b). So, 39(b) as a condition precedent would require an
20 acquisition.

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** [INAUDIBLE]

23

24 **UTTARA BABBAR:** Lordships, that would be very dangerous, because that would amount
25 to an acquisition in terms of 39(b), when 39(b) presupposes that there is already a preexisting
26 acquisition and all that 39(b) does is, it distributes. Distributes so as best to subserve the
27 common good. That is the obligation and the goal in terms of 39(b).

28

29 **JUSTICE B. V. NAGARATHNA:** In order to distribute, acquisition may be necessary.

30

31 **UTTARA BABBAR:** Yes, but that can't happen under 39(b).

32

33 **JUSTICE B. V. NAGARATHNA:** As a first step, you should do that.

34

35 **UTTARA BABBAR:** Absolutely. So, only limited point that I'm making is that that
36 acquisition does not happen in terms of 39(b). There is already... that's outside 39(b). And
37 secondly, how can you distribute something which is not owned? How can you distribute

1 something which does not belong to you? So, if Your Lordships don't want... I mean, want me
2 to skip the definition, I'll just make a... the Page reference is page 840 of Volume IVA. I'll just
3 hand over the... We have filed these, Your Lordships, and also emailed it, but there is some
4 difficulty with some...

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The point you are making is a very substantial
7 point. No doubt about it. Absolutely. There's a very fundamental and profound point which
8 you have made. You have to deal with it properly.

9

10 **UTTARA BABBAR:** Yes, Lordships. I may just hand over. There is a certain aspect.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** You are raising it, and you've raised it very
13 coherently and very succinctly.

14

15 **UTTARA BABBAR:** I'm so grateful. I just have one last one document, which is already a
16 part of the compilation, but this is a PDF version. It's easier to read. So, I've put this together
17 along with my written submissions. It is been e-filed, but....

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Just tell us what it is. We'll read it later, but
20 tell us what it is.

21

22 **UTTARA BABBAR:** There are certain aspects. There was an amendment proposed to the
23 draft constitution.

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Oh, you are on the Constituent Assembly
26 debate?

27

28 **UTTARA BABBAR:** Yes. Yes, Your Lordship.

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Alright. Because that's something yesterday we
31 were saying... And Jamshed was also saying...

32

33 **UTTARA BABBAR:** 13. 13. This is the start of the volume - Constituent Assembly debates.
34 And this particular debate is of 22 November 1948.

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

37

1 **UTTARA BABBAR:** So, if Your Lordship sees Page 21 of this. Come to Page 21. The middle
2 of the page, where it says, 'Mr. Vice President', after 'Naziruddin Ahmed.' 'Mr. Vice President',
3 then 885. 'Professor K. T. Shah'. So, this is the Amendment number 885, proposed by
4 Professor K.T. Shah. Professor K.T. Shah, "Mr. Vice President Sir, I beg to move, that for
5 Clause (2) of Article 31 the following be substituted. Clause (2) of 31 is identical with 39(b).
6 We have put the clause of the draft constitution, 31B also in the compilation, but Your
7 Lordships can take it from me - it from it's identical with 39(b).

8

9 **JUSTICE SUDHANSHU DHULIA:** It's quoted.

10

11 **JUSTICE B. V. NAGARATHNA:** It's there. It's quoted there.

12

13 **JUSTICE SUDHANSHU DHULIA:** Quoted just below.

14

15 **UTTARA BABBAR:** Yes.

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That is a substitution which you wanted.
18 Substitution.

19

20 **UTTARA BABBAR:** And secondly, this is referred to as Article 31(2). And that's the same
21 as present 39(b). The proposed amendment is what is now quoted, that for Clause (2) of Article
22 31, the following be substituted that, "the ownership, control and management of the natural
23 resources of the country in the shape of mines and mineral wealth, forests, rivers and flowing
24 waters, as well as in the shape of the seas along the coast of the country shall be vested in, and
25 belong to the country collectively, and shall be exploited and developed, on behalf of the
26 community by the State as represented by the Central or Provincial Governments, or local
27 governing authority, or statutory corporation, as may be provided for, in each case, by Act of
28 Parliament." So, one significant feature is, that it specifies the kinds of natural resources, and
29 the second significant feature is that, it provides that these resources shall be vested in, rather
30 than using the word "distribute", this proposed amendment brings in the phrase "vested in
31 and belong to" the country, collectively. May I just read that again, Your Lordships, at page,
32 the third line of the amendment, uses the phrase, "shall be vested in and belong to". And if
33 Your Lordships comes to the third line from the bottom. I suggest therefore, that it should be
34 substituted by what I have just read.

35

36 **JUSTICE MANOJ MISRA:** Read the previous part also. "Sir, the original clause..."

37

1 **UTTARA BABBAR:** Sir, the original clause, for which I propose this one in substitution,
2 stands as follows, Subclause (2), "that the ownership and control of the material resources of
3 the community are so distributed as best to subserve the common good." I'm so grateful. That's
4 verbatim, identical to 39(b). And then if Your Lordships comes to the third paragraph from
5 the bottom. "I suggest, therefore, that it should be substituted by what I have just read out
6 where, whereby the ownership, control and management of the natural resources shall be
7 vested in the community collectively, and shall be exploited, developed and worked by the
8 community as represented by the Central or Provincial or local governments, or by any
9 statutory corporations, that may have been created for the purpose. I think there can be no
10 dispute on this proposition that, as regards to natural resources that I have tried to described,
11 no human being has lent any value to those resources by his or her own labour." Your
12 Lordships may turn to the next page, page 22. Again the third last paragraph. "It is high time,
13 therefore...." page 22, third last paragraph. "It is high time, therefore, that in this Constitution,
14 we lay down very categorically, that the ultimate ownership and direct management, conduct
15 and development of these resources can only be in the hands of the State or the agents of the
16 State, the representatives of the State, the creatures of the State, like provinces, municipalities
17 or statutory corporations.'

18
19 And thereafter, page 31, at the bottom of the page 31. Sri Jadubans Sahaya, is the member
20 who's addressing the Constituent Assembly. And on the next page, page 32, this is what he
21 says about this clause, fourth line from the top. "I most respectfully submit, submit that in this
22 chapter, Article 31, that is the same as 39 is a pivot around which everything will revolve.
23 Article 31, Clause 2, is the most important feature, for which I shall most respectfully draw the
24 attention of the House. But it is not possible for me, I'm sorry, to support the amendment
25 moved by my friend Professor Shah, outright, because I respectfully submit, it is loosely
26 worded. But I may state for the information of the house, so far as a principle which underlies
27 his amendment are concerned, I support them. The spirit of it also, I support. I fail to see why
28 this august Assembly, which meets only once in every country, is not keen to the extent of
29 clearly and boldly incorporating in this Article, that the means of production and the natural
30 or material resources of the country shall belong to the community and through it, to the
31 State." I can understand this and the last line of that paragraph. I cannot understand, how it
32 is, that the Congress, the predominantly majority party here is not pressing this thing. And
33 ultimately, at page 33, bottom of the page. This is Dr. Ambedkar. Just that last paragraph on
34 page 33. "With regard to his other amendment..." he's referring to Mr. K. T. Shah's
35 Amendment, namely substitution, page 33, last paragraph.

36

37 **JUSTICE J.B. PARDIWALA:** Yes, that's important.

1

2 **UTTARA BABBAR:** Yes. "With regard to his other amendments, on any substitution of his
3 own clauses for Sub-Clauses (2) and (3) of Article 31, all I want to say is this, that I would have
4 been quite prepared to consider the amendment of Professor Shah if he had shown, that what
5 he intended to do by the substitution of his own clauses was not possible to be done under the
6 language as it stands." So, if I may just pause here. Dr Ambedkar is clearly referring to.....

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, what Professor K T Shah wanted to do by
9 amendment is already there in this.

10

11 **UTTARA BABBAR:** Yes, and he's clearly referring, therefore, to the, if I just read the
12 complete portion of what he says. "was not possible to be done under the language as it stands.
13 So far as I am able to see I think the language has been used in the draft in a more extensive
14 language which also includes the particular propositions which have been moved by Professor
15 Shah. And I therefore do not see the necessity for substituting these limited particular clauses.
16 For the clauses which have been drafted in general language deliberately for a set purpose, I
17 therefore oppose his Second and Third Amendments." So, the first line at page 34, "for
18 substituting these limited particular clauses..." So, here he's clearly referring to that part of the
19 Amendment which specifies the resources, which refers to mines and mineral wealth, forests,
20 rivers and seas. That's the part which he does not really agree to ,because he says that the
21 original draft is fair, is more broad, and let's leave it at that.

22

23 **JUSTICE B. V. NAGARATHNA:** What was sought was only with regard to natural
24 resources.

25

26 **UTTARA BABBAR:** Yes.

27

28 **JUSTICE B. V. NAGARATHNA:** But they said it's more expansive.

29

30 **UTTARA BABBAR:** Yes. The draft as such. This is only discussion. There is no discussion
31 really on the vesting, the clause on vesting, which was also proposed by him. There is no
32 discussion, at least here, as far as I can see. So therefore, the fact of the matter is that there
33 was an amendment which inter-alia proposed an amendment which incorporated the word
34 'vesting' and which was not adopted. Therefore, today the word 'distribution' has to be given
35 its meaning. There cannot be vesting under Article 39(b). 39(b) would only come into the
36 picture after the property has vested in the State, and the State is at the stage of distributing
37 these assets. That is the only point of time where Article 39(b) can be invoked and cannot be

1 invoked in support of legislation that are vesting property in the State from private bodies or
2 where the property is being acquired. That's all Your Lordships. I'm so grateful. Lordships
3 before I part, in the tradition of the senior Mr. Andhyarujina, I just like to thank Daisy Hannah,
4 Angela Sen and Rayana Mukherji for all the contribution. Grateful.

5

6 **T. SRINIVASA MURTHY:** May I please Your Lordships? I appear for individual house
7 owners whose houses are subject to standard rent provisions. And for the... yes My Lord. There
8 are... My Lord, the Chief Justice has very clearly placed the bar which Your Lordships are
9 going to consider. My first respectful submission is that if we look at Article 39(b) from the
10 point of view of Article 31C, we are going to get a distorted view. One reason of course, is what
11 my learned friend said, that at the beginning of the Constitution, 31C was not there. So, Your
12 Lordships My Lord, if Your Lordships were to look there is, of course, a link between 31C and
13 39(b). But if that is going to be the starting point of inquiry....

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 39(b) cannot be interpreted from the lens of
16 31C.

17

18 **T. SRINIVASA MURTHY:** And My Lord this is relevant because all the nationalization
19 cases that Your Lordships have dealt with in the past, those are all very extreme cases, where,
20 there's a complete taking of certain establishments, industries, et cetera. And then, in that
21 context justification is given by the State, and Your Lordships will approve it. But at the dawn
22 of the Constitution all these provisions were not there. And like my learned friend pointed out
23 Article 31, Article 19(1)(f) were coexisting with Article 39(b). So, if that is the situation, and the
24 second point would be that Article 39(b) has never been construed as a vesting of legislative
25 power. There's a five- judge bench decision of Your Lordships saying very clearly that, if at all,
26 we're talking about acquisition or requisition, et cetera, there are very clear entries in the
27 Constitution, that power is always there. So, in the context of acquisition and requisition, Entry
28 42 of List III, covers the area. In *Ishwari Khetan's* case, Your Lordships said that the State
29 doesn't really have to bother too much, subject to the definitions of industry, et cetera. The
30 power is always there. And even independent of that, the power of Eminent Domain is a
31 concept which is so very well known in this Constitution that there is no doubt that if the
32 Government of the day wants to take over any property, any property, whatsoever, there is
33 nothing really fettering them except Part III, Legislative Competence, and not all the usual
34 restrictions. So, 39(b) would, therefore, not be seen as the source for the Government of the
35 Parliament to do certain things. There is no doubt about this, throughout the interpretations
36 of Your Lordships.

37

1 **JUSTICE B. V. NAGARATHNA:** Directive Principle which is fundamental in the
2 governance of the country.

3

4 **T. SRINIVASA MURTHY:** I'm grateful.

5

6 **JUSTICE B. V. NAGARATHNA:** It is a principle.

7

8 **T. SRINIVASA MURTHY:** It is a principle. It is a purpose.

9

10 **JUSTICE B. V. NAGARATHNA:** It's a power.

11

12 **T. SRINIVASA MURTHY:** That's right, which is why, My Lord, the Chief Justice said, that
13 if any of the laws, forget only 39(b), My Lord, any Directive Principle of State policy, if it is
14 sought to be given effect to, of course, it's a reasonable thing to do, provided, always the nexus,
15 et cetera, are clearly laid out. So, we also cannot put it so high that private property is off-
16 bounds at all points of time. That cannot be, My Lord. But for that, 39(b) interpretation is not
17 going to be the starting point or even the ending point. 39(b) is a purpose. For achieving that
18 purpose, there are other powers that the Government always has... always has had. Exercise
19 those powers and then see, My Lord, whether 39(b) is one of the objectives that is sought to
20 be fulfilled. And why stop only with 39(b)? There are other Directive Principles also. So, in this
21 context, how exactly are we supposed to look at a Directive Principle of State policy? What is
22 the importance to be given to it? What is the primacy to be given to it? And what happens
23 when a Directive Principle of State policy collides with a fundamental right? And My Lord,
24 there is a wealth of jurisprudence of Your Lordships, on this issue, that something like a
25 Directive Principle or a fundamental right part. They should never be so construed as to
26 conflict with each other. They should be construed harmoniously. And I can do no better than
27 to place my proposition in *Minerva Mills*. My Lord, the Chief Justice, Chandrachud, had
28 very categorically placed the contours of the debate. And if we look at Article 39 from that
29 perspective, then much of the apprehension that the Government would like us to believe, that
30 if there is an interference of 39(b), we will lose a lot of ability to do certain things... My Lord,
31 all that could be washed away. So, may I very quickly place paragraph 56 and 57 in *Minerva*
32 *Mills* Volume V, page 2050, at page 2079. There are two paragraphs which I really need to
33 place before you, Your Lordships, so that just to provide context to my submission, that please
34 do not look at 39(b) from the point of view of 31C. There is another much more primary, much
35 more primal, much more important way to look at it. And that, My Lord, is crystallized in this
36 judgment. Para 56. May I place it? May I? Sorry. It's page 2079 in Volume V. May I, please?

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

2

3 **T. SRINIVASA MURTHY:** Para 56 - The significance of the perception that Parts III and
4 IV together, constitute the core of commitment to social revolution and they together are the
5 conscious of the Constitution has to be traced to a deep understanding of the scheme of the
6 Indian Constitution. Granville Austin's observation brings out a true position that Parts III
7 and IV are like two wheels of a chariot, one no less important than the other. You snap one
8 and the other will lose its efficacy. They are like a twin formula for achieving the social
9 revolution, which is the ideal, which the visionary founders of the Constitution set before
10 themselves. In other words, the Indian Constitution is founded on the bedrock of the balance
11 between Parts III and IV. To give absolute primacy to one over the other is to disturb the
12 harmony of the Constitution. This harmony and balance between fundamental rights are, and
13 Directive Principles is an essential feature of the basic structure of the Constitution. And then,
14 My Lord, the Chief Justice expounds on this. This is not mere semantics. The edifice of our
15 Constitution is built upon the concepts crystallized in the preamble. We resolve to constitute
16 ourselves into a socialist state which carried with it the obligation, to secure to our people
17 justice, social, economic and political. We therefore, put Part IV in our Constitution,
18 containing Directive Principles of state policy, which specified a socialist goal to be achieved.
19 We promise to our people, a democratic polity which carries with it, the obligation of securing
20 to the people liberty of thought, expression, belief, faith and worship, equality of status, and
21 of opportunity and the assurance that the dignity of the individual will at all cost, be preserved.
22 We therefore, put Part III in our Constitution, conferring those rights on the people. Those
23 rights are not an end in themselves, but are the means to an ends. The ends is specified in Part
24 IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions, and the
25 Constitution provides that enforcement of some of them may, in stated uncommon
26 circumstances, be suspended. And My Lord, here is the pivotal part. But just as the rights
27 conferred by Part III would be without a radar and a compass, if they were not geared to an
28 ideal, in the same manner, the attainment of the ideal set out in Part IV, would become a
29 pretence of tyranny if the price to be paid for achieving that ideal, is human freedoms. One of
30 the faiths of our founding fathers, was a purity of means. Indeed, under our law, even a dacoit,
31 who has committed a murder, cannot be put to death in the exercise of right to self-defence,
32 after he has made good his escape. So great is the insistence of civilized laws on the purity of
33 means. The goals set out in Part IV have therefore, to be achieved without the abrogation of
34 the means provided by Part III. It is in this sense that Parts III and IV together constitute the
35 core of our Constitution, and combine to form its conscience. Anything that destroys the
36 balance between the two parts, will *ipso facto* destroy an essential element of the basic
37 structure of our constitution.' So now, if we look at 31C, which is essentially a power in the

1 arsenal of the State to acquire, to completely take away, then My Lord, Article 39(b) looks like
2 a bulldozer. But Article 39(b), Your Lordships have always felt is a control on the power of the
3 Government. In the natural resources case, the Presidential reference, Your Lordships have
4 explicitly said so, that 39(b) is a limitation on power. But if you look at it from 31C, then it
5 looks like it is a very formidable power. But if the matter is looked at according to paragraph
6 56 and 57, My Lord, these observations have also been reaffirmed by the nine judges bench in
7 **Coelho** case. I'll place that paragraph before Your Lordship. So, there is no doubt, My Lord,
8 that this balance between Part III and Part IV, is a part of the basic structure. If that is so My
9 Lord, then Article 31C should not be definitive or determinative of the way in which 39(b) is
10 to be construed, firstly. Secondly, My Lord, Article 31C, Your Lordships are very well aware is
11 a very peculiar Article. It is in Part III of the Constitution dealing with fundamental rights, but
12 actually it is a Trojan horse. It takes away the fundamental rights. So, how can that provision
13 be part of a balance in equation between Part III and Part IV? It will lead to a distorted vision,
14 which is why Mr. Sen's argument, in **Sanjeev Coke** was very clear, that when you look at
15 39(b), distribution presupposes something to distribute. That something to distribute, there
16 is no fetter on the power of the Government. Why the apprehension is coming is because, 31C
17 provides an immunity against the challenge on Article 14 and 19, which the Government of the
18 day does not want to answer, of any day. And therefore, from this perspective, if you look at
19 39(b), we will come to a wrong result. So, with that, may I immediately take Your Lordships
20 to, what is the balancing that Article 39, in fact, talks about?

21
22 We'll keep the fundamental rights on one side. But 39(b), in my respectful submission, is in
23 continuation and part of, paired with, coupled with Article 38. One cannot be read without the
24 other. And the use of the word, "in particular" in Article 39 to some extent, My Lord, helps my
25 argument. But more importantly, the manner in which is Justice Chandrachud has, the
26 Hon'ble the Chief Justice had interpreted it, 38 provides the bedrock, and 39 provides a further
27 mechanism to give effect to it.

28
29 Please see Article 38 before we get into Article 39. Now Article 37. Lordships have seen, that
30 they are not enforceable. But we have come too far away. They are very important, Directive
31 Principles of state policy. We should not dilute the importance of that. Question is to what
32 extent does it justify a certain exercise of power. And if an immunity is sought to be claimed,
33 whether Your Lordships will permit it or not? So, Article 38, My Lord, the language of Article
34 38, there were two amendments. The State shall strive to promote the welfare of the people by
35 securing and protecting, as effectively as it may, a social order in which justice, social,
36 economic and political shall inform all institutions in national life. Then My Lord Subclause
37 (2). The State shall in particular strive to minimize the inequalities in income and endeavour

1 to eliminate inequalities in status, facilities and opportunities not only among individuals but
2 also amongst groups of people residing in different areas, or engaged in different vocations.
3 My Lord here, let me just emphasize.

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** This came by the 44th Amendment.

6

7 **T. SRINIVASA MURTHY:** That's right. Absolutely. Now, what is even the 44th Amendment
8 focusing on? It is equality of status, facilities and opportunity. It is not an equality of result. If
9 I may explain this point. Every person, every citizen should have an equal opportunity, to lead
10 a better life. Provision of that opportunity is not the guarantee of an equality of result.
11 Everybody who works hard is not going to succeed in life. Everybody who is, who's got money
12 may not get a certain commodity, whether he likes it or not. There is no equality of result which
13 is guaranteed by Article 38. Now, this is very vital to understand Article 39.

14

15 **JUSTICE SUDHANSHU DHULIA:** There is one important...

16

17 **T. SRINIVASA MURTHY:** Yes.

18

19 **JUSTICE SUDHANSHU DHULIA:** As Chief was pointing out yesterday, 38 is this big, 39
20 is smaller.

21

22 **T. SRINIVASA MURTHY:** I'm obliged.

23

24 **JUSTICE SUDHANSHU DHULIA:** Difference is 38 is not protected by 31C.

25

26 **T. SRINIVASA MURTHY:** That's right.

27

28 **JUSTICE SUDHANSHU DHULIA:** As they would like us to read 31C.

29

30 **T. SRINIVASA MURTHY:** That's right.

31

32 **JUSTICE SUDHANSHU DHULIA:** That is the major difference.

33

34 **T. SRINIVASA MURTHY:** Yes, and that is exactly the canvas of this debate, that the
35 Parliament or the State Legislatures want to provide...

36

37 **JUSTICE SUDHANSHU DHULIA:** 39 only. With 39, 38 will not get that protection.

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T. SRINIVASA MURTHY: My respective submission is that 39 is in species with 38. So...

JUSTICE B. V. NAGARATHNA: 39 is illustrative of 38.

T. SRINIVASA MURTHY: I'm obliged. So, that becomes very clear immediately in Article 39, the State shall, in particular direct its policy towards securing. Now My Lord if there was no umbilical cord between these two, this word "in particular", this phrase "in particular" is an unnecessary addition here. Because any... perhaps as non-statable proposition that Parliament or Legislature can make a law which goes contrary to what is written Article 39. There will be no law which will be passed to....

CHIEF JUSTICE D. Y. CHANDRACHUD: 39 indicates that the State may follow certain other policy goals, but these have been emphasized by the Constitution.

T. SRINIVASA MURTHY: I'm obliged. And the larger policy goals are in 38. Now, this is where My Lord Justice Dhulia's question.

CHIEF JUSTICE D. Y. CHANDRACHUD: Beyond 38. 38 also may not be. 38 was [UNCLEAR] If it says an order in which, social order in which justice, social, economic and political, shall inform all the institutions of [UNCLEAR].

T. SRINIVASA MURTHY: The argument is that if equality of status, equality of facility, equality of opportunity is the goal, it is not equality of result, then you are empowering the dignity of people by saying that I will create the circumstances in which you can do your best, but beyond that, don't expect a result from the Government. And that Article 39(b) is exactly towards that, that the material resources of the community are so distributed, so as to subserve the common good. So, if Your Lordships were to interpret this in a manner that enhances the dignity of individuals, then the meaning would be, that acquisition or taking away a right..., just as a footnote here, I am, agreed by the rent control measures. There, it is not my property that is being taken away. There is a restriction put on my right to charge a rent. That restriction says that you can't charge more than the standard rent. Now, My Lord, the Chief Justice had mentioned that a right to a property, like, for instance, the pen or this book, this is my right. But the Havelian analysis says that my right to property is not just my right to this thing. Along with it, there are a number of other rights which are built into it. My right to preclude somebody else from it, my right to charge, the right to capital, my right to charge for this particular thing, these are all the various rights, and they're already protected to a significant

1 extent by the Contract Act or the Transfer of Property Act. There is nothing very spectacularly
2 unique about my house rent stipulation. It is there in every lease. It is there in every contract.
3 Now, the question is that when Your Lordships are interpreting a statute, which is taking away
4 a particular species of rights, how does that get construed in the context of acquisition? Non-
5 starter. How does it get construed in the context of taking away a right? There has to be My
6 Lord some connection between, what is being taken away, to who is it being given and in what
7 manner is it being given. That is the answer to My Lord's question, that Article 39(b) in my
8 respectful submission actually only talks about how the Government of the day can give effect
9 to anything that it wants to do, any policy that it wants to do. So throughout the 80's, 70's,
10 90's, Your Lordships have seen a spate of nationalization judgments. In the past decade or so,
11 hardly any nationalization of a very big scale happens. Post 1995, Your Lordships have seen is
12 more and more Private-Public partnership. Now, the way in which the Government should be
13 able to do some things in a given socio-economic condition, cannot be circumscribed by either
14 the Constitution or by Your Lordships. The free play in the joint that the Government may
15 need in today's condition, may not require nationalization... May require Public-Private
16 partnership. Now, this creates a number of sub issues- "To whom are we going to give these
17 resources? How are we going to give these resources?" So Article 39(b) talks about, 'how'. The
18 ownership and control of material resources of the community, such as airwaves, such as gas
19 allocations, such as private forest, such as mines and minerals. These are all... nobody can
20 claim immunity from those being taken away on the basis of some fundamental right to
21 property. But once they belong to the State in whatever way, how they are going to be given is
22 Article 39(b). And, it should not result in crony capitalism is Article 39(c). So, the free play in
23 the joint in Article 3(b), which is how the Parliament or the State wants to give effect to a
24 particular policy, by bringing in, for instance, auctions. Your Lordships will deal with that
25 issue. In the natural resources, the issue was clearly that, "Should we go for auction or are
26 there other ways in which the Government can give away what are these material resources of
27 the community?" Your Lordship said, "It's a case-by-case, very broad kind of a canvas on which
28 the State has free play. You cannot prescribe only auction as the way, because that would be
29 fettering it. Now, My lord, Your Lordships considered Article 39(b) in the 'natural resources'
30 reference. So Article 39(b), is only this. It is only a leeway given to the Government to do a
31 thing in a particular way. Article 39(c) says that, when you do that, it should not result in
32 concentration of wealth. Crony capitalism. That's all that Article 39(b) does. Anything more
33 being read into Article 39(b), is the burden which it doesn't need to carry. And the final
34 respectful submission is only this, that please see the effect in this case. In the *Malpe*
35 Judgment, Your Lordships categorically held the predecessor Act, 1947 Act to be violative of
36 Article 14. There was no plea taken at that time that Article 31C is applicable. It could have
37 been taken. They did not. Your Lordships found that Article 14 is violated. The State made a

1 concession that gives me a... We are actually going to redraw the law, and we'll take into
2 account this judgment, obviously. And also the model law which is being discussed -The
3 Housing Ministers. What they did thereafter was, they came out with the '99 law. Nothing but
4 old wine in a new bottle. The same degree of toxicity which was found unfit to be consumed
5 by Your Lordships. And then, My Lord, please see the mischief here. When the matter came
6 up, the State now says, we are taking protection of Article 31C. And that is recorded in the
7 order, My Lord, where there is another reference even in my writ petition. So, the point is, if
8 31A is going to be a shield against 14 and 19, even in cases like this, then, My Lord, 39(b) is
9 really in need of insulation from the attacks of 31C. That's all.

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes, Mr. Solicitor.

12

13 **TUSHAR MEHTA:** My Lord, at the outset, on 31C, at the outset, there is no resistance in
14 assisting Your Lordships. But we genuinely feel that that question is concluded. And we may
15 perhaps...

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That she argued that. That it is concluded and
18 therefore, it doesn't put...

19

20 **TUSHAR MEHTA:** Would Your Lordships consider giving me ten minutes. Why, My Lord?
21 Only on 31C. We have prepared a chart. Just for a quick reference. This would be really handy,
22 My Lord. Yes. And Your Lordships may go by the colour, because colour has significance.

23

24 **JUSTICE SUDHANSHU DHULIA:** This red ones are....

25

26 **TUSHAR MEHTA:** Every title has different colour, and the change made, is in that colour.

27

28 **SAMEER PAREKH:** My Lords, permits if 31C, if it's being argued, then let us open a....

29

30 **TUSHAR MEHTA:** No, I'm not arguing, I'm not arguing. My Lord, the first is, as introduced,
31 1971 Amendment. Correct, My Lord? Then post *Kesavananda Bharati* what happened
32 was, the blue part, *Kesavananda Bharati* title is in blue. Therefore, what happened is in
33 blue, just for easy reference. And no law containing a declaration that it is for giving effect to
34 such policies shall be called in question in any court on the ground that it does not give effect
35 to such policy. Rest is upheld by *Kesavananda Bharati*, 13 Hon'ble judges. Then comes
36 1976 Amendment.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, in *Kesavananda Bharati* they said that,
2 the immunity which is given to even challenging the nexus of the law to Article 39(b), that
3 immunity is struck down.

4

5 **TUSHAR MEHTA:** Correct. Rest is specifically upheld.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Then comes the 42nd Amendment.

8

9 **TUSHAR MEHTA:** '76. '76 Amendment. Yes, Your Lordships are right. That is in green,
10 where instead of Clause (b) and (c) of Article 39, the entire Chapter IV....

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** All or any....

13

14 **TUSHAR MEHTA:** Yes, My Lord. All or any principles laid down in Part V and blue
15 continues from the previous, so Your Lordships are, at this stage not concerned. My Lord
16 kindly come to next. Then post '78 Amendment...

17

18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Of course, 44th Amendment deleted Article 31
19 and 19 (1)(a). So, it was deleted from here also.

20

21 **TUSHAR MEHTA:** Therefore, Article, only read, the title is read and therefore Article 31 is
22 deleted in here. Now, *Minerva Mill* strikes down. And what is struck down, is also struck
23 down in my chart.

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But in your chart, that last column, you have
26 again put the words, 'the principle specified in Clause (b) or (c) of Article 39.' That is a more,
27 that is the part to be decided.

28

29 **TUSHAR MEHTA:** I am sorry.

30

31 **JUSTICE B. V. NAGARATHNA:** You have inserted it.

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** In clause, in your last columns, one, two, three,
34 four, fifth column.

35

36 **TUSHAR MEHTA:** Yes, My Lord.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What *Minerva Mills* stuck down.

2

3 **TUSHAR MEHTA:** That is our case and that is accepted by five judges.

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** One second. All or any of the principles laid
6 down in Part IV, that is stuck down in *Minerva Mills*.

7

8 **TUSHAR MEHTA:** Correct, My Lord.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And therefore, you have deleted it in your last
11 column.

12

13 **TUSHAR MEHTA:** Correct, My Lord.

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But does that have the effect of restoring the
16 words, 'the principle specified in Clause (b) or (c)'?

17

18 **TUSHAR MEHTA:** Whether the revival issue. Yes, My Lord, that's the content. According
19 to us, this is how the....

20

21 **JUSTICE SUDHANSHU DHULIA:** This is how it is to be read now?

22

23 **TUSHAR MEHTA:** 31C, that is how Your Lordships have....

24

25 **JUSTICE SUDHANSHU DHULIA:** you have inserted it?

26

27 **TUSHAR MEHTA:** No, we can't insert it.

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** last column.

30

31 **JUSTICE B. V. NAGARATHNA:** [UNCLEAR].

32

33 **TUSHAR MEHTA:** Yes, Your Lordships are right.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But whether it is, as a matter of law,
36 Constitution law, whether this is a....

37

1 **TUSHAR MEHTA:** Your Lordships have said so in a combination of five judges.

2

3 **CHIEF JUSTICE D. Y. CHANDRACHUD:** All right, now let's see that.

4

5 **TUSHAR MEHTA:** That's what I'm saying. First kindly see my note, which I used yesterday,
6 Volume II B. I skipped this yesterday. I'll just highlight, at the cost of repetition, saying that
7 there is no resistance, but I'm just saving time, My Lord, it's concluded by a five-judge bench.
8 And not disputed or doubted anywhere subsequently. My Lord I'll just read para 15.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Volume II B, page?

11

12 **TUSHAR MEHTA:** 6. PDF 6. The title is "Issue concerning revival".

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

15

16 **TUSHAR MEHTA:** Your Lordships may kindly bear in mind, My Lord, the question which
17 was framed in 31, with regard to 31C was a judgment of three Hon'ble judges in 1980. 1986 My
18 Lord, I stand corrected. Now we are in **Waman Rao**. It is at the outset, it is submitted to the
19 validity of the unamended provision in 31C, prior to the 42nd Amendment is no longer *res-*
20 *integra*. It is submitted that Article 31C was specifically upheld by the judgment of 13 Judges
21 in **Kesavananda Bharati** . The effect of judgment in **Minerva Mills** on the validity of
22 unamended 31C, post **Kesavananda Bharati** was specifically raised and rejected as far
23 back as in judgment in **Waman Rao**, supra. In **Waman Rao**, a bench of five-judges held as
24 under. That leaves for consideration the challenge to the Constitutional validity, of unamended
25 Article 31C. As we have stated at the beginning of this judgment, Article 31 C was introduced
26 by 25th Amendment. Initially, it sought to give protection to those laws only, which gave effect
27 to the policy of the State toward securing principles specified in Clause (b) and (c) of Article
28 39 of the Constitution. No such law could be deemed to be void, on ground as it is inconsistent
29 with or takes away or abridges the right conferred by Article 14, 19 and 31. The concluding
30 portion of the unamended Article which gave conclusiveness to certain declaration was struck
31 down in **Kesavananda Bharati** in so and so. Shri M N Phadke, who led the arguments on
32 behalf of the petitioners built a formidable attack against the *vires* of Article 31C, but with
33 respect to the learned Counsel, the effort is fruitless. Because the question as regards the
34 validity of 31C is no longer *res-integra*. The opening clause of Article 31 C was upheld in
35 majority in **Kesavananda Bharati** and we do not quite see how the petitioners can be
36 permitted to go behind that decision. Then My Lord again, highlighted part. The question of
37 validity of 25th Amendment by which the unamended Article 31C was introduced into the

1 Constitution was specifically raised before the Court, and the arguments in that we have was
2 specifically considered by all the six minority judges and Justice Khanna. It seems to us
3 difficult in these circumstances to hold, that no common ratio can be culled. But that was the
4 argument that because of various different judgments, common ratio is not possible. The
5 Court rejects that. It seems to us difficult in these circumstances to hold that no common ratio
6 can be culled out from the decision of the majority of seven judges who upheld the validity of
7 Article 31C. Putting it simply, and there is no reason why simple matters should be made
8 complicated. The ratio of majority judgment in *Kesavananda Bharati* is that first part of
9 Article 31C is valid. Apart from this, if we are right in upholding the validity of Article 31A on
10 its own merits, it must follow logically, that unamended Article 31C is also valid. Unamended
11 portion of 31C is not like an unchartered sea. It gives protection to a defined and limited
12 category of laws, which are passed for giving effect to the policy of the State toward securing
13 the principle specified in Clause (b) or Clause (c) of Article 39. These Clauses of Article 39
14 contain Directive Principles which are vital to the well-being of the country and the welfare of
15 its people. Whatever we have said in respect of the defined category of law envisaged by Article
16 31A must hold good, perhaps with greater force in respect of laws passed for the purpose of
17 giving effect to Clause (b)... Clause (b) and (c) of Article 39. It is impossible to conceive that
18 any law passed for such a purpose can at all violate Article 14 and 19. Article 31 is now out of
19 harms away... harm's way. In fact, far from damaging the basic structure of the Constitution,
20 laws pass truly in bona fide for giving effect to Directive Principles contained in Clause (b) and
21 (c) of Article 39 will fortify that structure. We do hope that Parliament will utilize to the
22 maximum, its potential to pass laws genuinely and truly, related to principles contained in
23 Clause (b) and (c) of Article 39. The challenge made to the validity of first part of the
24 unamended Article 31C therefore fails. And My Lord, Order of the Court at Page, My Lord, 8.

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But therefore, they say that Article 31C as
27 originally enacted, was upheld by the judgment in *Kesavananda Bharati*, except for that
28 last part, the last portion. But they don't say that that original amendment, that the original
29 position has revived, after they struck down that the amendment brought about by the 42nd
30 Amendment. That declaration is not issued by the court.

31

32 **TUSHAR MEHTA:** My Lord, that is subsequently in a judgment. Therefore, My Lord, I'm
33 saying with a sense of responsibility, not to avoid addressing on that. And, this judgment is
34 after *Minerva Mills* judgment, after taking note of *Minerva Mills* judgment. My Lord,
35 please see.

36

37 **CHIEF JUSTICE D. Y. CHANDRACHUD:** *Waman Rao* is after. *Waman Rao* is after.

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TUSHAR MEHTA: After, My Lord. Yes, My Lord. It takes note of *Minerva Mills* and says that, what will be the effect of *Minerva* judgment in 31C.

CHIEF JUSTICE D. Y. CHANDRACHUD: Actually, was, the Operative Order pronounced on the same day. Then *Waman Rao*, the actual reasons were delivered in November. I think *Minerva* came in August, if I am not wrong. July.

JUSTICE SUDHANSHU DHULIA: [UNCLEAR]

TUSHAR MEHTA: My Lord, would Your Lordships come to page... I'm sorry.

JUSTICE RAJESH BINDAL: One thing, this chart flow, You had made this Provision by '76 Amendment quite wider...

TUSHAR MEHTA: Yes

JUSTICE RAJESH BINDAL: Your amendment was - the principle and all that, including this Part IV. Part IV...

TUSHAR MEHTA: Entire Part IV. Not just 39 (b) and (c).

JUSTICE RAJESH BINDAL: [UNCLEAR] was struck down by the court.

TUSHAR MEHTA: Yes.

JUSTICE RAJESH BINDAL: So, how you can import the limited part when the wider is struck down?

TUSHAR MEHTA: No, My Lord, 'limited' was sustained. 'Wider' was struck down.

JUSTICE RAJESH BINDAL: Wider, the wider goes.

JUSTICE SUDHANSHU DHULIA: What Brother is saying, "How will it come back on its own?"

1 **TUSHAR MEHTA:** My Lord, that's why... It was sustained in *Kesavananda Bharati*, My
2 Lord, that's what *Waman Rao*...

3

4 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It was sustained in *Kesavananda*, then
5 Section 4 of the 42nd Amendment, substituted it completely. And the substituted Section 4
6 was struck down in *Minerva*.

7

8 **TUSHAR MEHTA:** My Lord, if Your Lordships wish to go into it, we will go into it. But
9 kindly, My Lord, allow me. There is a last five judge bench judgment, which squarely deals
10 with this.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now tell us... show us from *Minerva*, what is
13 the Operative Order? What is struck down in *Minerva*? Let's just see *Minerva*.

14

15 **TUSHAR MEHTA:** My Lord, can I show this complete... this...

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Before that, just let's see what was struck down
18 in *Minerva*?

19

20 **TUSHAR MEHTA:** Let it be taken up, My Lord. My Lord, I think, My Lord...

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** No, we want to see *Minerva*. What is the
23 operative part in *Minerva*? That's all. Just show us that. It will complete this process for us,
24 that's all.

25

26 **TUSHAR MEHTA:** And if Your Lordships see, that is there in page 7. That's what I'm saying.

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Why don't you show us some Volume V?

29

30 **TUSHAR MEHTA:** I'll show it.

31

32 **SAMEER PAREKH:** In the meanwhile, if I may just point out one fact. No, not my argument.

33

34 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Solicitor is on his legs. Just tell us, what is the
35 page of the operative direction in *Minerva*?

36

37 **SAMEER PAREKH:** 2085.

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CHIEF JUSTICE D. Y. CHANDRACHUD: 2085?

JUSTICE HRISHIKESH ROY: Which volume is it?

JUSTICE SUDHANSHU DHULIA: Volume V.

SAMEER PAREKH: Volume V, Page 2085.

TUSHAR MEHTA: Para 70, My Lord. 75. 75. Yes. Those then are our reasons for Order, which we passed on 9th May, as My Lord the Chief Justice... to the following effect - Section 4 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void, since it damages the basic, essential feature of the Constitution and destroys its basic structure by a total exclusion of challenge to any law, on the ground that it is inconsistent with, or takes away or abrades any of the rights conferred by Article 14 or 19 of the Constitution if the law is for giving effect to the policy of the State power, securing all or any of the principles laid down in Part IV. So, the entire Directive Principles of State policy.

CHIEF JUSTICE D. Y. CHANDRACHUD: Of the 42nd amendment...

TUSHAR MEHTA: Could Your Lordship..

CHIEF JUSTICE D. Y. CHANDRACHUD: 14. Where do we get that page?

UNKNOWN: 2066.

CHIEF JUSTICE D. Y. CHANDRACHUD: 2066?

ZAL ANDHYARUJINA: But may I assist Your Lordships and the learned Solicitor General, the correct observation is para 58.

TUSHAR MEHTA: If you don't mind Zal, I'll just conclude.
I left my note at a very crucial juncture.

CHIEF JUSTICE D. Y. CHANDRACHUD: We'll come back to it.

1 **TUSHAR MEHTA:** If you would have seen the operative part of *Waman Rao*, would have
2 assisted Your Lordship.

3

4 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We'll just look at this and then go to that.

5

6 **TUSHAR MEHTA:** Yes, My Lord. Para 40, Section 4 of 42nd Amendment, which was
7 brought into force with effect from January 3 1977 amended Article 31C of the Constitution by
8 substituting the words and phrases, 'all or any of the principles laid down in Part IV.'

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That's a little bit of a ticklish issue because it
11 substitutes, all or any of the principles.

12

13 **TUSHAR MEHTA:** That is considered, that issue is, that issue is considered by five-judge
14 bench. That's what I want Your Lordships to see.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** All right, you could go back to your note. Yes.

17

18 **TUSHAR MEHTA:** Yes, My Lord. Page 7. Page 8, My Lord, PDF Page 8, *Waman Rao*. II
19 B, short note on behalf of SG, and it's page 8. This is the order of the court. This is quoted by
20 me. I feel Your Lordships...

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The thing is logistics about opening multiple
23 windows, that's all, nothing else.

24

25 **TUSHAR MEHTA:** No. Order of the court, page 8, My Lords.

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Page?

28

29 **TUSHAR MEHTA:** Page 8. PDF 8, note, Volume II B.

30

31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Page 8. Para?

32

33 **TUSHAR MEHTA:** My Lord, Order of the court.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Order of the court, yes, yes.

36

1 **TUSHAR MEHTA:** This is not my words. That's how it is recorded in the judgment. Article
2 31C of the Constitution, this is five-judge bench in *Waman Rao*. Article 31C of the
3 Constitution, as it stood prior to its amendment by Section 4. After considering *Minerva*,
4 *Waman Rao*, the judgment says this, that Article 31C of the Constitution as it stood prior to
5 its Amendment by Section 4 of Constitution 42nd Amendment Act, is valid to the extent to
6 which, its constitutionality was upheld in *Kesavananda Bharati*. The revival declaration...
7 As my learned friend Mr. Sankaranarayanan rightly says, that if a player is on the field, you
8 send a substitute, substitute goes, the player also doesn't go simultaneously. He remains. As it
9 stood prior to so and so, Article 31C, as it stood prior to Constitution 42nd Amendment Act,
10 does not damage any of the basic...

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Tell us Mr. Solicitor, when a Constitutional
13 provision is amended by substituting a new provision in its place, does the original provision
14 stand?

15

16 **TUSHAR MEHTA:** Yes My Lord. That is what was, again, considered.

17

18 **JUSTICE SUDHANSHU DHULIA:** This is their entire argument that it doesn't.

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** When a Constitutional provision is substituted
21 by a fresh provision, the fresh provision comes into force instead, and in place of the original
22 provision, right? Now, if the validity of the fresh or the amended provision is struck down, on
23 what theory of law does the original provision get revived, that's the point.

24

25 **TUSHAR MEHTA:** Would Your Lordship see the *NJAC* judgment, again a five judgment,
26 where this question is squarely raised.

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now since we are on *Waman Rao*, you
29 remember Mr. Nariman had argued that, well, *Waman Rao* proceeded on a concession by
30 Mr. Palkhivala. Where is that concession recorded in *Waman Rao*?

31

32 **TUSHAR MEHTA:** Not in *Waman Rao*. That's in *Minerva*.

33

34 **RAKESH DWIVEDI:** Assumption

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Assumption is where, in *Minerva* or
37 *Waman Rao* ?

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RAKESH DWIVEDI: That's Mr. Nariman's argument.

TUSHAR MEHTA: In *Minerva*.

CHIEF JUSTICE D. Y. CHANDRACHUD: That's his argument. That's not what is held. But Mr. Nariman's argument is based on which part of the judgment? He said that Mr. Palkhivala conceded this position. Now, where does Mr. Nariman get that from?

JUSTICE SUDHANSHU DHULIA: Probably in that case. *Minerva Mills* is being discussed, Justice Chinnappa Reddy, and then there is something.

CHIEF JUSTICE D. Y. CHANDRACHUD: Now *NJAC*, where do we get?

TUSHAR MEHTA: Yes. Kindly have, come to *NJAC*. *NJAC* squarely... just, the question which fell from My Lord, the Chief Justice was raised.

JUSTICE SUDHANSHU DHULIA: Check-up, somebody.

TUSHAR MEHTA: In the meanwhile, we will do that. Volume?

JUSTICE SUDHANSHU DHULIA: We are perplexed. Something like that.

JUSTICE B. V. NAGARATHNA: We are perplexed.

TUSHAR MEHTA: Your Lordship?

JUSTICE SUDHANSHU DHULIA: Judge says that. We are not saying that.

JUSTICE B.V. NAGARATHNA: In *Sanjeev Coke* they have said that bench was perplexed.

TUSHAR MEHTA: Perplexed by this.

JUSTICE B. V. NAGARATHNA: The judgment in *Minerva Mills*.

JUSTICE SUDHANSHU DHULIA: And then it comes.

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JUSTICE B.V. NAGARATHNA: Not us.

TUSHAR MEHTA: Please come to Volume V. *NJAC* judgment. This contention was raised.

CHIEF JUSTICE D. Y. CHANDRACHUD: Which page?

RAKESH DWIVEDI: Page 3877 My Lord, para 408. There is a title given in the judgment.

CHIEF JUSTICE D. Y. CHANDRACHUD: Mr Dwivedi, Mr. Solicitor, that argument of Mr. Nariman's, which is referred to in the first Referring Order, was on the basis of *Minerva*, because I'm now at Volume V, page 2790...

RAKESH DWIVEDI: Correct.

CHIEF JUSTICE D. Y. CHANDRACHUD: Where he says, they record Mr. Nariman's submission Volume V, page 2790. He contended that the decision in *Minerva Mills* proceeded on the basis of a concession made by Mr. Palkhivala. And on an assumption that Article 31C as it survived as a result in *Kesavananda Bharati* stood revived after the subsequent event. That's what. That seems to have been his submission at that point.

TUSHAR MEHTA: Your Lordships found on page 2790?

CHIEF JUSTICE D. Y. CHANDRACHUD: 2790.

TUSHAR MEHTA: Para 5?

CHIEF JUSTICE D. Y. CHANDRACHUD: Para 5 you know , Mr Nariman's submission.

TUSHAR MEHTA: I would..... My Lord, speaking for myself, when Nani Palkhivala gives some concession on the basis of *Kesavananda Bharati* I would respectfully buy it. There must be a good reason not to. Yes, My Lord, my friend, My Lord... para, My Lord... para 2069, My Lord. But possibly it's not concession. Para 24, My Lord. This is *Minerva. Minerva Mills*. Possibly, the paraphrasing by Mr. Nariman appears to be a little inaccurate. It was not a concession.

CHIEF JUSTICE D. Y. CHANDRACHUD: Which was the para in *Minerva* page?

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TUSHAR MEHTA: My Lord, page number 2069, para 24. Does My Lords get, My Lord?

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

TUSHAR MEHTA: The next question which we have to consider is whether the Amendment made by Section 4 of that 42nd Amendment to Article 31C of the Constitution is valid. Mr. Palkhivala did not challenge the validity of the unamended Article 31C. And indeed that could not be done. The unamended 31C forms the subject matter of a separate proceedings, and we have indicated therein, that it is constitutionally valid to the extent to which it was upheld in *Kesavananda Bharati*. It was neither on assumption or concession. But possibly, Mr. Seervai, in his books write, in his book writes... My Lord, possibly, Mr. Seervai, in his book writes that this was a concession. Possibly. That's from where, My Lord, Mr. Nariman, the learned Counsel, Mr. Nariman... It's a statement of fact, not a concession.

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

TUSHAR MEHTA: Now, My Lord, may I come to *NJAC* judgment?

CHIEF JUSTICE D. Y. CHANDRACHUD: *NJAC*. Now where is *NJAC*?

TUSHAR MEHTA: 3877. At 3877. Same volume, My Lords. This is majority view of, My Lord, Justice Khehar. And similar view is taken by Justice Joseph also. Which is the penal number... Let's see. 255 - similar submission is raised, My Lord. I'll just come to that. But please see V - The effect of striking down the impugned Constitutional Amendment. Does Your Lordships get, My Lord? Would the amended provisions of the Constitution revive, if the impugned Constitutional Amendment was to be set aside, as being violative of the basic structure of the Constitution? It would be relevant to mention that the instant issue was not adverted to by the Learned Counsel for the petitioners, possibly on the assumption that if on consideration of present controversy, this Court would strike down the Constitution 99th Amendment Act, then Article 124, so and so... so and so... as they existed prior to the impugned order would revive, and on such revival, the judgment rendered in the second and third judges' case would again regulate selection and appointments, as also transfer of judges of the higher Judiciary. A serious objection of to the aforesaid assumption was raised on behalf of the Respondents, by the Solicitor General, who contended that striking down of the impugned Constitutional Amendment would not result in the revival of provisions which had been amended by Parliament. Contrary to what I'm urging now, was the argument that it doesn't

1 revive. In order to canvass the aforesaid proposition, reliance was placed on Article 367, which
2 postulates that provisions of the General Clauses Act had to be applied for an interpretation of
3 the articles of the Constitution in the same manner as the provisions of the General Clauses
4 Act are applicable for an interpretation of ordinary legislation. Insofar as the instant
5 submission is concerned, we have no hesitation in affirming, that unless the context requires
6 otherwise, the provisions of the General Clauses Act would apply. Now, kindly directly see,
7 3886. I'm sorry, my learned friend wants me to come to 3813, first.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 38?

10

11 **TUSHAR MEHTA:** Based on My Lord, what... 3813, para 255.1. These very proceedings were
12 relied upon my worthy predecessor, the learned Solicitor General. Your Lordship gets? This is
13 the same judgment, *NJAC*, the contention is noted.

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Property owners?

16

17 **TUSHAR MEHTA:** Yes, My Lord. Firstly, that the issue whether a Constitutional
18 Amendment, once struck down, would revive the original substituted Article was a matter
19 which at... 255.1, page 3813. Please see the last sentence of this. After quoting the judgments
20 Property Owners' Association, all three Property Owners' Association, respective references.
21 It was submitted, that the Order passed by this court.... am I with Your Lordship?

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

24

25 **TUSHAR MEHTA:** Order passed by this court, wherein the reference to a nine judge
26 Constitution bench had been made, was a case relating to, constitutionality of Article 31C. It
27 was pointed out that Article 31C as originally enacted provided that. It was submitted that the
28 later part of 31C which provided, and no law containing declaration that it is for giving effect
29 to such policy, shall be called in question, in any court on the ground, that it does not give
30 effect to said policy, has been struck down by this court in *Kesavananda Bharati* case. It
31 was contended that when the matter pertaining to the effect of the striking down of a
32 Constitutional Amendment had been referred to a nine-judge bench, it would be improper for
33 this court sitting in its present composition to determine the aforesaid issue. So, the request
34 was, that on this issue, you kindly refer it to a larger, nine-judge bench. And My Lord, now the
35 answer at page....

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37 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And then 255.2.

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TUSHAR MEHTA: Yes, I'm sorry.

CHIEF JUSTICE D. Y. CHANDRACHUD: This is a submission of the Solicitor General then.

TUSHAR MEHTA: Yes, My Lord. The second contention, advanced at the hands of the learned Solicitor General, was based on Section 6, 7 and 8 of the General Clauses Act. It was contended that an amendment which had deleted some part of the erstwhile Article 124 of the Constitution and substituted in its place something different, as in case of Article 124 of the Constitution Act, 99th Amendment Act would not result in the revival of the original Article which was in place prior to the Constitutional Amendment. Even if the 99th Amendment itself was to be struck down, it was submitted that if a substituted provision was declared as unconstitutional for whatever ground or reasons, the same would not automatically result in the revival of the repealed provision. In order to support the aforesaid contention, reliance was placed on so and so, so and so. It was submitted that general rule of construction...

Now please, come to page 3877. I'm just trying to point out, that there was a suggestion that, in a combination of five Hon'ble judges, revival question be not decided, because this reference, this particular present reference is referred to a nine-judge bench and it does not stand revived. That was the contention. I have read para 408, 409 under the title, "Effect of striking down of the impugned Constitutional Amendment." Now, please My Lord, directly come to 3886.

CHIEF JUSTICE D. Y. CHANDRACHUD: Page?

TUSHAR MEHTA: 3886. My Lord all the judgments followed which the learned Solicitor General, the then Solicitor General referred to and relied upon, were discussed and after the quotation of the judgment, after placitum D, what needs to be noticed, does Your Lordships get My Lord?

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

TUSHAR MEHTA: What needs to be noticed... May I read? Your Ladyship gets My Lord?

JUSTICE B. V. NAGARATHNA: 3886.

1 **TUSHAR MEHTA:** 3886. After the quotation of the judgment relied upon, just below
2 placitum D. What needs to be noticed from the extract reproduced above is that this Court, in
3 the above judgment clearly concluded that the legal effect on an earlier law, when the later law
4 enacted in its place was declared invalid. May I continue after lunch.

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We were reading *NJAC*.

9

10 **TUSHAR MEHTA:** Yes, My Lord, I must say that sometimes we assist Your Lordships as
11 officers of the Court, and Your Lordships would find out why. My Lord, the way, if we travel
12 the path which we are considering, Your Lordships are considering, what would be the
13 consequence? Please bear in mind, Article 124 was in question, in this judgment, which says,
14 that the President, in consultation with such judges, as he thinks appropriate, will make
15 appointment. There was a substitution, by the word 'National Judicial Commission' and the
16 argument made, was on our behalf, the Solicitor General, that now that provision goes because
17 you are declaring the provision to be unconstitutional. Please see 3886. What needs to be
18 noticed from the extract reproduced above, is that, this Court, in the above judgment, clearly
19 concluded that the legal effect of an earlier law, when the later law enacted in its place was
20 declared invalid, did not depend merely upon the use of the words like substitution or
21 supersession, and further, that it would depend on the totality of the circumstances and
22 context in which the provision was couched. If the contention advanced by the learned
23 Solicitor General is accepted, it would lead to a constitutional breakdown. The tremors of such
24 situation are already being felt. The retiring judges of the higher judiciary are not being
25 substituted by fresh appointments. The above judgment in our considered view does not
26 support the submission being canvassed, because on the consideration of... Then, My Lord,
27 the earlier judgments' quotes are taken. Totality of circumstances and the context. The instant
28 contention is just not acceptable. We are therefore of the considered view that even the instant
29 judgment cannot be of no avail to the Respondent insofar as present controversy is concerned.
30 Now, please come to My Lord, 3888. This is My Lord the majority view, penned by Justice
31 Khehar. Immediately after the quotation, what needs to be kept... My Lord, Your Lordships
32 has that? What needs to be kept in mind, as we have repeatedly expressed above, is that the
33 issue canvassed in the judgments relied upon was the effect of a voluntary decision of a
34 legislature in amending or repealing an existing provision. That position would arise if
35 Parliament had validly amended or repealed an existing constitutional provision. Herein, the
36 impugned Constitutional Amendment has definitely the effect of substituting some of the
37 existing provisions of the Constitution and also adding to it some new provisions. Naturally

1 substitution connotes, that the earlier provisions ceases to exist and the amended provisions
2 takes its place. The present situation is one where the impugned Constitutional Amendment
3 by a process of judicial review, has been set aside. Such being the position, whatever be the
4 cause and effect of the impugned Constitutional Amendment, the same will be deemed to be
5 set aside and the position preceding the Amendment will be restored. It does not matter what
6 are the stages or steps of the cause and effect of the Amendment. All the stages and steps will
7 stand negated, in the same fashion as they were introduced by the Amendment, when the
8 amended provisions are set aside. Then please...

9
10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** This goes against what you are canvassing,
11 because that was there. They say if it's a pure substitution, the earlier provision ceases to have
12 effect. They said, since the substituted provision was held to be unconstitutional by the
13 Supreme Court, therefore, the earlier provision is revived. When there is a pure substitution,
14 as in the case of 31C being substituted, the earlier provision ceases to have effect.

15
16 **TUSHAR MEHTA:** That is negated by them My Lord. May I read, My Lord?

17
18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** No, no, no.

19
20 **TUSHAR MEHTA:** May I read, My Lord?

21
22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes, yes. See, what needs to be kept in mind...

23
24 **TUSHAR MEHTA:** Kindly a little above that, My Lord.

25
26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Para B... Placitum B.

27
28 **TUSHAR MEHTA:** B. What needs to be kept in mind... I have no difficulty Your Lordships
29 to go into... I'm just sounding an alarm. What will be the position? What will be the
30 consequence of holding...

31
32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Consequence we will see what is to be done if
33 we are of the view that, well, the original 31C is not revived, what consequence we will have
34 known...?

35

1 **TUSHAR MEHTA:** No, I'm not on 31C also... 31C is also... few words... substituted. Few
2 words are substituted in 31C. Here also, instead of consultation with as many judges, such
3 judges...

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** They say that this was not a case of a pure
6 substitution but that a substituted provision was held to be unconstitutional by the Supreme
7 Court. And therefore, they say it is unconstitutional on the date of its enactment, and therefore,
8 the original provision continues to be substituted.

9

10 **TUSHAR MEHTA:** That is the position in 31C as well.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** No.

13

14 **TUSHAR MEHTA:** Then I have nothing to say My Lord.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** How?

17

18 **TUSHAR MEHTA:** It is the position My Lords. That is the position. *Minerva Mills* strikes
19 down that substituted part.

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Section 4. The entirety of Section 4 of the 42nd
22 Amendment completely substitutes that provision.

23

24 **JUSTICE SUDHANSHU DHULIA:** Just read Section 4.

25

26 **TUSHAR MEHTA:** Same *NJAC*. My Lord, I'll just point out, same as *NJAC* My Lord. I have
27 no difficulty if Your Lordship takes the view that the Government would stand to benefit. I'm
28 assisting Your Lordship as an officer of the Court.

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Please see Placitum B.

31

32 **TUSHAR MEHTA:** We can go into academic discussion. I'm just pointing out the
33 catastrophic, the void which is created. What will be the impact of that void? That's what I am
34 saying. Suppose, allow...

35

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** There is no void as in the case of *NJAC*. *NJAC*
2 what happened was they said that there's a breakdown of constitutional machinery because
3 there would be no mechanism left. This is only an immunity provision.

4

5 **TUSHAR MEHTA:** But if that is the distinction Your Lordship draws, than we are on
6 whether...

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The law does not become *ipso facto* invalid. It
9 only loses its immunity from challenge under 14.

10

11 **TUSHAR MEHTA:** Suppose, My Lord, kindly, sounding an alert, as an officer of the Court,
12 the Parliament does not like a particular provision. It substitutes a part of it. Kindly, allow me
13 Your Lordships attention for some time. There would be some more distinction Your Lordship
14 will be able to draw from this, but allow me a more, little My Lord... I'm sorry.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

17

18 **TUSHAR MEHTA:** Parliament does not like the particular provision. It substitutes the way
19 Section 4 was, Your Lordships have seen. Then I'll show *NJAC* provision also, I've kept it
20 ready. It substitutes a part of it which is declared unconstitutional and as the other side is
21 contending the entire provision does not revive, it goes. Correct, My Lord? The Parliament
22 may not reenact the original provision and the Court can never issue a mandamus to the
23 Parliament to...

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That's the discretion of Parliament. That
26 ultimately...

27

28 **TUSHAR MEHTA:** Please do that My Lord. I am happy with that. I am happy even in this
29 case. I'll show it's exactly identical Section 4 of 31C was *NJAC*. I'll show. That was precisely
30 the argument.

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Possibly, because what you are contending is
33 that the substituted words by the 42nd Amendment was struck down by this Court.

34

35 **TUSHAR MEHTA:** Therefore, a declaration. In *Waman Rao*, there was a declaration
36 made that the position as prevailing prior to that amendment will now stand restored and
37 revived and no Court has thereafter doubted that. I'm saying something against me, My Lord.

1 I'm not resisting that. As an officer of the Court, I am before a nine judge bench. Possibly,
2 therefore, after **Waman Rao**, no five judge bench has gone into 31C revival issue. Possibly
3 My Lord. This is my assumption. Now, please see further, at para 413. 'Even though we have
4 already recorded our determination with reference to the judgment cited by the learned
5 Solicitor General, it is imperative for us to record that it is evident from the conclusions
6 returned in Central Provinces so and so that in facts and circumstances of the present case, it
7 would have to be kept in mind that if the construction suggested by the learned Solicitor
8 General was to be adopted, it would result in the creation of a void. We say so, because if
9 neither the impugned Constitutional Provision nor the amended provision of the Constitution
10 would survive, it would lead to breakdown of the constitutional machinery in as much as there
11 would be a lacuna or a hiatus insofar as the manner of selection and appointment of judges to
12 the higher judiciary is concerned. Such a position, in our view, cannot be the result of any
13 sound process of interpretation. Likewise, from the observation emerging out of the decision
14 rendered in Indian Express, we are satisfied that the clear intent of Parliament, while enacting
15 the Constitution 99th Amendment Act was to provide for a new process of selection and
16 appointment of judges to the higher judiciary by amending the existing provisions. Naturally,
17 therefore, when the amended provision postulating a referral procedure is set aside, the
18 original process of selection and appointment under their unamended provision would revive.
19 The above position also emerges from the legal position declared in **Koteswar Vittal**
20 **Kamath**. It is not possible for us to accept the inferential contention advanced at the hands
21 of the learned Counsel for the Respondents by placing reliance on section so and so of General
22 Clauses Act. We say so, because the contention of the learned Solicitor General was based on
23 the assumption that a judicial verdict setting aside an amendment, has the same effect as a
24 repeal of an enactment through a legislation. This is an unacceptable assumption. When a
25 legislature amends or repeals an existing provision, its action is its own free will and is
26 premised on well-founded principles of interpretation, including the provisions of the General
27 Clauses Act. Not so when an amendment struck repeatedly set aside through a judicial process.
28 It is not necessary to repeat the consideration recorded in para so and so above. When a
29 judgment set aside an amendment or repeal by the Legislature it is but natural the *status quo*
30 *ante* would stand restored.' My Lord, possibly Your Lordships may not like to draw the
31 distinction between a provision which creates a void and a provision which does not create the
32 void. Your Lordships would decide the question of law. What would happen when there is
33 declaration of unconstitutionality of a part of the provision? Whether it is 31C, which possibly
34 may not leave any void and... Will leave a void. I'm on demurrer that it may not leave a void,
35 and here it would leave a void. Now, please see My Lord, the other view at page 4106. I'm sorry
36 My Lord. 415, My Lord. 'For the reasons recorded herein above...' My Lord, the same... Same
37 page, My Lord. Page 3889. Same page which I was reading. 'For the reasons recorded herein

1 above...' The submission is when an amendment, which substitute few parts of a main
2 provision, is struck down, without that part, the provision remains. That is My Lord, the
3 position. And if Your Lordships... I'll show...

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The provision, what part remains?

6

7 **TUSHAR MEHTA:** Unamended part, My Lord, which is not set aside.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The unamended part minus the substituted
10 part may possibly remain. But...

11

12 **TUSHAR MEHTA:** Yes, that's all we are saying.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But in this case, minus the substituted part,
15 the original part has no meaning at all.

16

17 **TUSHAR MEHTA:** No My Lord, it has a meaning. Please take the chart, My Lord. Please
18 take the chart My Lord. Kindly see the...

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Second last column. Take the second last
21 column.

22

23 **TUSHAR MEHTA:** I'm taking that, My Lord.

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Or take the third last column, actually... post...

26

27 **TUSHAR MEHTA:** It would revert back to what the *Kesavananda Bharati*...

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** No, it doesn't. That's the point. Just see. I'll tell
30 you why...

31

32 **TUSHAR MEHTA:** My Lord, it's better... We will address Your Lordships on merits. I was
33 arguing against me, that please don't go into this. Don't travel into this path, because there are
34 several judgments which have come relying upon 131, 134.

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It's not that. It's a very debatable issue. We
37 have to decide the issue.

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TUSHAR MEHTA: It's not therefore referred to Your Lordships.

CHIEF JUSTICE D. Y. CHANDRACHUD: See the third last column. Okay. The third last column, 31C.

TUSHAR MEHTA: Yes, My Lords.

CHIEF JUSTICE D. Y. CHANDRACHUD: Saving of laws giving effect to certain Directive Principles. Notwithstanding anything contained in 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV, shall be deemed to be void on the ground, that it is inconsistent with or takes away or abridges any of the rights conferred by 14, 19 or 31, right? After that it was struck down in *Kesavananda*. Now, if this part, all or any of the principles laid down in Part IV, is obliterated because it is struck down, then how does...

TUSHAR MEHTA: This not struck down, My Lords.

CHIEF JUSTICE D. Y. CHANDRACHUD: Of course, this is stuck down in *Minerva Mills*.

TUSHAR MEHTA: No, My Lords. Kindly see...

CHIEF JUSTICE D. Y. CHANDRACHUD: All the principles laid down in Part IV is struck down in *Minerva Mills*.

TUSHAR MEHTA: Third column. Please. Please see third column, Section 4 of post '76. The principles specified in Clause (b) or Clause (c)...

CHIEF JUSTICE D. Y. CHANDRACHUD: Para 58 of *Minerva*... para 58 of *Minerva Mills* says... para 58 of *Minerva Mills*, which is at page 2079, says that by granting immunity on a challenge based on Article 14 and 19, on the ground that the Directive Principles are being subserved. They say every Legislation virtually will be protected by that umbrella. So they strike it down on the ground of basic structure, saying that giving an immunity from 14 and 19 would violate the basic structure. That's the problem.

1 **TUSHAR MEHTA:** [INAUDIBLE] on merits. Allow me to clarify My Lords, confusion
2 between [INAUDIBLE]

3

4 **JUSTICE B. V. NAGARATHNA:** Functional utility of 14 and 19 goes.

5

6 **TUSHAR MEHTA:** Take the chart for a second. Take the chart. Kindly come to the third
7 chart.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The third column.

10

11 **TUSHAR MEHTA:** The third column. [INAUDIBLE]

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** All right, now, just let's wait here for a second.
14 The words the principles specified in Clause (b) or Clause (c) of Article 39 is subsumed in the
15 expression, all or any of the principles lay down in Part IV.

16

17 **TUSHAR MEHTA:** Substituted.

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Subsumed. It is subsumed.

20

21 **TUSHAR MEHTA:** The word used is anyway, subsumed.

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Substituted is a legislative device, but
24 subsumed means the larger includes the smaller. So if the earlier words are subsumed in what
25 is substituted, then when the entirety of what is substituted is struck down, that will not result
26 in the revival of what is the original provision. That's the problem.

27

28 **TUSHAR MEHTA:** Only a minute.

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And if you read this now in the context of para
31 58 of *Minerva*, they say that granting this immunity on the grounds of 14 and 19, itself
32 violates the basic features of the Constitution. That's the problem.

33

34 **TUSHAR MEHTA:** My Lord, kindly... I wanted to...

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** See *NJAC*... I'll tell you one thing. *NJAC* they
37 realize that there is a problem, namely that when you strike down, that's why the Solicitor

1 General was arguing. Your counterpart was arguing that look, if you strike down the **NJAC**
2 amendment that will not result in revival. That's why what did the court throw in, in the
3 exercise of its 142 power? They said.. one second, one second...

4

5 **TUSHAR MEHTA:** Not 142. Court interprets My Lord.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What did the Court say? The Court said that
8 this will lead to a constitutional breakdown. We are not in a situation of constitutional
9 breakdown. Why? Because if 31C is no longer there, all that it means that any law has to meet
10 the standard of 14 and 19. No law is invalidated *ipso facto*. It has to be tested, that's all. There
11 is no constitutional breakdown. [UNCLEAR] law is lifted.

12

13 **TUSHAR MEHTA:** That would be distinction without a difference only to.... I'm sure Your
14 Lordships would not try to come out of **NJAC** finding on 142. It was a finding. It may be wrong
15 finding.

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Alright. No, no. Forget 142, but **NJAC** in two
18 paragraphs, they say that this will result in a constitutional breakdown. Justice Khehar says
19 that. We were trying to see whether there will be a constitutional breakdown in a case like this.
20 They wouldn't be, because no law then becomes invalid. It's just that the law has to be. It has
21 to be justified by the State. It has been a reasonable legislature.

22

23 **TUSHAR MEHTA:** I wanted to read few more paragraphs, but if Your Lordships have
24 decided to go into it, I wanted Your Lordship to persuade not to, for good reasons. But if Your
25 Lordships have decided, well, I have nothing more.

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We have to look at it, because **NJAC** doesn't...
28 The logic of **NJAC**....

29

30 **TUSHAR MEHTA:** It's not referred, My Lord. Therefore, I think advisedly not referred.
31 Should we expand the scope? Would Your Lordships read paras 70... Only a minute.

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What we will do is this. We have heard you
34 now on this, as we have told Mr. Andhyarujina, he has to argue the 31C point. Let's hear Mr.
35 Andhyarujina.

36

1 **TUSHAR MEHTA:** That means our point is rejected. Before Your Lordship rejects our
2 submission, 2085.

3

4 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We are not rejecting it. Now, we have heard
5 you on that.

6

7 **TUSHAR MEHTA:** Doesn't matter. It's entirely Your Lordships jurisdiction.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yesterday we prevented him from arguing it.
10 Let us hear what he has to say. Then we'll take a call.

11

12 **TUSHAR MEHTA:** 2085, would Your Lordships come.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** At the end of it, we may still say that 31C we
15 need not go into it at all. We may still say and say that, well, *Waman Rao* says this, *Minerva*
16 *Mills* says this, *NJAC* says this. Or if he, if he persuades us to a contrary viewpoint, we may,
17 we may take a contrary view, but we'll have to hear him for that because yesterday...

18

19 **TUSHAR MEHTA:** Only a minute My Lord. Before that would Your Lordships come to para
20 75 of *Minerva Mills*? It's 2085. And keep Section 4 in mind. Your Lordships have read
21 Section 4.

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Since we are on 75, why don't we read 58 and
24 then go to 75. Let's go to para 58.

25

26 **JUSTICE B. V. NAGARATHNA:** [INAUDIBLE]

27

28 **TUSHAR MEHTA:** Yes My Lords, it's 2079. 'It is in this light that the validity of the amended
29 Article 31C has been examined. Article 13(2) says that the State shall not make any law which
30 takes away or abridges the rights conferred by Part III and any law made in contravention of
31 that Clause shall be to the extent of contravention, be void. Article 31C begins with a *non*
32 *obstante* clause by putting Article 13 out of harm's way. It provides for a certain consequences,
33 notwithstanding anything contained in Article 13. If it that denudes Article 14 and 19 of their
34 functional utility by providing that rights conferred by this Article will be no barrier against
35 passing laws for giving effect to the principles laid down in Part IV. On the reasonable
36 interpretation, there can be no doubt by the amendment introduced by Section 4 of the 42nd
37 Amendment, Article 14 and 19 stand abrogated, at least in regard to the categories of laws

1 described in Article 31C. The startling consequence which the amendment has produced is
2 that even if a law is in total defiance of mandate of Article 13 read with 14 and 19, its validity
3 will not be open to question so long as its object is to secure a Directive Principle of State
4 Policy. We are disposed to accept the submission of the learned Solicitor General, considering
5 the two charts of cases submitted by him that it is possible to conceive of law which will not
6 attract Article 31C, since they may not bear direct and reasonable nexus with the provisions of
7 Part IV. But then, in our opinion, is beside the point. A large majority of laws, the bulk of them
8 can at any rate be easily justified as having been passed for the purpose of giving effect to the
9 policy of State towards securing some principle or other laid down in Part IV. In respect of
10 such laws, which will cover an extensive gamut of relevant legislative activity, the protection
11 of Article 14 and 19 will stand wholly withdrawn. It is then no answer to say, while determining
12 whether the basic structure of the Constitution is altered, that at least some of the laws will fall
13 outside the scope.' Now 75, My Lord. We may have a serious issue with 31C, but someone will
14 have to lay a challenge not on the ground that it doesn't revive and that challenge will have to
15 be met with bias. There is no challenge.

16

17 **JUSTICE B. V. NAGARATHNA:** It is struck down. So nobody can challenge it.

18

19 **TUSHAR MEHTA:** It is upheld by 13 judges as in *Kesavananda Bharati*.

20

21 **JUSTICE B. V. NAGARATHNA:** The reason is in paragraph 58, the reason why it is stuck
22 down is shutting out an argument under Article 14 and Article 19 on the basis of fundamental
23 rights to a law is against the basic structure.

24

25 **TUSHAR MEHTA:** My Lord, substitution is struck down. Section 4 of the Amending Act is
26 struck down. 31C is upheld by 13 judges.

27

28 **JUSTICE B. V. NAGARATHNA:** Talking in 1980, what happened. Once Section 4, the
29 amendment is struck down, what remains? The previous provision and the subsequent
30 provision are in *para materia*. In fact, the expansive provision is struck down, the limited
31 provision goes with it.

32

33 **TUSHAR MEHTA:** My Lord, I won't be able to go beyond saying that it is...

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The same thing is in para 61. See para 61 also.

36

37 **TUSHAR MEHTA:** My Lord, I leave it to Your Lordship.

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CHIEF JUSTICE D. Y. CHANDRACHUD: Para 61 also see. 'Article 14 and 19 do not confer fanciful rights. They confer rights, which are elementary for the proper and effective functioning of a Democracy.' Then they say - 'If Articles 14 and 19 are put out of operation in regard to the bulk of laws which the Legislatures are empowered to pass, Article 32 will be drained of its life blood.' Then they continue. 'Then the power to take away the protection of Article 14 is the power to discriminate without a valid basis for classification.' And then in the end, they say - 'The nature and quality of the amendment introduced by Section 4 of the 42nd Amendment is therefore such that it virtually tears away the heart of basic, fundamental freedom.' This is what they say in these two paragraphs.

RAKESH DWIVEDI: My Lords, may I have 5 minutes?

TUSHAR MEHTA: I wanted to read. Kindly note few paragraphs. I'll not read it, now that Your Lordship seems to be convinced on this. But para 75 for my satisfaction, for whatever...

CHIEF JUSTICE D. Y. CHANDRACHUD: 75.

TUSHAR MEHTA: Please My Lord, 75 at page 2085. 'These then are our reasons for the order which we passed on May 9, 1980 to the following effect.' As My Lords were saying, the operative part was pronounced first.

JUSTICE: Although it was passed in August '18, it specifically says these are for reasons order were passed on May 9th...

TUSHAR MEHTA: The reasons came later. Section 4 of the Constitution's 42nd Amendment Act, is beyond the amending power of the Parliament and is void since it damages the basic or essential feature of the Constitution. My Lord, please keep Section 4 on the side, My Lord. Page 3966. Please keep it on the side. Volume 4. 3966, Volume 4 and what *Minerva Mills* does. I have that, 3966, Volume 4. Your Lordships have that, My Lord?

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

TUSHAR MEHTA: I may read My Lord, for the benefit of everyone My Lord. In Article 31C of the Constitution for the words, brackets, letters and figures, within comma, the Principles specified in Clause (b) or Clause (c) of Article 39, the words and figure within inverted comma, "all or any of the Principles laid down, in Part IV", shall be substituted. Correct, My Lords? So

1 now, they say that every, entire chapter protects any challenge. Now the Court My Lord, in the
2 para 75 says in *Minerva Mills*, Section 4 of the Constitution's 42nd Amendment Act is
3 beyond the amending power of the Parliament and is void, since it damages the basic or
4 essential feature of the Constitution and destroys its basic structure by a total exclusion of
5 challenge to any law on the ground that it is inconsistent with, or takes away or abridges any
6 of the rights conferred by Article 14 or 19 of the Constitution. If the law is for giving effect to
7 the policy of the State power, securing all or any of the principles laid down in Part IV, the
8 substituted part, Section 55 of the amendment is beyond the amending power with which we
9 are not concerned. So what is set as set aside is 4. And thereafter, *Waman Rao* deals with
10 this, and says, that the position prevailing before 42nd Amendment Act in 31C stands restored.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** They don't say that, in *Waman Rao*. They
13 don't say that there is a revival. *Waman Rao* doesn't use the expression, 'revival' or
14 'restoration' at all. Very careful. We saw *Waman Rao*...

15

16 **TUSHAR MEHTA:** Would Your Lordships come to Volume 2B, page 8? Volume 2B, page 8.
17 Your Lordship gets?

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

20

21 **TUSHAR MEHTA:** My Lord, this is *Waman Rao*. After *Minerva Mills*, after noting
22 *Minerva Mills*, after noting that this bracketed portion is set aside or declared
23 unconstitutional, holds this. Article 31C of the Constitution as it stood prior to its amendment
24 by Section 4 of the Constitution's 42nd Amendment Act, My Lord, which I read, is valid to the
25 extent to which its constitutionality was upheld in *Kesavananda Bharati* Article 31C, as it
26 stood prior to the Constitution's 42nd Amendment Act does not damage any of the basic or
27 essential features of the Constitution or its basic structure.

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But, this is prior to the substitution. The issue
30 of revival was never dealt with.

31

32 **TUSHAR MEHTA:** After the substitution My Lords. My contention may be wrong. Factually,
33 I'm right.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Factually, it is not so. Because see it says that
36 31C, as it stood prior to its amendment in 1950, '76, is valid to the extent to which its
37 constitutionality was upheld in *Kesavananda*. So, it only tells us what is the decision in

1 **Kesavananda**, namely the 31C prior to **Kesavananda**, and as upheld in **Kesavananda**,
2 is valid. That's all. It does not deal with what is the effect of the substitution, the substitution
3 having been struck down. That is not dealt with here at all.

4
5 **TUSHAR MEHTA:** It deals with 42nd Amendment, My Lords.

6
7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We have to deal with it. **Waman Rao** doesn't
8 give us an answer. **Waman Rao** doesn't give us an answer to the conundrum.

9
10 **R VENKATARAMANI:** Probably Your Lordships put it like this. This paragraph stands in
11 the same footing as paragraphs 413 of **NJAC** Judgment. It stands in the same logic and the
12 same footing. It doesn't have to expressly say so. The conclusion is there [UNCLEAR].
13 Otherwise, the theory of vacuum would probably equally apply to every situation when...

14
15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** There's no vacuum here. That's the problem
16 which you face.

17
18 **R VENKATARAMANI:** There's a vacuum in the law.

19
20 **TUSHAR MEHTA:** The Parliament wanted a protection, protection.

21
22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** There's no vacuum in the law. There would be
23 a vacuum if the law [UNCLEAR]

24
25 **TUSHAR MEHTA:** Can I put it a little candidly? Can I put it...

26
27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The law still can benefit from the presumption
28 that a law made to give effect to a Directive Principle is presumed to be reasonable.

29
30 **TUSHAR MEHTA:** Can I put it a little, candidly? Can I put it a little candidly? 31C, as we
31 read it, we find it difficult to accept the proposition that it is not even... it is immune from
32 challenge, but it will have to be challenged in an appropriate proceedings. This may not be a
33 proper procedure to declare 31C as non-existent.

34
35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The immunity, so they're entitled to say that
36 the immunity doesn't apply. There's no question of challenging it. Once you set up the
37 immunity, the immunity does not apply.

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R. VENKATARAMANI: I will still urge this. Your Lordships say that the vacuum principle is fairly [UNCLEAR] because what remains after 31C, second part gone. The first part gone.

TUSHAR MEHTA: It's difficult to accept immunity, but not by not revival doctrine.

CHIEF JUSTICE D. Y. CHANDRACHUD: The deprivation of an immunity as a matter of constitutional concept is not a vacuum, because the law is still presumed to be valid. The presumption of constitutional...

R VENKATARAMANI: *IR Coelho* takes care of that. *Coelho* takes care of that.

CHIEF JUSTICE D. Y. CHANDRACHUD: [UNCLEAR] that's all. It's only that it has to be justified.

R VENKATARAMANI: If 31C had a legitimate place in the Constitution, it had a legitimate place in the Constitution, minus [UNCLEAR] it would have had.

CHIEF JUSTICE D. Y. CHANDRACHUD: We've got your point. We've got your point. I mean, this is not a matter which is free from difficulty. Mr. Dwivedi would you like to add then we'll call upon Mr. Andhyarujina.

TUSHAR MEHTA: Only My Lord before that...

CHIEF JUSTICE D. Y. CHANDRACHUD: What we'll do is we'll hear Mr. Andhyarujina, because we have not heard him. We'll have to put our doubts now to him as well.

TUSHAR MEHTA: Just two, three paragraphs can I complete of *NJAC*? My Lord, please avoid for the time being, don't keep that constitutional breakdown in mind. It's not necessary. My proposition is that it is only when constitutional breakdown is the result, that revival does not take place and in other provisions it takes place. Either it takes place or it does not take place, that's my respectful submission.

JUSTICE B. V. NAGARATHNA: Even if we go by your theory of revival.

TUSHAR MEHTA: There are five..

1 **JUSTICE B. V. NAGARATHNA:** If you go by the theory of revival, if Article 31C is now
2 struck down, what revives is the position prior to Article 31C. That means the immunity goes.

3

4 **TUSHAR MEHTA:** If the Honourable Court believes it is struck down, My Lord, I have
5 nothing to say but it is not. I don't think the other side says it is struck down. It is upheld in 13
6 judge judgment. It's not struck down. The amendment of 42nd Amendment is struck down.
7 But I leave it at that My Lord. I can't...

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Which other paras?

10

11 **TUSHAR MEHTA:** 4106, Volume 5. Para 989. This is concurring view of Justice Joseph,
12 Justice Kurian Joseph. Your Lordship gets? 'One word on the consequence, though elaborate
13 arguments have been addressed that even if the constitutional amendment is struck down, the
14 collegium... My Lord, Justice Pardiwala gets?

15

16 **JUSTICE J. B. PARDIWALA:** Yes.

17

18 **TUSHAR MEHTA:** One word on the consequence, though elaborate arguments have been
19 addressed that even if the Constitutional Amendment is struck down, the collegium does not
20 resurrect, according to me, does not appeal even to common sense. The 99th Amendment
21 sought to substitute a few provisions of the Constitution and insert a few new provisions.
22 Identical situation to 42nd Amendment. Once the process of substitution and insertion by way
23 of a Constitutional Amendment is itself held to be bad and impermissible, the pre-amended
24 provisions automatically resurface and revive. That alone can be the reasonably inferential
25 conclusion. Legal parlance and common parlance may be different, but there cannot be any
26 legal sense of an issue which does not appeal to common sense.' That instead of x, you
27 substitute with y. The court says that y is not a valid substitution, then x would revive, rightly
28 or wrongly, this is what it says. And the last, page 4156. The same judgment, Justice Goel's
29 view, My Lord. Para 1110, page 4156. All the three honourable judges have dealt with this issue.
30 May I read? I'm sorry, My Lord Justice Pardiwala. On your leave, My Lord Justice Pardiwala?
31 Placitum H, at the foot. This is the view of Justice Goel. 'The contention that even if the
32 amendment is held to be void, the pre-existing system cannot be restored has no logic. In
33 exercise of power of judicial review, a provision can be declared void, in which case the legal
34 position as it stands without such void provision can be held to prevail. It is not a situation
35 when the position has not been made clear while deciding an issue. Power of this Court to
36 declare the effect of its order cannot be doubted, nor the decisions relied upon by the
37 Respondents show otherwise. I hold that on amendment being struck down, the pre-existing

1 system stands revived.' The honourable two judges do not mention about any breakdown.
2 They as a proposition of law that you have substituted x by y. Y is declared unconstitutional.
3 Therefore, x revived. That's the word used. We'll elaborate if needed.

4

5 **RAKESH DWIVEDI:** Please bear in mind that the substitution happened by virtue of
6 Section 4. Section 4 enlarges. This is substitution by enlargement. This court holds that this is
7 against the doctrine of basic structure and therefore void. It's very important. Whole of Section
8 4 is void.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Just a sec.

11

12 **RAKESH DWIVEDI:** There are numerous judgments...

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Substitution of the original took place by...?

15

16 **RAKESH DWIVEDI:** Section 4...

17

18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** By enlargement...

19

20 **RAKESH DWIVEDI:** By enlargement...

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Just one minute.

23

24 **RAKESH DWIVEDI:** For expansion.

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Then, second you said Section 4...

27

28 **RAKESH DWIVEDI:** ...was declared null and void by exercising the doctrine of *ultra vires*,
29 on account of destruction of the basic feature of the Constitution. One My Lords, there are
30 numerous judgments of this Court, without dissent, that, including in the context of Article 13,
31 that if a law is declared to be void, then it is void. Still born... void...

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** There is a controversy on it. Whether it is still
34 born or it becomes void from the date of the declaration, that you know Justice Matthew's
35 judgment in *Ambica Mills*.

36

1 **RAKESH DWIVEDI:** I would prefer to use word *Ab initio*, because stillborn would mean it
2 never operated. But what happens is that generally there is a time lag between the making of
3 the Constitutional Amendment and the declaration of *ultra vires* by the court. So in the
4 *interregnum*...

5
6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** ...Acts may have been taken place.

7
8 **RAKESH DWIVEDI:** ...some things may have been done. So, whenever Your Lordship
9 declares *ultra vires* a question arises, what should be the form of declaration.

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** You say what happened.

12

13 **RAKESH DWIVEDI:** Whether Your Lordship will protect or not protect. But one thing is
14 certain, that the Law, unless made prospective, operates retrospectively, from the date the law
15 came into operation. So, unless Your Lordship gives it prospectivity, partial prospectivity,
16 retrospectivity... with protection...

17

18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The power was never enacted.

19

20 **RAKESH DWIVEDI:** Never enacted. So, if Section 4 is to be held to have never been
21 enacted, by virtue of this declaration in *Minerva Mills*, then the logical sequitur is, that the
22 Section 31C, as upheld in *Kesavananda Bharati*, stands as part of the Constitution. There
23 is no question of revival, resurrection. That's a misnomer, My Lords. It stands. It was never
24 substituted. Something which is void *ab initio* can never substitute. So, Section 4, was dead or
25 declared dead, retrospectively. There is no prospectivity attached, My Lord, in the declaration,
26 in the *Minerva Mills* case.

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We will hear now. We got the point. Can we
29 hear Mr.....

30

31 **RAKESH DWIVEDI:** Other thing is My Lord, there's one more thing. Something absolutely
32 inherent in the word substitution. Please have Section 4, para 412.6 of the judgment which
33 Your Lordships were reading at page 3883. An earlier three judge judgment has been
34 approvingly referred to, in the context of what is substitution.

35

36 **JUSTICE SUDHANSHU DHULIA:** This is what page?

37

1 **RAKESH DWIVEDI:** Page 3883... Yes, *NJAC* judgment which Your Lordships were
2 considering... *Central Provinces Manganese Ore Company*. This is three judge
3 judgment which is relied upon for revival direction.

4

5 **JUSTICE SUDHANSHU DHULIA:** In *2016, Volume 5, SCC?*

6

7 **RAKESH DWIVEDI:** Yes. *NJAC* . Reference was then made to *Central Provinces*
8 *Manganese Ore*. We do not think that the word substitution necessarily are always
9 connotes. I'm sorry. Paragraph 412.6 at page 3883. The chart is slightly defective. It suggests
10 as if that portion is struck down, it's the entire Section 4 which is struck down.

11

12 **TUSHAR MEHTA:** It is created there. It's a confusion created by the chart. So, it's our
13 confusion.

14

15 **RAKESH DWIVEDI:** By us. So just read this para 412.6. Kindly peruse 412.6. 'We do not
16 think that the word substitution necessarily or always connotes to severable steps, that is to
17 say, one of repeal and another of fresh enactment even if it implies two steps. Indeed, the
18 natural meaning of the word substitution is to indicate that the process cannot be split up into
19 two pieces, like this. If the process described as substitution fails, it is totally ineffective so as
20 to leave intact, what was sought to be displaced. That seems to us to be the ordinary and
21 natural meaning of the word shall be substituted. This part could not become effective without
22 the ascent of the Governor General. The State Governor's ascent was insufficient. It could not
23 be inferred that what was intended was, that in case the substitution failed or proved
24 ineffective, some repeal not mentioned at all was brought about and remained effective, so as
25 to create what may be described as a vacuum in the state law itself.' So maybe, vacuum or not,
26 is not the question at all. Question is substitution is an amalgam, it repeals and replaces
27 something. So it can't be that in part it is struck down, gone, but the repeal part remains. That's
28 what this judgment said.

29

30 **JUSTICE SUDHANSHU DHULIA:** It was never there. It was never born, because ascent
31 was not there to declare. No in this case, it came into effect substitution was done and then
32 declaration.

33

34 **RAKESH DWIVEDI:** No, the point is that once Your Lordship declares the substitution
35 itself, to be void. What are we reading? How do we read Section 4 now? What are we reading?
36 We are reading it as if Section 4 though struck down as void in *Minerva*, yet the substance of
37 the amendment goes, the old doesn't revive, so it's a repeal. So the repealing effect is surviving.

1 The repealing effect of Section 4 is surviving, therefore notwithstanding the declaration that it
2 is void. How can that happen? We are splitting up the declaration of the court in *Minerva*
3 *Mills*. Part is void, part is surviving. Section 4 reads, this will be substituted. 4 is gone. So
4 where is the substitution? So in a matter of substitution, it's an amalgam. The going out and
5 the coming in are one intertwined act of the Legislature. The whole goes, unless the court splits
6 it up, having found that it is severable. Then, of course, Your Lordships can say that we are
7 striking down this part of it, but we are not reviving. That the court never said. It declares the
8 whole entirety of Section 4 null and void. So it can't have a split effect. The third thing, My
9 Lords. I'm not just elaborating. I have numerous judgments which I can cite, but I'll do it if
10 when my turn comes, but the third and more important is - what is this doctrine of basic
11 structure under 368? The doctrine is that if you damage the basic structure, then what you are
12 doing, your act is beyond your competence under 368. So the amendment which was, which
13 brought about the enlargement is being held in *Minerva Mills* to be beyond the competence
14 of the Parliament under 368. So, what is beyond the competence cannot have any effect at all.
15 It can't be that it was beyond the competence yet in part, in some little part, it is still surviving
16 to have the repealing effect of what was upheld by 13 judges. And it has dangerous
17 consequences, as the learned Solicitor said, which Your Lordships of course, will elaborate.
18 What all can be amended? And then My Lords, every time this court will be troubled with this.
19 How much of it is reviving or not reviving, in my submission, is quite contrary to Mr.
20 Nariman's. He says... refers to that expression 'stands part of the Constitution'. That's what in
21 Article 368 is, that once the bill is passed, it stands amended in terms of the bill. But he misses
22 the expression which is earlier 'once it is passed and assented, thereupon'. Now if it could not
23 be passed. Once it is void, it could not be passed. It could not be assented. So there's no
24 question of the thereupon effect following, that it 'stands apart'. Merely because the *ultra vires*
25 declaration comes after a decade. It doesn't mean that it was for the last ten years competence.

26

27 **BALBIR SINGH:** Can I just take two minutes?

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We can hear everybody later. Mr.
30 Andhyarujina. You'll get your full turn. There were 3 Counsels on one or self-evident
31 proposition. Now, Mr. Andhyarujina.

32

33 **BALBIR SINGH:** Only two dates, My Lord.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Let him argue in the response. Mr.
36 Andhyarujina, please start now.

37

1 **ZAL ANDHYARUJINA:** First of all, I want to express my gratitude, Your Lordships, for
2 taking up this point, but it is an important point, a point particularly important for the facts of
3 this case. My Lords, I fully understand the concerns expressed by my learned friends, the
4 Solicitor General, the Attorney General, Mr. Dwivedi. But regrettably, My Lord, I disagree with
5 almost every statement of law that they have made. Mr. Nariman's point, in my respectful
6 submission is the point which carries great force and a point which requires a determination
7 by Your Lordships' Bench. I have divided my arguments into four segments. But I'll just like
8 Your Lordships wanted to know how I wish to address Your Lordships today. My Lord, I will
9 just frame the issue before Your Lordships precisely because I think, it is important that we
10 understand that we are dealing with the effect of a declaration of unconstitutionality on a
11 substituted provision in the Constitution, and that is the precise issue. But I'll just frame it in
12 a moment for Your Lordships.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Effect of a declaration of a substitution...
15 declaration of unconstitutionality.

16

17 **ZAL ANDHYARUJINA:** Yes My Lord.

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Just one second. Of the declaration of
20 unconstitutionality on a substituted provision...

21

22 **ZAL ANDHYARUJINA:** In the Constitution. And I think, it is important that we bear in
23 mind the distinction of this issue from other legislative activities, such as repeal and
24 introducing the laws. My Lord, it's an important distinction to be borne in mind, in my
25 respectful submission. My Lord, I hope that I will persuade Your Lordships if that is the case.
26 So, the first part, I wanted to address Your Lordship, which will nail to the masts, with some
27 certainty, not what exactly factually took place. My Lords, so much will become evident from
28 that because I will show Your Lordship, that for 20 years, in fact, for about 22 years, Article
29 31C did not exist in the Constitution at all. It came in later. I'll also tell Your Lordship, in a
30 nutshell, about the reasons for introduction of Article 31C. There is no Constitutional chaos
31 which is going to result as Your Lordship, alluded to for different reasons. But I also want to
32 set out how the *Minerva Mills* judgment came to be. And I want to point out to Your
33 Lordship, that actually the problem, is a problem post *Minerva Mills*. So it is a problem post
34 1980. So, if you bear that in mind, the issue that we have, is a post 1980 issue. That will all
35 become evident in my Legislative history. The third issue, which I want to address to Your
36 Lordships, so the first was to frame the issue correctly. Then the second My Lords, was to deal
37 with Legislative history very swiftly. I won't take Your Lordship's time on that. And the third,

1 I wanted to deal with the effect of *Minerva Mills*, *Waman Rao*, and the successor
 2 judgments. There are in particular two - *Sanjeev Coke*, and the other one is the same *Bhim*
 3 *Singhji* judgment . And also, there's another judgment called *Basanti*, which actually dealt
 4 with the 31C challenge to MHADA itself where also, 31C was noticed and the learned judges
 5 proceeded on the basis that, in fact, it was valid. So My Lords, I'm going to show Your
 6 Lordships all of this. But I hope to immediately and swiftly show Your Lordships, that
 7 *Minerva Mills*, clearly proceeded on a concession which was made by Mr. Palkhivala, who
 8 was arguing the case. But the issue, in fact, never arose in *Waman Rao*, which will also
 9 become evident from the dates in my Legislative history. It could not have arisen, because the
 10 question of striking down was not before the Court in *Waman Rao* at all for that simple
 11 reason. But I hope to elaborate on that. I also, in the next segment of my arguments, want to
 12 deal with the *NJAC* judgment, because I did find it curious that my learning friends relied
 13 upon it, because that judgment, was a judgment I wanted to rely upon. But it entirely, in my
 14 respectful submission, supports my arguments, as I will show Your Lordships. And it
 15 distinguishes, of course, that Amendment, as saying that that Amendment was not a
 16 substitution. But that really is the short point with regards to the *NJAC* judgment. I hope to
 17 make that good. Then it otherwise, fully accepts, the submission, that in fact, there is no
 18 doctrine of automatic revival. The last part of my address, My Lord, is on the consequential
 19 aspects, in the event that I am to succeed. There will be no Constitutional chaos. There will be
 20 no crisis, as I will show Your Lordships, and to Your Lordships a very pointed question, about
 21 whether this is purely a technical point, in the sense that Parliament can always step in, and
 22 take the necessary steps to redress it for us. I'll make a few comments on that. So, that is how
 23 I propose to go about this. My time estimate, My Lords, is approximately two to two and a half
 24 hours, if Your Lordship will permit me that.

25

26 I will straightaway start by, if Your Lordship doesn't mind. I have prepared a note on this. My
 27 Lord, I have prepared a note on this. The note is actually what I gave Your Lordship yesterday,
 28 and the same note from which I argued the *Coelho* point. Today, I will be relying on serial
 29 numbers one and three. The note has an index in front of you, if Your Lordship will see it,
 30 where it has three items. (i) is Legislative history and (iii) is whether 31C is a paid letter. But
 31 before I go to the note, I wanted to give you, a brief overview of the legislative history. It is not
 32 even necessary to read this note. I think I can effectively bring it out in a few minutes before
 33 Your Lordships. Do Your Lordships have the note?

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Where is your note?

36

37 **SAMEER PAREKH:** It's 1B in the Google Drive. 1B.

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CHIEF JUSTICE D. Y. CHANDRACHUD: Volume 1B?

SAMEER PAREKH: The name is 'a note tendered by Mr. Zal T. Andhyarujina, Senior Advocate.'

JUSTICE SUDHANSHU DHULIA: Legislative history of Article 31C?

ZAL ANDHYARUJINA: Yes. Legislative history of 31C of the Constitution is the first item, relevant to the present case. That, it's not a general history relevant to... All of Your Lordships have it?

CHIEF JUSTICE D. Y. CHANDRACHUD: Just one second. I have one garbled version. Let me see. Yes?

ZAL ANDHYARUJINA: So, My Lord, it's a longish note, so I'll just summarize it first to Your Lordships. Kindly mark one date followed, that is, Item 5 of my list of dates. That is 20th April, 1972 and that is the date of insertion of Article 31C.

JUSTICE HRISHIKESH ROY: What are you reading? Which page?

ZAL ANDHYARUJINA: My Lord, it's page 6, PDF page 6. Your Lordships will just note that date. I first wanted to address Your Lordship on some constitutional events prior to that. On 18th June, 1951, we have the First Amendment. Just orally, just a few minutes. The First Amendment introduces Article 31A and Article 31B. The speeches piloting it through Parliament, which are given by Pandit Nehru, all indicate that it is really for the purpose of agrarian reform, which was one of the important platforms for the then, of the Congress party back then. But it is immediately challenged in *Sankari Prasad* case in 1951. *Sankari Prasad* case, the challenge is whether 31A and the amending law of the Constitution amounts to law under Article 13. And the question is, therefore, if Constitutional Law is law is understood under Article 13, if it is law as understood under Article 13, then the effect of that on Part III, was to be considered. My Lord *Sankari Prasad* rejects that challenge. But several years later, in *Sajjan Singh's* case in 1965 or *Sankari Prasad's* view is upheld. In 1967, we have *Golaknath's* case. As Your Lordship know, *Golaknath* resulted in a six-five majority and the effect of the six-five majority was to hold that Section 368 is not the source of the amending power of Parliament. It is a general power that the Parliament has and that Article 13A, Constitution law, is the law which. Sorry, my apologies. That the law under Article

1 13A is Constitutional law, namely the law, which is used to amend the Constitution from time
2 to time. As a result of **Golaknath's** judgment, Your Lordships knows that **Golaknath** then
3 set out the principle of prospective overruling, which was, till then, actually a concept which
4 was alien to our jurisprudence. But as a result of this, there was a severe limitation which was
5 then placed on the Constitute Power of Parliament. But Parliament reacted, followed by
6 introducing two amendments. The First Amendment was on 5th November 1971, which was
7 the 24th Amendment. They made certain amendments to Article 13, added Article 13(4), and
8 they made significant amendments then to Article 361 and to the marginal note, effectively
9 making it clear that Parliament had an unlimited power to amend. My Lord, on 20th April '72,
10 then they introduced the 25th Amendment. That is Article 31C. Now my point... my limited
11 point, what thus far is this that from inception Article 31C did not exist. Article 31C came across
12 as a Parliamentary reaction to the judgment of the Supreme Court in **Golaknath's** case. So,
13 it was to some extent, the Parliament... the tension between Parliament and the Court
14 manifested itself in the 25th Amendment they made on 20th April 1972. So, from the date of
15 inception to the Constitution to '72 chaos did not reign. But there was no anarchy in the
16 country. The Constitutional provisions remained as they were. And if I am right, we will revert
17 to that position prior to 1972. Now **Kesavananda's** judgment comes immediately, shortly
18 thereafter. Because in fact, the 55th Amendment is immediately challenged as Your Lordship
19 knows. One of the aspects which challenge in **Kesavananda** judgment. We have the
20 judgment then, on 20th April 1973. My Lord, **Kesavananda's** judgment notices the basic
21 structure, which is then further commented upon in **Indira Gandhi's** case. Now, we have
22 the 42nd Amendment, which comes on 18th December 1976. The 42nd Amendment has the
23 effect of expanding Article 31C. And Your Lordship will find this in my list of dates. If Your
24 Lordship will kindly look at PDF page 12. But I'll just read to Your Lordship, so Your Lordship
25 has in an orderly manner, what the amendment is. All of Your Lordships have that? My Lord,
26 it's Item 8, page 12.

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** PDF page 12.

29

30 **ZAL ANDHYARUJINA:** Yes My Lords. PDF page 12.

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And there we have that Section 4, which we,
33 which we read from **Minerva Mills**.

34

35 **ZAL ANDHYARUJINA:** Yes. I'll quickly just breeze through it to give Your Lordship a
36 comprehensive view. "The Constitution 42nd Amendment Act *inter alia* amending Article 31C
37 received the assent of the President of India. The amendments were as follows :

1 Insertion of new subheading after Article 31. After Article 31 of the Constitution, the following
2 subheading shall be inserted, 'Saving of certain laws'. Fourth, the amendment of Article 31C -
3 In Article 31C of the Constitution, for the words, brackets, letters and figures, the principles
4 specified in Clause (b) or Clause (c) of Article 39, the words and figures, all or any of the
5 principles laid down in Part IV shall be substituted.' There was also then, an amendment which
6 was made to 368 which is not very relevant, but for the sake of completeness I have set it out
7 to Your Lordship. Now if Your Lordship will then go down to Item 9. How did it stand as a
8 result of the amendment, I've set it out there. 'The amended...' It is at PDF page 13. 'The
9 amended Article 31C, read as under: Saving of laws giving effect to certain Directive Principles.
10 Notwithstanding anything contained in Article 13. No law giving effect to the policy of the State
11 towards securing all or any of the principles laid down in Part IV shall be deemed to be void
12 on the ground that it is inconsistent with or takes away or abridges any rights conferred by
13 Article 14, 19 or 31. No law continued a declaration that it is for giving effect... So on and so
14 forth.' As we know, part of it was then subsequently set aside. Now, if Your Lordship will just
15 go to Item 10 and kindly note the date also. 'In 1977, the writ petitions were filed under Article
16 32 in the Hon'ble Supreme Court in *Minerva Mills vs Union of India inter alia*,
17 challenging the Constitutional validity of Section 4 and Section 5 of the Constitution, 42nd
18 Amendment Act, 1976. The writ petitions under Article 32, filed in the Hon'ble Supreme Court
19 in *Waman Rao versus Union of India inter alia*, challenging the constitutional validities
20 of 31A, 31B and unamended Article 31C. So My Lords, these two matters will... have historically
21 always moved in step, and moved together. Now a very interesting development takes place
22 immediately thereafter, which I want to bring to Your Lordships' notice. On 15th May 1978,
23 the Constitution's 45th Amendment Bill. This is a bill of 1978, which is Bill 88 of 78, to further
24 Amend the Constitution of India was introduced in the Lok Sabha. Clause (8) of the bill read
25 as follows. This was an attempt by Parliament. The government had now changed, and it was
26 an attempt by Parliament to actually once again narrow the effect of Article 31C as Your
27 Lordship will see. The Amendment and 8 of the Amendment read thus...

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** They wanted to restore the position as it was
30 prior to the 42nd Amendment.

31

32 **ZAL ANDHYARUJINA:** Exactly. They wanted to restore the position as it was prior and as
33 I will show Your Lordship from this, actually the bill of course passed as an Act, but without
34 this portion being passed by the Rajya Sabha. So, if Your Lordship will just permit me to read
35 this through that will become evident to Your Lordship. For the words, figures, all or any of
36 the principles laid down in Part IV, the words, brackets, letters and figures, the principles laid
37 down in Clause (b) or Clause (c) of Article 39 should be substituted. So, that is what they

1 wanted to bring back. For the words and figures, 14, 19 and 31 the words and figures, Article
2 14 and 19 shall be substituted. Now, the second part was successful. 31 stood deleted. The first
3 part was not. The words and no law containing a declaration, that is for giving effect to such
4 policy shall be called in question in any Court on the ground that does not give effect to such
5 policy, shall be omitted. Now, My Lord, that was the portion... that was the portion which have
6 been dealt with by ***Kesavananda***.

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Proposed bill which never passed the Rajya
9 Sabha. So, 31, 19(1)(f) was deleted, 31 was deleted. But this remained as it is.

10

11 **ZAL ANDHYARUJINA:** Exactly. This remained as it is. And, of note My Lord, is the deletion
12 also. And why...

13

14 **JUSTICE B. V. NAGARATHNA:** Omission of what...

15

16 **ZAL ANDHYARUJINA:** Now My Lord, if I may just read the notes.

17

18 **JUSTICE D. Y. CHANDRACHUD:** Yes.

19

20 **ZAL ANDHYARUJINA:** Sorry, if I may just read the note to that. The notes on Clause to
21 Clause (8) read as follows. The Amendment proposed in sub-clause (a) or this clause, is for
22 confining the protection accorded to Article 31C, only to the laws giving effect to the policy of
23 State towards securing the Directive Principles specified in Clauses (b) and (c) of Article 39.
24 This would have the effect of restoring the Article, to the form in which it stood, before the
25 Amendment made to the Article by the Constitution's 42nd Amendment Act 1976, came into
26 force. The Amendment proposed in sub-clause (b) is consequential to the omission of Article
27 31 above. The amendment proposed in sub-clause (c) is for omitting the portion related to the
28 declaration contained in Article 31C, which was struck down by the Supreme Court in
29 ***Kesavananda Bharati***. Now, My Lord, that is a point which I want to develop a little later
30 on. What is the effect of a declaration of unconstitutionality on a constitutional provision. It is
31 now... I respectfully submit an accepted position that it does not get excised from the statute
32 book. It remains in the statute book, and it has actually has to be removed by Parliament. And
33 of course, the relevance of this point, is that the pronouncement by the courts, on the
34 constitutionality of the Articles of the Constitution, in my respectful submission, invariably
35 require a consequential Parliamentary action. So, that's the point that I hope to develop for
36 Your Lordships, as we go along. The bill also sought for a deletion of Article 19(1)(f) and Article
37 31, and the insertion of Article 300A. Now, about the fate of that bill... what exactly happened

1 to it, is at item 12. The Constitution Bill was considered by the Rajya Sabha. During the
2 consideration of the 45th Amendment bill by the Rajya Sabha, on 31st August 1978, the motion
3 for retaining Clause (8) as a part of the bill was put to vote. The motion was not carried by a
4 majority of the total membership of the house and by a majority of not less than two thirds of
5 the members present and voted. Note, the proposed amendment of 31C, in terms of Clause
6 8(a) of the Constitution bill was thus omitted from the bill by the Rajya Sabha. Thereafter, a
7 consequential amendment to 31C was moved under Clause 7(a). I'll just read it, 'Shri Shanti
8 Bhushan, may I have your permission to move a consequential amendment now that Article
9 31 has been deleted by the adoption of Clause 6. Reference to Article 31 in Article 31C is
10 inappropriate. Therefore, I'm moving Amendment 103 that the page after Line 4, the following
11 new clause be inserted, namely in Article 31C in the Constitution for the words and figures,
12 Article 14, 19 and 31, the words and figures, Article 14 and 19 shall be substituted.' So, that is
13 how Article 31 came to be deleted from... I'm sorry, but that is how the... Mention of Article 31
14 came to be deleted from Article 31C. Clause 7(a) was thereafter put to vote. The motion was
15 carried by the majority of total membership of the House and a majority of not less than two-
16 thirds of the members present and voting. Now as a result of this, what did Article 31C look
17 like, I have put that out in 13.

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes, Mr. Andhyarujina.

20

21 **ZAL ANDHYARUJINA:** My Lord, the result what Article 31C now looked at looked like as
22 a result of this legislative process, what I've set out at Item 13 of list of dates, page 17. The
23 saving of laws giving effect to certain Directive Principles notwithstanding anything contained
24 Article 13, no law giving effect to the policy of the state towards securing all or any of the
25 principles laid down Part IV, shall be deemed to be void on the ground that it is inconsistent
26 or takes away or abridges any of the rights conferred by 14 and 19. So, 31 stood. Now we come
27 to *Minerva Mills*. Your Lordships will turn to page 18 of my list of dates. On 9th May, 1980
28 we have the order in *Minerva Mills* case. The Chief Justice, Justice Chandrachud, P. N.
29 Bhagwati, A. C. Gupta, N. L. Untwalia and P. S. Kailasam. My Lord, five judges *inter alia* are
30 holding, but this is, of course, the majority view that Section 4 and Section 55 of the
31 Constitution 42nd Amendment Act to be void on the ground that it destroys the basic structure
32 of the Constitution. Now My Lord, I have only extracted here, some part of the order. Section
33 4 of the Constitution 42nd Amendment Act is beyond the amending power of Parliament and
34 is void, since it damages the basic or the essential features of the Constitution and destroys its
35 basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent
36 with or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the

1 Constitution, if the law is for giving effect to the policy of the State towards securing all or any
2 of the principles laid down in Part IV of the Constitution.

3

4 And as far as 55, just for the sake of completeness. 'Section 55 of the Constitution is beyond
5 the amending power of Parliament and is void, since it removes all limitations on the power
6 of Parliament to amend the Constitution and confers power upon it to amend the Constitution
7 so as to damage or destroy its basic or essential features or its basic structure.' So Section 55
8 was that section that brought about amendments to 368 giving Parliament plenary powers to
9 amend. 'Note - The reasons for the decision were given in the judgment on 31-07-1980.' Your
10 Lordship said - August. Your Lordship is not entirely wrong. 31st July 1980. See *Minerva*
11 *Mills* given below. There's a typo, I noticed in one of the other judgments which refers to
12 *Mills*. It was actually delivered on 31st July 1980. I think Justice Bhagwati's judgment states
13 the date incorrectly.

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right. 31st July '80 was post the [UNCLEAR]
16 probably.

17

18 **ZAL ANDHYARUJINA:** Then I just referred to the judgment and the reasons come in later.
19 But on the very same day, we have the judgement in...

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** This is something which we'll have to bear in
22 mind that though *Minerva* strikes down the entirety of Section 4 of the 42nd Amendment,
23 by virtue of which all or any of the principles in Part IV is struck down, *Waman Rao*, which
24 for which the reasons were delivered later, *Waman Rao* upholds 31C to the extent to which
25 it was upheld in *Kesavananda*.

26

27 **ZAL ANDHYARUJINA:** Unamended.

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That is the unamended Section 30... Article
30 31C.

31

32 **JUSTICE B. V. NAGARATHNA:** [UNCLEAR] Unamended was challenged there. Not the...
33 The amendment was not a subject of matter.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** [UNCLEAR] of *Waman Rao*.

36

37 **BALBIR SINGH:** And *Waman Rao* is subsequent in time.

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JUSTICE B. V. NAGARATHNA: What was challenged in *Waman Rao* was unamended.

BALBIR SINGH: Yes, it was used because came from High Court.

CHIEF JUSTICE D. Y. CHANDRACHUD: By then, *Kesavananda* had been delivered.

BALBIR SINGH: Yes.

CHIEF JUSTICE D. Y. CHANDRACHUD: So they say that...

BALBIR SINGH: No, interestingly, that's what the... because if we see *Minerva* came in July.

JUSTICE B. V. NAGARATHNA: *Waman Rao*.

BALBIR SINGH: *Waman Rao* came in November in spite of noting that it has been set aside in *Kesavananda*. After that, a separate finding has been given. Independent finding to say that unamended is declared unconstitutional.

JUSTICE B. V. NAGARATHNA: Correct. What is the basis of that unamended being challenged?

BALBIR SINGH: That has been equated with 31A principle My Lords to say the 31A independent of *Kesavananda*, the independent 31A principle applied, and interestingly, by that time *Minerva* was in hand. We had a judgment on that day.

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

ZAL ANDHYARUJINA: I'm obliged to my learned friend. My Lord, then he is undoubtedly correct in that. My Lord, that the *Waman Rao* rationale for upholding the unamended 31C was on an equivalence with 31A, which is what I will point out. But the point of relevance for the present argument is that this question with regard to the unconstitutionality of a substituted provision was never present before the judges in *Waman Rao's* case for the simple reason that when the hearing stood concluded the result of *Minerva Mills* was not. So that judgment could really never tackle this issue. But I'll come to the second point about what is the effect of that declaratory statement which is made in *Waman Rao*. But this issue,

1 this issue which we are dealing with, but precisely this issue was not present in **Waman**
2 **Rao's** case. But for this reason. But this coincidence of time. So, I'll just finish this in a few
3 minutes for the coming to the end. On 9th May 1980 or Item 15, we have the **Waman Rao**
4 order and here we have Chief Justice Chandrachud, Justice Bhagwati, Justices Krishna Iyer,
5 Tulzapurkar and A. P. Sen. My Lord, it's reported **1983 SCC**. Five judges upholding the
6 validity of unamended Article 31C to the extent to which its constitutionality was upheld in
7 case of **Kesavananda Bharati**. 'Article 31C of the Constitution as it stood prior...'

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** My learned brother Justice Roy is saying
10 something.

11

12 **JUSTICE HRISHIKESH ROY:** No, I am just going to say that instead of saying Chief
13 Justice Chandrachud, you can say Chief Justice Chandrachud I.

14

15 **ZAL ANDHYARUJINA:** I will take Your Lordship's advice on that. Perhaps as the former
16 Chief Justice Chandrachud. My Lord, it is a problem which doesn't come to Counsel very often.
17 The judgment in **Waman Rao** was delivered and the extract is there, My Lord. Article 31C of
18 the Constitution, as it stood prior to its Amendment by Section 4 of the Constitution, 42nd
19 Amendment Act, 1976, is valid, to the extent to which its constitutionality was upheld in
20 **Kesavananda Bharati**. Article 31C, as it stood prior to the Constitution Amendment Act,
21 does not damage any of the basic or essential features of the Constitution or its special
22 structure. The effect of the substitution of the words, all or any of the principles laid down in
23 part 4 for the words principle specified in Clause (b) or (c) of Article 39, effected by the 42nd
24 amendment was not at all considered. Now My Lord, thereafter we have the Judgment in
25 **Minerva Mills** on 31st July, 1980. The judgment is far too important to try to summarize,
26 My Lord. I will take Your Lordship to the relevant passages. But for Your Lordship's
27 convenience, I have tried to summarize it by referring to various passages at page 20. I will not
28 deal with the note here, because I'll make my submissions on **Minerva Mills** case, separately.
29 I just want to point out to Your Lordship, in conclusion of my list of days, two or three more
30 dates. On 13th November 1980, we have the judgment in **Waman Rao**. Once again, it is a
31 matter of great moment to this argument what I will read from the judgment itself, if Your
32 Lordships don't mind. And, then we have two or three other interesting developments. On
33 item 18, once again in 1980, 1980 we have three very, very important judgments, all dealing
34 with Article 31C. We have the third of those judgments, which is on 13th November 1980, the
35 order passed in **Bhim Singhji's** case.

36

37 **CHIEF JUSTICE D. Y. CHANDRACHUD:** ...comes **Bhim Singhji**.

1
2 **ZAL ANDHYARUJINA:** Yes. *Bhim Singhji*. Now, My Lord of *Bhim Singhji's* case was
3 the case which was referred to, by My Lady yesterday, in the context of the Urban Land Ceiling
4 challenge. As My Lady knows, *Bhim Singhji's* case, the result of the majority was to strike
5 down only one Section, which was 27(1). But the effect of *Bhim Singhji*, is a very neutral
6 effect on this argument, for reasons that I'll come to when I deal with the judgment
7 individually. Now My Lord, Your Lordships will only note, the relevance of the facts of this
8 case. Item 19, on 26th February 1986, Chapter 8A of MHADA is now introduced. So, just to
9 contextualize it to the facts of our case, this happens then. And, sorry My Lord, I seem to have
10 omitted to mention to Your Lordship, one relevant date My Lord... the item 16, I'm afraid I
11 have failed to read that. If Your Lordship will see the note, the judgment in *Minerva Mills*
12 also referred to *Sanjeev Coke*, note 2.

13
14 **JUSTICE B. V. NAGARATHNA:** *Sanjeev Coke* referred to *Minerva Mills*. It's the
15 reverse.

16
17 **ZAL ANDHYARUJINA:** Yes. My Lady.

18
19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The Judgment in *Minerva Mills* was referred
20 to in *Sanjeev Coke*.

21
22 **ZAL ANDHYARUJINA:** I am so sorry. So, *Sanjeev Coke* is the other judgment, which
23 also deals with this 31C. My apologies. My mistake. So, My Lord, we have *Sanjeev Coke*.
24 Then we have *Bhim Singhji's* case. We then have the insertion, and then, if Your Lordship
25 will just kindly turn to... there is one more date, which I want Your Lordships to have. I'll just
26 give it to Your Lordship presently, my order in...

27
28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** *Basanti*.

29
30 **ZAL ANDHYARUJINA:** Yes, that is 1986. The exact date... One sec... 13th March 1986.

31
32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right.

33
34 **ZAL ANDHYARUJINA:** And then, we have, finally, to conclude this, the order of reference
35 from three judges to five judges on this issue, on 1st May, 1996. So, that is how the issue now
36 arises before Your Lordships. May I now show Your Lordship, the *Minerva Mills* case?

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

2

3 **ZAL ANDHYARUJINA:** And then I will like to show Your Lordship *Waman Rao*, before
4 we move further. So if Your Lordship doesn't mind, *Minerva Mills*. Your Lordship will find
5 that at page 2050 of the precedents compilation, which Your Lordships have. My Lord, we are
6 principally concerned here with the majority view, but Justice Bhagwati actually does
7 something quite unusual. My Lord, in *Minerva Mills*, he also deals with *Waman Rao*. So,
8 may I refer Your Lordships in *Minerva Mills* straight away, to the question for consideration
9 and that Your Lordships will find at page 639. Sorry. Internal 639, which is 2064. Your
10 Lordships have that, My Lord?

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes, Mr. Andhyarujina?

13

14 **ZAL ANDHYARUJINA:** Yes, My Lord. So, in the first paragraph, the question is
15 summarized. In *Kesavananda Bharati*, this court held by a majority that though by Article
16 368, Parliament is given the power to amend the Constitution that power cannot be exercised
17 so as to damage the basic features of the Constitution or as to destroy its basic features. The
18 question for consideration in this group of petitions under Article 32 is, whether Section 4 and
19 55 transgress the limitation on the amending power. Then if Your Lordship will kindly notice
20 in paragraph 5, My Lord, a curious feature of this case was that the statute in question was
21 actually a pre-amendment statute, as Your Lordships will see. By these petitions, the
22 petitioners challenged the constitutional validity of certain provisions of the Sick Textile
23 Undertaking Nationalization Act and the order dated October 19, 1971. We are not concerned
24 with the merits of the challenge at that stage. And then, the way the matter proceeded was on
25 a basis of a concession, which I want to bring immediately to Your Lordships' attention. There
26 is, if I may say so, My Lord, you will find in paragraph 7 to paragraph 12, a masterful and
27 clearer exposition of the law in *Kesavananda Bharati*. A judgment which should have been
28 perennially difficult to exactly distil the meaning, but there is a masterful summary which I
29 found very useful in these paragraphs. And then if Your Lordship goes straight from there,
30 please go to paragraph 24.

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Para 24 at page?

33

34 **ZAL ANDHYARUJINA:** 24, My Lord, it is at 2069. And the point I want to make here is
35 that, the entire case proceeded on a concession as Your Lordships will notice. I won't
36 paraphrase it, but I'll just read it. The next question, which we have to consider is whether the
37 amendment made by Section 4 to, of the 42nd Amendment Act to Article 31C of the

1 Constitution is valid. Mr. Palkhivala did not challenge the validity of the unamended Article
2 31C. So, My Lord, it's very clearly stated...

3

4 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But they also say, 'and indeed, that could not
5 be done.' So they had their own reason, and they add the reason for it, the unamended 31C
6 forms a subject matter of a separate proceeding, and we have indicated therein that it is
7 constitutionally valid to the extent to which it was upheld in *Kesavananda Bharati*. So,
8 the unamended 31C was valid for the reason that it was upheld in *Kesavananda* itself.

9

10 **JUSTICE B. V. NAGARATHNA:** It was the subject matter in *Waman Rao*.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That's right.

13

14 **BALBIR SINGH:** Justice Bhagwati notes in detail under page 2088.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That's okay.

17

18 **BALBIR SINGH:** Very extensively dealt in a minority of Justice Bhagwati.

19

20 **ZAL ANDHYARUJINA:** My learned friend is right again, My Lord, Justice Bhagwati is....

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Mr. Andhyarujina, tell us this, that para 1 of
23 *Minerva* says, that what was challenged in *Minerva* was the constitutional validity of
24 Section 4 of the 42nd Amendment.

25

26 **ZAL ANDHYARUJINA:** That's right.

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now, Section 4 of the 42nd Amendment
29 comprehended two features. It actually comprehended one feature. Let me begin by saying
30 that. It comprised the entirety of the provision, the Directive Principles which are now brought
31 in by way of the amendment. So, that would include 39(b) and (c) and the other principles in
32 Part IV of the Constitution apart from 39(b) and (c). Now the validity *qua* 39(b) and (c) was
33 already dealt with in... it was already dealt with in *Kesavananda Bharati*.

34

35 **ZAL ANDHYARUJINA:** Your Lordships is right.

36

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right. Therefore, though the entirety of
2 Section 4 was an issue. I guess the problem is the *Minerva* bench felt was that they couldn't
3 bifurcate the two because what Parliament had done had to bring in one composite
4 amendment. So, they couldn't bifurcate between the 39(b) and (c) part and the other parts of
5 the Directive Principles.

6

7 **ZAL ANDHYARUJINA:** My Lord, I would agree with Your Lordship, respectfully. Because
8 as Your Lordship rightly pointed out...

9

10 **JUSTICE B. V. NAGARATHNA:** Para 24.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Para 24. That's what he was reading, actually.
13 You are reading para 24, that's why that struck me that Mr. Palkhivala also doesn't challenge
14 the validity of the unamended 31C because it was upheld in *Kesavananda*. And therefore
15 though there's a concession by Mr. Palkhivala, the court says - 'and indeed, that could not be
16 done'. They have endorsed it. As we do so many times in our orders that learned Counsel did
17 not or 'argued and correctly so' that we are lending our own authority to the submission of
18 Counsel.

19

20 **ZAL ANDHYARUJINA:** Yes, My Lord, Your Lordships is right. And it does add a slight
21 complication to the matter. But I believe...

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Referred to *Waman Rao* because *Waman*
24 *Rao* was pending at that time.

25

26 **ZAL ANDHYARUJINA:** So the curious, in one sense, it comes down to *Kesavananda*.

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** By the time these reasons had come in July,
29 the operative order in *Waman Rao* had been pronounced in May. So they knew that they
30 had upheld the constitutional validity of the unamended 31C in *Waman Rao*. The reasons
31 were to follow later in November.

32

33 **ZAL ANDHYARUJINA:** But I would add to that a little bit. But in fact, if Your Lordship sees
34 the order in *Waman Rao*. It's not exactly in line with the reasoning in *Waman Rao*. If Your
35 Lordship just comes back to reason why they said this.

36

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It's a conundrum because while *Minerva* sets
2 aside the entirety of Section 4, Section 4 comprises a smaller subset which has been upheld in
3 *Kesavananda*. The bench in *Minerva* did not have the ability to say that it was severable
4 because a severability would not arise because it was one amendment. It was one substitution.
5 It was composite. Otherwise they would have severed it. They would have said - 'What has
6 been upheld in *Kesavananda* and we can't strike it down.' But they didn't have that choice
7 here because it was one composite amendment. Otherwise, they could have applied the test of
8 severability. But when you apply the test of severability, something which is valid has to
9 survive. Here they could not apply the test of severability because it was composite. So in a
10 sense that is intellectually, the problem which the bench was facing. I mean, they don't
11 articulate it in that way, but obviously it's clear. Therefore, they strike down the entirety of
12 Section 4.

13
14 **ZAL ANDHYARUJINA:** May I add to? I am complete respectful agreement with everything
15 that Your Lordship in and My Lord, I'm glad that Your Lordship said it rather than I say it, but
16 may I add one or two things that I could say about it? If Your Lordship were to see the order
17 in *Waman Rao*, it actually says this. The reason why they actually repeated this in *Minerva*
18 *Mills*, was that the order in *Waman Rao*, which was available by the time that the Judgment
19 came in *Minerva Mills*, which Your Lordship will find conveniently at paragraph 15 of my
20 list of dates, page 19. My Lord, it says this. I'll just read to Your Lordship again. '31C as it stood
21 prior to its amendment is valid to the extent to which its constitutionality was upheld in
22 *Kesavananda Bharati*.' So the reason why they use this very language in *Minerva Mills*
23 was this was the order in *Waman Rao*. But what this meant, was actually explained by the
24 judgment in *Waman Rao*, but I'll just come to the judgment in *Waman Rao* in a minute.
25 My Lord, *Waman Rao* decided on independent reasoning, not on the Doctrine of Precedent
26 and *Kesavananda Bharati*, but arrived at the same conclusion. That is how this statement
27 comes to be a part. And that is the correct meaning to be ascribed to the latter part of this
28 concessionary statement.

29
30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But then, if *Waman Rao* independently
31 applies... upholds the unamended 31C, right, does it uphold it only for the period prior to the
32 42nd Amendment, or does it then... is it capable of the inference that, well, that the
33 unamended 31C survives the striking down of Section 4 in *Minerva*.

34
35 **ZAL ANDHYARUJINA:** Your Lordship, has once again rightly identified the complication.
36 As soon as we deal with *Minerva*, permit me to go to *Waman Rao*. But would Your
37 Lordship mind if we just finished with *Minerva* once?

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CHIEF JUSTICE D. Y. CHANDRACHUD: We saw para 24. Let's go ahead. You can go ahead. You can....

ZAL ANDHYARUJINA: 24 is a para of considerable importance.

CHIEF JUSTICE D. Y. CHANDRACHUD: Is it para 25 also?

JUSTICE B. V. NAGARATHNA: 25.

ZAL ANDHYARUJINA: Yes, 25 also. Of course, not the whole judgement...

CHIEF JUSTICE D. Y. CHANDRACHUD: Zal, you can read paragraph 24.

ZAL ANDHYARUJINA: I'll read this slowly. The next question, which we have to consider is, whether the amendment made by Section 4 of the 42nd Amendment to Article 31C of the Constitution is valid. Mr. Palkhivala did not challenge the validity of the unamended Article 31C, and indeed could not be done. Now, why could it not be done? The unamended Article 31C forms the subject matter of a separate proceeding. And we have indicated therein, that it is constitutionally valid to the extent to which it was upheld in *Kesavananda Bharati* and the asterix...

JUSTICE SUDHANSHU DHULIA: It's not a concession.

CHIEF JUSTICE D. Y. CHANDRACHUD: It's not a concession.

JUSTICE SUDHANSHU DHULIA: It's not a concession at all. It is because there is already a decision of Supreme Court which has upheld the validity of...

CHIEF JUSTICE D. Y. CHANDRACHUD: In *Kesavananda* and independently in *Waman Rao*.

JUSTICE HRISHIKESH ROY: It's an authoritative pronouncement.

ZAL ANDHYARUJINA: I accept what Your Lordships say, that yes, it was not... Palkhivala made that... Mr. Palkhivala made the concession, but the Judges said that on the basis of the

1 concession, and on this basis, in fact, the concession was unnecessary because **Waman Rao**
2 had already decided this.

3

4 **JUSTICE HRISHIKESH ROY:** See, will it be also right to say that it was a concession by
5 Mr. Palkhivala? Mr. Palkhivala, he said that he did not challenge it. That doesn't mean that
6 you can put it as if there was a concession made.

7

8 **JUSTICE SUDHANSHU DHULIA:** He stated the correct position of law. This is what has
9 happened.

10

11 **ZAL ANDHYARUJINA:** Yes, Your Lordships may well be right. That also works for my
12 argument. I don't dispute it. Yes, but it could well be that what Mr. Palkhivala said, that in
13 view of the... in view of the order now, which is passed in **Waman Rao**, I don't need to
14 challenge it. Albeit, I may respectfully differ from Your Lordship for this reason. My Lord,
15 consider the timeline. At the time when the matters were being heard together, the order in
16 **Waman Rao** was not out. During the course of the hearing, the order was not out. So, Mr.
17 Palkhivala would not have been able to know that in **Waman Rao** this would have been the
18 case. But by the time that the judgment is delivered in **Minerva Mills**, the order in **Waman**
19 **Rao** is out, so the judges have the advantage of that order. The way that I read this, given this
20 context...

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Mr. Zal, it's almost 04:00, but the only point
23 which we'll have to consider is this, you can reflect on it. The net result of **Waman Rao** and
24 **Minerva Mills** is this. **Waman Rao** upholds the unamended provisions of Article 31C, on
25 reasoning independent from that in **Kesavananda**. The amended provisions of section
26 Article 31C, as amended by the 42nd Amendment, are struck down in **Minerva Mills**. Now,
27 does that mean, does **Waman Rao** really mean, that the unamended 31C, is upheld only prior
28 to the date of the insertion of the substituted provision by the 42nd Amendment, or does the
29 unamended 31C continue to operate both before and after **Minerva**?

30

31 **ZAL ANDHYARUJINA:** Your Lordship has put the problem perfectly actually. I think that
32 my answer would be the first. But My Lord, I'll deal with it at some lengths tomorrow.

33

34 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Because then what was the purpose of
35 **Waman Rao**? Because see, the unamended provision of 31C, had already been upheld in
36 **Kesavananda**, right? Now **Waman Rao** they had to deal with. Then why would they write
37 a judgment in **Waman Rao**?

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ZAL ANDHYARUJINA: I'll show Your Lordships. Yes, but let me not say anything.

TUSHAR MEHTA: About the benefit of *Minerva*. They mentioned.

CHIEF JUSTICE D. Y. CHANDRACHUD: Because see *Waman Rao*, conscious of the fact that they have struck down Section 4 of the 42nd Amendment, yet proceeds to hold that the unamended 31C is valid.

ZAL ANDHYARUJINA: That's correct.

CHIEF JUSTICE D. Y. CHANDRACHUD: Is that not therefore susceptible of the inference that they treated 31C to be continuing in operation, though in its unamended form, post the decision in *Minerva*?

ZAL ANDHYARUJINA: I will reflect on that.

CHIEF JUSTICE D. Y. CHANDRACHUD: Just reflect on it, Mr. Andhyarujina. We'll continue tomorrow morning.

ZAL ANDHYARUJINA: Deeply obliged My Lords.

CHIEF JUSTICE D. Y. CHANDRACHUD: Let's also see. Let's see what was the nature of the challenge in *Minerva*. You've shown us para 1, with the nature of the challenge in *Waman Rao*. We'll also reflect on it in the evening and in the night today and look at it.

ZAL ANDHYARUJINA: Certainly. Deeply obliged, My Lord.

CHIEF JUSTICE D. Y. CHANDRACHUD: Mr. Andhyarujina are you headed back to Delhi tomorrow or no?

ZAL ANDHYARUJINA: Yes, My Lord, I will be, My Lord.

CHIEF JUSTICE D. Y. CHANDRACHUD: Alright, in physical presence hearing tomorrow.

TUSHAR MEHTA: Obligated, Your Lordships.

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END OF DAY'S PROCEEDINGS