HEAD NOTES OF LEADING CASES

ADVOCATES-ON-RECORD EXAMINATION
SYLLABUS FOR PAPER IV-LEADING CASES

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VOLUME III

LIST OF LEADING CASES

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NANDINI SUNDAR AND ORS.
v.
STATE OF CHATTISGARH

(Writ Petition (Civil) No. 250 of 2007)

JULY 05, 2011

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Constitution of India, 1950:

Constitutional norms and values – Held: Constitution promises to each and every citizen, complete justice-social, economic and political – Such a promise, even in its weakest form and content, cannot condone policies that turn a blind eye to deliberate infliction of misery on large segments of our population – On facts, violation of human rights of people of Dantewada District and its neighbouring areas in the State of Chattisgarh – Approach of lawless violence (counter-insurgency operations) in response to violence by the Maoist/Naxalite insurgency in the State of Chattisgarh, has not, and will not, solve the problems, and instead it would only perpetuate the cycles of more violent, both intensive and extensive, insurgency and counter-insurgency.

Articles 14 and 21 – Public interest litigation – Counter-insurgency operations launched by the State of Chattisgarh against Maoist/Naxalites extremists in the State of Chattisgarh – Violation of human rights of people of Dantewada District and its neighbour areas in the State of Chattisgarh – Writ Petition – Allegation that State of Chattisgarh was actively promoting criminal activities of Salwa Judum, or sometimes called Koya Commandos, thereby further exacerbating the ongoing struggle, and leading to further widespread violation of human rights; and that barely literate tribal youth are appointed as Special Police Officers (SPO) and given firearms to undertake tasks that only formal police force could undertake – Direction by Supreme Court to Union of India to file an affidavit regarding its role in the appointment of SPOs – Affidavit filed by the Union of India to the effect that its role is limited only to approving the total number of SPOs and the extent of reimbursement of honourarium paid to them and thus, the Union of India abdicated its responsibilities – State of Chattisgarh and the Union of India acknowledged

that the SPOs are actually involved in combat with the Maoist/Naxalites and are placed in direct danger of attacks without adequate safety that formal security would possess – Given their educational levels, the training provided to them is not adequate – Manner of use of firearm is not consonant with the concept of self-defence – Involving ill-equipped barely literate youngsters in counter-insurgency activities cannot be said to be creating livelihood for them – They (SPOs) are expected to perform all the duties of police officers, yet paid only an honorarium – Appointment of SPOs is temporary and once it is over, their life would be in danger – Thus, the appointment of tribal youth as SPOs in counter-insurgency activities has endangered and will necessarily endanger the human rights of the others in the society – It is violative of Article 21 and 14 – Thus, Central Bureau of Investigation directed to immediately take over the investigation as also take appropriate legal action against all individuals responsible for the said incidents – The State of Chattisgarh directed to immediately cease and desist from using SPOs in controlling, countering, mitigating or eliminating Maoist/Naxalite activities in the State; to make every effort to recall ail firearms issued to any of the SPOs; to make arrangements to provide appropriate security, and take necessary measures to protect those who had been employed as SPOs previously, or given any initial orders of selection/appointment; and to take all appropriate measures to prevent the operation of any group, including but not limited to Salwa Judum and Koya Commandos – Union of India also not to use any of its funds in supporting the recruitment of SPOs for engaging in any form of counter-insurgency activities – CBI directed to submit its preliminary status report within six weeks – The State of Chattisgarh and the Union of India also directed to submit compliance reports with respect to all the orders and directions issued within six weeks.

Olga Tellis v Bombay Municipal Corporation **(1985) 3 SCC 545 – referred to.**

State policies designed to combat terrorism and extremism – Interference with – Held: It can be interfered with, for security considerations – State necessarily has the obligation, moral and constitutional, to combat terrorism, extremism, and provide security to the people of the country – This is a primordial necessity – Judiciary intervenes in order to safeguard constitutional values and goals, and fundamental rights such as equality, and right to life.

G.V.K Industries v. ITO **(2011) 4 SCC 36 – referred to.**

Almadani v. Ministry of Defense **H.C. 3451/02, 56(3) P.D – referred to.**

Counter-insurgency operations against Maoist/Naxalites extremists in the State of Chattisgarh – Violation of human rights of people of Dantewada District and its neighbour areas in the State of Chattisgarh – Allegations by civil society leader with regard to the incidents of violence in three villages, as well as incidents of violence allegedly perpetrated by people, including SPOs, Koya Commandos, and/or members of Salwa Judum, against him and others travelling with him in March 2011 to provide humanitarian aid to victims of violence in the said villages – Affidavit filed by the State of Chattisgarh – Held: Affidavit wherein the State admitted about the incident is nothing more than an attempt at self-justification and rationalization, rather than an acknowledgment of the constitutional responsibility to take such instances of violence seriously – Offer/measure by State of Chattisgarh to constitute an Inquiry Commission, headed by a sitting or a retired judge of the High Court, are inadequate – These may prevent such incidents in the future, however, they do not fulfill the requirement of the law: that crimes against citizens be fully investigated and those engaging in criminal activities be punished by law – Public interest litigation.

Chattisgarh Police Act, 2007 – s. 23(1)(h) and 23(1)(i) – Special Police Officers – Appointment of, to perform any of the duties of regular police officers, other than those specified in s.23(1)(h) and s.23(1)(i) – Held: Is unconstitutional – Tribal youth, previously engaged as SPOs in counter-insurgency activities against Maoists/Naxalites may be employed as SPOs to perform duties limited to those enumerated in s. 23(1)(h) and 23(1)(i), provided they have not engaged in any activities, as SPOs or in their own individual/private capacities, violative of human rights of other individuals or of, any disciplinary code or criminal laws.

Case Law Reference:

(2005) 5 SCC 517	**Relied on**	**Para 78**
(1985) 3 SCC 545	**Referred to**	**Para 62**
(2011) 4 SCC 36	**Referred to**	**Para 68**
H.C. 3451/02, 56(3) P.D	**Referred to**	**Para 70**

ARNESH KUMAR
v.
STATE OF BIHAR & ANR.

(Criminal Appeal No. 1277 of 2014)

JULY 2, 2014

[CHANDRAMAULI KR. PRASAD AND PINAKI CHANDRA GHOSE, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.41 and 167 — Arrest by police without warrant — Of persons accused of offences punishable with imprisonment upto seven years - Held: Section 41 makes it evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence — Before arrest police officer to record his satisfaction with regard to factors enumerated in clauses (a) to (e) of s.41(1) — Arrest brings humiliation, curtails freedom and casts scars forever — The need for caution in exercising the drastic power of arrest has been emphasized time and again by courts but has not yielded desired result - The attitude to arrest first and then proceed with rest is despicable - It has become a handy tool to police officers who lack sensitivity or act with oblique motive — No arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for police officers to do so — No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person — Directions given in order to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically — Penal Code, 1860 - s.498-A - Dowry Prohibition Act, 1961 — s.4.

s. 41-A - Notice of appearance before police officer - Held: Where the arrest of a person is not required u/s 41(1), police officer is required to issue notice directing the accused to appear before him at a specified place and time - Law obliges such an accused to appear before police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, police officer is of

the opinion that arrest is necessary - At this stage also, condition precedent for arrest as envisaged u/s 41 has to be complied and shall be subject to scrutiny by Magistrate.

s. 167 r/w s. 57- Judicial Magistrate authorising accused to police remand - Held: The power u/s 167 to authorise detention is a very solemn function - It affects the liberty and freedom of citizens and needs to be exercised with great care and caution - Before a Magistrate authorises detention u/s 167, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied - The police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and Magistrate in turn is to be satisfied that condition precedent for arrest u/s 41 has been satisfied and it is only thereafter that he will authorise detention of an accused - Constitution on India, 1950 - Art. 22.

BAIL:

Application of appellant for anticipatory bail - In a case involving offences u/s 498-A, IPC and s.4 of Dowry Prohibition Act - Declined by High Court - Provisional bail granted by Supreme Court on certain conditions - Held: Order granting bail made absolute - Penal Code, 1860 - s.498-A - Dowry Prohibition Act, 1961 - s.4.

The appellant-husband apprehending his arrest in a case of offences u/s 498-A IPC and s.4 of the Dowry Prohibition Act, 1961, having failed to secure anticipatory bail, filed the instant appeal. During the pendency of the appeal, the Supreme Court, by order dated 31.10.2013, granted provisional bail to the appellant.

Allowing the appeal, the Court

HELD: 1.1. There is phenomenal increase in matrimonial disputes in recent years. Arrest brings humiliation, curtails freedom and casts scars forever. The need for caution in exercising the drastic power of arrest has been emphasized time and again by courts but has not yielded desired result. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive. No arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from

power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. [para 6- 8]

1.2. Section 41 makes it evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of s. 41 of Cr.PC. Police officer before arrest, in such cases has to be satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest. [para 9]

1.3. This Court is of the opinion that if the provisions of s.41, Cr.PC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant, are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. It is emphasised that the practice of mechanically reproducing in the case diary all or most of the reasons contained in s.41 Cr.PC for effecting arrest be discouraged and discontinued. [para 13]

2. An accused arrested without warrant by the police has the right under Art. 22(2) of the Constitution of India and s.57, Cr.PC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. The power u/s 167 CrPC to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs

to be exercised with great care and caution. The experience shows that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. Before a Magistrate authorises detention u/s 167, Cr.PC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. The police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest u/s 41 Cr.PC has been satisfied and it is only thereafter that he will authorise the detention of an accused. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. The Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant and secondly a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated are attracted. To this limited extent the Magistrate will make judicial scrutiny. [para 10]

3.1. Further, s.41-A CrPC makes it clear that in all cases where the arrest of a person is not required u/s 41(1) Cr.PC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged u/s 41 Cr.PC has to be complied and shall be subject to the scrutiny by the Magistrate. [para 12]

3.2. Directions are given in order to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. The directions issued shall not only apply to the cases u/s 498-A of the I.P.C. or s.4 of the Dowry Prohibition Act, the case in hand, but also to such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine. [para 15]

4. The order dated 31.10.2013 granting provisional bail to the appellant on certain conditions, is made absolute. [para 17]

ABHIRAM SINGH
v.
C.D. COMMACHEN (DEAD) BY LRS. & ORS.

(Civil Appeal No. 37 of 1992)

JANUARY 02, 2017

[T.S. THAKUR, CJI, MADAN B. LOKUR, S. A. BOBDE, ADARSH KUMAR GOEL, UDAY UMESH LALIT, DR. D.Y. CHANDRACHUD AND L. NAGESWARA RAO, JJ.]

Representation of the People Act, 1951:

s. 123 (3) (as amended in 1961) – Interpretation of – Held: **Majority View:** *The Act being a statute that enables to cherish and strengthen democratic ideals should be interpreted in a manner that assists the elector or the electorate and not that assists the candidates – Keeping in view the social context in which sub-section (3) of s.123 was enacted and today's social and technological context, it is absolutely necessary to give a broad and purposive interpretation rather than a literal or strict interpretation – The provisions under sub-section (3) are required to be read and appreciated in the context of simultaneous and contemporaneous amendments inserting sub-section (3A) in s. 123 and inserting s. 153A in IPC – Therefore sub-section (3) of s. 123 is to be interpreted in such a way so as to bring within sweep of 'corrupt practice', any appeal on the ground of the religion, race, caste, community or language of (i) any candidate or (ii) his agent, or (iii) any other person making appeal with the consent of the candidate, or (iv) the elector – The bar u/s. 123 (3) to making an appeal on the ground of religion must not be confined to the religion of the candidate or that of his rival candidates – The word 'his' occurring in the Section refers not only to the candidate or his agent, but is also intended to refer to the voter or elector – Determination of the facts whether an appeal, at all, has been made to the elector and whether appeal made, is in violation of s. 123(3), would be a matter of evidence –* **Minority view:** *Election petitions alleging corrupt practices have a quasi-criminal character wherein standard of proof is close to that which guides a criminal trial – Therefore, s.123(3) must be interpreted in literal sense – The expression 'his' in s. 123(3) used in conjunction with religion, race, caste, community or language is in reference to the religion,*

race, caste, community or language of the candidate (in whose favour the appeal to caste a vote is made) or that of a rival candidate (when an appeal is made to refrain from voting for another) – Sub-section (3) cannot be construed as referring to the religion, race, caste, community or language of the voter, even if the provision is given a purposive interpretation – Discussion, debate or dialogue, of matters relating to religion, race, caste, community or language of the voters is not an appeal on those grounds, and the same is protected being an intrinsic part of freedom of speech.

s.123(3) – Long-standing interpretation of given by the courts – Unsettling of – Permissibility – Held: **Per Madan B. Lokur, J.:** *The interpretation given to s.123(3) was not well recognized and there was uncertainty about correct interpretation thereof, the court can unsettle the long-standing interpretation* – **Per: Dr. D.Y. Chandrachud, J.:** *A change in the legal position, which has held the field through judicial precedent over a length of time can be considered only in exceptional and compelling circumstances – In the present cases no case has been made out to take a view at variance with the settled legal position that the expression 'his' in s. 123 (3) must mean the religion, race, community or language of the candidate – Precedent.*

Interpretation of Statutes:

Literal interpretation vis-a-vis purposive interpretation – **Per Madan B. Lokur, J.:** *While interpreting a statute or a provision in a statute, not only the text of the law, but also the context in which it was enacted and the social context, should be considered – However, in statutes having penal consequence, affecting liberty of an individual or imposing financial burden on a person, the rule of literal interpretation would still hold good –* **Per T.S. Thakur, C.J.I.:** *While interpreting an enactment, the courts should remain cognizant of constitutional goals and the purpose of the Act and interpret the provisions accordingly* **– Per S.A. Bobde, J.:** *A literal interpretation does not exclude a purposive interpretation – While construing a statute both the rules of interpretation can be applied whether it be penal statute or taxing statute* – **Per Dr. D.Y. Chandrachud, J.:** *Where a statutory provision implicates penal consequences or consequences of a quasi-criminal character, a strict construction of the words used by the legislature must be adopted.*

Rule of Interpretation – **Per T. S. Thakur, C.J.I.:** *An interpretation which has the effect of eroding or diluting the constitutional objective of keeping the State and its activities free from religious considerations, must be avoided –*

The interpretations that are in tune with constitutional provisions and ethos ought to be preferred over others.

Rule of interpretation – **Per S.A. Bobde, J.:** *While interpreting statutes, wherever the language is clear, the intention of the legislature must be gathered from the language used, and the support from extraneous sources should be avoided.*

Statutory interpretation – Use of legislative history as an aid to statutory interpretation – Permissibility – Held: **Per Dr. D.Y. Chandrachud, J.:** *Legislative history is a significant element in the formation of an informed interpretation.*

Answering the reference, the Court

HELD: MAJORITY VIEW: Per Madan B. Lokur, J. (For himself and for L. Nageswara Rao, J.):

1.1 The conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial. It can be settled only if the draftsman gives a long-winded explanation in drafting the law but this would result in an awkward draft that might well turn out to be unintelligible. The interpreter has, therefore, to consider not only the text of the law but the context in which the law was enacted and the social context in which the law should be interpreted. [Para 36]

R. v. Secretary of State for Health ex parte Quintavalle **[2003] UKHL 13 – referred to.**

Bennion on Statutory Interpretation **Sixth Edition (Indian Reprint) page 847 – referred to.**

1.2 Ordinarily, if a statute is well-drafted and debated in Parliament there is little or no need to adopt any interpretation other than a literal interpretation of the statute. However, in a welfare State, what is intended for the benefit of the people is not fully reflected in the text of a statute. In such legislations, a pragmatic view is required to be taken and the law interpreted purposefully and realistically so that the benefit reaches the masses. Of course, in statutes that have a penal consequence and affect the liberty of an individual or a statute

that could impose a financial burden on a person, the rule of literal interpretation would still hold good. [Para 38]

1.3 The Representation of the People Act, 1951 is a statute that enables to cherish and strengthen democratic ideals. To interpret it in a manner that assists candidates to an election rather than the elector or the electorate in a vast democracy like that of India would really be going against public interest. [Para 39]

1.4 The purpose of enacting sub-section (3) of Section 123 of the Act and amending it more than once during the course of the first 10 years of its enactment indicates the seriousness with which Parliament grappled with the necessity of curbing communalism, separatist and fissiparous tendencies during an election campaign (and even otherwise in view of the amendment of Section 153A of the IPC). It is during electioneering that a candidate goes virtually all out to seek votes from the electorate and Parliament felt it necessary to put some fetters on the language that might be used so that the democratic process is not derailed but strengthened. Taking all this into consideration, Parliament felt the need to place a strong check on corrupt practices based on an appeal on grounds of religion during election campaigns (and even otherwise). [Para 41]

1.5 The concerns which formed the ground for amending Section 123(3) of the Act have increased with the tremendous reach already available to a candidate through the print and electronic media, and now with access to millions through the internet and social media as well as mobile phone technology, none of which were seriously contemplated till about fifteen years ago. Therefore now, more than ever it is necessary to ensure that the provisions of sub-section (3) of Section 123 of the Act are not exploited by a candidate or anyone on his or her behalf by making an appeal on the ground of religion with a possibility of disturbing the even tempo of life. [Para 42]

1.6 Keeping in view the social context in which sub-section (3) of Section 123 of the Act was enacted and today's social and technological context, it is absolutely necessary to give a purposive interpretation to the provision rather than a literal or strict interpretation i.e. limited only to the candidate's religion or that of his rival candidates. [Para 46]

Union of India v. Raghubir Singh (Dead) by Lrs. **[1989] 3 SCR 316 : (1989) 2 SCC 754;** *Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay* **[1975] 1 SCR 1 : (1974) 2 SCC 402;** *Badshah v. Urmila Badshah Godse* **[2013] 10 SCR 259 : (2014) 1 SCC 188 – relied on.**

1.7 The provisions of sub-section (3) of Section 123 of the Representation of the People Act, 1951 are required to be read and appreciated in the context of simultaneous and contemporaneous amendments inserting sub-section (3A) in Section 123 of the Act and inserting Section 153A in the Penal Code. [Para 49]

1.8 So read together, and for maintaining the purity of the electoral process and not vitiating it, sub-section (3) of Section 123 of the Representation of the People Act, 1951 must be given a broad and purposive interpretation thereby bringing within the sweep of a corrupt practice any appeal made to an elector by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate on the ground of the religion, race, caste, community or language of (i) any candidate or (ii) his agent or (iii) any other person making the appeal with the consent of the candidate or (iv) the elector. [Para 49]

1.9 It is a matter of evidence for determining whether an appeal has at all been made to an elector and whether the appeal if made is in violation of the provisions of sub-section (3) of Section 123 of the Representation of the People Act, 1951. [Para 49]

2. There was some uncertainty about the correct interpretation of sub-section (3) of Section 123 of the Act. It is not as if the interpretation was well-recognized and settled. That being the position, the court can unsettle the long-standing interpretation given to s. 123(3) of the Act. [Para 48]

Kultar Singh v. Mukhtiar Singh **AIR 1965 SC 141 : [1964] SCR 790 – followed.**

Jagdev Singh Sidhanti v. Pratap Singh Daulta **[1964] 6**

SCR 750; *Kami Prasad Jayshanker Yagnik v. Pushottamdas Ranchhoddas Patel* **[1969] 3 SCR 400 : (1969) 1 SCC 455;** *Dr Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte* **[1995] 6 Suppl. SCR 371: (1996) 1 SCC 130 – held not correct law.**

Abhiram Singh v. C.D. Commachen **[1996] 1 Suppl. SCR 340 : (1996) 3 SCC 665;** *Narayan Singh v. Sunderlal Patwa* **(2003) 9 SCC 300;** *Mohd. Aslam v. Union of India* **[1996] 3 SCR 782 : (1996) 2 SCC 749;** *S. R. Bommai v. Union of India* **[1994] 2 SCR 644 : (1994) 3 SCC 1;** *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra* **[1975] Suppl. SCR 281 : (1976) 2 SCC 17;** *S. Hareharan Singh v. S. Sajjan Singh* **[1985] 2 SCR 159 : (1985) 1 SCC 370;** *Jamuna Prasad Mukhariya v. Lachhi Ram* **[1955] 1 SCR 608 – referred to.**

Per T.S. Thakur, C.J.I. (Concurring)

1. It cannot be said that the amendment in 1961, in one sense served to widen the scope of corrupt practice u/s. 123(3) of Representation of People Act, 1951, but in another sense restrict the scope of corrupt practice. The unamended provision made any appeal in the name of religion, race, caste, community or language a corrupt practice, regardless of whose religion, race, caste, community or language was involved for such an appeal. The only other requirement was that such an appeal was made in a systematic manner for the furtherance of the prospects of a candidate. If that was the legal position before the amendment and if the Parliament intended to enlarge the scope of the corrupt practice, the question of the scope being widened and restricted at the same time did not arise. There is nothing to suggest either in the statement of objects and reasons or contemporaneous record of proceedings, including notes accompanying the bill to show that the amendment was contrary to the earlier position intended to permit appeals in the name of religion, race, caste, community or language to be made except those made in the name of the religion, race, caste, community or language of the candidate for the furtherance of whose prospects such appeals were made. Any such interpretation will not

only do violence to the provisions of Section 123(3) but also go against the avowed purpose of the amendment. Any such interpretation will artificially restrict the scope of corrupt practice for it will make permissible what was clearly impermissible under the unamended provision. The correct approach, is to ask whether appeals in the name of religion, race, caste, community or language which were forbidden under the unamended law were actually meant to be made permissible subject only to the condition that any such appeal was not founded on the religion, race, caste, community or language of the candidate for whose benefit the same was made. The answer to that question has to be in the negative. The law as it stood before the amendment did not permit an appeal in the name of religion, race, caste community or language, no matter whose religion, race, community or language was invoked. The amendment did not intend to relax or remove that restriction. On the contrary it intended to widen the scope of the corrupt practice by making even a 'single such appeal' a corrupt practice which was not so under the unamended provision. Seen both textually and contextually the argument that the term "*his religion*" appearing in the amended provision must be interpreted so as to confine the same to appeals in the name of "religion of the candidate" concerned alone does not stand closer scrutiny and must be rejected. [Paras 8 and 9]

2.1 Under the constitutional scheme mixing religion with State power is not permissible while freedom to practice, profess and propagate religion of one's choice is guaranteed. The State being secular in character will not identify itself with any one of the religions or religious denominations. This necessarily implies that religion will not play any role in the governance of the country which must at all times be secular in nature. The elections to the State legislature or to the Parliament or for that matter or any other body in the State is a secular exercise just as the functions of the elected representatives must be secular in both outlook and practice. The Constitutional ethos forbids mixing of religions or religious considerations with the secular functions of the State. This necessarily implies that interpretation of any statute must not offend the fundamental mandate under the Constitution. An interpretation which has the effect of eroding or diluting the constitutional objective of keeping the State and its activities free from religious considerations, therefore, must be avoided.

While interpreting an enactment, the Courts should remain cognizant of the Constitutional goals and the purpose of the Act and interpret the provisions accordingly. [Para 23]

2.2 While interpreting a legislative provision, the Courts must remain alive to the constitutional provisions and ethos and that interpretations that are in tune with such provisions and ethos ought to be preferred over others. Applying that principle to the present case, an interpretation that will have the effect of removing the religion or religious considerations from the secular character of the State or state activity ought to be preferred over an interpretation which may allow such considerations to enter, effect or influence such activities. Electoral processes are doubtless secular activities of the State. Religion can have no place in such activities for religion is a matter personal to the individual with which neither the State nor any other individual has anything to do. The State is under an obligation to allow complete freedom for practicing, professing and propagating religious faith to which a citizen belongs in terms of Article 25 of the Constitution of India but the freedom so guaranteed has nothing to do with secular activities which the State undertakes. The State can and indeed has in terms of Section 123(3) forbidden interference of religions and religious beliefs with secular activity of elections to legislative bodies. [Para 28]

Saifuddin Saheb v. State of Bombay **AIR 1962 SC 853: [1962] Suppl. SCR 496;** *Ahmedabad St. Xavier's College Society and Anr. v. State of Gujarat and Anr.* **[1975] 1 SCR 173 : (1974) 1 SCC 717;** *Indira Nehru Gandhi v. Shri Raj Narain* **[1976] SCR 347 : (1975) Suppl. SCC 1;** *S.R. Bommai v. Union of India* **[1994] 2 SCR 644 : 1994 (3) SCC 1;** *M.P. Gopalakrishnan Nair and Anr. v. State of Kerala and Ors.* **[2005] 3 SCR 712: (2005) 11 SCC 45;** *Dr. Vimal (Mrs.) v. Bhaguji & Ors.* **[1995] 1 Suppl. SCR 392 : (1996) 9 SCC 351;** *Ambika Sharan Singh v. Mahant Mahadeva and Giri and Others* **(1969) 3 SCC 492;** *Kedar Nath v. State of Bihar* **(AIR 1962 SC 955) : [1962] Suppl. SCR 769;** *State of Karnataka v. Appa Balu Ingale and Others* **[1992] 3 Suppl. SCR 284 : (1995) Supp.4 SCC 469;** *Vipulbhai M. Chaudhary v. Gujarat Cooperative Milk*

Marketing Federation Ltd. and Ors. **[2015] 3 SCR 997 : (2015) 8 SCC 1 – relied on.**

3. An appeal in the name of religion, race, caste, community or language is impermissible under the Representation of the People Act, 1951 and would constitute a corrupt practice sufficient to annul the election in which such an appeal was made regardless whether the appeal was in the name of the candidate's religion or the religion of the election agent or that of the opponent or that of the voter's. The sum total of Section 123 (3) even after amendment is that an appeal in the name of religion, race, caste, community or language is forbidden even when the appeal may not be in the name of the religion, race, caste, community or language of the candidate for whom it has been made. So interpreted religion, race, caste, community or language would not be allowed to play any role in the electoral process and should an appeal be made on any of those considerations, the same would constitute a corrupt practice. [Para 29]

Per S. A. Bobde, J. (Concurring):

1. The bar under Section 123(3) of the Representation of People Act, 1951 to making an appeal on the ground of religion must not be confined to the religion of the candidate because of the word 'his' in that provision. The purposive interpretation in the social context adjudication as a facet of purposive interpretation warrants a broad interpretation of that section. That the section is intended to serve the broad purpose of checking appeals to religion, race, caste, community or language by any candidate. That to maintain the sanctity of the democratic process and to avoid the vitiating of secular atmosphere of democratic life, an appeal to any of the factors should avoid the election of the candidate making such an appeal. [Para 1]

2. Such a construction is not only warranted upon the application of the purposive test of interpretation but also on textual interpretation. A literal interpretation does not exclude a purposive interpretation of the provisions whether in relation to a taxing statute or a penal statute. There seems no valid reason while construing a statute (be it a taxing or penal statute) why both rules of interpretation cannot be applied. [Para 2]

IRC v. Trustees of Sir John Aird's Settlement **1984 CH 382 : (1983) 3 All ER 481 (CA) – referred to.**

3. Section 123 (3) prohibits an "appeal by a candidate", etc. "to vote or refrain from voting for any person on the ground of his religion", etc. The word "his" occurring in the section refers not only to the candidate or his agent but is also intended to refer to the voter i.e. the elector. What is prohibited by a candidate is an appeal to vote on certain grounds. The word "his" therefore must necessarily be taken to embrace the entire transaction of the appeal to vote made to voters and must be held referable to all the actors involved i.e. the candidate, his election agent etc. and the voter. Thus, the pronoun in the singular "his" refers to a candidate or his agent or any other person with the consent of a candidate or his election agent and to the voter. In other words, what is prohibited is an appeal by a candidate etc. to a voter for voting on the ground of his religion i.e. those categories preceding "his". This construction is fortified by the purposive test. [Para 3]

4. While interpreting statutes, wherever the language is clear, the intention of the legislature must be gathered from the language used and support from extraneous sources should be avoided. The language that is used in Section 123 (3) of the Act intends to include the voter and the pronoun "his" refers to the voter in addition to the candidate, his election agent etc. Also because the intendment and the purpose of the statute is to prevent an appeal to votes on the ground of religion. It is an unreasonable shrinkage to hold that only an appeal referring to the religion of the candidate who made the appeal is prohibited and not an appeal which refers to religion of the voter. It is quite conceivable that a candidate makes an appeal on the ground of religion but leaves out any reference to his religion and only refers to religion of the voter. This interpretation is wholesome and leaves no scope for any sectarian caste or language based appeal and is best suited to bring out the intendment of the provision. There is no doubt that the section on textual and contextual interpretation proscribes a reference to either. [Para 4]

Grasim Industries v. Collector of Customs, Bombay **[2002] 2 SCR 945 : 2002 (4) SCC 297 – relied on.**

5. It is an overriding duty of the Court while interpreting the provision of a statute that the intention of the legislature is not frustrated and any doubt or ambiguity must be resolved by recourse to the rules of purposive construction. It seems clear that the *mens* or *sententia legis* of the Parliament in using the pronoun "his" was to prohibit an appeal made on the ground of the voter's religion. Parliamentary intent therefore, was to clearly proscribe appeals based on sectarian, linguistic or caste considerations; to infuse a modicum of oneness, transcending such barriers and to borrow Tagore's phrase transcend the fragmented "*narrow domestic walls*" and send out the message that regardless of these distinctions voters were free to choose the candidate best suited to represent them. Applying the above principles, there is no doubt that Parliament intended an appeal for votes on the ground of religion is not permissible whether the appeal is made on the ground of the religion of the candidate etc. or of the voter. Accordingly, the words "his religion" must be construed as referring to all the categories of persons preceding these words. [Paras 5, 7 and 8]

Balram Kumawat v. Union of India **[2003] 3 Suppl. SCR 24 : 2003 (7) SCC 628 – relied on.**

Craies on Statute Law **7th Edn. Page 531 – referred to.**

MINORITY VIEW:

Per Dr. D. Y. Chandrachud, J. (for himself and for Adarsh Kumar Goel and Uday Umesh Lalit, JJ.) :

1. Election petitions alleging corrupt practices have a quasi-criminal character. Where a statutory provision implicates penal consequences or consequences of a quasi-criminal character, a strict construction of the words used by the legislature must be adopted. The standard of proof is hence much higher than a preponderance of probabilities which operates in civil trials. The standard of proof in an election trial veers close to that which guides a criminal trial. While a strict construction of a quasi-criminal provision in the nature of an electoral practice is mandated, the legislative history also supports that view. [Paras 11, 12 and 44]

Tolaram Relumal v. State of Bombay **[1951] 1 SCR 158 – followed.**

Amolakchand Chhazed v. Bhagwandas **(1977) 3 SCC 566;** *Baldev Singh Mann v. Gurcharan Singh (MLA)* **[1996] 2 SCR 99 : (1996) 2 SCC 743;** *Thampanoor Ravi v. Charupara Ravi* **[1999] 2 Suppl. SCR 419 : (1999) 8 SCC 74;** *Bipinchandra Parshottamdas Patel (Vakil) v. State of Gujarat* **[2003] 3 SCR 533 : (2003) 4 SCC 642;** *S Subramaniam Balaji v. State of Tamil Nadu* **(2013) 9 SCC 659 – relied on.**

2.1 Essentially, Section 123(3) can be understood by dividing its provisions into three parts. The first part describes the person making the appeal, the second part describes what the appeal seeks to achieve while the third part relates to the ground or basis reflected in the second. The first part of the provision postulates an appeal. The appeal could be : (i) by a candidate; or (ii) by the agent of a candidate; or (iii) by another person with the consent of a candidate; or (iv) by another person with the consent of the election agent of the candidate. Where the person making the appeal is not the candidate or his agent, consent of the candidate or his agent is mandated. The appeal is to vote or refrain from voting for any person. The expression 'any person' is evidently a reference to a candidate contesting the election. The third part speaks of the basis of the appeal. The appeal is to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language. In the latter part of Section 123(3), the corrupt practices consist in the use of or appeal to religious symbols or national symbols such as the national flag or emblem for (i) the furtherance of the prospects of the election of that candidate or (ii) prejudicially affecting the election of any candidate. [Paras 13 and 14]

2.2 Section 123(3) evinces a Parliamentary intent to bring within the corrupt practice an appeal by a candidate or his agent (or by any person with the consent of the candidate or his election agent) to either vote or refrain from voting for any person. The positive element is embodied in the expression "to vote". What it means is that there is an appeal to vote in favour of a particular candidate. Negatively, an appeal not to vote for a rival candidate is also within the text of the provision. An appeal to

vote for a candidate is made to enhance the prospects of the candidate at the election. An appeal to refrain from voting for a candidate has a detrimental effect on the election prospects of a rival candidate. Hence, in the first instance, there is an appeal by a candidate (or his agent or by another person with the consent of the election agent). The appeal is for soliciting votes in favour of the candidate or to refrain from voting for a rival candidate. The expression 'his' means belonging to or associated with a person previously mentioned. The expression "his" used in conjunction with religion, race, caste, community or language is in reference to the religion, race, caste, community or language of the candidate (in whose favour the appeal to cast a vote is made) or that of a rival candidate (when an appeal is made to refrain from voting for another). It is impossible to construe sub-section (3) as referring to the religion, race, caste, community or language of the voter. The provision, adverts to "a candidate" or "his agent", or "by any other person with the consent of a candidate or his election agent". This is a reference to the person making the appeal. The next part of the provision contains a reference to the appeal being made "to vote or refrain from voting for any person". The vote is solicited for a candidate or there is an appeal not to vote for a candidate. Each of these expressions is in the singular. They are followed by expression "on the ground of his religion...". The expression "his religion..." must necessarily qualify what precedes; namely, the religion of the candidate in whose favour a vote is sought or that of another candidate against whom there is an appeal to refrain from voting. 'His' religion (and the same principle would apply to 'his' race, 'his' caste, 'his' community, or 'his' language) must hence refer to the religion of the person in whose favour votes are solicited or the person against whom there is an appeal for refraining from casting a ballot. [Para 15]

2.3 Section 123(3) uses the expression "on the ground of his religion...". The expression 'the' is a definite article used especially before a noun with a specifying or particularizing effect. 'The' is used as opposed to the indefinite or generalizing forces of the indefinite article 'a' or 'an'. The expression 'ground' was substituted in Section 123(3) in place of 'grounds', following the amendment of 1961. Read together, the words "the ground of his religion..." indicate that what the legislature has proscribed is an appeal to vote for a candidate or to refrain from

voting for another candidate exclusively on the basis of the religion (or race, caste, community or language) of the candidate or a rival candidate. 'The ground' means solely or exclusively on the basis of the identified feature or circumstance. [Para 16]

2.4 There is a clear rationale and logic underlying the provision u/s. 123(3). A person who contests an election for being elected as a representative of the people either to Parliament or the State legislatures seeks to represent the entire constituency. A person who is elected represents the whole of the constituency. The Constitution of India has rejected and consciously did not adopt separate electorates. Even where a constituency is reserved for a particular category, the elected candidate represents the constituency as a whole and not merely persons who belong to the class or category for whom the seat is reserved. A representative of the people represents people at large and not a particular religion, caste or community. Consequently, as a matter of legislative policy Parliament has mandated that the religion of a candidate cannot be utilized to solicit votes at the election. Similarly, the religion of a rival candidate cannot form the basis of an appeal to refrain from voting for that candidate. [Para 17]

2.5 There is also rationale for Section 123(3) not to advert to the religion, caste, community or language of the voter as a corrupt practice. The Constitution recognizes the broad diversity of India and, as a political document, seeks to foster a sense of inclusion. It seeks to wield a nation where its citizens practice different religions, speak varieties of languages, belong to various castes and are of different communities into the concept of one nationhood. Yet, the Constitution, in doing so, recognizes the position of religion, caste, language and gender in the social life of the nation. Individual histories both of citizens and collective groups in the society are associated through the ages with histories of discrimination and injustice on the basis of these defining characteristics. In numerous provisions, the Constitution has sought to preserve a delicate balance between individual liberty and the need to remedy these histories of injustice founded upon immutable characteristics such as of religion, race, caste and language. There is no wall of separation between the State on the one hand and religion, caste, language, race or community on the other. [Paras 18, 20]

2.6 The corrupt practice lies in an appeal being made to vote for

a candidate on the ground of his religion, race, caste, community or language. The corrupt practice also lies in an appeal to refrain from voting for any candidate on the basis of the above characteristics of the candidate. Electors however, may have and in fact do have a legitimate expectation that the discrimination and deprivation which they may have suffered in the past (and which many continue to suffer) on the basis of their religion, caste, or language should be remedied. Access to governance is a means of addressing social disparities. Social mobilisation is a powerful instrument of bringing marginalised groups into the mainstream. To hold that a person who seeks to contest an election is prohibited from speaking of the legitimate concerns of citizens that the injustices faced by them on the basis of traits having an origin in religion, race, caste, community or language would be remedied is to reduce democracy to an abstraction. Coupled with this fact is the constitutional protection of free speech and expression in Article 19(1)(a) of the Constitution. This fundamental right is subject to reasonable restrictions as provided in the Constitution. Section 123(3) was not meant to and does not refer to the religion (or race, community, language or caste) of the voter. If Parliament intended to do so, it was for the legislature to so provide in clear and unmistakable terms. There is no warrant for making an assumption that Parliament while enacting Section123(3) intended to sanitize the electoral process from the real histories of the people grounded in injustice, discrimination and suffering. The purity of electoral process is sought to be maintained by proscribing an appeal to the religion of a candidate (or to his or her caste, race, community or language) or in a negative sense to these characteristics of a rival candidate. The "his" in Section 123(3) cannot validly refer to the religion, race, caste, community or language of the voter. [Para 20]

2.7 s. 123(3) does not prohibit discussion, debate or dialogue during the course of an election campaign on issues pertaining to religion or on issues of caste, community, race or language. Discussion of matters relating to religion, caste, race, community or language which are of concern to the voters is not an appeal on those grounds. Caste, race, religion and language are matters of concern to voters especially where large segments of the population were deprived of basic human rights as a result of prejudice and discrimination which they have suffered on

the basis of caste and race. Discussion about these matters - within and outside the electoral context – is a constitutionally protected value and is an intrinsic part of the freedom of speech and expression. [Para 21]

2.8 Thus, Section 123(3) must be interpreted in a literal sense. However, even if the provision were to be given a purposive interpretation, that does not necessarily lead to the interpretation that Section 123(3) must refer to the caste, religion, race, community or language of the voter. On the contrary, there are sound constitutional reasons, which militate against Section 123(3) being read to include a reference to the religion (etc) of the voter. Hence, it is not proper for the court to choose a particular theory based on purposive interpretation, when that principle of interpretation does not necessarily lead to one inference or result alone. It must be left to the legislature to amend or re-draft the legislative provision, if it considers it necessary to do so. [Para 22]

2.9 The traditional view of courts both in India and the UK was a rule of exclusion by which parliamentary history was not readily utilized in interpreting a law. Over a period of time, the narrow view favouring the exclusion of legislative history has given way to a broader perspective. Debates in the Constituent Assembly have been utilized as an aid to the interpretation of a constitutional provision. The modern trend is to permit the utilization of parliamentary material, particularly a speech by the Minister moving a Bill in construing the words of a statute. The use of parliamentary debates as an aid to statutory interpretation has been noticed in several decisions of this Court. There is need for a balance between the traditional view supporting the exclusion of the enacting history of a statute and the more realistic contemporary doctrine allowing its use as an aid to statutory interpretation. The modern trend is to enable the court to look at the enacting history of a legislation to foster a full understanding of the meaning behind words used by the legislature, the mischief which the law seeks to deal and in the process, to formulate an informed interpretation of the law. Enacting history is a significant element in the formation of an informed interpretation. [Paras 31, 32, 33 and 35]

Chiranjit Lal Chowdhuri v. Union of India **AIR 1951 SC 41: [1950] SCR 869;** *Dr Ramesh Yeshwant Prabhoo v. PK*

Kunte **[1995] 6 Suppl. SCR 371 : 1995 (7) SCALE 1 – relied on.**

State of Travancore Co. v. Bombay Co. Ltd. **AIR 1952 SC 366 : [1952] SCR 1112;** *State of West Bengal v. Union of India* **[1964] 1 SCR 371;** *Indra Sawhney v. Union of India* **AIR 1993 SC 477 : [1992] 2 Suppl. SCR 454;** *Novartis AG v. Union of India* **(2013) 6 SCC 1 : [2013] 13 SCR 148;** *State of Madhya Pradesh v. Dadabhoy's New Chirimiri Ponri Hill Colliery Co. Pvt. Ltd.* **(1972) 1 SCC 298 : [1972] 2 SCR 609;** *Union of India v. Legal Stock Holders Syndicate* **AIR 1976 SC 879 : [1976] 3 SCR 504;** *K.P. Vergese v. Income Tax Officer* **AIR 1981 SC 1922 : [1982] 1 SCR 629;** *Surana Steels Pvt. Ltd. v. Dy Commissioner of Income Tax* **[1999] 2 SCR 589 : (1999) 4 SCC 306 – referred to.**

'Principles of Statutory Interpretation' by G.P. Singh **XIVth Edn.P-253;** *Bennion on Statutory Interpretation,* Indian Reprint **Sixth Edition page 561 – referred to.**

2.10 The legislative history of s. 123(3) indicates that Parliament, while omitting the requirement of a "systematic" appeal intended to widen the ambit of the provision. An 'appeal' is not hedged in by the restrictive requirements, evidentiary and substantive, associated with the expression "systematic appeal". 'Language' was introduced as an additional ground as well. However, it would not be correct as a principle of interpretation to hold that if the expression "his" religion is used to refer to the religion of a candidate, the legislature would be constraining the width of the provision even beyond its pre-amended avatar. It is true that the expression "his" was not a part of Section 123(3) as it stood prior to the amendment of 1961. Conceivably the appeal to religion was not required to relate to an appeal to the religion of the candidate. But by imposing the requirement of a systematic appeal, Parliament had constrained the application of Section 123(3) only to cases where as the word systematic indicates the conduct was planned and repetitive. Moreover, subsection 3A was not introduced earlier into Section 123. A new corrupt practice of that nature was introduced in 1961. The position can be looked at from more than one

perspective. When Parliament expanded the ambit of Section 123(3) in 1961, it was entitled to determine the extent to which the provision should be widened. Parliament would be mindful of the consequence of an unrestrained expansion of the ambit of Section 123(3). Parliament is entitled to perceive, in the best interest of democratic political discourse and bearing in mind the fundamental right to free speech and expression that what should be proscribed should only be an appeal to the religion, race, caste, community or language of the candidate or of a rival candidate. For, if the provision is construed to apply to the religion of the voter, this would result in a situation where persons contesting an election would run the risk of engaging in a corrupt practice if the discourse during the course of a campaign dwells on injustices suffered by a segment of the population on the basis of caste, race, community or language. Parliament did not intend its amendment to lead to such a drastic consequence. In making that legislative judgment, Parliament cannot be faulted. The extent to which a legislative provision, particularly one of a quasi-criminal character, should be widened lies in the legislative wisdom of the enacting body. While expanding the width of the erstwhile provision, Parliament was legitimately entitled to define its boundaries. The incorporation of the word "his" achieves just that purpose. [Para 36]

> *Jagdev Singh Sidhanti v. Pratap Singh Daulta* **[1964] 6 SCR 750;** *Kultar Singh v. Mukhtiar Singh* **AIR 1965 SC 141 : [1964] SCR 790 – followed.**
>
> *Kanti Prasad Jayshanker Yagnik v. Purshottam Das Ranchhoddas Patel* **[1969] 3 SCR 400 : (1969) 1 SCC 455 – relied on.**

2.11 Secularism is a basic feature of the Constitution of India. It postulates the equality amongst and equal respect for religions in the polity. Parliament, when it legislates as a representative body of the people, can legitimately formulate its policy of what would best subserve the needs of secular India. It has in Section 123(3) laid down its normative vision. An appeal to vote on the ground of the religion (or caste, community, race or language) of a candidate or torefrain from voting for a candidate on the basis of these features is

proscribed. Certain conduct is in addition prohibited by sub-section 3A, which is also a corrupt practice. Legislation involved drawing balances between different, and often conflicting values. Even when the values do not conflict,the legislating body has to determine what weight should be assigned to each value in its calculus. Parliament has made that determination and the duty of the court is to give effect to it. The reference to 'his' religion in Section 123(3) has been construed to mean the religion of the candidate in whose favour votes arc sought or the religion of a rival candidate where an appeal is made to refrain from voting for him. A change in a legal position which has held the field through judicial precedent over a length of time can be considered only in exceptional and compelling circumstances. In the present case, no case has been made out to take a view at variance with the settled legal position that the expression "his" in Section 123(3) must mean the religion, race,community or language of the candidate in whose favour an appeal to cast a vote is made or that of another candidate against whom there is an appeal to refrain from voting on the ground of the religion, race, caste, community or language of that candidate. [Paras 42, 43, 46 and 50]

Supreme Court Advocates on Record Association v. Union of India **(2016) 5 SCC 1;** *Keshav Mills Company Ltd. v. Commissioner of Income Tax, Bombay North, Ahmedabad* **[1965] 2 SCR 908 – followed.**

Ambika Sharan Singh v. Mahant Mahadeva and Giri **(1969) 3 SCC 492;** *Ziyauddin Bukhari v. Brijmohan Ramdas* **[1975] Suppl. SCR 281 : (1976) 2 SCC 17;** *Dr Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte* **[1995] 6 Suppl. SCR 371 : (1996) 1 SCC 130;** *Manohar Joshi v. Nitin Bhaurao Patil* **[1995] 6 Suppl. SCR 421 : (1996) 1 SCC 169;** *Harmohinder Singh Pradhan v. Ranjit Singh Talwandi* **[2005] 3 SCR 952 : (2005) 5 SCC 46;** *Mohd. Aslam v. Union of India* **[1996] 3 SCR 782 : (1996) 2 SCC 749 – relied on.**

S R Bommai v. Union of India **[1994] 2 SCR 644 : (1994) 3 SCC 1 – referred to.**

Case Law Reference

In the Judgment of Madan B, Lokur, J,

[1996] 1 Suppl. SCR 340	**referred to**	**Para 2**
(2003) 9 SCC 300	**referred to**	**Para 2**
[1964] 6 SCR 750	**held not correct law**	**Para 6**
[1964] 7 SCR 790	**relied on**	**Para 7**
[1969] 3 SCR 400	**held not correct law**	**Para 8**
[1996] 3 SCR 782	**referred to**	**Para 10**
[1994] 2 SCR 644	**referred to**	**Para 10**
[1995] 6 Suppl. SCR 371	**held not correct law**	**Para 11**
[1975] Suppl. SCR 281	**referred to**	**Para 35**
[1985] 2 SCR 159	**referred to**	**Para 35**
[2003] UKHL 13	**referred to**	**Para 36**
[1989] 3 SCR 316	**relied on**	**Pare 43**
[1975] 1 SCR 1	**relied on**	**Pare 44**
[2013] 10 SCR 259	**relied on**	**Pare 45**
[1955] 1 SCR 608	**referred to**	**Page 47**

In the Judgment of T.S. Thakur, C.J.I

[1962] Suppl, SCR 496	**relied on**	**Para 13**
[19751 1 SCR 173	**relied on**	**Para 14**
[1976] SCR 347	**relied on**	**Para 15**
[1994] 2 SCR 644	**relied on**	**Para 16**
[2005| 3 SCR 712	**relied on**	**Para 20**
[1995] 1 Suppl. SCR 392	**relied on**	**Para 21**
(1969) 3 SCC 492	**relied on**	**Para 22**

[1962] Suppl. SCR 769	**relied on**	**Para 24**
[1992] 3 Suppl. SCR 284	**relied on**	**Para 26**
J2015J 3 SCR 997	**relied on**	**Para 27**

In the Judgment of S.A. Bobde, J.

1984 CH 382 =		
(1983) 3 AII ER 481 (CA)	**referred to**	**Para2**
[2002] 2 SCR 94 5	**relied on**	**Para5**
[2003] 3 Suppl. SCR 24	**relied on**	**Para 7**

In the Judgment of Dr, D. Y, Chandrachud J.

[1951] 1 SCR 158	**followed**	**Para 1**
(1977) 3 SCC 566	**relied on**	**Para 11**
[1996] 2 SCR 99	**relied on**	**Para 12**
[1999] 2 Suppl. SCR 419	**relied on**	**Para 12**
[2003] 3 SCR 533	**relied on**	**Para 12**
(2013) 9 SCC 659	**relied on**	**Para 12**
[1952] SCR 1112	**referred to**	**Para 32**
[1964] 1 SCR 371	**referred to**	**Para 32**
[1950] SCR 869	**relied on**	**Para 32**
[1992] 2 Suppl. SCR 454	**referred to**	**Para 32**
[2013] 13 SCR 148	**referred to**	**Para 32**
[1972] 2 SCR 609	**referred to**	**Para 32**
[1976] 3 SCR 504	**referred to**	**Para 32**
[1982] 1 SCR 629	**referred to**	**Para 32**
[1999] 2 SCR 589	**referred to**	**Para 32**
[1995] 6 Suppl. SCR 371	**relied on**	**Para 34**

[1964] 6 SCR 750	**relied on**	**Para 37**
[1964] SCR 790	**relied on**	**Para 38**
[1969] 3 SCR 400	**relied on**	**Para 38**
(1969) 3 SCC 492	**relied on**	**Para 39**
[1975] Suppl. SCR 281	**relied on**	**Para 40**
[1995] 6 SuppL SCR 371	**relied on**	**Para 41**
[1995] 6 Suppl. SCR 421	**relied on**	**Para 41**
[2005] 3 SCR 952	**relied on**	**Fara 41**
[1994] 2 SCR 644	**referred to**	**Para 43**
[1996] 3 SCR 782	**referred to**	**Para 43**
[1965] 2 SCR 908	**relied on**	**Para 46**
(2016) 5 SCC 1	**followed**	**Para 47**

NEERAJ DUTTA
v.
STATE (GOVT. OF N.C.T. OF DELHI)

(Criminal Appeal No. 1669 of 2009)

DECEMBER 15, 2022

[S. ABDUL NAZEER, B. R. GAVAI, A. S. BOPANNA, V. RAMASUBRAMANIAN AND B. V. NAGARATHNA, JJ.]

Prevention of Corruption Act 1988: ss.7 and 13(1)(d) r/w s.13(2) – In the absence of evidence of the complainant (direct/primary, oral/documentary evidence) it is permissible to draw an inferential deduction of culpability/ guilt of a public servant u/ss.7 and 13(1)(d) r/w s.13(2) of the Act based on other evidence adduced by the prosecution.

Reference Matter – Prevention of Corruption Act 1988 – Whether B. Jayaraj v State of A.P *&* P. Satyanarayana Murthy v D. Insp. Of Police, State of A.P. *in conflict with* M. Narsinga Rao v State of A.P – *Reference Answered – There is no conflict in* B. Jayaraj *and P*. Satyanarayana Murthy *with the decision in* M. Narasinga Rao, *with regard to the nature and quality of proof necessary to sustain a conviction for offences u/ss.7 or 13(1)(d)(i) and (ii) of the Act, when the direct evidence of the complainant or "primary evidence" of the complainant is unavailable owing to his death or any other reason – Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a* sine qua non *in order to establish the guilt of the accused public servant u/ss.7 and 13 (1)(d) (i) and (ii) of the Act – Prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact and the same can be proved by direct evidence – The proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence, if such circumstantial evidences corroborates the foundational fact of demand and acceptance of illegal gratification.*

Prevention of Corruption Act 1988: s.20 – Scope of Presumption used therein – s.20 envisages the law regarding the presumption where public servant accepts gratification other than legal remuneration – The expression used therein is "shall presume" which is legal or compulsory presumption

– The said provision deals with a legal presumption which is in the nature of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the Section is satisfied – It does not say that the said condition should be satisfied through direct evidence but the only requirement is that it must be proved that the accused has accepted or agreed to accept gratification.

Evidence Act, 1872: s.3 – Word "Fact" – "Factum Probandum & Factum Probans*" – Classification and Connection – Fact consists of state of things, events or mental state – The principal fact (fact-in-issue) constitutes* Factum Probandum *whereas the evidentiary fact (relevant fact) constitute* Factum Probans *– Facts relevant to the issue are evidentiary fact which render probable the existence or non-existence of fact-in-issue or some other relevant fact.*

Evidence Act, 1872: s.3 – Word "Evidence" – Scope – Evidence may include the actual words of witnesses, or documents produced – The term evidence is not restricted to only oral and documentary evidence but also to other things like material objects, the demeanour of the witnesses, facts of which judicial notice could be taken, admissions of parties, local inspection made and answers given by the accused to questions put forth by the Magistrate or Judge u/s.313 of the Criminal Procedure Code.

Evidence Act, 1872 – ss. 3, 59, 60, 61 – Classification of Evidence – Evidence may be classified as direct evidence (original evidence) and indirect evidence (substantial evidence) – Direct Evidence establishes the existence of a thing or fact either by actual production or by testimony or demonstrable declaration of someone who has himself perceived it and the same is devoid of any room for inference or presumption – Indirect Evidence gives rise to the logical inference that a fact-in-issue exists, either conclusively or presumptively – Direct Evidence may constitute either oral or documentary evidence – Indirect evidence may constitute evidence which is circumstantial in nature.

Evidence Act, 1872: s.60 – Oral Evidence – Classification and Scope – Oral Evidence can be either original or hearsay in nature – It is original if it is given by the person who himself have seen or heard something through his own senses – Hearsay Evidence could be called as derivative, transmitted or second-hand evidence in which a witness is merely reporting what he had

not himself seen or heard but have learnt from some third person – Oral Evidence is also sub-categorized as Primary and Secondary evidence – Former is an oral account of the original evidence while latter is a report or an oral account of the original evidence or a copy of a document or a model of the original thing – As per the mandate of s.60, the oral evidence must be direct or positive.

Evidence Act, 1872: Word "Hearsay evidence" – Scope – The expression "hearsay evidence" is not defined under the Evidence Act – Hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but it does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed such as evidence of an informant of the crime.

Evidence Act, 1872: ss. 59, 61, 62, 63, 64, 65, 66, 67(2), 78 – Documentary Evidence – Classification and scope – As per the mandate of s.59 contents of document cannot be proved by oral evidence – Documentary evidences are to be proved by production of documents themselves or, in their absence, by secondary evidence u/s.65 of the Act – s.61 permits proof of contents of document by primary or by secondary evidence – As per s.62, primary evidence mean when the document itself is produced for inspection of the court – For an evidence to be a secondary evidence for proving the contents of the document, it must be of the kind as specified u/s.63 – As per the mandate of s.64 document must be proved by adducing primary evidence, except in the cases mentioned u/s.65 – The policy of law is that primary evidence is the best evidence and it affords the greatest certainty of the fact in question and it is only when the absence of the primary source has been satisfactorily explained that secondary evidence is permissible to prove the contents of documents.

Evidence Act, 1872: ss. 4, 114 – Law regarding presumptions – Word "May Presume, Shall Presume, Conclusive Proof" – Factual Presumption or discretionary presumption come under "May Presume" and in this case facts may be proved either by adducing evidence or the court may presume the existence of a fact – Legal Presumption or Compulsory Presumption come under "shall presume" and once it is declared by the law that the court shall presume the existence of a fact, then the court is under obligation to presume such fact unless such presumption is displaced by adducing evidence contrary to such presumption – Conclusive proof is a strict declaration of law and once a fact is declared to be a conclusive proof of the other,

then the court shall not allow the evidence to be adduced to misplace such presumption – The presumption as contemplated by s.114 is a discretionary presumption.

Evidence Act, 1872: Chapter 7 – Burden of Proof - The phrase "burden of proof" has two meanings one, the burden of proof as a matter of law and pleading and the other, the burden of establishing a case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour.

Evidence Act, 1872: Hostile Witness – Admissibility of Evidence – Settled Legal Position – Even if a witness is treated as "hostile" and is cross-examined, his evidence cannot be written off altogether but must be considered with due care and circumspection and that part of the testimony which is creditworthy must be considered and acted upon.

Answering the Reference petition, the Court

HELD: 1. Congruent to the principle of res gestae, a fact includes a state of things or events as well as the mental state i.e. intention or animus. A fact in law of evidence includes the factum probandum i.e., the principal fact to be proved and the factum probans, i.e., the evidentiary fact from which the principal fact follows immediately or by inference. On the other hand, the expression "fact in issue" means the matters which are in dispute or which form the subject of investigation. It is well settled that evidence is upon facts pleaded in a case and hence, the principal facts are sometimes the facts in issue. Facts relevant to the issue are evidentiary facts which render probable the existence or non-existence of a fact in issue or some relevant fact. [Para 30, 31]

2. In criminal cases, the facts in issue are constituted in the charge, or acquisition, in cases of warrant or summon cases. The proof of facts in issue could be oral and documentary evidence. Evidence is the medium through which the court is convinced of the truth or otherwise of the matter under enquiry, i.e., the actual words of witnesses, or documents produced and not the facts which have to be proved by oral and documentary evidence. Of course, the term evidence is not restricted to only oral and documentary evidence but also to other things like material objects, the demeanour of the witnesses, facts

of which judicial notice could be taken, admissions of parties, local inspection made and answers given by the accused to questions put forth by the Magistrate or Judge under Section 313 of the Criminal Procedure Code (CrPC). [Para 32]

3. "Direct" or "original" evidence means that evidence which establishes the existence of a thing or fact either by actual production or by testimony or demonstrable declaration of someone who has himself perceived it, and believed that it established a fact in issue. Direct evidence proves the existence of a fact in issue without any inference of presumption. On the other hand, "indirect evidence" or "substantial evidence" gives rise to the logical inference that such a fact exists, either conclusively or presumptively. The effect of substantial evidence under consideration must be such as not to admit more than one solution and must be inconsistent with any explanation that the fact is not proved. By direct or presumptive evidence (circumstantial evidence), one may say that other facts are proved from which, existence of a given fact may be logically inferred. [Para 33]

4. Oral evidence can be classified as original and hearsay evidence. Original evidence is that which a witness reports himself to have seen or heard through the medium of his own senses. Hearsay evidence is also called derivative, transmitted, or second-hand evidence in which a witness is merely reporting not what he himself saw or heard, and not what has come under the immediate observation of his own bodily senses, but what he has learnt in respect of the fact through the medium of a third person. Normally, a hearsay witness would be inadmissible, but when it is corroborated by substantive evidence of other witnesses, it would be admissible. [Para 34]

5. Evidence that does not establish the fact in issue directly but throws light on the circumstances in which the fact in issue did not occur is circumstantial evidence (also called inferential or presumptive evidence). Circumstantial evidence means facts from which another fact is inferred. Although circumstantial evidence does not go to prove directly the fact in issue, it is equally direct. Circumstantial evidence has also to be proved by direct evidence of the circumstances. [Para 35]

6. Section 59 of the Evidence Act states that all facts, except the contents of documents or electronic records, may be proved by

oral evidence. Oral evidence means the testimony of living persons examined in the presence of the court or commissioners appointed by the court, deaf and dumb persons may also adduce evidence by signs or through interpretation or by writing, if they are literate. Documentary evidences, on the other hand, are to be proved by the production of the documents themselves or, in their absence, by secondary evidence under Section 65 of the Act. Further, facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, or ill will need not be proved by direct testimony. It may be proved inferentially from conduct, surrounding circumstances, etc. [Para 36, 37]

7. Section 60 of the Evidence Act requires that oral evidence must be direct or positive. Direct evidence is when it goes straight to establish the main fact in issue. The word "direct" is used in juxtaposition to derivative or hearsay evidence where a witness gives evidence that he received information from some other person. If that person does not, himself, state such information, such evidence would be inadmissible being hearsay evidence. On the other hand, forensic procedure as circumstantial or inferential evidence or presumptive evidence (Section 3) is indirect evidence. It means proof of other facts from which the existence of the fact in issue may be logically inferred. In this context, the expression "circumstantial evidence" is used in a loose sense as, sometimes, circumstantial evidence may also be direct. Although the expression "hearsay evidence" is not defined under the Evidence Act, it is, nevertheless, in constant use in the courts. However, hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but it does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed such as evidence of an informant of the crime. At this stage, it must be distinguished that even with regard to oral evidence, there are sub-categories – primary evidence and secondary evidence. Primary evidence is an oral account of the original evidence i.e., of a person who saw what happened and gives an account of it recorded by the court, or the original document itself, or the original thing when produced in court. Secondary evidence is a report or an oral account of the original evidence or a copy of a document or a model of the original thing. [Para 39, 40, 41]

8. Section 61 deals with proof of contents of documents which is by either primary or by secondary evidence. When a document is produced as primary evidence, it will have to be proved in the manner laid down in Sections 67 to 73 of the Evidence Act. Mere production and marking of a document as an exhibit by the court cannot be held to be due proof of its contents. Its execution has to be proved by admissible evidence. On the other hand, when a document is produced and admitted by the opposite party and is marked as an exhibit by the court, the contents of the document must be proved either by the production of the original document i.e., primary evidence or by copies of the same as per Section 65 as secondary evidence. So long as an original document is in existence and is available, its contents must be proved by primary evidence. It is only when the primary evidence is lost, in the interest of justice, the secondary evidence must be allowed. Primary evidence is the best evidence and it affords the greatest certainty of the fact in question. Thus, when a particular fact is to be established by production of documentary evidence, there is no scope for leading oral evidence. What is to be produced is the primary evidence i.e., document itself. It is only when the absence of the primary source has been satisfactorily explained that secondary evidence is permissible to prove the contents of documents. Secondary evidence, therefore, should not be accepted without a sufficient reason being given for non-production of the original. [Para 42]

9. Section 62 of the Evidence Act defines primary evidence to mean the documents itself produced for the inspection of the court. If primary evidence is available, it would exclude secondary evidence. Section 63 of the Evidence Act deals with secondary evidence and defines what it means and includes. Section 63 mentions five kinds of secondary evidence, namely, - (i) Certified copies given under the provisions hereinafter contained; (ii) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies; (iii) Copies made from or compared with the original; (iv) Counterparts of documents as against the parties who did not execute them; (v) Oral accounts of the contents of a document given by some person who has himself seen it. [Para 43]

10. Section 64 of the Evidence Act states that documents must be proved by primary evidence except in certain cases mentioned above.

Once a document is admitted, the contents of that document are also admitted in evidence, though those contents may not be conclusive evidence. Moreover, once certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence. There is a prohibition for any other evidence to be led which may detract from the conclusiveness of that evidence and the court has no option to hold the existence of the fact otherwise when such evidence is made conclusive. Thus, once a document has been properly admitted, the contents of the documents would stand admitted in evidence, and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence of such a document, no such objection could be allowed to be raised at any later stage of the case or in appeal. [Para 44]

11. Courts are authorised to draw a particular inference from a particular fact, unless and until the truth of such inference is disproved by other facts. The court can, under Section 4 of the Evidence Act, raise a presumption for purposes of proof of a fact. It is well settled that a presumption is not in itself evidence but only makes a prima facie case for a party for whose benefit it exists. As per English Law, there are three categories of presumptions, namely, (i) presumptions of fact or natural presumption; (ii) presumption of law (rebuttable and irrebuttable); and (iii) mixed presumptions i.e., "presumptions of mixed law and fact" or "presumptions of fact recognised by law". The expression "may presume" and "shall presume" in Section 4 of the Evidence Act are also categories of presumptions. Factual presumptions or discretionary presumptions come under the division of "may presume" while legal presumptions or compulsory presumptions come under the division of "shall presume". "May presume" leaves it to the discretion of the court to make the presumption according to the circumstances of the case but "shall presume" leaves no option with the court, and it is bound to presume the fact as proved until evidence is given to disprove it, for instance, the genuineness of a document purporting to be the Gazette of India. The expression "shall presume" is found in Sections 79, 80, 81, 83, 85, 89 and 105 of the Evidence Act. [Para 46]

12. Section 20 of the Act deals with presumption where public servant accepts gratification other than legal remuneration. It uses the expression "shall be presumed" in sub-section (1) and sub-section

(2) unless the contrary is proved. The said provision deals with a legal presumption which is in the nature of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the Section is satisfied. The only condition for drawing a legal presumption under Section 20 of the Act is that during trial, it should be proved that the accused had accepted or agreed to accept any gratification. The Section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept gratification. [Para 48]

13. A presumption under Section 114 of the Evidence Act is discretionary in nature inasmuch as it is open to the court to draw or not to draw a presumption as to the existence of one fact from the proof of another fact. This is unlike a presumption under Section 4(1) of the 1947 Act or Section 20 of the Act where the court has to draw such presumption, if a certain fact is proved, that is, where any illegal gratification has been received by an accused. In such a case the presumption that has to be drawn that the person received that thing as a motive of reward. Therefore, the court has no choice in the matter, once it is established that the accused has received a sum of money which was not due to him as a legal remuneration. Of course, it is open to the accused to show that though that money was not due to him as a legal remuneration it was legally due to him in some other manner or that he had received it under a transaction or an arrangement which is lawful. The burden resting on the accused in such a case would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words "unless the contrary is proved" which occur in this provision make it clear that the presumption has to be rebutted by "proof" and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material brought before it, the Court finds its existence to be so probable that a reasonable man would act on the supposition that

it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted. [Para 50]

14. As opposed to the expressions "may presume" and "shall presume", the expression "conclusive proof" is also used in Section 4 of the Evidence Act. When the law says that a particular kind of evidence would be conclusive, that fact can be proved either by that evidence or by some other evidence that the court permits or requires. When evidence which is made conclusive is adduced, the court has no option but to hold that the fact exists. For instance, the statement in an order of the court is conclusive of what happened before the presiding officer of the court. Thus, conclusive proof gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to combat that effect. When a statute makes certain facts final and conclusive, evidence to disprove such facts is not to be allowed. [Para 52]

15. All evidence let in before the court of law are classified either as direct or circumstantial evidence. "Direct evidence" means when the principal fact is attested directly by witnesses, things or documents. For all other forms, the term "circumstantial evidence" which is "indirect evidence" is referred, whether by witnesses, things or documents, which can be received as evidence. This is also of two kinds namely, conclusive and presumptive. Conclusive is when the connection between the principal and evidentiary facts – the factum probandum and factum probans - is a necessary consequence of the laws of nature; "presumptive" is when the inference of the principal fact from the evidence is only probable, whatever be the degree of persuasion which it may generate. Thus, circumstantial evidence is evidence of circumstances as opposed to what is called direct evidence. The prosecution must take place and prove all necessary circumstances constituting a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence. [Para 53]

16. Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections

7 and 13 (1)(d) (i) and(ii) of the Act. In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence. Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence. [Para 68]

17. There is no conflict in the three judge Bench decisions of this Court in B. Jayaraj and P. Satyanarayana Murthy with the three judge Bench decision in M. Narasinga Rao, with regard to the nature and quality of proof necessary to sustain a conviction for offences under Sections 7 or 13(1)(d)(i) and (ii) of the Act, when the direct evidence of the complainant or "primary evidence" of the complainant is unavailable owing to his death or any other reason. [Para 69][160-E-F]

Subash Parbat Sonvane v. State of Gujarat **(2002) 5 SCC 86 : [2002] 3 SCR 359;** *Ram Krishan v. State of Delhi* **AIR 1956 SC 476 : [1956] SCR 182;** *C.K. Damodaran Nair v. Government of India* **(1997) 9 SCC 477 : [1997] 1 SCR 107;** *B. Jayaraj v. State of Andhra Pradesh* **(2014) 13 SCC 55 ("B. Jayaraj") : [2014] 4 SCR 554;** *P. Satyanarayana Murthy v. D. Inspector of Police, State of A.P.* **(2015) 10 SCC 152;** *M. Narsinga Rao v. State of A.P.* **(2001) 1 SCC 691 : [2000] 5 Suppl. SCR 584;** *A. Subair v. State of Kerala* **(2009) 6 SCC 587 : [2009] 9 SCR 1058;** *State of Kerala v. C.P. Rao* **(2011) 6 SCC 450 : [2011] 6 SCR 864;** *Suresh Budharmal Kalani v. State of Maharashtra* **(1998) 7 SCC 337 : [1998] 1 Suppl. SCR 608;** *Hazari Lal v. State (Delhi Admn.)* **(1980) 2 SCC 390 : [1980] 2 SCR 1053;** *Kishan Chand Mangal v. State of Rajasthan* **(1982) 3 SCC 466 : [1983] 1 SCR 569;** *K. Shanthamma v. State of Karnataka* **(2022) 4 SCC 574;** *State of U.P. v. Ram Asrey* **(1990) Suppl. SCC 12;** *Mukhtiar Singh v. State of Punjab* **(2017) 8 SCC 136 : [2017] 8 SCR 109;** *M. R. Purushotam v. State of Karnataka* **(2015) 3 SCC 247;** *C. M. Sharma*

v. State of Andhra Pradesh **(2010) 15 SCC 1 : [2010] 13 SCR 1105;** *State of Maharashtra v. Dhyaneshwar Laxman Rao Wankhede* **(2009) 15 SCC 200 : [2009] 11 SCR 513;** *Sukumaran v. State of Kerala* **(2015) 11 SCC 314;** *Sunkanna v. State of Andhra Pradesh* **(2016) 1 SCC 713 : [2015] 12 SCR 882;** *State of Madhya Pradesh v. Ram Singh* **(2000) 5 SCC 88 : [2000] 1 SCR 579;** *State of Rajasthan v. Babu Meena* **(2013) 4 SCC 206;** *Amarjit Singh v. State (Delhi Admn.)* **1995 Cr LJ 1623 (Del);** *Kumar Exports v. Sharma Carpets* **(2009) 2 SCC 513 : [2008] 17 SCR 572;** *Krishna Janardhan Bhat v. Dattatraya G Hegde* **(2008) 4 SCC 54 : [2008] 1 SCR 605;** *State of Madras v. A. Vaidyanatha Iyer* **AIR 1958 SC 61 : [1958] SCR 580;** *Dhanvantrai Balwantrai Desai v. State of Maharashtra* **AIR 1964 SC 575 : [1963] Suppl. SCR 485;** *Navaneethakrishnan v. State by Inspector of Police* **AIR 2018 SC 2027 : [2018] 6 SCR 749;** *Sharad Birdhichand Sarda v. State of Maharashtra* **(1984) 4 SCC 116 : [1985] 1 SCR 88;** *Prakash v. State of Rajasthan* **(2013) 4 SCC 668 : [2013] 2 SCR 458;** *Kundan Lal Rallaram v. The Custodian, Evacuee Property Bombay* **AIR 1961 SC 1316;** *Madhukar Bhaskarrao Joshi v. State of Maharashtra* **(2000) 8 SCC 571 : [2000] 4 Suppl. SCR 475;** *State v. Dr. Anup Kumar Srivastava* **(2017) 15 SCC 560 : [2017] 9 SCR 341;** *State of Andhra Pradesh v. V. Vasudeva Rao* **(2004) 9 SCC 319 : [2003] 5 Suppl. SCR 500;** *State of Andhra Pradesh v. P. Venkateshwarlu* **(2015) 7 SCC 283 : [2015] 6 SCR 262;** *Selvaraj v. State of Karnataka* **(2015) 10 SCC 230 : [2015] 9 SCR 381;** *Nayan Kumar Shivappa Waghmare v. State of Maharashtra* **(2015) 11 SCC 213 : [2015] 2 SCR 171;** *Prakash Chand v. State (Delhi Admn.)* **(1979) 3 SCC 90 : [1979] 2 SCR 330;** *Sat Paul v. Delhi Administration* **(1976) 1 SCC 727 : [1976] 2 SCR 11;** *Swatantar Singh v. State of Haryana* **(1997) 4 SCC 14 : [1997] 2 SCR 639;** *A.B. Bhaskara Rao v. CBI* **(2011) 10 SCC 259 : [2011] 12 SCR 718;** *State of M.P. v. Shambhu Dayal* **(2006) 8 SCC 693 : [2006] 8 Suppl. SCR 319 – referred to.**

Case Law Reference

[2002] 3 SCR 359	**referred to**	**Para 6**
[1956] SCR 182	**referred to**	**Para 6**
[1997] 1 SCR 107	**referred to**	**Para 8**
[2014] 4 SCR 554	**referred to**	**Para 9**
[2000] 5 Suppl. SCR 584	**referred to**	**Para 9**
[2009] 9 SCR 1058	**referred to**	**Para 10b(iv)**
[2011] 6 SCR 864	**referred to**	**Para 10b(iv)**
[1998] 1 Suppl. SCR 608	**referred to**	**Para 10c(iii)**
[1980] 2 SCR 1053	**referred to**	**Para 10c(v)**
[1983] 1 SCR 569	**referred to**	**Para 14(viii)**
[2017] 8 SCR 109	**referred to**	**Para 15**
[2010] 13 SCR 1105	**referred to**	**Para 15**
[2009] 11 SCR 513	**referred to**	**Para 15**
[2015] 12 SCR 882	**referred to**	**Para 15**
[2000] 1 SCR 579	**referred to**	**Para 23**
[2008] 17 SCR 572	**referred to**	**Para 47**
[2008] 1 SCR 605	**referred to**	**Para 47**
[1958] SCR 580	**referred to**	**Para 49**
[1963] Suppl. SCR 485	**referred to**	**Para 50**
[2018] 6 SCR 749	**referred to**	**Para 53**
[1985] 1 SCR 88	**referred to**	**Para 55**
[2013] 2 SCR 458	**referred to**	**Para 55**
[2000] 4 Suppl. SCR 475	**referred to**	**Para 57**
[2017] 9 SCR 341	**referred to**	**Para 58**
[2003] 5 Suppl. SCR 500	**referred to**	**Para 59(i)**

[2015] 6 SCR 262	**referred to**	**Para 59(ii)**
[2015] 9 SCR 381	**referred to**	**Para 59(iii)**
[2015] 2 SCR 171	**referred to**	**Para 61**
[1979] 2 SCR 330	**referred to**	**Para 62**
[1976] 2 SCR 11	**referred to**	**Para 66**
[1997] 2 SCR 639	**referred to**	**Para 71**
[2011] 12 SCR 718	**referred to**	**Para 71**
[2006] 8 Suppl. SCR 319	**referred to**	**Para 71**

SUKHPAL SINGH KHAIRA
v.
THE STATE OF PUNJAB

(Criminal Appeal No. 885 of 2019)

DECEMBER 05, 2022

[S. ABDUL NAZEER, B.R. GAVAI, A.S. BOPANNA, V. RAMASUBRAMANIAN AND B.V NAGARATHNA, JJ.]

Code of Criminal Procedure, 1973 : s. 319 – Power to summon additional accused under – When the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order – Held: Power u/s. 319 has to be exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused – In the case of acquittal, the power should be exercised before the order of acquittal is pronounced – In case of conviction, summoning order u/s. 319 has to precede the conclusion of trial by imposition of sentence – If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same would not be sustainable.

s. 319 – Power to summon additional accused under – When the trial in respect of certain other absconding accused (whose presence is subsequently secured) is pending, having been bifurcated from the main trial – Held: Court has power to summon additional accused in trial proceedings in respect of the absconding accused after securing his presence subject to the evidence recorded in the split up (bifurcated) trial pointing to the involvement of the accused sought to be summoned – However, evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion.

s. 319 – Exercise of power under – Guidelines issued.

Answering the questions referred, the Court

HELD: 1.1 The power under Section 319 of the Code of Criminal Procedure, 1973 is to be invoked and exercised before the

pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal, the power should be exercised before the order of acquittal is pronounced. Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable. [Para 33]

1.2 The trial court has the power to summon additional accused when the trial is proceeded in respect of the absconding accused after securing his presence, subject to the evidence recorded in the split up (bifurcated) trial pointing to the involvement of the accused sought to be summoned. But the evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion. [Para 33]

1.3 The guidelines that the competent court must follow while exercising power under Section 319 CrPC are:

(i) If the competent court finds evidence or if application under Section 319 of CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.

(ii) The Court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.

(iii) If the decision of the court is to exercise the power under Section 319 of CrPC and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.

(iv) If the summoning order of additional accused is passed, depending on the stage at which it is passed, the Court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.

(v) If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.

(vi) If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with.

(vii) If the proceeding paused as in (i) above is in a case where the accused who were tried are to be acquitted and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.

(viii) If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 of CrPC can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split up (bifurcated) trial.

(ix) If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke and exercise the power under Section 319 of CrPC, the appropriate course for the court is to set it down for re-hearing.

(x) On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

(xi) Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.

(xii) If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier;

(a) The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.

(b) In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused. [Para 33][187-D-H; 188-A-H; 189-A]

2.1 It is amply clear from s. 319 Cr.PC that the power bestowed on the Court is to the effect that in the course of an inquiry into, or trial of an offence, based on the evidence tendered before the Court, if it appears to the Court that such evidence points to any person other than

the accused who are being tried before the Court to have committed any offence and such accused has been excluded in the charge sheet or in the process of trial till such time could still be summoned and tried together with the accused for the offence which appears to have been committed by such persons summoned as additional accused. [Para 14]

2.2 Under section 319, power bestowed on the court to summon any person who is not an accused in the case is, when in the course of the trial it appears from the evidence that such person has a role in committing the offence. Therefore, it would be open for the Court to summon such a person so that he could be tried together with the accused and such power is exclusively of the Court. Obviously, when such power is to summon the additional accused and try such a person with the already charged accused against whom the trial is proceeding, it will have to be exercised before the conclusion of trial. The connotation 'conclusion of trial' in the instant case cannot be reckoned as the stage till the evidence is recorded, but, is to be understood as the stage before pronouncement of the judgment, since on judgment being pronounced the trial comes to a conclusion since until such time the accused is being tried by the Court. [Para 20]

2.3 From the perusal of section 232 CrPC, it is seen that if the Sessions Court while analysing the evidence recorded finds that there is no evidence to hold the accused for having committed the offence, the judge is required to record an order of acquittal. In that case, there is nothing further to be done by the judge and therefore the trial concludes at that stage. In such cases where it arises u/s. 232 CrPC and an order of acquittal is recorded and when there are more than one accused or the sole accused, have/has been acquitted, in such cases, that being the end of the trial by drawing the curtain, the power of the court to summon an accused based on the evidence as contemplated under Section 319 CrPC will have to be invoked and exercised before pronouncement of judgment of acquittal. There shall be application of mind also, as to whether separate trial or joint trial is to be held while trying him afresh. After such order it will be open to pronounce the judgment of acquittal of the accused who was tried earlier. If Judge arrives at the conclusion that the accused is to be convicted, the conviction shall be ordered through the judgment as contemplated u/s. 235 CrPC. Sub-section (2) thereto provides that if the Judge does not

proceed to give the benefit to the accused of being released on probation u/s. 360 of CrPC, the judge shall hear the accused on the question of sentence and then impose a sentence on him. [Para 22, 23]

2.4 Even after the pronouncement of the judgment of conviction, the trial is not complete since the Sessions Judge is required to apply her/his mind to the evidence which is available on record to determine the gravity of the charge for which the accused is found guilty; the role of the particular accused when there is more than one accused involved in an offence and in that light, to award an appropriate sentence. Therefore, it cannot be said that the trial is complete on the pronouncement of the judgment of conviction alone, though it may be so in the case of acquittal as contemplated under Section 232 of CrPC, since in that case there is nothing further to be done by the Judge except to record an order of acquittal which results in conclusion of trial. [Paras 24]

2.5 The conclusion of the trial in a criminal prosecution if it ends in conviction, a judgment is considered to be complete in all respects only when the sentence is imposed on the convict, if the convict is not given the benefit of Section 360 of CrPC. Similarly, in a case where there are more than one accused and if one or more among them are acquitted and the others are convicted, the trial would stand concluded as against the accused who are acquitted and the trial will have to be concluded against the convicted accused with the imposition of sentence. When considered in the context of Section 319 of CrPC, there would be no dichotomy, since what becomes relevant here is only the decision to summon a new accused based on the evidence available on record which would not prejudice the existing accused since in any event they are convicted. [Para 27]

2.6 In that view of the matter, if the Court finds from the evidence recorded in the process of trial that any other person is involved, such power to summon the accused under Section 319 CrPC can be exercised by passing an order to that effect before the sentence is imposed and the judgment is complete in all respects bringing the trial to a conclusion. While arriving at such conclusion what is also to be kept in view is the requirement of sub-section (4) to Section 319 CrPC. From the said provision it is clear that if the Sessions Judge exercises the power to summon the additional accused, the proceedings in respect

of such person shall be commenced afresh and the witnesses will have to be re-examined in the presence of the additional accused. In a case where the Sessions Judge exercises the power under Section 319 CrPC after recording the evidence of the witnesses or after pronouncing the judgment of conviction but before sentence being imposed, the very same evidence which is available on record cannot be used against the newly added accused in view of Section 273 of CrPC. As against the accused who has been summoned subsequently a fresh trial is to be held. However while considering the application under Section 319 CrPC, if the decision by the Sessions Judge is to summon the additional accused before passing the judgment of conviction or passing an order on sentence, the conclusion of the trial by pronouncing the judgment is required to be withheld and the application under Section 319 CrPC is required to be disposed of and only then the conclusion of the judgment, either to convict the other accused who were before the Court and to sentence them can be proceeded with. This is so since the power under Section 319 CrPC can be exercised only before the conclusion of the trial by passing the judgment of conviction and sentence. [Para 28]

2.7 Though Section 319 of CrPC provides that such person summoned as per sub-section (1) thereto could be jointly tried together with the other accused, keeping in view the power available to the Court under Section 223 of CrPC to hold a joint trial, it would also be open to the Sessions Judge at the point of considering the application under Section 319 of CrPC and deciding to summon the additional accused, to also take a decision as to whether a joint trial is to be held after summoning such accused by deferring the judgment being passed against the tried accused. If a conclusion is reached that the fresh trial to be conducted against the newly added accused could be separately tried, in such event it would be open for the Sessions Judge to order so and proceed to pass the judgment and conclude the trial insofar as the accused against whom it had originally proceeded and thereafter proceed in the case of the newly added accused. However, what is important is that the decision to summon an additional accused either suo-moto by the Court or on an application under Section 319 in all eventuality be considered and disposed of before the judgment of conviction and sentence is pronounced, as otherwise, the trial would get concluded and the Court will get divested of the power under Section

319. Since a power is available to the Court to decide as to whether a joint trial is required to be held or not, the phrase, "could be tried together with the accused" as contained in Section 319(1) CrPC, is to be directory. [Para 29]

2.8 If the trial against the absconding accused is split up (bifurcated) and is pending, that by itself will not provide validity to an application filed under Section 319 of CrPC or the order of Court to summon an additional accused in the earlier main trial if such summoning order is made in the earlier concluded trial against the other accused. This is so, since such power is to be exercised by the Court based on the evidence recorded in that case pointing to the involvement of the accused who is sought to be summoned. If in the split up case, on securing the presence of the absconding accused the trial is commenced and if in the evidence recorded therein it points to the involvement of any other person as contemplated in Section 319 CrPC, such power to summon the accused can certainly be invoked in the split up (bifurcated) case before conclusion of the trial therein. [Para 30]

Shashikant Singh v. Tarkeshwar Singh **(2002) 5 SCC 738 : [2002] 3 SCR 400;** *Hardeep Singh v. State of Punjab* **(2014) 3 SCC 92 : [2014] 2 SCR 1;** *Rama Narang vs. Ramesh Narang and Others* **(1995) 2 SCC 513 : [1995] 1 SCR 456;** *Yakub Abdul Razak Memon v. State of Maharashtra* **(2013) 13 SCC 1 : [2013] 15 SCR 1;** *Rajendra Singh v. State of U.P. and Another* **(2007) 7 SCC 378 : [2007] 8 SCR 834;** *Manjit Singh v. State of Haryana and Others* **(2021) SCC Online SC 632 – referred to.**

Case Law Reference

[2014] 2 SCR 1	**referred to**	**Para 5**
[1995] 1 SCR 456	**relied on**	**Para 25**
[2013] 15 SCR 1	**referred to**	**Para 26**
[2002] 3 SCR 400	**relied on**	**Para 29**
[2007] 8 SCR 834	**referred to**	**Para 31**

SATENDER KUMAR ANTIL
v.
CENTRAL BUREAU OF INVESTIGATION & ANR.

(Miscellaneous Application No.1849 of 2021)

JULY 11, 2022

[SANJAY KISHAN KAUL AND M.M. SUNDRESH, JJ.]

Bail – Grant of – Code of Criminal Procedure, 1973 – ss. 41, 41A, 88, 170, 204 and 209 – Constitution of India – Arts. 21 & 22 – Applications have been filed seeking certain directions/clarifications, to deal with the aspects governing the grant of bail – Held: The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act so as to streamline the grant of bail – While considering the application for enlargement on bail, Courts will have to satisfy themselves on the due compliance of sec. 41 of CrPC – Any non-compliance would entitle the accused to a grant of bail – Section 41 and 41A are facets of Article 21 of the Constitution – The directions of Arnesh Kumar v. State of Bihar ought to be complied with in letter and spirit by the investigating and prosecuting agencies – While the view expressed by the Supreme Court on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders – To take care of not only the unwarranted arrests, but also the clogging of bail applications before various Courts, all the State Governments and the Union Territories directed to facilitate standing orders, to comply with the mandate of Section 41A – There need not be any insistence of a bail application while considering the application u/ss. 88, 170, 204 and 209 of the Code.

Code of Criminal Procedure, 1973 – Special Courts – Constitution of – The State and Central Governments will have to comply with the directions issued by Supreme Court from time to time with respect to constitution of special courts – The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts – The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.

Code of Criminal Procedure, 1973 – ss. 436A, 440 – Undertrial Prisoners – The statistics placed before the Court indicated that more

than 2/3rd of the inmates of the prisons constitute undertrial prisoners – Of this category of prisoners, majority may not even be required to be arrested despite registration of a cognizable offense, being charged with offenses punishable for seven years or less – The High Courts are directed to undertake the exercise of finding out the undertrial prisoners who are not able to comply with the bail conditions – After doing so, appropriate action will have to be taken in light of sec. 440, facilitating the release – While insisting upon sureties the mandate of sec. 440 of the Code has to be kept in mind – An exercise will have to be done in a similar manner to comply with the mandate of sec. 436A both at the district judiciary level and the High Court as earlier directed by this Court in Bhim Singh, followed by appropriate orders.

Code of Criminal Procedure, 1973 – Bail Application – Disposal of – Timeframe – Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application – Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.

Code of Criminal Procedure, 1973 – Sec. 167(2) – Object and presumption under – It has got a laudable object behind it, which is to ensure an expeditious investigation and a fair trial, and to set down a rationalised procedure that protects the interests of the indigent sections of society – This is also another limb of Art. 21 – Presumption of innocence is also inbuilt in this provision – The right enshrined is an absolute and indefeasible one, inuring to the benefit of suspect – A duty is enjoined upon the agency to complete the investigation within the time prescribed and a failure would enable the release of the accused – Such a right cannot be taken away even during any unforeseen circumstances – As a consequence of the right flowing from Sec.167(2), courts will have to give due effect to it, and thus any detention beyond this period would certainly be illegal, being an affront to the liberty of the person concerned – Therefore, it is not only the duty of the investigating agency but also the courts to see to it that an accused gets the benefit of Section 167 (2).

Code of Criminal Procedure, 1973 – Sec. 170 – Scope and ambit – A power which is to be exercised by the court after the completion of the investigation – In a case where the prosecution does not require custody of the accused, there is no need for an arrest when a case is sent to the

magistrate u/s. 170 – There is not even a need for filing a bail application, as the accused is merely forwarded to the court for the framing of charges and issuance of process for trial – However, cases in which the accused persons are already in custody, then, the bail application has to be decided on its own merits – There needs to be Strict Complanace of he mandate laid down in Siddharth v. State of U.P.

Code of Criminal Procedure, 1973 – ss. 88 & 204 – s. 204 gives a discretion to a Magistrate, and being procedural in nature, it is to be exercised as a matter of course by following the prescription of sec. 88 – Thus, issuing a warrant may be an exception in which case the Magistrate will have to give reasons.

Code of Criminal Procedure, 1973 – s. 209 – It gives ample power to the Magistrate to remand a person into custody during or until the conclusion of the trial – Since the power is to be exercised by the Magistrate on a case-to-case basis, it is his wisdom in either remanding an accused or granting bail – Even here, it is judicial discretion which the Magistrate has to exercise – A Magistrate can take a call even without an application for bail if he is inclined to do so.

Code of Criminal Procedure, 1973 – sec. 309 – Bail – It mandates courts to continue the proceedings on a day-to-day basis till the completion of the evidence – Any delay on the part of the court or the prosecution would certainly violate Art. 21 – Courts shall make sure that the accused does not suffer for the delay occasioned due to no fault of his own – Therefore, while it is expected of the court to comply with sec. 309 to the extent possible, an unexplained, avoidable and prolonged delay in concluding a trial, appeal or revision would certainly be a factor for the consideration of bail.

Code of Criminal Procedure, 1973 – sec. 389 – Bail – It concerns itself with circumstances pending appeal leading to the release of the appellant on bail – The power exercisable u/s. 389 is different from that of the one either u/ss. 437 or 439, pending trial – This is for the reason that "presumption of innocence" and "bail is the rule and jail is the exception" may not be available to the appellant who has suffered a conviction – A mere pendency of an appeal per se would not be a factor – However, delay in taking up the main appeal or revision coupled with the benefit conferred u/s. 436A of the Code among other factors ought to be considered for a favourable release on bail.

Code of Criminal Procedure, 1973 – sec. 436A – In a case where an appeal is pending for a longer time, to bring it u/s. 436A, the period of incarceration in all forms will have to be reckoned, and so also for the revision – When a person has undergone detention for a period extending to one-half of the maximum period of imprisonment specified for that offense he shall be released by the court on his personal bond with or without sureties – There is not even a need for a bail application in a case of this nature particularly when the reasons for delay are not attributable against the accused.

Code of Criminal Procedure, 1973 – sec. 437 – It empowers the Magistrate to deal with all the offenses while considering an application for bail with the exception of an offense punishable either with life imprisonment or death triable exclusively by the Court of Sessions.

Code of Criminal Procedure, 1973 – sec. 440 – The amount of every bond executed is to be fixed with regard to the circumstances of the case and shall not be excessive – Reasonableness of the bond and surety is something which the court has to keep in mind whenever the same is insisted upon, and therefore while exercising the power u/s. 88 also the said factum has to be kept in mind – Imposing a condition which is impossible of compliance would be defeating the very object of the release.

Code of Criminal Procedure, 1973 – ss. 436A, 309 167(2), 440 – Special Acts – The general principle governing delay would apply to Special Acts also – To make it clear, the provision contained in sec. 436A would apply to the Special Acts also in the absence of any specific provision – There is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Sec. 309 – The existence of a pari materia or a similar provision like sec.167(2) available under the Special Act would have the same effect entitling the accused for a default bail – Even here the court will have to consider the satisfaction u/s. 440.

Bail – Whether Economic Offences should be treated as a class of its own or otherwise – The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence – After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another – Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis.

Practice and Procedures – Criminal Trial – Approach of the Court - Criminal courts in general with the trial court in particular are the guardian angels of liberty - Any conscious failure by the Criminal Courts would constitute an affront to liberty - It is the pious duty of the Criminal Court to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos - A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest.

Bail Application – Judicial Dispensation - Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles – The Court cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial – On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice – Uniformity and certainty in the decisions of the court are the foundations of judicial dispensation - Persons accused with same offense shall never be treated differently either by the same court or by the same or different courts – Such an action though by an exercise of discretion despite being a judicial one would be a grave affront to Arts. 14 and 15 of the Constitution of India.

Code of Criminal Procedure, 1973 – Trial - Defined - An extended meaning has to be given to this word for the purpose of enlargement on bail to include, the stage of investigation and thereafter - In the former stage, an arrest followed by a police custody may be warranted for a thorough investigation, while in the latter what matters substantially is the proceedings before the Court in the form of a trial - An appeal or revision shall also be construed as a facet of trial when it comes to the consideration of bail on suspension of sentence.

Code of Criminal Procedure, 1973 – Bail – Defined - A bail is nothing but a surety inclusive of a personal bond from the accused - It means the release of an accused person either by the orders of the Court or by the police or by the Investigating Agency - It is a conditional release on the solemn undertaking by the suspect that he would cooperate both with the investigation and the trial - Bail is the rule and jail is the exception.

Presumption of innocence - Onus on the prosecution to prove the guilt before the Court - Presumption of innocence being a facet of Article 21, shall inure to the benefit of the accused – The weightage of the evidence has to be assessed on the principle of beyond reasonable doubt.

Disposing of the applications, the Court

HELD: 1. These directions are meant for the investigating agencies and also for the courts. Accordingly, the Court deem it appropriate to issue the following directions, which may be subject to State amendments.:

a.) The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act so as to streamline the grant of bails.

b.) The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in *Arnesh Kumar*. Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.

c.) The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the accused for grant of bail.

d.) All the State Governments and the Union Territories are directed to facilitate standing orders for the procedure to be followed under Section 41 and 41A of the Code while taking note of the order of the High Court of Delhi dated 07.02.2018 in Writ Petition (C) No. 7608 of 2017 and the standing order issued by the Delhi Police i.e. Standing Order No. 109 of 2020, to comply with the mandate of Section 41A of the Code.

e.) There need not be any insistence of a bail application while considering the application under Section 88, 170, 204 and 209 of the Code.

f.) There needs to be a strict compliance of the mandate laid down in the judgment of this court in *Siddharth*.

g.) The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to constitution of special courts. The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.

h.) The High Courts are directed to undertake the exercise of finding out the undertrial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.

i.) While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.

j.) An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code both at the district judiciary level and the High Court as earlier directed by this Court in *Bhim Singh*, followed by appropriate orders.

k.) Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.

l.) All State Governments, Union Territories and High Courts are directed to file affidavits/ status reports within a period of four months. [Para 73]

Nikesh Tarachand Shah v. Union of India **(2018) 11 SCC 1 : [2017] 12 SCR 358;** *Sanjay Chandra v. CBI* **(2012) 1 SCC 40 : [2011] 13 SCR 309;** *Corey Lee James Myers v. Her Majesty the Queen* **2019 SCC 18;** *Her Majesty the Queen v. Kevin Antic and Ors.* **2017 SCC 27;** *Arnesh Kumar v. State of Bihar* **(2014) 8 SCC 273 : [2014] 8 SCR 128;** *Inder Mohan Goswami v. State of Uttaranchal* **(2007) 12 SCC 1 : [2007] 10 SCR 847;** *Pankaj Jain v. Union of India* **(2018) 5 SCC 743 : [2018] 9 SCR 248;** *M. Ravindran v. Directorate of Revenue Intelligence* **(2021) 2 SCC 485;** *Siddharth v. State of U.P.* **(2021) 1 SCC 676;** *Hussainara Khatoon & Ors. v Home Secretary, State of Bihar,* **1980 (1) SCC 81 : [1979] 3 SCR 169;** *Hussain & Anr. v. Union of India & Ors.* **2017 (5) SCC 702 : [2017] 2 SCR 626;** *Surinder Singh @ Shingara Singh v State of Punjab* **2005 (7) SCC 387 : [2005] 2 Suppl. SCR 1172;** *Atul Tripathi v State of U.P. & Anr.* **2014 (9) SCC 177 : [2014] 14 SCR 1188;** *Angana v.*

State of Rajasthan **(2009) 3 SCC 767 : [2009] 1 SCR 941;** *Sunil Kumar v. Vipin Kumar* **(2014) 8 SCC 868;** *Bhim Singh v. Union of India* **(2015) 13 SCC 605;** *Prahlad Singh Bhati v. NCT, Delhi* **(2001) 4 SCC 280 : [2001] 2 SCR 684;** *The Balasaheb Satbhai Merchant Coop Bank Ltd. vs. The State of Maharashtra and Ors.* **2011 SCC OnLine Bom 1261;** *In re Kenneth Humphrey,* **S 247278; 482 P.3d 1008 (2021);** *Union of India v. K.A. Najeeb* **(2021) 3 SCC 713;** *Supreme Court Legal Aid Committee v. Union of India* **(1994) 6 SCC 731 : [1994] 4 Suppl. SCR 386;** *P. Chidambaram v. Directorate of Enforcement* **(2020) 13 SCC 791 : [2019] 14 SCR 450;** *Sanjay Chandra v. CBI* **(2012) 1 SCC 40 : [2011] 13 SCR 309;** *Arnab Manoranjan Goswami v. State of Maharashtra* **(2021) 2 SCC 427 – referred to**

Case Law Reference

[2017] 12 SCR 358	**referred to**	**Para 11**
[2011] 13 SCR 309	**referred to**	**Para 12**
(2019) SCC 18	**referred to**	**Para 16**
(2017) SCC 27	**referred to**	**Para 16**
[2014] 8 SCR 128	**referred to**	**Para 25**
[2007] 10 SCR 847	**referred to**	**Para 32**
[2018] 9 SCR 248	**referred to**	**Para 32**
(2021) 2 SCC 485	**referred to**	**Para 36**
(2021) 1 SCC 676	**referred to**	**Para 36**
[1979] 3 SCR 169	**referred to**	**Para 41**
[2017] 2 SCR 626	**referred to**	**Para 41**
[2005] 2 Suppl. SCR 1172	**referred to**	**Para 41**
[2014] 14 SCR 1188	**referred to**	**Para 44**
[2009] 1 SCR 941	**referred to**	**Para 44**

(2014) 8 SCC 868	**referred to**	**Para 44**
(2015) 13 SCC 605	**referred to**	**Para 47**
[2001] 2 SCR 684	**referred to**	**Para 53**
(2021) 3 SCC 713	**referred to**	**Para 64**
[1994] 4 Suppl. SCR 386	**referred to**	**Para 64**
[2019] 14 SCR 450	**referred to**	**Para 66**
[2011] 13 SCR 309	**referred to**	**Para 66**
(2021) 2 SCC 427	**referred to**	**Para 68**

JANHIT ABHIYAN
v.
UNION OF INDIA

(Writ Petition (Civil) No. 55 of 2019)

NOVEMBER 07, 2022

[UDAY UMESH LALIT, CJI, DINESH MAHESHWARI, S. RAVINDRA BHAT, BELA M. TRIVEDI AND J.B. PARDIWALA, JJ.]

*Constitution (One Hundred and Third Amendment) Act, 2019 – Challenge to – Vide said amendment, Arts. 15 and 16 of the Constitution were amended by adding two new clauses viz., clause (6) to Art.15 with Explanation and clause (6) to Art.16; and thereby, the State was empowered, inter alia, to provide for a maximum of ten per cent reservation for "the economically weaker sections" (EWS) of citizens other than "the Scheduled Castes", "the Scheduled Tribes" and the non-creamy layer of "the Other Backward Classes" – The amendment did not mandate but enabled reservation for EWS and prescribed a ceiling limit of ten per cent – Challenge to said amendment essentially on three-fold grounds: first, that making of special provisions including reservation in education and employment on the basis of economic criteria is entirely impermissible and offends the basic structure of the Constitution; second, that in any case, exclusion of socially and educationally backward classes i.e., SCs, STs and non-creamy layer OBCs from the benefit of the special provisions for EWS is inexplicably discriminatory and destroys the basic structure of the Constitution; and third, that providing for ten per cent additional reservation directly breaches the fifty per cent ceiling of reservations already settled by decisions of Supreme Court and hence, results in unacceptable abrogation of the Equality Code which, again, destroys the basic structure of the Constitution – Constitution (One Hundred and Third Amendment) Act, 2019 – Validity of – **Held (per 3:2 majority) (Majority opinion contained in separate judgments rendered by Dinesh Maheshwari, Bela M. Trivedi and J.B. Pardiwala, JJ.) :** Valid – **Held (per Dinesh Maheshwari, J.):** Reservation is an instrument of affirmative action by the State so as to ensure all-inclusive march towards the goals of an egalitarian society while counteracting inequalities; it is an instrument not only for inclusion of socially and*

educationally backward classes to the mainstream of society but, also for inclusion of any class or section so disadvantaged as to be answering the description of a weaker section – In this background, reservation structured singularly on economic criteria does not violate any essential feature of the Constitution and does not cause any damage to the basic structure of the Constitution – Exclusion of the classes covered by Arts.15(4), 15(5) and 16(4) from getting the benefit of reservation as economically weaker sections, being in the nature of balancing the requirements of non-discrimination and compensatory discrimination, does not violate Equality Code and does not in any manner cause damage to the basic structure of the Constitution – Reservation for economically weaker sections of citizens up to ten per cent in addition to the existing reservations does not result in violation of any essential feature of the Constitution and does not cause any damage to the basic structure of the Constitution on account of breach of the ceiling limit of fifty per cent because, that ceiling limit itself is not inflexible and in any case, applies only to reservations envisaged by Arts.15(4), 15(5) and 16(4) of the Constitution – The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria or by permitting the State to make special provisions in relation to admission to private unaided institutions or in excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation – ***Held (per Bela M. Trivedi, J.) (Concurring with Dinesh Maheshwari, J.):*** *The impugned amendment enabling the State to make special provisions for the "economically weaker sections" of the citizens other than the scheduled castes/schedules tribes and socially and educationally backward classes of citizens, is required to be treated as an affirmative action on the part of the Parliament for the benefit and for advancement of the economically weaker sections of the citizens – Treating economically weaker sections of the citizens as a separate class would be a reasonable classification, and cannot be termed as an unreasonable or unjustifiable classification, much less a betrayal of basic feature or violative of Art.14 – Just as equals cannot be treated unequally, unequals also cannot be treated equally – Treating unequals as equals would as well offend the doctrine of equality enshrined in Arts.14 and 16 of the Constitution – The impugned amendment creates a separate class of "economically weaker sections of the citizens" from the general/unreserved class, without affecting the special rights of reservations provided to the Scheduled Caste/Scheduled Tribe and backward class of citizens covered under Art.15(4), 15(5) and*

16(4) – Therefore, their exclusion from the newly created class for the benefit of the "economically weaker sections of the citizens" in the impugned amendment cannot be said to be discriminatory or violative of the equality code – Such amendment could certainly be not termed as shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice – The limitations- substantive or procedural - imposed on the exercise of constituent power of the State under Art.368 could not be said by any stretch of imagination, to have been disregarded by the Parliament – Neither the procedural limitation i.e. the mode of exercise of the amending power nor the substantive limitation i.e. the restricted field has been disregarded, which otherwise would invalidate the impugned amendment – What is visualised in the Preamble and what is permissible both in Part-III and Part-IV of the Constitution cannot be said to be violative of the basic structure or basic feature of the Constitution – In absence of any obliteration of any of the constitutional provisions or any alteration or destruction in the existing structure of equality code or in the basic structure of the Constitution, neither the width test nor the identity test as propounded in Kesavananda case can be said to have been violated in the impugned Amendment – Accordingly, the challenge to the constitutional validity of the 103rd Amendment fails, and the validity thereof is upheld – However, there is a need to revisit the system of reservation in the larger interest of the society as a whole, as a step forward towards transformative constitutionalism – If a time limit is prescribed, for the special provisions in respect of the reservations and representations provided in Arts. 15 and 16 of the Constitution, it could be a way forward leading to an egalitarian, casteless and classless society – ***Held (per J.B. Pardiwala, J.) (Concurring with Dinesh Maheshwari, J.):*** *Reservation is not an end but a means – a means to secure social and economic justice – The longstanding development and the spread of education have resulted in tapering the gap between the classes to a considerable extent – As larger percentages of backward class members attain acceptable standards of education and employment, they should be removed from the backward categories so that the attention can be paid toward those classes which genuinely need help – In such circumstances, it is very much necessary to take into review the method of identification and the ways of determination of backward classes, and also, ascertain whether the criteria adopted or applied for the classification of backward is relevant for today's conditions – Reservation should not continue for an indefinite period of time so as to become a vested interest – The impugned amendment is valid and in no*

manner alters the basic structure of the Constitution – ***Held (per S. Ravindra Bhat, J. (for Uday Umesh Lalit, CJI and himself) (Minority opinion):*** *The States' compelling interest to fulfil the objectives set out in the Directive Principles, through special provisions on the basis of economic criteria, is legitimate – That reservation or special provisions have so far been provided in favour of historically disadvantaged communities, cannot be the basis for contending that other disadvantaged groups who have not been able to progress due to the ill effects of abject poverty, should remain so and the special provisions should not be made by way of affirmative action or even reservation on their behalf – Therefore, special provisions based on objective economic criteria (for the purpose of Art.15), is per se not violative of the basic structure – However, the framework in which it has been introduced by the impugned amendment – by excluding backward classes – is violative of the basic structure – The impugned amendment and the classification it creates, is arbitrary, and results in hostile discrimination of the poorest sections of the society that are socially and educationally backward, and/or subjected to caste discrimination – Insertion of Art.15(6) and 16(6) is struck down, and is held to be violative of the equality code, particularly the principle of non-discrimination and non-exclusion which forms an inextricable part of the basic structure of the Constitution – ss.2 and 3 of the Constitution (One Hundred and Third Amendment) Act, 2019 which inserted clause (6) in Art.15 and clause (6) in Art.16, respectively, are unconstitutional and void on the ground that they are violative of the basic structure of the Constitution – Constitution of India – Arts. 15 and 16.*

Doctrines/Principles – Doctrine of basic structure – Vide Constitution (One Hundred and Third Amendment) Act, 2019, Arts. 15 and 16 of the Constitution was amended by adding two new clauses viz., clause (6) to Art.15 with Explanation and clause (6) to Art.16; and thereby, the State was empowered, inter alia, to provide for a maximum of ten per cent reservation for "the economically weaker sections" (EWS) of citizens other than "the Scheduled Castes", "the Scheduled Tribes" and the non-creamy layer of "the Other Backward Classes" – The amendment did not mandate but enabled reservation for EWS and prescribed a ceiling limit of ten per cent – Whether the doctrine of basic structure could be invoked for laying a challenge to the 103rd Amendment – ***Held (per Dinesh Maheshwari, J.):*** *No – Using the doctrine of basic structure as a sword against the amendment in question and thereby to stultify State's effort to do economic justice as ordained by the*

Preamble and DPSP and, inter alia, enshrined in Articles 38, 39 and 46 of the Constitution cannot be countenanced – Provisions contained in Arts. 15 and 16 of the Constitution, providing for reservation by way of affirmative action, being of exception to the general rule of equality, cannot be treated as a basic feature – Moreover, even if reservation is one of the features of the Constitution, it being in the nature of enabling provision only, cannot be regarded as an essential feature of that nature whose modulation for the sake of other valid affirmative action would damage the basic structure of the Constitution – Constitution (One Hundred and Third Amendment) Act, 2019.

Constitution of India – Art.368 – Power to amend the Constitution availing under Art.368 – ***Held (Per Dinesh Maheshwari, J.):*** *Is recognized as a constituent power and is subject to various safeguards intrinsic to Art.368, including the procedural safeguards.*

Constitution of India – Art.368 – Doctrine of Basic Structure and Constitutional Amendments – Discussed – ***Held (Per Dinesh Maheshwari, J.):*** *The power to amend the Constitution essentially vests with the Parliament and when a high threshold and other procedural safeguards are provided in Art.368, it would not be correct to assume that every amendment to the Constitution could be challenged by theoretical reference to the basic structure doctrine – As exposited in* ***Kesavananda*** *case, the amending power can even be used by the Parliament to reshape the Constitution in order to fulfil the obligation imposed on the State, subject, of course, to the defined limits of not damaging the basic structure of the Constitution – Again, as put in* ***Kesavananda*** *case, judicial review of constitutional amendment is a matter of great circumspection for the judiciary where the Courts cannot be oblivious of the practical needs of the Government and door has to be left open even for 'trial and error', subject, again, to the limitations of not damaging the identity of the Constitution – The expressions "basic features" and "basic structure" convey different meaning, even though many times they have been used interchangeably – Basic structure of the Constitution is the sum total of its essential features – As to when abrogation of any particular essential feature would lead to damaging the basic structure of Constitution would depend upon the nature of that feature as also the nature of amendment – As regards Part-III of the Constitution, every case of amendment of Fundamental Rights may not necessarily result in damaging or destroying the basic structure – The issue would always be*

as to whether what is sought to be withdrawn or altered is an inviolable part of the basic structure – Mere violation of the rule of equality does not violate the basic structure of the Constitution unless the violation is shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice – If any constitutional amendment moderately abridges or alters the equality principles, it cannot be said to be a violation of the basic structure.

Doctrines / Principles – Doctrine of equality – Reasonable classification – Discussed – ***Held (Per Dinesh Maheshwari, J.):*** *Equals must be treated equally while unequals need to be treated differently – A classification to be valid must necessarily satisfy two tests: first, the distinguishing rationale should be based on a just objective and secondly, the choice of differentiating one set of persons from another should have a reasonable nexus to the object sought to be achieved – However, a valid classification does not require mathematical niceties and perfect equality; nor does it require identity of treatment – If there is similarity or uniformity within a group, the law will not be condemned as discriminatory, even though due to some fortuitous circumstances arising out of a particular situation, some included in the class get an advantage over others left out, so long as they are not singled out for special treatment – In spite of certain indefiniteness in the expression 'equality', when the same is sought to be applied to a particular case or class of cases in the complex conditions of a modern society, there is no denying the fact that the general principle of 'equality' forms the basis of a Democratic Government – Democracy – Constitution of India – Arts. 14 to 18.*

Reservation – Affirmative Action by 'Reservation': Exception to the General Rule of Equality – Affirmative action by way of compensatory discrimination – ***Held (Per Dinesh Maheshwari, J.):*** *In a multifaceted social structure, ensuring substantive and real equality, perforce, calls for consistent efforts to remove inequalities, wherever existing and in whatever form existing – Hence, the State is tasked with affirmative action – And, one duly recognised form of affirmative action is by way of compensatory discrimination, which has the preliminary goal of curbing discrimination and the ultimate goal of its eradication so as to reach the destination of real and substantive equality – This has led to what is known as reservation and quota system in State activities – The 'doctrine of equality', as collectively enshrined in Arts.14 to 18, happens to be the principal basis for the creation of*

a reasonable classification whereunder 'affirmative action', be it legislative or executive, is authorised to be undertaken – The constitutional Courts too, precedent by precedent, have constructively contributed to evolution of what may be termed as 'reservation jurisprudence' – Reservation jurisprudence – Constitution of India – Arts. 14 to 18.

Reservation – For economically weaker sections – Economic Disabilities and Affirmative Action – ***Held (Per Dinesh Maheshwari, J.):*** *The expression 'economically weaker sections of citizens' is not a matter of mere semantics but is an expression of hard realities – Poverty is not merely a state of stagnation but is a point of regression – Providing for affirmative action in relation to one particular segment or class may operate constructively in the direction of meeting with and removing the inequalities faced by that segment or class but, if another segment of society suffers from inequalities because of one particular dominating factor like that of poverty, the said segment could not be denied of the State support by way of affirmative action of reservation only because of the fact that that segment is otherwise not suffering from other disadvantages – In the State's efforts of ensuring all-inclusive socio-economic justice, there cannot be competition of claims for affirmative action based on disadvantages in the manner that one disadvantaged section would seek denial of affirmative action for another disadvantaged section – Justice – Socio-economic justice.*

Doctrines /Principles – Principle of "Distributive Justice" – Discussed – Mandate of the Constitution – ***Held (Per Dinesh Maheshwari, J.):*** *Principle of "Distributive Justice" is a bedrock of the provisions like Art.46 as also Arts. 38 and 39 of the Constitution – The mandate of the Constitution to the State is to administer distributive justice; and in the law-making process, the concept of distributive justice connotes, inter alia, the removal of economic inequalities – There could be different methods of distributive justice – The philosophy of distributive justice is of wide amplitude which, inter alia, reaches to the requirements of removing economic inequalities; and then, it is not confined to one class or a few classes of the disadvantaged citizens – The wide spectrum of distributive justice mandates promotion of educational and economic interests of all the weaker sections, in minimizing the inequalities in income as also providing adequate means of livelihood to the citizens – In this commitment, leaving one class of citizens to struggle because of inequalities in income and want of adequate means of livelihood may not serve the ultimate goal of securing all-inclusive socio-economic*

justice – Constitution of India – Art.46, 38 and 39 – Words and Phrases – "Distributive Justice".

*Constitution of India – Doctrine of Basic Structure and Constitutional Amendments – **Held (Per Dinesh Maheshwari, J.):** There is no, and there cannot be any, cut-and-dried formula or a theorem which could supply a ready-made answer to the question as to whether a particular amendment to the Constitution violates or affects the basic structure – The nature of amendment and the feature/s of the Constitution sought to be touched, altered, modulated, or changed by the amendment would be the material factors for an appropriate determination of the question – Doctrine of basic structure cannot be readily applied to every constitutional amendment – Supreme Court has applied the same only against such hostile constitutional amendments which were found to be striking at the very identity of the Constitution, like direct abrogation of the features of judicial review (**Kesavananda**, **Minerva Mills** and **P. Sambhamurthy** cases); free and fair elections (**Indira Nehru Gandhi** case); plenary jurisdiction of constitutional Courts (**L. Chandra Kumar** case); and independence of judiciary (**NJAC Judgment** case) – Most of the other attempts to question the constitutional amendments have met with disapproval of the Court even when there had been departure from the existing constitutional provisions and scheme.*

*Constitution of India – Interplay of amending powers of the Parliament and judicial review by the Constitutional Court over such exercise of amending powers – Reason for minimal interference by Supreme Court in the constitutional amendments – **Held (Per Dinesh Maheshwari, J.):** In our constitutional set-up of parliamentary democracy, even when the power of judicial review is an essential feature and thereby an immutable part of the basic structure of the Constitution, the power to amend the Constitution, vested in the Parliament in terms of Art.368, is equally an inherent part of the basic structure of the Constitution – Both these powers, of amending the Constitution (by Parliament) and of judicial review (by Constitutional Court) are subject to their own limitations.*

*Reservation – Compensatory discrimination – Exclusion of Socially and Educationally Backward Classes (SEBCs) / Other Backward Classes (OBCs) / Scheduled Castes (SCs)/ Scheduled Tribes (STs) from Economically Weaker Sections (EWS) reservation – **Held (Per Dinesh Maheshwari, J.):** Compensatory discrimination, wherever applied, is exclusionary in character and could acquire its worth and substance only by way of exclusion*

of others – Such differentiation cannot be said to be legally impermissible; rather it is inevitable – Exclusion of Socially and Educationally Backward Classes (SEBCs) / Other Backward Classes (OBCs) / Scheduled Castes (SCs)/ Scheduled Tribes (STs) from Economically Weaker Sections (EWS) reservation is compensatory discrimination of the same species as is exclusion of general EWS from SEBCs/OBCs/SCs/STs reservation.

*Reservation – Reservation by affirmative action – **Held (Per Dinesh Maheshwari, J.):** Economic backwardness of citizens can also be the sole ground for providing reservation by affirmative action.*

*Equality – Indian constitutional jurisprudence – Equality clause in the Constitution – **Held (Per Dinesh Maheshwari, J.):** Guarantee of equality is substantive and not a mere formalistic requirement – Equality is at the nucleus of the unified goals of social and economic justice.*

*Reservation – Exception to the general rule of equality – **Held (Per Dinesh Maheshwari, J.):** For the socio-economic structure which the law in our democracy seeks to build up, the requirements of real and substantive equality call for affirmative action – Reservation is recognised as one such affirmative action, which is permissible under the Constitution; and its operation is defined by a large number of decisions of this Court, running up to the detailed expositions in **Dr. Jaishri Patil** case – However, reservation is nevertheless an exception to the general rule of equality and hence, cannot be regarded as such an essential feature of the Constitution that cannot be modulated.*

*Constitution of India – Art.46 – Phraseology of Art. 46 – Expression "other weaker sections" in Art.46 – Meaning of – **Held (Per Dinesh Maheshwari, J.):** The broader expression "other weaker sections" in Art.46 is disjointed from the particular weaker sections (Scheduled Castes and Scheduled Tribe); and is not confined to only those sections who are similarly circumstanced to SCs and STs – It cannot be said that the expression "other weaker sections" is not to be given widest possible meaning or that this expression refers only to those weaker sections who are similarly circumstanced to SCs and STs – Reservation.*

*Constitution of India – Amendment to – Scope for judicial review –**Held (per Bela Trivedi, J.):** Any amendment made by the Parliament is open to judicial review and is liable to be interfered with by the Court on the ground that it affects one or the other basic feature of the Constitution.*

*Constitution of India – Amendment to – Challenge to, on ground of being discriminatory – **Held (per Bela Trivedi, J.):** A Constitutional amendment cannot be struck down as discriminatory if the state of facts are reasonably conceived to justify it.*

*Constitution of India – Interpretation of – Distinction from interpretation of statutes – **Held (per J.B. Pardiwala, J.):** If there is an apparent or real conflict between two provisions of the Constitution, it is to be resolved by applying the principle of harmonious construction – The rules of the interpretation of the Constitution have to take into consideration the problems of government, structure of a State, dynamism in operation, caution about checks and balances, not ordinarily called for in the interpretation of statutes.*

*Constitution of India – Amendment of – Scope and limitations – **Held (per J.B. Pardiwala, J.):** Since the power to amend the Constitution is a derivative power, the exercise of such power to amend the Constitution is subject to two limitations, namely, the doctrine of Basic Structure and lack of legislative competence – If an amendment is to be struck down under the 'basic structure' formulation, the central principle of these inter-related provisions should be at threat – A mere violation of one of the enabling provisions would not be of much consequence under the doctrine of Basic Structure as long as such violation does not infringe upon the central thesis of equality – Redress for marginal encroachment cannot be found under the 'Basic Structure Doctrine' – Doctrines/ Principles – Doctrine of 'Basic Structure'.*

*Constitution (One Hundred and Third Amendment) Act, 2019 – Challenge to – Vide said amendment, Arts. 15 and 16 of the Constitution was amended by adding two new clauses viz., clause (6) to Art.15 with Explanation and clause (6) to Art.16; and thereby, the State was empowered, inter alia, to provide for a maximum of ten per cent reservation for "the economically weaker sections" (EWS) of citizens other than "the Scheduled Castes", "the Scheduled Tribes" and the non-creamy layer of "the Other Backward Classes" – **Held (per J.B. Pardiwala, J.):** The new concept of economic criteria introduced by the impugned amendment for affirmative action may go a long way in eradicating caste-based reservation – It may be perceived as a first step in the process of doing away with caste-based reservation.*

Doctrines/ Principles – Doctrine of basic structure – Enabling provision – Effect of – ***Held (per Ravindra Bhat, J. (for Uday Umesh Lalit, CJI and himself):*** *It is inaccurate to say that provisions that enable, exercise of power, would not violate the basic structure of the Constitution – The court's inquiry therefore, cannot stop at the threshold, when an enabling provision is enacted – Its potential for violating the basic structure of the Constitution is precisely the power it confers, on the legislature, or the executive.*

Constitution of India – Judicial review of constitutional amendments – Scope – ***Held (per Ravindra Bhat, J. (for Uday Umesh Lalit, CJI and himself):*** *Appropriate test or standard of judicial review of constitutional amendments is not the same as in the case of ordinary laws – In constitutional amendment judicial review, the court would consider the history of the provision amended, or the way the new provision impacts the identity, or character, or nature of the Constitution.*

Constitution of India – Fraternity – Relevance of – ***Held (per Ravindra Bhat, J. (for Uday Umesh Lalit, CJI and himself):*** *People cannot be assured of Justice, Liberty or Equality, unless Fraternity in one form or another, to some degree, is felt by individuals at each level of our social order, and economic system – Weakening fraternity therefore undermines justice, liberty, and equality – The value of fraternity is as much a part of the equality code, and its facets – equality of opportunity, the principle of non-discrimination and the non-exclusionary principle, as it inextricably binds them with the concepts of liberty and freedom.*

Words and Phrases – "basic features" and "basic structure" – Meaning of – ***Held (per Dinesh Maheshwari, J.):*** *Basic structure of the Constitution is the sum total of its essential features.*

Words and Phrases – Words "other than" in Arts. 15(6) and 16(6) of the Constitution – If to be read as "in addition to", so as to include SCs/ STs/OBCs within Economically Weaker Sections (EWS) – ***Held (per Dinesh Maheshwari, J.):*** *The suggested construction is plainly against the direct meaning of the exclusionary expression "other than" as employed in, and for the purpose of, the said Arts. 15(6) and 16(6) – Constitution of India – Arts. 15(6) and 16(6).*

Words and Phrases – "compensatory discrimination" and "reservation jurisprudence" – Discussed ***(per Dinesh Maheshwari, J.)****.*

Words and Phrases – "economically weaker sections of citizens" – Meaning of – Discussed ***(per Dinesh Maheshwari, J.)****.*

Equality – Real and substantive equality – Economic justice vis-à-vis social justice – Discussed ***(per Dinesh Maheshwari, J.)****.*

In the instant writ petitions and other proceedings the following three questions came up for consideration:-

Question 1: Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria?

Question 2: Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions in relation to admission to private unaided institutions?

Question 3: Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution in excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation?

Disposing of the Writ petitions and other proceedings, the Court

HELD:

Per COURT (3:2 majority)

In view of the decision rendered by the majority consisting of Hon'ble Mr. Justice Dinesh Maheshwari, Hon'ble Ms. Justice Bela M. Trivedi and Hon'ble Mr. Justice J.B. Pardiwala, the challenge raised to 103rd Amendment to the Constitution fails and the decision rendered by Hon'ble Mr. Justice S. Ravindra Bhat remains in minority. [Para 2]

Per DINESH MAHESHWARI, J.

HELD: 1. The power to amend the Constitution availing under Article 368 has been a significant area of the development of Constitutional Law in our country. This power, recognised as a constituent power, is subject to various safeguards which are intrinsic to Article 368, including the procedural safeguards. [Para 34]

2. The expressions "basic features" and "basic structure" convey different meaning, even though many times they have been used

interchangeably. It could reasonably be said that basic structure of the Constitution is the sum total of its essential features. As to when abrogation of any particular essential feature would lead to damaging the basic structure of Constitution would depend upon the nature of that feature as also the nature of amendment. [Paras 39.4, 39.5]

3. In a nutshell, the principle of equality can be stated thus: equals must be treated equally while unequals need to be treated differently, inasmuch as for the application of this principle in real life, one has to differentiate between those who being equal, are grouped together, and those who being different, are left out from the group. This is expressed as reasonable classification. Now, a classification to be valid must necessarily satisfy two tests: first, the distinguishing rationale should be based on a just objective and secondly, the choice of differentiating one set of persons from another should have a reasonable nexus to the object sought to be achieved. However, a valid classification does not require mathematical niceties and perfect equality; nor does it require identity of treatment. If there is similarity or uniformity within a group, the law will not be condemned as discriminatory, even though due to some fortuitous circumstances arising out of a particular situation, some included in the class get an advantage over others left out, so long as they are not singled out for special treatment. In spite of certain indefiniteness in the expression 'equality', when the same is sought to be applied to a particular case or class of cases in the complex conditions of a modern society, there is no denying the fact that the general principle of 'equality' forms the basis of a Democratic Government. [Para 44]

4. In the multifaceted social structure, ensuring substantive and real equality, perforce, calls for consistent efforts to remove inequalities, wherever existing and in whatever form existing. Hence, the State is tasked with affirmative action. And, one duly recognised form of affirmative action is by way of compensatory discrimination, which has the preliminary goal of curbing discrimination and the ultimate goal of its eradication so as to reach the destination of real and substantive equality. This has led to what is known as reservation and quota system in State activities. [Para 48]

5. The 'doctrine of equality', as collectively enshrined in Articles 14 to 18, happens to be the principal basis for the creation of a reasonable classification whereunder 'affirmative action', be it legislative or

executive, is authorised to be undertaken. The constitutional Courts too, precedent by precedent, have constructively contributed to the evolution of what one may term as 'reservation jurisprudence'. However, reservation, one of the permissible affirmative actions enabled by the Constitution of India, is nevertheless an exception to the general rule of equality and hence, cannot be regarded as such an essential feature of the Constitution that cannot be modulated; or whose modulation for a valid reason, including benefit of any section other than the sections who are already availing its benefit, may damage the basic structure. [Paras 50, 56]

6. In almost all references to real and substantive equality, the concept of economic justice has acquired equal focus alongside the principles of social justice. In giving effect to the rule of equality enshrined in Article 14, the Courts have also been guided by the jurisprudence evolved by the U.S. Supreme Court in the light of the amendments made to their Constitution, which were founded on economic considerations. This is to highlight that the economic backwardness of citizens can also be the sole ground for providing reservation by affirmative action. Any civilized jurisdiction differentiates between haves and have-nots, in several walks of life and more particularly, for the purpose of differential treatment by way of affirmative action. If an egalitarian socio-economic order is the goal so as to make the social and economic rights a meaningful reality, which indeed is the goal of our Constitution, the deprivations arising from economic disadvantages, including those of discrimination and exclusion, need to be addressed to by the State; and for that matter, every affirmative action has the sanction of our Constitution, as noticeable from the frame of Preamble as also the text and texture of the provisions contained in Part III and Part IV. [Paras 64, 65, 67]

7. The expression 'economically weaker sections of citizens' is not a matter of mere semantics but is an expression of hard realities. Poverty is not merely a state of stagnation but is a point of regression. Of course, mass poverty cannot be eliminated within a short period and it is a question of progress along a time path. In *Kesavananda* case, building a Welfare State is held to be one of the main objectives of the Constitution. In the Welfare State, public power becomes an instrumentality for the achievement of purposes beyond the

minimum objectives of domestic order and national defence. It is not enough that the society be secured against internal disorder and/or external aggression; a society can be thus secured and well-ordered but, could be lacking in real and substantive justice for all. Equally, providing for affirmative action in relation to one particular segment or class may operate constructively in the direction of meeting with and removing the inequalities faced by that segment or class but, if another segment of society suffers from inequalities because of one particular dominating factor like that of poverty, the question arises as to whether the said segment could be denied of the State support by way of affirmative action of reservation only because of the fact that that segment is otherwise not suffering from other disadvantages. The answer could only be in the negative for, in the State's efforts of ensuring all-inclusive socio-economic justice, there cannot be competition of claims for affirmative action based on disadvantages in the manner that one disadvantaged section would seek denial of affirmative action for another disadvantaged section. [Paras 69, 70]

8. On a contextual reading, it could reasonably be culled out that the observations, wherever occurring in the decisions of this Court, to the effect that reservation cannot be availed only on economic criteria, were to convey the principle that to avail the benefit of this affirmative action under Articles 15(4) and/or 15(5) and/or 16(4), as the case may be, the class concerned ought to be carrying some other disadvantage too and not the economic disadvantage alone. The said decisions cannot be read to mean that if any class or section other than those covered by Articles 15(4) and/or 15(5) and/or 16(4) is suffering from disadvantage only due to economic conditions, the State can never take affirmative action qua that class or section. In view of the principles discernible from the decisions as also the background aspects, including the avowed objective of socio-economic justice in the Constitution, the observations of this Court in the past decisions that reservations cannot be claimed only on the economic criteria, apply only to class or classes covered by or seeking coverage under Articles 15(4) and/or 15(5) and/or 16(4); and else, this Court has not put a blanket ban on providing reservation for other sections who are disadvantaged due to economic conditions. [Paras 72, 73]

9. The mandate of the Constitution to the State is to administer distributive justice; and in the law-making process, the concept of distributive justice connotes, *inter alia*, the removal of economic inequalities. There could be different methods of distributive justice; and it comprehends more than merely achieving the lessening of inequalities by tax or debt relief measures or by regulation of contractual transactions or redistribution of wealth, etc. It is more than evident that the philosophy of distributive justice is of wide amplitude which, *inter alia*, reaches to the requirements of removing economic inequalities; and then, it is not confined to one class or a few classes of the disadvantaged citizens. In other words, the wide spectrum of distributive justice mandates promotion of educational and economic interests of all the weaker sections, in minimizing the inequalities in income as also providing adequate means of livelihood to the citizens. In this commitment, leaving one class of citizens to struggle because of inequalities in income and want of adequate means of livelihood may not serve the ultimate goal of securing all-inclusive socio-economic justice. In fact, the argument that the State may adopt any poverty alleviation measure but cannot provide reservation for EWS by way of affirmative action proceeds on the assumption that the affirmative action of reservation in our constitutional scheme is itself reserved only for SEBCs/OBCs/SCs/STs in view of the existing text of Articles 15(4), 15(5) and 16(4) of the Constitution. Such an assumption is neither valid nor compatible with our constitutional scheme. This line of argument is wanting on the fundamental constitutional objectives, with the promise of securing 'JUSTICE, social, economic and political' for 'all' the citizens; and to promote FRATERNITY among them 'all'. Thus viewed, the challenge to the amendment in question fails on the principle of distributive justice. [Paras 74.1.1, 74.1.2]

10. Though, the text and the order of expressions used in the body of Article 46 have been repeatedly recounted on behalf of the petitioners to emphasise on the arguments based on ejusdem generis principle of interpretation but, as aforesaid, that principle does not fit in the interpretation of an organic thing like the Constitution. This apart, when traversing through the principles of interpretation, it could also be noticed that in case of any doubt, the heading or sub-heading of a provision could also be referred to as an internal aid in

construing the provision, while not cutting down the wide application of clear words used in the provision. What is interesting to notice is that in the heading of Article 46, the chronology of the description of target groups for promotion of educational and economic interests is stated in reverse order than the contents of the provision. The heading signifies 'Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections' whereas the contents of the main provision are framed with the sentence 'interest of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes'. A simple reading of the heading together with the contents would make it clear that the broader expression "other weaker sections" in Article 46 is disjointed from the particular weaker sections (Schedule Castes and Scheduled Tribe); and is not confined to only those sections who are similarly circumstanced to SCs and STs. [Para 74.2.3]

11. The amendment in question could be correlated with any other provision of the Constitution, including the Preamble as well as Articles 38 and 39. Moreover, it is not the requirement of our constitutional scheme that an amendment to the Constitution has to be based on some existing provision in DPSP. In fact, an amendment to the Constitution (of course, within the bounds of basic structure) could be made even without any corresponding provision in DPSP. In the aforesaid view of matter, there appears no reason to analyse another unacceptable line of arguments adopted by the petitioners that the amendment in question provides for compensatory discrimination in favour of the so-called forward class/caste. Suffice it to observe that the amendment in question is essentially related to the requirements of those economically weaker sections who have hitherto not been given the benefit of such an affirmative action (particularly of reservation), which was accorded to the other class/classes of citizens namely, the SEBCs/OBCs/SCs/STs. Viewing this affirmative action of EWS reservation from the standpoint of backward class versus forward class is not in accord with the very permissibility of compensatory discrimination towards the goal of real and substantive justice for all. The challenge to the amendment in question on the ground that though the State could take all the relevant measures to deal with poverty and the disadvantages arising therefrom but, the affirmative action of reservation is envisaged by

the Constitution only for socially and educationally backward class of citizens; and economic disadvantage alone had never been in contemplation for this action of reservation, is required to be rejected. In any case, any legitimate effort of the State towards all-inclusive socio-economic justice, by way of affirmative action of reservation in support of economically weaker sections of citizens, who had otherwise not been given the benefit of this affirmative action, cannot be lightly interfered with by the Court. [Paras 74.3, 75, 76]

12. EWS reservation itself is another form of compensatory discrimination, which is meant for serving the cause of such weaker sections who have hitherto not been given any State support by way of reservation. SEBCs/OBCs/SCs/STs are having the existing compensatory discrimination in their favour wherein the presently supported EWS are also excluded alongwith all other excluded classes/ persons. As a necessary corollary, when EWS is to be given support by way of compensatory discrimination, that could only be given by exclusion of others, and more particularly by exclusion of those who are availing the benefit of the existing compensatory discrimination in exclusion of all others. Put in simple words, the exclusion of SEBCs/OBCs/SCs/STs from EWS reservation is the compensatory discrimination of the same species as is the exclusion of general EWS from SEBCs/OBCs/SCs/STs reservation. As said above, compensatory discrimination, wherever applied, is exclusionary in character and could acquire its worth and substance only by way of exclusion of others. Such differentiation cannot be said to be legally impermissible; rather it is inevitable. [Para 82.1]

13. The fact that exclusion is innate in compensatory discrimination could further be exemplified by the fact that in *Indra Sawhney*, this Court excluded the creamy layer of OBCs from the benefit of reservation. In the complex set-up of formal equality on one hand (which debars discrimination altogether) and real and substantive equality on the other (which permits compensatory discrimination so as to upset the disadvantages), exclusion is as indispensable as the compensatory discrimination itself is. In fact, 'creamy layer' principle itself was applied to make a true compact of socially and educationally backward class. Two features strikingly come to fore with creamy layer principle. One is that to make a real compact of socially and

educationally backward class, economic factors play an equally important role; and then, the exclusionary principle applies therein too. These two features, when applied to the present case, make it clear that the use of economic criteria is not contra- indicated for the exercise of reservation, rather it is imperative; and second, to make the exercise of compensatory discrimination meaningful so as to achieve its desired result, exclusion of every other class/person from the target group is inevitable. Thus viewed, the amendment in question remains unexceptionable in the accepted principles of constitutional law presently in operation. [Paras 83, 83.1]

14. Having examined the permissible limits of affirmative action in light of the possible harm of preferential treatment qua other innocent class of competitors, i.e., general merit candidates, this Court has expressed the desirability of fifty per cent as the ceiling limit for reservation in education and public employment but, all such observations are required to be read essentially in the context of the reservation obtaining under Articles 15(4), 15(5) and 16(4) or other areas of affirmative action like that in relation to local self- government and cannot be overstretched to the reservation provided for entirely different class, consisting of the economically weaker sections. [Para 93]

15. In the ultimate analysis, it is beyond doubt that using the doctrine of basic structure as a sword against the amendment in question and thereby to stultify State's effort to do economic justice as ordained by the Preamble and Directive Principles of State Policy (DPSP) and, *inter alia*, enshrined in Articles 38, 39 and 46, cannot be countenanced. This is essentially for the reason that the provisions contained in Articles 15 and 16 of the Constitution of India, providing for reservation by way of affirmative action, being of exception to the general rule of equality, cannot be treated as a basic feature. Moreover, even if reservation is one of the features of the Constitution, it being in the nature of enabling provision only, cannot be regarded as an essential feature of that nature whose modulation for the sake of other valid affirmative action would damage the basic structure of the Constitution. Therefore, the doctrine of basic structure cannot be invoked for laying a challenge to the 103rd Amendment. [Para 101]

16. Reservation is an instrument of affirmative action by the State so as to ensure all-inclusive march towards the goals of an egalitarian

society while counteracting inequalities; it is an instrument not only for inclusion of socially and educationally backward classes to the mainstream of society but, also for inclusion of any class or section so disadvantaged as to be answering the description of a weaker section. In this background, reservation structured singularly on economic criteria does not violate any essential feature of the Constitution of India and does not cause any damage to the basic structure of the Constitution of India. [Para 102]

17. Exclusion of the classes covered by Articles 15(4), 15(5) and 16(4) from getting the benefit of reservation as economically weaker sections, being in the nature of balancing the requirements of non-discrimination and compensatory discrimination, does not violate Equality Code and does not in any manner cause damage to the basic structure of the Constitution of India. [Para 102]

18. Reservation for economically weaker sections of citizens up to ten per cent. in addition to the existing reservations does not result in violation of any essential feature of the Constitution of India and does not cause any damage to the basic structure of the Constitution of India on account of breach of the ceiling limit of fifty per cent because, that ceiling limit itself is not inflexible and in any case, applies only to the reservations envisaged by Articles 15(4), 15(5) and 16(4) of the Constitution of India. [Para 102]

19. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria. [Para 104]

20. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution by permitting the State to make special provisions in relation to admission to private unaided institutions. [Para 104]

21. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution in excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation. [Para 104]

Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. **(1973) 4 SCC 225: [1973] Suppl. SCR 1;** *Bhim Singhji v. Union of India and Ors.* **(1981) 1 SCC 166** *and Minerva Mills Ltd. and Ors. v. Union of India and Ors.* **(1980) 3 SCC 625: [1981] 1 SCR 206 – relied on.**

State of Madras v. Champakam Dorairajan **AIR 1951 SC 226: [1951] SCR 525;** *K.C. Vasanth Kumar and Anr. v. State of Karnataka* **1985 Supp SCC 714: [1985] Suppl. SCR 352;** *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.* **(2017) 10 SCC 1: [2017] 10 SCR 569;** *People's Union for Democratic Rights and Ors. v. Union of India and Ors.* **(1982) 3 SCC 235: [1983] 1 SCR 456;** *Jolly George Varghese and Anr. v. The Bank of Cochin* **(1980) 2 SCC 360: [1980] 2 SCR 913;** *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan and Ors.* **(1997) 11 SCC 121:[1996] 7 Suppl. SCR 548;** *State of Kerala and Anr. v. N.M. Thomas and Ors.* **(1976) 2 SCC 310;** *P. Sambhamurthy and Ors. v. State of Andhra Pradesh and Anr.* **(1987) 1 SCC 362: [1987] 1 SCR 879;** *Lingappa Pochanna Appelwar v. State of Maharashtra and Anr.* **(1985) 1 SCC 479: [1985] 2 SCR 224;** *T. Devadasan v. Union of India and Anr.* **[1964] 4 SCR 680;** *Indra Sawhney and Ors. v. Union of India and Ors.* **1992 Supp (3) SCC 217;** *M. Nagaraj and Ors. v. Union of India and Ors.* **(2006) 8 SCC 212:[2006] 7 Suppl. SCR 336;** *Ashoka Kumar Thakur v. Union of India and Ors.* **(2008) 6 SCC 1:[2008] 4 SCR 1;** *M.R. Balaji and Ors. v. State of Mysore and Ors.* **[1963] Supp 1 SCR 439;** *Indra Sawhney v. Union of India* **(2000) 1 SCC 168:[1999] 5 Suppl. SCR 229;** *R. Chitralekha and Anr. v. State of Mysore and Ors.* **[1964] 6 SCR 368;** *Janki Prasad Parimoo and Ors. v. State of J&K and Ors.* **(1973) 1 SCC 420: [1973] 3 SCR 236;** *Sri Sankari Prasad Singh Deo v. Union of India and Anr.* **[1952] SCR 89;** *Sajjan Singh v. State of Rajasthan* **[1965] 1 SCR 933;** *I.C. Golak Nath and Ors. v. State of Punjab and Anr.* **[1967] 2 SCR 762;** *E.P. Royappa v. State of Tamil Nadu and Anr.* **(1974) 4 SCC 3: [1974] 2 SCR 348;** *Prathvi Raj Chauhan v. Union*

of India and Ors. **(2020) 4 SCC 727: [2020] 2 SCR 727;** *B.K. Pavitra and Ors. v. Union of India and Ors.* **(2019) 16 SCC 129:[2019] 7 SCR 1086;** *Dr. Jaishri Laxmanrao Patil v. Chief Minister and Ors.* **(2021) 8 SCC 1;** *Dayaram Khemkaran Verma v. State of Gujarat* **2016 SCC Online Guj 1821;** *Madhav Rao Scindia Bahadur etc. v. Union of India* **(1971) 1 SCC 85:[1971] 3 SCR 9;** *State (NCT of Delhi) v. Union of India and Anr.* **(2018) 8 SCC 501: [2018] 7 SCR 1;** *T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.* **(2002) 8 SCC 481;** *V.V. Giri v. D.S. Dora* **[1960] 1 SCR 246;** *Saurav Yadav and Ors. v. State of Uttar Pradesh and Ors.* **(2021) 4 SCC 542;** *Waman Rao and Ors. v. Union of India and Ors.* **(1981) 2 SCC 362: [1981] 2 SCR 1;** *Ashoka Kumar Thakur v. State of Bihar and Ors.* **(1995) 5 SCC 403: [1995] 3 Suppl. SCR 269;** *Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board and Ors.* **(2009) 15 SCC 458:[2009] 12 SCR 978;** *Raghunathrao Ganpatrao v. Union of India* **1994 Supp (1) SCC 191: [1993] 1 SCR 480;** *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* **(2012) 6 SCC 1;** *Pramati Educational and Cultural Trust (Registered) and Ors. v. Union of India and Ors.* **(2014) 8 SCC 1;** *Indira Nehru Gandhi v. Raj Narain and Anr.* **1975 Supp SCC 1;** *State of Karnataka v. Union of India and Anr.* **(1977) 4 SCC 608: [1978] 2 SCR 1;** *Kihoto Hollohan v. Zachillhu and Ors.* **1992 Supp (2) SCC 651: [1992] 1 SCR 686;** *L. Chandra Kumar v. Union of India and Ors.* **(1997) 3 SCC 261: [1997] 2 SCR 1186;** *K. Krishna Murthy (Dr.) and Ors. v. Union of India and Anr.* **(2010) 7 SCC 202: [2010] 6 SCR 972;** *Supreme Court Advocates-on-Record Association and Anr. v. Union of India* **(2016) 5 SCC 1: [2015] 13 SCR 1;** *Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay and Ors.* **(1974) 2 SCC 402: [1975] 1 SCR 1;** *Chairman and Managing Director, Central Bank of India and Ors. v. Central Bank of India SC/ST Employees Welfare Association and Ors.* **(2015) 12 SCC 308: [2015] 1 SCR 55;** *State of Uttar Pradesh v. Dr. Dina Nath Shukla and Anr.* **(1997) 9 SCC 662: [1997]**

1 SCR 750; *M/s Shantistar Builders v. Narayan K. Totame and Ors.* **(1990) 1 SCC 520;** *Association of Unified Tele Services Providers and Ors. v. Union of India and Ors.* **(2014) 6 SCC 110: [2014] 9 SCR 780;** *People's Union for Civil Liberties (PUCL) and Anr. v. Union of India and Anr.* **(2003) 4 SCC 399: [2003] 2 SCR 1136;** *M/s Frick India Ltd. v. Union of India and Ors.* **(1990) 1 SCC 400: [1989] 2 Suppl. SCR 570;** *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors.* **(1981) 1 SCC 246: [1981] 2 SCR 185** *and R. D. Upadhyay v. State of Andhra Pradesh and Ors.* **(2007) 15 SCC 337: [2006] 3 SCR 1132 – referred to.**

Corocraft v. Pan American Airways **1969 (1) All ER 82 – referred to.**

Per BELA M. TRIVEDI, J. (Concurring with DINESH MAHESHWARI, J.)

HELD: 1. It is very well-established proposition of law that it is the Constitution and not the constituent power which is supreme. It is axiomatic that the Parliament has been conferred upon the constituent power to amend by way of addition, variation or repeal any provision of the Constitution under Article 368 of the Constitution, and the same is required to be exercised in accordance with the procedure laid down in the said Article. The Constitution is said to be a living document or a work in progress only because of the plenary power to amend is conferred upon the Parliament under the said provision. Of course, as laid down in plethora of judgments, the said power is subject to the constraints of the basic structure theory. Deriving inspiration from the Preamble and the whole scheme of the Constitution, the majority in *Kesavananda Bharati* case held that every provision of the Constitution can be amended so long as the basic foundation and structure of the Constitution remains the same. Some of the basic features of the constitutional structure carved out by the Court in the said judgment were, the supremacy of the Constitution, Republican and democratic form of government, separation of powers, judicial review, sovereignty and the integrity of the nation, Federal Character of Government etc. A multitude of features have been acknowledged as the basic features

in various subsequent judicial pronouncements. Accordingly, any amendment made by the Parliament is open to the judicial review and is liable to be interfered with by the Court on the ground that it affects one or the other basic feature of the Constitution. [Paras 5, 6]

2. As transpiring from the Statements of Objects and Reasons for introducing the Bill to the impugned amendment, the Parliament has taken note that the economically weaker sections of the citizens have largely remained excluded from attaining the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under Clauses (4) and (5) of Article 15 and Clause (4) of Article 16 are generally unavailable to them unless they meet with the specific criteria of social and educational backwardness. It has been further stated that vide the Constitution (Ninety-third Amendment) Act, 2005, Clause (5) was inserted in Article 15 of the Constitution which enables the State to make special provision for the advancement of any social and educational backwardness of citizens, or for the Scheduled Castes or the Scheduled Tribes, in relation to their admission in higher educational institutions. Similarly, Clause(4) of Article 16 of the Constitution enables the State to make special provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State, is not adequately represented in the services under the State. However, economically weaker sections of citizens were not eligible for the benefit of reservation. Therefore, with a view to fulfil the ideals lying behind Article 46, and to ensure that economically weaker sections of citizens to get a fair chance of receiving higher education and participation in employment in the services of the State, it was decided to amend the Constitution of India. [Para 19]

3. As well settled, it must be presumed that the legislature understands and appreciates the needs of its own people. Its laws are directed to the problems made manifest by experience, and its discriminations are based on adequate norms. Therefore, the constitutional amendment could not be struck down as discriminatory if the state of facts are reasonably conceived to justify it. In the instant case, the Legislature being aware of the exclusion of economically weaker sections of citizens from having the benefits of reservations

provided to the SCs/STs and SEBCs citizens in Clauses(4) and (5) of Article 15 and Clause(4) of Article 16, has come out with the impugned amendment empowering the State to make special provision for the advancement of the "economically weaker sections" of citizens other than the classes mentioned in Clauses(4) and (5) of Article 15 and further to make special provision for the reservation of appointments or posts in favour of the economically weaker sections of the citizens other than the classes mentioned in Clause(4) of Article 16. The impugned amendment enabling the State to make special provisions for the "economically weaker sections" of the citizens other than the scheduled castes/schedules tribes and socially and educationally backward classes of citizens, is required to be treated as an affirmative action on the part of the Parliament for the benefit and for the advancement of the economically weaker sections of the citizens. Treating economically weaker sections of the citizens as a separate class would be a reasonable classification, and could not be termed as an unreasonable or unjustifiable classification, much less a betrayal of basic feature or violative of Article 14. Just as equals cannot be treated unequally, unequals also cannot be treated equally. Treating unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution. [Para 20]

4. The Scheduled Castes/Scheduled Tribes and the backward class for whom the special provisions have already been provided in Article 15(4), 15(5) and 16(4) form a separate category as distinguished from the general or unreserved category. They cannot be treated at par with the citizens belonging to the general or unreserved category. The impugned amendment creates a separate class of "economically weaker sectionsof the citizens" from the general/unreserved class, without affecting the special rights of reservations provided to the Scheduled Caste/Scheduled Tribe and backward class of citizens covered under Article 15(4), 15(5) and 16(4). Therefore, their exclusion from the newly created class for the benefit of the "economically weaker sections of the citizens" in the impugned amendment cannot be said to be discriminatory or violative of the equality code. Such amendment could certainly be not termed as shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice as sought to be submitted by the petitioners. [Para 21]

5. The sum and substance is that the limitations – substantive or procedural – imposed on the exercise of constituent power of the State under Article 368 could not be said by any stretch of imagination, to have been disregarded by the Parliament. Neither the procedural limitation i.e. the mode of exercise of the amending power has been disregarded nor the substantive limitation i.e. the restricted field has been disregarded, which otherwise would invalidate the impugned amendment. What is visualised in the Preamble and what is permissible both in Part-III and Part-IV of the Constitution could not be said to be violative of the basic structure or basic feature of the Constitution. In absence of any obliteration of any of the constitutional provisions and in absence of any alteration or destruction in the existing structure of equality code or in the basic structure of the Constitution, neither the width test nor the identity test as propounded in *Kesavananda* could be said to have been violated in the impugned Amendment. Accordingly, the challenge to the constitutional validity of the 103rd Amendment fails, and the validity thereof is upheld. [Para 22]

6. What was envisioned by the framers of the Constitution, what was proposed by the Constitution Bench in 1985 and what was sought to be achieved on the completion of fifty years of the advent of the Constitution, i.e. that the policy of reservation must have a time span, has still not been achieved even till this day, i.e. till the completion of seventy-five years of our Independence. It cannot be gainsaid that the age-old caste system in India was responsible for the origination of the reservation system in the country. It was introduced to correct the historical injustice faced by the persons belonging to the scheduled castes and scheduled tribes and other backward classes, and to provide them a level playing field to compete with the persons belonging to the forward classes. However, at the end of seventy-five years of our independence, we need to revisit the system of reservation in the larger interest of the society as a whole, as a step forward towards transformative constitutionalism. [Para 28]

7. As per Article 334 of the Constitution, the provisions of the Constitution relating to the reservation of seats for the SCs and the STs in the House of the People and in the Legislative Assemblies of the States would cease to have effect on the expiration of a period of eighty years from the commencement of the Constitution. The representation

of Anglo-Indian community in the House of the Parliament and in the Legislative Assemblies of the States by nomination, has already ceased by virtue of the 104th Amendment w.e.f. 25.01.2020. Therefore, similar time limit if prescribed, for the special provisions in respect of the reservations and representations provided in Article 15 and Article 16 of the Constitution, it could be a way forward leading to an egalitarian, casteless and classless society. [Para 29]

Kesavananda Bharati v. State of Kerala & Anr. **(1973) 4 SCC 225;** *K.C. Vasanth Kumar and Anr. v. State of Karnataka,* **(1985) Suppl. SCC 714 : 1985 (1) Suppl. SCR 352** *and Ashoka Kumar Thakur v. Union of India,* **(2008) 6 SCC 1 : 2008 (4) SCR 1 – relied on.**

Kihoto Hollohan v. Zachillhu & Ors. **(1992) Suppl. 2 SCC 651: [1992] 1 SCR 686;** *Maharao Sahib Shri Bhim Singhji v. Union of India & Ors.* **(1981) 1 SCC 166;** *Indira Nehru Gandhi v. Raj Narain* **(1975) Suppl. SCC 1: [1976] 2 SCR 347;** *State of Kerala & Anr. v. N.M. Thomas & Ors.* **(1976) 2 SCC 310: [1976] 1 SCR 906** *and Waman Rao & Ors. v. Union of India & Ors.* **(1981) 2 SCC 362:[1981] 2 SCR 1;** *M. Nagraj & others v. Union of India* **(2006) 8 SCC 212: [2006] 7 Suppl. SCR 336** *and State of Gujarat and Another v. & The Ashok Mills Co. Ltd. Ahmedabad and Another* **(1974) 4 SCC 656: [1974] 3 SCR 760 – referred to.**

Per J.B. PARDIWALA, J. (Concurring with DINESH MAHESWHARI, J.)

HELD:1. Article 21 encompasses the right to live with dignity. Article 21 has been given wide connotation and expression by the courts, particularly, by this Court to give effect to the constitutional policy of welfare state. The decision of this Court in *Unni Krishnan* is an authority on this aspect where the Court confirmed that right to education is implicit under Article 21 and proceeded to identify the content and parameters of this right to be achieved by Articles 41, 45, and 46 in relation to education. Understood in this context, Article 46 gives not only solemn protection to the weaker sections of the people at

par with the Scheduled Castes and the Scheduled Tribes but speaks of special care to be taken by the State of this section of people. Further, the expression "educational and economic interests" in Article 46 concludes the whole legal position in relation to Article 46 to mean that the State must endeavour to do welfare especially of this section of people. The endeavour of the State to give the weaker section of the people a life of dignity is the link between Articles 46 and 21. The conjoint reading of both the provisions puts constitutional obligation on the State to achieve the goal of welfare of the weaker sections of the people by all means. Article 46 is not based on social test but on the means test. It speaks of "educational and economic interests" of "weaker sections". The expression "weaker sections" and their "economic interests" are correlative and denote the means status of the people who are to be taken care of. Although, the phrase "economic interests" is not to be read alone but in consonance with the expression "educational" used in Article 46; yet to confuse Article 46 with the "social status" would be to put a strain and nullify otherwise the pure object of Article 46. The distinction can be explained with the aid of Article 15(4). Article 15(4) gives impetus to the social and educational "advancement" of Backward Classes or the Scheduled Castes and Scheduled Tribes. It is an enabling provision for the State to make special provisions for the socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes. The emphasis here is on the upliftment of three constitutionally earmarked classes i.e., Scheduled Castes, Scheduled Tribes and Backward classes. However, Article 46 is wide in expression. The object of welfare under Article 46 is towards those educationally and economically weak. Thus, it is evident from the aforesaid that there can be reservation for certain weaker sections other than the SCs/STs and socially and educationally backward classes. The impugned amendment is meant for weaker sections of the society who are economically weak and cannot afford to impart education to their children or are unable to secure employment in the services of the State. [Para 81, 82]

2. The interpretation of a Constitution involves more than a passing interest concerning the actual litigants and being a pronouncement of the Courts on the government and administration, has a more general and far-reaching consequence. If there is an apparent or real conflict

between two provisions of the Constitution, it is to be resolved by applying the principle of harmonious construction. The rules of the interpretation of the Constitution have to take into consideration the problems of government, structure of a State, dynamism in operation, caution about checks and balances, not ordinarily called for in the interpretation of statutes. [Para 86, 87, 90]

3. Since the power to amend the Constitution is a derivative power, the exercise of such power to amend the Constitution is subject to two limitations, namely, the doctrine of Basic Structure and lack of legislative competence. The doctrine of Basic Structure is brought in as a window to keep the power of judicial review intact as abrogation of such a power would result in violation of basic structure. When one speaks of discrimination or arbitrary classification, the same constitutes violation of Article 14 of the Constitution. There is a distinction between constitutional law and ordinary law in a rigid Constitution like ours. The said distinction proceeds on the assumption that ordinary law can be challenged on the touchstone of the Constitution. Therefore, when an ordinary law seeks to make a classification without any rational basis and without any nexus with the object sought to be achieved, such ordinary law could be challenged on the touchstone of Article 14 of the Constitution. However, when it comes to the validity of a constitutional amendment, one has to examine the validity of such amendment by asking the question as to whether such an amendment violates any overarching principle in the Constitution. What is overarching principle? Concepts like secularism, democracy, separation of powers, power of judicial review fall outside the scope of amendatory powers of the Parliament under Article 368. If any of these were to be deleted, it would require changes to be made not only in Part III of the Constitution but also in Article 245 and the three Lists of the Constitution resulting in the change of the very structure or framework of the Constitution. When an impugned Act creates a classification without any rational basis and having no nexus with the objects sought to be achieved, the principle of equality before law is violated undoubtedly. Such an Act can be declared to be violative of Article 14. Such a violation does not require re-writing of the Constitution. This would be a case of violation of ordinary principle of equality before law. Similarly, "egalitarian equality" is a much wider concept. It is an

overarching principle. The term "egalitarianism" has distinct definition that all people should be treated as equal and have the same political, economic, social and civil rights or have a social philosophy advocating the removal of economic inequalities among the people, economic egalitarianism or the decentralisation of power. [Para 154]

4. Article 14 has two clear facets which are invalid. One is over-classification and the other is under-classification, which is otherwise, over- inclusiveness or under-inclusiveness. The judicial review of over-classification should be undertaken very strictly. In the cases of under-classification when the complaint is either by those who are left out or those who are in i.e. that the statute has roped him in, but a similarly situated person has been left out, it would be under-inclusiveness. It is to say that you ought to have brought him in to make the classification reasonable. It is in such cases that the courts have said that 'who should be brought in' should be left to the wisdom of the legislature because it is essentially a stage where there should be an element of practicability. Therefore, the cases of under-inclusion can be reviewed in a little liberal manner. The under-inclusion argument should not be very readily accepted by the courts because the stage could be experimental. For instance, in the case on hand, the argument in the context of 103rd Constitution Amendment is that SCs, STs and OBCs have been left out, the Court would say that it is under-inclusiveness. The Legislature does not have to bring any and everybody to make it reasonable. The case on hand is not one of active exclusion. The SCs, STs and OBCs who have been left out at the first instance are telling the Court that they ought to have been included. In such circumstances, the test would be very strict, not that it would be impervious to review. Had they been included in clause (6) of Article 15 & clause (6) of Article 16 resply at any point of time and thereafter, excluded, it would be legitimate for them to argue that having treated them as one, they cannot be excluded in an arbitrary manner. [Para 164]

5. Each one of the Constitutional provisions that are categorised as rights under Part III has intrinsic value content. Many of these rights are a part of the mechanism geared towards realising a common constitutional principle. For example, Articles 14, 15 and 16 of the Constitution are committed to the common principle of equality. Reasonably then, if an amendment is to be struck down under the

'basic structure' formulation, the central principle of these inter-related provisions should be at threat. A mere violation of one of these enabling provisions would not be of much consequence under the doctrine of Basic Structure as long as such violation does not infringe upon the central thesis of equality. Redress for marginal encroachment cannot be found under the 'Basic Structure Doctrine'. In considering the effect of an amendment on the constitutional core, it is important to keep in mind the widest ramifications of the amendment. It is imperative to contemplate and consider every way in which the 'basic structure' of the Constitution might be threatened through the impugned amendment. The amendment would stand as constitutional only after a satisfactory understanding as to its effect on the constitutional core is reached by the courts. To sustain itself, the amendment should not violate such core in the widest interpretation given to it. [Para 186]

6. The new concept of economic criteria introduced by the impugned amendment for affirmative action may go a long way in eradicating caste-based reservation. It may be perceived as a first step in the process of doing away with caste-based reservation. [Para 187]

7. Reservation is not an end but a means – a means to secure social and economic justice. Reservation should not be allowed to become a vested interest. Real solution, however, lies in eliminating the causes that have led to the social, educational and economic backwardness of the weaker sections of the community. This exercise of eliminating the causes started immediately after the Independence i.e., almost seven decades back and it still continues. The longstanding development and the spread of education have resulted in tapering the gap between the classes to a considerable extent. As larger percentages of backward class members attain acceptable standards of education and employment, they should be removed from the backward categories so that the attention can be paid toward those classes which genuinely need help. In such circumstances, it is very much necessary to take into review the method of identification and the ways of determination of backward classes, and also, ascertain whether the criteria adopted or applied for the classification of backward is relevant for today's conditions. The idea of Baba Saheb Ambedkar was to bring social harmony by introducing reservation for only ten years. However, it has continued past seven decades. Reservation should not continue for an indefinite period of time so as to become a vested interest. [Para 190]

8. In the result, the impugned amendment is valid and in no manner alters the basic structure of the Constitution. [Para 191]

Minor A. Peeriakaruppan v. State of Tamil Nadu and Others **(1971) 1 SCC 38: [1971] 2 SCR 430 – relied on.**

Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. **(1973) 4 SCC 225: [1973] Suppl. SCR 1;** *The State of Madras v. Champakam Dorairajan & Another* **AIR 1951 SC 226: [1951] SCR 525;** *Kathi Raning Rawat v. State of Saurashtra* **AIR 1952 SC 123: [1952] SCR 435;** *State of Kerala and Another v. N.M. Thomas and Others* **(1976) 2 SCC 310 : [1976] 1 SCR 906;** *E.P. Royappa v. State of Tamil Nadu and Another* **AIR 1974 SC 555: [1974] 2 SCR 348;** *Govt. of Andhra Pradesh v. P.B. Vijaykumar and another* **AIR 1995 SC 1648;** *T.M.A. Pai Foundation and Others v. State of Karnataka and Others* **(2002) 8 SCC 481: [2002] 3 Suppl. SCR 587;** *Supreme Court Advocates-on-Record Association and another v. Union of India* **AIR 2016 SC 117: [2015] SCR 975;** *Smt. Indira Nehru Gandhi v. Shri Raj Narain* **AIR 1975 SC 2299: [1975] Suppl. SCC 1;** *S.R. Bommai and others etc. etc. v. Union of India and others etc. etc.* **AIR 1994 SC 1918: [1994] 2 SCR 644;** *I.R. Coelho (dead) by L.Rs. v. State of Tamil Nadu* **AIR 2007 SC 861: [2007] 1 SCR 706;** *The State of West Bengal v. Anwar Ali Sarkar* **[1952] 0 SCR 284;** *State of Gujarat and Another v. Shri Ambika Mills Ltd. Ahmedabad and Another* **(1974) 4 SCC 656: [1974] 3 SCR 760;** *Mohammad Shujat Ali and others v. Union of India and others Ashutosh Gupta v. State of Rajasthan* **AIR 2002 SC 1533;** *Mohini Jain (Miss) v. State of Karnataka and Others* **(1992) 3 SCC 666: [1992] 3 SCR 658;** *Society for Unaided Private Schools of Rajasthan v. Union of India and Another* **(2012) 6 SCC1: [2012] 2 SCR 715;** *Pramati Educational and Cultural Trust (Registered) and Others v. Union of India and Others* **(2014) 8 SCC 1: [2014] 11 SCR 712;** *M. Nagaraj and Others v. Union of India and Others* **(2006) 8 SCC 212: [2006] 7 Suppl. SCR 336;**

M.R. Balaji and Others v. State of Mysore **[1963] Supp 1 SCR 439** *and Dalmia Cement (Bharat) Ltd. and Another v. Union of India and Others* **(1996) 10 SCC 104: [1996] 1 Suppl. SCR 825;** *State of Jammu & Kashmir v. Triloki Nath Khosa and others* **AIR 1974 SC 1: [1974] 1 SCR 771;** *Ram Singh and Others v. Union of India* **(2015) 4 SCC 697: [2015] 5 SCR 670;** *M/s Shantistar Builders v. Narayan Khimalal Totame and Others* **(1990) 1 SCC 520;** *Ashoka Kumar Thakur v. Union of India* **(2008) 6 SCC 1: [2008] 4 SCR 1;** *M.P.V. Sundararamier & Co. v. State of A.P. and Others* **[1958] SCR 1422;** *State of West Bengal v. Shaik Serajuddin Batley* **[1954] SCR 378;** *Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Others* **[1959] SCR 279;** *R.C. Poudyal v. Union of India and Others* **1994 Supp (1) SCC 324 : [1993] 1 SCR 891;** *Kihoto Hollohan v. Zachillhu and Others* **1992 Supp (2) SCC 651: [1992] 1 SCR 686;** *Kuldip Nayar v. Union of India & Ors.* **AIR 2006 SC 3127: [2006] 5 Suppl. SCR 1;** *Glanrock Estate Private Limited v. State of Tamil Nadu* **(2010) 10 SCC 96: [2010] 12 SCR 597;** *Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd.* **(1983) 1 SCC 147: [1983] 1 SCR 1000;** *S. Seshachalam and Others v. Chairman, Bar Council of Tamil Nadu and Others* **(2014) 16 SCC 72 : [2014] 12 SCR 465;** *State of Madhya Pradesh v. Narmada Bachao Andolan and Another* **(2011) 7 SCC 639: [2011] 6 SCR 443;** *Ajit Singh and Others v. State of Punjab and Others* **(1999) 7 SCC 209: [1999] 2 Suppl. SCR 521;** *C.A. Rajendran v. Union of India & Others* **[1968] 1 SCR 721;** *Indra Sawhney and Others v. Union of India and Others* **1992 Supp (3) SCC 217 : [1992] 2 Suppl. SCR 454;** *Unni Krishnan, J.P. and Others v. State of Andhra Pradesh and Others* **(1993) 1 SCC 645: [1993] 1 SCR 594;** *Sajjan Singh v. State of Rajasthan* **AIR 1965 SC 845: [1965] 1 SCR 933** *and Golak Nath and Others v. State of Punjab and Another* **1967 AIR SC 1643: [1967] 2 SCR 762 – referred to.**

Srimathi Champakam Dorairajan and Another v. The State of Madras **AIR 1951 Madras 120;** *Padmraj Samarendra v.*

the State of Bihar, **Patna High Court, Special Bench, 1978 SCC OnLine Pat 64 : 1979 PLJR 258 : AIR 1979 Pat 266;** *State of Kerala v. R. Jacob Mathew and others,* **AIR 1964 Kerala 316 – referred to.**

James v. Commonwealth of Australia **(1936) A.C. 578, 614;** *Central Provinces Case* **(1939) F. C. R. 18;** *United States v. Patrick B. Classic* **[1941 SCC OnLine US SC 112: 313 US 299 (1941)] ;** *Missouri, K & T Rly v. May,* **194 US 267 (1904), 269 – referred to.**

Per S. RAVINDRA BHAT, J. (for UDAY UMESH LALIT, CJI and himself) (Minority opinion)

1. Our Constitution does not speak the language of exclusion. The 103rd Constitution Amendment, by the language of exclusion, undermines the fabric of social justice, and thereby, the basic structure. [Para 1]

2. The addition, or insertion of the 'economic criteria' for affirmative action in aid of the section of population who face deprivation due to poverty, in furtherance of Article 46 of the Constitution, does not *per se* stray from the Constitutional principles, so as to alter, violate, or destroy its basic structure. As long as the State addresses deprivation resulting from discriminatory social practices which have kept the largest number of our populace in the margins, and continues its ameliorative policies and laws, the introduction of such deprivation-based affirmative action, is consistent with constitutional goals. What, however, needs further scrutiny, is whether the manner of implementing – i.e., the *implicit* exclusion of those covered under Art. 15(4) and 16(4) [Scheduled Castes ("SC"), Scheduled Tribes ("ST"), and socially and educationally backward classes ("SEBC")], cumulatively referred to as 'backward classes'] violates, or damages the basic structure or essential features of the Constitution. [Para 2]

3. The appropriate test or standard of judicial review of constitutional amendments is not the same as in the case of ordinary laws; the test is whether the amendment challenged destroys, abrogates, or damages the "identity", or "nature" or "character" or "personality" of the Constitution, by directly impacting one or some of the

"overarching principles" which inform its express provisions. Further in constitutional amendment judicial review, the court would consider the history of the provision amended, or the way the new provision impacts the identity, or character, or nature of the Constitution. The standard of judicial review of constitutional amendments, draws upon distinct terminologies – identity, personality, nature and character to see if the constitutional identity undergoes a fundamental change, as to alter the Constitution into something it can never be. Or, differently put, the test is whether the impact of the amendment is to change the Constitution, into something it could never be considered to be. Each of the terms, i.e. identity, nature, personality, character, and so on, are methods of expressing the idea that some part of the Constitution, either through its express provisions, or its general scheme, and yet transcending those provisions, are embedded as overarching principles, which cannot be destroyed or damaged. [Paras 29, 30]

4. The application of the doctrine classification differentiating the poorest segments of the society, as one segment (i.e., the forward classes) *not being beneficiaries* of reservation, and the other, the poorest, who are subjected to *additional* disabilities due to caste stigmatization or social barrier based discrimination – the latter being *justifiably* kept out of the new reservation benefit, is an exercise in deluding ourselves that those getting social and educational backwardness based reservations are somehow more fortunate. This classification is plainly contrary to the essence of equal opportunity. If this Constitution means anything, it is that the Code of Articles 15(1), 15(2), 15(4), 16(1), 16(2), and 16(4) are one indivisible whole. Articles 16(1) and 16(4) are facets of the same equality principle. That one needs Article 15(4) and 16(4) to achieve equality of opportunity guaranteed to all in Articles 15(1) and 16(1) cannot now be undermined, through this reasoning, to hold that the theory of classification permits exclusion on this very basis. [Para 80]

5. The basis of classification in the impugned amendment, enacted in furtherance of Article 46 – is economic deprivation. Applying that criterion, it is either income, or landholding, or value of assets or the extent of resources controlled, which are classifiers. The social origins, or identities of the target group are thus irrelevant. That there is some basis for classification, whether relevant or irrelevant, which is sufficient to differentiate between members of an otherwise homogenous group,

is no justification. The economic criteria, based on economic indicators, which distinguish between one individual and another, would be relevant for the purpose of classification, and grant of reservation benefit. The Union's concern that SC/ST/OBCs are beneficiaries of other reservations, which set apart the poorest among them, from the poorest amongst other communities which do not fall within Articles 15(4) and 16(4), cannot be a distinguishing factor, as to either constitute an intelligible differentia between the two, nor is there any rational nexus between that distinction and the object of the amendment, which is to eliminate poverty and further the goal of equity and economic justice. [Para 84, 87]

6. None of the materials placed on the record contain any suggestion that the SC/ST/OBC categories should be excluded from the poverty or economic criteria-based reservation, on the justification that existing reservation policies have yielded such significant results, that a majority of them have risen above the circumstances which resulted in, or exacerbate, their marginalization and poverty. There is nothing to suggest, how, keeping out those who qualify for the benefit of this economic-criteria reservation, but belong to this large segment constituting 82% of the country's population (SC, ST and OBC together), will advance the object of economically weaker sections of society. [Para 91]

7. The characterisation of including the poor (i.e., those who qualify for the economic eligibility) among those covered under Articles 15(4) and 16(4), in the new reservations under Articles 15(6) and 16(6), as bestowing "double benefit" is incorrect. What is described as 'benefits' for those covered under Articles 15(4) and 16(4) by the Union, cannot be understood to be a free pass, but as a reparative and compensatory mechanism meant to level the field – where they are unequal due to their *social* stigmatisation. This exclusion violates the non-discrimination and the non-exclusionary facet of the equality code, which thereby violates the basic structure of the Constitution. [Para 100]

8. The impugned amendment creates paths, gateways, and opportunities to the poorest segments of our society, enabling them multiple access points to spaces they were unable to go to, places and positions they were unable to fill, and opportunities they could not hope, ever to ordinarily use, due to their destitution, economic deprivation,

and penury. These: destitution, economic deprivation, poverty, are markers, or *intelligible differentia,* forming the basis of the classification on which the impugned amendment is entirely premised. To that extent, the amendment is constitutionally indefeasible. However, by excluding a large section of equally poor and destitute individuals – based on their social backwardness and legally acknowledged caste stigmatization – from the benefit of the new opportunities created for the poor, the amendment *practices* constitutionally prohibited forms of discrimination. The overarching principles underlying Articles 15(1), 15(2), and Articles 16(1), 16(2) is that caste based or community-based exclusion (i.e., the practice of discrimination), is impermissible. Whichever way one would look at it, the Constitution is intolerant towards untouchability in all its forms and manifestations which are *articulated* in Articles 15(1), (2), Articles 16, 17, 23 and 24. It equally prohibits exclusion based on past discriminatory practices. The exclusion made through the "other than" exclusionary clause, negates those principles and strikes at the heart of the equality code (specifically the non-discriminatory principle) which is a part of the core of the Constitution. [Para 101]

9. Equality of opportunity in public employment – a specific facet of the equality code – is a guarantee to each citizen. The equally forthright prohibition in Article 16(2), enjoining discrimination on various grounds, including caste, is to reinforce the absoluteness of equality of opportunity, that it cannot be denied. The only departure through Article 16(4) is to give voice to hitherto unrepresented classes, discriminated against on the proscribed grounds. This link- between *providing equal opportunity,* and *representation* through reservations, was the only exception, permitted by the Constitution, to further equality *in public employment.* The impugned amendment snaps the link between the idea of providing reservation for backward classes to ensure their *empowerment* and *representation* (who were, before the enactment of Article 16(4), absent from public employment). The entire philosophy of Article 16 is to ensure barrier-free equal opportunity in regard to public employment. Article 16(4) – enables citizens belonging to backward classes access to public employment with the superadded condition that this is to ensure their "*adequate representation*". Important decisions of this court*: Indra Sawhney,*

M. Nagaraj, Jarnail Singh v. Lachhmi Narain Gupta **and** ***BK Pavitra (II) v. Union of India*** **have time and again emphasized that reservations under Article 16 are conditioned upon periodic adequate representation review. [Paras 129, 130]**

10. The introduction of reservations for *economically weaker* sections of the society is not premised on their lack of representation (unlike backward classes); the absence of this condition implies that persons who benefit from the EWS reservations can, and in all probability do belong to classes or castes, which are "forward" and are represented in public service, adequately. This additional reservation, by which a section of the population who are not socially backward, and whose communities are represented in public employment – violates the equality of opportunity which the Preamble assures, and Article 16(1) guarantees. [Para 131]

11. The impugned amendment results in treating those covered by reservations under Article 16(4) with a standard that is more exacting and stringent than those covered by Article 16(6). For instance, if the poorest citizens among a certain community or that entire community, is unrepresented, and the quota set apart for the concerned group (SC) as a whole is filled, the requirement of "representation" is deemed fulfilled, i.e., notwithstanding that the *specific* community has not been represented in public employment, no citizen belonging to it, would be entitled to claim reservation. However, in the case of non-SC/ST/OBCs, whether the individual belongs to a community which is represented or not, is entirely irrelevant. This vital dimension of *need to be represented, to be heard in the decision-making process,* has been entirely discarded by the impugned amendment in clause (6) of Article 16. Within the amended Article 16, therefore, lie two standards: representation as a relevant factor (for SC, ST and OBC under Article 16(4)), and representation as an irrelevant factor (for Article 16(6)). [Para 132]

12. The introduction of this reservation in public employment violates the right to equal opportunity, in addition to the non-discriminatory facet of equality, both of which are part of the equality code and the basic structure. [Para 133]

13. The characterisation of reservations for economically weaker sections of the population (EWS) as compensatory and on par with the

existing reservations under Articles 15(4) and 16(4), is without basis. The endeavour of the Constitution makers was to ensure that past discriminatory practices which had, so to say, eaten the vitals of the Indian society and distorted it to such an extent that when the republic was created, an equal society was merely an illusion, which compelled them to enact special provisions such as Article 16(4) – and later Article 15(4), to ensure equality. It was not compensatory but also reparatory. They continue to compensate, definitionally and in reality, because even as on date, the acknowledged position is that reservations are necessary for SCs/STs and OBCs who are not part of the creamy layer. On the other hand, the EWS category, was consciously not made beneficiaries of reservations at the time of the framing of the Constitution, because perhaps the framers felt that the enacted provisions (including the soon to be added Articles 31A and 31B) and the slew of economic reforms which were enacted were sufficient to remove economic disparities. That hope however, did not materialise. Economic disparities (unconnected with social and educational backwardness) continued – and perhaps were even exacerbated to such an extent that as of now almost 25% of the population continue to live in abject poverty. *Indra Sawhney* acknowledged that measures taken for their purpose would only result in "poverty alleviation". [Para 168]

14. The principles of non-discrimination, non-exclusion and equality of opportunity to all is manifested in the Constitution through the equality code, which is part of its basic structure. Their link with fraternity, which the Preamble assures is intrinsic to "dignity of the individual and unity and integrity of the nation", is inseparable. The framers of our constitution recognised that there can be no justice without equality of status, and that bereft of fraternity, even equality would be an illusion as existing divisions and "narrow domestic walls" would fragment society. [Para 180]

15. The fraternal principle is deeply embedded to this nation's ethos and culture. The specific provisions which form part of the Equality Code, are inextricably intertwined with fraternity as well.

People cannot be assured of Justice, Liberty or Equality, unless Fraternity in one form or another, to some degree, is felt by individuals at each level of our social order, and economic system. Weakening

fraternity therefore undermines justice, liberty, and equality. [Paras 181, 182, 183]

16. One-ness, *inclusiveness,* humanism and the idea that not only are all equal, and should have equal opportunities, and the content of each one's rights be no different from the other, but also that all stand together, and for each other, is a powerful precept. This precept suffuses every provision of Part III of the Constitution, especially Articles 14-18, 38-39 and 46. The value of fraternity is as much a part of the equality code, and its facets – equality of opportunity, the principle of non-discrimination and the non-exclusionary principle, as it inextricably binds them with the concepts of liberty and freedom. [Paras 185, 186]

17. The exclusionary clause (in the impugned amendment) that keeps out from the benefits of economic reservation, backward classes and SC/STs therefore, strikes a death knell to the equality and fraternal principle which permeates the equality code and non-discrimination principle. [Para 187]

18. The concepts which our Constitution fosters, and the principles it engenders – equality, fraternity, egalitarianism, dignity, and justice (at individual and social levels) are all inclusive, all encompassing. The equality code in its majestic formulation (Article 14, 15, 16 and 17) promotes inclusiveness. Even provisions enabling reservations foster social justice and equality, to ensure inclusiveness and participation of all sections of society. These provisions assure representation, diversity, and empowerment. Conversely, exclusion, with all its negative connotation – is not a constitutional principle and finds no place in our constitutional ethos. Therefore, to admit now, that exclusion of people based on their backwardness, rooted in social practice, is permissible, destroys the constitutional ethos of fraternity, non-discrimination, and non-exclusion. [Para 188]

19. On Question 1, it is held that the states' compelling interest to fulfil the objectives set out in the Directive Principles, through special provisions on the basis of economic criteria, is legitimate. That reservation or special provisions have so far been provided in favour of historically disadvantaged communities, cannot be the basis for contending that *other* disadvantaged groups who have not been able to progress due to the ill effects of abject poverty, should remain so and the

special provisions should not be made by way of affirmative action or even reservation on their behalf. Therefore, special provisions based on objective economic criteria (for the purpose of Article 15), is *per se* not violative of the basic structure. [Para 189]

20. However, the framework in which it has been introduced by the impugned amendment – *by excluding* backward classes – is violative of the basic structure. The identifier for the new criteria-is based on deprivation faced by individuals. Therefore, which community the individual belongs to is irrelevant. An individual who is a target of the new 10% reservation may be a member of any community or class. The state does not – and perhaps justly so - will not look into her background. Yet in the same breath, the state is saying that members of certain communities who may be equally or desperately poor (for the purposes of classification identification) but will otherwise be beneficiaries of reservation of a different kind, would not be able to access this new benefit, since they belong to those communities. This dichotomy of on the one hand, using a *neutral identifier* entirely based on economic status and at the same time, for the purpose of exclusion, using social status, i.e., the castes or socially deprived members, on the ground that they are beneficiaries of reservations (under Article 15(4) and 16(4)) is entirely offensive to the Equality Code. [Para 190]

21. A universally acknowledged truth is that reservations have been conceived and quotas created, through provision in the Constitution, only to offset fundamental, deep rooted generations of wrongs perpetrated on entire communities and castes. Reservation is designed as a powerful tool to enable equal access and equal opportunity. Introducing the economic basis for reservation – as a new criterion, is permissible. Yet, the "othering" of socially and educationally disadvantaged classes – including SCs/ STs/ OBCs by excluding them from this new reservation on the ground that they enjoy pre-existing benefits, is to heap fresh injustice based on past disability. The exclusionary clause operates in an utterly arbitrary manner. Firstly, it "others" those subjected to socially questionable, and outlawed practices – though they are amongst the poorest sections of society. Secondly, for the purpose of the new reservations, the exclusion operates against the socially disadvantaged classes and castes, absolutely, by confining them within their allocated reservation

quotas (15% for SCs, 7.5% for STs, etc.). Thirdly, it denies the chance of mobility from the reserved quota (based on past discrimination) to a reservation benefit based only on economic deprivation. The net effect of the entire exclusionary principle is Orwellian, (so to say) which is that all the poorest are entitled to be considered, regardless of their caste or class, yet only those who belong to forward classes or castes, would be considered, and those from socially disadvantaged classes for SC/STs would be ineligible. Within the narrative of the classification jurisprudence, the differentia (or marker) distinguishing one person from another is deprivation alone. The exclusion, however, is not based on deprivation but social origin or identity. This strikes at the essence of the non-discriminatory rule. Therefore, the total and absolute exclusion of constitutionally recognised backward classes of citizens - and more acutely, SC and ST communities, is nothing but discrimination which reaches to the level of undermining, and destroying the equality code, and particularly the principle of non-discrimination. [Para 191]

22. On question 3, it is clear that the impugned amendment and the classification it creates, is arbitrary, and results in hostile discrimination of the poorest sections of the society that are socially and educationally backward, and/or subjected to caste discrimination. For these reasons, the insertion of Article 15(6) and 16(6) is struck down, is held to be violative of the equality code, particularly the principle of *non-discrimination* and *non-exclusion* which forms an inextricable part of the basic structure of the Constitution. [Para 192]

23. While this reasoning is sufficient to conclude that Article 16(6) is liable to be struck down, there are additional reasons due to which this court is compelled to clarify that while the 'economic criteria' *per se* is permissible in relation to *access* of public goods (under Article 15), the same is not true for Article 16, the goal of which is empowerment, through *representation* of the community. [Para 193]

24. On the point of Question 2, it is true that unaided private educational institutions would be bound under Article 15(6) to provide for EWS reservations, however, given that the analysis under Question 3 on 'exclusion' leads to the conclusion that the Amendment is violative of the basic structure, the question herein has been rendered moot. [Para 194]

25. Sections 2 and 3 of the Constitution (One Hundred and Third Amendment) Act, 2019 which inserted clause (6) in Article 15 and clause (6) in Article 16, respectively, are unconstitutional and void on the ground that they are violative of the basic structure of the Constitution. [Para 195]

State of Madras v. Champakam Dorairajan **1951 SCC 351: [1951] SCR 525;** *M.R. Balaji v. State of Mysore* **[1963] Supp 1 SCR 439;** *T. Devadasan v. Union of India* **(1964) 4 SCR 680;** *State of Kerala v. N.M. Thomas* **(1976) 2 SCC 310: [1976] 1 SCR 906;** *Indra Sawhney v. Union of India* **1992 Supp (3) SCC 217: [1992] 2 Suppl. SCR 454;** *Pramati Educational & Cultural Trust v. Union of India* **(2014) 8 SCC 1;** *Chebrolu Leela Prasad Rao v. State of A.P.* **(2021) 11 SCC 401;** *Jaishri Laxmanrao Patil v. State of Maharashtra* **(2021) 8 SCC 1;** *Kesavananda Bharati v. State of Kerala* **(1973) 4 SCC 225: [1973] Supp SCR 1;** *Minerva Mills v. Union of India* **(1980) 3 SCC 625: [1981] 1 SCR 206;** *Indira Nehru Gandhi v. Raj Narain* **1975 Supp SCC 1: [1976] 2 SCR 347;** *P. Sambamurthy v. State of A.P* **(1987) 1 SCC 362: [1987] 1 SCR 879;** *Kihoto Hollohan v. Zachillhu* **1992 Supp (2) SCC 651: [1992] 1 SCR 686;** *L. Chandra Kumar v. Union of India* **(1997) 3 SCC 261: [1997] 2 SCR 1186 ;** *Raghunathrao Ganpatrao v. Union of India* **1994 Supp (1) SCC 191: [1993] 1 SCR 480;** *I.R. Coelho v. State of Tamil Nadu* **(2007) 2 SCC 1: [2007] 1 SCR 706;** *Waman Rao v. Union of India* **(1981) 2 SCC 362: [1981] 2 SCR 1;** *Indra Sawhney (2) v. Union of India* **(2000) 1 SCC 168: [1999] 5 Suppl. SCR 229;** *Indian Young Lawyers Association and Ors. v. State of Kerala and Ors.* **(2019) 11 SCC 1: [2018] 9 SCR 561;** *Supreme Court Advocates on Record Association (SCAORA) v. Union of India* **(2016) 5 SCC 1: [2015] 13 SCR 1;** *Roop Chand Adlakha v. Delhi Development Authority* **(1989) Supp (1) SCC 116: [1988] 3 Suppl. SCR 253;** *State of West Bengal v. Anwar Ali Sarkar* **(1952) 1 SCC 1: [1952] SCR 284;** *Mohammad Shujat Ali and Ors. v. Union of India* **(1975) 3 SCC 76: [1975] 1 SCR 449;** *Bhim Singhji v. Union of India*

(1981) 1 SCC 166; *M. Nagaraj v. Union of India* **(2006) 8 SCC 212: [2006] 7 Suppl. SCR 336;** *Ashok Kumar Thakur v. Union of India* **(2008) 6 SCC 1: [2008] 4 SCR 1;** *K. Krishna Murthy v. Union of India* **(2010) 7 SCC 202: [2010] 6 SCR 972;** *R.C. Poudyal v. Union of India* **1994 Supp (1) SCC 324: [1993] 1 SCR 891;** *Air India v. Nargesh Mirza* **(1981) SC 1829 : [1982] 1 SCR 438;** *Vishaka v. State of Rajasthan* **(1997) 6 SCC 241: [1997] 3 Suppl. SCR 404;** *Anuj Garg and Others v. Hotel Association of India and Others,* **(2008) 3 SCC 1: [2007] 12 SCR 991;** *National Legal Services Authority v UOI and Others* **(2014) 5 SCC 438: [2014] 5 SCR 119;** *Vineeta Sharma v. Rakesh Sharma & Others* **(2020) 9 SCC 1: [2020] 10 SCR 135;** *Secretary, Ministry of Defence v. Babita Puniya & Others* **(2020) 7 SCC 469: [2020] 3 SCR 833;** *Lt. Col. Nitisha & Others v. Union of India & Others,* **2021 SCC OnLine SC 261;** *State of Karnataka v. Appa Balu Ingale* **(1995) Supp (4) SCC 469: [1992] 3 Suppl. SCR 284;** *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College & Ors.* **(1990) 3 SCC 130: [1990] 2 SCR 843;** *Valsamma Paul & Ors. v. Cochin University & Ors.* **(1996) 3 SCC 545: [1996] 1 SCR 128;** *Abhiram Singh and Ors. v. C.D. Commachen* **(2017) 2 SCC 629: [2017] 1 SCR 158;** *Saurabh Chaudri & Ors. v. Union of India & Ors.* **(2003) 11 SCC 146; [2003] Supp 5 SCR 152;** *S.R. Bommai v. Union of India* **(1994) 3 SCC 1: [1994] 2 SCR 644 ;** *Vikas Sankhala & Ors. v. Vikas Kumar Agarwal & Ors* **(2017) 1 SCC 350: [2016] 7 SCR 639;** *Samatha v. State of A.P. & Ors.* **(1997) 8 SCC 191: [1997] Supp 2 SCR 305;** *Indian Medical Association & Ors. v. Union of India & Ors.* **(2011) 7 SCC 179: [2011] 6 SCR 599;** *Society for Unaided Private Schools of Rajasthan v. Union of India,* **(2012) 6 SCC 1: [2012] 2 SCR 715;** *State of Jammu and Kashmir v. Triloki Nath Khosa & Ors.* **(1974) 1 SCC 19: [1974] 1 SCR 771;** *Pattali Makkal Katchi v. A. Mayilerumperumal and Ors* **2022 SCC Online SC 386;** *Col. A.S. Iyer v. V. Balasubramanyam* **(1980) 1 SCC 634: [1980] 1 SCR 1036 ;** *Lachhman Das v. State of Punjab* **[1963] 2 SCR 353;** *National Legal Services Authority v. Union of India & Ors.* **(2014) 5 SCC 438:**

[2014] 5 SCR 119; *Charu Khurana v. Union of India* **(2015) 1 SCC 192: [2014] 12 SCR 259;** *State of West Bengal v. Anwar Ali Sarkar* **[1952] 1 SCR 284;** *Nandini Satpathy v. PL Dani* **[1978] 3 SCR 608;** *Jarnail Singh v. Lachhmi Narain Gupta* **(2018) 10 SCC 396: [2018] 10 SCR 663;** *BK Pavitra (II) v. Union of India* **(2019) 16 SCC 129: [2019] 7 SCR 1086;** *T.M.A. Pai Foundation v. State of Karnataka* **(2002) 8 SCC 481: [2002] 3 Suppl. SCR 587;** *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress* **1991 Supp (1) SCC 600: [1990] 1 Suppl. SCR 142;** *K.C. Vasant Kumar v. State of Karnataka* **(1985) Supp SCC 714: [1985] Suppl. SCR 352;** *State of Gujarat v. Shri Ambika Mills* **(1974) 4 SCC 656: [1974] 3 SCR 760;** *S. Seshachalam & Ors. v. Chairman Bar Council of TN* **(2014) 16 SCC 72: [2014] 12 SCR 465;** *R.K. Garg v. Union of India* **(1981) 4 SCC 675: [1982] 1 SCR 947** *and Prathvi Raj Chauhan v. Union of India,* **(2020) 4 SCC 727: [2020] 2 SCR 727 – referred to.**

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, **165 U.S. 150 (1891)** *and Korematsu v. United States,* **323 U.S. 214 (1944) – referred to.**

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[1964] 4 SCR 680	**referred to**	**Para 7.2**
(1976) 2 SCC 310	**referred to**	**Para 7.2**
1992 Supp (3) SCC 217	**referred to**	**Para 7.2**
[1963] Supp 1 SCR 439	**referred to**	**Para 7.2**
[2020] 2 SCR 727	**referred to**	**Para 7.4**
[2019] 7 SCR 1086	**referred to**	**Para 8.2**
[2006] 7 Suppl. SCR 336	**referred to**	**Para 9.2**
(2021) 8 SCC 1	**referred to**	**Para 9.2**

[1951] SCR 525	**referred to**	**Para 10**
[2008] 4 SCR 1	**referred to**	**Para 10**
[1974] 2 SCR 348	**referred to**	**Para 11**
[1973] Suppl. SCR 1	**relied on**	**Para 13**
[1971] 3 SCR 9	**referred to**	**Para 13**
[2018] 7 SCR 1	**referred to**	**Para 15.4**
[1985] Suppl. SCR 352	**referred to**	**Para 15.4**
[1981] 1 SCR 206	**relied on**	**Para 16.1**
[1999] 5 Suppl. SCR 229	**referred to**	**Para 16.2**
(2002) 8 SCC 481	**referred to**	**Para 17.1**
[1960] 1 SCR 246	**referred to**	**Para 17.1**
[2017] 10 SCR 569	**referred to**	**Para 18.1**
(2021) 4 SCC 542	**referred to**	**Para 19**
[1964] 6 SCR 368	**referred to**	**Para 24.1**
[1981] 2 SCR 1	**referred to**	**Para 24.1**
[1995] 3 Suppl. SCR 269	**referred to**	**Para 24.3**
[2009] 12 SCR 978	**referred to**	**Para 24.3**
(1981) 1 SCC 166	**relied on**	**Para 24.3**
[1993] 1 SCR 480	**referred to**	**Para 25.1**
(2012) 6 SCC 1	**referred to**	**Para 25.5**
(2014) 8 SCC 1	**referred to**	**Para 25.5**
1975 Supp SCC 1	**referred to**	**Para 26**
[1952] SCR 89	**referred to**	**Para 35**
[1965] 1 SCR 933	**referred to**	**Para 35**
[1967] 2 SCR 762	**referred to**	**Para 35**
[1978] 2 SCR 1	**referred to**	**Para 36.1**

[1987] 1 SCR 879	**referred to**	**Para 37.5**
[1992] 1 SCR 686	**referred to**	**Para 37.6**
[1997] 2 SCR 1186	**referred to**	**Para 37.8**
[2010] 6 SCR 972	**referred to**	**Para 37.11**
[2015] 13 SCR 1	**referred to**	**Para 37.13**
[1975] 1 SCR 1	**referred to**	**Para 45.1**
[2015] 1 SCR 55	**referred to**	**Para 53**
[1997] 1 SCR 750	**referred to**	**Para 61**
[1980] 2 SCR 913	**referred to**	**Para 62**
[1996] 7 Suppl. SCR 548	**referred to**	**Para 63.1.1**
[1983] 1 SCR 456	**referred to**	**Para 63.1.2**
[1973] 3 SCR 236	**referred to**	**Para 71.3**
(1990) 1 SCC 520	**referred to**	**Para 71.5**
[1985] 2 SCR 224	**referred to**	**Para 74.1**
[2014] 9 SCR 780	**referred to**	**Para 74.2.1**
[2003] 2 SCR 1136	**referred to**	**Para 74.2.1**
[1989] 2 Suppl. SCR 570	**referred to**	**Para 74.2.3**
[1981] 2 SCR 185	**referred to**	**Para 92.4**
[2006] 3 SCR 1132	**referred to**	**Para 99.1**

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(1973) 4 SCC 225	**relied on**	**Para 5**
[1992] 1 SCR 686	**referred to**	**Para 7**
(1981) 1 SCC 166	**referred to**	**Para 9**
[1976] 2 SCR 347	**referred to**	**Para 10**
[1976] 1 SCR 906	**referred to**	**Para 11**
[1981] 2 SCR 1	**referred to**	**Para 12**

[2006] 7 Suppl. SCR 336	**referred to**	**Para 13**
[1974] 3 SCR 760	**referred to**	**Para 14**
1985 (1) Suppl. SCR 352	**relied on**	**Para 26**
2008 (4) SCR 1	**relied on**	**Para 27**

In the judgment of J.B. PARDIWALA, J.

[1973] Suppl. SCR 1	**referred to**	**Para 5**
[1951] SCR 525	**referred to**	**Para 13**
[1952] SCR 435	**referred to**	**Para 14**
AIR 2002 SC 1533	**referred to**	**Para 15**
[1992] 2 Suppl. SCR 454	**referred to**	**Para 19**
AIR 1974 SC 1631	**referred to**	**Para 29**
[1976] 1 SCR 906	**referred to**	**Para 31**
[1974] 2 SCR 348	**referred to**	**Para 33**
AIR 1995 SC 1648	**referred to**	**Para 34**
[1992] 3 SCR 658	**referred to**	**Para 36**
[1993] 1 SCR 594	**referred to**	**Para 37**
[2002] 3 Suppl. SCR 587	**referred to**	**Para 38**
[2012] 2 SCR 715	**referred to**	**Para 39**
[2014] 11 SCR 712	**referred to**	**Para 47**
[2006] 7 Suppl. SCR 336	**referred to**	**Para 49**
[1963] Supp 1 SCR 439	**referred to**	**Para 49**
[1996] 1 Suppl. SCR 825	**referred to**	**Para 55**
[1974] 1 SCR 771	**referred to**	**Para 60**
[2015] 5 SCR 670	**referred to**	**Para 61**

(1990) 1 SCC 520	**referred to**	**Para 78**
[2008] 4 SCR 1	**referred to**	**Para 81**
[1958] SCR 1422	**referred to**	**Para 91**
[1954] SCR 378	**referred to**	**Para 92**
[1959] SCR 279	**referred to**	**Para 93**
[1993] 1 SCR 891	**referred to**	**Para 94**
[1992] 1 SCR 686	**referred to**	**Para 95**
[2006] 7 Suppl. SCR 336	**referred to**	**Para 96**
[1965] 1 SCR 933	**referred to**	**Para 108**
[1967] 2 SCR 762	**referred to**	**Para 115**
[1975] Suppl. SCC 1	**referred to**	**Para 135**
[1994] 2 SCR 644	**referred to**	**Para 139**
[2007] 1 SCR 706	**referred to**	**Para 141**
[2015] SCR 975	**referred to**	**Para 148**
[2006] 5 Suppl. SCR 1	**referred to**	**Para 149**
[2010] 12 SCR 597	**referred to**	**Para 151**
[1974] 3 SCR 760	**referred to**	**Para 165**
[1952] SCR 284	**referred to**	**Para 167**
[1983] 1 SCR 1000	**referred to**	**Para 169**
[2014] 12 SCR 465	**referred to**	**Para 171**
[2011] 6 SCR 443	**referred to**	**Para 178**
[1999] 2 Suppl. SCR 521	**referred to**	**Para 185**
[1968] 1 SCR 721	**referred to**	**Para 185**
[1971] 2 SCR 430	**relied on**	**Para 189**

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[1951] SCR 525	**referred to**	**Para 6**
[1963] Supp 1 SCR 439	**referred to**	**Para 6**
[1976] 1 SCR 906	**referred to**	**Para 8**
[1992] 2 Suppl. SCR 454	**referred to**	**Para 9**
[2006] 7 Suppl. SCR 336	**referred to**	**Para10**
[2008] 4 SCR 1	**referred to**	**Para 10**
[2010] 6 SCR 972	**referred to**	**Para10**
(2014) 8 SCC 1	**referred to**	**Para 10**
(2021) 11 SCC 401	**referred to**	**Para 10**
(2021) 8 SCC 1	**referred to**	**Para 10**
[1973] Supp SCR 1	**referred to**	**Para 12**
[1981] 1 SCR 206	**referred to**	**Para 12**
[1976] 2 SCR 347	**referred to**	**Para 13**
[1987] 1 SCR 879	**referred to**	**Para 16**
[1992] 1 SCR 686	**referred to**	**Para 16**
[1997] 2 SCR 1186	**referred to**	**Para 16**
[1993] 1 SCR 480	**referred to**	**Para 16**
[1981] 2 SCR 1	**referred to**	**Para 22**
[1993] 1 SCR 891	**referred to**	**Para 24**
[2015] 13 SCR 1	**referred to**	**Para 26**
[1982] 1 SCR 438	**referred to**	**Para 40**
[1997] 3 Suppl. SCR 404	**referred to**	**Para 40**
[2007] 12 SCR 991	**referred to**	**Para 40**

[2014] 5 SCR 119	**referred to**	**Para 40**
[2018] 9 SCR 561	**referred to**	**Para 40**
[2020] 10 SCR 135	**referred to**	**Para 40**
[2020] 3 SCR 833	**referred to**	**Para 40**
[1992] 3 Suppl. SCR 284	**referred to**	**Para 49**
[1990] 2 SCR 843	**referred to**	**Para 50**
[1996] 1 SCR 128	**referred to**	**Para 51**
[2017] 1 SCR 158	**referred to**	**Para 52**
[1999] 5 Suppl. SCR 229	**referred to**	**Para 53**
[2003] Supp 5 SCR 152	**referred to**	**Para 64**
[1994] 2 SCR 644	**referred to**	**Para 65**
[2007] 1 SCR 706	**referred to**	**Para 66**
[2016] 7 SCR 639	**referred to**	**Para 68**
[1997] 2 Suppl. SCR 305	**referred to**	**Para 69**
[2011] 6 SCR 599	**referred to**	**Para 70**
(1981) 1 SCC 166	**referred to**	**Para 72**
[2012] 2 SCR 715	**referred to**	**Para 74**
[1952] SCR 284	**referred to**	**Para 81**
[1974] 1 SCR 771	**referred to**	**Para 82**
[1975] 1 SCR 449	**referred to**	**Para 83**
[1980] 1 SCR 1036	**referred to**	**Para 85**
[1963] 2 SCR 353	**referred to**	**Para 86**
[2014] 5 SCR 119	**referred to**	**Para 88**
[2014] 12 SCR 259	**referred to**	**Para 90**

[1952] 1 SCR 284	**referred to**	**Para 124**
[1978] 3 SCR 608	**referred to**	**Para 124**
[2018] 10 SCR 663	**referred to**	**Para 130**
[2019] 7 SCR 1086	**referred to**	**Para 130**
[2002] 3 Suppl. SCR 587	**referred to**	**Para 134**
[1990] 1 Suppl. SCR 142	**referred to**	**Para 140**
[1985] Suppl. SCR 352	**referred to**	**Para 161**
[1974] 3 SCR 760	**referred to**	**Para 163**
[2014] 12 SCR 465	**referred to**	**Para 163**
[1982] 1 SCR 947	**referred to**	**Para 163**
[1988] 3 Suppl. SCR 253	**referred to**	**Para 164**
[2020] 2 SCR 727	**referred to**	**Para 186**

SHILPA SAILESH
v.
VARUN SREENIVASAN

(Transfer Petition (Civil) No. 1118 of 2014)

MAY 01, 2023

[SANJAY KISHAN KAUL, SANJIV KHANNA*, ABHAY S. OKA, VIKRAM NATH AND J.K. MAHESHWARI, JJ.]

Constitution of India – Art. 142 – Scope and ambit of – Held: The power u/Art. 142(1) is undefined and uncatalogued, so as to ensure elasticity to mould relief to suit a given situation – The Supreme Court can depart from the procedure as well as the substantive laws, as long as the decision is exercised based on considerations of fundamental general and specific public policy – While deciding whether to exercise discretion, the Court must consider the substantive provisions as enacted and not ignore the same, albeit the Court acts as a problem solver by balancing out equities between the conflicting claims – This power is to be exercised in a 'cause or matter'.

Constitution of India – Art. 142 – Hindu Marriage Act, 1955 – s.13-B – Grant of a decree of divorce by mutual consent – Whether Supreme Court while hearing a transfer petition, or in any other proceedings, can exercise power u/Art.142(1) to grant a decree of divorce by mutual consent dispensing with the period and the procedure prescribed u/s.13-B of the Act of 1956 and also quash and dispose of other/connected proceedings and in which cases and under what circumstances should Supreme Court exercise jurisdiction u/Art. 142 – Held: In view of settlement between the parties, the Supreme Court has the discretion to dissolve the marriage by passing a decree of divorce by mutual consent, without being bound by the procedural requirement to move the second motion – This power should be exercised with care and caution, keeping in mind the factors stated in Amardeep Singh case and Amit Kumar case – This Court can also, in exercise of power u/Art. 142(1) can also quash and set aside other proceedings and orders, including criminal proceedings.

Constitution of India – Art. 142 – Grant of divorce in case of irretrievable breakdown of marriage – Whether Supreme Court can grant divorce in exercise of power under Article 142(1), when there is complete and

irretrievable breakdown of marriage in spite of the other spouses opposing the prayer – Held: The Court in exercise of power under Art.142(1), has the discretion to dissolve the marriage on the ground of its irretrievable breakdown – The Court's discretionary power is to be exercised to do 'complete justice' to the parties – The Court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward – The Supreme Court, as a court of equity, is required to also balance the circumstances and the background in which the party opposing the dissolution is placed.

Hindu Marriage Act, 1955 – Irretrievable breakdown of marriage – Determination of – Held: That the marriage has irretrievably broken down is to be factually determined and firmly established – For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc. – The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor – Question of custody and welfare of minor children are also to be considered – Some of the factors mentioned can be taken as illustrative, and worthy of consideration – The factors are not codified – The exercise of jurisdiction u/ Art. 142(1) is situation specific.

Constitution of India – Art.32 – Whether a party can directly canvass before the Supreme Court on the ground of irretrievable breakdown, by filing a writ petition under Art. 32 of the Constitution – Held: The parties should not be permitted to circumvent the procedure by resorting to the writ jurisdiction u/Art. 32 or 226 – The remedy of a person aggrieved by the decision of the competent judicial forum is to approach the superior forum for redressal of his grievance – Relief u/Art. 32 can be sought to enforce the rights conferred by Part III of the Constitution of India, and on the proof of infringement thereof – Judicial orders passed by the court in, or in relation to, the proceedings pending before it, are not amenable to correction u/Art. 32 of the Constitution of India – The view regarding the same in Poonam v. Sumit Tanwar is accepted.

Judgment/Order – Clarification – Held: It is clarified that reference in Poonam v. Sumit Tanwar and the observation that it is questionable whether the period of six months for moving the second motion can be waived has not been approved.

Answering the reference, the Court

HELD:

The scope and ambit of power and jurisdiction of this Court under Article 142(1) of the Constitution of India;

1. The plenary and conscientious power conferred on this Court under Article 142(1) of the Constitution of India, seemingly unhindered, is tempered or bounded by restraint, which must be exercised based on fundamental considerations of general and specific public policy. Fundamental general conditions of public policy refer to the fundamental rights, secularism, federalism, and other basic features of the Constitution of India. Specific public policy should be understood as some express pre-eminent prohibition in any substantive law, and not stipulations and requirements to a particular statutory scheme. It should not contravene a fundamental and non-derogable principle at the core of the statute. Even in the strictest sense, it was never doubted or debated that this Court is empowered under Article 142(1) of the Constitution of India to do 'complete justice' without being bound by the relevant provisions of procedure, if it is satisfied that the departure from the said procedure is necessary to do 'complete justice' between the parties. Difference between procedural and substantive law in jurisprudential terms is contentious, albeit not necessary to be examined in depth in the present decision, as in terms of the dictum enunciated by this Court in *Union Carbide Corporation and Supreme Court Bar Association*, exercise of power under Article 142(1) of the Constitution of India to do 'complete justice' in a 'cause or matter' is prohibited only when the exercise is to pass an order which is plainly and expressly barred by statutory provisions of substantive law based on fundamental considerations of general or specific public policy. As explained in *Supreme Court Bar Association*, the exercise of power under Article 142(1) of the Constitution of India being curative in nature, this Court would not ordinarily pass an order ignoring or disregarding a statutory provision governing the subject, except

to balance the equities between conflicting claims of the litigating parties by ironing out creases in a 'cause or matter' before it. In this sense, this Court is not a forum of restricted jurisdiction when it decides and settles the dispute in a 'cause or matter'. While this Court cannot supplant the substantive law by building a new edifice where none existed earlier, or by ignoring express substantive statutory law provisions, it is a problem-solver in the nebulous areas. As long as 'complete justice' required by the 'cause or matter' is achieved without violating fundamental principles of general or specific public policy, the exercise of the power and discretion under Article 142(1) is valid and as per the Constitution of India. This is the reason why the power under Article 142(1) of the Constitution of India is undefined and uncatalogued, so as to ensure elasticity to mould relief to suit a given situation. The fact that the power is conferred only on this Court is an assurance that it will be used with due restraint and circumspection. [Para 13]

2. Question as to the power and jurisdiction of this Court under Article 142(1) of the Constitution of India is answered holding that this Court can depart from the procedure as well as the substantive laws, as long as the decision is exercised based on considerations of fundamental general and specific public policy. While deciding whether to exercise discretion, this Court must consider the substantive provisions as enacted and not ignore the same, *albeit* this Court acts as a problem solver by balancing out equities between the conflicting claims. This power is to be exercised in a 'cause or matter'. [Para 42]

Whether Court, while hearing a transfer petition, or in any other proceedings, can exercise power under Article 142(1) of the Constitution of India, in view of the settlement between the parties, and grant a decree of divorce by mutual consent dispensing with the period and the procedure prescribed under Section 13-B of the Hindu Marriage Act, and also quash and dispose of other/connected proceedings under the Protection of Women from Domestic Violence Act, 2005, Section 125 of the Code of Criminal Procedure, 1973, or criminal prosecution primarily under Section 498-A and other provisions of the Indian Penal Code, 1860. If the answer to this question is in the affirmative, in which cases and under what circumstances should this

Court exercise jurisdiction under Article 142(1) of the Constitution of India is an ancillary issue to be decided;

3. There is a difference between existence of a power, and exercise of that power in a given case. Existence of power is generally a matter of law, whereas exercise of power is a mixed question of law and facts. Even when the power to pass a decree of divorce by mutual consent exists and can be exercised by this Court under Article 142(1) of the Constitution of India, when and in which of the cases the power should be exercised to do 'complete justice' in a 'cause or matter' is an issue that has to be determined independent of existence of the power. This discretion has to be exercised on the basis of the factual matrix in the particular case, evaluated on objective criteria and factors, without ignoring the objective of the statutory provisions. [Para 20]

4. Section 13-B of the Hindu Marriage Act does not impose any fetters on the powers of this Court to grant a decree of divorce by mutual consent on a joint application, when the substantive conditions of the Section are fulfilled and the Court, after referring to the factors mentioned above, is convinced and of the opinion that the decree of divorce should be granted. [Para 21]

5. The legislature and the Courts treat matrimonial litigations as a special, if not a unique category. Public policy underlying the legislations dealing with family and matrimonial matters is to encourage mutual settlement, as is clearly stated in Section 89 of the C.P.C., Section 23(2) of the Hindu Marriage Act, and Section 9 of the Family Courts Act, 1984. Given that there are multiple legislations governing different aspects, even if the cause of dispute is identical or similar, most matrimonial disputes lead to a miscellany of cases including criminal cases, at times genuine, and on other occasions initiated because of indignation, hurt, anger or even misguided advice to teach a lesson. The multiplicity of litigations can restrict and block solutions, as a settlement has to be holistic and comprehensive, given that the objective and purpose is to enable the parties to cohabit and live together, or if they decide to part ways, to have a new beginning and settle down to live peacefully. The courts must not encourage matrimonial litigation, and prolongation of such litigation is detrimental to both the parties who lose their young age in chasing multiple litigations. Thus, adopting a hyper-

technical view can be counter-productive as pendency itself causes pain, suffering and harassment and, consequently, it is the duty of the court to ensure that matrimonial matters are amicably resolved, thereby bringing the agony, affliction, and torment to an end. In this regard, the courts only have to enquire and ensure that the settlement between the parties is achieved without pressure, force, coercion, fraud, misrepresentation, or undue influence, and that the consent is indeed sought by free will and choice, and the autonomy of the parties is not compromised. In view of the above legal position and discussion, Supreme Court, on the basis of settlement between the parties, while passing a decree of divorce by mutual consent, can set aside and quash other proceedings and orders, including criminal cases and First Information Report(s), provided the conditions, as specified in the various judgments, are satisfied. [Para 22]

6. This Court, in view of settlement between the parties, has the discretion to dissolve the marriage by passing a decree of divorce by mutual consent, without being bound by the procedural requirement to move the second motion. This power should be exercised with care and caution, keeping in mind the factors stated in *Amardeep Singh* and *Amit Kumar*. This Court can also, in exercise of power under Article 142(1) of the Constitution of India, quash and set aside other proceedings and orders, including criminal proceedings. [Para 42]

Whether this Court can grant divorce in exercise of power under Article 142(1) of the Constitution of India when there is complete and irretrievable breakdown of marriage in spite of the other spouse opposing the prayer.

7. This Court would not read the provisions of the Hindu Marriage Act, their underlying intent, and any fundamental specific issue of public policy, as barring this Court from dissolving a broken and shattered marriage in exercise of the Constitutional power under Article 142(1) of the Constitution of India. If at all, the underlying fundamental issues of public policy, as explained in the judgments of *V. Bhagat, Ashok Hurra*, and *Naveen Kohli*, support the view that it would be in the best interest of all, including the individuals involved, to give legality, in the form of formal divorce, to a dead marriage, otherwise the litigation(s), resultant sufferance, misery

and torment shall continue. Therefore, apportioning blame and greater fault may not be the rule to resolve and adjudicate the dispute in rare and exceptional matrimonial cases, as the rules of evidence under the Evidence Act are rules of procedure. When the life-like situation is known indubitably, the essence and objective behind section 13(1)(i-a) of the Hindu Marriage Act that no spouse should be subjected to mental cruelty and live in misery and pain is established. These rules of procedure must give way to 'complete justice' in a 'cause or matter'. Fault theory can be diluted by this Court to do 'complete justice' in a particular case, without breaching the self-imposed restraint applicable when this Court exercises power under Article 142(1) of the Constitution of India. [Para 30]

8. It is clearly stated that grant of divorce on the ground of irretrievable breakdown of marriage by this Court is not a matter of right, but a discretion which is to be exercised with great care and caution, keeping in mind several factors ensuring that 'complete justice' is done to both parties. It is obvious that this Court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward. That the marriage has irretrievably broken down is to be factually determined and firmly established. For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc. The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor. But these facts have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children. Question of custody and welfare of minor children, provision for fair and adequate alimony for the wife, and

economic rights of the children and other pending matters, if any, are relevant considerations. This Court would not like to codify the factors so as to curtail exercise of jurisdiction under Article 142(1) of the Constitution of India, which is situation specific. Some of the factors mentioned can be taken as illustrative, and worthy of consideration. [Para 33]

9. This Court, in exercise of power under Article 142(1) of the Constitution of India, has the discretion to dissolve the marriage on the ground of its irretrievable breakdown. This discretionary power is to be exercised to do 'complete justice' to the parties, wherein this Court is satisfied that the facts established show that the marriage has completely failed and there is no possibility that the parties will cohabit together, and continuation of the formal legal relationship is unjustified. The Court, as a court of equity, is required to also balance the circumstances and the background in which the party opposing the dissolution is placed. [Para 42]

10. This Court is of the opinion that the decisions of this Court in *Manish Goel* , *Neelam Kumar* , *Darshan Gupta* , *Hitesh Bhatnagar*, *Savitri Pandey* and others have to be read down in the context of the power of this Court given by the Constitution of India to do 'complete justice' in exercise of the jurisdiction under Article 142(1) of the Constitution of India. In consonance with our findings on the scope and ambit of the power under Article 142(1) of the Constitution of India, in the context of matrimonial disputes arising out of the Hindu Marriage Act, this Court hold that the power to do 'complete justice' is not fettered by the doctrine of fault and blame, applicable to petitions for divorce under Section 13(1)(i-a) of the Hindu Marriage Act. As held above, this Court's power to dissolve marriage on settlement by passing a decree of divorce by mutual consent, as well as quash and set aside other proceedings, including criminal proceedings, remains and can be exercised. [Para 40]

11. Lastly, this Court must express its opinion on whether a party can directly canvass before this Court the ground of irretrievable breakdown by filing a writ petition under Article 32 of the Constitution. In *Poonam* v. *Sumit Tanwar*, a two judges' bench of this Court has rightly held that any such attempt must be spurned and not accepted, as the parties should not be permitted to file a

writ petition under Article 32 of the Constitution of India, or for that matter under Article 226 of the Constitution of India before the High Court, and seek divorce on the ground of irretrievable breakdown of marriage. The reason is that the remedy of a person aggrieved by the decision of the competent judicial forum is to approach the superior tribunal/forum for redressal of his/her grievance. The parties should not be permitted to circumvent the procedure by resorting to the writ jurisdiction under Article 32 or 226 of the Constitution of India, as the case may be. Secondly, and more importantly, relief under Article 32 of the Constitution of India can be sought to enforce the rights conferred by Part III of the Constitution of India, and on the proof of infringement thereof. Judicial orders passed by the court in, or in relation to, the proceedings pending before it, are not amenable to correction under Article 32 of the Constitution of India. Therefore, a party cannot file a writ petition under Article 32 of the Constitution of India and seek relief of dissolution of marriage directly from this Court. [Para 41]

M. Siddiq (Dead) Through Legal Representatives (Ram Janmabhumi Temple Case) v. Mahant Suresh Das and Others **(2020) 1 SCC 1 : [2019] 18 SCR 1;** *Prem Chand Garg and Another v. The Excise Commissioner, U.P. and Others* **AIR 1963 SC 996 : [1963] Suppl. SCR 885;** *Supreme Court Bar Association v. Union of India and Another* **(1998) 4 SCC 409 : [1998] 2 SCR 795 – followed.**

Union Carbide Corporation and Others v. Union of India and Others **(1991) 4 SCC 584 : [1991] 1 Suppl. SCR 251;** *Amardeep Singh v. Harveen Kaur* **(2017) 8 SCC 746 : [2017] 8 SCR 925;** *Amit Kumar v. Suman Beniwal* **(2021) SCC Online SC 1270 – relied on.**

Poonam v. Sumit Tanwar **(2010) 4 SCC 460 : [2010] 3 SCR 557 – affirmed.**

Manish Goel v. Rohini Goel **(2010) 4 SCC 393 : [2010] 2 SCR 414;** *Anjana Kishore v. Puneet Kishore* **(2002) 10 SCC 194;** *Pradip Chandra Parija and Others v. Pramod Chandra Patnaik and Others* **(2002) 1 SCC 1 : [2001]**

5 Suppl. SCR 460; *State (Through Central Bureau of Investigation) v. Kalyan Singh (Former Chief Minister of Uttar Pradesh) and Others* **(2017) 7 SCC 444 : [2017] 6 SCR 946;** *I. C. Golak Nath and Others v. State of Punjab and Another* **AIR 1967 SC 1643 : [1967] SCR 762;** *B.S. Joshi and Others v. State of Haryana and Another* **(2003) 4 SCC 675 : [2003] 2 SCR 1104;** *Gian Singh v. State of Punjab and Another* **(2012) 10 SCC 303 : [2012] 8 SCR 753;** *Jitendra Raghuvanshi and Others v. Babita Raghuvanshi and Another* **(2013) 4 SCC 58 : [2013] 2 SCR 921;** *State of Madhya Pradesh v. Laxmi Narayan and Others* **(2019) 5 SCC 688 : [2019] 2 SCR 864;** *N.G. Dastane v. S. Dastane* **(1975) 2 SCC 326 : [1975] 3 SCR 967;** *V. Bhagat v. D. Bhagat* **(1994) 1 SCC 337 : [1993] 3 Suppl. SCR 796;** *Ashok Hurra v. Rupa Bipin Zaveri* **(1997) 4 SCC 226 : [1997] 2 SCR 875;** *Naveen Kohli v. Neelu Kohli* **(2006) 4 SCC 558 : [2006] 3 SCR 53;** *Munish Kakkar v. Nidhi Kakkar* **(2020) 14 SCC 657 : [2019] 15 SCR 169;** *Sivasankaran v. Santhimeenal* **2021 SCC OnLine SC 702;** *R. Srinivas Kumar v. R. Shametha* **(2019) 9 SCC 409 : [2019] 12 SCR 873;** *Hitesh Bhatnagar v. Deepa Bhatnagar* **(2011) 5 SCC 234 : [2011] 6 SCR 118;** *Sureshta Devi v. Om Prakash* **(1991) 2 SCC 25 : [1991] 1 SCR 274;** *Smruti Pahariya v. Sanjay Pahariya* **(2009) 13 SCC 338 : [2009] 8 SCR 631;** *Shyam Sundar Kohli v. Sushma Kohli Alias Satya Devi* **(2004) 7 SCC 747;** *Darshan Gupta v. Radhika Gupta* **(2013) 9 SCC 1 : [2013] 10 SCR 937;** *Gurbux Singh v. Harminder Kaur* **(2010) 14 SCC 301 : [2010] 12 SCR 275;** *Neelam Kumar v. Dayarani* **(2010) 13 SCC 298;** *Satish Sitole v. Ganga* **(2008) 7 SCC 734 : [2008] 10 SCR 767;** *Vishnu Dutt Sharma v. Manju Sharma* **(2009) 6 SCC 379 : [2009] 3 SCR 891;** *Savitri Pandey v. Prem Chandra Pandey* **(2002) 2 SCC 73 : [2002] 1 SCR 50;** *Jorden Diengdeh v. S.S. Chopra* **(1985) 3 SCC 62 : [1985] 1 Suppl. SCR 704 – referred to.**

Horton v. Horton **[1940] P.187;** *Owens v. Owens* **(2018) UKSC 41 – referred to.**

KAUSHAL KISHOR
v.
STATE OF UTTAR PRADESH & ORS.

(Writ Petition (Criminal) No. 113 of 2016)

JANUARY 03, 2023

[S. ABDUL NAZEER, B. R. GAVAI, A. S. BOPANNA, V. RAMASUBRAMANIAN* AND B. V. NAGARATHNA, JJ.]

Constitution of India – Arts. 19(1)(a) and 19(2) – Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights – Held: The grounds lined up in Art.19(2) for restricting the right to free speech are exhaustive – Under the guise of invoking other fundamental rights or under the guise of two fundamental rights staking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual.

Constitution of India – Arts. 19 and 21 – Can a fundamental right under Article 19 or 21 be claimed other than against the 'State' or its instrumentalities – Held (per V. Ramasubramanian, J.) (for S. Abdul Nazeer, B.R. Gavai and A.S. Bopanna, JJ., and himself): A fundamental right under Article 19/21 can be enforced even against persons other than the State or its instrumentalities – Held (per B.V. Nagarathna, J.): The rights in the realm of common law, which may be similar or identical in their content to the Fundamental Rights under Article 19/21, operate horizontally – However, the Fundamental Rights under Arts. 19 and 21, may not be justiciable horizontally before the Constitutional Courts except those rights which have been statutorily recognised and in accordance with the applicable law – However, they may be the basis for seeking common law remedies – But a remedy in the form of writ of Habeas Corpus, if sought against a private person on the basis of Article 21 can be before a Constitutional Court i.e., by way of Article 226 before the High Court or Article 32 read with Article 142 before the Supreme Court.

Constitution of India – Art. 21 – Whether the State is under a duty to

affirmatively protect the rights of a citizen under Art.21 even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency – Held (per V. Ramasubramanian, J.) (for S. Abdul Nazeer, B.R. Gavai and A.S. Bopanna, JJ., and himself): The State is under a duty to affirmatively protect the rights of a person under Article 21, whenever there is a threat to personal liberty, even by a non-State actor – Held (per B.V. Nagarathna, J.): The duty cast upon the State under Article 21 is a negative duty not to deprive a person of his life and personal liberty except in accordance with law – The State has an affirmative duty to carry out obligations cast upon it under statutory and constitutional law, which are based on the Fundamental Right guaranteed under Article 21 of the Constitution – Such obligations may require interference by the State where acts of a private actor may threaten the life or liberty of another individual –Failure to carry out the duties enjoined upon the State under statutory law to protect the rights of a citizen, could have the effect of depriving a citizen of his right to life and personal liberty – When a citizen is so deprived of his right to life and personal liberties, the State would have breached the negative duty cast upon it under Art.21.

Doctrines / Principles – Principle of Collective Responsibility – Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility – Held (per V. Ramasubramanian, J.) (for S. Abdul Nazeer, B.R. Gavai and A.S. Bopanna, JJ., and himself) : A statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility – Held (per B.V. Nagarathna, J.): A statement made by a Minister if traceable to any affairs of the State or for protecting the Government, can be attributed vicariously to the Government by invoking the principle of collective responsibility, so long as such statement represents the view of the Government also – If such a statement is not consistent with the view of the Government, then it is attributable to the Minister personally.

Tort – Constitutional Tort – Whether a statement by a Minister, inconsistent with the rights of a citizen under Part III of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort" – Held (per V. Ramasubramanian, J.) (for S. Abdul Nazeer, B.R. Gavai and A.S. Bopanna, JJ., and himself) : A mere statement

made by a Minister, inconsistent with the rights of a citizen under Part III of the Constitution, may not constitute a violation of the constitutional rights and become actionable as Constitutional tort – But if as a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort – Held (Per B.V. Nagarathna, J.): A proper legal framework is necessary to define the acts or omissions which would amount to constitutional tort and the manner in which the same would be redressed or remedied on the basis of judicial precedent.

Answering the Reference, the Court

Per V. Ramasubramanian, J. (For S. Abdul Nazeer, B.R. Gavai, and A.S. Bopanna, JJ. and himself) (Majority opinion)

HELD:

1. **The restrictions under clause (2) of Article 19 are comprehensive enough to cover all possible attacks on the individual, groups/classes of people, the society, the court, the country and the State. This is why this Court repeatedly held that any restriction which does not fall within the four corners of Article 19(2) will be unconstitutional. [Para 28]**

2. **That the Executive cannot transgress its limits by imposing an additional restriction in the form of Executive or Departmental instruction was emphasised by this Court in Bijoe Emmanuel vs. State of Kerala. The Court made it clear that the reasonable restrictions sought to be imposed must be through "a law" having statutory force and not a mere Executive or Departmental instruction. The restraint upon the Executive not to have a back-door intrusion applies equally to Courts. While Courts may be entitled to interpret the law in such a manner that the rights existing in blue print have expansive connotations, the Court cannot impose additional restrictions by using tools of interpretation. [Para 29]**

3. **Since the eight heads of restrictions contained in clause (2) of Article 19 seek to protect: (i) the individual – against the infringement of his dignity, reputation, bodily autonomy and property; (ii) different sections of society professing and practicing, different religious**

beliefs/sentiments against offending their beliefs and sentiments; (iii) classes/groups of citizens belonging to different races, linguistic identities etc. against an attack on their identities; (iv) women and children – against the violation of their special rights; (v) the State against the breach of its security; (vi) the country against an attack on its sovereignty and integrity; (vii) the Court – against an attempt to undermine its authority, and therefore the restrictions contained in clause (2) of Article 19 are exhaustive and no further restriction need to be incorporated. [Para 32]

4. **In any event, the law imposing any restriction in terms of clause (2) of Article 19 can only be made by the State and not by the Court. The role envisaged in the Constitutional scheme for the Court, is to be a gatekeeper (and a conscience keeper) to check strictly the entry of restrictions, into the temple of fundamental rights. The role of the Court is to protect fundamental rights limited by lawful restrictions and not to protect restrictions and make the rights residual privileges. Clause (2) of Article 19 saves (i) the operation of any existing law; and (ii) the making of any law by the State. Therefore, it is not for the court to add one or more restrictions than what is already found. [Para 33]**

5. **The exercise of all fundamental rights by all citizens is possible only when each individual respects the other person's rights. This Court has always struck a balance whenever it was found that the exercise of fundamental rights by an individual, caused inroads into the space available for the exercise of fundamental rights by another individual. The emphasis even in the Preamble on "fraternity" is an indication that the survival of all fundamental rights and the survival of democracy itself depends upon mutual respect, accommodation and willingness to coexist in peace and tranquility on the part of the citizens. The Fundamental Duty enjoined upon every citizen of the country under Article 51A(e) to "promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women", is also an indicator that no one can exercise his fundamental right in a manner that infringes upon the fundamental right of another. [Para 40]**

6. The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other fundamental rights or under the guise of two fundamental rights staking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual. [Para 45]

7. Wherever Constitutional rights regulate and impact only the conduct of the Government and Governmental actors, in their dealings with private individuals, they are said to have "a vertical effect". But wherever Constitutional rights impact even the relations between private individuals, they are said to have "a horizontal effect". [Para 47]

8. After defining the expression "the State" in Article 12 and after declaring all laws inconsistent with or in derogation of the fundamental rights to be void under Article 13, Part III of the Constitution proceeds to deal with rights. There are some Articles in Part III where the mandate is directly to the State and there are other Articles where without injuncting the State, certain rights are recognized to be inherent, either in the citizens of the country or in persons. In fact, there are two sets of dichotomies that are apparent in the Articles contained in Part III. One set of dichotomy is between (i) what is directed against the State; and (ii) what is spelt out as inhering in every individual without reference to the State. The other dichotomy is between (i) citizens; and (ii) persons. The Articles of Part-III are in the form of a directive to the State, while others are not. This is an indication that some of the rights conferred by Part III are to be honored by and also enforceable against, non-State actors. [Para 73, 74]

9. The original thinking of this Court that these rights can be enforced only against the State, changed over a period of time. The transformation was from "State" to "Authorities" to "instrumentalities of State" to "agency of the Government" to "impregnation with Governmental character" to "enjoyment of monopoly status conferred by State" to "deep and pervasive control" to the "nature of the duties/functions performed". Therefore "A fundamental right under Article 19/21 can be enforced even against persons other than the State or its instrumentalities". [Para 78]

10. The expression "the State" is not used in Article 21. This Article 21 guarantees every person that he shall not be deprived of his life and liberty except according to the procedure established by law. Going by the scheme of Part III it is clear that the State has two obligations, (i) not to deprive a person of his life and liberty except according to procedure established by law; and (ii) to ensure that the life and liberty of a person is not deprived even otherwise. Article 21 does not say "the State shall not deprive a person of his life and liberty", but says that "no person shall be deprived of his life or personal liberty". [Para 81]

11. The understanding of this Court in A.K. Gopalan, that deprivation of personal liberty required a physical restraint, underwent a change in Kharak Singh and Gobind . From there, the law marched to the next stage in Satwant Singh Sawhney vs. D. Ramarathnam, Assistant Passport Officer, New Delhi where a Constitution Bench of this Court held by a majority, that the right to personal liberty included the right of locomotion and right to travel abroad. It was held in the said decision that "liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U.S. Constitution and the expression "personal liberty" in Article 21 only excludes the ingredients of "liberty" enshrined in Article 19 of the Constitution. The Court went on to hold that "the expression "personal liberty" in Art. 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Art. 19. [Para 88]

12. Technological eavesdropping except in accordance with the procedure established by law was frowned upon by the Court. This was at a time when mobile phones had not become the order of the day and the State monopoly was yet to be replaced by private players such as intermediaries/service providers. Today, the infringement of the right to privacy is mostly by private players and if fundamental rights cannot be enforced against non-State actors, this right will go for a toss. [Para 97]

13. The expression "collective responsibility" can be traced to some extent, to Article 75(3) insofar as the Union is concerned and to

Article 164(2) insofar as the States are concerned. But in both the Articles, it is the Council of Ministers who are stated to be collectively responsible to the House of the People/Legislative Assembly of the State. Generally collective responsibility of the Council of Ministers either to the House of the People or to the Assembly should be understood to correlate to the decisions and actions of the Council of Ministers and not to every statement made by every individual Minister. [Para 112]

14. What follows from the discussion is, (i) that the concept of collective responsibility is essentially a political concept; (ii) that the collective responsibility is that of the Council of Ministers; and (iii) that such collective responsibility is to the House of the People/ Legislative Assembly of the State. Generally, such responsibility correlates to (i) the decisions taken; and (ii) the acts of omission and commission done. It is not possible to extend this concept of collective responsibility to any and every statement orally made by a Minister outside the House of the People/Legislative Assembly. A statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility. [Para 126, 137]

15. This Court and the High Courts have been consistent in invoking Constitutional tort whenever an act of omission and commission on the part of a public functionary, including a Minister, caused harm or loss. But the matter pre-eminently deserves a proper legal framework so that the principles and procedure are coherently set out without leaving the matter open ended or vague. In fact, the First Report of the Law Commission submitted a draft bill way back in 1956. This Court recommended a legislative measure in *Kasturi Lal* in 1965 and a bill called *Government (Liability in Torts) Bill* was introduced in 1967. But nothing happened in the past 55 years. In such circumstances, courts cannot turn a blind eye but may have to imaginatively fashion the remedy to be provided to persons who suffer injury or loss, without turning them away on the ground that there is no proper legal frame work. Therefore, "*A mere statement made by a Minister, inconsistent with the rights of a citizen under Part III of the Constitution, may not constitute*

***a violation of the constitutional rights and become actionable as Constitutional tort. But if as a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort*". [Para 153, 154]**

Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India **(2012) 10 SCC 603 : [2012] 12 SCR 256;** *Justice K.S. Puttaswamy v. Union of India* **(2017) 10 SCC 1 : [2017] 10 SCR 569;** *A. Sanjeevi Naidu v. State of Madras* **(1970) 1 SCC 443 : [1970] 3 SCR 505** *and State of Karnataka v. Union of India.* **(1977) 4 SCC 608 : [1978] 2 SCR 1 – followed.**

Express Newspapers (Private) Ltd. v. The Union of India **[1959] SCR 12;** *Sakal Papers (P) Ltd. v. The Union of India* **[1962] 3 SCR 842;** *Bijoe Emmanuel v. State of Kerala* **(1986) 3 SCC 615 : [1986] 3 SCR 518;** *Ram Jethmalani v. Union of India (2011)* **8 SCC 1 : [2011] 8 SCR 725;** *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal* **(1995) 2 SCC 161 : [1995] 1 SCR 1036;** *Ramlila Maidan Incident, in re.* **(2012) 5 SCC 1 : [2012] 4 SCR 971;** *R. Rajagopal alias R. R. Gopal v. State of T.N* **(1994) 6 SCC 632 : [1994] 4 Suppl. SCR 353;** *People's Union for Civil Liberties (PUCL) v. Union of India* **(2003) 4 SCC 399 : [2003] 2 SCR 1136;** *Noise Pollution (V.), in Re* **(2005) 5 SCC 733 : [2005] 1 Suppl. SCR 624;** *Thalappalam Service Cooperative Bank Ltd. v. State of Kerala* **(2013) 16 SCC 82 : [2013] 14 SCR 475;** *Subramanian Swamy v. Union of India, Ministry of Law* **(2016) 7 SCC 221 : [2016] 3 SCR 865;** *Asha Ranjan v. State of Bihar* **(2017) 4 SCC 397 : [2017] 1 SCR 945;** *Railway Board representing the Union of India v. Niranjan Singh* **(1969) 1 SCC 502 : [1969] 3 SCR 548;** *Life Insurance Corporation of India v. Prof. Manubhai D. Shah* **(1992) 3 SCC 637 : [1992] 3 SCR 595;** *S. Krishnan v. State of Madras* **AIR 1951 SC 301 : [1951] SCR 621;** *Pt. Parmanand Katara v. Union of India* **(1989) 4 SCC**

286 : [1989] 3 SCR 997; *Shakti Vahini v. Union of India & Ors.* **(2018) 7 SCC 192 : [2018] 3 SCR 770;** *R.K. Jain v. Union of India* **(1993) 4 SCC 119 : [1993] 3 SCR 802;** *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain* **(1997) 1 SCC 35 : [1996] 6 Suppl. SCR 584;** *Vineet Narain v. Union of India* **(1998) 1 SCC 226 : [1997] 6 Suppl. SCR 595;** *Common Cause, A Registered Society v. Union of India* **(1999) 6 SCC 667 : [1999] 3 SCR 1279** *and State (NCT of Delhi) v. Union of India* **(2018) 8 SCC 501 : [2018] 7 SCR 1 – relied on.**

Amish Devgan v. Union of India **(2021) 1 SCC 1 – distinguished.**

Romesh Thappar v. State of Madras **AIR 1950 SC 124 : [1950] SCR 594;** *Rustom Cavasjee Cooper v. Union of India* **(1970) 1 SCC 248 : [1970] 3 SCR 530;** *Satwant Singh Sawhney v. D. Ramarathna m, Assistant Passport Officer, New Delhi* **AIR 1967 SC 1836 : [1967] 2 SCR 525;** *Maneka Gandhi v. Union of India* **(1978) 1 SCC 248 : [1978] 2 SCR 621;** *Bandhua Mukti Morcha v. Union of India & Ors.* **(1984) 3 SCC 161 : [1984] 2 SCR 67;** *National Human Rights Commission v. State of Arunachal Pradesh & Anr.* **(1996) 1 SCC 742 : [1996] 1 SCR 278;** *Mr. 'X' v. Hospital 'Z'* **(1998) 8 SCC 296 : [1998] 1 Suppl. SCR 723;** *People's Union for Civil Liberties (PUCL) v. Union of India* **(1997) 1 SCC 301 : [1996] 10 Suppl. SCR 321;** *M/s. Kasturi Lal Ralia Ram Jain v. The State of Uttar Pradesh,* **AIR 1965 SC 1039 : [1965] 1 SCR 375;** *State of Rajasthan v. Mst. Vidhyawati* **AIR 1962 SC 933 : [1962] Suppl. SCR 989;** *Rudul Sah v. State of Bihar* **(1983) 4 SCC 141 : [1983] 3 SCR 508;** *Nilabati Behera (Smt.) Alias Lalita Behera (Through the Supreme Court Legal Aid Committee) v. State of Orissa* **(1993) 2 SCC 746 : [1993] 2 SCR 581;** *Jumuna Prasad Mukhariya v. Lachhi Ram* **[1955] 1 SCR 608;** *People's Union for Democratic Rights v. Union of India* **(1982) 3 SCC 235 : [1983] 1 SCR 456;** *Bodhisattwa Gautam v. Subhra Chakraborty (Ms.)* **(1996) 1 SC 490 : [1995] 6**

Suppl. SCR 731; *M. C. Mehta v. Kamal Nath* **(2000) 6 SCC 213 : [2000] 1 Suppl. SCR 389;** *P. D. Shamdasani v. Central Bank of India Ltd.* **[1952] SCR 391;** *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal* **(2010) 3 SCC 571 : [2010] 2 SCR 979;** *S. Rangarajan v. P. Jagjivan Ram* **(1989) 2 SCC 574 : [1989] 2 SCR 204;** *Union of India v. K.M. Shankarappa* **(2001) 1 SCC 582 : [2000] 5 Suppl. SCR 117;** *Indibly Creative Private Limited v. Government of West Bengal* **(2020) 12 SCC 436 : [2019] 5 SCR 679;** *State of Maharashtra vs. Sarangdharsingh Shivdassingh Chavan* **(2011) 1 SCC 577 : [2010] 15 SCR 1145;** *Manoj Narula v. Union of India* **(2014) 9 SCC 1 : [2014] 9 SCR 965;** *R. Sai Bharathi v. J. Jayalalitha* **(2004) 2 SCC 9 : [2003] Suppl. SCR 85;** *Praga Tools Corporation v. Shri C.A. Imanual* **(1969) 1 SCC 585 : [1969] 3 SCR 773;** *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotasav Smarak Trust v. V. R. Rudani* **(1989) 2 SCC 691 : [1989] 2 SCR 697;** *M. C. Mehta v. Union of India* **AIR 1987 SC 1086 : [1987] 1 SCR 819;** *Binny Ltd. v. V. Sadasivan* **(2005) 6 SCC 657 : [2005] 2 Suppl. SCR 421;** *Society for Unaided Private Schools of Rajasthan v. Union of India* **(2012) 6 SCC 1 : [2012] 2 SCR 715;** *Pravasi Bhalai Sangathan v. Union of India* **(2014) 11 SCC 477 : [2014] 4 SCR 446;** *Kodungallur Film Society v. Union of India* **(2018) 10 SCC 713 : [2018] 12 SCR 695;** *Brij Bhushan v. The State of Delhi* **AIR 1950 SC 129 : [1950] SCR 605;** *State of Madras v. V. G. Row* **(1952) 1 SCC 410;** *Smt. Vidya Varma v. Dr. Shiv Narain Varma* **AIR 1956 SC 108 : [1955] 2 SCR 983;** *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* **(1975) 1 SCC 421 : [1975] 3 SCR 619;** *Lucknow Development Authority v. M.K. Gupta* **(1994) 1 SCC 243 : [1993] 3 Suppl. SCR 615;** *Chairman, Railway Board & Ors. v. Chandrima Das (Mrs.) & Ors.* **(2000) 2 SCC 465 : [2000] 1 SCR 480;** *M. C. Mehta v. Kamal Nath* **(1997) 1 SCC 388 : [1996] 10 Suppl. SCR 12;** *Vellore Citizens' Welfare Forum v. Union of India* **(1996) 5 SCC 647 : [1996] 5 Suppl. SCR 241;** *Indian Council for Enviro-Legal Action*

v. Union of India **(1996) 3 SCC 212 : [1996] 2 SCR 503;** *Consumer Education & Research Centre & Ors. v. Union of India & Ors.* **(1995) 3 SCC 42 : [1995] 1 SCR 626;** *Vishaka v. State of Rajasthan* **(1997) 6 SCC 241 : [1997] 3 Suppl. SCR 404;** *Medha Kotwal Lele & Ors. v. Union of India* **(2013) 1 SCC 297 : [2012] 9 SCR 895;** *Githa Hariharan (Ms.) & Anr. v. Reserve Bank of India & Anr.* **(1999) 2 SCC 228 : [1999] 1 SCR 669;** *Indian Medical Association v. Union of India* **(2011) 7 SCC 179 : [2011] 6 SCR 599;** *Jeeja Ghosh v. Union of India* **(2016) 7 SCC 761 : [2016] 4 SCR 638;** *Zee Telefilms Ltd. v. Union of India* **(2005) 4 SCC 649 : [2005] 1 SCR 913;** *Janet Jeyapaul v. SRM University* **(2015) 16 SCC 530 76;** *A. K. Gopalan v. State of Madras* **AIR 1950 SC 27 : [1950] SCR 88;** *R. D. Shetty v. International Airport Authority* **(1979) 3 SCC 489 : [1979] 3 SCR 1014;** *Andi Mukta v. V. R. Rudani* **(1989) 2 SCC 691 : [1989] 2 SCR 697;** *Siddharam Satlingappa Mhetre v. State of Maharashtra* **(2011) 1 SCC 694 : [2010] 15 SCR 201;** *Kharak Singh v. State of U.P.* **AIR 1963 SC 1295 : [1964] 1 SCR 332;** *Mohd. Arif Alias Ashfaq v. Registrar, Supreme Court of India & Ors.* **(2014) 9 SCC 737 : [2014] 11 SCR 1009;** *Gobind v. State of Madhya Pradesh* **(1975) 2 SCC 148 : [1975] 3 SCR 946;** *Suchita Srivastava & Anr. v. Chandigarh* **(2009) 9 SCC 1 : [2009] 13 SCR 989;** *Devika Biswas v. Union of India* **(2016) 10 SCC 726;** *District Registrar and Collector, Hyderabad & Anr. v. Canara Bank & Ors.* **(2005) 1 SCC 496 : [2004] 5 Suppl. SCR 833;** *Indian Woman says Gang-raped on orders of village Court published in Business and Financial News dated 23-1-2014, in Re* **(2014) 4 SCC 786 : [2014] 4 SCR 264;** *Lata Singh v. State of U.P.* **(2006) 5 SCC 475 : [2006] 3 Suppl. SCR 350;** *Arumugam Servai v. State of Tamil Nadu* **(2011) 6 SCC 405 : [2011] 5 SCR 488;** *The State of Bihar v. Abdul Majid* **AIR 1954 SC 245 : [1954] SCR 786** *and Khatri (II) vs. State of Bihar* **(1981) 1 SCC 627 : [1981] 2 SCR 408 – referred to.**

John Meskell v. Córas Iompair Éireann **1973 IR 121 1972 IR 330;** *Murtagh Properties Limited v. Cleary* **121 1972 IR**

330; *Shelly v. Kraemer* **334 U.S. 1 (1948); Lûth Luth (1958) BVerfGE 7, 198;** *Gitlow v. New York* **286 US 652 (1925); "Civil Rights Cases" 109 US 3 (1883);** *Jones v. Alfred H. Mayer Co* **392 US 409 (1968);** *New York Times v. Sullivan* **376 U.S. 254 (1964);** *Du Plessis and Others v. De Klerk and Another* **1996 ZACC 10;** *Khumalo v. Holomisa* **(2002) ZACC 12;** *Governing Body of the Juma Musjid Primary School & Others v. Essay N.O. and Others* **(CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC);** *Douglas v. Hello! Ltd.* **[2001] QB 967; X v. Y [2004] EWCA Civ 662;** *Plattform "Ärzte Für Das Leben" v. Austria* **[1988] ECHR 15** *X and Y v. The Netherlands* **[1985] ECHR 4** *Marsh v. Alabama* **326 US 501 (1946) – referred to.**

Anup Surendranath - Article on "Life and Personal Liberty" in The Oxford Handbook of the Indian Constitution (South Asia Edition), 2016 and Frances Kamm, Morality, **Mortality Vol.2, Oxford University Press, 1996 – referred to.**

Per B. V. NAGARATHNA, J. (Partly dissenting)

HELD:

1. **The freedom of speech and expression as envisaged under Article 19(1)(a) of the Constitution means the right to free speech and to express opinions through various media such as by word of mouth, through the print or electronic media, through pictographs, writings, graphics or any other manner that can be discerned by the mind. The right includes the freedom of press. The content of this right also includes propagation of ideas through publication and circulation, the right to seek information and to acquire or impart ideas. In short, the right to free speech would include every nature of right that would come within the scope and ambit of free speech. Hence, Article 19(1)(a) in very broad and in wide terms states that all citizens shall have the right to freedom of speech and expression. The said right can be curtailed only by reasonable restrictions which are enumerated in Article 19(2) thereof which can be imposed by the State under the authority of law but not by**

exercise of executive power in the absence of any law. Further, the nature of restrictions on right to free speech must be reasonable, and in the interest of the sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. (Article 19(2)). For a country like ours which is a Parliamentary Democracy, freedom of speech and expression is a necessary right as well as a concomitant for the purpose of not only ensuring a healthy democracy but also to ensure that the citizens could be well informed and educated on governance. The dissemination of information through various media, including print and electronic media or audio visual form, is to ensure that the citizens are enlightened about their rights and duties, the manner in which they should conduct themselves in a democracy and for enabling a debate on the policies and actions of the Governments and ultimately for the development of the Indian society in an egalitarian way. The right to freedom of speech and expression in Article 19(1)(a) of the Constitution has its genesis in the Preamble of the Constitution which, *inter alia*, speaks of liberty of thought, expression, belief. Since, India is a sovereign democratic republic and we follow a parliamentary system of democracy, liberty of thought and expression is a significant freedom and right under our constitutional setup. [Para 12.3, 12.4, 12.5]

2. The Constitution of India confers under Article 19(1)(a), the right to freedom of speech and expression to all its citizens. The State has a corelative duty to abstain from interference with such right except as provided in Article 19(2) of the Constitution which are reasonable restrictions on the right conferred under Article 19(1)(a). The extent of such duty depends upon the content of speech. For instance, in respect of speech that is likely to be adverse to the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality; or speech that constitutes contempt of court, defamation or is of such nature as would be likely to incite the commission of an offence, the duty of the State to abstain from interference, is nil. This principle is Constitutionally reflected under Article 19(2) which enables the State to enact law which would impose reasonable

restrictions on such speech as described under eight grounds which are the basis for reasonable restrictions. [Para 14.1]

3. **The extent of protection of speech would depend on whether, such speech would constitute a 'propagation of ideas' or would have any social value. If the answer to the said question is in the affirmative, such speech would be protected under Article 19(1)(a); if the answer is in the negative, such speech would not be protected under Article 19(1)(a). In respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference having regard to Article 19(2) of the Constitution and only the grounds mentioned therein. [Para 14.1]**

4. **Having noted that the protective perimeter within which a person can exercise his/her rights depends on the degree to which the State is duty bound to protect the right, it may also be said as a corollary that in respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference and therefore, speech such as hate speech, defamatory speech, etc. would lie outside the protective perimeter within which a person can exercise his right to freedom of speech. Such speech can be subjected to restrictions or restraints. While restrictions on the right to freedom of speech and expression are required to be made only under the grounds listed under Article 19(2), by the State, restraints on the said right, do not gather their strength from Article 19(2). Restraints on the right to freedom of speech and expression are governed by the content of Article 19(1)(a) itself; i.e., any kind of speech, which does not conform to the content of the right under Article 19(1)(a), may be restrained. Questions pertaining to the voluntary or binding nature of such restraint, the force behind the same, the persons on whom such restraints are to be imposed, the manner in which compliance thereof could be achieved, etc., are aspects left to be deliberated upon and answered by the Parliament. However, the finding made hereinabove is only to the extent of clarifying that any kind of speech, which does not form the content of Article 19(1)(a), may be restrained as such speech does not constitute an exchange of ideas, in a manner compatible with the ethos cultivated in a civilised society. Such restraints need not be traceable only to Article 19(2), which exhaustively lists eight grounds**

on which restrictions may be imposed on the right to freedom of speech and expression by the state. [Para 14.1]

5. Article 19(1)(a) serves as a vehicle through which dissent can be expressed. The right to dissent, disagree and adopt varying and individualistic points of view inheres in every citizen of this Country. In fact, the right to dissent is the essence of a vibrant democracy, for it is only when there is dissent that different ideas would emerge which may be of help or assist the Government to improve or innovate upon its policies so that its governance would have a positive effect on the people of the country which would ultimately lead to stability, peace and development which are concomitants of good governance. [Para 15.2]

6. Equality, liberty and fraternity are the foundational values embedded in the Preamble of our Constitution. 'Hate speech', in the sense discussed, strikes at each of these foundational values, by marking out a society as being unequal. It also violates fraternity of citizens from diverse backgrounds, the sine-qua-non of a cohesive society based on plurality and multi-culturalism such as in India that is, Bharat. Democracy, being one of the basic features of our Constitution, it is implicit that in a rule by majority there would be a sense of security and inclusiveness. Further, the Preamble of the Constitution which envisages, *inter alia*, fraternity, assures that the dignity of individuals cannot be dented by means of unwarranted speech being made by fellow citizens, including public functionaries. Thus, the Preamble of the Constitution and the values thereof assuring the people of India not only justice, liberty, equality but also fraternity and unity and integrity of the nation, must remind every citizen of this Country irrespective of the office or position or power that is held, of the sublime ideals of the Constitution and to respect them in their true letter and spirit. There is an inbuilt constitutional check to ensure that the values of the Constitution are not in any way undermined or violated. It is high time that we, as a society in general and as individuals in particular, re-dedicate ourselves to the sacred values of the Constitution and promote them not only at our individual level but at the macro level. Any kind of speech which undermines the

values for which our Constitution stands would cause a dent on our social and political values. [Para 26, 27.3]

7. The status of the violator of the right, is also an essential parameter for distinction between the two rights and corresponding remedies. Where the interference with a recognized right is by the State or any other entity recognized under Article 12, a claim for the violation of a fundamental right would lie under Articles 32 and 226 of the Constitution before this Court or before the High Court respectively. Where interference is by an entity other than State or its instrumentalities, an action would lie under common law and to such extent, the legal scheme recognises horizontal operation of such rights. Though the content of the Fundamental Right may be identical under the Constitution with the common law right, it is only the common law right that operates horizontally except when those Fundamental Rights have been transformed into statutory rights under specific enactments or where horizontal operation has been expressly recognised under the Constitution. [Para 42, 43]

8. Recognising a horizontal approach of Fundamental Rights between citizens inter se would set at naught and render redundant, all the tests and doctrines forged by this Court to identify "State" for the purpose of entertaining claims of fundamental rights violations. Had the intention of this Court been to allow Fundamental Rights, including the rights under Articles 19 and 21, to operate horizontally, this Court would not have engaged in evolving and refining tests to determine the true meaning and scope of "State" as defined under Article 12. This Court would have simply entertained claims of fundamental rights violations against all persons and entities, without deliberating on fundamental questions as to maintainability of the writ petitions. Although this Court has significantly expanded the scope of "State" as defined under Article 12, such expansion is based on considerations such as the nature of functions performed by the entity in question and the degree of control exercised over it by the State as such. This is significantly different from recognising horizontality of the fundamental rights under Articles 19 and 21, except while seeking a writ in the nature of habeas corpus. Such a recognition would amount to disregarding the jurisprudence evolved by this Court as to the scope of Article 12 of the Constitution.

Another aspect that needs consideration is that a Writ Court, does not ordinarily adjudicate to issue Writs in cases where alternate and efficacious remedies exist under common law or statutory law particularly against private persons. Therefore, even if horizontal operation of the Fundamental Rights under Article 19/21 is recognised, such recognition would be of no avail because the claim before a Writ Court of fundamental rights violations would fail on the ground that the congruent common law right which is identical in content to the Fundamental Right, may be enforced by having recourse to common law remedies. Therefore, on the ground that there exists an alternate and efficacious remedy in common law, the horizontal claim for fundamental rights violations would fail before a Writ Court. [Para 43]

9. **The duty cast upon the State under Article 21 is a negative duty not to deprive a person of his life and personal liberty except in accordance with law. The State has an affirmative duty to carry out obligations cast upon it under statutory and constitutional law, which are based on the Fundamental Right guaranteed under Article 21 of the Constitution. Such obligations may require interference by the State where acts of a private actor may threaten the life or liberty of another individual. Failure to carry out the duties enjoined upon the State under statutory law to protect the rights of a citizen, could have the effect of depriving a citizen of his right to life and personal liberty. When a citizen is so deprived of his right to life and personal liberties, the State would have breached the negative duty cast upon it under Article 21. [Para 44]**

10. **A statement made by a Minister if traceable to any affairs of the State or for protecting the Government, can be attributed vicariously to the Government by invoking the principle of collective responsibility, so long as such statement represents the view of the Government also. If such a statement is not consistent with the view of the Government, then it is attributable to the Minister personally. [Para 45]**

11. **A proper legal framework is necessary to define the acts or omissions which would amount to constitutional tort and the manner in which the same would be redressed or remedied on the basis of judicial precedent. Particularly, it is not prudent to treat all cases where a**

statement made by a public functionary resulting in harm or loss to a person/citizen, as a constitutional tort, except in the context of the answer given to Question No. 4 . It is for the Parliament in its wisdom to enact a legislation or code to restrain, citizens in general and public functionaries, in particular, from making disparaging or vitriolic remarks against fellow citizens, having regard to the strict parameters of Article 19(2) and bearing in mind the freedom under Article 19(1) (a) of the Constitution of India. [Para 66, 67]

Pravasi Bhalai Sangathan v. Union of India **(2014) 11 SC 477 : [2014] 4 SCR 446;** *K. S. Puttaswamy (Retd.) v. Union of India* **(2019) 1 SCC 1 : [2018] 8 SCR 1;** *Subramanian Swamy v. Union of India* **(2016) 7 SCC 221 : [2016] 3 SCR 865;** *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala* **(1973) 4 SCC 225;** *People's Union for Civil Liberties v. Union of India* **(2005) 2 SCC 436 : [2005] 1 SCR 494;** *P. D. Shamdasani v. Central Bank of India Ltd.* **A.I.R. 1952 SC 59 : [1952] SCR 391;** *Zoroastrian Cooperative Housing Society Limited v. District Registrar, Cooperative Societies (Urban)* **(2005) 5 SCC 632 : [2005] 3 SCR 592;** *Ramakrishna Mission v. Kago Kunya* **(2019) 16 SCC 303 : [2019] 5 SCR 452;** *Parmanand Katara v. Union of India* **A.I.R. 1989 SC 2039 : [1989] 3 SCR 997;** *National Human Rights Commission v. State of Arunachal Pradesh* **(1996) 1 SCC 742 : [1996] 1 SCR 278;** *Gaurav Kumar Bansal v. Union of India* **(2015) 2 SCC 130 : [2014] 7 SCR 725** *and Swaraj Abhiyan v. Union of India* **(2016) 7 SCC 498 – relied on.**

Romesh Thappar v. State of Madras **A.I.R. 1950 SC 124 : [1950] SCR 594;** *S. Khushboo v. Kanniammal* **(2010) 5 SCC 600 : [2010] 5 SCR 322;** *Shreya Singhal v. Union of India* **(2015) 5 SCC 1 : [2015] 5 SCR 963;** *Sakal Papers (P) Ltd. v. Union of India* **A.I.R. 1962 SC 305 : [1962] 3 SCR 842;** *Life Insurance Corporation vs. Prof. Manubhai D. Shah* **(1992) 3 SCC 637 : [1992] 3 SCR 595;** *Kedar Nath Singh v. State of Bihar* **A.I.R. 1962 SC 955 : [1962] Suppl. SCR 769;** *Directorate General of Doordarshan v. Anand*

Patwardhan **(2006) 8 SCC 433 : [2006] 5 Suppl. SCR 403;** *Hamdard Dawakhana (Wakf) Lal Kuan v. Union of India* **A.I.R 1960 SC 554 : [1960] 2 SCR 671;** *Indian Express Newspaper (Bombay) Pvt. Ltd. v. Union of India* **(1985) 1 SCC 641 : [1985] 2 SCR 287;** *Tata Press Limited v. Mahanagar Telephone Nigam Limited* **(1995) 5 SCC 139 : [1995] 2 Suppl. SCR 467;** *Union of India v. Motion Picture Association* **A.I.R. 1999 SC 2334 : [1999] 3 SCR 875;** *National Legal Services Authority v. Union of India* **(2014) 5 SCC 438 : [2014] 5 SCR 119;** *Prabha Dutt v. Union of India* **(1982) 1 SCC 1 : [1982] 1 SCR 1184;** *Swapnil Tripathi v. Supreme Court of India* **(2018) 10 SCC 639 : [2018] 11 SCR 57;** *Union of India v. Naveen Jindal* **(2004) 2 SCC 510 : [2004] 1 SCR 1038;** *Bijoe Emmanuel v. State of Kerala* **(1986) 3 SCC 615 : [1986] 3 SCR 518;** *Amish Devgan v. Union of India* **(2021) 1 SCC 1;** *Charu Khurana v. Union of India* **(2015) 1 SCC 192 : [2014] 12 SCR 259;** *In Re. Noise Pollution (V)* **(2005) 5 SCC 733 : [2005] 1 Suppl. SCR 624;** *Additional District Magistrate, Jabalpur vs. Shivkant Shukla* **A.I.R. 1976 SC 1207 : [1976] Suppl. SCR 172;** *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology* **(2002) 5 SCC 111 : [2002] 3 SCR 100;** *Zee Telefilms Ltd. v. Union of India* **(2005) 4 SCC 649 : [2005] 1 SCR 913;** *Janet Jeyapaul v. S.R.M. University* **(2015) 16 SCC 530;** *Union of India v. Paul Manickam* **(2003) 8 SCC 342 : [2003] 4 Suppl. SCR 618;** *Mohd. Ikram Hussain v. State of Uttar Pradesh* **A.I.R. 1964 SC 1625 : [1964] 5 SCR 86;** *Nirmaljit Kaur (2) v. State of Punjab* **(2006) 9 SCC 364 : [2005] 5 Suppl. SCR 514;** *Union of India v. Paul Manickam* **(2003) 8 SCC 342 : [2003] 4 Suppl. SCR 618;** *Pt. Rudul Sah v. State of Bihar* **(1983) 4 SCC 141 : [1983] 3 SCR 508;** *Sebastian M. Hongray v. Union of India* **(1984) 3 SCC 82 : [1984] 3 SCR 544; Bhim Singh v. State of J&K (1985) 4 SCC 677; People's** *Union for Democratic Rights v. Police Commissioner* **(1989) 4 SCC 730;** *Saheli v. Commissioner of Police* **(1990) 1 SCC 422 : [1989] 2 Suppl. SCR 488;** *State of Maharashtra v. Ravikant S. Patil* **(1991) 2 SCC 373;** *Kumari v. State of*

Tamil Nadu **(1992) 2 SCC 223;** *Shakuntala Devi v. Delhi Electric Supply Undertaking* **(1995) 2 SCC 369;** *Tamil Nadu Electricity Board v. Sumanth* **(2000) 4 SCC 543 : [2000] 3 SCR 708;** *Railway Board v. Chandrima Das* **(2000) 2 SCC 465 : [2000] 1 SCR 480;** *Sabastian M. Hongray v. Union of India* **A.I.R. 1984 SC 1026 : [1984] 3 SCR 544;** *Bhim Singh, MLA v. State of Jammu and Kashmir* **A.I.R. 1986 SC : 494;** *Nilabati Behera v. State of Orissa* **(1993) 2 SCC 746 : [1993] 2 SCR 581;** *D. K. Basu v. State of West Bengal* **(1997) 1 SCC 416 : [1996] 10 Suppl. SCR 284;** *Hindustan Paper Corporation Ltd. v. Ananta Bhattacharjee* **(2004) 6 SCC 213;** *Chairman, Railway Board v. Chandrima Das* **(2000) 2 SCC 465 : [2000] 1 SCR 480;** *Kumari v. State of Tamil Nadu* **(1992) 2 SCC 223;** *Tamil Nadu Electricity Board v. Sumathi Das* **(2000) 4 SCC 543 : [2000] 3 SCR 708;** *and Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & amp; Allied Workers* **(2011) 8 SCC 568 : [2011] 12 SCR 34 – referred to.**

Chaplinsky v. State of New Hampshire **315 U.S.568 (1942);** *R v. James Keegstra* **[1990] 3 SCR 697;** *Canada Human Rights Commission v. Taylor* **[1990] 3 SCR 892;** *Pat Eatock v. Andrew Bolt* **(2011) FCA and** *Peninsular; Oriental Steam Navigation Co. v. Secy. of State* **(1868-69) 5** *Bom HCR APP 1 and Saskatchewan Human Rights Commission v. William Whatcott* **2013 SCC 11 – referred to.**

SUBHASH DESAI
v.
PRINCIPAL SECRETARY, GOVERNOR OF MAHARASHTRA & ORS.

(Writ Petition (C) No. 493 of 2022)

MAY 11, 2023

[DR. DHANANJAYA Y CHANDRACHUD*, CJI, M. R. SHAH, KRISHNA MURARI, HIMA KOHLI AND PAMIDIGHANTAM SRI NARASIMHA, JJ.]

Constitution of India: Art.191(2) – Maharashtra Legislative Assembly Rules – r.95 – Coalition Government – Split in Political Party – Losing Confidence of the House – Power of the Governor to call for Floor Test – After the State elections in 2019, a coalition government of Maha Vikas Agadi (MVA) [a post-poll alliance of Shiv Sena, Nationalist Congress Party (NCP), Indian National Congress (INC) and some independent MLAs] was formed in Maharashtra, with Mr. Thackeray of Shiv Sena as the Chief Minister – However, certain events transpired in mid-2022 which led to split in Shiv Sena into two factions, one led by Mr. Thackeray and the other led by Mr. Shinde – 34 Shiv Sena MLAs (of Shinde Group) issued notice to Deputy Speaker stating that he no longer enjoyed their support and calling upon him to move a motion for his own removal – In the meanwhile, notices were issued by the Deputy Speaker on petition filed by the Chief Whip of petitioners (Thackeray Group) under Tenth Schedule to the Constitution for disqualification of MLAs of Shinde Group – Governor, pursuant to letter addressed by the Opposition Party, called upon the Thackeray Group to prove majority on the floor of the House – Thackeray resigned on the very next day and thereafter a new Govt. was formed by a coalition consisting of BJP MLAs and rebel MLAs of Shiv Sena, with Mr. Shinde as the Chief Minister –Discretion and power of governor to invite a person to form the Government – Extent of – Held: The discretion to call for a floor test is not an unfettered discretion but one that must be exercised with circumspection, in accordance with the limits placed on it by law – The Governor had no objective material on the basis of which he could doubt the confidence of the incumbent government – The resolution on which the Governor relied

did not contain any indication that the MLAs wished to exit from the MVA government – Communication expressing discontent on the part of some MLAs is not sufficient for the Governor to call for a floor test – The Governor ought to apply his mind to the communication or other material before him to assess whether the Government seemed to have lost the confidence of the House – The 34 Shiv Sena MLAs did not express their desire to withdraw support from the MVA Government in the resolution – The floor test cannot be used as a medium to resolve internal party disputes or intra party disputes – In the present case, the Governor did not have any objective material before him to indicate that the incumbent government had lost the confidence of the House and that he should call for a floor test – Hence, exercise of discretion by the Governor in this case was not in accordance with law – The Governor was not justified in calling upon Mr. Thackeray to prove his majority on the floor of the House because he did not have reasons based on objective material before him, to reach the conclusion that Mr. Thackeray had lost the confidence of the House – However, the status quo ante cannot be restored because Mr. Thackeray did not face the floor test and tendered his resignation – The Governor was justified in inviting Mr. Shinde to form the government.

Constitution of India – Art.153 – Position of Governor – In Internal Disputes of a Political Party – Split in Political Party – Held: The Governor is the titular head of the State Government – He is a constitutional functionary who derives his authority from the Constitution and he cannot exercise a power that is not conferred on him by the Constitution or a law made under it – Neither the Constitution nor the laws enacted by Parliament provide for a mechanism by which disputes amongst members of a particular political party can be settled – They certainly do not empower the Governor to enter the political arena and play a role (however minute) either in inter-party disputes or in intra-party disputes.

Constitution of India: Tenth Schedule and Arts.32 & 226 – Power and Jurisdiction of Court – To adjudicate upon Disqualifications of Legislative Members – Held: Disqualification of a person for being a member of the House has drastic consequences for the member concerned and by extension, for the citizens of that constituency – Supreme Court should normally refrain from deciding disqualification petitions at the first instance, having due regard to constitutional intendment – The question of disqualification ought

to be adjudicated by the constitutional authority concerned, namely the Speaker of the Legislative Assembly, by following the procedure prescribed – The Speaker must decide disqualification petitions within a reasonable period.

Constitution of India: Art.181 – Reference to Larger Bench – Whether a notice for removal of a Speaker restricts them from continuing with disqualification proceedings under Tenth Schedule as held by this Court in Nabam Rebia – Held: Although the decision in Nabam Rebia is not applicable to the factual scenario, however, Nabam Rebia is in conflict with the judgement in Kihoto Hollohan – It appears that the majority in Nabam Rebia did not consider the effect and import of Article 181 of Constitution of India – Hence, the decision in Nabam Rebia merits reference to a larger Bench because a substantial question of law remains to be settled.

Constitution of India: Tenth Schedule – Maharashtra Legislative Members (Removal of Disqualification) Act, 1956 – s.23 – Maharashtra Legislative Assembly (Disqualification on Ground of Defection) Rules 1986 – Rule 3(1)(a) & 6 – Appointment of Whip – Difference between Political Party and Legislature Party – Held: The political party and not the legislature party appoints the Whip and the Leader – The Tenth Schedule would become unworkable if the term 'political party' is read as the 'legislature party' – A clear demarcation is made between political party and legislature party for the purpose of a merger under Paragraph 4 – To read the term 'political party' as 'legislature party' would be contrary to the plain language of the Tenth Schedule – Direction to vote in a particular manner or to abstain from voting is issued by the political party and not the legislature party – The Speaker must recognize the Whip and the Leader who are duly authorised by the political party after conducting an enquiry in this regard.

Constitution of India – Arts. 189(2) and 190(3) – Decision of Speaker – Disqualification of Member – Validity of Proceedings of the Legislature – Held: An MLA has the right to participate in proceedings of the House regardless of the pendency of any petitions for their disqualification – Validity of proceedings of the House in the interregnum is not "subject to" outcome of the disqualification petitions – Decision of the Speaker does not relate back to the date when the MLA indulged in prohibitory conduct – The decision of the Speaker and the consequences of disqualification are

prospective – If a member incurs disqualification under the Tenth Schedule, it does not automatically result in their expulsion from the political party to which they belong.

Constitution of India – Tenth Schedule – Election Symbols (Reservation and Allotment) Order, 1968 – Para 15 – Held: The Speaker and the ECI are empowered to concurrently adjudicate on the petitions before them under the Tenth Schedule and under Paragraph 15 of the Symbols Order respectively.

Election Symbols (Reservation and Allotment) Order, 1968 – Para 15 – Held: While adjudicating petitions under Paragraph 15 of the Symbols Order, the ECI may apply a test that is best suited to the facts and circumstances of the case before it.

Constitution of India – Tenth Schedule – Para 2(1) and Para 3 –Deletion of Paragraph 3 of the Tenth Schedule – Effect of – Held: Is that the defence of 'split' is no longer available to members facing disqualification proceedings – The Speaker would prima facie determine who the political party is for the purpose of adjudicating disqualification petitions under Paragraph 2(1) of the Tenth Schedule, where two or more factions claim to be that political party – When there are two Whips appointed by two or more factions of the political party, the Speaker decides which of the two Whips represents the political party

Constitution of India – Tenth Schedule – Para 2 & 3 – Election Symbols (Reservation and Allotment) Order, 1968 – Para 15 – Determination of, by Election Commission of India – Which group constitutes the political party – Allotment of Symbol – Held: The test of majority in the legislative and organisational wings of the party is not the only or primary test – The ECI is free to fashion a test suited to the facts and complexities of the specific case before it – In some cases, it is futile to assess which group enjoys a majority in the legislature – Other tests include an evaluation of the majority in the organisational wings of the political party, an analysis of the provisions of the party constitution, or any other appropriate test – ECI to refrain from passing a subjective judgment on the approaches preferred by rival factions by applying the test of whether rival groups are adhering to the aims and objects of the party as incorporated in its constitution – Decision of ECI need not be consistent with the decision of the Speaker – Decision of the ECI has prospective effect – Disqualification proceedings before the Speaker cannot be stayed in anticipation of the decision of the ECI.

Constitution of India – Art.164(1B) – Appointment of Chief Minister – Pending disqualification petitions – Held: Disqualification is triggered only if disqualification incurred under the Tenth Schedule – Mere institution of a disqualification petition does not trigger some or all of the consequences which flow from the disqualification itself.

Disposing of the Writ Petitions, the Court

HELD:

1.1 The decision in Nabam Rebia merits reference to a larger Bench because a substantial question of law remains to be settled. To give quietus to the issue, the following question (and any allied issues which may arise) are referred to a larger Bench: whether the issuance of a notice of intention to move a resolution for the removal of the Speaker restrains them from adjudicating disqualification petitions under the Tenth Schedule of the Constitution. [Para 70 & 71]

1.2 This Court should normally refrain from deciding disqualification petitions at the first instance, having due regard to constitutional intendment. The question of disqualification ought to be adjudicated by the constitutional authority concerned, namely the Speaker of the Legislative Assembly, by following the procedure prescribed. Disqualification of a person for being a member of the House has drastic consequences for the member concerned and by extension, for the citizens of that constituency. Therefore, any question of disqualification ought to be decided by following the procedure established by law. Absent exceptional circumstances, the Speaker is the appropriate authority to adjudicate petitions for disqualification under the Tenth Schedule. The Speaker is expected to act fairly, independently, and impartially while adjudicating the disqualification petitions under the Tenth Schedule. Ultimately, the decision of the Speaker on the question of disqualification is subject to judicial review. Therefore, the Speaker of the Maharashtra Legislative Assembly is the appropriate constitutional authority to decide the question of disqualification under the Tenth Schedule. [Para 80 & 85]

1.3 The plain meaning of the provisions of the Tenth Schedule, 1986 Rules, and Act of 1956 indicate that the Whip and the Leader

must be appointed by the political party. To hold that it is the legislature party which appoints the Whip would be to sever the figurative umbilical cord which connects a member of the House to the political party. It would mean that legislators could rely on the political party for the purpose of setting them up for election, that their campaign would be based on the strengths (and weaknesses) of the political party and its promises and policies, that they could appeal to the voters on the basis of their affiliation with the party, but that they can later disconnect themselves entirely from that very party and be able to function as a group of MLAs which no longer owes even a hint of allegiance to the political party. This is not the system of governance that is envisaged by the Constitution. In fact, the Tenth Schedule guards against precisely this outcome. That a Whip be appointed by the political party is crucial for the sustenance of the Tenth Schedule. The entire structure of the Tenth Schedule which is built on political parties would crumble if this requirement is not complied with. It would render the provisions of the Tenth Schedule otiose and have wider ramifications for the democratic fabric of this country. Thus, the Courts cannot be excluded by Article 212 from inquiring into the validity of the action of the Speaker recognizing the Whip. [Para 111, 113 & 114]

1.4 The decision of the ECI under Symbol Order has prospective effect. A declaration that one of the rival groups is that political party takes effect prospectively from the date of the decision. In the event that members of the faction which has been awarded the symbol are disqualified from the House by the Speaker, the members of the group which continues to be in the House will have to follow the procedure prescribed in the Symbols Order and in any other relevant law(s) for the allotment of a fresh symbol to their group. The disqualification proceedings before the Speaker cannot be stayed in anticipation of the decision of the ECI. In cases where a petition under Paragraph 15 of the Symbols Order is filed after the (alleged) commission of prohibitory conduct, the decision of the ECI cannot be relied upon by the Speaker for adjudicating disqualification proceedings. If the disqualification petitions are adjudicated based on the decision of the ECI in such cases, the decision of the ECI would have retrospective effect. This would be contrary to law. [Para 155 & 156]

1.5 The Governor had no objective material on the basis of which he could doubt the confidence of the incumbent government. The resolution on which the Governor relied did not contain any indication that the MLAs wished to exit from the MVA government. The communication expressing discontent on the part of some MLAs is not sufficient for the Governor to call for a floor test. The Governor ought to apply his mind to the communication (or any other material) before him to assess whether the Government seemed to have lost the confidence of the House. The term 'opinion' is used to mean satisfaction based on *objective* criteria as to whether he possessed relevant material, and not to mean the *subjective satisfaction* of the Governor. Once a government is democratically elected in accordance with law, there is a presumption that it enjoys the confidence of the House. There must exist some objective material to dislodge this presumption. The Governor is the titular head of the State Government. He is a constitutional functionary who derives his authority from the Constitution. This being the case, the Governor must be cognizant of the constitutional bounds of the power vested in him. He cannot exercise a power that is not conferred on him by the Constitution or a law made under it. Neither the Constitution nor the laws enacted by Parliament provide for a mechanism by which disputes amongst members of a particular political party can be settled. They certainly do not empower the Governor to enter the political arena and play a role (however minute) either in inter-party disputes or in intra-party disputes. It follows from this that the Governor cannot act upon an inference that he has drawn that a section of the Shiv Sena wished to withdraw their support to the Government on the floor of the House. [Para 186 & 189]

2. In view of the discussion above, it is concluded as follows: (a) The correctness of the decision in Nabam Rebia is referred to a larger Bench of seven judges; (b) This Court cannot ordinarily adjudicate petitions for disqualification under the Tenth Schedule in the first instance. There are no extraordinary circumstances in the instant case that warrant the exercise of jurisdiction by this Court to adjudicate disqualification petitions. The Speaker must decide disqualification petitions within a reasonable period; (c) An

MLA has the right to participate in the proceedings of the House regardless of the pendency of any petitions for their disqualification. The validity of the proceedings of the House in the interregnum is not "subject to" the outcome of the disqualification petitions; (d) The political party and not the legislature party appoints the Whip and the Leader of the party in the House. Further, the direction to vote in a particular manner or to abstain from voting is issued by the political party and not the legislature party. The decision of the Speaker as communicated by the Deputy Secretary to the Maharashtra Legislative Assembly dated 3 July 2022 is contrary to law. The Speaker shall recognize the Whip and the Leader who are duly authorised by the Shiv Sena political party with reference to the provisions of the party constitution, after conducting an enquiry in this regard and in keeping with the principles discussed in this judgement; (e) The Speaker and the ECI are empowered to concurrently adjudicate on the petitions before them under the Tenth Schedule and under Paragraph 15 of the Symbols Order respectively; (f) While adjudicating petitions under Paragraph 15 of the Symbols Order, the ECI may apply a test that is best suited to the facts and circumstances of the case before it; (g) The effect of the deletion of Paragraph 3 of the Tenth Schedule is that the defence of 'split' is no longer available to members facing disqualification proceedings. The Speaker would prima facie determine who the political party is for the purpose of adjudicating disqualification petitions under Paragraph 2(1) of the Tenth Schedule, where two or more factions claim to be that political party; (h) The Governor was not justified in calling upon Mr. Thackeray to prove his majority on the floor of the House because he did not have reasons based on objective material before him, to reach the conclusion that Mr. Thackeray had lost the confidence of the House. However, the *status quo ante* cannot be restored because Mr. Thackeray did not face the floor test and tendered his resignation; and (i) The Governor was justified in inviting Mr. Shinde to form the government. [Para 206]

Nabam Rebia & Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly **(2016) 8 SCC 1 : [2016] 6 SCR 1 – referred to larger bench.**

Rajendra Singh Rana v. Swami Prasad Maurya **(2007) 4 SCC 270 : [2007] 2 SCR 591** *and Speaker, Haryana Vidhan Sabha v. Kuldeep Bishnoi,* **(2015) 12 SCC 381 : [2012] 10 SCR 672 – held inapplicable.**

Kihoto Hollohan v. Zachillhu **(1992) Supp (2) SCC 651 : [1992] 1 SCR 686** *and Shrimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly* **(2020) 2 SCC 595 : [2019] 16 SCR 886 – relied on.**

Ramdas Athawale v. Union of India, **(2010) 4 SCC 1: [2010] 3 SCR 1059 – explained.**

Special Reference No. 1 of 1964 (Powers, Privileges and Immunities of State Legislatures) **AIR 1965 SC 745 : [1965] 1 SCR 413;** *SR Bommai v. Union of India* **(1994) 3 SCC 1 : [1994] 2 SCR 644;** *Mayawati v. Markandeya Chand* **(1998) 7 SCC 517 : [1998] 2 Suppl. SCR 204;** *Sadiq Ali v. Election Commission of India* **(1972) 4 SCC 664 : [1972] 2 SCR 318;** *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha* **(2006) 2 SCC 1 : [2006] 1 SCR 562;** *Rameshwar Prasad v. Union of India* **(2007) 3 SCC 184 : [2007] 1 SCR 317; I***ndore Development Authority v. Manohar Lal* **(2020) 8 SCC 129 : [2020] 3 SCR 1** *Pratap Gouda Patil v. State of Karnataka* **(2019) 7 SCC 463;** *Shivraj Singh Chouhan v. Union of India* **(2020) 17 SCC 1 : [2020] 9 SCR 787;** *Kshetrimayum Biren Singh v. Hon'ble Speaker, Manipur Legislative Assembly* **(2022) 2 SCC 759;** *Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly* **(2020) SCC OnLine SC 55;** *Justice KS Puttaswamy v. Union of India (Aadhar 5J)* **(2019) 1 SCC 1 : [2018] 8 SCR 1;** *Rojer Mathew v. South Indian Bank Ltd.* **(2020) 6 SCC 1 : [2019] 16 SCR 1;** *State of UP v. Desh Raj,* **(2007) 1 SCC 257 : [2006] 9 Suppl. SCR 352;** *Kuldip Nayar v. Union of India* **(2006) 7 SCC 1 : [2006] 5 Suppl. SCR 1;** *Delhi Admn. v. Gurdip Singh Uban,* **(2000) 7 SCC 296 : [2000] 2 Suppl. SCR 496** *and Taxi Owners United Transport v. State Transport Authority (Orissa),* **(1983) 4 SCC 34 – referred to.**

[2023] 15 S.C.R. 621 : 2023 INSC 1051

COX AND KINGS LTD.
v.
SAP INDIA PVT. LTD. & ANR.

(Arbitration Petition (Civil) No. 38 of 2020)

DECEMBER 06, 2023

[DR DHANANJAYA Y CHANDRACHUD, CJI, HRISHIKESH ROY, PAMIDIGHANTAM SRI NARASIMHA, J B PARDIWALA AND MANOJ MISRA, JJ.]

Issues for consideration:

The primary issue for consideration of the present Constitution Bench of Five Judges was determination of the validity of the 'Group of companies doctrine' in Indian arbitration jurisprudence and its applicability to proceedings under the Arbitration and Conciliation Act, 1996. Earlier, the Group of Companies doctrine had been adopted and applied in Indian arbitration jurisprudence in *Chloro Controls* case, where a three Judge Bench of the Supreme Court had read the said doctrine into the phrase "claiming through or under" in Section 45 of the Arbitration and Conciliation Act, 1996.

The 'Group of companies doctrine' provides that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories. This doctrine was called into question purportedly on the ground that it interfered with the established legal principles such as party autonomy, privity of contract, and separate legal personality.

Also, there were ancillary issues such as: (i) whether the Arbitration and Conciliation Act, 1996 allows joinder of a non-signatory as a party to an arbitration agreement; (ii) whether Section 7 of the Arbitration and Conciliation Act, 1996 allows for determination of an intention to arbitrate on the basis of the conduct of the parties; and (iii) interpretation of the phrase "claiming through or under" appearing under Sections 8, 35 and 45 of the Arbitration and Conciliation Act, 1996.

Arbitration – Arbitration agreement – Consent as the basis for arbitration:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *Consensus ad idem between the parties forms the essential basis to constitute a valid arbitration agreement – Since consent forms the cornerstone of arbitration, a non-signatory cannot be forcibly made a "party" to an arbitration agreement as doing so would violate the sacrosanct principles of privity of contract and party autonomy. [Paras 60, 63]*

Arbitration and Conciliation Act, 1996 – s.2(1)(h) r/w s.7 – Definition of "parties":

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties. [Para 165]*

Arbitration – Parties to an arbitration Agreement – Method to figure out:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The signature of a party on the agreement is the most profound expression of the consent of a person or entity to submit to the jurisdiction of an arbitral tribunal – However, the corollary that persons or entities who have not signed the agreement are not bound by it may not always be correct – The issue of who is a "party" to an arbitration agreement is primarily an issue of consent. [Para 66]*

Words and Phrases – Arbitration agreement – Term "non-signatories" – Meaning of:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The term "non-signatories", instead of the traditional "third parties", seems the most suitable to describe situations where consent to arbitration is expressed through means other than signature – A non-signatory is a person or entity that is implicated in a dispute which is the subject matter of an arbitration, although it has not formally entered into an arbitration agreement – Non-signatories, by virtue of their relationship with the signatory parties and active involvement in the performance of commercial obligations which are intricately linked to*

the subject matter, are not actually strangers to the dispute between the signatory parties. [Paras 66, 127]

Arbitration – Group of companies doctrine in Indian arbitration jurisprudence – Relevance –Doctrines / Principles:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The group of companies doctrine is a consent-based doctrine which has been applied, for identifying the real intention of the parties to bind a non-signatory to an arbitration agreement – The group of companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements. [Paras 81, 165]*

Corporate Law – Principle of corporate separateness – Separate legal personality:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The entities within a corporate group have separate legal personality, which cannot be ignored save in exceptional circumstances such as fraud – The distinction between a parent company and its subsidiary is fundamental, and cannot be easily abridged by taking recourse to economic convenience – Legally, the rights and liabilities of a parent company cannot be transferred to the subsidiary company, and vice versa, unless, there is a strong legal basis for doing so – The underlying basis for the application of the group of companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement. [Paras 89, 165]*

Arbitration – Group of companies doctrine – Adopting a pragmatic approach to consent:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *Corporate structures may take the form of groups based on equity, joint ventures, and informal alliances – In the context of arbitration law, the challenge arises when only one member of the group signs the arbitration agreement, to the exclusion of other members – Should the non-signatories be excluded from the arbitration proceedings,*

even though they were implicated in the dispute which forms the subject matter of arbitration? – As a response to this challenge, arbitration law has developed and adopted the group of companies doctrine, to allow or compel a non-signatory party to be bound by an arbitration agreement – The group of companies doctrine is applied to ascertain the intentions of the parties by analysing the factual circumstances surrounding the contractual arrangements. [Paras 96 and 97]

Arbitration – Group of companies doctrine – International perspectives – Precedents on applicability of the doctrine in France, England, Switzerland, Singapore and the USA – Discussed:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The international jurisdictions, in some form or the other, have moved beyond the formalistic requirement of consent to bind a non-signatory to an arbitration agreement – The issue of binding a non-signatory to an arbitration agreement is more of a fact-specific aspect – In jurisdictions such as France and Switzerland, there is a broad consensus that consent or subjective intention of a non-signatory to arbitrate may be proved by conduct – Such subjective intention could be derived from the objective evidence in the form of participation of the nonsignatory in the negotiation, performance, or termination of the underlying contract containing the arbitration agreement – However, the group of companies doctrine has not been universally accepted by all jurisdictions – In jurisdictions such as France where the doctrine has gained acceptance, group of companies is one of the several factors that a court or tribunal considers to determine the mutual intention of all the parties to join the nonsignatory to the arbitration agreement. [Para 58]*

Arbitration – Group of companies doctrine, a fact based doctrine:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The existence of a group of companies is a factual element that the court or tribunal has to consider when analysing the consent of the parties – It inevitably adds an extra layer of criteria to an exercise which at its core is preponderant on determining the consent of the parties in case of complex transactions involving multiple parties and agreements. [Para 102]*

Arbitration – Group of companies doctrine – Mutual intention of all the parties to bind the non-signatory to the arbitration agreement – The determination of mutual intention:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The primary test to apply the group of companies doctrine is by determining the intention of the parties on the basis of the underlying factual circumstances – The application of the group of companies doctrine will serve to stymie satellite litigation by non-signatory members of the corporate group, thereby ensuring the efficacy of the agreement between the parties – Avoiding multiplicity of proceedings and fragmentation of disputes is certainly in the interests of justice –However, it can never be the sole consideration to invoke the group of companies doctrine. [Para 109]*

Arbitration – Group of companies doctrine – Applicability – Threshold standard of evidence:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *In Discovery Enterprises case, the Supreme Court refined and clarified the cumulative factors that the courts and tribunals should consider in deciding whether a company within a group of companies is bound by the arbitration agreement – All the cumulative factors laid down in Discovery Enterprises case must be considered while determining the applicability of the group of companies doctrine – However, the application of the above factors has to be fact-specific, and onecannot tie the hands of the courts or tribunals by laying down how much weightage they ought to give to the above factors – The principle of single economic unit cannot be the sole basis for invoking the group of companies doctrine. [Paras 110, 128 and 165]*

Arbitration and Conciliation Act, 1996 – ss.8 and 45 – Phrase "claiming through or under" as appearing under ss.8 and 45 of the Arbitration Act – Party to arbitration agreement and Persons "claiming through or under" a party to the arbitration agreement are different:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *A person "claiming through or under" is asserting their legal demand or cause of action in an intermediate or derivative capacity – A person "claiming through or under" has inferior*

or subordinate rights in comparison to the party from which it is deriving its claim or right – Therefore, a person "claiming through or under" cannot be a "party" to an arbitration agreement on its own terms because it only stands in the shoes of the original signatory party – Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement – The persons "claiming through or under" can only assert a right in a derivative capacity. [Paras 137, 165]

Words and Phrases – "Claiming through or under"; "claim"; "through" and "claiming under". *[Para 137]*

Arbitration and Conciliation Act, 1996 – s.9 – Power of the Courts to issue directions u/s.9:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The group of companies doctrine is based on determining the mutual intention to join the non-signatory as a "veritable" party to the arbitration agreement – Once a tribunal comes to the determination that a non-signatory is a party to the arbitration agreement, such non-signatory party can apply for interim measures under s.9 of the Arbitration and Conciliation Act, 1996. [Para 153]*

Arbitration and Conciliation Act, 1996 – ss.8 and 11 – Standard of determination at the referral stage – Stage of applicability of the group of companies doctrine under the Arbitration Act:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *When a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement – At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement. [Paras 163, 165]*

Arbitration and Conciliation Act, 1996 – s.7 – Requirement of a written arbitration agreement u/s.7 – Effect:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh*

***Roy, J B Pardiwala and Manoj Misra, JJ.*)**: *The requirement of a written arbitration agreement u/s.7 does not exclude the possibility of binding non-signatory parties. [Para 165]*

Arbitration – Group of companies doctrine – Whether the principle of alter ego or piercing the corporate veil can be the basis for application of the group of companies doctrine:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The principle of alter ego disregards the corporate separateness and the intentions of the parties in view of the overriding considerations of equity and good faith – In contrast, the group of companies doctrine facilitates the identification of the intention of the parties to determine the true parties to the arbitration agreement without disturbing the legal personality of the entity in question – The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine. [Paras 104, 165]*

Arbitration – Group of companies doctrine – Factors to be considered for application of the doctrine – Conduct of the non-signatory parties – Relevance:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the courts and tribunals – The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement – The non-signatory's participation in the negotiation, performance, or termination of the contract can give rise to the implied consent of it being bound by the contract – Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement. [Paras 118, 125 and 165]*

Arbitration – Arbitration and Conciliation Act, 1996 – s.2(1)(h) and s.7 – Group of companies doctrine – Has independent existence:

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The group of companies*

doctrine has an independent existence as a principle of law which stems from a harmonious reading of s.2(1)(h) along with s.7 of the Arbitration Act. [Para 165]

Arbitration and Conciliation Act, 1996 – Group of Companies doctrine – In *Chloro Controls* case, a three Judge Bench of Supreme Court read the said doctrine into the phrase "claiming through or under" in s.45 of the Arbitration Act – Challenge to.

Held (per *Dr. Dhananjaya Y Chandrachud, CJI) (for himself, Hrishikesh Roy, J B Pardiwala and Manoj Misra, JJ.*): *The approach of the Supreme Court in Chloro Controls case to the extent that it traced the group of companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract law and corporate law. [Para 165]*

Arbitration – Group of companies doctrine – Applicability – Non-signatory, if party to arbitration agreement – Determination – Arbitration and Conciliation Act, 1996 – s.7(4)(b).

Held *(*per *Pamidighantam Sri Narasimha, J.) (Concurring with Dr. Dhananjaya Y Chandrachud, CJI)*: *An agreement to refer disputes to arbitration must be in a written form, as against an oral agreement, but need not be signed by the parties – Under s.7(4)(b), a court or arbitral tribunal will determine whether a non-signatory is a party to an arbitration agreement by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of the formation, performance, and discharge of the contract – While interpreting and constructing the contract, courts or tribunals may adopt well-established principles, which aid and assist proper adjudication and determination – The Group of Companies doctrine is one such principle. [Para 56]*

Arbitration – Group of companies doctrine – Arbitration agreement – Ascertaining the intention of the non-signatory.

Held *(*per *Pamidighantam Sri Narasimha, J.) (Concurring with Dr. Dhananjaya Y Chandrachud, CJI)*: *The Group of Companies doctrine is also premised on ascertaining the intention of the non-signatory to be party to an arbitration agreement – The doctrine requires the intention to be gathered from additional factors such as direct relationship with the*

signatory parties, commonality of subject-matter, composite nature of the transaction, and performance of the contract. [Para 56]

Arbitration and Conciliation Act, 1996 – s.7(4)(b) – Inquiry by a court or arbitral tribunal under s.7(4)(b) and Group of companies doctrine.

Held ***(*per *Pamidighantam Sri Narasimha, J.) (Concurring with Dr. Dhananjaya Y Chandrachud, CJI)*****:** *Since the purpose of inquiry by a court or arbitral tribunal u/s.7(4)(b) and the Group of Companies doctrine is the same, the doctrine can be subsumed within s.7(4)(b) to enable a court or arbitral tribunal to determine the true intention and consent of the non-signatory parties to refer the matter to arbitration – The doctrine is subsumed within the statutory regime of s.7(4)(b) for the purpose of certainty and systematic development of law. [Para 56]*

Arbitration and Conciliation Act, 1996 – ss.2(1)(h), 7, 8 and 45 – Expression "claiming through or under" in ss.8 and 45 – Difference from expression 'party' in s.2(1)(h) and 7.

Held ***(*per *Pamidighantam Sri Narasimha, J.) (Concurring with Dr. Dhananjaya Y Chandrachud, CJI)*****:** *The expression "claiming through or under" in ss.8 and 45 is intended to provide a derivative right; and it does not enable a non-signatory to become a party to the arbitration agreement – The decision in Chloro Controls tracing the Group of Companies doctrine through the phrase "claiming through or under" in ss.8 and 45 is erroneous – The expression 'party' in s.2(1)(h) and s.7 is distinct from "persons claiming through or under them".[Para 56]*

In the judgment of Dr. Dhananjaya Y Chandrachud, CJI

Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc **(2013) 1 SCC 641 : [2012] 13 SCR 402 – held, erroneous to an extent.**

Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Pvt. Ltd., **(2022) 8 SCC 42 : [2022] 4 SCR 926 – affirmed.**

Cheran Properties Ltd v. Kasturi and Sons Ltd. **(2018) 16 SCC 413 : [2018] 4 SCR 1063;** *Mahanagar Telephone*

Nigam Ltd. v. Canara Bank **(2020) 12 SCC 767 : [2019] 11 SCR 660;** *Sukanya Holdings (P) Ltd v. Jayesh H Pandya* **(2003) 5 SCC 531 : [2003] 3 SCR 558;** *Indowind Energy Ltd v. Wescare (I) Ltd.* **(2010) 5 SCC 306 : [2010] 5 SCR 284;** *Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd.* **(2022) 1 SCC 75;** *Sumitomo Corporation v. CDC Financial Services (Mauritius) Ltd, (***2008) 4 SCC 91 : [2008] 3 SCR 309;** *S N Prasad v. Monnet Finance Ltd.* **(2011) 1 SCC 320 : [2010] 13 SCR 207;** *Ameet Lalchand Shah v. Rishabh Enterprises,* **(2018) 15 SCC 678 : [2018] 6 SCR 1001;** *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited,* **(2019) 7 SCC 62 : [2019] 8 SCR 966***; Bharat Aluminium Company v Kaiser Aluminium Technical Services,* **(2016) 4 SCC 126 : [2016] 1 SCR 364;** *Satish Kumar v. Surinder Kumar* **[1969] 2 SCR 244;** *Bihar State Mineral Development Corporation v. Encon Builders (I) Pvt. Ltd.* **(2003) 7 SCC 418 : [2003] 2 Suppl. SCR 812;** *Dhulabhai v. State of Madhya Pradesh* **[1968] 3 SCR 662;** *Vidya Drolia v. Durga Trading Corporation,* **(2021) 2 SCC 1 : [2020] 11 SCR 1001;** *M C Chacko v. State Bank of Travancore* **(1969) 2 SCC 343 : [1970] 1 SCR 658;** *Haji Mohammed Ishaq v. Mohamad Iqbal* **(1978) 2 SCC 493 : [1978] 3 SCR 571;** *Shakti Bhog Foods Limited v. Kola Shipping Ltd.* **(2009) 2 SCC 134 : [2008] 13 SCR 925;** *Trimex International FZE Ltd v. Vedanta* **[2022] 4 SCR 926;** *Aluminium Ltd.* **(2010) 3 SCC 1 : [2010] 1 SCR 820;** *Great Offshore Ltd. v. Iranian Offshore Engineering and Construction Company,* **(2008) 14 SCC 240 : [2008] 12 SCR 515;** *S N Prasad v. Monnet Finance Limited* **(2011) 1 SCC 320 : [2010] 13 SCR 207;** *Govind Rubber Ltd v. M/s Louis Dreyfus Commodities,* **(2015) 13 SCC 477 : [2014] 12 SCR 488;** *Sundaram Finance Ltd v. NEPC India Ltd.* **(1999) 2 SCC 479 : [1999] 1 SCR 89***; P Manohar Reddy and Bros v. Maharashtra Krishna Valley Development Corporation,* **(2009) 2 SCC 494 : [2008] 17 SCR 1217;** *Tata Engineering and Locomotive Co Ltd. v. State of Bihar* **[1964] 6 SCR 885;** *LIC v. Escorts Ltd.* **(1986) 1 SCC 264 :**

[1985] 3 Suppl. SCR 909; *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.* **(1996) 4 SCC 662 : [1996] 2 Suppl. SCR 295;** *Kapila Hingorani v. State of Bihar* **(2003) 6 SCC 1 : [2003] 1 Suppl. SCR 175;** *Balwant Rai Saluja v. Air India* **(2014) 9 SCC 407 : [2014] 14 SCR 1512;** *Vodafone International Holding BV v. Union of India* **(2012) 6 SCC 613 : [2012] 1 SCR 573;** *Kamla Devi v. Takhatmal Land,* **AIR 1964 SC 859 : [1964] 2 SCR 152;** *Bangalore Electricity Supply Co Ltd v. E S Solar Power (P) Ltd.* **(2021) 6 SCC 718 : [2021] 1 SCR 453;** *Bank of India v. K Mohandas* **(2009) 5 SCC 313 : [2009] 1 SCR 1045;** *M Dayanand Reddy v. A P Industrial Infrastructure Corporation Ltd.* **(1993) 3 SCC 137 : [1993] 2 SCR 629;** *A Ayyasamy v. A Paramsivam,* **(2016) 10 SCC 386 : [2016] 11 SCR 521;** *Union of India v. D N Revri,* **(1976) 4 SCC 147 : [1977] 1 SCR 483;** *Roop Kumar v. Mohan Thedani,* **(2003) 6 SCC 595 : [2003] 3 SCR 292;** *Olympus Superstructures (P) Ltd v. Meena Vijay Khetan,* **(1999) 5 SCC 651 : [1999] 3 SCR 490;** *Reliance Industries Ltd v. Union of India,* **(2014) 7 SCC 603 : [2014] 6 SCR 456;** *Enercon (India) Ltd v. Enercon Gmbh,* **(2014) 5 SCC 1: [2014] 2 SCR 855;** *Agri Gold Exims Ltd v. Sri Lakshmi Knits & Wovens,* **(2007) 3 SCC 686 : [2007] 1 SCR 1161;** *SBP & Co v. Patel Engineering Ltd.* **(2005) 8 SCC 618 : [2005] 4 Suppl. SCR 688;** *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field,* **(2020) 2 SCC 455;** *Pravin Electricals Pvt Ltd v. Galaxy Infra and Engineering Pvt Ltd.* **(2021) 5 SCC 671: [2021] 1 SCR 1162;** *Shin-Etsu Chemical Co Ltd. v. Aksh Optifibre Ltd.* **(2005) 7 SCC 234 : [2005] 2 Suppl. SCR 699 and** *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar* **(2011) 11 SCC 375 : [2011] 5 SCR 674 – referred to.**

Dow Chemical v. Isover Saint Gobain, Interim Award, **ICC Case No. 4131, 23 September 1982;** *Paris Court of Appeal, 7 December 1994, V 2000 (formerly Jaguar France) v. Project XS, Rev. Arb.* **(1996) 67;** *A, B, C v. D and State of Libya, 4 A 636/2018; 5 Saudi Butec Ltd et Al Fouzan*

Trading v. Saudi Arabian Saipem Ltd, unpublished ICC Interim Award of 25 October 1994, confirmed by DFT on 29 January 1996, ASA Bulletin (1996) Vol 3 p 496;X v. Y Engineering S.p.A. and Y S.p.A., 4A_450/2013, ASA Bull., **160 (2015);** *Peterson Farms INC v. C & M Farming Limited,* **[2004] EWHC 121;** *Roussel-Uclaf v. G D Searle and Co Ltd.* **[1978] 1** *Lloyd's Rep; The Mayoralty and Commonalty & Citizens of the City of London v. Ashok Sancheti,* **[2008] EWCA Civ 1283;** *Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council,* **[1990] 1 WLR 1195;** *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* **[2010] UKSC 46;** *Manuchar Steel Hong Kong Limited v. Star Pacific Line Pte Ltd.* **[2014] SGHC 181;** *G E Energy Power Conversion France SAS v. Outokumpu Stainless,* **140 S. Ct. 1637 (2020);** *American Fuel Corp v. Utah Energy Development Co, Inc,* **122 F.3d 130, 134 (2d Cir 1997);** *American Bureau, Shipping v. Tencara Shipyard,* **170 F.3d 349, 353 (2d Cir 1999);** *Sunkist Soft Drinks, Inc v. Sunkist Growers, Inc,* **10 F.3d 753, 757 (11th Cir 1993) and** *Grigson v. Creative Artists Agency, LLC,* **210 F.3d 524 (2000);** *United Steelworkers of America v. Warrior and Gulf Navigation,* **(1960) 363 US 574, 582;** *Fiona Trust and Holding Company v. Privalov* **[2007] UKHL 40;** *Salomon v. Salomon* **[1897] AC 22;** *D H N Food Distributors Ltd v. Tower Hamlets London Borough Council* **[1976] 1 WLR 852;** *Bank of Tokyo v. Karoon, (1986) 3 All ER 468; Schiffahrts–gesellschaft Detlev von Appen v Voest Alpine Intertrading,* **[1997] EWCA Civ 1420;** *Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd.* **[2005] EWHC 455 (Comm);** *West Tankers Inc. v. Allianz Spa,* **[2012] EWCA Civ 27;** *Tanning Research Laboratories Inc v. O'Brien,* **[1990] HCA 8;** *Rinehart v. Hancock Prospecting Pty Ltd.* **[2019] HCA 13 – referred to.**

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v. Commercial Reality' in Stavros Brekoulakis, Julian DM Lew, et al (eds) in 'The Evolution and Future of International Arbitration' (2016) 119, 120; UNCITRAL, 'Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form of arbitration agreement: Report of the Secretary General' A/CN.9/WG.II/WP.108/Add.1 (26 January 2000); Stavros Brekoulakis, 'Parties in International Arbitration: Consent v. Commercial Reality' in Stavros Brekoulakis, Julian DM Lew, et al (eds) 'The Evolution and Future of International Arbitration' (2016) 119, 137, 148; UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3; Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610, 621; Karim Youssef, 'The Limits of Consent: The Right or Obligation to Arbitrate of Non-Signatories in Group of Companies' in Multiparty Arbitration: Dossiers of the ICC Institute of Worlds Business Law, Volume 7 (2010) 71, 79; Russel on Arbitration (23rd edn, 2007) 99 para 3-018; Vicky Priskich, 'Binding non-signatories to arbitration agreements – who are person 'claiming through or under' a party?' (2019) 35(3) Arbitration International 375-386; Black's Law Dictionary (5th edn, 1979) 224; P Ramanatha Aiyar's, The Law Lexicon (1997) 330, 331; Black's Law Dictionary (5th edn, 1979) 1328; Ronald Dworkin, Law's Empire (Belknap Press, Harvard University Press 1986) 229 **– referred to.**

In the judgment of Pamidighantam Sri Narasimha, J.

Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., **(2013) 1 SCC 641 : [2012] 13 SCR 402 – held erroneous.**

Cox and Kings Ltd v. SAP India Pvt Ltd. **(2022) 8 SCC 1;** *Vidya Drolia v. Durga Trading Corporation,* **(2021) 2**

SCC 1 : [2020] 11 SCR 1001; *Gemini Bay Transcription Pvt Ltd v. Integrated Sales Service Ltd.* **(2022) 1 SCC 753;** *Jugal Kishore Rameshwardas v. Goolbai Hormusji* **[1955] 2 SCR 857;** *Caravel Shipping Services (P) Ltd v. Premier Sea Foods Exim (P) Ltd.* **(2019) 11 SCC 461 : [2018] 14 SCR 289;** *Rickmers Verwaltung Gmbh v. Indian Oil Corporation Ltd.* **(1999) 1 SCC 1 : [1998] 3 Suppl. SCR 42;** *MTNL v. Canara Bank,* **(2020) 12 SCC 767 : [2019] 11 SCR 660;** *Babanrao Rajaram Pund v. Samarth Builders and Developers,* **(2022) 9 SCC 691;** *KK Modi v. KN Modi,* **(1998) 3 SCC 573 : [1998] 1 SCR 601;** *Bihar State Mineral Development Corporation v. Encon Builders (I) Pvt Ltd.* **(2003) 7 SCC 418 : [2003] 2 Suppl. SCR 812;** *Shakti Bhog Foods v. Kola Shipping Ltd.* **(2009) 2 SCC 134 : [2008] 13 SCR 925;** *Smita Conductors v. Euro Alloys,* **(2001) 7 SCC 728 : [2001] 2 Suppl. SCR 477;** *Unissi (India) Pvt Ltd v. Post Graduate Institute of Medical Education and Research* **(2009) 1 SCC 107 : [2008] 14 SCR 108;** *Powertech World Wide Ltd v. Delvin international General Trading LLC* **(2012) 1 SCC 361 : [2011] 13 SCR 122;** *Govind Rubber v. Louids Dreyfus Commodities Asia Pvt Ltd.* **(2015) 13 SCC 477: [2014] 12 SCR 488;** *Nimet Resources Inc v. Essar Steels Ltd,* **(2000) 7 SCC 497;** *Bangalore Electricity Supply Company Ltd (BESCOM) v. E.S. Solar Power Pvt Ltd.* **(2021) 6 SCC 718;** *Food Corporation of India v. Abhijit Paul* **2022 SCC OnLine SC 1605;** *Bank of India v. K. Mohandas* **(2009) 5 SCC 313 : [2009] 5 SCR 118;** *Godhra Electricity Co Ltd v. State of Gujarat* **(1975) 1 SCC 199 : [1975] 2 SCR 42;** *McDermott International Inc v. Burn Standard Co Ltd.* **(2006) 11 SCC 181 : [2006] 2 Suppl. SCR 409;** *ONGC v. Saw Pipes Ltd.* **(2003) 5 SCC 705 : [2003] 3 SCR 691;** *Roop Kumar v. Mohan Thedani* **(2003) 6 SCC 595 : [2003] 3 SCR 292;** *Sukanya Holdings v. Jayesh H Pandya* **(2003) 5 SCC 531 : [2003] 3 SCR 558;** *Indowind Energy Ltd v. Wescare (India) Ltd.* **(2010) 5 SCC 306 : [2010] 5 SCR 284;** *Duro Felguera, S.A. v. Gangavaram Port Ltd.* **(2017) 9 SCC 729 : [2017] 10 SCR 285;** *Cheran Properties Ltd v. Kasturi and Sons Ltd.* **(2018) 16 SCC 413 : [2018] 4 SCR 1063;** *Ameet Lalchand Shah*

v. Rishabh Enterprises **(2018) 15 SCC 678 : [2018] 6 SCR 1001;** *ONGC v. Discovery Enterprises Pvt Ltd.* **(2022) 8 SCC 42;** *Reckitt Benckiser (India) Pvt Ltd v. Reynders Label Printing India Pvt Ltd.* **(2019) 7 SCC 62 : [2019] 8 SCR 966;** *MTNL v. Canara Bank* **(2020) 12 SCC 767: [2019] 11 SCR 660 – referred to.**

Dow Chemical v. Isover Saint Gobain. **ICC Case No. 4131***, 23 September 1982; Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan Case No. 9-28533, dated 17 February 2011 (Paris Cour d'Appel), [2010] UKSC 46; Malakoff Corporation Berhad and TLEMCEN Desalination Investment Company v. Algerian Energy Company SA and Hyflux Limited,* **Case No. 21-07296, dated 13 June 2023 (Paris Cour d'Appel);** *Peterson Farms Inc v. C&M Farming Ltd.* **[2004] EWHC 121 (Comm);** *Mayor and Commonalty & Citizens of the City of London v. Ashok Sancheti,* **[2008] EWCA Civ 1283;** *Bank of Tokyo Ltd v. Karoon,* **[1987] AC 45;** *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait),* **[2021] UKSC 48;** *Manuchar Steel Hong Kong Ltd v. Star Pacific Line Pte Ltd.* **[2014] SGHC 181;** *GE Energy Power Conversion France SAS Corp., FKA Converteam SAS v. Outokumpu Stainless USA, LLC, et al.,* **Case No. 18-1048 (1 June 2020);** *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co. Inc.,* **741 F.2d 342 (11th Cir. 1984);** *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.* **138 F.3d 160 (5th Cir. 1998);** *Sarhank Group v. Oracle Corp,* **404 F. 3d 657 (2nd Cir. 2005) – referred to.**

Lewison, The Interpretation of Contracts (6th edn, Sweet and Maxwell 2016) para 2.01, 27; Gary Born, International Commercial Arbitration, vol 1 (3rd edn, Kluwer Law International 2021) 1531; Bernard Hanotiau, 'Chapter 14: Group of Companies in International Arbitration' in Loukas A. Mistelis and Julian D.M. Lew (ed), Pervasive Problems in International Arbitration, vol 15 (Kluwer Law International 2006), 286; Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?' (2011) 27(4) Arbitration International 539 – **referred to.**

[2023] 15 S.C.R. 1081 : 2023 INSC 1066

IN RE: INTERPLAY BETWEEN ARBITRATION AGREEMENTS UNDER THE ARBITRATION AND CONCILIATION ACT 1996 AND THE INDIAN STAMP ACT 1899

(Curative Petition (C) No. 44 of 2023)
In
(Review Petition (C) No. 704 of 2021)
In
(Civil Appeal No. 1599 of 2020)

DECEMBER 13, 2023

[DR. DHANANJAYA Y CHANDRACHUD, CJI, SANJAY KISHAN KAUL, SANJIV KHANNA, B R GAVAI, SURYA KANT, J B PARDIWALA AND MANOJ MISRA, JJ.]

Issue for consideration: The issue at hand arose in the context of three statutes; the Arbitration and Conciliation Act 1996, the Indian Stamp Act, 1899, and the Indian Contract Act, 1872. The Stamp Act imposes duty on "instruments". Arbitration agreements are often embedded in underlying instruments or substantive contracts. The primary issue for consideration was whether such arbitration agreements would be non-existent, unenforceable, or invalid if the underlying contract is not stamped. The challenge before the Supreme Court was to harmonize the provisions of the Arbitration and Conciliation Act, 1996 and the Stamp Act, 1899.

Arbitration and Conciliation Act 1996 – ss.8 and 11 – Arbitration agreements embedded in underlying instruments or substantive contracts – Whether such arbitration agreements would be non-existent, unenforceable, or invalid if the underlying contract is not stamped – Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899 – Unstamped or insufficiently stamped instruments – If admissible in evidence – Non-stamping or inadequate stamping – If curable.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): Agreements which are not stamped or are inadequately stamped are

inadmissible in evidence u/s.35 of the Stamp Act – Such agreements are not rendered void or void *ab initio* or unenforceable – Non-stamping or inadequate stamping is a curable defect – The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it – An objection as to stamping does not fall for determination u/ss.8 or 11 of the Arbitration Act – The concerned court must examine whether the arbitration agreement *prima facie* exists – Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal. [Paras 48 and 224] – **Held (per Sanjiv Khanna, J.) (Concurring):** Unstamped or insufficiently stamped instruments inadmissible in evidence in terms of s.35 of the Indian Stamp Act, 1899, are not rendered void and void *ab initio* – An objection as to the under-stamping or non-stamping of the underlying contract will not have any bearing when the *prima facie* test, "the existence of arbitration agreement", is applied by the courts while deciding applications under Sections 8 or 11 of the Arbitration and Conciliation Act, 1996 – An objection as to insufficient stamping of the underlying agreement can be examined and decided by the arbitral tribunal. [Para 1]

Evidence – Admissibility of documents – Difference between inadmissibility and voidness – Contract Act, 1872 – s.2(g).

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The admissibility of an instrument in evidence is distinct from its validity or enforceability in law – An agreement can be void without its nature as a void agreement having an impact on whether it may be introduced in evidence – Similarly, an agreement can be valid but inadmissible in evidence – When an agreement is void, one is speaking of its enforceability in a court of law – When it is inadmissible, one is referring to whether the court may consider or rely upon it while adjudicating the case – This is the essence of the difference between voidness and admissibility. [Paras 44, 45 and 46]

Indian Stamp Act, 1899 – Purpose of.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The Stamp Act is a fiscal legislation which is intended to raise revenue for the government – It is a mandatory statute. [Para 58]

Arbitration – Principle of arbitral autonomy – Doctrines / Principles.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The principle of arbitral autonomy is an integral element of the ever-evolving domain of arbitration law – Arbitral autonomy means that the parties to an arbitration agreement can exercise their contractual freedom to bestow the arbitral tribunal with the authority to decide disputes that may arise between them – The basis of arbitral autonomy is to give effect to the true intention of parties to distance themselves from the "risk of domestic judicial parochialism. [Para 66]

Doctrines / Principles – Principle of judicial interference in arbitration proceedings – Scope of non-obstante clause contained in s.5 of the Arbitration and Conciliation Act 1996 – Legislative intention.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The principle of judicial non-interference in arbitral proceedings serves to proscribe judicial interference in arbitral proceedings, which would undermine the objective of the parties in agreeing to arbitrate their disputes, their desire for less formal and more flexible procedures, and their desire for neutral and expert arbitral procedures – The principle of judicial non-interference in arbitral proceedings respects the autonomy of the parties to determine the arbitral procedures – This principle has also been incorporated in international instruments – s.5 of the Arbitration Act is of aid in interpreting the extent of judicial interference under ss.8 and 11 of the Arbitration Act – s.5 contains a general rule of judicial non-interference – Therefore, every provision of the Arbitration Act ought to be construed in view of s.5 to give true effect to the legislative intention of minimal judicial intervention. [Paras 69 and 82]

Arbitration and Conciliation Act, 1996 – Is a self-contained code – Provisions of other statutes cannot interfere with the working of the Arbitration Act, unless specified otherwise. [Para 85 in judgment of Dr. D.Y. Chandrachud, CJI]

Arbitration – Arbitration agreement – Is the foundation of

arbitration as it records the consent of the parties to submit their disputes to arbitration. [Para 88 in judgment of Dr. D.Y. Chandrachud, CJI]

Arbitration – Arbitration agreement – Separability of the arbitration agreement from the underlying contract in which it is contained.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): An arbitration agreement is juridically independent from the underlying contract in which it is contained – The concept of separability reflects the presumptive intention of the parties to distinguish the underlying contract, which captures the substantive rights and obligations of the parties, from an arbitration agreement which provides a procedural framework to resolve the disputes arising out of the underlying contract – This presumption has various consequences in theory and practice, the most important being that an arbitration agreement survives the invalidity or termination of the underlying contract – The separability presumption gives effect to the doctrine of competence-competence. [Paras 90 and 112]

Doctrines / Principles – Doctrine of competence-competence – Comparative analysis – Arbitration and Conciliation Act 1996 – s.16.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The doctrine of kompetenz-kompetenz (also known as competence competence), as originally developed in Germany, was traditionally understood to imply that arbitrators are empowered to make a final ruling on their own jurisdiction, with no subsequent judicial review of the decision by any court – However, many jurisdictions allow an arbitral tribunal to render a decision on its jurisdiction, subject to substantive judicial review – The UK position is that although the arbitral tribunal is empowered to consider whether it has jurisdiction, its determination is subject to the examination of the courts – The courts in the United States have considered the principle of competence-competence to be intertwined with the separability presumption – The Singapore High Court has given full effect to the doctrine of competence-competence since the arbitral tribunal gets the first priority to determine issues even with respect to the very existence of the arbitration agreement, while the jurisdiction of

the courts is limited to a *prima facie* determination – s.16 of the Arbitration Act recognizes the doctrine of competence-competence in Indian arbitration law. [Paras 115, 117, 118, 119, 120]

Doctrines / Principles – Doctrine of competence-competence – Positive and negative aspects of the doctrine – Negative competence-competence – Discussed.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The international arbitration law as well as domestic law prioritize the arbitral tribunal by permitting them to initially decide challenges to their authority instead of the courts – The policy consideration behind this approach is twofold: first, to recognize the mutual intention of the parties of choosing the arbitrator to resolve all their disputes about the substantive rights and obligations arising out of contract; and second, to prevent parties from initiating parallel proceedings before courts and delaying the arbitral process – This is the positive aspect of the doctrine of competence-competence – The negative aspect, in contrast, speaks to the national courts – It instructs the courts to limit their interference at the referral stage by deferring to the jurisdiction of the arbitral tribunal in issues pertaining to the existence and validity of an arbitration agreement – Allowing arbitral tribunals to first rule on their own jurisdiction and later allowing the courts to determine if the tribunal exercised its powers properly safeguards both the power and authority of the arbitral tribunal as well as the courts – The negative aspect of the doctrine has been expressly recognized by Indian courts – Considering both the positive and negative facets, the principle can be defined as a rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, which is subject to subsequent review by courts. [Paras 129, 130]

Arbitration and Conciliation Act, 1996 – Arbitration Act is a legislation enacted to *inter alia* consolidate the law relating to arbitration in India – It will have primacy over the Stamp Act and the Contract Act in relation to arbitration agreements. [Para 166 in judgment of Dr. D.Y. Chandrachud, CJI]

Interpretation of Statutes – Harmonious construction – Provisions contained in two statutes must be, if possible, interpreted in a harmonious manner to give full effect to both the statutes – In providing a harmonious interpretation, the Court has to be cognizant of the fact that it does not defeat the purpose of the statutes or render them ineffective. [Para 165 in judgment of Dr. D.Y. Chandrachud, CJI]

Interpretation of Statutes – Non-obstante clause – Held: Although a non-obstante clause must be allowed to operate with full vigour, its effect is limited to the extent intended by the legislature. [Para 77 in judgment of Dr. D.Y. Chandrachud, CJI]

Words and Phrases – "admissible". [Para 44 in judgment of Dr. D.Y. Chandrachud, CJI]

Words and Phrases – Word "shall" – In ss.33 and 35 of the Stamp Act – Meaning and effect of. [Para 189 in judgment of Dr. D.Y. Chandrachud, CJI]

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[2023] 16 S.C.R. 1 : 2023 INSC 1058

IN RE: ARTICLE 370 OF THE CONSTITUTION

(Writ Petition (Civil) No. 1099 of 2019)

DECEMBER 11, 2023

[DR. DHANANJAYA Y CHANDRACHUD, CJI, SANJAY KISHAN KAUL, SANJIV KHANNA, B. R. GAVAI AND SURYA KANT, JJ.]

Issues for consideration: Article 370 of the Constitution of India incorporated special arrangements for the governance of the State of Jammu and Kashmir. The President issued Constitutional Orders 272 and 273 during the subsistence of a Proclamation under Article 356(1)(b) which orders had the effect of applying the entire Constitution of India to the State of Jammu and Kashmir and abrogating Article 370. Contemporaneously, the Parliament enacted the Jammu and Kashmir Reorganisation Act 2019 which bifurcated the State into two Union territories, namely, the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh. The petitioners challenged the constitutionality of these actions. CO 272 was issued under Article 370(1)(d) and sought to amend clause (3) of Article 370. The petitioners challenged CO 272 as being ultra vires Article 370(1)(d) on the grounds that: a. It modified Article 370, which could only be done on exercise of power under Article 370(3); and b. Only the State Government may accord "concurrence" to the President under the second proviso to Article 370(1)(d). Further, the exercise of power under Article 370(3) in issuing CO 273 was challenged. The questions for determination were:

a. Whether the provisions of Article 370 of the Constitution were temporary in nature or whether they acquired a status of permanence in the Constitution;

b. Whether the amendment to Article 367 of the Constitution in exercise of the power under Article 370(1)(d) so as to substitute the reference to the "Constituent Assembly of the State referred to in clause (3) of Article 370 by the words "Legislative Assembly of the State" was constitutionally valid;

c. Whether the entire Constitution of India could have been applied to the State of Jammu and Kashmir in exercise of the power under Article 370(1)(d);

d. Whether the abrogation of Article 370 by the President in exercise of the power under Article 370(3) was constitutionally invalid in the absence of a recommendation of the Constituent Assembly of the State of Jammu and Kashmir as mandated by the proviso to clause (3);

e. Whether the proclamation of the Governor dated 20 June 2018 in exercise of power conferred by Section 92 of the Constitution of Jammu and Kashmir and the subsequent exercise of power on 21 November 2018, under Section 53(2) of the Constitution of Jammu and Kashmir to dissolve the Legislative Assembly were constitutionally valid;

f. Whether the Proclamation which was issued by the President under Article 356 of the Constitution on 19 December 2018 and the subsequent extensions were constitutionally valid;

g. Whether the Jammu and Kashmir Reorganisation Act 2019 by which the State of Jammu and Kashmir was bifurcated into two Union Territories (Union Territory of Jammu and Kashmir and Union Territory of Ladakh) was constitutionally valid bearing in mind: (i) The first proviso to Article 3 which requires that a Bill affecting the area, boundaries or name of a State has to be referred to the legislature of the State for its views; and (ii.) The second proviso to Article 3 which requires the consent of the State legislature for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name of boundary of the State before the introduction of the Bill in Parliament;

h. Whether during the tenure of a Proclamation under Article 356, and when the Legislative Assembly of the State is either dissolved or is in suspended animation the status of the State of Jammu and Kashmir as a State under Article 1(3)(a) of the Constitution and its conversion into a Union Territory under Article 1(3)(b) constitutes a valid exercise of power.

Federalism – Asymmetric federalism – Constitutional integration of Indian States – Accession of Jammu and Kashmir – Article 370 of the Constitution of India incorporated special arrangements for the governance of the State of Jammu and Kashmir – Whether the State of Jammu and Kashmir possessed sovereignty – Meaning of sovereignty.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, B.R. Gavai and Surya Kant, JJ.): The State of Jammu and Kashmir does not retain any

element of sovereignty after the execution of the Instrument of Accession (IoA) and the issuance of the Proclamation dated 25 November 1949 by which the Constitution of India was adopted – The State of Jammu and Kashmir does not have 'internal sovereignty' which is distinguishable from the powers and privileges enjoyed by other States in the country – Article 370 was a feature of asymmetric federalism and not sovereignty. [Para 514] – **Held (per Sanjay Kishan Kaul, J.):** In light of the Supreme Court's prior finding in Prem Nath Kaul case, the State of Jammu and Kashmir retained an element of internal sovereignty despite Maharaja Hari Singh signing the IoA with the Dominion – Art.370 of the Constitution recognized this internal sovereignty by recognizing the Constituent Assembly of the State. [Para 112] – **Held (per Sanjiv Khanna, J.):** The abrogation of Article 370 does not negate the federal structure, as the citizens living in Jammu and Kashmir do and will enjoy same status and rights as given to citizens residing in other parts of the country. [Para 2]

Constitution of India – Art. 356 – Constitution of Jammu and Kashmir – s.92 – Proclamations issued under Article 356 of the Constitution of India and s.92 of the Constitution of Jammu and Kashmir – Constitutional validity of.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, B.R. Gavai and Surya Kant, JJ.): The petitioners did not challenge the issuance of the Proclamations under Section 92 of the Jammu and Kashmir Constitution and Article 356 of the Indian Constitution until the special status of Jammu and Kashmir was abrogated – The challenge to the Proclamations does not merit adjudication because the principal challenge is to the actions which were taken after the Proclamation was issued. [Para 514]

Constitution of India – Art. 356 – Presidential Proclamation – Exercise of power by President or Parliament under Article 356 – Limitations on, if any – Standard to assess actions taken under Article 356 after issuance of Proclamation.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, B.R. Gavai and Surya Kant, JJ.): The exercise of power by the President after the Proclamation under Article 356 is issued is subject to judicial review – The exercise of power by the President must have a reasonable nexus with the

object of the Proclamation – The person challenging the exercise of power must prima facie establish that it is a mala fide or extraneous exercise of power – Once a prima facie case is made, the onus shifts to the Union to justify the exercise of such power – The power of Parliament under Article 356(1)(b) to exercise the powers of the Legislature of the State cannot be restricted to law-making power thereby excluding non-law making power of the Legislature of the State – Such an interpretation would amount to reading in a limitation into the provision contrary to the text of the Article. [Para 514] – **Held (per Sanjay Kishan Kaul, J.) (Concurring with Dr. D.Y. Chandrachud, CJI):** President's rule can be imposed after the dissolution of the State Assembly since the Presidential emergency was predicated on the failure of the constitutional machinery, which took place prior to the Governor's rule and the dissolution of the Assembly by the Governor of Jammu & Kashmir was only a subsequent consequence – Once the Presidential proclamation has been approved by both Houses of Parliament, so as to reflect the will of the people, the President has the power under Article 356 to make irreversible changes, including the dissolution of the State Assembly – The imposition of an emergency highlights an extraordinary situation and in the absence of the State Government and State Legislature, the power of these elected organs must lie with any other competent authority – Article 357 does not bar the President from exercising the non-legislative powers of the State Legislature, and Article 356(1)(b) allows the Union Parliament to exercise all powers of the State Legislature without distinguishing between legislative and non-legislative powers of the State Legislature – Therefore, the President is permitted to exercise both legislative and non-legislative functions of the State Legislature – However, a proclamation of emergency is bound by judicial and constitutional scrutiny to ensure the exercise of emergency powers is not unfettered and absolute. [Para 112] **– Sanjiv Khanna, J. concurring with Dr. D.Y. Chandrachud, CJI.**

Constitution of India – Art. 370 – Scope and interpretation of – Art.370 incorporating special arrangements for governance of the State of Jammu and Kashmir, if a temporary provision – Historical context to the Article – Placement of Art.370 in Part XXI of the Constitution – Effect of.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, B.R. Gavai and Surya Kant, JJ.): It can be garnered from the historical context for the

inclusion of Article 370 and the placement of Article 370 in Part XXI of the Constitution that it is a temporary provision. [Para 514] **– Held (per Sanjay Kishan Kaul, J.) (Concurring with Dr. D.Y. Chandrachud, CJI):** A combination of factors, such as Article 370's historical context, its text, and its subsequent practice, indicate that Article 370 was intended to be a temporary provision. [Para 112] – **Held (per Sanjiv Khanna, J.) (Concurring with both Dr. D.Y. Chandrachud, CJI and Sanjay Kishan Kaul, J.):** Article 370 was enacted as a transitional provision and did not have permanent character. [Para 2]

Constitution of India – Art. 370 – Effect of dissolution of the Constituent Assembly of Jammu and Kashmir on the scope of powers under Art.370(3).

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, B.R. Gavai and Surya Kant, JJ.): The power under Article 370(3) did not cease to exist upon the dissolution of the Constituent Assembly of Jammu and Kashmir – When the Constituent Assembly was dissolved, only the transitional power recognised in the proviso to Article 370(3) which empowered the Constituent Assembly to make its recommendations ceased to exist – It did not affect the power held by the President under Article 370(3). [Para 514] **– Held (per Sanjay Kishan Kaul, J.) (Concurring with Dr. D.Y. Chandrachud, CJI):** Article 370(3) contained the mechanism to bring the temporary arrangement to an end, and in turn, to de-recognize the internal sovereignty of the State and apply the Constitution of India in toto – Since Article 370 is meant to be a temporary arrangement, it cannot be said that the mechanism under Article 370(3) came to an end after the State Constituent Assembly was dissolved – The power of the President under Article 370(3) was unaffected by the dissolution of the Constituent Assembly of Jammu and Kashmir – The President could exercise their power anytime after the dissolution of the Constituent Assembly of Jammu and Kashmir, in line with the aim of full integration of the State. [Para 112] **– Sanjiv Khanna, J. concurring with Sanjay Kishan Kaul, J.**

Constitution of India – Art. 370 – Amendment of Art. 370 through Art. 370(1)(d) – Application of the Constitution of India to the State of Jammu and Kashmir through exercise of power under Art. 370(1)(d) – Amendment to Article 367 of the Constitution in exercise of the

power under Article 370(1)(d) so as to substitute the reference to the "Constituent Assembly of the State referred to in clause (3) of Article 370 by the words "Legislative Assembly of the State" – Validity of modification of Art. 367 – The President issued Constitutional Orders 272 and 273 during the subsistence of a Proclamation under Article 356(1)(b) – These orders had the effect of applying the entire Constitution of India to the State of Jammu and Kashmir and abrogating Art.370 – Challenge to the Constitutional Orders 272 and 273 (C.Os 272 and 273).

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, B.R. Gavai and Surya Kant, JJ.): Article 370 cannot be amended by exercise of power under Article 370(1)(d) – Recourse must have been taken to the procedure contemplated by Article 370(3) if Article 370 is to cease to operate or is to be amended or modified in its application to the State of Jammu and Kashmir – Paragraph 2 of CO 272 by which Article 370 was amended through Article 367 is ultra vires Article 370(1)(d) because it modifies Article 370, in effect, without following the procedure prescribed to modify Article 370 – An interpretation clause cannot be used to bypass the procedure laid down for amendment – However, the exercise of power by the President under Article 370(1)(d) to issue CO 272 is not mala fide – The President in exercise of power under Article 370(3) can unilaterally issue a notification that Article 370 ceases to exist – The President did not have to secure the concurrence of the Government of the State or Union Government acting on behalf of the State Government under the second proviso to Article 370(1)(d) while applying all the provisions of the Constitution to Jammu and Kashmir because such an exercise of power has the same effect as an exercise of power under Article 370(3) for which the concurrence or collaboration with the State Government was not required – Paragraph 2 of CO 272 issued by the President in exercise of power under Article 370(1)(d) applying all the provisions of the Constitution of India to the State of Jammu and Kashmir is valid – Such an exercise of power is not mala fide merely because all the provisions were applied together without following a piece-meal approach – The President had the power to issue a notification declaring that Article 370(3) ceases to operate without the recommendation of the Constituent Assembly – The continuous exercise of power under Article 370(1) by the President indicates that the gradual process of constitutional integration was ongoing – The declaration

issued by the President under Article 370(3) is a culmination of the process of integration and as such is a valid exercise of power – Thus, CO 273 is valid – The Constitution of India is a complete code for constitutional governance – Following the application of the Constitution of India in its entirety to the State of Jammu and Kashmir by CO 273, the Constitution of the State of Jammu and Kashmir is inoperative and is declared to have become redundant. [Para 514] – **Held (per Sanjay Kishan Kaul, J.) (Concurring with Dr. D.Y. Chandrachud, CJI):** The power of the President under Article 370(3) was unaffected by the dissolution of the Constituent Assembly of Jammu and Kashmir – The President could exercise their power anytime after the dissolution of the Constituent Assembly of Jammu and Kashmir, in line with the aim of full integration of the State – Hence, C.O. 273, which declares that Article 370 shall cease to operate except as provided, and was issued under Article 370(3), is valid – The power to issue C.O. 272 without the concurrence of the Government of the State is valid, as the power of the President is not limited by the concurrence of the Government of the State in this case – The power under Article 370(1)(d) read with Article 367 cannot be used to do indirectly, what cannot be done directly – The power to make modifications under Article 370(1)(d) cannot be used to amend Article 370 and Article 367, which is an interpretation clause, cannot be used to alter the character of a provision – Therefore, Paragraph 2 of C.O. 272, which amends Article 367(4) is ultra vires Article 370 – However, the President had the power to apply all provisions of the Constitution of India to Jammu and Kashmir under Article 370(1)(d), which is similar to the power under Article 370(3) – Therefore, the remainder of Paragraph 2 of C.O. 272 is valid. [Para 112] – **Held (per Sanjiv Khanna, J.) (Concurring with both Dr. D.Y. Chandrachud, CJI and Sanjay Kishan Kaul, J.):** Paragraph (2) of C.O. 272 by which Article 370 was amended by taking recourse to Article 367 is ultra vires and bad in law, albeit can be sustained in view of the corresponding power under Article 370(1)(d) – Most importantly, Article 370 has been made inoperative in terms of clause (3) to Article 370 – Lastly, C.O. 273 is valid. [Para 2]

Jammu and Kashmir Reorganisation Act 2019 – s.14 – Parliament enacted the Jammu and Kashmir Reorganisation Act 2019 which bifurcated the State of Jammu and Kashmir into two Union territories, Union Territory of Jammu and Kashmir and Union Territory of Ladakh – Challenge to the Reorganisation Act on substantive grounds

and on procedural grounds – Contours of the power under Art. 3 of the Constitution of India – Parliament's exercise of power under the first proviso to Art.3 – Suspension of the second proviso to Art.3 as applicable to Jammu and Kashmir – Constitution of India – Art.3.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, B.R. Gavai and Surya Kant, JJ.): The views of the Legislature of the State under the first proviso to Article 3 are recommendatory – Thus, Parliament's exercise of power under the first proviso to Article 3 under the Proclamation was valid and not mala fide – The Solicitor General stated that the statehood of Jammu and Kashmir will be restored (except for the carving out of the Union Territory of Ladakh) – In view of the statement, it is not necessary to determine whether the reorganisation of the State of Jammu and Kashmir into two Union Territories of Ladakh and Jammu and Kashmir is permissible under Article 3 – However, the validity of the decision to carve out the Union Territory of Ladakh is upheld in view of Article 3(a) read with Explanation I which permits forming a Union Territory by separation of a territory from any State – Steps to be taken by the Election Commission of India to conduct elections to the Legislative Assembly of Jammu and Kashmir constituted under s.14 of the Reorganisation Act by 30 September 2024 – Restoration of Statehood shall take place at the earliest and as soon as possible. [Para 514] **– Held (per Sanjay Kishan Kaul, J.) (Concurring with Dr. D.Y. Chandrachud, CJI):** The challenge to Section 4 of the Jammu and Kashmir Reorganization Act on the touchstone of Article 3 is not required to be debated on account of the assurance on behalf of the Government of India that the Statehood of Jammu & Kashmir would be restored on elections being held – It is imperative to ascertain the 'views' of the State Legislature under the first proviso to Article 3 if the proposed Bill affects the area, boundaries or name of the State – However, in the instant case since the State of Jammu & Kashmir was under President's Rule and the State Legislature was already dissolved, the functions of the State Legislature were performed by the Union Parliament – Hence, it was not possible to ascertain the views of the State Legislature – It follows that Section 3 of the Reorganization Act is valid. [Para 112] **– Held (per Sanjiv Khanna, J.) (Concurring with Dr. D.Y. Chandrachud, CJI):** Union Territories are normally geographically small territories, or may be created for aberrant reasons or causes – Conversion of a State into Union Territory has grave consequences, amongst others, it denies the citizens of the

State an elected state government and impinges on federalism – Conversion/ creation of a Union Territory from a State has to be justified by giving very strong and cogent grounds – It must be in strict compliance with Article 3 of the Constitution of India. [Para 6]

Human Rights – Jammu and Kashmir – Held Per Sanjay Kishan Kaul, J, Recommendation made by for setting up of an impartial truth and reconciliation Commission to investigate and report on violation of human rights both by State and non-State actors in Jammu & Kashmir at least since the 1980s and recommend measures for reconciliation. [Para 120]

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[2024] 2 S.C.R. 420 : 2024 INSC 113

Association for Democratic Reforms & Anr.
v.
Union of India & Ors.

(Writ Petition (C) No. 880 of 2017)

15 February 2024

**[Dr Dhananjaya Y Chandrachud,* CJI, Sanjiv Khanna,*
B R Gavai, J B Pardiwala and Manoj Misra, JJ.]**

Issue for Consideration

The matter pertains to the constitutional validity of the Electoral Bond Scheme which introduced anonymous financial contributions to political parties; as also the constitutional validity of the provisions of the Finance Act 2017 which, among other things, amended the provisions of the Reserve Bank of India Act 1934, the Representation of the People Act 1951, the Income Tax Act 1961; as also whether unlimited corporate funding to political parties, as envisaged by the amendment to s. 182(1) of the Companies Act infringes the principle of free and fair elections and violates Art. 14 of the Constitution; and whether the non-disclosure of information on voluntary contributions to political parties under the Electoral Bond Scheme and the amendments to s. 29C of the RPA, s. 182(3) of the CA and s. 13A(b) of the IT Act are violative of the right to information of citizens u/Art. 19(1)(a) of the Constitution.

Headnotes

Elections – Electoral process – Electoral Bond Scheme, 2018 – Electoral Bond Scheme introduced anonymous financial contribution to political parties – Constitutional validity of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Electoral Bond Scheme is unconstitutional – Directions to the issuing bank to stop the issuance of Electoral Bonds – SBI to submit: details of Electoral Bonds purchased since 12 April 2019 till date to the ECI including the date of purchase of each Electoral Bond, the name of the purchaser of the bond and the denomination of the Electoral Bond purchased; details of political parties which have*

received contributions through Electoral Bonds since 12 April 2019 till date to the ECI, and each Electoral Bond encashed by political parties – SBI to submit the said information to the ECI within the period stipulated – ECI to publish the information shared by the SBI on its official website – Electoral Bonds within the validity period of fifteen days but have not been encashed by the political party yet, to be returned by the political party or the purchaser to the issuing bank – Constitution of India. [Paras 216, 219] – **Held: (per Sanjiv Khanna, J.) (Concurring with Dr Dhananjaya Y Chandrachud, CJI.) (Concurring with conclusions albeit with different reasonings)** *Electoral Bond Scheme is unconstitutional and is struck down – Directions to ECI to ascertain the details from the political parties and the State Bank of India, which issued the Bonds, and the bankers of the political parties and thereupon disclose the details and names of the donor/purchaser of the Bonds and the amounts donated to the political party – Henceforth, the issuance of fresh Bonds is prohibited – Electoral Bonds within the validity period of fifteen days but have not been encashed by the political party yet, to be returned by the political party or the purchaser to the issuing bank. [Para 79]*

Elections – Electoral process – Electoral Bond Scheme – Amendment to s. 182 of the Companies Act, 2013 Act, deleting the first proviso thereunder (as amended by the s. 154 of the Finance Act, 2017) thereby permitting unlimited corporate funding to political parties – First proviso to s. 182 provided the limit of contribution by the company upto seven and a half per cent of its average net profits during the three immediately preceding financial years – Validity of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): *Is arbitrary and violative of Art. 14 – It infringes the principle of free and fair elections – Amendment to s. 182 is manifestly arbitrary for treating political contributions by companies and individuals alike; permitting the unregulated influence of companies in the governance and political process violating the principle of free and fair elections; and treating contributions made by profit-making and loss-making companies to political parties alike [Paras 215, 216] –* **Held: (per Sanjiv Khanna, J.)** *Amendment to s. 182 of the Companies Act, deleting the first proviso thereunder, is unconstitutional, and is struck down – Principle of proportionality applied which would subsume the test of manifest arbitrariness*

– Furthermore, the claim of privacy by a corporate or a company, especially a public limited company would be on very limited grounds, restricted possibly to protect the privacy of the individuals and persons responsible for conducting the business and commerce of the company – It would be rather difficult for a public (or even a private) limited company to claim a violation of privacy as its affairs have to be open to the shareholders and the public who are interacting with the body corporate/company – Constitution of India – Art. 14 – Companies Act, 2013 – s. 182. [Para 73]

Elections – Electoral process – Electoral Bond Scheme – Non-disclosure of information on voluntary contributions to political parties under the Electoral Bond Scheme and the amendments to s. 29C of the Representation of the People Act 1951, s. 182(3) of the Companies Act and s. 13A(b) of the IT Act by the Finance Act, 2017 – If violative of Art. 19(1)(a):

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Information about funding to a political party is essential for a voter to exercise their freedom to vote in an effective manner – Electoral Bond Scheme and the impugned provisions-proviso to s. 29C(1) of the RPA, s. 182(3) of the CA, and s. 13A(b) of the ITA to the extent that they infringe upon the right to information of the voter by anonymizing contributions through electoral bonds are violative of Art 19(1)(a) and unconstitutional – Union of India was unable to establish that the measure employed in Clause 7(4) of the Electoral Bond Scheme is the least restrictive means to balance the rights of informational privacy to political contributions and the right to information of political contributions – Deletion of the mandate of disclosing the particulars of contributions in s. 182(3) violates the right to information of the voter since they would not possess information about the political party to which the contribution was made which, is necessary to identify corruption and quid pro quo transactions in governance – Such information is also necessary for exercising an informed vote – s. 29C exempts political parties from disclosing information of contributions received through Electoral Bonds whereas s. 182(3) applies to all modes of transfer – Both must be read together – Only purpose of amending s. 182(3) was to bring the provision in tune with the amendment under the RPA exempting disclosure requirements for contributions through electoral bonds – Amendment to s. 182(3) becomes otiose in terms of the*

holding that the Electoral Bond Scheme and relevant amendments to the RPA and the IT Act mandating non-disclosure of particulars on political contributions through electoral bonds is unconstitutional [Paras 104, 168, 169, 172-174, 216] – **Held: (per Sanjiv Khanna, J.)** *On application of the doctrine of proportionality, proviso to s. 29C(1) of the RPA, s. 182(3) of the CA, 2013, and s. 13A(b) of the ITA, as amended by the Finance Act, 2017, unconstitutional, and are struck down – Representation of the People Act, 1951 – s. 29C – Companies Act, 2013 – s. 182(3) – Income Tax Act, 1961 – s. 13A(b) – Constitution of India – Art. 19(1)(a). [Para 74]*

Elections – Electoral process – Electoral Bond Scheme – s. 31(3) of the RBI Act added by the Finance Act, 2017 to effectuate the issuance of the Bonds which, as envisaged, are not to mention the name of the political party to whom they are payable, and hence are in the nature of bearer demand bill or note – Challenge to:

Held: Per Sanjiv Khanna, J. *Sub-section (3) to s. 31 of the RBI Act, 1934 and the Explanation thereto introduced by the Finance Act, 2017 is unconstitutional, and are struck down as it permits issuance of Bonds payable to a bearer on demand by such person – Finance Act, 2017 – Reserve Bank of India Act, 1934 – s. 31(3). [Para 79]*

Elections – Electoral process – Electoral Bonds Scheme, 2018 – Challenge to the Electoral Bond Scheme and the statutory amendments mandating non-disclosure of information on electoral financing; and provisions permitting unlimited corporate funding to political parties – Parameters to test:

Held: (per Dr Dhananjaya Y Chandrachud, CJI, (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): *Courts must adopt a less stringent form of judicial review while adjudicating challenges to legislation and executive action which relate to economic policy as compared to laws relating to civil rights such as the freedom of speech or the freedom of religion – Amendments relate to the electoral process – Correspondence between the Ministry of Finance and RBI that the Bonds were introduced only to curb black money in the electoral process, and protect informational privacy of financial contributors to political parties – Union of India itself classified the amendments as an "electoral reform" – It cannot be said that the amendments deal with economic policy [Paras 40, 42]* – **Held: (per Sanjiv Khanna, J.)** *Scheme*

cannot be tested on the parameters applicable to economic policy – Matters of economic policy normally pertain to trade, business and commerce, whereas contributions to political parties relate to the democratic polity, citizens' right to know and accountability in the democracy – Primary objective of the Scheme, and relevant amendments, is electoral reform and not economic reform – To give the legislation the latitude of economic policy, it would be diluting the principle of free and fair elections. [Para 15]

Elections – Electoral process – Presumption of constitutionality – Application, to electoral laws:

Held: (per Dr Dhananjaya Y Chandrachud, CJI, (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): *Presumption of constitutionality is based on democratic accountability, that is, the legislators are elected representatives who are aware of the needs of the citizens and are best placed to frame policies to resolve them; and that they are privy to information necessary for policy making which the Courts as an adjudicating authority are not – However, the policy underlying the legislation must not violate the freedoms and rights entrenched in Part III of the Constitution and other constitutional provisions – Presumption of constitutionality is rebutted when a prima facie case of violation of a fundamental right is established – Onus then shifts on the State to prove that the violation of the fundamental right is justified – It cannot be said that the presumption of constitutionality does not apply to laws which deal with electoral process [Paras 44, 45] –* **Held: (per Sanjiv Khanna, J.):** *Doctrine of presumption of constitutionality has its limitations when the test of proportionality is applied – Structured proportionality places an obligation on the State at a higher level, as it is a polycentric examination, both empirical and normative – While the courts do not pass a value judgment on contested questions of policy, and give weight and deference to the government decision by acknowledging the legislature's expertise to determine complex factual issues, the proportionality test is not based on preconceived notion or presumption – Standard of proof is a civil standard or a balance of probabilities; where scientific or social science evidence is available, it is examined; and where evidence is inconclusive or does not exist and cannot be developed, reason and logic may suffice. [Para 18]*

Elections – Electoral process – Electoral Bond Scheme, 2018 – Corporate donations to national parties through electoral bonds – Annual audit

reports of political parties from 2017-18 to 2022-23 as available on website of ECI – Significance – Doctrine of proportionality, application:

Held: (Per Sanjiv Khanna, J.) *Data indicative of the quantum of corporate funding through the anonymous Bonds – It clarifies that majority of contribution through Bonds has gone to political parties which are ruling parties in the Centre and the States – More than 50% of the Electoral Bonds in number, and 94% of the Electoral Bonds in value terms were for Rs.1 crore – This supports the reasoning and conclusion on the application of the doctrine of proportionality – Based on the analysis of the data available, the Scheme fails to meet the balancing prong of the proportionality test, however, the proportionality stricto sensu not applied due to the limited availability of data and evidence. [Paras 69, 74]*

Elections – Electoral Process – Electoral Bond Scheme – Infringement of the right to information of the voter, if satisfies the proportionality standard vis-à-vis the purposes of curbing black money; and protecting donor privacy:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Purpose of curbing black money is not traceable to any of the grounds in Art 19(2) – Electoral trusts are an effective alternative through which the objective of curbing black money in electoral financing can be achieved – Electoral Bond Scheme not being the least restrictive means to achieve the purpose of curbing black money in electoral process, there is no necessity of applying the balancing prong of the proportionality standard – Electoral Bond Scheme is not the only means for curbing black money in Electoral Finance – There are other alternatives which substantially fulfill the purpose and impact the right to information minimally when compared to the impact of electoral bonds on the right to information – Constitution of India – Art. 19(1) (a) and 19(2). [Paras 116, 121, 124, 129, 130]*

Elections – Electoral process – Right to informational privacy, if extends to financial contributions to a political party:

Held : (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *If the right to informational privacy extends to financial contributions to a political party, this Court*

needs to decide if the Electoral Bond Scheme adequately balances the right to information and right to informational privacy of political affiliation – Informational privacy to political affiliation is necessary to protect the freedom of political affiliation and exercise of electoral franchise – As regards, right to informational privacy if can be extended to the contributions to political parties, Electoral Bond Scheme has two manifestations of privacy, informational privacy by prescribing confidentiality vis-à-vis the political party; and informational privacy by prescribing non-disclosure of the information of political contributions to the public – Financial contributions to political parties are usually made because they may constitute an expression of support to the political party and that the contribution may be based on a quid pro quo – Law permits contributions to political parties by both corporations and individuals – Huge political contributions made by corporations and companies should not be allowed to conceal the reason for financial contributions made by another section of the population: a student, a daily wage worker, an artist, or a teacher – When the law permits political contributions and such contributions could be made as an expression of political support which would indicate the political affiliation of a person, it is the duty of the Constitution to protect them – Contributions made as quid pro quo transactions are not an expression of political support – However, to not grant the umbrella of informational privacy to political contributions only because a portion of the contributions is made for other reasons would be impermissible – Constitution does not turn a blind eye merely because of the possibilities of misuse. [Paras 131, 138, 139, 142]

Doctrines/Principles – Principle of proportionality – Proportionality standard test – Four prongs — Explanation of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Proportionality standard is laid down to determine if the violation of the fundamental right is justified – Proportionality standard is-the measure restricting a right must have a legitimate goal (legitimate goal stage); the measure must be a suitable means for furthering the goal (suitability or rational connection stage); the measure must be least restrictive and equally effective (necessity stage); and the measure must not have a disproportionate impact on the right holder (balancing stage) – At the legitimate goal stage, the Court is*

to analyze if the objective of introducing the law is a legitimate purpose for the infringement of rights – Second prong of the proportionality analysis requires the State to assess whether the means used are rationally connected to the purpose – At this stage, the court is required to assess whether the means, if realised, would increase the likelihood of the purpose – It is not necessary that the means chosen should be the only means capable of realising the purpose – Next stage is the necessity stage, wherein the Court is to determine if the means adopted is the least restrictive means to give effect to the purpose – The Court is to see, whether there are other possible means which could have been adopted by the State; whether the alternative means identified realise the objective in a 'real and substantial manner'; whether the alternative identified and the means used by the State impact fundamental rights differently; and whether on an overall comparison (and balancing) of the measure and the alternative, the alternative is better suited considering the degree of realizing the government objective and the impact on fundamental rights – In the last stage, the Court undertakes a balancing exercise to analyse if the cost of the interference with the right is proportional to the extent of fulfilment of the purpose – It is in this step that the Court undertakes an analysis of the comparative importance of the considerations involved in the case, the justifications for the infringement of the rights, and if the effect of infringement of one right is proportional to achieve the goal [Paras 105, 106, 117, 119, 156] – **Held: (per Sanjiv Khanna, J.)** *Four steps of test of proportionality are: first step is to examine whether the act/measure restricting the fundamental right has a legitimate aim, second step is to examine whether the restriction has rational connection with the aim, third step is to examine whether there should have been a less restrictive alternate measure that is equally effective, and last stage is to strike an appropriate balance between the fundamental right and the pursued public purpose. [Para 25]*

Doctrines/Principles – Principle of proportionality – Test of proportionality – Proportionality standard to balance two conflicting fundamental rights – Foreign vis-à-vis Indian jurisprudence:

Held: (per Dr Dhananjaya Y Chandrachud, CJI, (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): *Foreign case *Campbell v MGM Limited judgment adopts a double proportionality standard – It employed a three step approach to balance fundamental rights, first step to analyse the comparative importance of the actual rights claimed, second step*

to lay down the justifications for the infringement of the rights, and third to apply the proportionality standard to both the rights – Said approach must be slightly tempered to suit Indian jurisprudence on proportionality – Indian Courts adopt a four prong structured proportionality standard to test the infringement of the fundamental rights – In the last stage, the Court undertakes a balancing exercise, wherein the Court undertakes an analysis of the comparative importance of the considerations involved in the case, the justifications for the infringement of the rights, and if the effect of infringement of one right is proportional to achieve the goal – Thus, the first two steps laid down in Campbell case are subsumed within the balancing prong of the proportionality analysis. [Paras 154, 156] – **Held: (per Sanjiv Khanna, J.)** *Test of proportionality employed by courts in various jurisdictions like Germany, Canada, South Africa, Australia and the United Kingdom, however, no uniformity on application of test of proportionality or the method of using the last two prongs – In the third prong, courts examine whether the restriction is necessary to achieve the desired end, wherein they consider whether a less intrusive alternative is available to achieve the same ends, aiming for minimal impairment – As regards, the fourth prong, the balancing stage, some jurists believe that balancing is ambiguous and value-based, which stems from the premise of rule-based legal adjudication, where courts determine entitlements rather than balancing interests – However, proportionality is a standard-based review rather than a rule-based one – Balancing stage enables judges to consider various factors by analysing them against the standards proposed by the four prongs of proportionality – This ensures that all aspects of a case are carefully weighed in decision-making – While balancing is integral to the standard of proportionality, such an exercise should be rooted in empirical data and evidence as adopted by most of the countries – In the absence of data and figures, there is a lack of standards by which proportionality stricto sensu can be determined – However many of the constitutional courts have employed the balancing stage 'normatively' by examining the weight of the seriousness of the right infringement against the urgency of the factors that justify it – Findings of empirical legal studies provide a more solid foundation for normative reasoning and enhance understanding of the relationship between means and ends – Proportionality analyses would be more accurate and would lead to better and more democratic governance. [Paras 29, 31-33, 35]*

Doctrines/Principles – Doctrine of proportionality – Proportionality standard test to balance fundamental rights-right to information and the right to informational privacy:

Held: **(per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ)** *Proportionality standard is an effective standard to test whether the infringement of the fundamental right is justified – It would prove to be ineffective when the State's interest in question is also a reflection of a fundamental right – Proportionality standard is by nature curated to give prominence to the fundamental right and minimize the restriction on it – If the single proportionality standard were employed to the considerations in the instant case, at the suitability prong, the Court would determine if non-disclosure is a suitable means for furthering the right to privacy – At the necessity stage, the Court would determine if non-disclosure is the least restrictive means to give effect to the right to privacy – At the balancing stage, the Court would determine if non-disclosure has a disproportionate effect on the right holder – In this analysis, the necessity and the suitability prongs would inevitably be satisfied because the purpose is substantial: it is a fundamental right – Balancing stage will only account for the disproportionate impact of the measure on the right to information (the right) and not the right to privacy (the purpose) since the Court is required to balance the impact on the right with the fulfillment of the purpose through the selected means – Thus, the Court while applying the proportionality standard to resolve the conflict between two fundamental rights preferentially frames the standard to give prominence to the fundamental right which is alleged to be violated by the petitioners (in this case, the right to information). [Paras 152-153]*

Doctrines/Principles – Double proportionality standard – Application of, to both the rights-right to informational privacy of the contributor and the right to information of the voter:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Double proportionality standard is the proportionality standard to both the rights (as purpose) to determine if the means used are suitable, necessary and proportionate to the fundamental rights – First prong of the analysis is whether the means has a rational connection with both the purposes, that is, informational privacy of the political contributions and disclosure of information to the voter –*

Further, while applying the suitability prong to the purpose of privacy of political contribution, the court must consider whether the non-disclosure of information to the voter and its disclosure only when demanded by a competent court and upon the registration of criminal case has a rational nexus with the purpose of achieving privacy of political contribution – Undoubtedly, the measure by prescribing non-disclosure of information about political funding shares a nexus with the purpose – Non-disclosure of information grants anonymity to the contributor, thereby protecting information privacy – It is certainly one of the ways capable of realizing the purpose of informational privacy of political affiliation – Suitability prong must next be applied to the purpose of disclosure of information about political contributions to voters – There is no nexus between the balancing measure adopted with the purpose of disclosure of information to the voter – According to Clause 7(4) of the Electoral Bond Scheme and the amendments, the information about contributions made through the Electoral Bond Scheme is exempted from disclosure requirements – This information is never disclosed to the voter – Purpose of securing information about political funding can never be fulfilled by absolute non-disclosure – Measure adopted does not satisfy the suitability prong vis-à-vis the purpose of information of political funding – The next stage is the necessity prong, wherein the Court determines if the measure identified is the least restrictive and equally effective measure – Court must determine if there are other possible means which could have been adopted to fulfill the purpose, and whether such alternative means realize the purpose in a real and substantial manner; impact fundamental rights differently; and are better suited on an overall comparison of the degree of realizing the purpose and the impact on fundamental rights - On an overall comparison of the measure and the alternative, the alternative is better suited because it realizes the purposes to a considerable extent and imposes a lesser restriction on the fundamental rights – Having concluded that Clause 7(4) of the Scheme is not the least restrictive means to balance the fundamental rights, there is no necessity of applying the balancing prong of the proportionality standard. [Paras 160-164, 168]

Doctrine/Principles – Doctrine of proportionality, when applied:

Held: (Per Sanjiv Khanna, J.) *Proportionality principle is applied by courts when they exercise their power of judicial review in cases involving a restriction on fundamental rights – It is applied to strike an appropriate*

balance between the fundamental right and the pursued purpose and objective of the restriction. [Para 24]

Doctrine/Principles – Doctrine of proportionality – Application of proportionality test to Electoral Bond Scheme, 2018 – Legitimate purpose prong – Retribution, victimisation or retaliation, if can be treated as a legitimate aim:

Held: (Per Sanjiv Khanna, J.) *Retribution, victimisation or retaliation cannot by any stretch be treated as a legitimate aim – This would not satisfy the legitimate purpose prong of the proportionality test – Neither the Scheme nor the amendments to the Finance Act, 2017, rationally connected to the fulfilment of the purpose to counter retribution, victimisation or retaliation in political donations – It will also not satisfy the necessity stage of the proportionality even if the balancing stage is ignored – Retribution, victimisation or retaliation against any donor exercising their choice to donate to a political party is an abuse of law and power – This has to be checked and corrected – As it is a wrong, the wrong itself cannot be a justification or a purpose – Cloak of secrecy, leads to severe restriction and curtailment of the collective's right to information and the right to know – Transparency and not secrecy is the cure and antidote. [Para 39]*

Doctrine/Principles – Doctrine of proportionality – Application of proportionality test to Electoral Bond Scheme, 2018 – Rational nexus prong:

Held: (Per Sanjiv Khanna, J.) *Donor may like to keep his identity anonymous is a mere ipse dixit assumption – Plea of infringement of the right to privacy has no application at all if the donor makes the contribution, that too through a banking channel, to a political party – Identity of the purchaser of the Bond can always be revealed upon registration of a criminal case or by an order/ direction of the court – Thus, the fear of reprisal and vindictiveness does not end – So-called protection exists only on paper but in practical terms is not a good safeguard even if it is accepted that the purpose is legitimate – Under the Scheme, political parties in power may have asymmetric access to information with the authorised bank – They also retain the ability to use their power and authority of investigation to compel the revelation of Bond related information – Thus, the entire objective of the Scheme is contradictory and inconsistent – Rational connection test fails since the purpose of curtailing*

black or unaccounted-for money in the electoral process has no connection or relationship with the concealment of the identity of the donor – Payment through banking channels is easy and an existing antidote – On the other hand, obfuscation of the details may lead to unaccounted and laundered money getting legitimised. [Paras 41, 42, 44]

Doctrine/Principles – Doctrine of proportionality – Application of proportionality test to Electoral Bond Scheme, 2018 – Necessity prong:

Held: (Per Sanjiv Khanna, J.) *As per the Electoral Trust Scheme, contributions could be made by a person or body corporate to the trust which would transfer the amount to the political party – Trust is thus, treated as the contributor to the political party and guidelines were issued by the ECI to ensure transparency and openness in the electoral process – When the necessity test is applied, the Trust Scheme achieves the objective of the Union of India in a real and substantial manner and is also a less restrictive alternate measure in view of the disclosure requirements, viz. the right to know of voters – Trust Scheme is in force and is a result of the legislative process – In a comparison of limited alternatives, it is a measure that best realises the objective of the Union of India in a real and substantial manner without significantly impacting the fundamental right of the voter to know. [Paras 50-51]*

Doctrine/Principles – Doctrine of proportionality – Application of proportionality test to Electoral Bond Scheme, 2018 – Fourth prong-the balancing prong of proportionality:

Held: (Per Sanjiv Khanna, J.) *On application of the balancing prong of proportionality, the Electoral Bond Scheme falls foul and negates and overwhelmingly disavows and annuls the voters right in an electoral process as neither the right of privacy nor the purpose of incentivising donations to political parties through banking channels, justify the infringement of the right to voters – Voters right to know and access to information is far too important in a democratic set-up so as to curtail and deny 'essential' information on the pretext of privacy and the desire to check the flow of unaccounted money to the political parties – While secret ballots are integral to fostering free and fair elections, transparency-not secrecy-in funding of political parties is a prerequisite for free and fair elections – Confidentiality*

of the voting booth does not extend to the anonymity in contributions to political parties. [Para 57]

Constitution of India – Balancing of conflicting fundamental rights-right to information and the right to informational privacy – Standard to be followed:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *First exercise that the Court must undertake while balancing two fundamental rights is to determine if the Constitution creates a hierarchy between the two rights in conflict, if yes, then the right which has been granted a higher status would prevail over the other right involved – And if not, the following standard must be employed from the perspective of both the rights where rights A and B are in conflict, whether the measure is a suitable means for furthering right A and right B, whether the measure is least restrictive and equally effective to realise right A and right B, and whether the measure has a disproportionate impact on right A and right B – Courts have used the collective interest or the public interest standard, the single proportionality standard, and the double proportionality standard to balance the competing interests of fundamental rights – There is no constitutional hierarchy between the right to information and the right to informational privacy of political affiliation. [Paras 145-146, 157, 159]*

Constitution of India – Fundamental right – Breach of – Burden of proof:

Held: (per Dr Dhananjaya Y Chandrachud, CJI, (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): *Courts cannot carve out an exception to the evidentiary principle which is available to the legislature based on the democratic legitimacy which it enjoys – In the challenge to electoral law, like all legislation, the petitioners would have to prima facie prove that the law infringes fundamental rights or constitutional provisions, upon which the onus would shift to the State to justify the infringement [Para 45]* – **Held: (per Sanjiv Khanna, J.)** *Once the petitioners are able to prima facie establish a breach of a fundamental right, then the onus is on the State to show that the right limiting measure pursues a proper purpose, has rational nexus with that purpose, the means adopted were necessary for achieving that purpose, and lastly proper balance has been incorporated. [Para 17]*

Constitution of India – Art. 14 – Doctrine of manifest arbitrariness – Application of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Doctrine of manifest arbitrariness can be used to strike down a provision where the legislature fails to make a classification by recognizing the degrees of harm; and the purpose is not in consonance with constitutional values – Legislative action can also be tested for being manifestly arbitrary – There is, and ought to be, a distinction between plenary legislation and subordinate legislation when they are challenged for being manifestly arbitrary – Manifest arbitrariness of a subordinate legislation has to be primarily tested vis-a-vis its conformity with the parent statute – Doctrines/Principles. [Paras 198, 209]*

Constitution of India – Art 19(1)(a) – Right to information, scope of – Evolution of jurisprudence on right to information:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Right to information can be divided into two phases – In the first phase, the right to information is traced to the values of good governance, transparency and accountability – In the second phase, the importance of information to form views on social, cultural and political issues, and participate in and contribute to discussions is recognised – Crucial aspect of the expansion of the right to information in the second phase is that right to information is not restricted to information about state affairs, that is, public information – It includes information which would be necessary to further participatory democracy in other forms – Right to information has an instrumental exegesis, which recognizes the value of the right in facilitating the realization of democratic goals – Beyond that, it has an intrinsic constitutional value; one that recognizes that it is not just a means to an end but an end in itself. [Paras 60, 64, 65]*

Constitution of India – Art. 19(1)(a) – Right to vote – Right to know – Significance:

Held: (Per Sanjiv Khanna, J.) *Right to vote is a constitutional and statutory right, grounded in Art 19(1)(a), as the casting of a vote amounts to expression of an opinion by the voter – Citizens' right to know stems from this very right, as meaningfully exercising choice by voting requires information –*

Representatives elected as a result of the votes cast in their favour, enact new, and amend existing laws, and when in power, take policy decisions – Access to information which can materially shape the citizens' choice is necessary for them to have a say – Thus, the right to know is paramount for free and fair elections and democracy – Denying voters the right to know the details of funding of political parties would lead to a dichotomous situation – Funding of political parties cannot be treated differently from that of the candidates who contest elections – Democratic legitimacy is drawn not only from representative democracy but also through the maintenance of an efficient participatory democracy – In the absence of fair and effective participation of all stakeholders, the notion of representation in a democracy would be rendered hollow. [Paras 19, 21, 22]

Constitution of India – Fundamental rights – Conflict of – Voter's right to know vis-à-vis right to privacy:

Held: (Per Sanjiv Khanna, J.) *Fundamental rights are not absolute, legislations/policies restricting the rights may be enacted in accordance with the scheme of the Constitution – Thread of reasonableness applies to all such restrictions – Furthermore, Art. 14 includes the facet of formal equality and substantive equality – Thus, the principle 'equal protection of law' requires the legislature and the executive to achieve factual equality – This principle can be extended to any restriction on fundamental rights which must be reasonable to the identified degree of harm – If the restriction is unreasonable, unjust or arbitrary, then the law should be struck down – Further, it is for the legislature to identify the degree of harm – Voters right to know and access to information is far too important in a democratic set-up so as to curtail and deny 'essential' information on the pretext of privacy and the desire to check the flow of unaccounted money to the political parties. [Paras 56, 57]*

Elections – Electoral Bond Scheme, 2018 – Clause 7(4), 2(a) – Features of the Scheme:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Scheme defines electoral bond "as a bond issued in the nature of promissory note which shall be a bearer banking instrument and shall not carry the name of the buyer or payee" – The Scheme also stipulates that the information furnished by the buyer shall be treated as confidential which shall not be disclosed by any*

authority except when demanded by a competent court or by a law enforcement agency upon the registration of criminal case – While it is true that the law prescribes anonymity as a central characteristic of electoral bonds, the de jure anonymity of the contributors does not translate to de facto anonymity – The Scheme is not fool-proof – There are sufficient gaps in the Scheme which enable political parties to know the particulars of the contributions made to them – Electoral bonds provide economically resourced contributors who already have a seat at the table selective anonymity vis-à-vis the public and not the political party. [Paras 102, 103]

Elections – Electoral process – Focal point of the electoral process-candidate or political party:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Statutory provisions relating to elections accord considerable importance to political parties, signifying that political parties have been the focal point of elections – 'Political party' is a relevant political unit in the democratic electoral process in India – Voters associate voting with political parties because of the centrality of symbols and its election manifesto in the electoral process – Form of government where the executive is chosen from the legislature based on the political party or coalition of political parties which has secured the majority – Prominence accorded to political parties by the Tenth Schedule of the Constitution – Law recognises the inextricable link between a political party and the candidate though vote is cast for a candidate – Voters casts their votes based on two considerations: the capability of the candidate as a representative and the ideology of the political party. [Paras 80, 86, 89, 94]*

Elections – Electoral democracy in India – Basis of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Electoral democracy in India is premised on the principle of political equality, guaranteed by the Constitution in two ways – Firstly, by guaranteeing the principle of "one person one vote" which assures equal representation in voting, and secondly, the Constitution ensures that socio-economic inequality does not perpetuate political inequality by mandating reservation of seats for Scheduled Castes and Scheduled Tribes in Parliament and State Assemblies – Constitution guarantees political equality by focusing on the 'elector' and the 'elected' –*

However, political inequality continues to persist in spite of the constitutional guarantees – Difference in the ability of persons to influence political decisions because of economic inequality is one of the factors – Economic inequality leads to differing levels of political engagement because of the deep association between money and politics – It is in light of the nexus between economic inequality and political inequality, and the legal regime in India regulating party financing that the essentiality of the information on political financing for an informed voter must be analyzed. [Paras 96-100]

Elections – Electoral process in India – Nexus between money and electoral democracy:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Law does not bar electoral financing by the public – Both corporates and individuals are permitted to contribute to political parties which is crucial for the sustenance and progression of electoral politics – Primary way through which money directly influences politics is through its impact on electoral outcomes – One way in which money influences electoral outcomes is through vote buying – Another way in which money influences electoral outcomes is through incurring electoral expenditure for political campaigns – Enhanced campaign expenditure proportionately increases campaign outreach which influences the voting behavior of voters – Money also creates entry-barriers to politics by limiting the kind of candidates and political parties which enter the electoral fray – Challenge to the statutory amendments-provisions dealing with electoral finance and the Electoral Bond Scheme cannot be adjudicated in isolation without a reference to the actual impact of money on electoral politics. [Paras 46-51, 55]*

Election Symbols (Reservation and Allotment) Order, 1968 – Allotment of symbols to political parties – Significance:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *In terms of the provisions of the Symbols Order, the ECI shall allot a symbol to every candidate contesting the election – Symbols Order classifies political parties into recognised political parties and unrecognised political parties – Difference in the procedure under the Symbols Order for allotting symbols to recognised political parties, registered but unrecognised political parties and independent*

candidates indicates both the relevance and significance of political parties in elections in India – Purpose of allotting symbols to political parties is to aid voters in identifying and remembering the political party – Law recognises the inextricable link between a political party and the candidate though the vote is cast for a candidate – Most of the voters identified a political party only with its symbol and this still continues to the day – Symbols also gain significance when the names of political parties sound similar. [Paras 81, 84, 86, 87]

Words and Phrases – Privacy – Definition:

Held : (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) *Privacy is not limited to private actions and decisions – Privacy is defined as essential protection for the exercise and development of other freedoms protected by the Constitution, and from direct or indirect influence by both State and non-State actors – Viewed in this manner, privacy takes within its fold, decisions which also have a 'public component'. [Para 133]*

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List of Keywords

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Electoral bond scheme, 2018; Electoral bond; Corporate contributions; Curbing black money; Transparency; Judicial review; Close association of politics and money; Non-disclosure of information on electoral financing; Right to information; Electoral process; Donor privacy; Informational privacy of financial contributions to political parties; Privacy vis-a-vis political party; Right to informational privacy; Judicial approach; Balancing fundamental rights; Double proportionality standard; Arbitrariness; Manifest arbitrariness; Indian jurisprudence; Anonymous financial contributions to political parties; Financial contributions to political parties; Financial contributions; Election Commission of India; Transparency of political finance; Quid pro quo arrangements; Free and fair elections; Presumption of constitutionality; Corporate funding; Electoral campaigns; Excessive delegation; Principle of 'one person-one vote'; Non-disclosure of funding by companies; Public domain; Corporate donations; Anonymity of donations to political parties; Judicial restraint; Symbols Order; Electoral democracy; Proportionality standard; Electoral Trusts; Political contribution; Electronic transfer other than electoral bonds; Right to informational privacy of political affiliation; Privacy; Political beliefs; Political affiliation; Privacy of political affiliation; Electoral franchise;

Corrupt practices; Single proportionality standard; Plenary legislation; Subordinate legislation; Removal of contribution restrictions; Loss-making companies; Profit-making companies.

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Electoral Bonds Scheme, 2018; Electoral bonds; Electoral process; Doctrine of proportionality; Corporate funding; Ban on contributions to political parties; Contributions by companies; Electronic Clearing System; Economic policy; Judicial review; Electoral democracy; Burden of proof; Doctrine of presumption of constitutionality; Test of proportionality; Structured proportionality; Right to vote; Right to know; Symbol allotted to political parties; Funding of political parties; Democratic legitimacy; Substantive balance; Diversity; Conscientiousness; Equal consideration; Donors of a political party; Informational privacy of donors; Black money in electoral finance; Retribution; Victimisation; Retaliation; Quid pro quo; Multiple donors; Double proportionality; Single proportionality standard; Principle of reasonableness; Right of privacy; Balancing prong of proportionality; Principle of lis pendens; Necessity test; Rational connection test; Standard based review; Rule based legal adjudication; Empirical deference; Transparency; Secrecy; Identities of donor; Money laundering; Alternative measures; Electoral Trust Scheme; Fundamental rights; Complementary rights; Law Commission of India; Party wise donation; Test of manifest arbitrariness.

[2024] 2 S.C.R. 1136 : 2024 INSC 192

Dr Kavita Kamboj
v.
High Court of Punjab and Haryana & Ors

(Civil Appeal Nos 2179-2180 of 2024)

13 February 2024

**[Dr. Dhananjaya Y Chandrachud,* CJI,
J B Pardiwala and Manoj Misra, JJ]**

Issue for Consideration

The issue for consideration was a challenge to a decision of the High Court of Punjab & Haryana directing the State of Haryana to take positive action to accept its recommendation *vide* communication dated 23.02.2023, whereby the names of thirteen in-service judicial officers were recommended for appointment by way of promotion as Additional District and Sessions Judge.

The challenge before the High Court was *inter alia* to a decision of the State of Haryana *vide* Letter dated 12.03.2023, whereby the State had decided not to accept the aforesaid High Court recommendation dated 23.02.2023, on the ground that the "settled procedure" under Article 233 read with Article 309 of the Constitution of India and the Haryana Superior Judicial Service Rules 2007 had not been followed.

Headnotes

Service Law – Promotion – Eligibility Criteria – Haryana Superior Judicial Service Rules 2007 – Rule 6(1)(a) r/w. Rule 8 – Recommendation of the High Court that for a candidate seeking promotion on the basis of merit-cum-seniority, an aggregate of 50% marks for both, i.e. in the written test and in the *viva voce,* would be required so as to render a candidate eligible for promotion – Challenge to:

Held: *The High Court was correct in prescribing that recruitment by promotion to the Higher Judicial Service should have a minimum of 50% both in the written test as well as in the viva voce independently, for those in-service candidates who were drawn for promotion in the 65% promotion quota – This is because the candidate should not just demonstrate the ability*

to reproduce their knowledge by answering questions in the suitability test, but must also demonstrate both practical knowledge and the application of the substantive law in the course of the interview – In-service candidates seeking recruitment through promotions cannot be considered at par with candidates seeking direct recruitment or with candidates seeking accelerated promotion through a limited competitive test – The three modes of recruitment have been reasonably classified and different requirements have been prescribed for each – As such, what may or may not have been held in respect of the viva voce in direct recruitments may not necessarily apply to the viva voce requirement in recruitments through promotions [Paras 65, 37, 41]

Eligibility criteria for Higher Judicial Services:

Held: *The Higher Judicial Services require the selection of judicial officers of mature personality and requisite professional experience – In-service judicial officers are expected to have a greater familiarity with the law and the procedure based on their experience as judicial officers – While an objective written examination can be the best gauge of the legal knowledge of a candidate, the viva voce offers the best mode of assessing the overall personality of a candidate – The purpose of the interview for officers in that class is to assess the officer in terms of the ability to meet the duties required for performing the role of an Additional District and Sessions Judge – Consequently, there would be a reasonable and valid basis, if the High Court were to do so, to impose a requirement of a minimum eligibility or cut-off both in the written test and in the viva voce separately. [Paras 42, 44]*

Administrative directions can fill up the gaps and supplement the Rules, when they are silent on a particular point:

Held: *When the Rules under Article 309 hold the field, these Rules have to be implemented – Where specific provisions are made in the Rules framed under Article 309, it would not be open to the High Court to issue administrative directions either in the form of the Full Court Resolution or otherwise, that are at inconsistent with the mandate of the Rules – On the other hand, in cases such as the one at hand, where the Rules were silent, it is open to the High Court to issue a Full Court Resolution – The Rules being silent, it was clearly open to the High Court to prescribe such a criterion as it did in 2013, when the 50% cut-off was prescribed on aggregate scores and also, in 2021, when the 50% cut-off was prescribed on the written test scores and the viva voce separately. [Paras 50, 52 and 65]*

Constitution of India - Articles 233, 234 and 235 – Appointments to the District Judiciary to be in consultation with the High Court and any other exercise *de hors* such consultation would not be in accordance with the scheme of the Constitution:

Held: *In matters of appointment of judicial officers, the opinion of the High Court is not a mere formality because the High Court is in the best position to know about the suitability of the candidates to the post of District Judge – The Constitution, therefore, expects the Governor to engage in constructive constitutional dialogue with the High Court before appointing persons to the post of District Judges under Article 233. [Para 62]*

The State Government travelled beyond the remit of the consultation with the High Court by referring the matter to the Union Government. Any issue between the High Court and the State Government should have been ironed out in the course of the consultative process within the two entities – The State Government was bound to consult only the High Court – Any other exercise de hors such consultation would not be in accordance with the scheme of the Constitution. [Para 66]

Doctrines – Doctrine of Legitimate Expectation – Twin Test:

Held: *An individual who claims the benefit or entitlement based on the doctrine of legitimate expectation has to establish: (i) the legitimacy of the expectation; and (ii) that the denial of the legitimate expectation led to a violation of Article 14. [Para 58]*

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Haryana Superior Judicial Service Rules 2007; Constitution of India

List of Keywords

Promotion; Eligibility Criteria; Service Rules, Recruitment; District Judiciary.

[2024] 3 S.C.R. 462 : 2024 INSC 161

Sita Soren
v.
Union of India

(Criminal Appeal No. 451 of 2019)

04 March 2024

[Dr Dhananjaya Y Chandrachud,* CJI, A.S. Bopanna, M. M. Sundresh, Pamidighantam Sri Narasimha, J.B. Pardiwala, Sanjay Kumar and Manoj Misra, JJ.]

Issue for Consideration

*Instant Reference pertains to reconsideration of the correctness of the view of the majority judgment in *PV Narasimha Rao's case granting immunity from prosecution to a member of the legislature who has allegedly engaged in bribery for speaking or casting a vote.*

Headnotes

Constitution of India – Arts. 105 and 196 – Powers, privileges and immunities of the Houses of Parliament or Legislature, as the case may be, and of members and committees – Member of Parliament or the Legislative Assembly, if can claim immunity from prosecution on a charge of bribery in a criminal court – Reconsideration of the correctness of the majority view in *PV Narasimha Rao's case which grants immunity from prosecution to a member of the legislature who has allegedly engaged in bribery for casting a vote or speaking:

Held: *Judgment of the majority in *PV Narasimha Rao's case has wide ramifications on public interest, probity in public life and parliamentary democracy – There is a grave danger of this Court allowing an error to be perpetuated if decision not reconsidered – Thus, said case not concurred with and overruled. [Para 188]*

Constitution of India – Arts. 105 and 196 – Powers, privileges and immunities of the Houses of Parliament or Legislature, and of members and committees – Allegation against the member of Legislative Assembly that she accepted bribe from an independent candidate for casting her

vote in his favour in the Rajya Sabha elections, however, in an open ballot, she did not cast her vote in favour of the alleged bribe giver but her own party candidate – Chargesheet against the member – Petition for quashing of criminal charges, claiming protection of Art.194(2), relying on **PV Narasimha Rao's* case that member would enjoy immunity from prosecution for accepting bribe for speaking or giving their vote in Parliament – Rejected by the High Court – Matter before the Supreme Court where the two-judge bench referred the matter to three-judge bench, who further referred to five-judges bench – Bench of five-judges doubted the correctness of **PV Narasimha Rao* wherein the majority judgment held that the legislator is conferred with immunity when they accept bribe for speaking or giving their vote in Parliament, whereas minority held that giving bribe to influence legislator to vote or speak in Parliament, not protected by Arts. 105(2) and 194(2), and referred the matter to bench of seven judges:

Held: *Interpretation placed on the issue in question in the judgment of the majority in *PV Narasimha Rao's case results in a paradoxical outcome – Such an interpretation is contrary to the text and purpose of Arts. 105 and 194 – Reconsidering *PV Narasimha Rao's case does not violate the principle of stare decisis – Members of the House or indeed the House itself cannot claim privileges which are not essentially related to their functioning – Constitution envisions probity in public life – Corruption and bribery of members of the legislature erode the foundation of the Parliamentary democracy – Bribery is not protected by parliamentary privilege – Delivery of result irrelevant to the offence of bribery – Voting for elections to the Rajya Sabha falls within the ambit of Art. 194(2) – Thus, said case not concurred with and overruled. [Paras D, G, I, 188]*

Judicial Precedent – Overruling of the long-settled law in **PV Narasimha Rao's* case, if warranted:

Held : *Period of time over which the case has held the field is not of primary consequence – It is not appropriate for this Court to confine itself to a rigid understanding of the doctrine of stare decisis – Ability of this Court to reconsider its decisions is necessary for the organic development of law and the advancement of justice – If this Court is denuded of its power to reconsider its decisions, the development of constitutional jurisprudence would virtually come to a standstill – Thus, reconsidering *PV Narasimha*

*Rao's case does not violate the principle of stare decisis – *PV Narasimha Rao's case has wide ramifications on public interest, probity in public life and the functioning of parliamentary democracy – It contains several apparent errors, its interpretation of the text of Art. 105; its conceptualization of the scope and purpose of parliamentary privilege and its approach to international jurisprudence all of which resulted in a paradoxical outcome – There is an imminent threat of allowing an error to be perpetuated if the decision in *PV Narasimha Rao's case is not reconsidered – Mistaken interpretation of the Constitution, must not be perpetuted merely because of rigid allegiance to a previous opinion of five judges of this Court. [Paras 31, 33, 40, 44, 188.1]*

Constitution of India – Arts. 105 and 194 – Parliamentary privileges, if collective right of the house – Two constituent elements of privileges:

Held: *First is the sum of rights enjoyed by the House of Parliament collectively and the second is the rights enjoyed by members of the House individually – Rights and immunities such as the power to regulate its own procedure, the power to punish for contempt of the House or to expel a member, belong to the first element of privileges held by the House as a collective body for its proper functioning, protection of members, and vindication of its own authority and dignity – Second element of rights exercised individually by members of the House includes freedom of speech and freedom from arrest, among others – Privilege exercised by members individually is in turn qualified by its necessity, in that the privilege must be such that "without which they could not discharge their functions" – These privileges enjoyed by members of the House individually are a means to ensure and facilitate the effective discharge of the collective functions of the House – Privileges enjoyed by members of the House which exceed those possessed by other bodies or individuals, are not absolute or unqualified – Thus, the privileges and immunities enshrined in Arts. 105 and 194 belong to the House collectively – Exercise of the privileges individually by members must be tested on the anvil of whether it is tethered to the healthy and essential functioning of the House. [Paras 76, 77, 84]*

Constitution of India – Arts. 105 and 194 – Parliamentary privileges – Necessity test to claim and exercise a privilege:

Held: *Members of the House or indeed the House itself cannot claim privileges which are not essentially related to their functioning – Assertion*

of a privilege by an individual member of Parliament or Legislature would be governed by a twofold test, first, the privilege claimed has to be tethered to the collective functioning of the House, and second, its necessity must bear a functional relationship to the discharge of the essential duties of a legislator – Burden of satisfying that a privilege exists and that it is necessary for the House to collectively discharge its function lies with the person or body claiming the privilege – Houses of Parliament or Legislatures, and the committees are not islands which act as enclaves shielding those inside from the application of ordinary laws – Lawmakers are subject to the same law that the law-making body enacts for the people it governs and claims to represent. [Paras 87, 90, 91]

Constitution of India – Arts. 105 and 194 – Parliamentary privilege – Privileges, if attract immunity to a member of Parliament or of the Legislatures who engages in bribery in connection with their speech or vote:

Held: *Bribery is not protected by parliamentary privilege – Bribery is not in respect of anything said or any vote given – Bribery is not immune under clause (2) of Art.105 and Art.194 because a member engaging in bribery commits a crime which is unrelated to their ability to vote or to make a decision on their vote – Same principle applies to bribery in connection with a speech in the House or a Committee – Individual member of the legislature cannot assert a claim of privilege to seek immunity u/Arts 105 and 194 from prosecution on a charge of bribery in connection with a vote or speech in the legislature – Such a claim to immunity fails to fulfil the twofold test that the claim is tethered to the collective functioning of the House and that it is necessary to the discharge of the essential duties of a legislator. [Para G, 188.4, 188.7]*

Constitution of India – Arts. 105 and 194 – Parliamentary privilege – Expression 'in respect of' and 'anything' in Clause (2) of Art. 105 – Interpretation:

Held: *Clause (2) of Art. 105 grants immunity "in respect of anything" said or any vote given – Extent of this immunity must be tested on the anvil of the test of intrinsic relation to the functioning of the House and the necessity test – Phrase "in respect of" is significant to delineate the ambit of the immunity granted under Clause (2) of Art. 105 – Words "in respect of" in Clause (2)*

apply to the phrase "anything said or any vote given," and in the latter part to a publication by or with the authority of the House – Expressions "anything" and "any" must be read in the context of the accompanying expressions in Arts 105(2) and 194(2) – Words "anything" or "any" may not be interpreted without reading the operative word on which it applies i.e. "said" and "vote given" respectively – Words "anything" and "any" when read with their respective operative words mean that a member may claim immunity to say as they feel and vote in a direction that they desire on any matter before the House – These are absolutely outside the scope of interference by the courts – Words "in respect of" means 'arising out of' or 'bearing a clear relation to' and cannot be interpreted to mean anything which may have even a remote connection with the speech or vote given. [Paras 99, 102-103, 188.6]

Constitution of India – Arts. 105 and 194 – Power, privileges and immunity in Parliament – Purpose and object:

Held: *Constitution envisions probity in public life – Purpose and object for which the Constitution stipulates powers, privileges and immunity in Parliament must be borne in mind – Privileges are essentially related to the House collectively and necessary for its functioning – Hence, the phrase "in respect of" in Art. 105 must have a meaning consistent with the purpose of privileges and immunities – Arts. 105 and 194 seek to create a fearless atmosphere in which debate, deliberations and exchange of ideas can take place within the Houses of Parliament and the state legislatures – Purpose is destroyed when a member is induced to vote or speak in a certain manner not because of their belief/position on an issue but because of an act of bribery – Corruption and bribery of members of the legislature erode the foundation of Indian Parliamentary democracy – It is destructive of the aspirational and deliberative ideals of the Constitution and creates a polity which deprives citizens of a responsible, responsive and representative democracy. [Paras 104, 188.5, 188.8]*

Constitution of India – Arts. 105 and 194 – Parliamentary privileges – Courts and the House, if exercise parallel jurisdiction over allegations of bribery:

Held: *Issue of bribery is not one of exclusivity of jurisdiction by the House over its bribe-taking members – Purpose of a House acting against a*

contempt by a member for receiving a bribe serves a purpose distinct from a criminal prosecution – Jurisdiction which is exercised by a competent court to prosecute a criminal offence and the authority of the House to take action for a breach of discipline in relation to the acceptance of a bribe by a member of the legislature exist in distinct spheres – Scope, purpose and consequences of the court exercising jurisdiction in relation to a criminal offence and the authority of the House to discipline its members are different – Potential of misuse against individual members of the legislature is neither enhanced nor diminished by recognizing the jurisdiction of the court to prosecute a member of the legislature who is alleged to have indulged in an act of bribery. [Paras 188.9, 188.10]

Constitution of India – Arts. 105 and 194 – Parliamentary privileges – Offence of bribery, stage at which it crystallizes:

Held: *Offence of a public servant being bribed is pegged to receiving or agreeing to receive the undue advantage and not the actual performance of the act for which the undue advantage is obtained – Delivery of results is irrelevant to the offence of bribery – To read Arts. 105(2) and 194(2) in the manner proposed in the majority judgment in PV Narasimha Rao's case results in a paradoxical outcome – Such an interpretation results in a situation where a legislator is rewarded with immunity when they accept a bribe and follow through by voting in the agreed direction – On the other hand, a legislator who agrees to accept a bribe, but may eventually decide to vote independently will be prosecuted – Such an interpretation belies not only the text of Arts. 105 and 194 but also the purpose of conferring parliamentary privilege on members of the legislature – Offence of bribery is agnostic to the performance of the agreed action and crystallizes on the exchange of illegal gratification – It does not matter whether the vote is cast in the agreed direction or if the vote is cast at all – Offence of bribery is complete at the point in time when the legislator accepts the bribe – Prevention of Corruption Act, 1988 – s. 7. [Paras 117, 126, 188.11]*

Constitution of India – Arts. 105 and 194 – Parliamentary privileges – Votes casted by elected members of the state legislative assembly in an election to the Rajya Sabha, if protected by Art. 194(2):

Held: *Voting for elections to the Rajya Sabha falls within the ambit of Art.194(2) – Text of Art. 194 consciously uses the term 'Legislature' instead*

of 'House' to include parliamentary processes which do not necessarily take place on the floor of the House or involve 'lawmaking' in its pedantic sense – Rajya Sabha or the Council of States performs an integral function in the working of the democracy and the role played by Rajya Sabha constitutes a part of the basic structure of the Constitution – Role played by elected members of the state legislative assemblies in electing members of Rajya Sabha is significant and requires utmost protection to ensure that vote is exercised freely and without fear of legal persecution – Any other interpretation belies the text of Art.194(2) and the purpose of parliamentary privilege – Protection Arts. 105 and 194 colloquially called "parliamentary privilege" and not "legislative privilege" – It cannot be restricted to only law-making on the floor of the House but extends to other powers and responsibilities of elected members, taking place in the Legislature or Parliament, even when the House is not sitting. [Paras 180, 187]

Constitution of India – Art. 194 – Use of the term "Legislature" instead of the "House of Legislature" at appropriate places – Effect:

Held: *It is evident from the drafting of the provision that the two terms have not been used interchangeably – First limb of Art. 194(2) pertains to "anything said or any vote given by him in the Legislature or any committee thereof" – However, in the second limb, the phrase used is "in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes, or proceedings" – There is a clear departure from the term 'Legislature' used in the first limb, to use the term "House of such a Legislature" in the second limb of the provision – Provision creates a distinction between the two – Terms "House of Legislature" and "Legislature" have different connotations – "House of Legislature" refers to the juridical body, which is summoned by the Governor pursuant to Art. 174 – Term "Legislature", on the other hand, refers to the wider concept under Art. 168, comprising the Governor and the Houses of the Legislature – Use of the phrase "in the Legislature" instead of "House of Legislature" is significant. [Paras 174, 175.]*

Constitution of India – Arts. 105, 194 – Parliamentary privilege under:

Held: *Is integral to deliberative democracy in facilitating the functioning of a parliamentary form of governance – It ensures that legislators in whom citizens repose their faith can express their views and opinions on the floor*

of the House without 'fear or favour' – Legislator belonging to a political party with a minuscule vote share can fearlessly vote on any motion; a legislator from a remote region of the country can raise issues that impact her constituency without the fear of being harassed by legal prosecution; and a legislator can demand accountability without the apprehension of being accused of defamation. [Para 1]

Constitution of India – Art. 105, clause (1), (2), (3), (4) – Powers, privileges, etc. of the Houses of Parliament and of the members and committees thereof – Explanation:

Held: *Clause (1) declares that there shall be freedom of speech in Parliament, subject to the Constitution and to the rules and standing orders regulating the procedure in Parliament – First limb of Clause (2) prescribes that a member of Parliament shall not be liable before any court in respect of "anything said or any vote given" by them in Parliament or any committee thereof and second limb prescribes that no person shall be liable before any court in respect of the publication by or under the authority of either House of Parliament of any report, paper, vote or proceedings – Clauses (1) and (2) explicitly guarantee freedom of speech in Parliament – Clause (1) is a positive postulate which guarantees freedom of speech whereas Clause (2) is an extension of the same freedom postulated negatively – Clause (3) states that in respect of privileges not falling under Clauses (1) and (2) of Art. 105, the powers, privileges and immunities, shall be such as may from time to time be defined by Parliament by law – Clause (3) allows Parliament to enact a law on its privileges from time to time – Clause (4) extends the freedoms in the above clauses to all persons who by virtue of the Constitution have a right to speak in Parliament – Thus, four clauses in Arts. 105 and 194 form a composite whole which lend colour to each other and together form the corpus of the powers, privileges and immunities of the Houses of Parliament or Legislature, and of members and committees. [Paras 63-66, 73]*

Parliamentary privileges – History of privileges of legislatures in India:

Held: *History can be traced to the history of parliamentary privileges in the House of Commons in the UK as well as the struggle of the Indian Legislatures to claim these privileges under colonial rule – Unlike the House of Commons in the UK, India does not have 'ancient and undoubted' privileges which were vested after a struggle between Parliament and the*

King – Statutory privilege transitioned to a constitutional privilege after the commencement of the Constitution. [Paras 49, 188.2]

Parliamentary privileges – Bribery vis-à-vis privileges – Jurisprudence in foreign jurisdictions – Evolution and position of the law on privileges vis-a-vis bribe received by a member of Parliament in other jurisdictions- United Kingdom, United States of America, Canada, and Australia – Explained and discussed. *[Paras 128-167]*

Prevention of Corruption Act, 1988 – s. 7 – Offence relating to public servant being bribed – Offence of bribery, when complete – Constituent elements of the offence:

Held: *Under s. 7, the mere "obtaining", "accepting" or "attempting" to obtain an undue advantage with the intention to act or forbear from acting in a certain way is sufficient to complete the offence – It is not necessary that the act for which the bribe is given be actually performed – First explanation to the provision strengthens such an interpretation when it expressly states that the "obtaining, accepting, or attempting" to obtain an undue advantage shall itself constitute an offence even if the performance of a public duty by a public servant has not been improper – Thus, the offence of a public servant being bribed is pegged to receiving or agreeing to receive the undue advantage and not the actual performance of the act for which the undue advantage is obtained. [Para 117]*

Judicial review – Amenability – Claim to parliamentary privilege :

Held: *Claim to parliamentary privilege conforms to the parameters of the Constitution, as such amenable to judicial review. [Para 188.3]*

Judicial discipline – Procedure of:

Held: *Decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength – A Bench of lesser strength cannot disagree with or dissent from the view of the law taken by the bench of larger strength – However, a bench of the same strength can question the correctness of a decision rendered by a co-ordinate bench – In such situations, the case is placed before a bench of larger strength – In consonance with judicial discipline, the correctness of the decision in PV Narasimha Rao's case was only doubted by the co-equal*

*bench of five judges of this Court in a detailed order and accordingly, the matter was placed before this bench of seven judges – Thus, no infirmity in the reference to seven judges bench to reconsider the decision in *PV Narasimha Rao's case. [Paras 24, 25, 30]*

Doctrines/Principles – Doctrine of *stare decisis* – Meaning:

Held: *Doctrine of stare decisis provides that the Court should not lightly dissent from precedent – However, the doctrine is not an inflexible rule of law, and it cannot result in perpetuating an error to the detriment of the general welfare of the public – Larger bench of this Court may reconsider a previous decision in appropriate cases, bearing in mind the tests formulated in the precedents of this Court – This Court may review its earlier decisions if it believes that there is an error, or the effect of the decision would harm the interests of the public or if it is inconsistent with the legal philosophy of the Constitution – In cases involving the interpretation of the Constitution, this Court would do so more readily than in other branches of law because not rectifying a manifest error would be harmful to public interest and the polity. [Paras 33, 188.1]*

Interpretation of Constitution – Interpretation of a provision of the Constitution:

Held: *Court must interpret the text in a manner that does not do violence to the fabric of the Constitution. [Para 92]*

Interpretation of Constitution – Marginal note to the Article – Importance of:

Held: *With reference to Articles of the Constitution, a marginal note may be used as a tool to provide some clue as to the meaning and purpose of the Article – However, the real meaning of the Article is to be derived from the bare text of the Article – When language of the Article is plain and ambiguous, undue importance cannot be placed on the marginal note appended to it – Furthermore, marginal note to a Section in a statute does not control the meaning of the body of the Section if the language employed is clear. [Para 173]*

Interpretation of statutes – Principles of statutory interpretation – Illustrations appended to s. 7 of the Prevention of Corruption Act – Relevance:

Held: *Illustrations appended to a Section are of value and relevance in construing the text of a statutory provision and they should not be readily rejected as repugnant to the Section – Illustration to the first explanation of s. 7 of the PC Act aids in construing the provision to mean that the offence of bribery crystallizes on the exchange of the bribe and does not require the actual performance of the act – Similarly, in the formulation of a legislator accepting a bribe, it does not matter whether she votes in the agreed direction or votes at all – At the point in time when the bribe is accepted, the offence of bribery is complete – Prevention of Corruption Act, 1988. [Para 118]*

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Nath Sarkar v. State of W.B., **[1974] 1 SCR 1 : (1973) 1 SCC 856;** *Lt. Col. Khajoor Singh v. Union of India,* **[1961] 2 SCR 828;** *Union of India v. Raghubir Singh,* **[1989] 3 SCR 316 : (1989) 2 SCC 754;** *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,* **[2002] 3 SCR 100 : (2002) 5 SCC 111;** *Supreme Court Advocates-on-Record Assn. v. Union of India,* **[2015] 13 SCR 1 : (2016) 5 SCC 1;** *Ajit Mohan v. Legislative Assembly, National Capital Territory of Delhi,* **[2021] 14 SCR 611 : (2022) 3 SCC 529;** *Rajeev Suri v DDA,* **[2021] 15 SCR 283 : (2022) 11 SCC 1;** *Alagaapuram R Mohanraj v. TN Legislative Assembly,* **[2016] 6 SCR 611 : (2016) 6 SCC 82;** *Tej Kiran Jain v. N Sanjeeva Reddy,* **[1971] 1 SCR 612 : (1970) 2 SCC 272;** *MSM Sharma v. Sri Krishna Sinha,* **[1959] Suppl. 1 SCR 806 : AIR 1959 SC 395;** *Special Reference No. 1 of 1964,* **[1965] 1 SCR 413;** *State of Karnataka v. Union of India,* **[1978] 2 SCR 1 : (1977) 4 SCC 608;** *N Ravi v. Speaker, Legislative Assembly Chennai,* **2003 (9) SCALE 464;** *State (NCT of Delhi) v Union of India***, [2018] 7 SCR 1 : (2018) 8 SCC 501;** *Kihoto Hollohan v. Zachillhu,* **[1992] 1 SCR 686 : (1992) Supp 2 SCC 651;** *Chaturdas Bhagwandas Patel v. State of Gujarat,* **[1976] 3 SCR 1052 : (1976) 3 SCC 46;** *Neeraj Dutta v. State (NCT of Delhi),* **[2023] 2 SCR 997 : (2023) 4 SCC 731;** *Pashupati Nath Sukul v. Nem Chandra Jain and Ors.,* **[1984] 1 SCR 939 : (1984) 2 SCC 404;** *Madhukar Jetly v. Union of India,* **(1997) 11 SCC 111;** *Kesavananda Bharati v. State of Kerala,* **[1973] Suppl. 1 SCR 1 : (1973) 4 SCC 225;** *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India,* **[2018] 8 SCR 1 : 2018 SCC OnLine SC 1642 – referred.**

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List of Keywords

Bribery for speaking or casting a vote; Bribery vis-à-vis privileges; Parliamentary privilege; Legislative privilege; Ancient privileges; Statutory privilege; Constitutional privilege; History of privileges of legislatures; Immunities of the Houses of Parliament or Legislature; Reconsideration of PV Narasimha Rao case; Probity in public life; Parliamentary democracy; Principle of stare decisis; Elections to Rajya Sabha; Overruled; Judicial Precedent; Constitutional jurisprudence; Freedom of speech; House of Parliament; Necessity test; Collective functioning of the House; Immunity "in respect of anything" said or any vote given; Parallel jurisdiction; House of Legislature; Legislature; Colonial rule; House of Commons in the UK; Foreign jurisdictions; Obtaining, accepting or attempting to obtain an undue advantage; Judicial review; Judicial discipline; Illustrations appended to a Section; Marginal note to a Section; Reforms of Committee, 1924.

[2024] 5 S.C.R. 1159 : 2024 INSC 455

Government of NCT of Delhi & Anr.
v.
M/s BSK Realtors LLP & Anr.

(Civil Appeal No. 6604 of 2024)

17 May 2024

[Surya Kant, Dipankar Datta and Ujjal Bhuyan, JJ.]

Issue for Consideration

a) Whether the dismissal of a civil appeal preferred by one appellant in the first round operates as *res judicata* against the other appellant in the second round before this Court; b) Whether suppression of the first round of litigation by the appellants constitutes a material fact, thereby inviting an outright dismissal of the appeals at the threshold; c) Does the doctrine of merger operate as a bar to entertain the civil appeals in the present case; d) Whether the previous determination of the rights of subsequent purchasers in an *inter se* dispute precludes the same issue from being reconsidered between the same parties.

Headnotes

Land Acquisition Act, 1894 – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Whether the dismissal of a civil appeal preferred by one appellant in the first round operates as *res judicata* against the other appellant in the second round before this Court:

Held: *In the lead matter before this Court or for that matter the other appeals, the co-respondents before the High Court, namely, GNCTD and DDA did not have conflicting interests – Inter se them, neither was there any disputed issue, nor could have the High Court possibly adjudicated on any such issue – Before this Court too, in the first round, there was no issue on which GNCTD and DDA were at loggerheads – In the light of this, in accordance with the legal principle, the applicability of res judicata is negated – Res judicata, as a technical legal principle, operates to prevent the same parties from relitigating the same issues that have already been*

conclusively determined by a court – However, it is crucial to note that the previous decision of this Court in the first round would not operate as res judicata to bar a decision on the lead matter and the other appeals; more so, because this rule may not apply hard and fast in situations where larger public interest is at stake – In such cases, a more flexible approach ought to be adopted by courts, recognizing that certain matters transcend individual disputes and have far-reaching public interest implications. [Paras 23 and 25]

Land Acquisition Act, 1894 – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Whether suppression of the first round of litigation by the appellants constitutes a material fact, thereby inviting an outright dismissal of the appeals at the threshold:

Held: *Law is well settled that the fact suppressed must be material in the sense that it would have an effect on the merits of the case – The concept of suppression or non-disclosure of facts transcends mere concealment; it necessitates the deliberate withholding of material facts—those of such critical import that their absence would render any decision unjust – Material facts, in this context, refer to those facts that possess the potential to significantly influence the decision-making process or alter its trajectory – This principle is not intended to arm one party with a weapon of technicality over its adversary but rather serves as a crucial safeguard against the abuse of the judicial process – Nevertheless, this Court has carefully considered the orders issued during the first round of litigation, which are alleged to have been suppressed – Despite reviewing these orders, there are no compelling reason to dismiss the appeals based solely on the prior dismissal of appeals filed by some other appellant/authority. [Paras 30 and 31]*

Land Acquisition Act, 1894 – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Does the doctrine of merger operate as a bar to entertain the civil appeals in the instant case:

Held: *The concept of public interest need not be viewed narrowly only on the yardstick of loss to public exchequer and that these are the cases where public at large has acquired interest in the public infrastructures already complete or in process of completion, this Court is satisfied that if the*

doctrine of merger is applied mechanically in respect of Groups A (deals with M.A.s filed by the appellants-authorities primarily pleading change in law and seeking recall of the judgments and orders of this Court dismissing the Civil Appeals and/or Review Petitions in the first round) and B.1 (includes cases where Civil Appeals were dismissed in the first round, and now an SLP (now Civil Appeal) is pending before this Court in the second round) cases, it will lead to irreversible consequences – This Court is satisfied that the element of disparity between Groups A and B.1 cases visà-vis cases falling in Group C is liable to be eliminated and this can only be done by invoking extraordinary power under Article 142 of the Constitution of India so that complete justice is done between the expropriated landowners, the State and its developing agencies and most importantly the public in general who has acquired a vested right in the public infrastructure projects. [Para 41]

Land Acquisition Act, 1894 – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Delhi Lands (Restrictions on Transfers) Act, 1972 – Whether the previous determination of the rights of subsequent purchasers in an *inter se* dispute precludes the same issue from being reconsidered between the same parties:

Held: *Group E cases deal with allegations regarding fraud by landowners by suppressing subsequent sale transactions, ownership title disputes, etc – It is settled that transfer of land in respect of which acquisition proceedings had been initiated, after issuance of Notification under section 4(1) of the 1894 Act, is void and a subsequent purchaser cannot challenge the validity of the notification or the irregularity in taking possession of the land – Also, the structure of the Delhi Lands (Restrictions on Transfers) Act, 1972 clearly indicates that any subsequent sale of the specified land without prior permission from the competent authority is not allowed, and if such sale is done through concealment, it amounts to fraud – The law with respect to "who" can invoke section 24(2) of the 2013 Act has been well settled after the decision of this Court in Shiv Kumar wherein it was held that subsequent purchasers do not have the locus to contest the acquisition and/or claim lapse of the acquisition proceedings – Coming to the specifics of each case qua subsequent purchasers or disputes regarding the title of the subject lands, this Court has clarified the scope of inquiry in Delhi Development Authority v. Tejpal and others – As far as the concealment of material facts*

regarding subsequent sale transactions, earlier round of litigations etc. are concerned, it is noted that the landowners and affected parties are under no obligation to either confirm or deny the allegations levelled against them – Nor this Court has directed the appellants to furnish original records or documents to substantiate their claim of concealment and suppression of material facts – Engaging in a factual inquiry at such an advanced stage of the legal process, especially without providing adequate opportunities to all parties, may not be fair – The cases listed in Group E involve complex questions of fact and this Court being the Court of the last resort, ought not to be involved in such elaborate factfinding exercise – Therefore, deem it appropriate to remit these cases to the High Court for proper adjudication on points of law as well as facts. [Paras 42, 44, 45, 46, 48]

Doctrine/Principles – *Res judicata* – discussed.

Doctrine/Principles – Doctrine of merger – Exception:

Held: *This Court takes notice of the exception carved out by this Court in Kunhayammed, to the effect that the doctrine of merger is not of universal or unlimited application and that the nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or which could have been laid shall have to be kept in view – The exception that has been carved out in Kunhayammed, will only be permissible in the rarest of rare cases and such a deviation can be invoked sparingly only – However, among such exceptions, the extraordinary constitutional powers vested in this Court under Article 142 of the Constitution of India, which is to be exercised with a view to do complete justice between the parties, remains unaffected and being an unfettered power, shall always be deemed to be preserved as an exception to the doctrine of merger and the rule of stare decisis. [Para 33]*

Public Interest – Land Acquisition – Elements of Public interest:

Held: *a) While balancing the interest of the public exchequer against that of individuals, there are many other interests at stake, and it might not be possible to undo the acquisitions without causing significant cascading harms and losses to such other interests; b) Since development projects have either begun or most of the acquired lands have already been deployed for essential public projects such as hospitals, schools, expansion of metro, etc.,*

the effect of non-condonation of delay would go beyond mere financial loss to the exchequer and would extend to the public at large; c) It would be like unscrambling the egg if compensation paid would have to be clawed back or possession taken would have to be reversed; d) In many cases, the development projects might also have to be undone – The reversal of possession of even a small plot lying on projects such as an under-construction metro corridor would be practically impossible; e) These are the cases where rights are vested to the public at large given the public infrastructure that has come up on a large number of acquired lands; f) The fresh acquisition, if so is required to be done by the State, would be at the expense of delaying the construction of critical public infrastructure in our national capital – When balancing public with private interest, the comparative interest on the landowners would be nominal as compared to the public at large; and g) The multiplicity of contradictory judicial opinions on section 24 (2) of the 2013 Act has made the present set of circumstances sui generis – The constant flux in the legal position of law has posed significant challenges for the State and its authorities. [Para 40]

Case Law Cited

Indore Development Authority v. Manoharlal **[2020] 3 SCR 1 : (2020) 8 SCC 129 – followed.**

State of Gujarat and Others v. M.P. Shah Charitable Trust and Others **[1994] 3 SCR 163 : (1994) 3 SCC 552;** *Mathura Prasad Bajoo Jaiswal and Others v. Dossibai N.B. Jeejeebhoy* **[1970] 3 SCR 830 : (1970) 1 SCC 613;** *S.J.S. Business Enterprises (P) Ltd v. State of Bihar and Others* **[2004] 3 SCR 56 : (2004) 7 SCC 166;** *Arunima Baruah v. Union of India and Others* **[2007] 5 SCR 904 : (2007) 6 SCC 120 – relied on.**

Delhi Development Authority v. Tejpal and Others **Civil Appeal No. 6798 of 2024 arising out of SLP (Civil) No. 26697/2019;** *Pune Municipal Corporation v. Harakchand Mistrimal Solanki* **[2014] 1 SCR 783 : (2014) 3 SCC 183;** *Govt (NCT) of Delhi v. Manav Dharam Trust and Another* **[2017] 4 SCR 232 : (2017) 6 SCC 751;** *Shiv Kumar and*

Another v. Union of India and Others **[2019] 13 SCR 695 : (2019) 10 SCC 229;** *Kunhayammed and Others. v. State of Kerala and Another* **[2000] Supp. 1 SCR 538 : (2000) 6 SCC 359;** *Pune Municipal Corporation v. Harakchand Misirimal Solanki* **(2020) SCC OnLine SC 1471 – referred to.**

Ranjana Bhatia v. Govt. of NCT of Delhi and another **(2014) SCC OnLine Del 2151;** *Sparsh Properties Pvt. Ltd. v. Union of India and Others* **(2014) SCC OnLine Del 6659 – referred to.**

Munni Bibi (since deceased) and Another v. Tirloki Nath and Others **AIR (1931) PC 114 – referred to.**

List of Acts

Land Acquisition Act, 1894; Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; Delhi Lands (Restrictions on Transfers) Act, 1972; Constitution of India; Supreme Court Rules, 2013.

List of Keywords

Land Acquisition; Res judicata; Interest reipublicae ut sit finis litium; Salus populi suprema lex esto; Public interest; Doctrine of merger; Article 142 of the Constitution of India; Elements of Public interest; Balancing the interest of the public exchequer; Public infrastructure; Balancing public with private interest; Fraud by Landowners; Concealment and suppression of material facts; Subsequent sale transactions; Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; Section 4(1) of the Land Acquisition Act, 1894.

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Mineral Area Development Authority & Anr.
v.
M/s Steel Authority of India & Anr. Etc.

(Civil Appeal Nos. 4056-4064 of 1999)

25 July 2024

[Dr. Dhananjaya Y. Chandrachud,* CJI, Hrishikesh Roy, Abhay S Oka, B.V. Nagarathna,* J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.]

Issue for Consideration

The questions which arose for determination are as to what is the true nature of royalty determined u/s.9 r/w s.15(1) of the Mines and Minerals (Development and Regulation) Act, 1957; whether royalty is in the nature of tax; what is the scope of Entry 50 List II Seventh Schedule; what is the ambit of the limitations imposable by Parliament in exercise of its legislative powers under Entry 54 List I; does s.9, or any other provision of the MMDR Act, contain any limitation with respect to the field in Entry 50 List II; whether the expression "subject to any limitations imposed by Parliament by law relating to mineral development" in Entry 50 List II *pro tanto* subjects the entry to Entry 54 List I, which is a non-taxing general entry; whether there is any departure from the general scheme of distribution of legislative powers as enunciated in M P V Sundararamier's case; what is the scope of Entry 49 List II and whether it covers a tax which involves a measure based on the value of the produce of land; would the constitutional position be any different qua mining land on account of Entry 50 List II r/w Entry 54 List I; and whether Entry 50 List II is a specific entry in relation to Entry 49 List II, and would thus, subtract mining land from the scope of Entry 49 List II.

Headnotes

Mines and Minerals (Development and Regulation) Act, 1957 – s.9 read with s.15(1) – Royalties in respect of mining leases – Nature of royalty determined u/s.9/15(1) – Royalty, if in the nature of tax:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal

Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Royalty is not a tax – Royalty is a contractual consideration paid by the mining lessee to the lessor for enjoyment of mineral rights – Liability to pay royalty arises out of the contractual conditions of the mining lease – Payments made to the Government cannot be deemed to be a tax merely because the statute provides for their recovery as arrears. [Para 342a]* – **Held: (per B.V. Nagarathna, J.) (Dissenting)** *Royalty determined u/s.9 r/w s.15(1) is in the nature of a tax or an exaction coming within the scope and ambit of Art.366(28) which defines taxation to include the imposition of any tax or impost, whether general or local or special and the word "tax" is to be construed accordingly – It is not merely a contractual payment but a statutory levy u/s.9 – Liability to pay royalty does not arise purely out of the contractual conditions of a binding lease – Payment of royalty to the Government is a tax in view of Entry 50 List II being subject to any limitations imposed by Parliament by law in the context of Entry 54 List I read with s.2 of the MMDR Act – Constitution of India – Art.366(28), Entry 54 List I, Entry 50 List II. [Paras 40a, 41a]*

Mines and Minerals (Development and Regulation) Act, 1957 – s.9 – Royalties in respect of mining leases – Constitution of India – Entry 50 List II Seventh Schedule – Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development – Scope of Entry 50 List II – Ambit of the limitations imposable by Parliament in exercise of its legislative powers under Entry 54 List I – s.9, or any other provision of the MMDR Act, if contains any limitation with respect to the field in Entry 50 List II:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Legislative power to tax mineral rights vests with the State legislatures – Parliament does not have legislative competence to tax mineral rights under Entry 54 List I, it being a general entry – Since the power to tax mineral rights is enumerated in Entry 50 List II, Parliament cannot use its residuary powers with respect to that subject-matter – Entry 50 List II envisages that Parliament can impose "any limitations" on the legislative field created by that entry under a law relating to mineral development – MMDR Act as it stands has not imposed any limitations as envisaged in Entry 50 List II –*

Entry 54 List I, Entry 50 List II Seventh Schedule. [Para 342b, c] – **Held: (per B.V. Nagarathna, J.) (Dissenting)** – *Entry 50 List II dealing with taxes on mineral rights, is subject to any limitations imposed by Parliament by law relating to mineral development – Use of the word "any" means the limitation could be in any form which can be imposed only by the Parliament by law relating to mineral development – Use of the expression 'any limitations' must be given the widest possible meaning to include a limitation in the form of ss.9 and 9A, 25 or any other provision of the MMDR Act and Rules made thereunder which act as a limitation to Entry 50 List II – Scope of the expression "any limitations" under Entry 50 List II is wide enough to include the imposition of restriction, conditions, principles as well as a prohibition by Parliament by law relating to mineral development – Thus, in view of the declaration u/s.2 of the MMDR Act made in terms of Entry 54 List I and to the extent of the provisions of the said Act, the State legislature is denuded of its powers under Enry 50 List. [Paras 40b, 41d, e]*

Mines and Minerals (Development and Regulation) Act, 1957 – s.9 – Royalties in respect of mining leases – Constitution of India – Entry 50 List II Seventh Schedule – Expression "subject to any limitations imposed by Parliament by law relating to mineral development" in Entry 50 List II, if *pro tanto* subjects the Entry to Entry 54 List I, which is a non-taxing general Entry – If there is any departure from the general scheme of distribution of legislative powers as enunciated in MPV Sundararamier's case:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) – *Legislative power to tax mineral rights vests with the State legislatures – Parliament does not have legislative competence to tax mineral rights under Entry 54 List I, it being a general entry – Since the power to tax mineral rights is enumerated in Entry 50 List II, Parliament cannot use its residuary powers with respect to that subject-matter – Entry 50 List II does not constitute an exception to the position of law laid down in M P V Sundararamier's case. [Para 342b, c, d]* – **Held: (per B.V. Nagarathna, J.) (Dissenting)** *Expression "subject to any limitations imposed by Parliament by law relating to mineral development" in Entry 50 List II pro tanto subjects the Entry to Entry 54 List I – Use of the expression "any limitations" would mean that the taxing*

Entry would be subject to a non-taxing or general Entry such as in Entry 54 List I which could also be termed as a regulatory Entry – Thus, there is a departure from the general scheme of distribution of legislative powers as enumerated in MPV Sundararamier's case insofar as Entry 50 List II read with Entry 54 List I is concerned which is unique to Entry 50 List II – This is having regard to the significance of Entry 54 List I which also overrides Entry 23 List II – Entry 50 List II is an exception to the position of law laid down in ***MPV Sundararamier's case****. [Paras 40c, 41b]*

Mines and Minerals (Development and Regulation) Act, 1957 – ss.9, 2 – Royalties in respect of mining leases – Constitution of India – Entry 49 List II Seventh Schedule – Scope of Entry 49 List II – Entry 49 List II, if covers tax involving a measure based on the value of the produce of land – Constitutional position, if different *qua* mining land on account of Entry 50 List II read with Entry 54 List I:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *State legislatures have legislative competence u/Art.246 read with Entry 49 List II to tax lands which comprise of mines and quarries – Mineral-bearing land falls within the description of "lands" under Entry 49 List II – Yield of mineral bearing land, in terms of the quantity of mineral produced or the royalty, can be used as a measure to tax the land under Entry 49 List II – Decision in Goodricke's case clarified to this extent [Para 342 e, f] –* **Held: (per B.V. Nagarathna, J.) (Dissenting)** *Entry 49 List II deals with taxation of lands and buildings – It does not cover taxes on mineral bearing lands – Constitutional position is different qua mineral bearing lands on account of Entry 50 List II read with Entry 54 List I and s.2 of the MMDR Act – Thus, any imposition on the basis of royalty by a State Legislature or involving royalty as a measure of the value of the minerals extracted from the land is impermissible – State legislatures have legislative competence under Art.246 read with Entry 49 List II to tax lands and buildings but not lands which comprise of mines and quarries or have mineral deposits as mineral bearing lands do not fall within the description of lands (under Entry 49 List II) – Similarly, States can tax such mineral bearing lands which are not covered within the scope of MMDR Act-minor minerals, under Entry 50 List II and not under Entry 49 List II as tax on exercise of*

mineral rights – Thus, mineral bearing lands cannot be taxed under Entry 49 List II – Further, the yield of mineral bearing lands, in terms of quantity of mineral produced or royalty paid cannot also be used as a measure to tax such lands under Entry 49 List II – Decision in ***Goodricke's*** *case does not require any clarification – Entry 50 List II read with Entry 54 List I Seventh Schedule. [Paras 40d, 41f, g]*

Mines and Minerals (Development and Regulation) Act, 1957 – ss.9, 2 – Constitution of India – Entry 49 List II, Entry 50 List II Seventh Schedule – Entry 50 List II, if a specific Entry in relation to Entry 49 List II, and would consequently subtract mining land from the scope of Entry 49 List II:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Entries 49 and 50 of List II deal with distinct subject matters and operate in different fields – Mineral value or mineral produce can be used as a measure to impose a tax on lands under Entry 49 List II – "Limitations" imposed by Parliament in a law relating to mineral development with respect to Entry 50 List II do not operate on Entry 49 List II because there is no specific stipulation under the Constitution to that effect. [Para 342g, h]* – **Held: (per B.V. Nagarathna, J.) (Dissenting)** *Entry 50 List II is a specific Entry in relation to Entry 49 List II and would consequently subtract mining lands from the scope of Entry 49 List II, having regard to Entry 50 List II to be read with Entry 54 List I and s.2 of the MMDR Act. [Para 40e]*

Mines and Minerals – Royalty, in the nature of tax or not – Divergence between India Cement's case and Kesoram's case – India Cement's case held that royalty is a tax, and as such a cess on royalty being a tax on royalty, is beyond the competence of the State legislature because s.9 of the Central Act covers the field and the State legislature is denuded of its competence under Entry 23 List II whereas Kesoram's case held that royalty is not a tax, but a payment made to the owner of land who may be a person and may not necessarily be the State:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *– Kesoram held that India Cement's case was caused by "an apparent*

typographical error or inadvertent error" and should not be understood as a correct declaration of law – Kesoram's case also expressed its disagreement with Mahalaxmi Fabric Mills's case to the extent it had held that there was no "typographical error" in India Cement's case – Kesoram's case concurred with India Cement's case on the aspect that cess on royalty is beyond the legislative competence of the State legislatures – Divergence on the point of law between India Cement's case and Kesoram's case is apparent and pertains to whether or not royalty is a tax – Thus, the royalty does not meet the characteristic requirements of a tax. [Paras 117, 121, 122] – **Held: (per B.V. Nagarathna, J.)** *Majority decision in Kesoram is a serious departure from the law laid down by the seven-judge Bench in India Cement which was wholly unwarranted and thus, the said majority judgment is liable to be overruled and is overruled to the extent of holding that royalty is not a tax – India Cement was correctly decided wherein it was held that royalty is in the nature of tax. [Paras 42 (ii), 1.1]*

Constitution of India – Legislative entries – Interpretation – Entries 49 and 50 List II in the context of mineral bearing lands – Interplay of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Entries 49 and 50 of List II deal with distinct subject matters – Both the entries operate in different fields without any overlap – Nature of taxes under the entries are distinct – Fact that mineral value or mineral produced is used as a measure under Entry 50 List II does not preclude the legislature from using the same measure for taxing mineral bearing land under Entry 49 List II – Doctrine of generalia specialibus non derogant has no application because Entries 49 and 50 List II operate in different fields – Though Parliament can limit the taxing field entrusted to the State under Entry 50 List II through a law relating to mineral development, the limitation operates on the field of taxing mineral rights – Such a limitation cannot operate on Entry 49 List II because there is no specific stipulation under the Constitution to that effect – Constitution envisages the imposition of limitations by Parliament on the legislative field of the state of taxes on mineral rights, and not taxes on lands. [Para 339]* – **Held: (per B.V. Nagarathna, J.) (Dissenting)** *Entry 49 List II is of the widest amplitude – Mineral value or mineral produce cannot be used as a measure to tax mineral bearing land under Entry 49 List II, also, the word "lands" under Entry 49 List II cannot include mineral*

bearing land as well – This would amount to "double taxation", one, by the State Legislature on the mineral bearing land under Entry 49 List II and again for conducting a mining operation which is for exercise of a mineral right u/s.9 of MMDR Act, which is Parliamentary law also paid to the State Government – This is impermissible having regard to the constitutional intent and scheme of Entries in the Lists – Thus, royalty cannot also be a measure to impose tax on mineral bearing land – State Legislature using royalty on mineral produce as a measure to impose a cess under Entry 49 List II on mineral bearing land would overlap Entry 50 List II, because minerals are extracted by virtue of mining activity which is in exercise of mineral right and taxes on mineral rights are envisaged under Entry 50 List II subject to any limitation imposed by Parliament – Thus, Entry 50 List II would have to be viewed distinctly from Entry 49 List II – If so viewed, it becomes subject to Parliamentary law in the form of MMDR Act and the rules made thereunder which would be a limitation on the power of State to tax under Entry 50 List II – Hence to get over the rigour of Entry 50 List II, States cannot resort to Entry 49 List II. [Paras 33, 34]

Mines and Minerals – Dead rent – Explanation:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Dead rent acts as a deterrent against a leaseholder cornering a mining lease and keeping the mineral resources idle – Similar to royalty, dead rent is also a statutory imposition and an integral part of the mining lease, but it generally does not serve as a consideration for the removal or consumption of minerals – Dead rent is determined on the basis of the area of land covered by the lease – Imposition of dead rent ensures that the proprietor obtains a fixed rent from the lessee even if the mine remains unworked – Thus, dead rent is not in addition to royalty but an alternative – Principles applicable to royalty apply to dead rent because dead rent is imposed in the exercise of the proprietary right (and not a sovereign right) by the lessor to ensure that the lessee works the mine, and does not keep it idle, and in a situation where the lessee keeps the mine idle, it ensures a constant flow of income to the proprietor; the liability to pay dead rent flows from the terms of the mining lease; dead rent is an alternate to royalty; if the rates of royalty are higher than dead rent, the lessee is required to pay the former and not the latter; and the Central Government prescribes the dead rent not in the exercise of*

its sovereign right, but as a regulatory measure to ensure uniformity of rates. [Paras 99, 129] – **Held: (per B.V. Nagarathna, J.)** *Entry 49 List II does not apply to mineral bearing lands as such lands are taxed in the form of royalty or dead rent in the context of exercise of mineral rights – Exercise of mineral rights is the basis for payment of royalty or dead rent – Insofar as extraction of minerals is concerned, being an exercise of a mineral right, royalty is payable by a holder of a mining lease and when no mining activity is carried on, dead rent is payable by such a person. [Paras 33, 41]*

Constitution of India – Federalism – Explanation – Distinctive elements:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Federalism is one of the basic features of the Constitution which embodies a division of powers between the units of the federation-the Union and the States – Indian federalism is defined as asymmetric because it tilts towards the Centre, producing a strong Central Government – Yet, it has not necessarily resulted in weak State governments – Indian States are sovereigns within the legislative competence assigned to them – Delicate balance of power is secured by constitutional courts by interpreting the scheme of distribution of powers – In a federal form of government, each federal unit should be able to perform its core constitutional functions with a certain degree of independence – Constitution has to be interpreted in a manner which does not dilute the federal character of our constitutional scheme – Effort of the constitutional court should be to ensure that State legislatures are not subordinated to the Union in the areas exclusively reserved for them. [Paras 48, 49] –* **Held: (per B.V. Nagarathna, J.)** *India's postcolonial Constitution introduced a new approach to federalism which has departed from the principle that federal and regional governments should each have independence in their own sphere of authority – Distinctive elements of Indian federalism were shaped at their foundations by the desire to boost industrial development and lay the foundation for a national welfare state in a post-colonial future by preventing the consolidation of "race to the bottom" dynamics arising from unregulated inter-provincial economic competition – Distinctive element of Indian federalism is the combination of a strong Centre and a substantial sphere of shared Centre-State jurisdiction – Desirable balance between Central and the State Governments has to be viewed in the context of the*

country continuing to confront the need to promote economic growth while upholding and expanding social rights. [Paras 36, 36.3, 36.4]

Mines and Minerals (Development and Regulation) Act, 1957 – s.9 – Royalty – Royalty, in nature of tax or not:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Royalty is not a tax – It is a consideration paid by a mining lessee to the lessor for enjoyment of mineral rights and to compensate for the loss of value of minerals suffered by the owner of the minerals – Liability to pay royalty arises out of the contractual conditions of the mining lease – s.9 statutorily regulates the right of a lessor to receive consideration in the form of royalty from the lessee for removing or carrying away minerals from the leased area – Rates of royalty prescribed u/s.9 does not make it a "compulsory exaction by public authority for public purposes" – s.25 allows recovery of royalty due to the Government under the MMDR Act or "under the terms of the contract" as arrears of land does not make royalty "an impost enforceable by law" – Furthermore, there is difference between royalty and a tax – Proprietor charges royalty as a consideration for parting with the right to win minerals, while a tax is an imposition of a sovereign, royalty is paid in consideration of doing a particular action, that is, extracting minerals from the soil, while tax is generally levied with respect to a taxable event determined by law, and royalty generally flows from the lease deed as compared to tax which is imposed by authority of law – Since royalty is a consideration paid by the lessee to the lessor under a mining lease, it cannot be termed as an impost – Furthermore, both royalty and dead rent do not fulfil the characteristics of tax or impost – Thus, observation in* **India Cement's case** *that royalty is a tax is incorrect. [Paras 327, 123-130]*

Mines and Minerals (Development and Regulation) Act, 1957 – s.9 – Royalties in respect of mining leases – Purpose of s.9:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *s.9 sought to remedy the disparity of royalty rates across India – Rates of royalty were primarily governed by the terms of lease prior to the enactment*

of the MMDR Act – Once a mining lease was entered into between a lessor and lessee, the rates of royalty would remain static during the subsistence of the lease – s.9 has enabled the Central Government to examine the rates of royalty in respect of all minerals and modulate them periodically after taking into consideration various factors, including the uniformity of mineral prices – Primary reason for empowering the Central Government to fix the rate of royalty could be traced to the Industrial Policy Resolution which underscored the active and predominant role of the State in organizing and utilizing mineral resources – State Governments were not empowered to determine royalty in order to maintain a uniform regime of royalty across India – This was intended to promote domestic industry and maintain competitive commodity prices in the international market. [Paras 77, 78]

Mines and Minerals (Development and Regulation) Act, 1957 – Meaning of "royalty" – Explanation – Essential characteristics:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Royalty is generally understood as compensation paid for rights and privileges enjoyed by the grantee – It has its genesis in the agreement entered into between the grantor and grantee – Royalty is a payment made by the lessee to the lessor or proprietor of the minerals for the removal of minerals – Royalty also serves to compensate the lessor for the degradation of the value of the mine because of the extraction of minerals – Essential characteristics of royalty are that-it is a consideration or payment made to the proprietor of minerals, either government or private person, it flows from a statutory agreement (mining lease) between lessor and lessee, it represents a return for the grant of privilege (to lessee) of removing or consuming the minerals, and it is generally determined on basis of the quantity of the minerals removed. [Paras 94, 96, 98]*

Mines and Minerals (Development and Regulation) Act, 1957– s.9 – Royalty – Nature of – Calculation of royalty:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Royalty is not a tax but a statutory consideration payable by the lessee to*

the lessor for the exercise of mineral rights – Specification of rates of royalty with respect to major minerals under the MMDR Act limits the powers of the State Government in terms of Entry 54 List I read with Entry 23 List II – Royalty is payable u/s.9 on the removal or consumption of minerals by the lessee in the leased area – Thus, essentially royalty is payable on the dispatch of minerals from the leased area – Rates of royalty are generally calculated on per tonnage basis or ad valorem basis on the basis of the formula laid down – Royalty is calculated on the basis of the quantity of minerals extracted or removed – Yield from mineral bearing land is nothing but the quantity of mineral produced – Royalty is per se not the yield from a mineral bearing land, but the yield (mineral produced) is the important factor in determination of the rate of royalty – Moreover, royalty can be considered as an income if it is paid to a private landowner – In case minerals are vested in the State, royalty is paid to the State Government, and hence assumes the form of non-tax revenues – Thus, royalty is relatable to the yield of the mineral-bearing land as well as the income in case the minerals vest in a private person. [Paras 87, 327-332]

Mines and Minerals (Development and Regulation) Act, 1957 – s.9 – If serve as a limitation on the taxing powers of State under Entry 50 List II – Expression 'any limitation' under Entry 50 List II, if can be extended to prohibition:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Scheme of the MMDR Act does not in itself serve as a limitation on the field of taxation under Entry 50 List II – MMDR Act empowers the Central Government to specify the rates of royalty u/s.9 r/w Second Schedule – Since royalty payable u/s.9 is not a tax on mineral rights, any limitation on the enhancement of the rates of royalty is not the imposition of a tax under Entry 50 List II – ss.9, 9A, 9B, and 9C do not impose any limitations on the powers of State to tax mineral rights under Entry 50 List II – Under Entry 50 List II, phrase "any limitations" is specifically used – Framers of the Constitution intended to empower Parliament to impose "all" and "every" possible limitation on the taxing powers of the State in the interests of mineral development, which include even "prohibition" – Thus, the expression 'any limitations' include the power to prohibit the States from taxing mineral*

rights – Overall scheme of Art. 246 r/w Entry 54 List I and Entry 50 List II makes it clear that Parliament, in the interests of mineral development, can impose "any limitations" – Purport of expression "any limitations" is wide enough to include the imposition of restrictions, conditions, principles, as well as prohibition – Constitution of India – Entry 50 List II. [Paras 229, 231, 244, 245]

Mines and Minerals (Development and Regulation) Act, 1957 – Mineral-bearing land – Measure to tax – Minerals produced, if a measure to tax mineral bearing land:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Tax on lands and buildings under Entry 49 List II is often measured with respect to the income derived from the land or building sought to be taxed – Measure for taxing land may bear a reasonable relationship to the actual or potential productivity of land – Measures such as annual value or market value provide a proximate basis to measure the income derived from land – If the State legislature utilizes the income derived from the land as a measure to quantify a tax on land, it does not trench upon the legislative domain of Union to tax income – Income merely serves as the measure to calculate the levy of taxes on land – MMDR Act does not serve as a limitation on the legislative competence of the States to tax mineral rights under Entry 50 List II, including the power to levy taxes on mineral-bearing lands under Entry 49 List II – Mineral value or mineral produce could be used as a measure of the tax on land under Entry 49 List II – Entry 50 List II pertains to taxes on mineral rights would not preclude the State legislature to use the measure of mineral value or mineral produce under Entry 49 List II – State legislature has legislative discretion to determine the appropriate measure for the purposes of quantifying taxes, so long as there is a reasonable nexus between the measure and the nature of the tax – Measure does not determine the nature of the tax – Lands under Entry 49 List II includes mineral bearing land – Mineral produce is the yield from a mineral bearing land – Since royalty is determined on the basis of the mineral produce, royalty can also be used as a measure to determine the tax on royalty – Fact that the State legislature uses mineral produce or royalty as a measure does not overlap with Entry 50 List II. [Paras 291, 294, 302, 341]*

Mines and Minerals (Development and Regulation) Act, 1957 – Mineral bearing land – Decoupling of minerals from land – When:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Minerals are decoupled from land only upon the exercise of mineral rights by the lessee – Although the title to minerals vests in the State Government, the mining lease transfers the interest in the mineral from the State Government to the mining lessee – During the whole process, minerals continue to remain embedded in the earth, either over or above – Thus, there is no decoupling of minerals from land – When a mining lease is granted, the lease holder necessarily has to occupy the surface rights of the area specified in the lease – Leaseholder has rights to both the minerals and surface during the subsistence of the mining lease – It cannot be said that the mineral rights are transferred from the State to the mining lessee only upon the extraction of minerals – Once the lease deed is signed, the interest in the minerals is transferred from the State Government (in case the minerals vest in the State Government) to the lessee – Interest of the lessee in the minerals continues until the determination of the lease deed – It is only upon the exercise of mineral rights by the lessee, that is removal or consumption of minerals, that the lessee is required to pay royalty – Thus, the transfer of interest in the minerals is distinct from the exercise of the mineral rights. [Paras 323, 324]*

Mines and Minerals (Development and Regulation) Act, 1957 – ss.2, 4, 9, 9A, 9B, 9C, 13, 15, 25 – Royalty under the MMDR Act – Explained. (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *[Paras 62-74]*

Mines and Minerals (Development and Regulation) Act, 1957 – Mines and Minerals – Contours of a mining lease – Explanation:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Expressions 'lease' and 'licence' have been used in the context of mining operations in the Constitution and in the MMRD Act – "Mining lease" is defined under the MMDR Act to mean a lease granted for the purpose of*

undertaking mining operations and includes a sub-lease granted for such purpose – Expression "mining operations" has been defined to mean any operations undertaken for the purpose of winning any mineral – Expression "winning" means getting or extracting minerals from the mines – Under a lease deed for mining operations, the owner transfers the interest in the minerals to the lessee in lieu of the payment of rent, which usually takes the form of royalty – Under the MMDR Act, a "prospecting licence" is granted for the purpose of undertaking prospecting operations for the purpose of exploring, locating, or proving a mineral deposit – Under a prospecting licence, the licensee does not get an interest in the land or in the minerals contained therein – Licensee is only allowed to carry away a limited quantity of minerals after payment of specified royalty. [Paras 86, 87]

Mines and Minerals (Development and Regulation) Act, 1957 – Mineral Concession Rules, 1960 – Nature of a mining lease under the MMDR Act and Mineral Concession Rules:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *MMDR Act and the Mineral Concession Rules detail the procedure for the grant of mining leases in three situations-where the minerals vest in the government, where the minerals vest in a person other than the government, and where the minerals vest partly in the government and partly in a private person – Right of proprietors to grant leases and receive royalty stems from the proprietary interest in the immovable property including the minerals – MMDR Act regulates the exercise of the proprietary rights in the minerals in the larger public interest – Statute specifies the terms of the lease, but the lease deed is ultimately entered between the State Government (or the private person, as the case may be) and the lessee – Similarly, the rates of royalty are fixed by the Central Government u/s. 9, but royalty is received by the mining lessor, that is the State Government or a private person. [Paras 89, 93]*

Constitution of India – Federalism – Fiscal federalism, in the context of mineral resources:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.)

Basic features of fiscal federalism is that both the Union government and the State governments ought to have adequate fiscal resources to discharge their constitutional responsibilities – List I and List II of the Seventh Schedule contain various subject-matters under which Parliament and the State legislatures can respectively levy taxes – Purpose of such a distribution is to entrust adequate fiscal powers with the legislatures to raise revenues to meet the growing fiscal expenditures and rein in the fiscal deficit – Legislatures can formulate the principles underlying any taxing legislation, define the taxing event or the charge of tax as well the mode and manner of its implementation – As regards fiscal federalism in the context of mineral resources, not all states are equally endowed with mineral resources – Few States have greater reserves of mineral resources, resultantly, the contribution of the mining sector in the state domestic product is higher – Despite the abundance of mineral wealth, many of these states lag economically and suffer from, "resource curse" – Taxation is among the important sources of revenue for these States, impacting on their ability to deliver welfare schemes and services to the people – Fiscal federalism entails that the power of the States to levy taxes within the legislative domain carved out to them and subject to the limitations laid down by the Constitution must be secured from unconstitutional interference by Parliament. [Paras 51-54]

Constitution of India – Arts.366(28), 265 – Expression 'tax' – Explanation – Essential characteristics of tax:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Taxes are monetary burdens or charges imposed by legislative power upon persons, or property to raise revenues to fund public expenditure – Objects to be taxed can be taxed by the legislature according to the exigencies of its needs so long as they happen to be within the legislative competence of the legislature – Although the power of taxation is pervasive and an incidence of sovereignty, it is subject to well-defined constitutional limitations – Tax is a compulsory exaction of money by a public authority, it is imposed under statutory power without the consent of the tax payer, the demand is enforceable by law, it is an imposition made for public purposes to meet the general expenses of the state without reference to any special benefit to be conferred on the payer of the tax, and it is part of the common burden – Art. 366(28) defines "taxation" to include "the imposition of any tax or impost, whether*

general or local or special" – Expression "tax" u/Art.265 includes every kind of impost in the form of a compulsory exaction – Liability arising out of contract cannot be termed as an impost or tax – Consideration paid under a contract to the State Government for acquiring exclusive privileges and rights with respect to a particular activity cannot be termed as an "impost" or "tax" u/Art. 366(28) – Government may demand payments in the nature of a price or consideration for parting with its exclusive privilege to carry on activities of a particular description which is neither a tax nor a fee. [Paras 102, 104, 105, 108, 109]

Constitution of India – Entry 23 List II and Entry 54 List I – Inter-relationship between – "Regulation of mines" and "mineral development" – Meaning and explanation of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *As regards, inter-relationship between Entry 54 List I and Entry 23 List II the State legislatures possess plenary legislative power in respect of regulation of mines and mineral development under Entry 23 List II; Entry 23 List II is, however, subject to the operation of Entry 54 List I; field under Entry 23 List II is subordinated to the extent to which Parliament has brought under its control the regulation of mines and development of minerals under the MMDR Act; expression of the legislative intention to cover a particular field relating to mines and mineral development excludes or denudes the legislative powers of the State with respect to that particular field; and Parliamentary intention to cover a particular field relating to the regulation of mines and mineral development and the extent to which control of the Union is regarded to be in the public interest has to be ascertained from the language of the statute – Entry 54 List I and Entry 23 List II are general or regulatory entries dealing with the same subject matter, namely of "regulation of mines and mineral development" – By making Entry 23 List II subordinate to Entry 54 List I, Constitution tilts the balance of legislative powers with respect to the regulation of mines and mineral development in favor of the Union – Expression "regulation of mines" mean the management of both the process of extracting minerals as well the place where such minerals will be extracted from sub-surface levels – MMDR Act gives shape and meaning to the expression "regulation of mines and mineral development"*

through its provisions and the rules – Entry 54 List I and Entry 23 List II do not use the expression "minerals" simpliciter – Entries use the term "mineral development" – As a concept, mineral development is a term of wide import – It encompasses exploitation of minerals, reduction of wastage in the beneficiation process, regulation of mining activities for ecological and environmental factors and equitable distribution of mineral resources and mining leases – Expression "mineral development" has been understood under the MMDR Act in a comprehensive manner, to include all activities and transactions relating to the working of mines, extracting of minerals, their storage and disposal, as well as the conservation of the environment. [Paras 132, 137, 138, 140, 141, 163]

Constitution of India – Entry 50 List II and Entry 54 List I – Inter-relationship between:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Entry 50 List II has two elements, the legislative field governing taxes on mineral rights is given exclusively to the states and the field given to the states is subject to any limitations imposed by Parliament by law relating to mineral development – Entry 50 List II is a taxing entry – Limitations on the field created by Entry 50 List II is however, contemplated to be created by a law which relates to mineral development – Legislative competence of Parliament to enact a "law relating to mineral development" can be traced to Entry 54 List I, a general entry – Thus, the taxing powers of the state with respect to mineral rights under Entry 50 List II can be restricted by Parliament by its regulatory power under Entry 54 List I. [Para 165]*

Constitution of India – Entry 50 List II – Expression "mineral rights" – Meaning of – Taxes on mineral rights:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Constitution does not define "mineral rights" – Though the expression "mineral rights" is used in Entry 50 List II, it does not find mention in any of the other related legislative entries Entry 54 List I and Entry 23 List II – Expression has to be given its ordinary and natural meaning by adopting*

an interpretative approach which eschews rigidity – Mineral rights are inextricably connected to property – Any understanding of "mineral rights" must be prefaced on an understanding of the basics of property law – Right to minerals entails the right to monetize mineral resources by either consuming them or selling them to third parties – Expression "mineral rights" under Entry 50 List II envisages a bundle of rights associated with the ownership of minerals, including rights which can be transferred to lessee through a mining lease – Usually, the right to mine includes excavation of minerals and removal or consumption of the extracted minerals – Expression "mineral rights" must be construed in this spirit to ensure that the taxing powers of the State under Entry 50 List II are not unnecessarily curtailed – Breadth and scope of mineral rights has also been recognized under the MMDR Act – As regards, the "taxes on mineral rights", it is the subject matter of Entry 50 List II – Taxable event under Entry 50 List II would relate to exercise of mineral rights – Right to receive royalty is an integral part of the mineral rights of the lessor – However, royalty is not a tax – Thus, royalty would not be comprehended within the meaning of the expression "taxes on mineral rights" – Scope of taxes on mineral rights includes taxes on the right to extract minerals, aspects relating to the exercise of mineral rights such as working the mines and dispatching minerals from the leased area – However, the legislature has to ensure that the exercise of the taxing powers relatable to the field under Entry 50 List II does not foray into a duty of excise or a tax on the sale of minerals. [Paras 170, 172, 175, 178, 179, 185, 187, 188]

Constitution of India – Entry 50 List II – Limitations on the taxing power of the State under Entry 50 List II – Entry 50 List II, if constitutes an exception to the Sundararamier principle:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Entry 50 List II is unique because though it is a taxing entry, it is made subject to "any limitations imposed by Parliament by law relating to mineral development" – Thus, the taxing power of the state is capable of being controlled by a non-fiscal enactment by Parliament relating to the development of minerals – This seems to recognize that a fiscal imposition in the nature of a tax on mineral rights by a state may impact on the development of minerals – Position enunciated in* **Sundararamier's case** *is that the field of taxation*

is distinct from the general subjects of legislation in the Union and State lists of the Seventh Schedule – While Entry 50 List II is sui generis, it does not constitute an exception to the Sundararamier's principle – Entry 50 List II is subordinated only to the extent of any limitations that may be imposed by Parliament by law relating to mineral development – Unless Parliament imposes a limitation, the plenary power of the state legislature to levy taxes on mineral rights is unaffected – Question of an overlap between the taxing entry and general entry does not arise because Parliament cannot impose taxes on minerals under Entry 54 List I – There is no direct conflict between the taxing powers of the States under Entry 50 List II and regulatory powers of the Union. [Paras 190, 192, 205, 207]

Constitution of India – Taxing powers of the states – Limitations imposed by Parliament – Nature of – Determination:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *There is a distinction between the nature of the restraints imposable by Parliament on the legislative field of the states to regulate mines and development of minerals, the Parliamentary restraints contemplated on the taxing power of the states over mineral rights – In relation to the former, distinction emerges from the language of Entry 54 List I and Entry 23 List II and as regards the latter, it is Entry 50 List II – Relationship between Entry 23 List II and Entry 54 List I is that the latter results in a denudation of the legislative field of the states to the extent envisaged by Parliament by law – Expression 'extent' leaves it entirely to Parliament to determine whether the extent of the control by the Union is to be total or partial – Denudation of the legislative field of the states follows such a declaration by Parliament and the extent would be determined by the MMDR Act enacted by Parliament – Entry 50 List II gives the legislative field of taxing mineral rights to the states however, subject to limitations imposed by Parliament by law relating to mineral development – Entry 50 List II does not result in the field of taxing mineral rights being conferred on Parliament, because there is no specific entry in List I giving the field of taxing mineral rights to the Union – Field of taxing mineral rights is exclusive to the states and continues to remain with them but subject to limitations imposed by Parliamentary law relating*

to mineral development – Parliament can determine as to how the taxing power of the states over mineral rights should be limited in order to ensure that it does not impede or retard mineral development – If Parliament does so and indicates the nature of the limitations, states are bound to abide by them while exercising the taxing power over mineral rights. [Paras 208, 210, 211]

Constitution of India – Entry 50 List II – Expression 'any limitations' – Construction of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Use of the expression "any" before "limitations" under Entry 50 of List II indicates that the scope of the limitations is expansive and includes "all" or "every" limitation that could be imposed by Parliament by law relating to mineral development – Expression "any" has to be construed in its context, taking into consideration the scheme, purpose, and subject matter of the enactment, or the scheme of distribution of legislative powers under the Constitution – Expression "any limitations" is indicative of the fact that Parliament has been provided with ample legislative freedom to conceive limitations or restrictions on the legislative powers of the State to tax minerals. [Para 233]*

Constitution of India – Taxes on mineral rights on mineral development – Impact of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Uniformity of prices of mineral commodities ensures the objective of mineral development as envisaged under the MMDR Act – Levy of a tax on mineral rights by the State legislatures may lead to an increase in the prices of the mineral commodity in India – An increase in the rate of tax on a particular commodity cannot per se be said to impede free trade and commerce in that commodity – To counteract any adverse impact on the development of minerals in India that the Constitution has empowered Parliament under Entry 50 List II to impose limitations on the basis of which the State legislature can*

tax mineral rights – Parliament has the responsibility to ensure that there is no adverse effect on development of mineral rights – Legislative powers granted to the State legislatures cannot be whittled down impliedly based on the presumption that all taxes on mineral rights imposed by the State will have adverse economic consequences on mineral development – States have a constitutional and sovereign authority to exercise their taxing powers, within the bounds of the Constitution, to raise adequate revenues for the welfare of the people. [Paras 248, 249]

Constitution of India – Entry 49 List II – Taxes on lands and buildings – Principles governing 'taxes on lands and buildings' under Entry 49 List II – Explanation – State legislatures, if competent to levy a tax on mineral-bearing land as a unit under Entry 49 of List II:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Entry 49 List II contemplates levy of tax on land as a unit, irrespective of the use to which it is put – Thus, the State legislature is competent while designing the levy under Entry 49 List II to tax lands which comprise of mines and quarries – Mineral-bearing land also falls within the description of "lands" under Entry 49 List II – State legislature has wide discretion to classify lands and levy taxes on them under Entry 49 List II – Subject of taxation in Entry 49 List II is land as a unit – Subject of tax in Entry 50 List II is the mineral rights – There is a distinction between the two legislative entries – Legislative competence of the States to tax lands under Entry 49 List II will not be affected by the MMDR Act. [Paras 275, 278-280]*

Constitution of India – Arts.245, 246, 265 – Scheme of distribution of legislative powers between the Parliament and the State Legislature and constitutional limitations – Stated. (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *[Paras 29-37]*

Constitution of India – Seventh Schedule – Legislative entries – Interpretation of – Stated. (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala,

Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *[Paras 38, 40-47]*

Doctrines/Principles – Public trust doctrine – Natural resources and the public trust doctrine:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Public trust doctrine is founded on the principle that certain resources are nature's bounty which ought to be reserved for the whole populace, for the present and for the future – State holds all natural resources, including minerals, as a trustee of the public and must deal with them in a manner consistent with the nature of such a trust – Central Government or State Government may not always be the owner of the underlying minerals – Constitution has entrusted the Union and the States with the responsibility to regulate mines and mineral development in consonance with the principles of the public trust doctrine and sustainable development of mineral resources – Entrustment to the State being subject to the power of Parliament to regulate the domain – Under the MMDR Act, the Central Government, acting as a public trustee of minerals, regulates prospecting and mining operations in public interest. [Paras 55, 57-60]*

Tax/Taxation – Nature of – True test – Measure of tax and levy of tax – Nexus between:

Held: (per Dr Dhananjaya Y Chandrachud, CJI) (for himself and for Hrishikesh Roy, Abhay S Oka, J.B. Pardiwala, Manoj Misra, Ujjal Bhuyan, Satish Chandra Sharma and Augustine George Masih, JJ.) *Among its elements tax has to provide for the charge of tax, the incidence of tax, the measure of the tax and would contain provisions in the nature of the machinery for assessment and recovery – Measure of tax is not a true test of the nature of tax – Standard adopted as a measure of tax may be a relevant consideration in determining the nature of tax, but is not conclusive – Nexus between the measure and levy of tax need not be "direct and immediate" – Nexus has to be "reasonable" and must have some relationship with the nature of levy – Reasonability of the nexus would largely depend upon the nature of the tax and the means available with the legislature to design the measure of the tax – Since the measure of the levy is a matter of legislative*

policy and convenience, the reasonability of the nexus between the measure and tax has to be determined by the courts on a case-to-case basis. [Paras 283, 286, 290]

Mines and Minerals (Development and Regulation) Act, 1957 – Object and scope of – MMDR Act vis-a-vis Entry 50 List II:

Held: (per B. V. Nagarathna, J.) *MMDR Act contemplates all manner of levies, charges, impost or demands that could be provided for having a nexus with mineral rights – Thus, the Act itself has to be construed as a limitation on the power of the States to demand or impose levies to the extent to which is stated in the Act – Though, Entry 50 List II is a taxing Entry, it would be subject to the limitations enacted by the Parliament by law under Entry 54 List I – States cannot impose levies under Entry 50 List II over and above the amount of royalty received by them under the MMDR Act – Entry 50 List II is sui generis because it is the only legislative Entry which limits the taxing powers of the State legislatures by reference to a general law – Thus, expression "mineral development" found in Entry 50 List II has to be traced to the entire architecture of the MMDR Act which serves as limitation of taxing power of the State legislature under Entry 50 List II – To read it otherwise would lead to destruction of the federal balance – Further, tax on mineral right would also include royalty as envisaged u/s.9 and other Sections of the MMDR Act and every holder of mining lease is bound to pay royalty irrespective of the owner of the mineral bearing land, in terms of s.9 read with Second Schedule to the said Act – Thus, royalty is in the nature of a tax on mineral rights – Also the MMDR Act and the Rules made thereunder is a complete Code on the regulation of mineral development – State legislature cannot, on the basis of royalty paid, levy any other tax, cess or surcharge on cess – States can only levy tax on sale of mineral as per Entry 54 List II which is not a tax on mineral rights – Moreover, Entry 50 List II is a recognition of parliamentary superiority via imposition of a limitation. [Paras 39, 39.1]*

Mines and Minerals (Development and Regulation) Act, 1957 – ss.2, 9, 9A – India Cement's case holding that royalty is a tax – Effect of overruling India Cement:

Held: (per B.V. Nagarathna, J.) *If royalty is not held to be a tax and the same being covered under the provisions of the MMDR Act, it would imply that despite Entry 54 List I and ss.2, 9, 9A and other provisions, taxes on*

mineral rights could be imposed by States over and above payment of royalty on a holder of a mining lease – Limitation that Parliament has made by law on the taxing power of a State explicitly stated in Entry 50 List II would be given a go by and the States could pass laws imposing taxes, cesses, surcharge on cess, etc. on the basis of royalty which is in addition to payment of royalty – Such levies could also be imposed under Entry 49 List II thereby making Entry 50 List II redundant which is not acceptable – There would be unhealthy competition between the States to derive additional revenue and consequently, the steep, uncoordinated and uneven increase in cost of minerals, subjecting the national market being exploited for arbitrage – Overall economy of the country would be affected adversely – This would lead to breakdown of the federal system envisaged under the Constitution in the context of mineral development and mineral rights – Overruling the judgment in ***India Cement*** *would mean that all judgments akin to* ***India Cement's case*** *whether prior to or subsequent thereto, stand overruled irrespective of whether they are of High Courts or this Court – Thus, all States would once again start levying taxes on mineral rights under Entry 49 List II, thereby bypassing Entry 50 List II so as to not be bound by any limitation that Parliament had imposed by law on power of the States to levy taxes on mineral rights – Parliament would have to again step in to bring about uniformity in the prices of minerals and in the interest of mineral development so as to curb the States from imposing levies, taxes on mineral rights. [Paras 35.2, 35.3]*

Precedent – Typographical error in a judgment of a larger Bench – If can be questioned by smaller Benches on the basis thereof:

Held: (per B.V. Nagarathna, J.) *Judgments of larger Benches cannot be questioned by smaller Benches on the basis of an imagined "typographical error" – Entire judgment must be read and understood including its under currents before negating it for what it stands – Judgment of a Court of law is not a piece of legislation but one pregnant with reasoning and it becomes the duty of a succeeding Bench considering a precedent to be cautious in opining something contrary on the premise of a "typographical error" in a judgment of a larger Bench by failing to understand the import of the reasoning – Opinion of the majority in the Kesoram's case is per incuriam as it failed to follow the dictum in India Cement on the basis of a "typographical error" where there was none. [Para 27]*

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In the judgment of Dr. Dhananjaya Y. Chandrachud, CJI:

State of West Bengal v. Kesoram Industries Ltd. **[2004] 1 SCR 564 : (2004) 10 SCC 201 – affirmed.**

Goodricke Group Ltd. v. State of West Bengal **[1994] Supp. 6 SCR 120 : (1995) Supp 1 SCC 707 – clarified.**

M P V Sundararamier & Co. v. State of Andhra Pradesh **[1958] 1 SCR 1422 – explained.**

India Cement Ltd. v. State of Tamil Nadu **[1989] Supp. 1 SCR 692 : (1990) 1 SCC 12;** *Orissa Cement Ltd. v. State of Orissa* **[1991] 2 SCR 105 : (1991) Supp 1 SCC 430;** *Federation of Mining Associations of Rajasthan v. State of Rajasthan* **(1992) Supp 2 SCC 239;** *State of M P v. Mahalaxmi Fabric Mills Ltd.* **[1995] 1 SCR 756 : (1995) Supp 1 SCC 642;** *Saurashtra Cement & Chemical Industries Ltd. v. Union of India* **[2000] Supp. 4 SCR 44 : (2001) 1 SCC 91;** *State of Orissa v. Mahanadi Coalfields Ltd.* **[1995] 3 SCR 639 : (1995) Supp 2 SCC 686;** *P Kannadasan v. State of Tamil Nadu* **[1996] Supp. 4 SCR 92 : (1996) 5 SCC 670 – overruled.**

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District Mining Officer v. Tata Iron and Steel Company **[2001] Supp. 1 SCR 147 : (2001) 7 SCC 358 – correct law.**

India Cement Limited v. State of Tamil Nadu **[1989] Supp. 1 SCR 692 : (1990) 1 SCC 12 : AIR 1990 SC 85;** *State of Madhya Pradesh v. Mahalaxmi Fabric Mills Ltd.* **[1995] 1 SCR 756 : (1995) Supp 1 SCC 642;** *Orissa Cement Limited v. State of Orissa* **[1991] 2 SCR 105 : (1991) Supp 1 SCC 430;** *Saurashtra Cement & Chemicals Industries Ltd. v. Union of India* **[2000] Supp. 4 SCR 44 : (2001) 1 SCC 91;** *State of Orissa v. Mahanadi Coalfields Ltd.* **[1995] 3 SCR 639 : (1995) Supp. 2 SCC 686;** *P. Kannadasan v. State of Tamil Nadu* **[1996] Supp. 4 SCR 92 : (1996) 5 SCC 670 – correct law excluding to the extent overruled in Tata Iron and Steel's case.**

State of West Bengal v. Kesoram Industries Limited **[2004] 1 SCR 564 : (2004) 10 SCC 201 – overruled to the extent that royalty is not a tax.**

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[2024] 8 S.C.R. 1321 : 2024 INSC 562

The State of Punjab & Ors.
v.
Davinder Singh & Ors.

Civil Appeal No. 2317 of 2011

01 August 2024

**[Dr Dhananjaya Y Chandrachud,* CJI, B.R. Gavai,*
Vikram Nath,* Bela M. Trivedi,* Pankaj Mithal,*
Manoj Misra and Satish Chandra Sharma,* JJ.]**

Issue for Consideration

The Supreme Court was required to adjudicate upon whether the sub-classification of Scheduled Castes for the purpose of providing affirmative action, including reservation is valid. In this context, the following issues arose for consideration: Whether sub-classification of a reserved class is permissible under Articles 14, 15 and 16 of the Constitution; Whether the Scheduled Castes constitute a homogenous or a heterogenous grouping; Whether Article 341 of the Constitution creates a homogenous class through the operation of the deeming fiction; and Whether there any limits on the scope of sub-classification.

Headnotes

Reservation – Whether sub-classification of Scheduled Castes for purposes of reservation is constitutionally permissible – Held (per majority), Yes.

Held (per Dr D Y Chandrachud, CJI) (for himself and Manoj Misra, J.): 1. *Article 14 of the Constitution permits sub-classification of a class which is not similarly situated for the purpose of the law – The Court while testing the validity of sub-classification must determine if the class is a homogenous integrated class for fulfilling the objective of the sub-classification – If the class is not integrated for the purpose, the class can be further classified upon the fulfillment of the two-prong intelligible differentia standard. [Para 205(a)]*

2. *The holding in Chinnaiah that sub-classification of the Scheduled Castes is impermissible is overruled. [Para 205(f)]*

Held (per B.R. Gavai, J.) (Concurring): 1. *E.V. Chinnaiah, which held that sub-classification amongst the Scheduled Castes for the purpose of giving more beneficial treatment to a group in the larger group of the Scheduled Castes is not permissible, does not lay down a good law. [Para 296 (i)]*

2. *Sub-classification amongst the Scheduled Castes for giving more beneficial treatment is permissible in law. [Para 296 (ii)]*

Held (per Vikram Nath, J.) (Concurring): *I am generally in agreement with the reasons and conclusions arrived at in the opinions of Hon'ble the Chief Justice and Brother Justice Gavai in particular that the holding in E.V. Chinnaiah, that sub-classification within Scheduled Castes was impermissible, does not lay down good law and stands over-ruled. [Para 1]*

Held (per Pankaj Mithal, J.) (Concurring): 1. *The issue of sub-classification of scheduled castes has been appropriately answered by the Chief Justice and my esteemed brother Justice Gavai by their separate opinions with which I respectfully agree. [Para 9]*

2. *The policy of reservation as enshrined under the Constitution and by its various amendments requires a fresh re-look and evolvement of other methods for helping and uplifting the depressed class or the downtrodden or the persons belonging to SC/ST/OBC communities – So long no new method is evolved or adopted, the system of reservation as prevailing may continue to occupy the field with power to permit sub-classification of a class particularly scheduled caste as I would not be suggesting dismantling of an existing building without erecting a new one in its place which may prove to be more useful. [Para 84(i)]*

3. *Sub-classification of Scheduled Castes is permissible in law for the purposes of reservation. [Para 85]*

Held (per Satish Chandra Sharma, J.) (Concurring): *I have had the privilege of reading the lucid and detailed opinion(s) authored by Hon'ble Dr. Justice D.Y.Chandrachud, Chief Justice of India and Hon'ble Mr. Justice B.R. Gavai, respectively – I am fully in agreement with both opinions to the extent that the validity of sub-classification within Scheduled Castes has been held to be constitutionally permissible. [Para 1]*

Held (per Bela M. Trivedi, J.) (Dissenting): 1. *When the law was settled by the Constitution Bench in E.V. Chinnaiah after considering all the previous judgments including Indra Sawhney and after investing substantial judicial time and resources, the same should not have been doubted and referred to the larger bench by the Three-Judge Bench in Davinder Singh, and that too without assigning any reason much less cogent reason for their disagreement disregarding the well settled doctrines of Precedents and Stare decisis. [Para 79(i)]*

2. *The Nine-Judge Bench in Indra Sawhney and the Five-Judge Bench in Jarnail Singh had not dealt with the issue of sub-classification of the "Scheduled Castes" in the context of Article 341, much less had dealt with the State's powers to sub-classify or sub-divide or regroup the castes specified as "Scheduled Castes" under Article 341 of the Constitution, and therefore, it could not be held that the law laid down in E.V. Chinnaiah was not in consonance with Indra Sawhney or Jarnail Singh. [Para 79(viii)]*

3. *The power conferred upon the Supreme Court under Article 142 cannot be used to supplant the substantive law applicable to the case under consideration – Even with the width of its amplitude, Article 142 cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with the subject, and thereby to achieve something indirectly which cannot be achieved directly – The action of the State, though well intentioned and affirmative in nature, if violates the specific provision of the Constitution, cannot be validated by the Supreme Court in exercise of its jurisdiction under Article 142. [Para 79(ix)]*

4. *The affirmative action and legal frameworks, though both do aim at more equitable society, they must navigate complex legal principles to ensure fairness and constitutionality. [Para 79(x)]*

5. *The law laid down by the Five-Judge Bench in E.V. Chinnaiah is the correct law and deserves to be confirmed. [Para 80]*

Reservation – Whether sub-classification of Scheduled Castes for reservation was excluded or barred by the Nine Judge Bench decision in *Indra Sawhney* case – Held, No.

Held (per Dr D Y Chandrachud, CJI) (for himself and Manoj Misra, J.): *In Indra Sawhney, this Court did not limit the application of sub-classification only to the Other Backward Class – This Court upheld the*

application of the principle to beneficiary classes under Articles 15(4) and 16(4). [Para 205(b)]

Held (per B.R. Gavai, J.) (Concurring): *In Indra Sawhney, 7 Learned Judges affirmed the position as laid down in N.M. Thomas that clause (4) of Article 16 is not by way of an exception to clause (1) of Article 16, but it is an emphatic way of stating a principle implicit in Article 16(1) – It has been held that further classification of backward classes into backward and more backward classes is permissible under the Constitution – It has been held in Indra Sawhney that under Article 16(4) the Scheduled Castes are also included in the term 'backward class of citizens'. [Paras 247, 248]*

Held (per Pankaj Mithal, J.) (Concurring): *The Chief Justice in his opinion has clearly opined that this Court in Indra Sawhney never intended to limit the application of sub-classification to the other backward classes only – If any class is not integrated it can be further classified and such sub-classification of a class would not be violative of Article 14 of the Constitution, so long persons in a class are not similarly situated. [Para 79]*

Held (per Bela M. Trivedi, J.): *Though Indra Sawhney had sought to define "backward class" in terms of social backwardness, while considering the ambit of "backward class" for the purpose of Article 16(4), it did not deal with the issue qua the Scheduled Castes/ Scheduled Tribes particularly in the light of Article 341/342, rather it categorically kept the Scheduled Castes/ Scheduled Tribes outside the purview of consideration – The Scheduled Castes being the most backward class amongst the backward classes, and having acquired a special status by virtue of Article 341, the question of defining "backward class" qua the "Scheduled Castes" did not arise, and rightly not dealt with in Indra Sawhney for the purposes of Article 16(4) of the Constitution. [Para 70]*

Reservation – Whether Scheduled Castes under Article 341, constitute a homogeneous class – Held (per majority), No – Constitution of India – Art. 341.

Held (per Dr D Y Chandrachud, CJI) (for himself and Manoj Misra, J.): 1. *In Chinnaiah, Justice Santosh Hegde observed that the Castes notified by the President in the exercise of power under Article 341 form a class in themselves – For this purpose, the learned Judge relied on certain observations*

of the Constitution Bench in NM Thomas case – In NM Thomas however, rules providing concessions to the members of the Scheduled Castes for qualifying at the entrance examination were challenged – One of the issues before the Court was whether the concession to the members of the Scheduled Castes violated Article 16(2) since it discriminates solely on the ground of "caste" – To overcome the embargo placed by Article 16(2), the learned Judges observed that provision for affirmative action is made in favour of the Scheduled Castes, which once notified by the President in exercise of the power under Article 341 are not a "caste" but a class – The class that is constituted by the Presidential notification as the Scheduled Castes consists of numerous castes, thereby forming a class – The observations in NM Thomas do not go further to state that it is a homogenous class that cannot be classified further – Additionally, the approach adopted in NM Thomas by this Court that the Scheduled Castes are a class because they comprise of a collection of castes must be read in the context of the nine-Judge Bench decision in Indra Sawhney, where this Court held that caste is itself a class – Therefore, the inference drawn by Justice Hegde in Chinnaiah that the Scheduled Castes are a homogenous class based on the above observations in NM Thomas is erroneous. [Paras 113, 114]

2. *Article 341(1) does not create a deeming fiction – The phrase "deemed" is used in the provision to mean that the castes or groups notified by the President shall be "regarded as" the Scheduled Castes – Even if it is accepted that the deeming fiction is used for the creation of a constitutional identity, the only logical consequence that flows from it is that castes included in the list will receive the benefits that the Constitution provides to the Scheduled Castes – The operation of the provision does not create an integrated homogenous class. [Para 205(c)]*

3. *Sub-classification within the Scheduled Castes does not violate Article 341(2) because the castes are not per se included in or excluded from the List – Sub-classification would violate the provision only when either preference or exclusive benefit is provided to certain castes or groups of the Scheduled Castes over all the seats reserved for the class. [Para 205(d)]*

Held (per B.R. Gavai, J.) (Concurring): *The ground realities cannot be denied – Even among the Scheduled Castes, there are some categories who have received more inhuman treatment for centuries and generations as compared to the other categories – The hardships and the backwardness*

which these categories have suffered historically would differ from category to category – Therefore, merely because they are part of a single or a combined Presidential List, it cannot be said that they form part of a homogeneous group. [Para 261]

Held (per Bela M. Trivedi, J.) (Dissenting): 1. *While giving a broad and generous construction to the Constitutional provisions, the rule of "plain meaning", or "literal" interpretation, which is the "primary rule" has to be kept in mind. [Para 79(ii)]*

2. *The Presidential List specifying "Scheduled Castes" under Article 341 assumes finality on the publication of the notification, and the castes, races or tribes, or groups within castes, races or tribes specified in the notification are deemed to be the "Scheduled Castes" in relation to that State or Union Territory as the case may be, for the purposes of the Constitution and as such assume special status of "Scheduled Castes". [Para 79(iii)]*

3. *It is only the Parliament by law which can include in or exclude from the list of the "Scheduled Castes" specified in the notification notified under Clause (1), any caste, race or tribe or part of or group within any caste, race or tribe – Such notification notified under Clause (1) cannot be varied even by the President by issuing any subsequent notification. [Para 79(iv)]*

4. *It is by virtue of the notification of the President under Article 341 that the "Scheduled Castes" come into being – Though the members of Scheduled Castes are drawn from different castes, races or tribes, they attain special status of "Scheduled Castes" by virtue of Presidential Notification – The etymological and evolutionary history and the background of the nomenclature "Scheduled Castes", coupled with the Presidential orders published under Article 341 of the Constitution, make the "Scheduled Castes", a homogenous class, which cannot be tinkered with by the States. [Para 79(v)]*

Reservation – Whether State legislature has the power of sub-classification of Scheduled Castes under Arts. 15 and 16 – Held (per majority), Yes – Constitution of India – Arts. 15 and 16.

Held (per Dr D Y Chandrachud, CJI) (for himself and Manoj Misra, J.): *Historical and empirical evidence demonstrates that the Scheduled Castes are a socially heterogenous class – Thus, the State in exercise of the power under Articles 15(4) and 16(4) can further classify the Scheduled Castes*

if (a) there is a rational principle for differentiation; and (b) the rational principle has a nexus with the purpose of sub-classification. [Para 205(e)]

Held (per B.R. Gavai, J.) (Concurring):

1. *It is the duty of the State to give preferential treatment to the backward class of citizens who are not adequately represented – If the State while discharging that duty finds that certain categories within the Scheduled Castes and Scheduled Tribes are not adequately represented and only the people belonging to few of the categories are enjoying the entire benefit reserved for Scheduled Castes and Scheduled Tribes, can the State be denied its right to give more preferential treatment for such categories? The answer would be in the negative, since the same would not amount to tinkering with the Presidential List. [Para 258]*

2. *No doubt that if the State decides to provide 100% of the reservation for Scheduled Castes to one or more categories enlisted in the Presidential List in that State to the exclusion of some categories, it may amount to tinkering with that list because, in effect, it would amount to denial of benefit of reservation to those Scheduled Caste categories which have been excluded – That would, in effect, amount to deletion of the said categories from the Presidential List notified under Article 341 of the Constitution, which power is exclusively reserved with Parliament; such an exercise would not be permissible. [Para 259]*

3. *However, merely because more preferential treatment is provided to the more backward or more inadequately represented among the Scheduled Castes, it would not amount to tinkering with the Presidential List – The same would be permissible in view of the law laid down by the 9-Judge Bench in the case of Indra Sawhney. [Para 260]*

Held (per Bela M. Trivedi, J.) (Dissenting): 1. *The States have no legislative competence to enact the law for providing reservation or giving preferential treatment to a particular caste/castes by dividing/sub-dividing/sub-classifying or regrouping the castes, races or tribes enumerated as the "Scheduled Castes" in the notification under Article 341. [Para 79(vi)]*

2. *Under the guise of providing reservation or under the pretext of taking affirmative action for the weaker of the weakest sections of the society, the State cannot vary the Presidential List, nor can tinker with Article 341 of the Constitution. [Para 79(vii)]*

Reservation – Criteria and scope for sub-classification of Scheduled Castes – Discussed.

Held (per Dr D Y Chandrachud, CJI) (for himself and Manoj Misra, J.): 1. *The purpose of the reservation clause is to remedy the inadequate representation in public services of certain "classes" – The intent of Article 16(4) is to cover those classes which have been inadequately represented because of their backwardness. [Paras 165, 166]*

2. *However, adequacy of representation when determined purely from a numerical perspective without accounting for factors such as representation vis-à-vis posts would dilute the purpose of the provision – The objective of Article 16(4) is to ensure effective representation of the class in the services of the State across posts and grades – The objective of the provision is not to emulate the existing social hierarchy where the low-grade posts are occupied by the socially backward while supervisory and managerial posts continue to be occupied by the advanced classes – If the objective of Article 16(4) is to be achieved in the truest sense, the inadequacy of representation must not be determined only on the basis of the total number of members of the backward class in the services of the State but by assessing the representation of the class across various posts. [Paras 167, 168]*

3. *Since the purpose of Articles 15(4) and 16(4) is to ensure equality of opportunity of the socially backward classes, the criterion for sub-classification within a class (be it the Other Backward Classes or the Scheduled Castes or Tribes) must be an indicator of social backwardness – The yardstick for classification must differentiate the class based on inter-se social backwardness – The inter-se backwardness could be identified based on the same or different identity. [Para 174]*

4. *Since the State can use any yardstick to determine inter-se backwardness, it is not necessary that the criteria for sub-classification and the criteria used to distinguish the class from the other classes must be the same – How does the State identify inter-se social backwardness within the Scheduled Castes? The inter-se backwardness can, inter alia, be identified based on inadequacy of effective representation – However, it must be proved that inadequacy of effective representation of a caste is because of its social backwardness – The State must prove that the group/caste carved out from the larger group of Scheduled Castes is more disadvantaged and inadequately represented. [Paras 175, 177]*

5. *While the State may embark on an exercise of sub-classification, it must do so on the basis of quantifiable and demonstrable data bearing on levels of backwardness and representation in the services of the State – It cannot merely act on its whims or as a matter of political expediency – The decision of the State is amenable to judicial review – When its action is challenged under Article 226 or before this Court under Article 32, the State must provide justification and the rationale for its determination – No State action can be manifestly arbitrary – It must be based on intelligible differentia which underlie the sub-classification – The basis of the sub-classification must bear a reasonable nexus to the object sought to be achieved. [Para 190]*

6. *Though sub-categorization based on each caste is permissible, there can never be a situation where seats are allocated for every caste separately – Though each caste is a separate unit, the social backwardness suffered by each of them is not substantially distinguishable to warrant the State to reserve seats for each caste – If the social backwardness of two or more classes is comparable, they must be grouped together for the purposes of reservation. [Para 195]*

7. *The scope of sub-classification of the Scheduled Castes is summarized as follows: (i) The objective of any form of affirmative action including sub-classification is to provide substantive equality of opportunity for the backward classes – The State can sub-classify, inter alia, based on inadequate representation of certain castes – However, the State must establish that the inadequacy of representation of a caste/group is because of its backwardness; (ii) The State must collect data on the inadequacy of representation in the "services of the State" because it is used as an indicator of backwardness; and (iii) Article 335 of the Constitution is not a limitation on the exercise of power under Articles 16(1) and 16(4) – Rather, it is a restatement of the necessity of considering the claims of the Scheduled Castes and the Scheduled Tribes in public services – Efficiency of administration must be viewed in a manner which promotes inclusion and equality as required by Article 16(1). [Para 205(f)]*

Held (per B.R. Gavai, J.) (Concurring): 1. *For sub-classification amongst the Scheduled Castes, the State will have to justify that the group for which more beneficial treatment is provided is inadequately represented as compared to the other castes in the said List. [Para 296 (iii)]*

2. *While doing so, the State will have to justify the same on the basis of empirical data that a sub-class in whose favour such more beneficial treatment is provided is not adequately represented. [Para 296 (iv)]*

3. *However, while providing for sub-classification, the State would not be entitled to reserve 100% seats available for Scheduled Castes in favour of a sub-class to the exclusion of other castes in the List. [Para 296 (v)]*

4. *Such a sub-classification would be permissible only if there is a reservation for a sub-class as well as the larger class. [Para 296 (vi)]*

Held (per Vikram Nath, J.) (Concurring): *Any exercise involving sub-classification by the State must be supported by empirical data. [Para 1]*

Held (per Satish Chandra Sharma, J.) (Concurring): *I am fully in agreement with the opinion(s) authored by Hon'ble Dr. Justice D.Y. Chandrachud, Chief Justice of India and Hon'ble Mr. Justice B.R. Gavai, respectively to the extent that any exercise involving sub-classification by the State, must be supported by empirical data that ought to underscore the more 'disadvantaged' status of the sub-group to which such preferential treatment is sought to be provided vis-à-vis the Constitutional Class as a whole. [Para 1]*

Reservation – Applicability of creamy layer principle to the Scheduled Castes – Discussed.

Held (per B.R. Gavai, J.): 1. *Taking into consideration that the Constitution itself recognizes the Scheduled Castes and Scheduled Tribes to be the most backward section of the society, the parameters for exclusion from affirmative action of the person belonging to this category may not be the same that is applicable to the other classes – If a person from such a category, by bagging the benefit of reservation achieved a position of a peon or maybe a sweeper, he would continue to belong to a socially, economically and educationally backward class – At the same time, the people from this category, who after having availed the benefits of reservation have reached the high echelons in life cannot be considered to be socially, economically and educationally backward so as to continue availing the benefit of affirmative action – They have already reached a stage where on their own accord they should walk out of the special provisions and give way to the deserving and needy. [Para 294]*

2. *The State must evolve a policy for identifying the creamy layer even from the Scheduled Castes and Scheduled Tribes so as exclude them from the benefit of affirmative action – Only this and this alone can achieve the real equality as enshrined under the Constitution. [Para 295]*

3. *The finding of* ***M. Nagaraj***, ***Jarnail Singh*** *and* ***Davinder Singh*** *to the effect that creamy layer principle is also applicable to Scheduled Castes and Scheduled Tribes lays down the correct position of law. [Para 296 (vii)]*

4. *The criteria for exclusion of the creamy layer from the Scheduled Castes and Scheduled Tribes for the purpose of affirmative action could be different from the criteria as applicable to the Other Backward Classes. [Para 296 (viii)]*

Held (per Vikram Nath, J.) (Concurring): *I am in agreement with the opinion of Brother Justice Gavai that 'creamy layer' principle is also applicable to Scheduled Castes and Scheduled Tribes, and that the criteria for exclusion of creamy layer for the purpose of affirmative action could be different from the criteria as applicable to the Other Backward Classes. [Para 2]*

Held (per Pankaj Mithal, J.) (Concurring): 1. *Justice Gavai has rightly concluded that the State must evolve a policy of identifying the creamy layer even from the scheduled castes and scheduled tribes so as to exclude them from the benefit of reservation. [Para 83]*

2. *In the Constitutional regime, there is no caste system and the country has moved into a casteless society except for the deeming provision under the Constitution for the limited purposes of affording reservation to the depressed class of persons, downtrodden or belonging to SC/ST/OBC – Therefore, any facility or privilege for the promotion of the above categories of persons has to be on a totally different criteria other than the caste may be on economic or financial factors, status of living, vocation and the facilities available to each one of them based upon their place of living (urban or rural). [Para 84(ii)]*

3. *The reservation, if any, has to be limited only for the first generation or one generation and if any generation in the family has taken advantage of the reservation and have achieved higher status, the benefit of reservation would not be logically available to the second generation. [Para 84(iii)]*

4. *Periodical exercise has to be undertaken to exclude the class of person who after taking advantage of reservation has come to march, shoulder to shoulder with the general category. [Para 84(iv)]*

Held (per Satish Chandra Sharma, J.) (Concurring): *On the question of applicability of the 'creamy layer principle' to Scheduled Castes and Scheduled Tribes, I find myself in agreement with the view expressed by Justice Gavai i.e., for the full realisation of substantive equality inter se the Scheduled Castes and Scheduled Tribes, the identification of the 'creamy layer' qua Scheduled Castes and Scheduled Tribes ought to become a constitutional imperative for the State. [Para 2]*

Held (per Bela M. Trivedi, J.) (Dissenting): *In so far as Article 15(4) and 15(5) are concerned, the use of the word "any" before the words "socially and educationally backward classes" and the use of the word "the" before "Scheduled Castes/Scheduled Tribes" clearly indicate that the said provisions pertain to the "Other Backward Classes" which are socially and educationally backward, and that the said provisions also pertain to the "Scheduled Castes" and "Scheduled Tribes", however the "Scheduled Castes" do not require any further identification once they are notified under Article 341 – As rightly held in Ashok Kumar Thakur, the "creamy layer" principle is one of the parameters to identify backward classes – The "Scheduled Castes" having already been specified in the Presidential List under Article 341, the said creamy layer principle cannot be applied to the "Scheduled Castes" for their identification as backward class. [Para 71]*

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List of Keywords

Articles 14, 15, 16 and 341 of Constitution; Reservation; Scheduled Castes; Sub-classification; Affirmative action; Homogenous or heterogenous grouping; Operation of deeming fiction; Limits on scope of sub-classification; Intelligible differentia; Beneficial treatment; Doctrine of Precedent; Stare decisis; Substantive law; Backward class; Integrated homogenous class; Presidential List; Historical and empirical evidence; Socially heterogenous class; Rational principle for differentiation; Preferential treatment; Inadequate representation; Criteria and scope for sub-classification; Inter-se backwardness; Judicial review; Reasonable nexus; Sub-categorization based on caste; Social backwardness; Empirical data; more 'disadvantaged' status; Creamy layer principle.

[2024] 11 S.C.R. 1647 : 2024 INSC 856

Aligarh Muslim University
v.
Naresh Agarwal & Ors.

(Civil Appeal No. 2286 of 2006)

08 November 2024

[Dr Dhananjaya Y Chandrachud,* CJI, Sanjiv Khanna, Surya Kant,* J.B. Pardiwala, Dipankar Datta,* Manoj Misra and Satish Chandra Sharma, JJ.]

Issue for Consideration

The issues were: 1) ingredients, indicia or criteria for an educational institution to be considered a minority educational institution under Article 30 of the Constitution; 2) whether Aligarh Muslim University (AMU) is a minority educational institution; 3) whether the Constitution Bench decision in *Azeez Basha* was incorrect, and 4) Whether two-Judge Bench of Supreme Court in Anjuman-e-Rahmaniya erred in referring the correctness of the decision rendered in *Azeez Basha* directly to a Bench of seven Judges.

Headnotes

A1. Educational Institution – No distinction between educational institutions established before and after commencement of the Constitution for purposes of Art. 30(1) – Right guaranteed by Article 30(1) is applicable to universities established before commencement of the Constitution – Constitution of India – Art.30.

A2. Educational Institution – Minority institution – Indicia for 'establishment' of a minority educational institution – Meaning of word 'establish' as used in Art.30(1) – Effect of incorporation on minority character of an institution – Distinction between 'incorporation' and 'establishment' – Constitution of India – Art.30.

A3. Educational Institution – Minority institution – Declaration of an institution as one of national importance does not amount to change in minority character of the institution.

A4. Educational Institution – Minority educational institution – Whether Aligarh Muslim University (AMU) is a minority educational institution.

A5. Constitution of India – Art.30 – Scope of – Purpose of Art.30(1) – Special protection guaranteed by Art.30(1).

A6. Constitution of India – Art.30 – Article 30(1) can be classified as both an anti-discrimination provision and a special rights provision.

A7. Words and Phrases – 'establishment' and 'incorporation' of educational institutions – The words 'incorporation' and 'establishment' cannot be used interchangeably.

Held [per Dr D Y Chandrachud, CJI (for himself, Sanjiv Khanna, J.B. Pardiwala and Manoj Misra, JJ.)]:

1.1. A distinction between educational institutions established before and after the commencement of the Constitution cannot be made for the purposes of Article 30(1) – Article 30 will stand diluted and weakened if it is to only apply prospectively to institutions established after the commencement of the Constitution – The adoption of the Constitution reflects a break from the system of sovereign and potentate government under the colonial regime and the dawn of governance based on the rule of law – It secures to the minority educational institutions, rights under the Constitution from the date of its commencement. [Para 83]

1.2. Upon the commencement of the Constitution, citizens received the protective cover of Part III – Article 372 read with Article 13(1) stipulates that laws which pre-date the Constitution are unconstitutional if they contravene the fundamental rights – The provisions do not stipulate that laws which pre-date the Constitution cannot receive the additional protection which the fundamental rights offer – The right to administration in Article 30(1) is one such protection. [Para 84]

2.1. 'Incorporation' signifies the legal existence of the institution. In contrast, 'establishment' signifies the founding or bringing into existence of the institution – The possibility of distinguishing the establishment and incorporation of universities arose with the advent of teaching Universities – Two kinds of institutions were incorporated as teaching universities – They consisted of institutions which were established and incorporated at the same time, and institutions in

which the establishment of the institution predated its incorporation – Universities in the latter category, however, were teaching colleges converted into teaching universities – The instance of conversion of teaching collages to teaching universities elucidates the distinction between the 'establishment' and 'incorporation' of educational institutions. [Para 94]

2.2. The word 'establish' as used in Article 30(1) cannot and should not be understood in a narrow and legalistic sense – The words used in clause (1) of Article 30 have to be interpreted in view of the object and purpose of the article, and the guarantee and protection it confers – The guarantee and protection are not dependent on the basis or the manner in which the legal requirements were/are complied with, rather it concerns the persons who have founded and created the establishment – The incorporation by a statute or the procedure and requirements in law are not determinative factors – The persons behind it, that is, the promoters and founder(s) are important – They should belong to a linguistic or a religious minority – There will always be individuals and groups instrumental in catalysing and setting up the institution – Thus, giving a legal character to an educational institution through state or sovereign action, it does not ipso facto follow that the university so established deprives the group of persons/individuals the guarantee under clause (1) of Article 30 of the Constitution – Universities are as much educational institutions as schools and colleges – The interpretation in *Azeez Basha* confers a legalistic meaning to the word 'established', sans the context of clause (1) of Article 30 – No distinction exists between universities and other educational institutions such as schools and colleges for the purpose of Article 30(1). [Para 95]

2.3. It cannot be argued that a university was established by Parliament merely because the long title and preamble of the statute incorporating the university states that it is an Act to establish and incorporate – If such a formalistic interpretation is adopted, fundamental rights would be made subservient to legislative language – The courts must identify the circumstances surrounding the incorporation of the University (including through a reading of the statute) to identify who established the university – Formalism must give way to actuality and to what is real. [Para 112]

2.4. The argument that the test of whether an educational institution is a minority institution must be examined based on whether the community

or the group which had established the institution was a minority at the time of its establishment in pre-independent India, is rejected – The purpose of the provision is to ensure that the minorities are able to preserve and promote their linguistic and religious culture – For this purpose, the status of the group/community, that had established the institution, on the date of commencement of the Constitution should be considered – The test of establishment will apply to future situations on the day when new educational institutions are established – The protection under clause (1) of Article 30 cannot be denied to institutions established before the commencement of the Constitution for the reason that at the time of establishment in pre-independent India, the founders were not aware that they would receive protection of Article 30(1). [Para 122]

2.5. 'establishment' or formation of an institution can be at any point of time and even before the commencement of the Constitution – If an institution was established before the commencement of the Constitution, the enquiry on the question of 'establishment' must relate back to the date when the institution was established or formed to ascertain whether it would qualify as a minority institution upon the commencement of the Constitution. [Para 134]

3.1. To determine who established the institution, the Courts must consider the genesis of the educational institution – For this analysis, the Courts must trace the origin of the idea for the establishment of the institution – The Court must identify who was the brain behind the establishment of the educational institution – Letters, correspondence with other members of the community or with government/State officials and resolutions issued could be valid proof for establishing ideation or the impetus to found and establish – The proof of ideation must point towards one member of the minority or a group from the community. [Para 135]

3.2. The second indicia is the purpose for which the educational institution was established – Though it is not necessary that the educational institution must have been established only for the benefit of a religious or linguistic minority community, it must predominantly be for its benefit – It is not necessary that education must be provided in the language spoken by the minority or on the religion of the minority – For example, it is not necessary that an educational institution established for the Tamils in Uttar Pradesh must necessarily prescribe Tamil as the

language of instruction – However, it must be proved that the institution was established for the benefit of the tamil-speaking community – This indicia could be proved by a reference to private communication or speeches about the necessity of establishing an educational institution for the community and a recognition of the educational difficulties faced by the community. [Para 136]

3.3. The third test is tracing the steps taken towards the implementation of the idea – Information on who contributed the funds for its creation, who was responsible for obtaining the land, and whether the land was donated by a member of the minority community or purchased from funds raised by the minority community for this purpose or donated by a person from some other community specifically for the establishment of a minority educational institution are elements that must be considered – Similar questions must be asked of its other assets – Other important questions are: who took the steps necessary for establishing the institution (such as obtaining the relevant permissions, constructing the buildings, and arranging other infrastructure). It is also important to note that the state may grant some land or other monetary aid during or after the establishment of the educational institution – If the land or monies were granted after the establishment, the grant would not have the effect of changing the minority character of the institution – Minority institutions are not barred from receiving aid save at the cost of their minority status – If the land or monies are granted at the time of establishment, the circumstances surrounding the establishment must be considered as a whole to determine who established the institution – The presence of a grant must not be automatically interpreted as leading to the erasure of a claim to minority status. [Para 137]

3.4. An educational institution is a minority educational institution if it is established by a religious or linguistic minority – It is not necessary to prove that administration vests with the minority to prove that it is a minority educational institution because the very purpose of Article 30(1) is to grant special rights on administration as a consequence of establishment – To do otherwise, would amount to converting the consequence to a pre-condition – The right to administer is guaranteed to minority educational institutions to enable them to possess sufficient autonomy to model the educational institution according to the educational values that the community wishes to emphasise – It is not necessary that the purpose can only be implemented if persons

belonging to the community helm the administrative affairs – This is so particularly because a minority institution may wish to emphasise secular education. [Para 138]

3.5. The test to be adopted by the Court is whether the administrative set up of the educational institution affirms the minority character of the institution – If the administrative structure of the educational institution does not reflect its minority character or when it does not elucidate that the educational institution was established to protect and promote the interests of the minority, it may be reasonably inferred that the purpose was not to establish an educational institution for the benefit of the minority community – [Para 139]

3.6. The test of administration should be evaluated in praesenti, that is, on the date of the commencement of the Constitution – An institution to be a minority institution must satisfy the criteria of being 'administered' as a minority institution on the date of commencement of the Constitution, and being a minority institution on the date of formation – Even if an educational institution was established by the minority for the purposes of the community, one must assess the impact of any subsequent events that altered the character of the institution before the commencement of the Constitution – The statutory incorporation of the institution does not ipso facto amount to a surrender of the minority character of the institution – The Court must pierce the veil to identify if the University was established by a minority for the purpose of promoting the interest of the community – The Court may on a holistic reading of the statutory provisions relating to the administrative set-up of the educational institution deduce if the minority character or the purpose of establishment was relinquished upon incorporation – The question is whether the regulatory measures wrest the administrative control from the founders of the institution – This is a question of fact which must be determined on the facts of each case – The Court must make that determination upon a comprehensive analysis of the administrative framework which includes host of factors such as the representation of the interests of the community in the administrative set-up. [Para 140]

3.7. Taken together, these are the main indicia which assist the Court in determining who established an educational institution under Article 30 – However, the complex nature of establishing an educational institution is not lost on us – Undoubtedly, there can be no straitjacket formula which may be applied – The above indicia of establishment

must be considered as a whole, along with any relevant facts which are available to the Court – The matter must be considered in totality and competing factors must be weighed against each other depending on the facts and circumstances of each institution. [Para 141]

3.8. The above indicia must be proved through the submission of cogent material – Reliance must be placed on primary sources such as office documents, letters and resolutions or memorandums issued to implement the resolutions – Secondary sources must only be used to corroborate the primary sources – The onus to prove that the educational institution was established by a minority is on the claimants. [Para 142]

4. The declaration of an institution as one of national importance does not amount to a change in the minority character of the institution – This is for multiple reasons – First, Entries in the Lists in the Seventh Schedule delineate the legislative competence of Parliament and of the legislatures of the States – The State may regulate various aspects of education and educational institutions – The field of legislative competence over universities does not amount to a surrender of minority character – The distribution of legislative competence between Parliament and the State legislatures does not bear upon the minority character of the institution – Second, as a matter of principle, nothing prevents a minority educational institution from being an institution of national importance – The qualities denoted by the terms 'national' and 'minority' are not at odds with each other nor are they mutually exclusive – The former indicates that the institution has a pan-India or national character, as opposed to relatively more local or regional institutions – It is indicative of the importance of the institution on the national stage – The latter is evidence of the religious or linguistic background of the founders and the constitutional rights which vest in them – Each term indicates distinct attributes which are not antithetical to one another – A university may well be both national and ergo, of national importance, as well as minority in character – There is no reason why a minority educational institution cannot also be an institution of national importance – Third, Entries 63 and 64 provide Parliament with the power to declare an institution to be of national importance – An interpretation that an institution of national importance cannot be a minority institution would amount to rendering the fundamental right guaranteed by Article 30(1) subservient to the legislative power of Parliament – Parliament can in terms of Entries 63 and 64 declare any institution to be of national importance. [Para 148]

5. Article 30(1) can be classified as both an anti-discrimination provision and a special rights provision – A legislation or an executive action which discriminates against religious or linguistic minorities in establishing or administering educational institutions is ultra vires Article 30(1) – This is the anti-discrimination reading of the provision – Additionally, a linguistic or religious minority which has established an educational institution receives the guarantee of greater autonomy in administration – This is the 'special rights' reading of the provision. [Para 160(b)]
6. Religious or linguistic minorities must prove that they established the educational institution for the community to be a minority educational institution for the purposes of Article 30(1). [Para 160(c)]
7. The right guaranteed by Article 30(1) is applicable to universities established before the commencement of the Constitution. [Para 160(d)]
8. The right under Article 30(1) is guaranteed to minorities as defined upon the commencement of the Constitution – A different right-bearing group cannot be identified for institutions established before the adoption of the Constitution. [Para 160(e)]
9. The incorporation of the University would not ipso facto lead to surrendering of the minority character of the institution – The circumstances surrounding the conversion of a teaching college to a teaching university must be viewed to identify if the minority character of the institution was surrendered upon the conversion – The Court may on a holistic reading of the statutory provisions relating to the administrative set-up of the educational institution deduce if the minority character or the purpose of establishment was relinquished upon incorporation. [Para 160(f)]
10. The following are the factors which must be used to determine if a minority 'established' an educational institution:
    i. The indicia of ideation, purpose and implementation must be satisfied – First, the idea for establishing an educational institution must have stemmed from a person or group belonging to the minority community; second, the educational institution must be established predominantly for the benefit of the minority community; and third, steps for the implementation of the idea must have been taken by the member(s) of the minority community; and

ii. The administrative-set up of the educational institution must elucidate and affirm (I) the minority character of the educational institution; and (II) that it was established to protect and promote the interests of the minority community. [Para 160(g)]

11. The question of whether AMU is a minority educational institution must be decided based on the principles laid down in this judgment – The papers of this batch of cases shall be placed before the regular bench for deciding whether AMU is a minority educational institution. [Para 161]

Held [per Surya Kant, J.]:

1. The minority institutions established in the pre-Constitution era are also entitled to the protection conferred by Article 30. [Para 192(g)]
2. Educational institutions, with reference to Article 30 include universities as well. [Para 192(h)]
3. In order to seek protection under Article 30 of our Constitution, the minority institution must satisfy the conjunctive test, namely that it was established by a minority community and has been/is being administered by such a community. [Para 192(i)]
4. The true import and meaning of the expressions 'establish' and 'administer', which comprise the very core of Article 30, are to be construed and understood strictly in accordance with the indicia in paragraphs 141 and 181. [Para 192(j)]
5. The question pertaining to whether AMU satisfies the abovementioned test of 'establish' and 'administer' so as to seek protection of Article 30 of the Constitution, and which will concomitantly entail a mixed question of facts and law, will be determined by a Regular Bench. [Para 192(k)]

Held [per Dipankar Dutta, J.]:

1. While the majority opinion seems to have identified establishment as the sole indicium, Hon'ble Surya Kant and Hon'ble Satish Chandra Sharma, JJ – have laid equal stress on administration apart from establishment as the indicia – Inasmuch as the broad criteria which can be used to assess the status of an educational institution is concerned, I express my agreement with the indicia laid out by Their Lordships. [Para 54]
2. Certain broad indicia, which are universally applicable, may be applied prospectively to facilitate identification of minority institutions –

However, any indicium or the indicia, as identified or formulated, for treating an institution as a minority institution may not be exhaustive so as to cater to all situations – Previous decisions of this Court have also determined the minority character of educational institutions vis-à-vis Article 30, as per indicia tailored to the specific factual matrices – It could be well-nigh difficult, if not impossible, to fix indicia without regard to a whole lot of relevant facts and circumstances, which might have escaped notice or may not have been visualized – A flexible framework rather than a rigid one-size-fits-all model is always desirable and essential for accurately assessing minority institution status – Having regard to special features that each minority institution is most likely to have, a nuanced approach would be required to identify minority institutions by balancing the general guidelines with unique institutional circumstances – The indicia, which have been proposed, could partly inform classification of minority institutions but a tailored evaluation is all the more necessary to account for distinct characteristics which each such institution is associated with; more so, when AMU is unique in itself and its status is under consideration as a standalone institution. [Para 57]

3. It is no longer res integra that even institutions established prior to the Constitution would be eligible to seek the protection of Article 30(1), as was expressed by this Court in Re: The Kerala Education Bill, 1957. [Para 67]
4. The claim of the appellants cannot stand – AMU was neither established by any religious community, nor is it administered by a religious community which is regarded as a minority community; hence, AMU does not qualify as a minority institution – Protection under Article 30(1) of the Constitution is, thus, not available – This submission of the appellants has no historic, legal, factual, or logical basis. [Para 149]
5. In terms of clause (5) of Article 145 of the Constitution, not only do the references not require an answer, it is also declared that AMU is not a minority educational institution and that the appeals seeking minority status for it should fail. [Para 150]

Held [per Satish Chandra Sharma, J.]:

1. The 'establishment' of an institution by the minority is necessary for the said minority to claim right of administration under Article 30 – The words 'establish' and 'administer' are used conjunctively in Article 30 of the Constitution. [Para 266]

2. The term 'establish' in Article 30 means 'to bring into existence or to create' and cannot be conflated with generic phrases such as 'genesis of the institution' or the 'founding moment of the institution'. [Para 266]
3. The real positive indicia for determining the question of establishment of an institution would have to be developed on a case to case basis with the following broad parameters in mind:

   Firstly, to claim 'establishment', the minority community must actually and tangibly bring the entirety of the institution into existence – The role played by the minority community must be predominant, in fact almost complete to the point of exclusion of all other forces – The indicia which may be illustrative and exhaustive in this regard may be the nature of the institution, the legal/statutory basis required for establishing the institution, whether the establishment required any 'negotiation' with outside forces, the role in acquiring lands, obtaining funds, constructing buildings, and other related matters must have been held completely by the minority community – Similarly, while teachers, curriculum, medium of instruction, etc. can be on secular lines, however, the decision-making authority regarding hiring teachers, curriculum decisions, medium of instruction, admission criteria, and similar matters must be the minority community – The choice of having secular education in the institution must be made expressly by the minority community, demonstrating the link between institution and the persons claiming to establish it.

   Secondly, the purpose of the institution must have been to predominantly serve the interests of the minority community or the sole betterment of the minority community, irrespective of the form of education provided and the mode of admission adopted – Therefore, as per the choice of the minority community, an institution may have secular education, but such secular education and the resultant institution, must be predominantly meant for the overall betterment of the minority community.

   Thirdly, the institution must be predominantly administered as a minority institution with the actual functional, executive and policy administration vested with the minority – The minority community should determine the selection, removal criteria, and procedures for hiring teaching, administrative staff, and other personnel – The authority to hire and fire staff must be from the minority community

– Further, even if teaching or administrative staff may include non-minority persons, the final authority exercising functional, directional, and policy control over these authorities must be from the minority community – This ensures that the thoughts, beliefs, and ideas of the minority community regarding administration are implemented in reality – This represents the real decision-making authority of the institution being of the minority community – In ascertaining the above, it would be open for the Court to look at the true purpose behind each of the above factors and to pierce the veil. [Para 266]

4. The minority community may conceptualize the idea of an institution and may advocate for the same, however, if during exchange or negotiation, the actual institution which was established had primacy of governmental efforts and control, then such institution cannot be held to be predominantly established by the efforts and actions of the minority community. [Para 266]
5. In the pre-independence and pre-UGC era, in the absence of a provision like Section 23 of the UGC Act, 1956, it was open for any institutions to adopt the titles such as 'university' or in some cases 'vidyapeeth' or 'jamia' asserting their capability to grant degrees – The absence of a legislative embargo from private establishment of Universities prior to 1956 would be critical for the scope of enquiry. [Para 266]
6. The use of the phrase 'establish and incorporate' by the Legislature may be relevant in the larger enquiry but cannot be said to be conclusively determinative of the factum of establishment or not by the minority community – If the intention of the Legislature is to establish or incorporate or recognise a minority University, the Legislatures have incorporated suitable provisions to colour the University with a minority identity. [Para 266]
7. There were no rights, fundamental or otherwise, prior to the Constitution coming into force and therefore, there is no question of surrendering any right – The British Indian Government was a supreme Imperial power in the country, and the question of surrender is illusionary and does not arise in the present case – The coming into force of the Constitution and fundamental right after 1950, cannot alter the events that occurred during the decade of 1910-1920 which led to the establishment of the AMU. [Para 266]
8. There is no legal requirement for the AMU 'Court' to be manned by the people from the minority community ever since 1951 and therefore,

merely because de facto the persons from the minority community may have manned the posts in the institution, would not be relevant to adjudicate the question. [Para 266]

9. The assertion that 'neutral' institutions or non-minority institutions would in the natural course of things be 'majoritarian' or that Article 30 contemplates constitutionally protecting certain educational spaces from such 'majoritarianism-by-default' tendencies, is wholly erroneous – The purpose of Article 30 is not to create 'minority only' ghettos rather provide positive rights to the minorities to establish educational institutions of their choice and kind. [Para 266]
10. Article 30, as a feature of the Constitution, provides important rights which function within the larger penumbra of fundamental rights – There is substantial interplay, intermixing and balancing of rights inter se within the fundamental rights and Article 30 is not absolute and certainly do not exist in a *silo.* [Para 266]
11. The crux of Article 30(1) lies in its mandate to ensure parity between non-minority [or 'neutral'] institutions and minority institutions – Its fundamental aim is to prevent any form of discrimination or preferential treatment to non-minority communities, thereby advocating for equal treatment under the law for one and all – This provision underscores that no specific category or type of institution should be disadvantaged or unduly favoured over another within the legal framework. [Para 266]
12. To assume that the minorities of the country require some 'safe haven' for attaining education and knowledge is wholly incorrect – The minorities of the country have not just joined the mainstream but comprise an important facet of the mainstream itself. The institutions of national character of the country always serve the interests of the minorities and are diverse centers of learning. [Para 266]

B. Educational Institution – Minority educational institution – Status of AMU vis-à-vis minority rights – Whether the Constitution Bench decision in *Azeez Basha* was incorrect.

Held [per Dr D Y Chandrachud, CJI (for himself, Sanjiv Khanna, J.B. Pardiwala and Manoj Misra, JJ.)]: The view taken in *Azeez Basha* that an educational institution is not established by a minority if it derives its legal character through a statute, is overruled. [Para 161]

Held [per Surya Kant, J.]: The Constitution Bench in *Azeez Basha*, when it holds that since Section 6 of the AMU Act, 1920 stipulates that degrees conferred by AMU would be recognised by the Government, it could not have been 'brought into existence by a private individual or body', is seemingly incorrect – There is no conflict between the seven-judge bench opinion in Kerala Education Bill and the five-judge Constitution Bench in *Azeez Basha* on the other – The six-judge Constitution Bench in Sidhajbhai Sabhai, laying down that the right under Article 30 is absolute and unconditional, is not the correct principle of law; the judgment is no more binding in nature and stands effectively overruled in TMA Pai, to that extent – Consequently, *Azeez Basha* does not suffer from any legal infirmity on the premise that it did not cite or follow Sidhajbhai Sabhai. [Para 192(a), (b) and (f)]

Held [per Dipankar Dutta, J.]: Not only is *Azeez Basha* a judicial verdict more than half a century old on the status of AMU vis-à-vis minority rights, but it has a strong foundational basis and is anchored in robust legal reasoning – The view taken therein, in the given facts and circumstances, is indeed a plausible view which demands due deference rather than the view being overruled at this distance of time. [Para 14]

Held [per Satish Chandra Sharma, J.]: The notion that *Azeez Basha* categorically prohibits minorities from establishing universities due to statutory requirements is unfounded – The bench in *Azeez Basha* and present bench are faced with a unique situation and needs to adopt a suitably modulated approach – The judgment in *Azeez Basha* does not preclude minorities from establishing universities but rather highlights the importance of legislative intent and statutory provisions in determining an institution's character – The UGC Act or the judgment in Yashpal, in no manner, comes to the aid of the parties challenging the correctness of the judgment in *Azeez Basha* – The amendment in the NCMEI Act 2004 does not come to the aid of the parties questioning the correctness of the decision in *Azeez Basha*.

C. Judicial discipline – Preliminary objection to reference – Whether two-Judge Bench of Supreme Court in *Anjuman-e-Rahmaniya* could not have referred the correctness of the decision rendered by the Constitution Bench in *Azeez Basha* directly to a Bench of seven Judges.

Held [per Dr D Y Chandrachud, CJI (for himself, Sanjiv Khanna, J.B. Pardiwala and Manoj Misra, JJ.)]:

1. In *Central Board of Dawoodi Bohra Community*, a Constitution Bench discussed the legal precepts which apply to orders of reference and reiterated the position of law as below:-
   a. Decisions of this Court rendered by a Bench of larger strength are binding on Benches of a less or equal strength;
   b. If a Bench of lower strength is doubtful about the correctness of a judgment delivered by a Bench of larger strength, it cannot disagree or dissent from the view taken by the larger Bench – In case of doubt, it can invite the attention of the Chief Justice of India to its opinion and request the Chief Justice to list the matter before a Bench, the strength of which is greater than that which delivered the judgment which has been doubted;
   c. The correctness of the view taken by any Bench can only be doubted by a Bench of equal strength – The matter will then be placed for hearing before a Bench of greater strength;
   d. There are two exceptions to the rules: i. The discretion of the Chief Justice is not bound by the rules – As the master of the roster, the Chief Justice may list any case before any Bench of any strength; ii. Despite the rules, if a particular case has come up for hearing before a Bench of larger strength and that Bench is of the opinion that the judgment of the Bench of lower strength requires reconsideration or correction, or is otherwise doubtful of its correctness, it may dispense with the need for a reference in the terms described above or an order of the Chief Justice and hear the matter for reasons given by it. [Para 37]
2. The position of law laid down in *Central Board of Dawoodi Bohra Community* is correct – Decisions of a larger Bench are binding precedent, and judicial discipline and propriety dictate that Benches of lower strength must adhere to such decisions – This will also avoid inconsistencies in the development of law – Questions concerning the correctness of judgments must ordinarily be referred only by a Bench which is equal in strength to the Bench whose judgment is doubted – We also agree with the two exceptions to this rule, as detailed by this Court in *Central Board of Dawoodi Bohra Community* – They must remain exceptions and not transmogrify into the rule itself. [Para 38]
3. The three issues which required an authoritative pronouncement in Anjuman-e-Rahmaniya, were not directly a point of contention in *Azeez Basha* – However, the decision would have a bearing on them

– Doubting the correctness of the opinion in *Azeez Basha*, without disagreeing with it, the two-Judge Bench requested that the matter may be placed before the Chief Justice of India for being heard by a Bench of seven Judges – This falls within the permissible limits laid down in *Central Board of Dawoodi Bohra Community* – Further, the Solicitor General has also stated that he is not pressing the Union's preliminary objection – The order of reference dated 12 February 2019 (wherein a three-Judge Bench of this Court observed that the correctness of the question arising from the decision in *Azeez Basha* was unanswered, and then referred the matter to a seven-Judge Bench), too, noted that although a three-Judge Bench could not ordinarily refer a case directly to a seven-Judge Bench, it was doing so in this case because the question was already referred to a Bench of seven Judges but was not answered. [Para 39]

4. The reference in Anjuman-e-Rahmaniya of the correctness of the decision in *Azeez Basha* was valid – The reference was within the parameters laid down in *Central Board of Dawoodi Bohra Community*. [Para 160(a)]

Held [per Surya Kant, J.]:

1.1. The two-judge bench in Anjuman, after expressing doubt about the correctness of *Azeez Basha* and its principles, referred the matter for reconsideration to a larger bench – Additionally, the bench in Anjuman specifically stated that the larger bench reviewing *Azeez Basha* —a decision by a five-judge bench—should consist of seven judges – The decision further directed that the matter be placed before the Hon'ble Chief Justice for appropriate directions – Such a reference is not consistent with the established norms of judicial propriety. [Paras 90, 91]

1.2. The principles enunciated in Dawoodi Bohra re-enforce the provisions of the Supreme Court Rules referred to earlier, and also reiterate the well-established principles based upon doctrines of predictability, consistency, finality and the principle of stare decisis – The two-judge bench in Anjuman, ought to have understood and applied the law, consistent with these principles – The two-judge bench in Anjuman being of lesser strength than the five-judge bench in *Azeez Basha*, lacked the authority to explicitly question the correctness of *Azeez Basha* and refer the matter to a seven-judge bench. [Para 93]

1.3. In Anjuman, the bench not only referred the matter but also specified the numerical strength of the bench to which it should be referred, with a further direction that the matter be placed before the Chief Justice for the limited purpose of notifying the composition of the seven-judge bench – This effectively impaired the Chief Justice's authority as the master of the roster – Allowing such a practice would enable benches of lesser strength, such as a two-judge bench, to undermine the decisions of larger benches, potentially even an eleven-judge bench – This would also place the Chief Justice in an untenable position, who would be bound by a judicial order while acting in an administrative role, leading to procedural complications and embarrassment. [Para 94]

2. There is no substantial difference between 'doubting' or 'disagreeing' with a judgement – That being so, the reference by a two-judge bench in Anjuman doubting the correctness of the five-judge bench in *Azeez Basha* and referring it to a seven-judge bench suffers from multiple illegalities, including judicial impropriety. [Para 192(c)]

3. In view of the dictum of the Constitution Bench in Dawoodi Bohra, a two-judge bench has no authority whatsoever to doubt or disagree with a judgement of the larger bench, and directly refer the matter to a bench having a numerically greater strength than the matter so doubted – The reference by the two judge bench in Anjuman is nothing but a challenge to the authority of the Chief Justice of India being the master of the roster and in derogation of the special powers enjoyed upon under Article 145 of the Constitution read with Order VII Rule 2 of the Supreme Court Rules, 1966 (as was applicable) – Consequently, the said reference is not maintainable – However, the subsequent reference dated 12.02.2019, in which the then Hon'ble Chief Justice of India was the presiding judge, is maintainable. [Para 192(d)]

4. The reference in Anjuman to a seven-judge bench for the reconsideration of the five-judge decision in *Azeez Basha* is bad in law and ought to be set aside. [Para 192(e)]

Held [per Dipankar Dutta, J.]:

1.1. It has been considered uniformly to be an act of breach of judicial propriety and discipline if a bench of lesser strength [of 2 (two) Judges] casts doubt in respect of a decision rendered by a bench of greater strength [of 5 (five Judges] and a request is made to the Chief Justice

of India to constitute a still larger Bench [of 7 (seven Judges] – This concept was extensively ratiocinated in *Central Board of Dawoodi Bohra Community vs. State of Maharashtra*. [Para 24]

1.2. If "doubting the correctness of the opinion in *Azeez Basha*, without disagreeing with it" could permit the bench in *Anjuman-e-Rahmania* to request the Chief Justice of India to place the matter for being heard by a bench of 7 (seven) Judges and such a course of action were held to be permissible and within the limits of *Central Board of Dawoodi Bohra Community*, as proposed in the majority opinion - I am afraid, tomorrow, a bench of 2 (two) Judges, referring to opinions of jurists [as in *Anjuman-e-Rahmania*] could well doubt the 'basic structure' doctrine and request the Chief Justice of India to constitute a bench of 15 (fifteen) Judges – The reasoning in the majority opinion, with due respect, appears to be based on an incomplete reading of paragraph 12(2) of *Central Board of Dawoodi Bohra Community* – Though the second sentence of the said paragraph is a bit ambiguous, but the same - read harmoniously with the other sentences - would lead to the inevitable conclusion that even in case of a doubt being expressed by a bench of 2 (two) Judges in respect of the ratio laid down by a bench of 5 (five) Judges, the case on a reference being made (with sufficient reasons) ought to be first placed before a bench of 3 (three) Judges, and not to a bench of either 5 (five) or 7 (seven) Judges – If, indeed, the proposed view in the majority opinion were accepted, all the precedents referred to above would stand overruled and a legal principle, which hitherto no bench of this Court did, would be laid down and, in the process, the floodgates for unmeritorious references opened – That would be an incorrect and improper approach – Hence, the order of reference in *Anjuman-e-Rahmania* must be regarded as completely flawed and non-est. [Para 28]

2. The essence of the law laid down in State of Kerala vs. Very Rev. Mother Provincial, which is a decision of the Constitution Bench of 6 (six) Judges of this Court rendered more than half a century back, and has never been doubted by any subsequent bench, is that the minority institution should have been established for the benefit of a minority community by a member of that community – Attention of the bench of 2 (two) Judges in *Anjuman-e-Rahmania* was not invited to this and one is left to wonder whether the reference would have at all been made if *Very Rev. Mother Provincial* was cited – There being no reference

in *Anjuman-e-Rahmania* of Very Rev. Mother Provincial, a binding decision, certainly the said decision of the Constitution Bench had not been placed before the bench of 2 (two) Judges by the set of counsel appearing before it who agreed with the bench on the question of (in) correctness of *Azeez Basha* – Also, there cannot be any comparison of chalk and cheese – The case dealt with by *Azeez Basha* and the one arising for decision in *Anjuman-e-Rahmania* were fundamentally different and in stark contrast with each other – Therefore, even on merits, there was no good reason to make a reference for being placed before a bench of 7 (seven) Judges which *Anjuman-e-Rahmania* ordered. [Para 42]

Held [per Satish Chandra Sharma, J.]: The bench of two judges in Anjuman-e-Rehmania & Ors v. Distt. Inspector of School & Ors. could not have referred the matter to a bench of seven Hon'ble Judges directly, without the Hon'ble Chief Justice of India, being a part of the bench. [Para 266]

Case Law Cited

In the judgment of Dr. D.Y. Chandrachud, CJI:

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Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhye **[2010] 4 SCR 15 : (2010) 4 SCC 378 – distinguished.**

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Catholic College v. T. Jose **[2006] Supp. 9 SCR 644 : (2007) 1 SCC 386;** *Satimbla Sharma v. St Paul's Senior Secondary School* **[2011] 10 SCR 203 : (2011) 13 SCC 760;** *Durgah Committee, Ajmer v. Syed Hussain Ali* **[1962] 1 SCR 383;** *P.S. Sathappan v. Andhra Bank Ltd. & Ors.* **[2004] Supp. 5 SCR 188 : (2004) 11 SCC 672;** *Executive Committee of Vaish Degree College v. Lakshmi Narain* **[1976] 2 SCR 1006 : (1976) 2 SCC 58;** *S.S. Dhanoa v. MCD* **[1981] 3 SCR 864 : (1981) 3 SCC 431;** *CIT v. Canara Bank* **[2018] 7 SCR 866 : (2018) 9 SCC 322;** *Sri Jagadguru Kari Basava Rajendraswami of Govimutt v. Commr. of Hindu Religious and Charitable Endowments* **[1964] 8 SCR 252 : [1964] 8 SCR 252;** *Rabindranath Bose v. Union of India* **(1970) 1 SCC 84;** *Guru Datta Sharma v. State of Bihar* **[1962] 2 SCR 292];** *KS Puttaswamy (Privacy-9 J.) v. Union of India* **[2018] 8 SCR 1 : (2017) 10 SCC 1;** *Keshavan Madhava Menon v. State of Bombay* **[1951] 1 SCR 228 : [1951] SCR 228** *and Pannalal Binjraj v. Union of India* **[1957] 1 SCR 233 – referred to.**

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[2024] 11 S.C.R. 1 : 2024 INSC 835

Property Owners Association & Ors.
v.
State of Maharashtra & Ors.

(Civil Appeal No. 1012 of 2002)

05 November 2024

[Dr Dhananjaya Y Chandrachud,* CJI, Hrishikesh Roy, B.V. Nagarathna,* Sudhanshu Dhulia,* J.B. Pardiwala, Manoj Misra, Rajesh Bindal, Satish Chandra Sharma and Augustine George Masih, JJ.]

Issue for Consideration

(1) Whether Article 31C (as upheld in *Kesavananda Bharati* case) survives in the Constitution after amendment to the provision by the forty-second amendment was struck down by the Supreme Court in *Minerva Mills* case; and

(2) Whether the interpretation of Article 39(b) adopted by Justice Krishna Iyer in *Ranganatha Reddy* case and followed in *Sanjeev Coke* case must be reconsidered; and whether the phrase 'material resources of the community' in Article 39(b) can be interpreted to include resources that are owned privately and not by the State.

Headnotes

A. Constitution of India – Art.31C – Art.31C (as upheld in *Kesavananda Bharati* case), if survives in the Constitution after amendment to the provision by the forty-second amendment was struck down by the Supreme Court in *Minerva Mills* case – Held: Article 31C to the extent that it was upheld in *Kesavananda Bharati* case remains in force.

Held [per Dr Dhananjaya Y Chandrachud, CJI (for himself and for Hrishikesh Roy, J. B. Pardiwala, Manoj Misra, Rajesh Bindal, Satish Chandra Sharma, and Augustine George Masih, JJ.)]:

1. Article 31C to the extent that it was upheld in Kesavananda Bharati v Union of India remains in force. [Para 229(a)]

2.1. By Section 4 of the Forty-Second Amendment, the words "the principles specified in clause (b) or clause (c) of Article 39" in Article 31-C were replaced with the words "all or any of the principles laid down in Part IV." This is a case of substitution. Section 4 of the Forty-Second Amendment was subsequently struck down in Minerva Mills. Where an amendment substituting certain text with certain alternate text is invalidated, the effect is that the unamended text continues in force. This is because the legislative intent of repeal and enactment in such cases is composite and cannot be separated. To give effect to the repeal and not the enactment would result in an outcome which does not correlate with legislative intent, and, as Justice Hidayatullah noted in Laxmibai "leave the original section truncated" resulting in absurd outcomes. This would in effect invalidate the original, valid and constitutional provision despite there being no constitutional fault with it nor the legislature intending to repeal it. Thus, the presumption would be that after Minerva Mills, the unamended Article 31-C would continue in force. Indeed, it is evident that cases such as Bhim Singh and Sanjeev Coke proceeded on this presumption. [Para 69]

2.2. The only plausible exception to this presumption would be if it could be demonstrated that Parliament, when enacting the Forty-Second Amendment would have repealed the words "the principles specified in clause (b) or clause (c) of Article 39" independent of their enactment of the words "all or any of the principles laid down in Part IV." In this case, no reference to the broader legislative proceedings or external aids is necessary to arrive at the inference that Parliament would not have independently repealed these words. The text of the amendment adopted by Parliament itself makes it abundantly clear that there was no independent intention to repeal. The effect of Section 4 of the Forty-Second Amendment was to expand the scope of the immunity provided by Article 31-C to legislation. Under the unamended Article 31-C, immunity was only provided to legislation if it gave effect to the Directive Principles found in clause (b) or clause (c) of Article 39. However, by Section 4 of the Forty-Second Amendment, the scope of this immunity was significantly expanded to immunise

legislations that gave effect to any or all of the Directive Principles in Part IV of the Constitution. Thus, the intention of Parliament in enacting Section 4 of the constitutional amendment was undoubtedly to expand the scope of the immunity granted by Article 31-C. This being the situation, it cannot be suggested that Parliament would have repealed the words "the principles specified in clause (b) or clause (c) of article 39" if it did not simultaneously enact the broader language expanding the scope of Article 31-C. If Parliament had independently repealed these words, it would have not just reduced the scope of Article 31-C but altogether eliminated the effect of the Article. Without the words "the principles specified in clause (b) or clause (c) of article 39" in Article 31- C, the provision would have been rendered nugatory. Given Parliament's manifest intention to expand the scope of Article 31-C by Section 4 of the Forty-Second Amendment, it is not plausible to hold that Parliament independently sought to repeal the words "the principles specified in clause (b) or clause (c) of article 39" from Article 31-C. Therefore, it is evident that the legislative intent of Parliament when adopting Section 4 of the Forty-Second Amendment was composite, to repeal and enact (i.e., to substitute) through one single action. This Court cannot therefore disaggregate the steps of repeal and enactment and give effect to the repeal even after invalidating the enactment. After Minerva Mills invalidated Section 4 of the Forty-Second Amendment, the composite legal effect of Section 4 is nullified and the unamended text of Article 31-C stands revived. [Para 70]

2.3. The text of the unamended Article 31-C was challenged, and the first part of the Article was upheld by thirteen-judge decision in Kesavananda Bharati while the latter half of the Article was invalidated. Therefore, the first half of unamended Article 31-C, which is the subject matter of the present controversy, was undoubtedly constitutional as held by the thirteen-judge decision in Kesavananda Bharati and further by the Constitution Bench in Waman Rao. Therefore, if as a consequence of the decision in Minerva Mills, the unamended Article 31-C continues in force, there can be no question of any unconstitutionality or adverse consequences associated with the unamended Article 31-C. Indeed,

both the Constitution Benches in Minerva Mills and Waman Rao expressly noted that the first half of Article 31-C had been held to be constitutional in Kesavananda Bharati. Further, given that the unamended Article 31-C has been given effect for over four decades as demonstrated by the decisions in Bhim Singh and Sanjeev Coke, no argument can be raised concerning any legal or practical difficulties with the operation of the unamended Article 31-C. Given these findings, the unamended Article 31-C continues in force. [Para 71]

2.4. An amendment can be invalidated when it modifies, obliterates, or adds some feature to the Constitution that is anathema to the principles that emerge upon a structural reading of the constitutional text. If an amendment is invalidated because it causes a drastic deviation from the principles that govern our constitutional democracy, the consequences must be a return to those principles. Article 31-C represented a delicate balance between the goals of Part IV and the rights of Part III of the Constitution. This balance was held to not impermissibly deviate from the core principles that govern our Constitution by the thirteen judges' decision of this Court in Kesavananda Bharati. However, in Minerva Mills, Section 4 of the Forty-Second Amendment was held to violate these core principles that form the basic structure. The logical result of such a ruling is that the constitutional text must return to within the fold of the basic structure. To give effect to the repealing portions of Section 4 of the Forty-Second Amendment while also invalidating the enactment would not result in a return to a constitutional text that is in conformity with the basic structure. Rather, it would result in a novel third outcome, the constitutionality of which would be uncertain, untested, and may itself violate the basic structure. Therefore, the consequence of invalidating Section 4 of the Forty-Second Amendment must be that the unamended Article 31-C is revived. [Para 72]

Held (per B.V. Nagarathna, J.) (Concurring): *I am in complete accord with the reasoning that, in the absence of any indication that Parliament intended a "repeal without substitution," the original text of Article 31C as it existed before the Constitution (Forty Second) Amendment Act, 1976 must be reinstated*

following the invalidation of the said amendment. In Minerva Mills case, when the amendment was struck down for deviating from constitutional principles, the logical consequence that must follow the declaration of invalidity of the amendment is to revert to those original principles which the amendment deviated from. This is by giving effect to Article 31C, to the extent it was upheld in Kesavananda Bharati case. This represents a return to the Constitution's original text, aligning with the basic structure of the Constitution. Consequently, invalidating Section 4 of the Forty-Second Amendment should automatically result in the restoration of the unamended Article 31C. I agree that Article 31C to the extent that it was upheld in Kesavananda Bharati remains in force. [Paras 3 and 23(a)]

Held (per Sudhanshu Dhulia, J.) (Concurring): *The unamended Article 31-C to the extent held valid in* ***Kesavananda Bharati*** *survives. [Para 2]*

B 1. Constitution of India – Art.39(b) – Whether the phrase 'material resources of the community' used in Art.39(b) includes privately owned resources – Held [per Dr Dhananjaya Y Chandrachud, CJI (for himself and for Hrishikesh Roy, J. B. Pardiwala, Manoj Misra, Rajesh Bindal, Satish Chandra Sharma, and Augustine George Masih, JJ.)] (Majority opinion) – Theoretically, the answer is yes, the phrase *may* include privately owned resources – However, one cannot subscribe to the expansive view adopted in the minority judgement authored by Justice Krishna Iyer in *Ranganatha Reddy* case and subsequently relied upon in *Sanjeev Coke* case – Not every resource owned by an individual can be considered a 'material resource of the community' merely because it meets the qualifier of 'material needs' – The inquiry about whether the resource in question falls within the ambit of Art. 39(b) must be context-specific and subject to a non-exhaustive list of factors such as the nature of the resource and its characteristics; the impact of the resource on the well-being of the community; the scarcity of the resource; and the consequences of such a resource being concentrated in the hands of private players – Public Trust Doctrine evolved by Supreme Court may also help identify resources which fall within

the ambit of the phrase "material resource of the community" – Held (per B.V. Nagarathna, J.) – Yes, privately owned resources except "personal effects" can come within the scope and ambit of the phrase "material resources of the community" provided such resources get transformed as "resources of the community" – Held (per Sudhanshu Dhulia, J.) (Dissenting) – The view of the learned Chief Justice in this case (i.e. the majority opinon) ultimately holds that not all privately owned resources are "material resources of the community" – Not only this it further limits the hands of the legislature to a non-exhaustive list of factors to determine which resources can be considered as "material resources" – There is no need for this pre-emptive determination – The definition of "material resources of the community" was purposely kept in generalized and broad-based terms – Privately owned resources are part of "material resources of the community" – Provisions in Article 39(b) & (c) have to be read in light of Art.38 of the Constitution – Once one does that, one cannot but give an expansive meaning to the phrase "material resources of the community".

B 2. Constitution of India – Art.39(b) – Interpretation of – Whether interpretation of Article 39(b) adopted by Justice Krishna Iyer in *Ranganatha Reddy* case and followed in *Sanjeev Coke* case must be reconsidered – Held [per Dr Dhananjaya Y Chandrachud, CJI (for himself and for Hrishikesh Roy, J. B. Pardiwala, Manoj Misra, Rajesh Bindal, Satish Chandra Sharma, and Augustine George Masih, JJ.)] (Majority opinion) – The majority judgment in Ranganatha Reddy expressly distanced itself from the observations made by Justice Krishna Iyer (speaking on behalf of the minority of judges) on the interpretation of Art.39(b) – Thus, a coequal bench of this Court in Sanjeev Coke erred by relying on the minority opinion – Held (per B.V. Nagarathna, J.) (Dissenting) – On merits it cannot be held that Sanjeev Coke violated judicial discipline – One cannot lose sight of the fact that in Sanjeev Coke this Court did not decide the case only on the basis of the opinion of Krishna Iyer, J. in Ranganatha Reddy – Therefore, Sanjeev Coke is good law insofar as on the merits of the matter is concerned – Held (per Sudhanshu Dhulia, J.) (Dissenting) – In *Sanjeev Coke*, when the Five Judge Constitution Bench unanimously followed the

minority judgement in *Ranganatha Reddy*, it did not violate judicial discipline of not following the majority, since in *Sanjeev Coke*, the Five Judges did not go against the law laid down by the majority Judges in *Ranganatha Reddy* but only adopted the logic of the Three Judges on which the majority of Four Judges were silent – The five learned judges in *Sanjeev Coke* relied upon the decision of the minority judges in *Ranganath Reddy* as they were persuaded by the logic and the interpretation given by Justice Krishna Iyer to the phrase *"material resources of the community"* – The broad and inclusive meaning given to the expression "material resources of the community" by Justice Krishna Iyer and Justice O. Chinnappa Reddy in *Ranganatha Reddy* and *Sanjeev Coke* respectively has lost none of its relevance, or jurisprudential value, nor has it lost the audience which appreciates these values.

B 3. Constitution of India – Art.39(b) – Phrase 'material resources of the community' in Article 39(b) – Meaning of – Single-sentence observation in *Mafatlal* case to the effect that 'material resources of the community' include privately owned resources – Effect of – Held [per Dr Dhananjaya Y Chandrachud, CJI (for himself and for Hrishikesh Roy, J. B. Pardiwala, Manoj Misra, Rajesh Bindal, Satish Chandra Sharma, and Augustine George Masih, JJ.)] (Majority opinion) – The single-sentence observation in *Mafatlal* case to the effect that 'material resources of the community' include privately owned resources is not part of the *ratio decidendi* of the judgement – Thus, it is not binding on the Court – Held (per Sudhanshu Dhulia, J.) (Concurring) – The majority opinion in Mafatlal constitutes obiter dicta and is not binding on this Court – Held (per B.V. Nagarathna, J.) – The single-sentence observation in Mafatlal to the effect that "material resources of the community" include privately owned resources may be obiter but has great persuasive value.

B 4. Words and Phrases – Term 'distribution' – Meaning and connotation of – Distribution by the State – Whether acquisition of private resources falls within the ambit of the term 'distribution – Held [per Dr Dhananjaya Y Chandrachud, CJI (for himself and for

Hrishikesh Roy, J. B. Pardiwala, Manoj Misra, Rajesh Bindal, Satish Chandra Sharma, and Augustine George Masih, JJ.)] – The term 'distribution' has a wide connotation – The various forms of distribution which can be adopted by the State cannot be exhaustively detailed – However, it may include the vesting of the concerned resources in the State or nationalisation – In the specific case, the Court must determine whether the distribution 'subserves the common good' – Held (per B.V. Nagarathna, J.): The term "distribution" has no doubt a wide connotation but vesting in the State of a particular privately owned "material resource" or nationalisation of the same are only conditions precedent to distribution which have to comply with Article 300A of the Constitution – Further, a resource which has vested in the State or a resource retained by a State on nationalisation could be utilised by the State to subserve the common good as a material resource of the community – The public trust doctrine would apply to such material resources – Alternatively, the State could decide to actually distribute the "material resources of the community" to eligible and deserving persons by way of assignment, lease, allotment, grant, etc. – The same would also come within the scope and ambit of the expression "distribution" – Held (per Sudhanshu Dhulia, J.): It is for the legislature to decide how the ownership and control of material resources is to be distributed in order to subserve common good – How to control and distribute a material resource is also the task of the Legislature, but while doing so what has to be seen is that the control and ownership of the material resource be so distributed that it subserves common good of the community – If it does not, then such a legislation can be struck down as the Judiciary is not deprived of its powers of judicial review.

Held [per Dr Dhananjaya Y Chandrachud, CJI (for himself and for Hrishikesh Roy, J. B. Pardiwala, Manoj Misra, Rajesh Bindal, Satish Chandra Sharma, and Augustine George Masih, JJ.)] (Majority Opinion):

1. *Article 39(b) is not a source of legislative power. The inclusion or exclusion of 'privately-owned resources' from the ambit of the provision does not impact the power of the legislature to enact*

laws to acquire such resources. The power to acquire private resources, in certain situations, continues to be traceable to other provisions in the Constitution, including the sovereign power of eminent domain. [Para 203]

2. *The interpretation of Article 39(b), i.e. that all private property is covered within the ambit of Article 39(b) is inconsistent with the text of Article 39(b). [Para 204]*

3. *There is a distinction between holding that private property may form part of the phrase 'material resources of the community' and holding that all private property falls within the net of the phrase. It is here that the judgment by Justice Krishna Iyer in Ranganatha Reddy, and the consequent observations in Sanjeev Coke fall into error. Justice Krishna Iyer cast the net wide, holding that all resources which meet "material needs" are covered by the phrase and any attempts by the government to nationalise these resources would be within the scope of Article 39(b). He clarified that not only the "means of production" but also the goods so produced fall within the net of the provision. The illustration which he provides in Ranganatha Reddy indicates the unworkable nature of such an interpretation. Justice Krishna Iyer observed, by way of an illustration, that not only do factories which produce cars fall within the net of Article 39(b), but even privately owned cars are covered by the provision. Similarly, even in Sanjeev Coke, the net is cast wide and this Court observed that "all things capable of producing wealth of the community" fall within the ambit of the phrase. In both decisions, it was observed that all resources of the individual are consequentially the resources of the community. [Para 209]*

4. *An interpretation of Article 39(b) which places all private property within the net of the phrase "material resources of the community" only satisfies one of the three requirements of the phrase, i.e. that the goods in question must be a 'resource'. However, it ignores the qualifiers that they must be "material" and "of the community". The use of the words "material" and "community" are not meaningless superfluities. One cannot adopt a construction of the provision which renders these terms otiose. The words "of the community" must be understood as distinct*

from the "individual". If Article 39(b) was meant to include all resources owned by an individual, it would state the "ownership and control of resources is so distributed as best to subserve the common good". Similarly, if the provision were to exclude privately owned resources, it would state "ownership and control of resources of the state ..." instead of its current phrasing. The use of the word "of the community" rather than "of the state" indicates a specific intention to include some privately owned resources. [Para 211]

5. *In essence, the text of the provision indicates that not all privately owned resources fall within the ambit of the phrase. However, privately owned resources are not excluded as a class and some private resources may be covered. The resource in question must meet the two qualifiers, i.e. it must be a "material" resource and it must be "of the community". [Para 212]*

6. *To declare that Article 39(b) includes the distribution of all private resources amounts to endorsing a particular economic ideology and structure for our economy. Justice Krishna Iyer's judgment in Ranganatha Reddy, which was followed inter alia in Sanjeev Coke and Bhim Singhji, was influenced by a particular school of economic thought. In essence, the interpretation of Article 39(b) adopted in these judgements is rooted in a particular economic ideology and the belief that an economic structure which prioritises the acquisition of private property by the state is beneficial for the nation. [Para 213]*

7. *The Constitution was framed in broad terms to allow succeeding governments to experiment with and adopt a structure for economic governance which would subserve the policies for which it owes accountability to the electorate. The role of this Court is not to lay down economic policy, but to facilitate this intent of the framers to lay down the foundation for an 'economic democracy'. The doctrinal error in the Krishna Iyer approach was, postulating a rigid economic theory, which advocates for greater state control over private resources, as the exclusive basis for constitutional governance. The foresighted vision of our framers to establish an 'economic democracy' and trust the wisdom of the elected government, has been the backbone of the highgrowth rate of*

India's economy, making it one of the fastest-growing economies in the world. To scuttle this constitutional vision by imposing a single economic theory, which views the acquisition of private property by the state as the ultimate goal, would undermine the very fabric and principles of our constitutional framework. [Paras 214, 215 and 216]

8. *The right to property was included in the Constitution as a fundamental right under Articles 19(1)(f) and Article 31. Subsequently, the right to property was deleted from Part III of the Constitution by the Constitution (Forty-fourth Amendment) Act, 1978. However, a modified version was inserted and the right to property continues to be constitutionally protected under Article 300A. Although no longer in the nature of a fundamental right, the provision has been characterised as a constitutional and human right. The interpretation of Article 39(b), both as a pre-cursor to the protection of Article 31C and as an aspirational Directive Principle, cannot run counter to the constitutional recognition of private property. To hold that all private property is covered by the phrase "material resources of the community" and that the ultimate aim is state control of private resources would be incompatible with the constitutional protection. [Paras 217, 220]*

9. *A construction of Article 39(b) which provides that all private property is included within the ambit of Article 39(b) is incorrect. However, there is no bar on the inclusion of private property as a class and if a privately owned resource meets the qualifiers of being a 'material resource' and 'of the community', it may fall within the net of the provision. "Material resources of the community" refers to either natural resources (which are those of the nation) or those resources which in a large sense can be said to be of community, even though they may be in private hands. [Para 221]*

10. *There are various forms of resources, which may be privately owned, and inherently have a bearing on ecology and/or the well-being of the community. Such resources fall within the net of Article 39(b). To illustrate, non-exhaustively, there may exist private ownership of forests, ponds, fragile areas, wetlands and resource-bearing lands. Similarly, resources like spectrum,*

airwaves, natural gas, mines and minerals, which are scarce and finite, may sometimes be within private control. However, as the community has a vital interest in the retention of the character of these resources, they fall within the ambit of the expression "material resources of the community". [Para 223]

11. *The majority judgment in Ranganatha Reddy expressly distanced itself from the observations made by Justice Krishna Iyer (speaking on behalf of the minority of judges) on the interpretation of Article 39(b). Thus, a coequal bench of this Court in Sanjeev Coke erred by relying on the minority opinion. [Para 229(b)]*

12. *The single-sentence observation in Mafatlal to the effect that 'material resources of the community' include privately owned resources is not part of the ratio decidendi of the judgement. Thus, it is not binding on this Court. [Para 229(c)]*

13. *On the limited question of whether the acquisition of private resources falls within the ambit of the term 'distribution', to hold that the term "distribution" cannot encompass the vesting of a private resource would amount to falling into the same error as the Justice Krishna Iyer doctrine, i.e. to lay down a preference of economic and social policy. The term 'distribution' has a wide connotation. The various forms of distribution which can be adopted by the state cannot be exhaustively detailed. However, it may include the vesting of the concerned resources in the state or nationalisation. In the specific case, the Court must determine whether the distribution 'subserves the common good'. [Paras 227, 228 and 229(f)]*

14. *The direct question referred to this bench is whether the phrase 'material resources of the community' used in Article 39(b) includes privately owned resources. Theoretically, the answer is yes, the phrase may include privately owned resources. However, this Court is unable to subscribe to the expansive view adopted in the minority judgement authored by Justice Krishna Iyer in Ranganatha Reddy and subsequently relied on by this Court in Sanjeev Coke. Not every resource owned by an individual can be considered a 'material resource of the community' merely because it meets the qualifier of 'material needs'. [Para 229(d)]*

15. The inquiry about whether the resource in question falls within the ambit of Article 39(b) must be context-specific and subject to a non-exhaustive list of factors such as the nature of the resource and its characteristics; the impact of the resource on the well-being of the community; the scarcity of the resource; and the consequences of such a resource being concentrated in the hands of private players. The Public Trust Doctrine evolved by this Court may also help identify resources which fall within the ambit of the phrase "material resource of the community". [Para 229(e)]

Held (per B.V. Nagarathna, J.):

1. Articles 37, 38 and 39 of the Constitution of India which are part of the Directive Principles of State Policy have to be interpreted by bearing in mind the changing economic policies of the State and not in a rigid watertight compartment. The flexibility of interpretation is having regard to the dynamic changes in the Indian socio-economic policies meant for the welfare and progress of the people of India. An interpretation of the aforesaid Articles or for that matter any other provision of the Constitution must be viewed in the historical backdrop of the period in which the interpretation was made by this Court during the course of adjudication. Any interpretation which was found to be sound and in consonance with the socio-economic policy of the State during a particular period of time, cannot be critiqued at a later point of time in any quarter including by a court of law merely because the socio- economic policies of the State have changed over a period of time or there is a paradigm shift in the thinking and policies of the State. [Para 22(I)]

2. Articles 37 and 38 of the Constitution have to be borne in mind by the Courts while considering the validity of any policy or statute which intend to further any of the Directive Principles of State Policy. [Para 22(II)]

3. Article 39(b) has to be read in the context of Article 39(c). Articles 39(b) and (c) supplement and complement each other and cannot be construed in silos. Article 39(b) comprises of following five components, namely, (i) ownership and control; (ii) material resources; (iii) of the community; (iv) so distributed; and (v) as best to subserve the common good.

(i) The expression "ownership and control" must be given its widest connotation in the context of "distribution of" "material resources of the community" "as best to subserve the common good".

(ii) "Material resources" can in the first instance be divided into two basic categories, namely, (i) State owned resources which belong to the State which are essentially material resources of the community, held in public trust by the State; and (ii) privately owned resources. However, the expression "material resources" does not include "personal effects" or "personal belonging" of individuals, such as, clothing or apparel, household articles, personal jewellery and other articles of daily use belonging to the individuals of a household and which are intimate and personal in nature and use. Excluding "personal effects", all other privately owned resources can be construed as "material resources". Thus, all resources whether they are public resources or privately owned resources which come within the scope and ambit of the expression "material resources" as stated above are included within that expression.

(iii) "Material resources" which are privately owned could be transformed as "material resources of the community", inter alia, in the following five ways: a. by nationalisation, which could be either by way of an enactment made by the Parliament or a State legislature or in any other manner in accordance with law; b. by acquisition, which could be by way of a special enactment made by the Parliament or a State legislature having regard to Entry 42 – List III of the Seventh Schedule of the Constitution. Alternatively, the acquisition could be made under the extant Parliamentary or State laws dealing with acquisition; c. by operation of law, such as vesting of private resources in the State, which could be by virtue of statutes dealing with land reforms, land tenures, abolition of inams, village offices or any other law where by operation of law there would be vesting of private material resources in the State or in any other manner

in accordance with law; d. by purchase of the material resource from private persons by the State, its agencies and instrumentalities in the manner known to law; and e. by the private owner of the material resource converting his "material resources" as a "material resource of the community" by donation, gift, creation of an endowment or a public trust or in any other manner known to law.

(iv) In (a) to (d) above, the provision of Article 300A which is a constitutional right to property has to be complied with.

(v) The "material resources of the community" have to be "distributed as best to subserve the common good". Distribution could be in two ways: Firstly, by the State itself retaining the material resource for a public purpose and/or for public use; and Secondly, privately owned material resources when converted as "material resources of the community" can be distributed to eligible and deserving persons either by way of auction, grant, assignment, allocation, lease, sale or any other mode of transfer known to law either temporarily or permanently depending upon the mode adopted and unconditionally or with conditions depending upon:(a) nature of the resource and its inherent characteristics; (b) the impact of the resource on the well-being of the community; (c) the scarcity of the resource; (d) the consequences of such a resource being concentrated in the hands of the private owners; and (e) any such factors.

(vi) The expression "common good" would, inter alia, mean that the distribution of the "ownership and control of material resources of the community" would not lead to concentration of the wealth and means of production in the hands of few which is a Directive Principle in clause (c) of Article 39. Thus, "distribution of material resources of the community" cannot violate the Directive Principle in clause (c) of Article 39 of the Constitution. [Para 22(III)]

4. The majority judgment of this Court in Ranganatha Reddy and the judgment in Abu Kavur Bai relate to nationalisation of contract carriages/State carriages which were upheld by this Court.

Nationalisation of coking coal mines was upheld by this Court in Sanjeev Coke. In Bhim Singhji and Basantibai, certain provisions of the Urban Land Ceiling Act and the provisions of MHADA respectively were upheld on the touchstone of Article 39(b) of the Constitution. The nine-Judge Bench in Mafatlal referred to the judgments of this Court in Ranganatha Reddy, Abu Kavur Bai etc. in the context of the submission made before, i.e., the Indian Constitution envisages Justice – social, economic and political, to all citizens of India as enshrined in the preamble. This was by way of an obiter but having persuasive value. [Para 22(IV)]

5. *The majority judgment in Ranganatha Reddy, no doubt, did not concur with the views of Krishna Iyer, J. expressed in his separate opinion. However, in Sanjeev Coke the Constitution Bench of five-Judges independently upheld what was challenged in the said case, namely, the Coking Coal Mines (Nationalisation) Act, 1972 and while doing so in paragraphs 19 and 20 referred to the observations of Krishna Iyer, J. in Ranganatha Reddy and made certain observations on the majority judgment in Minerva Mills. However, A.N. Sen, J. did not express any opinion on the judgment of this Court in Minerva Mills. What is significant is that the judgments in Ranganatha Reddy as well as in Sanjeev Coke upheld the respective Nationalisation Acts. Therefore, on merits it cannot be held that Sanjeev Coke violated judicial discipline. One cannot lose sight of the fact that in Sanjeev Coke this Court did not decide the case only on the basis of the opinion of Krishna Iyer, J. in Ranganatha Reddy but on merits on the validity of the Nationalisation Act. Therefore, Sanjeev Coke is good law insofar as on the merits of the matter is concerned. [Para 23(b)]*

6. *The single-sentence observation in Mafatlal to the effect that "material resources of the community" include privately owned resources may be obiter but has great persuasive value. [Para 23(c)]*

7. *Yes, privately owned resources except "personal effects" as explained above can come within the scope and ambit of the phrase "material resources of the community" provided such resources get transformed as "resources of the community" as discussed by me above. [Para 23(d)]*

8. I agree that the inquiry about whether the resource in question falls within the ambit of Article 39(b) must be context-specific and subject to a non-exhaustive list of factors such as the nature of the resource and its characteristics; the impact of the resource on the well-being of the community; the scarcity of the resource; and the consequences of such a resource being concentrated in the hands of private players. The Public Trust Doctrine evolved by this Court may also help identify resources which fall within the ambit of the phrase "material resource of the community". In addition, I also reiterate my discussion and conclusion on how privately owned material resource can be transformed as "material resource of the community". [Para 23(e)]

9. The term "distribution" has no doubt a wide connotation but vesting in the State of a particular privately owned "material resource" or nationalisation of the same are only conditions precedent to distribution which have to comply with Article 300A of the Constitution. Further, a resource which has vested in the State or a resource retained by a State on nationalisation could be utilised by the State to subserve the common good as a material resource of the community. The public trust doctrine would apply to such material resources. Alternatively, the State could decide to actually distribute the "material resources of the community" to eligible and deserving persons by way of assignment, lease, allotment, grant, etc. The same would also come within the scope and ambit of the expression "distribution". [Para 23(f)]

10. The judgments of this Court in Ranganatha Reddy, Sanjeev Coke, Abu Kavur Bai and Basantibai correctly decided the issues that fell for consideration and do not call for any interference on the merits of the matters. The observations of the Judges in those decisions would not call for any critique in the present times. Neither is it justified nor warranted. [Para 24]

Held (per Sudhanshu Dhulia, J.):

1. The question as to whether privately owned resources are part of "material resources of the community" as used in Article 39(b), has been answered by the learned Chief Justice as "yes", "the phrase may include privately owned resources", but not in the

expansive manner as held by the three learned judges in ***State of Karnataka*** *v.* ***Ranganatha Reddy*** *and later in* ***Sanjeev Coke Mfg. Co.*** *v.* ***Bharat Coking Coal Ltd.*** *The judgment further sets limits on what could be "material resources of the community". I am unable to accept the above proposition as this view ultimately holds that not all privately owned resources are "material resources of the community". Not only this it further limits the hands of the legislature to a non-exhaustive list of factors to determine which resources can be considered as "material resources". In my opinion there is no need for this pre-emptive determination. The definition of "material resources of the community" was purposely kept in generalized and broad-based terms. I entirely endorse the view taken by the Three learned Judges in* ***Ranganatha Reddy*** *and by the Five learned Judges in* ***Sanjeev Coke****, as to the scope and ambit of "material resources of the community". Privately owned resources are a part of the "material resources of the community". [Para 3]*

2. *"We may have democracy, or we may have wealth concentrated in the hands of a few, but we cannot have both." This expression is attributed to Justice Louis D. Brandeis, an eminent Jurist and a former Judge of US Supreme Court. Without doubt, when Articles 38 and 39 of the Constitution of India were being incorporated in Part IV of our Constitution, a similar thought dominated the minds of the framers of our Constitution. It is for this reason that Granville Austin calls the Indian Constitution, "first and foremost a social document". Our Constitution is not merely a roadmap for governance, it is also a vision for a just and equitable society. [Para 5]*

3. *In Mafatlal, the question before this Court primarily was of unjust enrichment. The observations of Justice Jeevan Reddy are only incidental and were not related to the core issue. I agree with the learned Chief Justice on this point and I adopt the detailed reasoning given by him in holding that the majority opinion in Mafatlal constitutes obiter dicta and is not binding on this Court. [Para 24]*

4. *The question is that when in* ***Sanjeev Coke****, the Five Judge Constitution Bench unanimously followed the minority judgement*

*in **Ranganatha Reddy** did it violate judicial discipline of not following the majority but the minority decision. In my opinion, it did not break any judicial discipline, since in **Sanjeev Coke,** the Five Judges did not go against the law laid down by the majority Judges in **Ranganatha Reddy** but only adopted the logic of the Three Judges on which the majority of Four Judges were silent. [Para 30]*

5. *It is difficult to even come to the conclusion that the Four Judges in **Ranganatha Reddy** entirely disagreed with the minority opinion of Justice Krishna Iyer. It merely says "we must not be understood to agree with all that he has said in his judgment in this regard." This is not exactly a disagreement. The majority of the Four Judges chose to remain silent on the subject. It cannot be said that the Four Judges, in any way, said anything contrary or in opposition to what was laid down by the Three Judges in **Ranganatha Reddy,** and therefore, no judicial discipline was broken by Justice O. Chinnappa Reddy when he authored the unanimous judgment in **Sanjeev Coke** by adopting the logic of the Three Judges in **Ranganatha Reddy.** The logic is very clear, in cases where a Judge or Judges of the Supreme Court in minority have given a decision on a point on which the majority has remained silent, that it would be binding on the High Courts and all other Courts, and for this Court the least it will have is persuasive value. The five learned judges in **Sanjeev Coke** relied upon the decision of the minority judges in **Ranganath Reddy** as they were persuaded by the logic and the interpretation given by Justice Krishna Iyer to the phrase "material resources of the community". [Para 31]*

6. *The provisions in Article 39(b) & (c) have to be read in the light of Article 38 of the Constitution of India. Once one does that, one cannot but give an expansive meaning to the phrase "material resources of the community". The meaning which must be given to "material resources of the community" is what has been given to it in **Ranganatha Reddy** by the Three Judges and what has been followed in the Constitution Bench decision in **Sanjeev Coke**. To my mind, this has been the interpretation of the phrase "material resources of the community". [Para 48]*

7. It is for the legislature to decide how the ownership and control of material resources is to be distributed in order to subserve common good. Once the expansive meaning of "material resources of the community" is determined, there is no necessity of drawing further guidelines for the legislatures to determine as to what will constitute material resources. How to control and distribute a material resource is also the task of the Legislature, but while doing so what has to be seen is that the control and ownership of the material resource be so distributed that it subserves common good of the community. If it does not, then such a legislation can be struck down as the Judiciary is not deprived of its powers of judicial review. The legislation in question has to establish a nexus with the principles specified in Article 39(b) and (c) to be a valid legislation. This is the law in terms of ***Kesavananda Bharati*** *and* ***Minerva Mills****. To put it differently what and when do the "privately owned resources" come within the definition of "material resources" is not for this Court to declare. This is not required. The key factor is whether such resources would subserve common good. Clearly the acquisition, ownership or even control of every privately owned resource will not subserve common good. Yet at this stage we cannot come out with a catalogue of do's and don'ts. We must leave this exercise to the wisdom of the legislatures. [Para 49]*

8. The incorporation of Article 38 as well as Article 39(b) and (c) in Part IV of our Constitution was based on the prevalent philosophy of the time and the path of development India chose to follow. The interpretation given to the above provisions by this Court, particularly in ***Ranganatha Reddy*** *and* ***Sanjeev Coke*** *also has its contextual relevance. Perhaps in some ways situations have changed. What has not changed, however, is the inequality. There is today a political equality and there is also an equality in law, yet the social and economic inequalities continue as cautioned by Dr. Ambedkar in his speech in the constituent Assembly on November 25, 1949. The inequality in income and wealth and the growing gap between the rich and the poor is still enormous. It will therefore not be prudent to abandon the principles on which Articles 38 and 39 are based and on which stands the Three*

*Judge opinion in **Ranganatha Reddy** and the unanimous verdict in **Sanjeev Coke.** [Para 50]*

9. *The broad and inclusive meaning given to the expression "material resources of the community" by Justice Krishna Iyer and Justice O. Chinnappa Reddy in **Ranganatha Reddy** and **Sanjeev Coke** respectively has stood us in good stead and has lost none of its relevance, or jurisprudential value, nor has it lost the audience which appreciates these values. I must also record here my strong disapproval on the remarks made on the Krishna Iyer Doctrine as it is called. This criticism is harsh, and could have been avoided. The Krishna Iyer Doctrine, or for that matter the O. Chinnappa Reddy Doctrine, is familiar to all who have anything to do with law or life. It is based on strong humanist principles of fairness and equity. It is a doctrine which has illuminated our path in dark times. The long body of their judgment is not just a reflection of their perspicacious intellect but more importantly of their empathy for the people, as human being was at the centre of their judicial philosophy. [Para 50]*

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List of Keywords

Article 31C of the Constitution; Amendment struck down by Supreme Court; Interpretation of Article 39(b) of the Constitution; Article 300A; Phrase 'material resources of the community'; Kesavananda Bharati case; Minerva Mills case; Sanjeev Coke case; Ranganatha Reddy case; Privately owned resources; Qualifier of 'material needs'; Public Trust Doctrine; Minority opinion; Term 'distribution'; Distribution by the State; Vesting of resources in the State; Nationalisation; Common good.

[2024] 12 S.C.R. 28 : 2024 INSC 847

Tej Prakash Pathak & Ors.
v.
Rajasthan High Court & Ors.

(Civil Appeal No. 2634 of 2013)

07 November 2024

[Dr Dhananjaya Y Chandrachud, CJI, Hrishikesh Roy, Pamidighantam Sri Narasimha, Pankaj Mithal and Manoj Misra,* JJ.]

Issue for Consideration

(a) When the recruitment process commences and comes to an end; (b) Basis of the doctrine that 'rules of the game' must not be changed during the course of the game, or after the game is played; (c) Whether the decision in K. Manjusree is at variance with earlier precedents on the subject; (d) Whether recruiting bodies can devise an appropriate procedure for concluding recruiting process; (e) Whether the procedure prescribed in the Extant Rule can be violated; (f) Whether appointment could be denied even after placement in select list.

Headnotes

Service Law – Recruitment – Commencement and end of the recruitment process:

Held: *The process of recruitment begins with the issuance of advertisement and ends with the filling up of notified vacancies – It consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment. [Para 13]*

Service Law – Recruitment – Basis of the doctrine that 'rules of the game' must not be changed during the course of the game, or after the game is played:

Held: *The doctrine proscribing change of rules midway through the game, or after the game is played, is predicated on the rule against arbitrariness*

enshrined in Article 14 of the Constitution – Article 16 is only an instance of the application of the concept of equality enshrined in Article 14 – In other words, Article 14 is the genus while Article 16 is a species – Article 16 gives effect to the concept of equality in all matters relating to public employment – These two articles strike at arbitrariness in State action and ensure fairness and equality of treatment – Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit – Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness. [Paras 14, 42(2)]

Service Law – Recruitment – Whether the decision in K. Manjusree is at variance with earlier precedents on the subject:

Held: *K. Manjusree case is not at variance with earlier precedents – The decision in K. Manjusree does not proscribe setting of benchmarks for various stages of the recruitment process but mandates that it should not be set after the stage is over, in other words after the game has already been played – This view is in consonance with the rule against arbitrariness enshrined in Article 14 of the Constitution and meets the legitimate expectation of the candidates as also the requirement of transparency in recruitment to public services and thereby obviates malpractices in preparation of select list – The decision in K. Manjusree case lays down good law and is not in conflict with the decision in Subash Chander Marwaha case – Subash Chander Marwaha deals with the right to be appointed from the Select List whereas K. Manjusree deals with the right to be placed in the Select List – The two cases therefore deal with altogether different issues. [Paras 18, 30, 42(3)]*

Service Law – Recruitment – Whether recruiting bodies can devise an appropriate procedure for concluding recruiting process:

Held: *Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/non-arbitrary and has a rational nexus to the object sought to be achieved. [Para 42(4)]*

Service Law – Recruitment – Whether the procedure prescribed in the Extant Rule can be violated:

Held: *Procedure prescribed in the Extant Rule cannot be violated – Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility – Where there are no Rules or the Rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the Rules – In that event administrative instructions would govern the field provided they are not ultra vires the provisions of the Rules or the Statute or the Constitution – But where the Rules expressly or impliedly cover the field, the recruiting body would have to abide by the Rules. [Paras 39, 42(5)]*

Service Law – Name in select list – Right to appointment – Whether appointment could be denied even after placement in select list:

Held: *Appointment may be denied even after placement in select list – A candidate placed in the select list gets no indefeasible right to be appointed even if vacancies are available – But there is a caveat – The State or its instrumentality cannot arbitrarily deny appointment to a selected candidate – Therefore, when a challenge is laid to State's action in respect of denying appointment to a selected candidate, the burden is on the State to justify its decision for not making appointment from the Select List. [Para 40]*

Service Law – Recruitment – Legitimate Expectation – Discretion of Public Authority – Public Interest:

Held: *Candidates participating in a recruitment process have legitimate expectation that the process of selection will be fair and non-arbitrary – The basis of doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in government dealings with individuals – However, the doctrine of legitimate expectation does not impede or hinder the power of the public authorities to lay down a policy or withdraw it – The public authority has the discretion to exercise the full range of choices available within its executive power – The public authority often has to take into consideration diverse factors, concerns, and interests before arriving at a particular policy decision – The courts are generally cautious in interfering with a bona fide decision of public authorities which denies legitimate expectation provided such a decision is taken in the larger public interest – Thus, public interest serves as a limitation on the application*

of the doctrine of legitimate expectation – Courts have to determine whether the public interest is compelling and sufficient to outweigh the legitimate expectation of the claimant. [Para 16]

Case Law Cited

K. Manjusree v. State of A.P. **[2008] 2 SCR 1025 : (2008) 3 SCC 512 – held good law.**

Sivanandan CT & Ors. v. High Court of Kerala & Ors. **[2023] 11 SCR 674 : 2023 INSC 709 – followed.**

Ramesh Kumar v. High Court of Delhi **[2010] 2 SCR 256 : (2010) 3 SCC 104;** *K. H. Siraj v. High Court of Kerala & Ors.* **[2006] Supp. 2 SCR 790 : (2006) 6 SCC 395;** *M.P. Public Service Commission v. Navnit Kumar Potdar* **[1994] Supp. 3 SCR 665 : (1994) 6 SCC 293;** *Union of India v. T. Sundararaman* **[1997] 3 SCR 792 : (1997) 4 SCC 664;** *Tridip Kumar Dingal v. State of W.B.* **[2008] 15 SCR 194 : (2009) 1 SCC 768;** *Salam Samarjeet Singh v. The High Court of Manipur at Imphal & Anr.* **[2024] 8 SCR 885 : 2024 INSC 647 – relied on.**

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List of Keywords

Service Law; Recruitment; Appointment; 'Rules of the game'; Recruiting bodies; Appropriate procedure; Recruiting process; Name in select list; Right to appointment; Procedure prescribed in the Extant Rule; Recruiting process; Article 14 of the Constitution; Article 16 of the Constitution; Article 309 of the Constitution; Transparent; Non-discriminatory; Non-arbitrary; Eligibility criteria; Select List; Extant Rule; Principle of fairness; Legitimate expectation; Rule against arbitrariness.