

BEFORE THE NATIONAL GREEN TRIBUNAL SITTING
AT CHENNAI

(Under Section 18(1) read with Section 16(c) [*in relation to orders under Section 33-A of the Water (Prevention and Control of Pollution) Act 1974, (6 of 1974)*] and Section 14 [*in relation to orders under Section 31-A of the Air (Prevention and Control of Pollution Act, 1981, (14 of 1981)*], of the National Green Tribunal Act 2010 (19 of 2010)

Appeal No. 10 of 2020 (SZ)

&

I.A. No. 26 of 2020(SZ)

IN THE MATTER OF

M/s Fatima Poultry Farm Rep by its
Proprietor Mohd Raza Nabi, S/o. Haji Ali Nabi.

APPELLANT

AND

Telangana State Pollution Control Board,
Hyderabad, Telangana State & 2 others

RESPONDENTS

ADDITIONAL DOCUMENTARY RECORDS &
WRITTEN SUBMISSIONS
IN THE MATTER OF MAINTAINABILITY
OF THE MATTER

FOR INDEX: KINDLY SEE INSIDE



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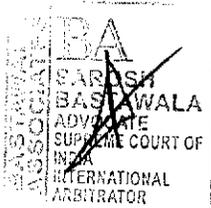
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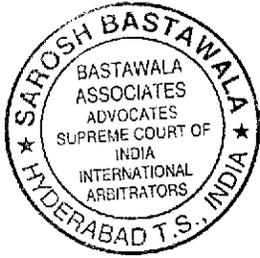
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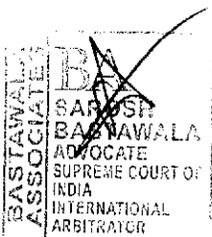
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RESPONDENTS

WRITTEN SUBMISSIONS
IN THE MATTER OF MAINTIANABILITY
OF THE MATTER

The following arguments are advanced by the Counsel for the Appellants in this matter of the maintainability of this petition for the following reasons thereto;

1. The Appellant has been running a Poultry Farm in Thummaluru Village, Maheshwaram Mandal, R.R District,



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a southern outlying area about 40+ Kilometers from the Main Hyderabad City on the main state highway leading to Srisailam since 2003. The project itself is about 3 kilometers from the main village also and was in a areas which was a wilderness, when the farm came about to be established.

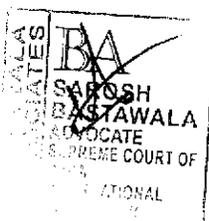
2. Around 2005 to 2008, when the New International Airport the Rajiv Gandhi International Airport was sited on this Southern tangent of the City of Hyderabad, this area fell to the rear entrance of this airport and after 2011 scattered development of Row Houses and Villas commenced in this area.

3. One such development was the "Banyan Tree Retreat" which was developed in the area, and totally contrary to the Sanction Plan of the said development a row of villas was built by the developers on the very southern perimeter of the said development without any set back and open spaces as



required by development regulations. An Association of these villa owners are the Respondent No 3 in this matter who after half a decade of their acquisition of the property have maliciously and mischievously made this false and fabricated complaint, with local political backing, to cause substantial financial losses to the Appellant and by this economic duress force the Appellant to sell these lands cheaply to local politicians and bigwigs.

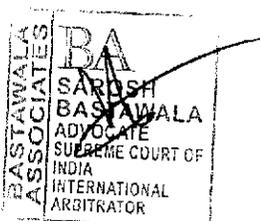
4. The Respondent No 1 has only in this grand conspiracy has chosen to act as the instrument of this malicious and mischievous exercise, and by a series of tainted and twisted reasoning have chosen to issue a purported "closure order" to the Poultry farm of the Appellant. The Complaint was received by the Respondent No 1 on 24-06-2019 and inspection was conducted within eight days thereof on 02-07-2019, show cause notice came to be issued on 06-07-2019 on which same day a detailed report also came to be



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filed with the respondent No 1, and another inspection memo came to be issued within six days therefrom.

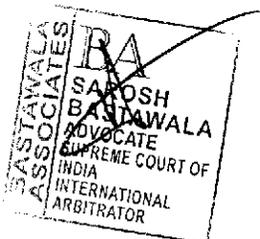
5. The Appellant came about respond to these false and baseless allegations on 03-08-2019 and after conducting a kangaroo court or purported "Legal Hearing", on 13-09-2019 issued the purported Closure Order [impugned order] on 27-09-2019, purported to be on the basis of a decision of this Learned Tribunal 25-01-2017, under G.O.Ms. No 111 dated 08-03-1996, which does not pertain to the geographical area in which this order operates, and in full and complete knowledge that this matter does not have the remotest application to the area of the Appellant, and riding on another purported Letter of the Central Pollution Control Board dated 03-03-2017 purported to be issued in the matter of "Directions under Section 18(1)(b) of the Water (Prevention & Control) Act, 1974 and The Air (Prevention & Control of Pollution) Act 1981, in the matter of Pollution



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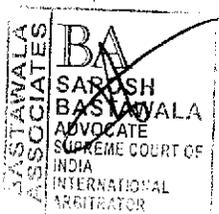
Control in 17 categories of Highly Pollution industries and ROG – Regarding Self-Monitoring bank of Compliance”, but as the Industry of the Appellant being a “Poultry”, this industry being in the Green Category in Entry No 33 of the “Final Document on Revised Classification of Industrial Sectors, dated 07-03-2016, the same would not be applicable to the said unit.

6. The matter is also substantially covered in fact and law by the final orders of the National Green Tribunal, in matter of *M/s New Era Poultries Vs State of Haryana and three others, Appeal No 86 of 2016, final order dated 01-02-2017*, which matter also in the matter of a similarly circumstances the National Green Tribunal was pleased to pass final orders of relief to the Appellants in the facts and circumstance similar to this matter.



7. The Appellant had originally approached the High Court of Judicature at Hyderabad in W.P. No. 22353 of 2019 on 14-10-2019, and interim relief was granted first on 14-10-2019 for ten days, and this interim protection was extended by the Green Bench for two weeks on 25-10-2019, and again on 08-11-2019 for another two weeks after which the same was not being extended and the electricity supply being disconnected, the Appellant filed an undertaking affidavit before the Learned Honorable Court for eight weeks' time to obtain, "consent to operate" and the Court was pleased by its order dated 06-12-2019 to grant six weeks' time to obtain consent to operate in the matter.

8. The Appellant has thereunder under the due process of law approached the Respondent No. 1 in Application No 2341317 (under Application Receipt No 158400630) dated 14-01-2020 for formal consent to operate the said poultry farm, even though throughout its existence the farm never

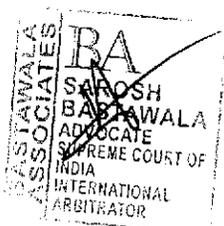


had more than the stipulated One Lakhs Birds on its establishments to require it to obtain such a consent.

9. The Appellant has in detail set out the grounds under which this adjudication of the closure order is a colorable piece of administrative action as the very basis on which it is purported to be issued in nonexistent and the instrumentalities of state have acted under dictation of their political and official influencers and is contrary to all norms of law and justice as applicable to such matters.

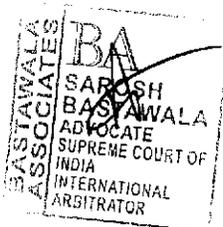
The main point in the matter of maintainability is therefore as under;

1. Whether the Appellant is permitted to maintain this petition under Section 18(1) read with Section 16(c) of the National Green Tribunal Act, (Central



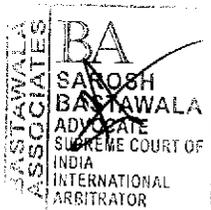
Act 19 of 2010), [in relation to orders under Section 33-A of the Water (Prevention and Control of Pollution) Act 1974, (6 of 1974)] and Section 14 of the National Green Tribunal Act, (Central Act 19 of 2010) [in relation to orders under Section 31-A of the Air (Prevention and Control of Pollution Act, 1981, (14 of 1981)], of the National Green Tribunal Act 2010 (19 of 2010) when having first approached the High Court of Judicature at Hyderabad, and later withdrawn, in the very same matter.

2. Whether the judgement in the matter of *final orders of the National Green Tribunal*, in matter of *M/s New*



Era Poultries Vs State of Haryana and three others, Appeal No 86 of 2016, final order dated 01-02-2017 , passed by a tribunal (court) of concurrent jurisdiction is a binding precedent on this matter as the factual issues in both this case and the case referred to are nearly one and the same.

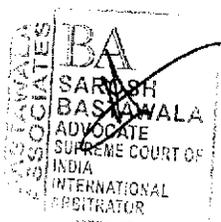
Factual similarities between this matter and the matters arising adjudicated in ***M/s New Era Poultries Vs State of Haryana and three others, Appeal No 86 of 2016, final order dated 01-02-2017*** by the National Green Tribunal, New Delhi. It is also understood by the records that the matter has become final and there is no appeal to the Supreme Court of India.



FIRST POINT

1. Whether the Appellant is permitted to maintain this petition under Section 18(1) read with Section 16(c) of the National Green Tribunal Act, (Central Act 19 of 2010), [in relation to orders under Section 33-A of the Water (Prevention and Control of Pollution) Act 1974, (6 of 1974)] and Section 14 of the National Green Tribunal Act, (Central Act 19 of 2010) [in relation to orders under Section 31-A of the Air (Prevention and Control of Pollution Act, 1981, (14 of 1981)], of the National Green Tribunal Act 2010 (19 of 2010) when having first approached the High Court of Judicature at Hyderabad, and later withdrawn, in the very same matter.

In the matter of the First Point that a petitioner which is a Statutory Right survives even though the case of L. Chandra Kumar Vs the Union of India, (1997) 3 SCC 261, and this is



discussed in Paras 82 to 89 of this judgement of his Lordship Chief Justice A.M. Ahmadi, (as he was then), experts of the same are hereunder;

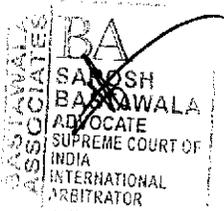
Para 82: There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. The decision in *Sampath Kumar case* [(1987) 1 SCC 124 : (1987) 2 ATC 82] was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in *Sampath Kumar case* [(1987) 1 SCC 124 : (1987) 2 ATC 82] adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be

most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

Para 83. We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in *Sampath Kumar case [(1987) 1 SCC 124 : (1987) 2 ATC 82]*. In his leading judgment, Ranganath Misra, J. refers to the fact that since Independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted. Reference was also made to the decision in *Kamal Kanti Dutta v. Union of India [(1980) 4 SCC 38 : 1980 SCC (L&S) 485]* where this Court had, while emphasizing the need for speedy resolution of service

disputes, proposed the establishment of Service Tribunals.

Para 84. The problem of clearing the backlogs of High Courts, which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to half a century. Over time, several Expert Committees and Commissions have analyzed the intricacies involved and have made suggestions, not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India (hereinafter referred to as “the LCI”) or similar high-level committees appointed by the Central Government, and are particularly noteworthy. [*Report of the High Court Arrears Committee 1949; LCI, 14th Report on Reform of Judicial Administration (1958); LCI, 27th Report on Code of Civil Procedure, 1908 (1964); LCI, 41st Report on Code of Criminal Procedure, 1898 (1969); LCI, 54th Report of Code of Civil Procedure, 1908 (1973); LCI, 57th Report on Structure and Jurisdiction of the Higher Judiciary (1974); Report of High Court Arrears Committee, 1972; LCI, 79th Report on Delay*

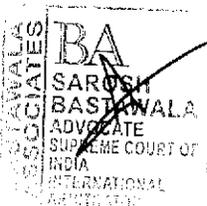


and Arrears in High Courts and other Appellate Courts (1979); LCI, 99th Report on Oral Arguments and Written Arguments in the Higher Courts (1984); Satish Chandra Committee Report 1986; LCI, 124th Report on the High Court Arrears — A Fresh Look (1988); Report of the Arrears Committee (1989-90).]

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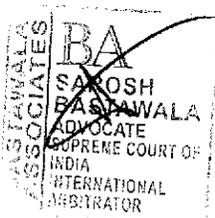
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Para 86. After analyzing the situation existing in the High Courts at length, the LCI made specific recommendations towards the establishment of specialist Tribunals thereby lending force to the approach adopted in *Sampath Kumar case [(1987) 1 SCC 124 : (1987) 2 ATC 82]*. The LCI noted the erstwhile international judicial trend which pointed towards generalist courts yielding their place to specialist Tribunals. Describing the pendency in the High Courts as “catastrophic, crisis-ridden, almost unmanageable, imposing ... an immeasurable burden on the system”, the LCI stated that the prevailing view in Indian Jurisprudence that the jurisdiction enjoyed by



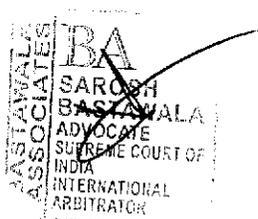
the High Court is a holy cow required a review. It, therefore, recommended the trimming of the jurisdiction of the High Courts by setting up specialist courts/Tribunals while simultaneously eliminating the jurisdiction of the High Courts.

Para 87. It is important to realize that though the theory of alternative institutional mechanisms was propounded in *Sampath Kumar case [(1987) 1 SCC 124 : (1987) 2 ATC 82]* in respect of the Administrative Tribunals, the concept itself — that of creating alternative modes of dispute resolution which would relieve High Courts of their burden while simultaneously providing specialized justice — is not new. In fact, the issue of having a specialized tax court has been discussed for several decades; though the Report of the High Court Arrears Committee (1972) dismissed it as “ill-conceived”, the LCI, in its 115th Report (1986) revived the recommendation of setting up separate Central Tax Courts. Similarly, other Reports of the LCI have suggested the setting up of “*Gram Nyayalayas*” [LCI, 114th Report (1986)], *Industrial/Labour Tribunals* [LCI, 122nd Report



(1987)] and Education Tribunals [LCI, 123rd Report (1987)].

Therefore, having withdrawn voluntarily from the adjudicatory process of the Local High court the issues in fact in the matter, still remain open for adjudications, and hence need to be looked into the matters. Also the matter is aptly illustrated an analogous case, when in the teeth of a final order of the High court of Haryana in Writ Petition No 8262 of 2007, dated 03-07-2012, the National Green Tribunal, Principal Bench, New Delhi, in Appeal No 56 of 2016, took it upon itself to hear and adjudicate at length the matter [which is also factually very very similar to the case at hand], and decided the matter per its order dated 01-02-2017. (Order is filed as Annexure No 22 on pages 195 to 211 of the First paper Book, and the Order of the High Court of Haryana is reproduced on Page 203 of the said compilation.



SECOND POINT

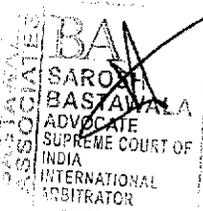
2. Whether the judgement in the matter of final orders of the National Green Tribunal, in matter of M/s New Era Poultries Vs State of Haryana and three others, Appeal No 86 of 2016, final order dated 01-02-2017 , passed by a tribunal (court) of concurrent jurisdiction is a binding precedent on this matter as the factual issues in both this case and the case referred to are nearly one and the same.

1. This Learned Honorable court is bound by the Doctrine of Precedent, and the decision of the National Green Tribunal, Principal Bench, New Delhi, in Appeal No 56 of 2016, [a matter very very similar to the case at hand], and decided the matter per its order dated 01-02-2017. (Order is filed as Annexure No 22 on pages 195 to 211 of the First paper Book) of the said compilation.

2. The doctrine of precedent, “when a single precedent is concerned it is possible to point to three stages in judicial reasoning by analogy although it is not suggested that they are always separated in practice. First comes the perception likeness between the previous case and the one before the court. Next there is the determination the *ratio decidendi* of the previous case and finally there is the decision to apply that ratio to the instant case. Analogy may be said to be employed at the first stage; it plays no part at the second stage but it is frequently decisive at the third where the judge has to consider whether the facts of the case before him resemble those of the previous case sufficiently to necessitate the application of its *ratio decidendi*, or to justify him in applying it if he wishes to do so¹.

3. Judicial reasoning by analogy is incomplete. The facts mentioned in a *dictum* rather than those of a previous case

¹ Cross, Rupert & Harris, J.W., Precedent in English law, 4th Edition, 2007, reprinted 2014, south Asia Edition, Clarendon Law Series, Oxford, page 192.



are frequently the starting point, and the reasoning is usually concerned with more than one past decision. When several decisions are involved the reasoning consists of four stages, the perception of analogies, (which may frequently conflict), between the instant case and a number of previous ones, the determination of the *rationes decidendi*, of the previous cases, the construction of a rule or rules, from those *rationes*, and the decision to apply the rule or one of the rules, to the instant case. Notwithstanding the inadequacy of the forgoing discussion, it is hoped that enough has been said to enable the reader to realize that there is a danger that this kind of analogical reasoning, may occasionally become too narrow and thus degenerate into conceptualism².

4. The Doctrine of Precedent is also applicable to Tribunals, as the Supreme Court of India in *Sub-Inspector Rooplal & another Vs Lt. Governor, through Chief*

² Ibid Page 196.

Secretary Delhi & others, (2000) 1 SCC 644, per the Learned Honorable Santosh Hegde, has held as under;

Para 12. At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public

confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. This Court in the case of *Tribhovandas Purshottamas Thakkar v. Ratilal Motilal Patel* [AIR 1968 SC 372 : (1968) 1 SCR 455] while dealing with a case in which a Judge of the High Court had failed to follow the earlier judgment of a larger Bench of the same Court observed thus:

“The judgment of the Full Bench of the Gujarat High Court was binding upon Raju, J. If the learned Judge was of the view that the decision of Bhagwati, J., in *Pinjare Karimbhai case* [*Pinjare Karimbhai v. Sukla Hariprasad*, (1962) 3 Guj LR 529] and of *Macleod, C.J., in Haridas case* [*Haridas v.*

Ratansey, AIR 1922 Bom 149 (2) : 23 Bom LR 802] did not lay down the correct law or rule of practice, it was open to him to recommend to the Chief Justice that the question be considered by a larger Bench. Judicial decorum, propriety and discipline required that he should not ignore it. Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by courts of coordinate authority or of superior authority. Gajendragadkar, C.J., observed in *Bhagwan v. Ram Chand* [AIR 1965 SC 1767] :

‘It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be

reconsidered, he should not embark upon that inquiry sitting as a Single Judge, but should refer the matter to a Division Bench, or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety.”

5. Also, the point of the applicability of the doctrine of precedent to tribunals is also stated in *Govt of A.P. & others Vs A.P. Jaiswal and others, (2001) 1 SCC 748*, per Justice Santosh Hegde, in Para 24 as under;

Para 24. Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve

consistency in judicial pronouncements, the courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice, which we see in plenty in this case. This Court in the case of Sub-Inspector Rooplal v. Lt. Governor [(2000) 1 SCC 644 : 2000 SCC (L&S) 213 : (1999) 7 Scale 466] held thus: (SCC p. 654, para 12)

“At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the

latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law from the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement.”

6. It may be convenient at this state to notice the case law and the passage from the text-books cited at the bar on the Law of Precedent. The English Law on the subject has been

succinctly summarized in Vol 18 of the Halsbury's Laws of England page 210, para. 535 :

"It may be laid down as a general rule that part alone of a decision of a Court of Law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined."

7. The principle, underlying the aforesaid proposition, has been clearly stated by Odgers in his Book "In the Common Law", 3rd Edition, Vol. I, pages 64 -- 65 as follows :

"There is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank; it does so simply from what may be called the comity among Judges. In the same way, there is no common law or a statutory rule to oblige a court to bow to its own decisions; it does so on the ground of judicial comity. This so-called comity has, however, been formulated

into rules which, though unwritten, are habitually followed by our Courts."

8. The scope of the rule was elucidated by the Court of Appeal in *Young v. Bristol Aeroplane Co.*, 1944 - 2 All ER 293. The question there was whether the Court of Appeal was not bound by its own earlier decisions. Lord Greene, M. R., exhaustively considered the question and came to the following conclusion:

"On a careful examination of the whole matter, we have come to the clear conclusion that this Court is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize (i) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow, (ii) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its

opinion stand with a decision of the House of Lords. (iii) The Court is not bound to follow a decision of its own if it is satisfied that decision was given *per incuriam*."

9. The statement of law is clear but the decision does not *denne* what are Courts of co-ordinate jurisdiction. The question whether the Rangoon High Court in exercise of its ordinary original and appellate jurisdiction was not bound by the reports of decisions of the Chief Court of Lower Burma was raised and decided by the Full Bench of the Rangoon High Court in -- '*Ma Mya v. Ma Thein*', AIR 1927 *Rang 4*. The Full Bench Cunliffe J. dissenting, held that the High Court was not bound by the said reports. The decision turned upon the question whether the Chief Court of Lower, Burma, which was replaced by the High Court, which had territorial jurisdiction not only in respect of lower Burma but also upper Burma, was a Court of co-ordinate jurisdiction. Rutledge C. J. held that "to decide whether the decisions of

the late Chief Court are binding upon this Courts, we must decide whether it is a Court of co-ordinate jurisdiction."

10. A Division Bench of the Travancore Cochin High Court in *Unni Kunchu Moldeen v. Subramonia, Iyer, AIR 1953 Trav-C 283* had to consider whether the decisions of the former Travancore and Cochin High Court were binding on the post-Constitution High Courts of Travancore-Cochin. The Full Bench disposed of the question with the observation that it had been repeatedly told by that Court that decisions of the former Travancore and Cochin High Courts were only of persuasive value for them and that those decisions did not bind them. That decision was obviously based upon the assumption that the former State High Courts, whose jurisdiction extended only over parts of the present State, were not Courts of co-ordinate jurisdiction with the present High Court. Neither of the former Courts

had jurisdiction over the entire area of the present Travancore -- Cochin State.

11. So too, a Full Bench of the Madhya Bharat High Court in -- *Chandulal v. Babulal*, AIR 1952 Madh B 171 held that the Madhya Bharat High Court could not be looked upon as successor to Indore High Court or any High Court of any covenanting State and, therefore, the High Courts of the former covenanting States could not be regarded as Courts of co-ordinate jurisdiction. In that view, they held that the judgments of those Courts were not binding on the High Court.

12. The Supreme Court in -- *State of Bihar v. Abdul Majid* AIR 1954 SC 245, held that the Supreme Court of India was in no way bound by the decisions given by the former Federal Court of India or by the Privy Council. There is no discussion but the conclusion may be sustained on the basis

that, in the view of the Supreme Court, neither the Privy Council nor the Federal Court were Courts of co-ordinate jurisdiction with the Supreme Court. It is, therefore, manifest that the binding nature of the precedents of one Court on another depends upon the fact whether such Courts are Courts of co-ordinate jurisdiction or not.

13. Thus, the question whether the New Delhi Bench and this bench are courts of coordinate jurisdiction; let us first answer the question what are Courts of co-ordinate jurisdiction? Courts of co-ordinate jurisdiction are those, which exercise simultaneous jurisdiction over the same area of law, or in respect of the same subject-matter in principle but in diverse jurisdictions. The words can also be equated to the words "co-ordinate jurisdiction" with the word "concurrent jurisdiction". Though the decisions already cited may afford illustration, they do not definitely define the term "co-ordinate jurisdiction". In my view, co-ordinate

jurisdiction does not connote the same idea as concurrent jurisdiction or simultaneous jurisdiction.

14. Concurrent jurisdiction is defined in Wharton's Law Lexicon to mean the jurisdiction of several different tribunals, both authorized to deal with the same subject-matter at the choice of the suitor. But no definition is given of co-ordinate jurisdiction in any of the Law Dictionaries. In Chamber's Twentieth Century Dictionary (Mid-Century Version), the meaning of the word "co-ordinate" is given as "of the same order or rank". Roget in "Thesaurus of English Words and Phrases" gives that word under the heading 'comparative quantity.' According to the author, it connotes an idea of sameness of quantity or degree.

15. It is, therefore, clear that the connotation of the word "co-ordination" is not the same as that of the word's concurrence or simultaneity. Simultaneity or co-existence is

not a necessary ingredient of co-ordination. Co-ordination is more comprehensive and takes in successive acts of the same status or level. It would not be inappropriate to call a successor Court a Court of co-ordinate jurisdiction, with its predecessor if their jurisdictions at the point of time they exercised it are similar to or co-extensive with each other. The cases cited at the Bar amply show that the said word was understood in the wider sense indicated by me. If it was not used in the sense indicated by me, the entire discussion of *Rutledge C. J., in AIR 1927 Rang 4* would be unnecessary for the Rangoon High Court could have disposed of the matter on the basis that the successor High Court could not be a Court of co-ordinate jurisdiction with its predecessor the Chief Court of Lower Burma, But, on the other hand, the learned Chief Justice assumed that they would be Courts of co-ordinate jurisdiction if the other tests laid down by him were satisfied At pp. 4 - 5, the learned Judge laid down the following tests :

"To decide whether the decisions of the late Chief Court are binding upon this Court we must decide, whether it is a Court of co-ordinate jurisdiction. Admittedly, it is not so in respect of territorial jurisdiction, as the Chief Court's jurisdiction was confined to Lower Burma, while the High Court's jurisdiction extends to upper Burma as well. In origin, the Chief Court was the creation of the Indian Legislature, and it was not a Court of Record. The High Court by its Letters Patent is the creation of the King Emperor and is declared to be a Court of Record. It is in fact the King's Court which the Chief Court never was. Its jurisdiction in certain respects such as contempt and mandamus is greater than that of the Chief Court. I am, therefore, of opinion that the Chief Court cannot be held to be a Court of co-ordinate jurisdiction with the High Court."

16. If the tests laid down by the learned Judge were satisfied, he would have certainly held that the Chief Court of Lower Burma was a Court of co-ordinate jurisdiction with

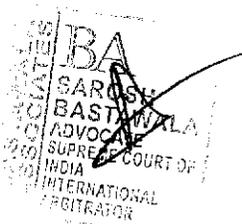
the High Court, Though *Lord Greene, M. R., in (1944) 2 All ER 293* was only considering the question of the binding nature of the earlier decisions of the Court of Appeal on the same Court or a Division of that Court, the learned Judge did not expressly or by necessary implication indicate that a predecessor Court could not be a Court of co-ordinate jurisdiction with its successor or vice versa. When the decision of -- *Mills v. Jennings', (1880) 13 Ch D 639* was cited, Lord Greene pointed out that in that case, Cotton L. J., justified his dissent from an earlier decision of the old Court of Appeal in Chancery on the ground that it was not uncommon to reconsider decisions given by the old Court of appeal in Chancery. That passage is relied upon in support of the argument that the simultaneous exercise of jurisdiction by two Courts is a necessary condition for the application of the doctrine of co-ordinate jurisdiction. The learned Lord meant to make any such distinction. He only pointed out the practice followed by the Court of Appeal in

dealing with the earlier decisions of the old Court of Appeal in Chancery, nor can the decision of the Division Bench of the Travancore-Cochin High Court be legitimately invoked by the learned Counsel for the petitioners in support of his contention. There, if I may say so, the learned Judge rightly assumed that the High Courts of Travancore and Cochin, which exercised only jurisdiction over small areas were not Courts of co-ordinate jurisdiction with the High Court of Travancore-Cochin. This was not on the principle that the earlier Courts were not exercising jurisdiction simultaneously with the present High Court, but because of the fact that their jurisdiction was not co-extensive with that of the present High Court.

17. In *Subbarayudu Vs the State AIR 1955 AP 87 (FB)*, Subba Rao, C.J. has held as under;

“Para 24. The question, therefore, is whether the Madras High Court is a Court of co-ordinate jurisdiction with the Andhra High Court. As

aforesaid, the Andhra High Court in effect and substance succeeded to the entire jurisdiction exercised by the Madras High Court within the territories comprised in the Andhra State. At first, the Madras High Court exercised jurisdiction over the entire composite State. After the constitution of the Andhra High Court the composite High Court exercised jurisdiction over the territories of the two States. After the inauguration of the Andhra High Court, the jurisdiction was split up and two High Courts are now exercising jurisdiction separately over the two States. The jurisdiction exercised by the Madras High Court over the composite State till 1.10.1953 and over the two States from 1.10.1953 to 5.7.1954 was co-extensive with the present jurisdiction exercised by the Andhra High Court in all respects except in regard to territorial jurisdiction. The content of the jurisdiction exercised by the Madras High Court and the present Andhra High Court is the same, though the area over which the said jurisdiction is exercised is now limited in the case of both the Courts. If the Andhra High Court is not a Court of co-ordinate jurisdiction, it could reasonably be



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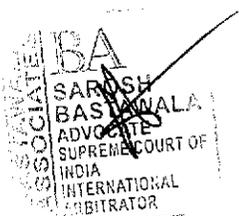
argued that the present Madras High Court is also not a Court of co-ordinate jurisdiction with its predecessor, the composite High Court, or, at any rate with the Madras High Court before the Constitution. I would, therefore, apply the following test to ascertain whether the two High Courts are of co-ordinate jurisdiction or not. viz.,

"Whether the two Courts are of equal rank and status or of equal authority and exercised similar jurisdiction."

Para 25 Applying the test, I have no hesitation to hold that the Madras High Court and the Andhra High Court are Courts of co-ordinate jurisdiction.

Para 26 Even if they are not Courts of co-ordinate jurisdiction, in my view, the principle of State decisis may usefully be invoked in public interests. In Broome's Legal Maxims, p. 103, 9th edition, the said doctrine was stated as follows:

"It is then an established rule to abide by former precedents stare decisis, where the same points come again in litigation, as well



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to keep the scale of Justice steady and not liable to waver with every new Judge's opinion, as also because the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter according to his private sentiments ; he being sworn to determine not according to his own private judgment, but according to the known laws of the land -- not delegated to pronounce a new law, but to maintain the old "Jus dicere et non jus dare".

(19) In Salmond's Jurisprudence, 10th Edition, p. 183, the principle was further elaborated in the following manner:

"It does not follow that a principle once established should be reversed simply because it is not as perfect and rational as it ought to be. It is often more important that the law should be certain than that it should be ideally perfect. These two requirements

are to a great extent inconsistent with each other, and we must often choose between them. Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development and the evils of the uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been, counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it; Important contracts may have been made on the strength of it ; it may have become to a great extent a basis of expectation and the ground of mutual dealings. Justice may, therefore, imperatively require that the decision, though founded in error, shall stand inviolate none the less "*Communis error facit jus*". "It is better", said Lord Eldon, that "the law should be certain than that every Judge shall speculate upon improvements in it".

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(20) There is no reason why the aforesaid salutary principle should not be followed in the case of decisions delivered by the Madras High Court when the Andhra area was under its jurisdiction. During that period, titles were settled transactions took place, settlements made, agreements entered into, wills executed and expectations raised on the basis of the decisions of the Madras High Court. If the Andhra High Court is now free to start from scratch, it would be introducing confusion in the law of the land and disturbing titles acquired. It would also become a fruitful source of litigation. Further the Madras High Court has had long and well-established traditions and was presided over by some of the Distinguished Judges of our land. This High Court would do well in its own interests and that of the Public to continue the great and abiding traditions laid down by the Madras High Court for generation and to be inspired by its noble examples.

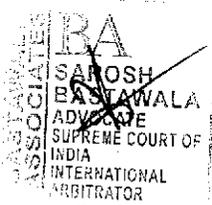
18. The Supreme Court *Sri Venkateswara Rice Ginning & Groundnut Oil Contractors Vs State of A.P. 1971 (2)*



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SCC 650 had occasion to deal with a similar matter and laid down as under;

Para 9. Our approach to the question before us is similar to that adopted by the High Court in the decision under appeal. We are in entire agreement with the reasoning of the High Court. But our attention was invited to a latter decision of the same High Court in *M. Nadar Khan & Co. v. Assistant Commissioner (Commercial Taxes), Anantpur [27 STC 18]* which took a view contrary to that taken in the decision under appeal. It is strange that a coordinate Bench of the same High Court should have tried to sit on judgment over a decision of another Bench of that Court. It is regrettable that the learned Judge who decided the latter case overlooked the fact that they were bound by the earlier decision. If they wanted that the earlier decision should be reconsidered, they should have referred the question in issue to a larger Bench and not to ignore the earlier decision.



19. In *Mamleshwar Prasad & Another Vs Kanhaiya Lal* (1975) 2 SCC 232, his Lordship Justice Krishna Iyer had occasion to state as under;

Para 4. What needs to be underscored is the appellant's own prayer that the four appeals be consolidated. The reason given is tell-tale:

“That only one judgment of the High Court in the Letters Patent Appeals is impugned before your Lordships in all the 4 appeals abovementioned. It is therefore in the interest of justice that the 4 appeals viz. the Civil Appeal No. 2556 of 1966 and the other 3 appeals arising from SCAs Nos. 186-D, 189-D and 190-D of 1966 deserve to be consolidated and would be disposed of by one argument (sic) common to all of them. That there is nothing to be decided by this Hon'ble Court in any of the appeals which is not common to any of the rest of them.”

This prayer was granted and thus the appellants got the benefits like reduced security deposit and

consolidation for purposes of printing and hearing of the appeals, on their representation to the Court that the points arising in all the appeals were common and the disposal of one would govern the rest.

Para 5. A litigant cannot play fast and loose with the Court. His word to the Court is as good as his bond and we must, without more ado, negative the present shift in stand by an astute discovery of a plea that the earlier judgment was rendered *per incuriam*.

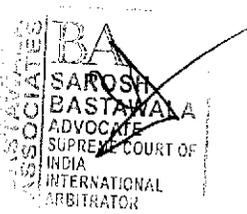
Para 6. The wisdom which has fallen from Bowen, L.J. in *Ex parte Pratt* [52 QB 334, 341] though delivered in a different context, has wider relevance to include the present position. The learned Lord Justice observed:

“There is a good old-fashioned rule that no one has a right to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has

decided against him, to turn round and say,
'You have no jurisdiction'."

Para 7. Certainty of the law, consistency of rulings and comity of courts — all flowering from the same principle — converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

Para 8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind.



20. In *The Mumbai Kamgar Sabha Bombay, Vs M/s Abdulbhai Faizullabhai* (1976) 3 SCC 832,

Para 38. It is trite, going by anglophonic principles, that a ruling of a superior court is binding law. It is not of scriptural sanctity but is of ratiowise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decision, exalting the doctrine of precedents into a prisonhouse of bigotry, regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position of subordinate courts, casual observations, generalisations and sub silentio determinations must be judiciously read by courts of coordinate jurisdiction and, so viewed, we are able to discern no impediment in reading Ghewar Chand as confined to profit-

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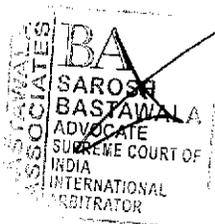
bonus, leaving room for non-statutory play of customary bonus. The case dealt with a bonus claim by two sets of workmen, based on profit of the business but the workmen fell outside the ambit of the legislation by express exclusion or exemption. Nothing relating to any other type of bonus arose and cannot be impliedly held to have been decided. The governing principle we have to appreciate as a key to the understanding of Ghewar Chand is that it relates to a case of profit bonus urged under the Industrial Disputes Act by two sets of workmen employed by establishments which are either excluded or exempted from the Bonus Act. The major inarticulate premise of the statute is that it deals with — and only with profit-based bonus as has been explained at some length earlier. There is no categorical provision in the Bonus Act nullifying all other kinds of bonus, nor does such a conclusion arise by necessary implication. The ruling undoubtedly lays down the law thus:

“Considering the history of the legislation, the background and the circumstances in

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which the Act was enacted, the object of the Act and its scheme, it is not possible to accept the construction suggested on behalf of the respondents that the Act is not an exhaustive Act dealing comprehensively with the subject-matter of bonus in all its aspects or that Parliament still left it open to those to whom the Act does not apply by reason of its provisions either as to exclusion or exemption to raise a dispute with regard to bonus through industrial adjudication under the Industrial Disputes Act or other corresponding law.”

21. I further state that this matter is also substantially covered in fact and law by the final orders of the *National Green Tribunal*, in matter of *M/s New Era Poultries Vs State of Haryana and three others, Appeal No 86 of 2016, final order dated 01-02-2017*, which matter also in the matter of a similarly circumstances the Principal Bench of the National Green Tribunal at New Delhi, was pleased to pass final orders of relief to the Appellants therein in the



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facts and circumstance similar to this matter which facts and circumstances are totally similar in fact and law thereto.

22. this Petitioner had original approached the High Court of Judicature at Hyderabad in W.P. No. 22353 of 2019 on 14-10-2019, and interim relief was granted first on 14-10-2019 for ten day, and this interim protection was extended by the Green Bench for two weeks on 25-10-2019, and again on 08-11-2019 for another two weeks after which the same not being extended and the electricity supply being disconnected, the Appellant filed a undertaking affidavit before the Learned Honorable Court for eight weeks' time to obtain, "consent to operate" and the Court was pleased by its order dated 06-12-2019 to grant six weeks' time to obtain consent to operate in the matter. The Judgement of the Supreme Court in *Rameshwarlal Vs Municipal Council, (1996) 6 SCC 100*, per a bench is as under;

Para 2. It is not necessary for us to go into the question of the legality of the order of the High



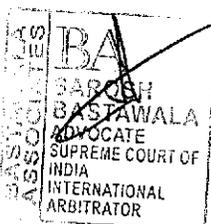
Court in refusing to grant the relief. It is axiomatic that the exercise of the power under Article 226 being discretionary, the learned Single Judge as well as the Division Bench have not exercised the same to direct the respondent to pay the alleged arrears of salary alleged to be due and payable to the petitioner. Under these circumstances, the only remedy open to the petitioner is to avail of the action in the suit. Since the limitation has run out to file a civil suit by now, which was not so on the date of the filing of the writ petition, the civil court is required to exclude, under Section 14 of the Limitation Act, 1963, the entire time taken by the High Court in disposing of the matter from the date of the institution of the writ petition.

Para 3. Normally for application of Section 14, the court dealing with the matter in the first instance, which is the subject of the issue in the later case, must be found to have lack of jurisdiction or other cause of like nature to entertain the matter. However, since the High Court expressly declined to grant relief relegating the petitioner to a suit in the civil court, the petitioner cannot be left

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remediless. Accordingly, the time taken in prosecuting the proceedings before the High Court and this Court, obviously pursued diligently and bona fide, needs to be excluded. The petitioner is permitted to issue notice to the Municipality within four weeks from today. After expiry thereof, he could file suit within two months thereafter. The trial court would consider and dispose of the matter in accordance with law on merits.

23. I have thereunder under the due process of law approached the Respondent No. 1 in Application No 2341317 (under Application Receipt No 158400630) dated 14-01-2020 for formal consent to operate the said poultry farm, even though throughout its existence the farm never had more than the stipulated One Lakhs Birds on its establishments to require it to obtain such a consent.



SS

24. On 12-06-2020 the Respondent No 1 herein with a cryptic email as under;

Dear Mohammed Reza Nabi

Your Application for CTO (Air & Water) No 2341317 has been rejected due to some reason.

Please check your OCMMS Account for details.

Thanks & Regards

TSPCB

However, the OCMMS account to date does not show the reasons for the said refusal.

25. On 03-07-2020 my Counsel had on 03-07-2020 in view of the Covid Pandemic, and the various orders, and the pendency of the matters before this Learned Honorable Tribunal, and the general directions of the Supreme Court and the T.S. High Court for suspension of execution of all orders passes from time to time, to the Tahsildar Maheswaran Mandal, to cease and desist from taking any coercive action of whatever nature in the matter.

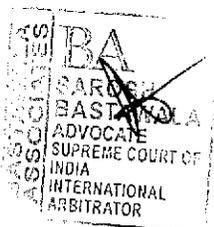


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26. Thereafter the Tahsildar, Maheswaran Mandal, R.R. Dist, addressed me in No B/1212/2020 dated 07-07-2020, requiring me to close the Poultry Farm in a week day on instruction of the Respondent No 1 in Letter in Lr. No. 3/Complaint/PCB/ROI-RRD/2020-1223, along with any annexures thereto, dated 26-06-2020 of the Environmental Engineer, TSPCB, Regional Office 1, 6-3-1219, Block B, Ward 91, 2nd Floor, Behind Country Club, Kundan Bagh, Uma Nager, Begumpet, Hyderabad 500016. Thereupon I has also filed W.P. No. 10680 of 2020 on 14-07-2020, before the High Court at Hyderabad in the same matter, but however the same was also withdrawn.

27. Also, I have addressed the Tahsildar, Maheshwaram Mandal, R.R. Dist, per my letter dated 13-07-2020 seeking six months' time in the matter to close the Poultry farm.

Thereafter I again addressed the Tahsildar, Maheshwaram



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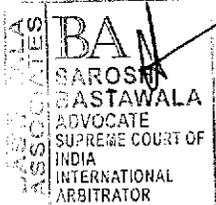
and doing justice to this petitioner allow him to restart operations in the said unit.

[Handwritten signature]
[Date: 21/12/2020]

SAROSH BASTAWALA
Advocate Supreme Court of India
Flat No 408 Block B, Okaz Apts,
Humayun Nager, Mehdiapatnam,
HYDERABAD 500028 T.S.

sarohsb@gmail.com

Phone 9391115412



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**THE HON'BLE THE CHIEF JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
THE HON'BLE SRI JUSTICE A. ABHISHEK REDDY**

WRIT PETITION No. 10680 OF 2020

ORDER: (Per the Hon'ble the Chief Justice Raghvendra Singh Chauhan)

Mr. Sarosh Sam Bastawala, the learned counsel, seeks liberty to withdraw the writ petition.

Therefore, the writ petition is, hereby, dismissed as withdrawn. No order as to costs.

Pending Miscellaneous Petitions, if any, stand closed.

(RAGHVENDRA SINGH CHAUHAN, CJ)

(A. ABHISHEK REDDY, J)

August 07, 2020

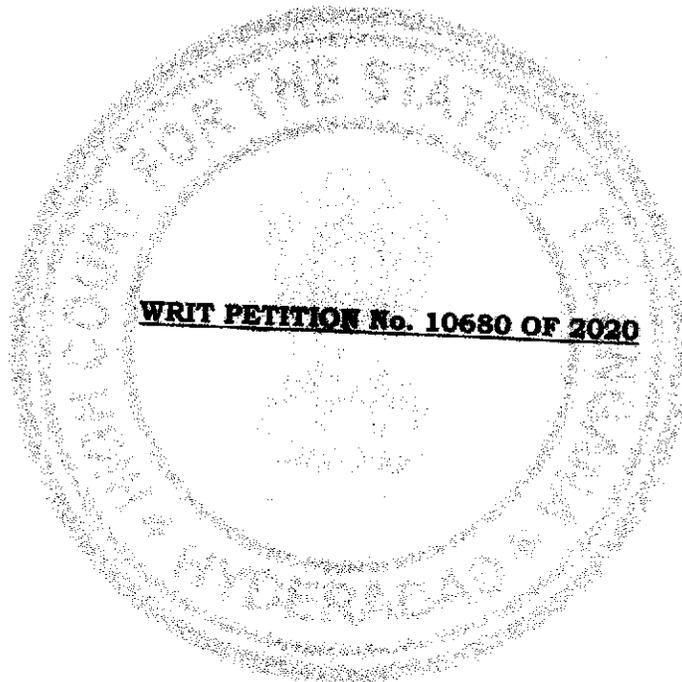
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BA
SAROSH
BASTAWALA
ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
ARBITRATOR

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**THE HON'BLE THE CHIEF JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
THE HON'BLE SRI JUSTICE A. ABHISHEK REDDY**



07.08.2020

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ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
ARBITRATOR

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**THE HON'BLE THE CHIEF JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
THE HON'BLE SRI JUSTICE A. ABHISHEK REDDY**

WRIT PETITION No. 22353 OF 2019

ORDER: (Per the Hon'ble the Chief Justice Raghvendra Singh Chauhan)

Mr. Sarosh Sam Bastawala, the learned counsel, seeks liberty to withdraw the writ petition.

Therefore, the writ petition is, hereby, dismissed as withdrawn. No order as to costs.

Pending Miscellaneous Petitions, if any, stand closed.

(RAGHVENDRA SINGH CHAUHAN, CJ)

(A. ABHISHEK REDDY, J)

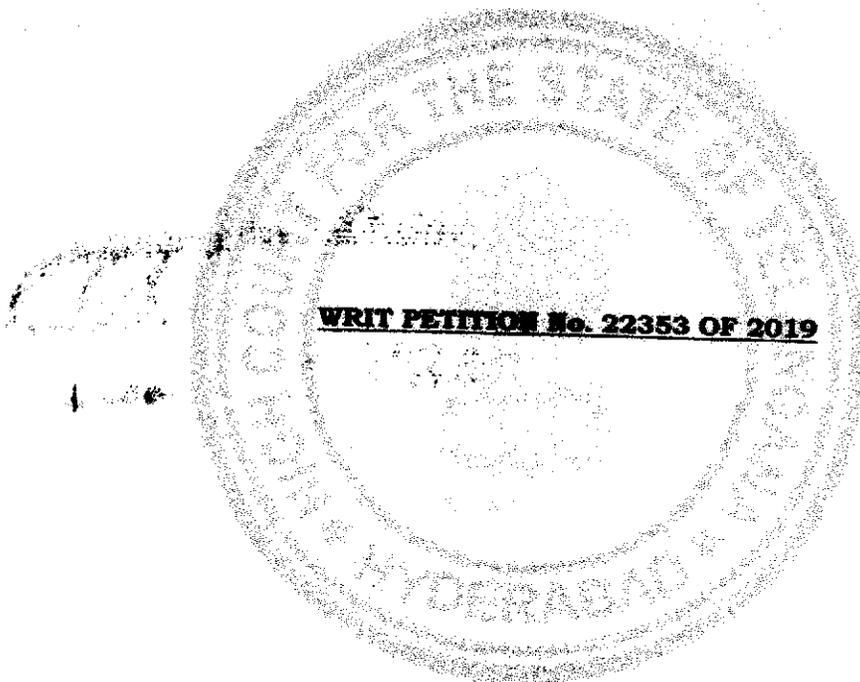
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**THE HON'BLE THE CHIEF JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
THE HON'BLE SRI JUSTICE A. ABHISHEK REDDY**



07.08.2020

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Range Reddy District
MEMORANDUM OF WRIT PETITION UNDER ARTICLE
226 OF THE CONSTITUTION OF INDIA

IN THE HIGH COURT OF JUDICATURE AT
HYDERABAD FOR THE STATE OF
TELANGANA

(Special Original Jurisdiction under Art. 226 of the Constitution of India)

W.P. No. 10680 of 2020

Between;

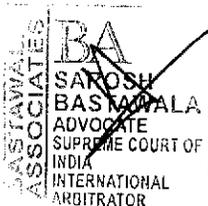
M/s. Fatima Poultry Farm, Survey No. 225
(Part) and 228 (Part), Thummaluru Village,
Maheshwaram Mandal, R.R District 501359
T.S. Rep., by its proprietor, Mohd Raza Nabi,
S/o. Haji Ali Nabi, Aged 62 years.

APPELLANT

AND

1. The State of Telangana represented by
the Prl. Secretary, Revenue Department,
Hyderabad T.S.
2. The District Collector, Range Reddy
District, Khairtabad, Hyderabad 500004 T.s.
3. The Revenue Divisional Officer,
Kandakur Division, Kandakur, Range Reddy
District, T.S.
4. The Environmental Engineer, T.S.
Pollution Control Board, Regional Office - I,
R.R. Dist., at 6-3-1219, Block C, Ward 91, 2nd
Floor, Backside of Country Club, Kundan
Bagh, Uma Nager, Begumpet, Hyderabad
500016, T.S. and
5. The Tahsildar, Maheshwaram Mandal,
Maheshwaram, Range Reddy District, 506311
T.S.

RESPONDENTS



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The address for the Petitioner herein for the purpose of service of all notices, summons, etc., is that of their counsel Sri. Sarosh Bastawala, [10432], Ms. G. Padma [10126], and Ms Shaik Somaya, [19901], Advocates Supreme Court of India, at Flat No. 408, Block B, Okaz Apartments, Humayun Nager, Mehdiapatnam, Hyderabad 500028, A.P.

The address for the Respondents herein for the purpose of service of all notices, summons, etc., is that as given in the name clause herein.

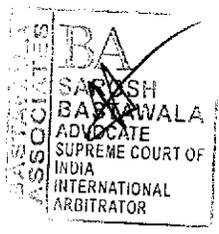
For the reasons stated in the accompanying affidavit, this court shall be pleased to issues a writ order or direction more so in the nature of a Writ of Mandamus to the Respondents and particularly the Respondent No 5 herein to cease and desist from giving effect to the proceedings of the Respondent No 5 in No B/1212/2020 dated 07-07-2020 and received by the Petitioner on 08-07-2020, in the matter of the sealing the Poultry Farm of the Petitioner No 1 situated at Survey No. 225 (Part) and 228 (Part), Thummaluru Village, Maheshwaram Mandal, R.R District 501359, and this court may be pleased to pass such other order or orders as this Learned Honourable Court may see

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fit and expedient in the facts and circumstances of this matter.

Dated 15-07-2020
Hyderabad T.S.

COUNSEL FOR THE PETITIONER



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IN THE HIGH COURT OF JUDICATURE AT
HYDERABAD FOR THE STATE OF
TELANGANA

(Special Original Jurisdiction under Art. 226 of the Constitution of India)

W.P. No. 10680 of 2020

Between;

M/s. Fatima Poultry Farm, Survey No. 225
(Part) and 228 (Part), Thummaluru Village,
Maheshwaram Mandal, R.R District 501359
T.S. Rep., by its proprietor, Mohd Raza Nabi,
S/o. Haji Ali Nabi, Aged 62 years.

APPELLANT

AND

1. The State of Telangana represented by
the Prl. Secretary, Revenue Department,
Hyderabad T.S.

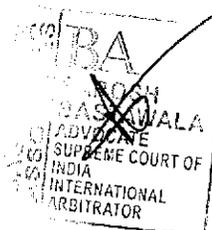
2. The District Collector, Range Reddy
District, Khairtabad, Hyderabad 500004 T.S.

3. The Revenue Divisional Officer,
Kandakur Division, Kandakur, Range Reddy
District, T.S.

4. The Environmental Engineer, T.S.
Pollution Control Board, Regional Office – I,
R.R. Dist., at 6-3-1219, Block C, Ward 91, 2nd
Floor, Backside of Country Club, Kundan
Bagh, Uma Nager, Begumpet, Hyderabad
500016, T.S. and

5. The Tahsildar, Maheshwaram Mandal,
Maheshwaram, Range Reddy District, 506311
T.S.

RESPONDENTS

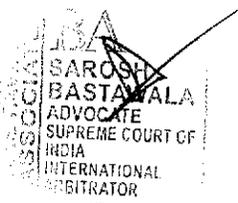


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AFFIDAVIT OF THE PETITIONER

I, Mohd Raza Nabi, S/o. Haji Ali Nabi, Aged 62 years, Proprietor,
M/s. Fatima Poultry Farm, Survey No. 225 (Part) and 228 (Part),
Thummaluru Village, Maheshwaram Mandal, R.R District 501359
T.S., do hereby solemnly state and affirm as under:

1. That I am the Petitioner in this matter of Writ Petition filed under the provisions of Article 226 of the Constitution of India and I am well aware of the facts and circumstances of this matter.
2. In the aforesaid matter the instrumentalities of the Respondent No 4 herein, the T.S. State Pollution Control Board had passed the order under Telangana State pollution Control Board, No 3-Complaint/TSPCB/RO.1-RRD/2019-454 dated 27-09-2019, and the same was challenged by way of Writ Petition No 22353 of 2019 before the T.S. High Court and the court was originally pleased to stay all further proceedings, on 14-10-2019 and later this stay was extended on 08-11-2020, and finally on 06-12-2019, a Undertaking affidavit was filed by this Petitioner, would either seek consent to operate from the T.S. State Pollution Control Board, or close the Poultry Farm, within six weeks



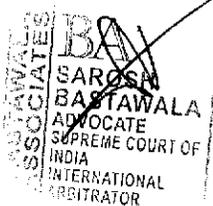
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therefrom, and the court recorded the said affidavit and passed order in lines thereof.

3. The Petitioner made an application within the time frame for Consent to Operate under Application No CTO (Air & Water) No 2341317 dated 13-01-2020 on the web site provided by the instrumentalities of the Respondent No 4 under File No 2341317. The said matter was pending when the National Lockdown was enforced in the country from 22-03-2020.

4. Also in the matter the Petitioner has also filed an Appeal No 10 (SZ) of 2020 before the National Green Tribunal, South Zone, at Chennai, and the National Green Tribunal, South Zone, at Chennai, has at its next hearing on 31st March 2020 after notice was issued to the Respondent No 4's organisation, who sought to wait for processing and determination of the Application for consent filed by the Petitioner herein. However with the National Lockdown this matter has been adjourned from time to time.

5. During the National Lockdown the instrumentalities and superiors of the Respondent No. 4's organisation issued an order No 96/TSPCB/Gen/CFE&CF/HO/2018 dated 29-04-2020 stating that in all pending matters the office will internally rely only on



internal e-mails and not on any physical inspections or other means of determination, including hearings in matter arising out of applications for consent to operate institutions.

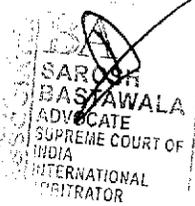
6. Later by an email to the concerned Environment Consultant in the matter of the Application of the Petitioner for consent to operate, on 12-06-2020, without any inspection before that date, or notice of personal hearing, and absolutely without assigning any reasons thereto, the application filed by the Petitioner under File No 2341317, under Reference No 7 was summarily rejected, and so far no reasons thereto have been assigned or placed upon record.
7. Thereafter the rejection of the said application for Consent to operate the Respondent No 4 addressed the Respondent No 5 herein, avoiding any reference to the Application for Consent to Operate on the premises that the Petition was using alternation source of Power, as the Electricity was already disconnected, and instructed for the seizure of the Poultry Farm.
8. On 02-07-2020 the premises of the Petitioner was inspected personally by the Respondent No 5 herein, and on 03-07-2020 a detailed note in the matter and circumstances of the matter also

with voluminous documents thereof were also filed by my counsel at the office on the Respondent No 5 herein. During the course of this inspection the Respondent No 5 has also personally observed the presence of about 50,000 live poultry birds on the farm.

9. The Respondent No 5 herein has after the receipt of the application of the petitioner, filed through his counsel, has not held any personal hearing or given any notice to the petitioner and has gone on to issue the impugned proceedings herein in proceeding No B/1212/2020 dated 07-07-2020 and received by the Petitioner on 08-07-2020, ordering and directing the closure of the Poultry Farm within "week days" failing which the respondent No 5 has threatened to seize the said poultry farm.

10. The order smacks of gross malades, non-application of mind and acting under dictation on the part of the Respondent No 5 herein, and even the minimum requirements of the law in force have been given a go-by and the action of the Respondent No 5 is capricious and lacks the force of law.

11. The Respondent No 5 has also personally observed that there are about 50,000 live birds left over in the poultry farm. It would be relevant and germane to refer to the views of the apex



court in *Animal Welfare Board of India v. A. Nagaraja*, (2014) 7 SCC 547, wherein the apex court per held that animals have a right to live with dignity, intrinsic worth and without unnecessary pain and suffering. The Court while dealing with the matter directed the Animal Welfare Boards of India and Governments "to take steps to prevent the infliction of unnecessary pain or suffering on the animals, since their rights have been statutorily protected under sections 3 and 11 of Prevention of Cruelty to Animals Act 1960. Later the government has also promulgated the Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules 2017 notified by the Central government, with effect from 23.05.2017.

12. As the matter is pending in Appeal No 10 (SZ) of 2020 before the National Green Tribunal, Chennai, and the said tribunal in under lockdown due to the Covid-19 situation in Tamil Naidu, and total lockdown in the city of Chennai, efforts are being made to the Principal Bench of the National Green Tribunal New Delhi for urgent hearing and the matter will be taken up in due course, after the physical transfer of records thereto.

13. Therefore the Counsel for the Petitioner, in view of the above orders, and pendency of the matters before the National Green

Tribunal in Chennai and now in New Delhi, and the general directions of the Supreme Court and the T.S. High Court for suspension of execution of all orders passes from time to time, addressed the Respondent No 5 to cease and desist from taking any coercive action of whatever nature in the matter pending the adjudication of the matter at length and not to jeopardise the lives of the 50,000 poultry birds presently domiciled on the farm.

14. It is also submitted that we have no other alternative or efficacious remedy except to invoke the extraordinary jurisdiction of the Honourable Court under Article 226 of the Constitution of India.

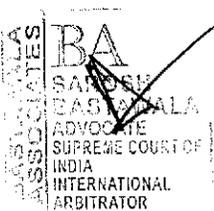
15. It is also submitted that we have not filed any suit or initiated any proceedings in any court of law or forum except this present petition.

Therefore this court shall be pleased to issues a writ order or direction more so in the nature of a Writ of Mandamus to the Respondents and particularly the Respondent No 5 herein to cease and desist from giving effect to the proceedings of the Respondent No 5 in No B/1212/2020



dated 07-07-2020 and received by the Petitioner on 08-07-2020, in the matter of the sealing the Poultry Farm of the Petitioner No 1 situated at Survey No. 225 (Part) and 228 (Part), Thummaluru Village, Maheshwaram Mandal, R.R District 501359, and this court may be pleased to pass such other order or orders as this Learned Honourable Court may see fit and expedient in the facts and circumstances of this matter.

This court also may also be pleased to direct the Respondents and more particularly the Respondent No 5 herein, not to implement the proceedings of the Respondent No 5 in No B/1212/2020 dated 07-07-2020 and received by the Petitioner on 08-07-2020, in the matter of the sealing the Poultry Farm of the Petitioner No 1 situated at Survey No. 225 (Part) and 228 (Part), Thummaluru Village, Maheshwaram Mandal, R.R District 501359, pending this Writ Petition and this court may be pleased to pass such other order or orders as this Learned Honourable Court



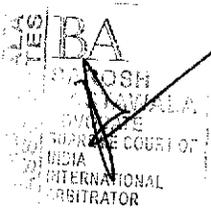
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may see fit and expedient in the facts and circumstances of
this matter.

Dated 15-07-2020
Hyderabad T.S.

DEPONENT

Verified and signed on this the 15th day of July 2020 at Hyderabad
T.S.

ADVOCATE/ HYDERABAD



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VERIFICATION

I, Mohd Raza Nabi, S/o. Haji Ali Nabi, Aged 62 years, Proprietor, M/s. Fatima Poultry Farm, Survey No. 225 (Part) and 228 (Part), Thummaluru Village, Maheshwaram Mandal, R.R District 501359 T.S., do hereby solemnly state and affirm that the contents of this affidavit in support of this writ petition is true and correct to the best of my knowledge information and belief, and hence sworn in herein under.

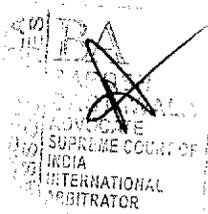
Dated 15-07-2020

Hyderabad T.S.

DEPONENT

Verified and signed on this the 15th day of July 2020 at Hyderabad T.S.

ADVOCATE/ HYDERABAD



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Dated 25-07-2020

From
M/s. Fatima Poultry Farm,
Rep. by Prop. Mohd Raza Nabi,
S/o. Haji Ali Nabi,
Survey No. 225 (Part) &
228 (Part),
Thummaluru Village,
Maheshwaram Mandal,
R.R District 501359 T.S.

To,
The Tahsildar
Maheshwaram Mandal,
Maheshwaram,
Ranga Reddy District, 506311 T.S.

Madam

Ref:

1. In Matter of your Notice No B/1212/2020 dated 07-07-2020 received by me on 08-07-2020.
2. My undertaking letter dated 13-07-2020.

In the aforesaid matter, I beg to state that in response of the aforesaid notice, I had already given an undertaking letter dated 13-07-2020 and in compliance thereof I have cause the removal of all the Layer Birds from the Poultry Farm on 20th and 21st - 07-2020 which was witnessed and recorded by your authority and in light there I shall be grateful if the matter is so recorded


Page 1 of 2

by this Learned Honorable Authority. It will also be relevant to state that the instrumentalities of this authority were also present at the time of the removal of the Layer Poultry Birds.

I shall remain ever grateful to this authority for its kindness and fortitude and for graciously enough to accede to our most humble application and dealing with this issue with a humane approach both to the live birds on the farm and to my advancing age in managing the affairs of the farm.

Thanking you once again.

2.

Yours faithfully
For M/s. Fatima Poultry Farm.

Mohd

Prop. Mohd Raza Nabi,
S/o. Haji Ali Nabi,

I also kindly submit that I would not resume any poultry activities on the said land, for the sake of clearing activities and safety there are about 15 labourers staying in the said area for livelihood.

Yours faithfully
For M/s Fatima Poultry
Prop. Mohd. Raza Nabi
S/o. Haji Ali Nabi.

11/11/2020
MPO Muzammas
1/1/20
15/08/2020



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Dated 13-07-2020

From
M/s. Fatima Poultry Farm,
Rep. by Prop. Mohd Raza Nabi,
S/o. Haji Ali Nabi,
Survey No. 225 (Part) &
228 (Part),
Thummaluru Village,
Maheshwaram Mandal,
R.R District 501359 T.S.

To,
The Tahsildar
Maheshwaram Mandal,
Maheshwaram,
Ranga Reddy District, 506311 T.S.

Madam

In Matter of Notice No B/1212/2020 dated
07-07-2020 received by me on 08-07-2020

In the aforesaid matter, I beg to state that in response of the aforesaid notice that as per your observation there are about 50,000 live poultry birds on the said farm, and you would appreciate that it will take time to remove the same from the premises, I do hereby most humbly request you to permit me an extended period for the implementation of the said above referred notice, equal to six months here from, or such extended period your authority may be kind enough to extend the implementation of the said notice to enable us to humanely

Page 1 of 2



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remove the Live Poultry birds from the said premises, for which act of kindness I shall remain grateful to you.

I shall also be grateful if you will order and direct the re-connection of the electricity to the said premises, to enable me to remove the birds much quicker, and I shall be grateful if you will make to remove the birds as soon as possible without even a moment's delay, waiting for the end of the extended period granted so kindly by this authority.

I therefore submit this written application and I shall be grateful if you shall be graciously pleased to accede to this humble application and deal with it kindly with a humane approach both to the live birds on the farm and to my advancing age in managing the affairs of the farm.

Thanking you in anticipation.

Yours faithfully
For M/s. Fatima Poultry Farm,

Prop. Mohd Raza Nabi,
S/o. Haji Ali Nabi,



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**Government of Telangana
Revenue Department**

Office of the Tahsildar,
Maheshwaram Mandal,
Ranga Reddy District.

No.B/1212/2020

Dated: 7 -07-2020

NOTICE

Sub:- TSPCB - RO1-Ranga Reddy District - M/s.Fathima Poultry Farm, Sy.No.225/Part & 228/Part, Beside BTR Gated Community, Thummaloor Village Maheshwaram Mandal - Ranga Reddy District
Smell Nuisance caused by the Poultry farm in the surrounding areas - closer orders issued by TSPCB - continuing operations by installing Solar Power - Requested for seize the Poultry Form - Reg.

**Ref:- Environmental Engineer TSPCB, Regional Office-1,
Ranga Reddy District Lr.No.3/Complaint/PCB/RO1-RRD/
2020-1223, Dtaed:26-06-2020.**

It is to inform that the Environmental Engineer TSPCB, Regional Office-1, Ranga Reddy District vide his letter Dated:26-06-2020, addressed the undersigned stating that M/s.Fathima Poultry & its proprietor is conducting Poultry activities in the premises contrary to the closer order issued by PCB and also in violation and disregard of the orders of the Hon'ble High Court by illegally using alternate source of Power Supply, even though the Electricity was officially disconnected by the TSSPDCL.

Therefore it is requested to seize M/s.Fathima Poultry Farm situated at Sy.No.225/Part & 228/Part beside BTR Gated Community Thummaloor Village Mahehsaram Mandal Ranga Reddy District and report compliance within (7) days.

Accordingly, I have inspected the M/s.Fathima Poultry Farm situated at Sy.No.225/Part & 228/Part beside BTR Gated Community Thummaloor Village Mahehsaram Mandal Ranga Reddy District on 04-07-2020. During my inspection I have observed that there are 50,000 Live Birds are existed in the Poultry Farm, if the Farm will seize the damage will causes to live Birds

However, In view of implement the Hon'ble High Court orders Dated:06-12-2019 in WP.No.22353/2019 and the Closure orders of the Pollution Control Board Dated:27-09-2019 the Proprietor M/s.Fathima Poultry Farm have been requested to shift the existing Birds from the Poultry Farm to avoid damage to the Birds and also Snell Nuisance in the surrounding area thereby affecting the public Health and Environment within week days for seizure of Farm.

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If you are failed to shift the Birds from the existing Farm with in the stipulated Time action will be taken for seizure of Farm and any damage causes to the Live Birds will lies on the Proprietor only.

Tahsildar 7/7/2020
Maheshwaram Mandal

To
M/s. Fathima Poultry Farms Rep. By its Proprietor
Mohammed Raza Nabi S/o. Hazi Ali Nabi
Sy.No.225/Part & 228/Part, Thummaloor Village, Maheshwaram Mandal,
Ranga Reddy District.

Copy Submitted To:

1. The Environmental Engineer TS Pollution Control Board Regional Office-1 R.R. Dist., at 6-3-1219, Block-C, Ward 91, 2nd Floor, Backside of Country Club, Kundan Bagh, Uma Nagar, Begumpet, Hyderabad-500016.
2. The District Collector Ranga Reddy District for favour of kind information.
3. The Revenue Divisional Officer Kandukur Division, for favour of kind information.

SARVESH
SASAWALA
ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
ARBITRATOR

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**Government of Telangana
Revenue Department**

From
R.P Jyothi,
Tahsildar,
Maheshwaram Mandal.

To
The Environmental Engineer
TS Pollution Control Board
R.R.Dist., at 6-3-1219, Block-
C, Ward 91, 2nd Floor, Backside
of Country Club, Kundan
Bagh, Uma Nagar, Begumpet,
Hyderabad-500016.

Lr No. B/ 1212 / 2020 Dated: 4-07-2020

Sub:- TSPCB - RO1-Ranga Reddy District - M/s.Fathima Poultry Farm, Sy.No.225/Part & 228/Part beside BTR Gated Community, Thummaloor Village Maheshwaram Mandal - Ranga Reddy District. Smell Nuisance caused by the Poultry farm in the surrounding areas. closure orders issued by TSPCB - continuing operations by installing Solar Power. Requested for seize the Poultry Farm - Compliance Report Submitted.

**Ref:- 1. Environmental Engineer TSPCB, Regional Office-1, Ranga Reddy District Letter No. 2020-1223, Dtaed:26-06-2020
2. This Office Notice No. B/1212/2020 Dated: 07-07-2020.**

I invite kind attention to the fact that as cited where in the Environmental Engineer TSPCB, Regional Office-1, Ranga Reddy District vide his letter Dated:26-06-2020, addressed the complaint stating that M/s.Fathima Poultry & its proprietor is conducting Poultry activities in the premises contrary to the closer order issued by PCB and also in violation and disregard of the orders of the Hon'ble High Court by illegally using alternate source of Power Supply, even though the Electricity was officially connected by the TSSPDCL. As such it was requested to seize M/s.Fathima Poultry Farm situated at Sy.No.225/Part & 228/Part beside BTR Gated Community Thummaloor Village Maheshwaram Mandal Ranga Reddy District and to ensure compliance within (7) days.

Accordingly, I have inspected M/s.Fathima Poultry Farm situated at Sy.No.225/Part & 228/Part beside BTR Gated Community Thummaloor Village Maheshwaram Mandal Ranga Reddy District on 04-07-2020. During my inspection it was observed that there are 20,000 Live Birds are existed in the Poultry Farm, if the Farm will seize the birds will causes to live Birds.

Further, the Proprietor M/s.Fathima Poultry Farm have been requested vide reference 2nd cited to shift the birds from the Poultry Farm to avoid damage to the Birds and also Smell nuisance in the surrounding area thereby affecting the public Health and Environment. Requested within week days for seizure of in view of implementation of Hon'ble High Court orders

SAROSH
B.S. Parvathi
ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
ARBITRATOR

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Dated:06-12-2019 in WP.No.22/2019 and the Closure orders of the Pollution Control Board Dated:27-07-2020

In reply to the said notice the proprietor M/s.Fathima Poultry Farm shifted the live birds from the said premises on 20th and 21st of July 2020 and given an undertaking that he would not resume any poultry activities in the said land. For the sake of cleaning and safety of the said land there are 15 labourers staying in the said area for their livelihood.

This is for favour of kind information.

Yours Faithfully

Encl: 1) Undertaking Dated :27-07-2020

T. J. S.
Tahsildar 4/8/2020
Maheshwaram Mandal

Copy Submitted To:

1. The District Collector Ranga Reddy District for favour of kind information.
2. The Revenue Divisional Officer Maheshwaram Division, for favour of kind information.
3. Copy to M/s. Fathima Poultry Farm By its Proprietor
Mohammed Raza Nabi S/o.Hazi A. S. Village, Mahehswaram Mandal,
Sy.No.225/Part & 228/Part, Thundavolu Village, Ranga Reddy District.

BA
ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
ARBITRATOR

**BASTAWALA
ASSOCIATES**

BA

ADVOCATES
SUPREME COURT OF INDIA
HIGH COURTS
INTERNATIONAL ARBITRATORS

SAROSH BASTAWALA

B.Com.(Hons), LL.B., LL.M. (PhD)

ADVOCATE

SUPREME COURT OF INDIA

Flat No. 408, Block B,
Okaz Apartments,
Humayun Nager, Mehdiapatnam,
Hyderabad 500028, T.S. India

0091 939 111 5412
0091 990 876 0005

Fax
0091 40 23536059

Email:
saroshsb@gmail.com
saroshbastawala@msn.com

To,
The Deputy Tahsildar /
Mandal Revenue Officer,
Maheshwaram Mandal,
Range Reddy District,
Hyderabad 506311, T.S.

19-06-2020

03-07-2020

Sir

In Re: The matter of M/s Fatima Poultry Farm,
Rep by its proprietor Mr Mohd Reza Nabi, S/o
Ali Nabi.

Ref: *
1. Orders of the Telangana State pollution
Control Board, No 3-Complaint/TSPCB/RO.1-
RRD/2019-454 dated 27-09-2019.

2. Interim Stay Orders of the Single Judge of
the T.S. High Court dated 14-10-2019 in W.P.
No. 22353 of 2019.

3. Extension of the Interim Stay Orders of
the Divisional Bench of the T.S. High Court
dated 14-10-2019 in W.P. No. 22353 of 2019.



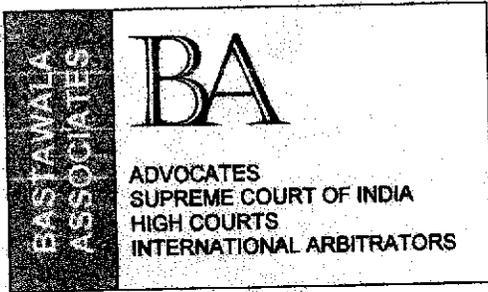
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4. Extension of the Interim Stay Orders of the Divisional Bench of the T.S. High Court dated 08-11-2019 in W.P. No. 22353 of 2019.
5. Undertaking affidavit dated 06-12-2019 filed by this Petitioner in the matter of obtaining Consent from the Telangana State Pollution Control Board or closure of the unit within six weeks therefrom before the T.S. High Court.
6. Recording of Undertaking affidavit, and Extension of the Interim Stay Orders of the Divisional Bench of the T.S. High Court dated 06-12-2019 in W.P. No. 22353 of 2019.
7. Application filed to the Telangana State Pollution Control Board for Consent to Operate Poultry Farm under Application No 2341317 (under Application Receipt No 158400630) dated 14-01-2020.
8. Appeal in Appeal / Applicant No 10 (SZ) of 2020, under Section 18(1) read with Section 16(c) [in relation to orders under Section 33-A of the Water (Prevention and Control of Pollution) Act 1974, (6 of 1974)] and Section 14 [in relation to orders under Section 31-A of the Air (Prevention and Control of Pollution Act, 1981, (14 of 1981)], of the National Green Tribunal Act 2010 (19 of 2010) by the applicant before the National Green Tribunal south Zone Chennai.

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9. General Suo-moto Orders of the High Court in Suo-moto W.P. No. Urgent 1 of 2020 dated 27-03-2020.
10. General Suo-moto Orders of the High Court in Suo-moto W.P. No. Urgent 1 of 2020 dated 08-06-2020.
11. General Suo-moto Orders of the High Court in Suo-moto W.P. No. 1 of 2020 dated 08-06-2020.
12. ROC No 394/SO/2020 dated 09-06-2020 of the Registrar General of the High Court.
13. Communication of Rejection [*reasons assigned not furnished or communicated so far*], of the Application filed to the Telangana State Pollution Control Board for Consent to Operate Poultry Farm under Application No 2341317 dated 12-06-2020.
14. ROC No 394/SO/2020 dated 27-06-2020 of the Registrar General of the High Court.

In the aforesaid matter the T.S. State Pollution Control Board had passed the order under reference No 1 herein, and the same was challenged by way of Writ Petition No 22353 of 2019 before the T.S. High Court and the court from time to time under References Nos 3, 5 & 4, was pleased to stay the operation of the said orders. Under Reference No 5 above this applicant has tendered an undertaking affidavit before the T.S. High Court that this applicant would seek consent to operate from the T.S. State Pollution Control Board, or close the Poultry Farm, and in likes of the same the T.S. High Court was pleased to pass the order under the



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Reference No 6 above. The Main Writ Petition No 22353 of 2019 is however still pending.

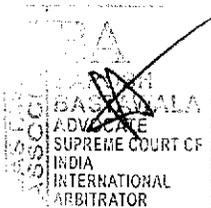
This Applicant has made an application for consent to operate online after the payment of the requisite fees under the Reference No 7 above.

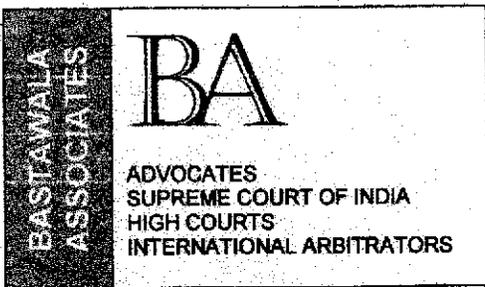
This Applicant has also filed Appeal No 10 (SZ) of 2020 before the National Green Tribunal, South Zone, at Chennai, and the national Green Tribunal, South Zone, at Chennai, has at its hearing on – March 2020 issued notice to the T.S. State Pollution Control Board, and sought to wait for processing and determination of the Application for consent filed under Reference No 7 hereinabove.

The matter under reference No 7 above was pending when the National Lockdown due to Covid-19, intervened and the T.S. High Court have passed a series of orders of suspension of court proceedings and extension of orders under the References 9,10,11, 12, & 14 above.

Under Reference No 13, on 12-06-2020 without any inspection before that date, or notice of personal hearing, and without assigning any reasons thereto, the application under Reference No 7 was summarily rejected, and so far no reasons thereto have been assigned or filed.

As the matter is pending in Appeal No 10 (SZ) of 2020 before the National Green Tribunal, Chennai, and the said tribunal in under lockdown due to the Covid-19 situation in Tamil Naidu, and total lockdown in the city of Chennai, efforts are being made to the Principal Bench of the National Green Tribunal New Delhi for





SAROSH BASTAWALA
Advocate - Supreme Court of India

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urgent hearing and the matter will be taken up is due course, after the physical transfer of records thereto.

Therefore in view of the above orders, and pendency of the matters before the National Green Tribunal in Chennai and now in New Delhi, and the general directions of the Supreme Court and the T.S. High Court for suspension of execution of all orders passes from time to time, I hope that you shall cease and desist from taking any coercive action of whatever nature in the matter.

Yours faithfully

SAROSH BASTAWALA

Encl:

Full file of the Matter filed before the Application / Appeal No 10 (SZ) of 2020 before the National Green Tribunal, South Zone, Chennai pending as of this day. [326 Pages]

BASTAWALA ASSOCIATES

SAROSH BASTAWALA
ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
ARBITRATOR

[Handwritten signatures]

M Gmail

SAROSH SAM BASTAWALA <saroshsb@gmail.com>

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Fwd: Application Rejected(OCMMS)

1 message

Ahmed Alishah <shahidali789@gmail.com>
To: saroshsb@gmail.com

10 July 2020 at 10:21

PFA

----- Forwarded message -----

From: **Ahmed Alishah** <shahidali789@gmail.com>
Date: Fri, Jul 10, 2020, 10:07 AM
Subject: Fwd: Application Rejected(OCMMS)
To: <fatimapoultry786@yahoo.co.in>

----- Forwarded message -----

From: <ocmms-tspcb@nic.in>
Date: Fri, Jun 12, 2020, 3:03 PM
Subject: Application Rejected(OCMMS)
To: <shahidali789@gmail.com>

Dear Mohammad Raza Nabi,

Your Application for CTO (Air & Water) no. 2341317 has been rejected due to some Reason. Please check your OCMMS Account for details.

Thanks & Regards:

TSPCB

SAROSH SAM BASTAWALA
ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
ARBITRATOR



OFFICE ORDER

Order No. 96/TSPCB/Gen/CFE&CFO/HO/2016

Dt: 29.04.2020

The Telangana State Pollution Control Board issues Consent for Establishment (CFE) and Consent for Operation (CFO) under Section 25 and 26 of Water (Prevention and Control of Pollution) Act, 1974 and section 21 of the Air (Prevention and Control of Pollution) Act, 1981 for establishing and operation of the industries in the State of Telangana. The applications are processed by examining in the CFE & CFO Committee meetings.

The Board has been receiving CFE and CFO applications from various industries for issue and renewal of CFE & CFO.

It is observed that some of the industries are manufacturing life saving products and related activities. The Government has also instructed the concerned departments to process the applications on priority. Due to the prevailing Lock Down, the Committee meetings could not be conducted.

Now, therefore, the Telangana State Pollution Control Board in public interest hereby informs that the applications submitted by the industries for CFE and CFO will be processed by obtaining recommendations of the CFE & CFO Committee members through e-mail.

Hence, all the industries are advised to apply for CFE and CFO permission online at <https://ipass.telangana.gov.in/> / <http://tsocmms.nic.in/TLNPCB>. The applications will be processed and clearances will be issued by the Competent Authority as per norms.

Sd/-
MEMBER SECRETARY

To
All the industries / Project proponents.

Copy to:

1. The Zonal Officers (Hyderabad & R.C. Puram) for information and necessary action.
2. All the Regional Officers of the Board for information and necessary action.

// T.C.F.B.O. //

[Signature]
Chief Environmental Engineer



MILLS v. JENNINGS.

[1877 M. 275.]

Mortgage—Consolidation—Parties—Redemption Suit—Trustees—Rules of Court, 1875, Order XVI., r. 7.

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Jan. 27;
Feb. 9, 1880.

The rule that the mortgagee of two estates belonging to the same mortgagor may consolidate them so that one cannot be redeemed without the other, does not apply to a case in which one of the mortgages was created subsequently to the assignment of the equity of redemption to the person seeking to redeem.

Tassell v. Smith (1) not followed.

In a suit for redemption, bare trustees of the equity of redemption sufficiently represent the trust estate without the presence of the persons beneficially interested under Order XVI., r. 7.

Goldsmid v. Stonehewer (2) distinguished.

The decision of *Bacon*, V.C., reversed.

Where mortgages of two different properties had been made by the same mortgagor at different dates, and the mortgages had been consolidated by a mortgagee, and the mortgagor had conveyed the equities of redemption to different purchasers, the equity of redemption of the second mortgage being conveyed before the equity of redemption of the first mortgage.

Held, in an action for redemption by the owner of the equity of redemption of the second mortgage, that he was entitled to the first right of redemption of both mortgages.

THIS action was brought by *John Mills*, since deceased, and *Edwin Jordan*, against *John Jennings*, to redeem a mortgage and further charge on certain copyhold property at *Oheltenham*, comprising the *Calcutta Inn* and several cottages, under the following circumstances:—

On the 6th of October, 1836, *Thomas Tale* surrendered the above-mentioned property to the use of *John Merrett*, by way of mortgage for securing £500 and interest, and on the 6th of December, 1837, he charged the same property with a further sum of £250.

On the 3rd of December, 1838, *Thomas Tale* settled the equity of redemption of two cottages, part of the above-mentioned premises, on the occasion of the marriage of his daughter, and conveyed the same to trustees upon the trusts of the settlement. The Plaintiffs were the present trustees of the settlement.

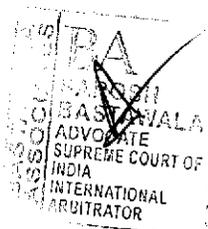
(1) 2 De G. & J. 713.

(2) 9 Hare, App. xxxviii.

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On the 21st of December, 1857, *J. Merrett* died, and his devisees transferred the mortgage and further charge to the Defendant, *J. Jennings*.

In March, 1858, default having been made in payment of the interest, the Defendant entered into possession of the mortgaged property, and remained in possession till the commencement of the present action, which was in August, 1877.

The Plaintiffs asked for an account against the Defendant, as mortgagee in possession, and claimed the right to redeem the mortgaged premises.

The Defendant put in a statement of defence, in which he stated the following facts:—

By indentures of the 26th and 27th of August, 1834, *Thomas Tale* mortgaged certain freehold land in *Cheltenham* to *R. Middleton* for £300, and on the 27th of February, 1836, he charged it with a further sum of £200.

On the 16th of December, 1836, *Thomas Tale* charged the same premises, and also the property comprised in *Merrett's* mortgage, with a further sum of £1000 due to *Middleton*.

On the 28th of February, 1842, these mortgage securities were transferred to *John Tale*, and ultimately became vested in the Defendant, who denied that he had any knowledge of the Plaintiffs' settlement till the commencement of the action.

On the 30th of October, 1839, subsequently to the date of the Plaintiffs' settlement, *T. Tale* surrendered a piece of copyhold land in *Union Street, Cheltenham*, to the use of *John Tale*, for securing £100 and interest. The equitable interest in this mortgage had become vested in the Defendant, but the property had never been surrendered to him.

The Defendant claimed to consolidate the mortgage securities of the freehold land comprised in *Middleton's* mortgage, and also the mortgage of the *Union Street* property with *Merrett's* mortgage, so that the latter might not be redeemed without redeeming the others.

He also objected that the persons entitled to the equity of redemption of the *Middleton* and *Union Street* mortgages were not parties to the action.

The action was tried on the 5th of November, 1878, before Vice-Chancellor *Bacon*. The surviving Plaintiff did not dispute

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the right of the Defendant to consolidate *Middleton's* mortgage with *Merrett's* mortgage, but he denied his right to consolidate the *Union Street* mortgage, which was subsequent in date to the Plaintiff's settlement. The Vice-Chancellor held that the action could not proceed in the absence of the persons interested in the equity of redemption of the mortgages sought to be consolidated, and ordered the action to stand over, with liberty to the Plaintiff to amend by adding parties; and his Lordship declined to give any opinion as to the right of the Defendant to consolidate the *Union Street* mortgage, until the persons entitled to the equity of redemption were made parties.

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The Plaintiff accordingly amended his statement of claim by stating that by an indenture dated the 6th of May, 1868, *T. Tale* conveyed the equity of redemption in the property subject to *Merrett's* mortgage, except the two settled cottages, and the *Middleton* mortgage to *W. Maule* (since deceased) and *William Price*, and then added *Price* as a Defendant to the action. But he did not add as parties the persons entitled to the equity of redemption in the *Union Street* mortgage.

It appeared by the deed of conveyance of the 6th of May, 1868, that *Maule* and *Price* were bare trustees of the property for other persons not before the Court.

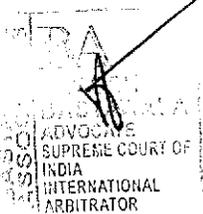
The Defendant set up an alleged deed of the 8th of October, 1845, by which *T. Tale* was expressed to assign the equity of redemption in the premises comprised in the *Middleton* and *Union Street* mortgages to a trustee for *George Tale*, who was not a party to the action. But the Plaintiff denied that such a deed had ever been executed by *T. Tale*.

On the 2nd of April, 1879, the action came on again before Vice-Chancellor *Bacon*, when his Lordship held upon the evidence, that the deed of the 8th of October, 1845 had been executed by *T. Tale*, and therefore that the parties entitled to the equity of redemption of the *Middleton* and *Union Street* mortgages were not before the Court. As, therefore, the order of the 5th of November, 1878, had not been complied with, his Lordship dismissed the action with costs.

From this decision the Plaintiff appealed. The appeal came on for hearing on the 27th of January, 1880.

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The first question that was argued on the appeal was whether the assignment of the equity of redemption of the mortgaged property by the deed of the 8th of October, 1845, was executed by *T. Tale*. This was asserted by the Defendant but denied by the Plaintiff.

THE COURT decided that the evidence shewed that the alleged deed was never executed.

It was then objected by the Defendant that the deed of the 6th of May, 1868, by which the equity of redemption of part of the *Merrett* mortgage and of the *Middleton* mortgage was assigned to *Maule* and *Price*, was not executed by *T. Tale*.

THE COURT held, on the evidence, that the deed was duly executed.

It was next objected on the part of the Defendant that the Plaintiff and *J. Price* being bare trustees did not sufficiently represent the persons interested in the equity of redemption.

Sir *H. Jackson*, Q.C., and *Townsend*, for the Defendant:—

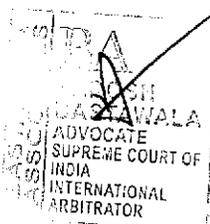
Order XVI., r. 7, under which trustees, executors, and administrators may sue and be sued as representing the property of which they are trustees or representatives, is only a repetition of the 9th rule of sect. 42 of the 15 & 16 Vict. c. 86. Under that Act it has been held that trustees do not represent their *cestuis que trust* in suits for the redemption or foreclosure of mortgages: *Goldsmid v. Stonehewer* (1); *Fisher on Mortgages* (2). It may be different in the case of executors or trustees who have funds available for the purpose of redemption, but the trustees in the present case are admitted to have no such powers. This interpretation of the rule is founded on reason, for it would be very hard if an estate were lost to the *cestuis que trust* in their absence by the inability of their trustee to redeem.

North, Q.C., and *Millar*, for the Plaintiff.

The limitation of the rule referred to only applies to suits for

(1) 9 Hare, App. xxxviii.

(2) 3rd Ed. p. 909.



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foreclosure. It has no application to cases like the present, where the Plaintiffs offer to redeem. The trustees would sufficiently represent their *cestuis que trust* under the clause in the former Act, but still more so under the *Judicature Act*, by which trustees and executors are put on the same footing: *Simpson v. Denny* (1).

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THE COURT reserved the question, and directed the argument to proceed on the remaining points.

North, Q.C., and Millar, for the Plaintiff:—

The main question now remains, whether the Defendant has a right to consolidate the *Union Street* mortgage with his other mortgages. We contend that he has not, because it was made subsequently to the date of the settlement of the equity of redemption under which we claim. The principle upon which a mortgagee is entitled to consolidation as against the purchaser of an equity of redemption is that the purchaser is bound by the same equities as the original mortgagor, and he is able to make inquiries and ascertain what those equities are: *Vint v. Padget* (2). But that can only apply to equities which exist at the time of the transfer. How can he be bound by anything which the mortgagor may think fit to do with his other estates after the purchase is completed, and which it is impossible for the purchaser to know anything about? The decision of the Court of Appeal in *Tassell v. Smith* (3) is cited as conclusive against us. But that case was decided on the special circumstances, and in *Baker v. Gray* (4) Vice-Chancellor *Hall* declined to consider it an authority for the proposition that consolidation could be claimed in the case of a mortgage which did not exist when the purchase of the equity of redemption took place. If that case went to that extent it was contrary to the previous authorities and ought not to be followed: *White v. Hillacre* (5); *Titley v. Davies* (6).

If the Court should be of opinion that the Defendant is entitled to consolidate the *Union Street* mortgage with the others, it does

(1) 10 Ch. D. 28.

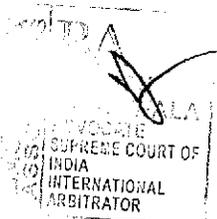
(2) 3 De G. & J. 611.

(3) 2 De G. & J. 713.

(4) 1 Ch. D. 491.

(5) 2 Y. & C. Ex. 597.

(6) 2 Y. & C. Ch. 399, n.



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not follow that the owners of the equity of redemption of that property must be parties to the suit. If the Defendant is entitled to have the *Union Street* mortgage paid off, we will pay him off, and we shall stand in his place and take a transfer of his mortgage: *Cracknall v. Janson* (1). That will not injure the mortgagors, whoever they may be.

Sir. *H. Jackson*, Q.C., and *Townsend*, for the Defendant:—

A mortgagee of two estates has a right to consolidate them as against a purchaser of the equity of redemption of either of them, whether the other mortgage be prior or subsequent to his purchase. That was distinctly decided in *Tassell v. Smith* (2), which was followed by *Beevor v. Luck* (3). In the latter case Lord *Hatherley*, then Vice-Chancellor, practically overruled *White v. Hillacre* (4). If a man takes a conveyance or a security without getting the legal estate, he takes it with notice not only that certain equities exist, but others may arise affecting the estate: *Ireson v. Denn* (5). In *Baker v. Gray* (6) Vice-Chancellor *Hall* recognised *Tassell v. Smith*, but thought it distinguishable. The rights of a mortgagee as to tacking or consolidation are the same whether the suit is for redemption or foreclosure: *Watts v. Symes* (7); *Selby v. Pomfret* (8).

If the Defendant is entitled to consolidate the *Union Street* mortgage, the Plaintiff cannot have a decree unless the mortgagors are made parties. How can the account be taken of what is done to the Defendant in the absence of the mortgagors? *Cholmondeley v. Clinton* (9). The Plaintiff has no right to force the Defendant to give him a transfer of his mortgage. He may wish to keep his money invested in the *Union Street* mortgage.

If the Court should hold that the Defendant is not entitled to consolidate the *Union Street*, but only the *Middleton* mortgage, the *Middleton* mortgage being the first in date must be first redeemed. Therefore *Price* must first redeem, and if he cannot

(1) 11 Ch. D. 1, 16.

(2) 2 De G. & J. 713.

(3) Law Rep. 4 Eq. 537.

(4) 3 Y. & C. Ex. 597.

(5) 2 Cox, 425.

(6) 1 Ch. D. 491.

(7) 1 D. M. & G. 240.

(8) 7 Jur. (N.S.) 835.

(9) 2 Jac. & W. 1.

do so, as is probable, he being only a trustee, his mortgage will be foreclosed: *Beevor v. Luck* (1); *Pemberton on Decrees* (2).

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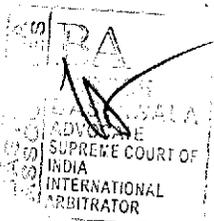
Feb. 14. COTTON, L.J., now delivered the judgment of the Court (*James, Baggallay, and Cotton, L.JJ.*) as follows:—

The Plaintiff in this case is the surviving trustee of a settlement executed in the year 1838 by one *Thomas Tale* of certain copyhold property. At the time of the execution of the settlement the property was in mortgage, and the settlor had also previously executed mortgages on other property belonging to him, and these mortgages at the time of the commencement of the action were vested in the Defendant *Jennings*. *Thomas Tale* had also subsequently to the date of the settlement, viz., in the year 1839, mortgaged to one *John Tale* another property called the *Union Street* property. The Plaintiff brought his action to redeem the mortgage of the settled estate, and *William Jennings*, who was originally the sole Defendant, claimed as against the Plaintiff to consolidate all the mortgages so vested in him, that is to say, claimed that the Plaintiff should not be at liberty to redeem one of the mortgaged properties unless he also paid what was due on all the mortgages, including that on the *Union Street* property, and contended that the parties entitled to the equity of redemption in all the properties must be brought before the Court.

At the first hearing before the Vice-Chancellor, the case was ordered to stand over, with liberty, or directions, to the Plaintiff to add parties. The Plaintiff amended his bill by making as Defendant thereto one *John Price*, as the person having vested in him the equity of redemption of all the mortgaged properties other than the settled estate and the *Union Street* property. When the case came again before the Vice-Chancellor, he was of opinion that as it was contended that the Defendant *Jennings* was, as against the Plaintiff, entitled to consolidate the mortgage on the *Union Street* property as well as the mortgages on the other properties, the parties entitled to the equity of redemption of the *Union Street* property were necessary parties to the

(1) Law Rep. 4 Eq. 537.

(2) Page 478.



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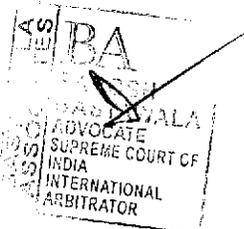
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suit, and as the Plaintiff had not made them parties, and was not willing to make them parties, he dismissed the action.

The Plaintiff before us did not contest the right of the Defendant *Jennings* to consolidate all the mortgages other than that on the *Union Street* property. The principal question before us was whether that Defendant was entitled to require the Plaintiff to redeem the *Union Street* mortgage.

The rule as to consolidation of mortgages in its simplest form is this, that where one person has vested in himself by way of mortgage two estates the property of the same mortgagor, one of these cannot be redeemed without the other, and this is so whether the two mortgages were originally granted to the same mortgagee or, having been originally vested in different persons, have by assignment become vested in the same person. This was on the equitable principle that a Court of Equity would not assist a mortgagor in getting back one of his estates unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a Court of Equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which might be of larger amount than the value of the estate. But even the rule in this its simplest form was doubted by Lord *Hardwicke* in the year 1750, as appears by the report of *Ex parte King* (1), though he afterwards recognised and adopted it. Moreover, as a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. It is in this case contended that this will apply even though one of the mortgages which it is sought to consolidate was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem. In our opinion,

(1) 1 Atk. 300.



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independently of authority, this contention cannot prevail. It seeks to affect in equity, and by virtue of a rule the creation of equity, the right of a purchaser by the subsequent act of his vendor. That this will be the result will appear from considering from what acts of the purchaser the right of consolidation arises. It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate as soon as the second mortgage is created a right to get both the mortgages into his hands, and to hold both till the debt due on each is paid. The principle which allows as against a subsequent purchaser or mortgagee the right of consolidation is that the mortgagor cannot by any dealing with the equity of redemption prejudice the rights of his mortgagee. This can only apply to rights already given or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequently to the sale or mortgage of this estate. It is true that a mortgagee of one estate may get in and consolidate the mortgage on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done by the vendor of the equity of redemption previously to the sale; and the act after the sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption and not bound to the purchaser by any contract inconsistent with the claim to consolidate. In our opinion, the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity. But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate there can be no consolidation of a mortgage subsequently created on another estate.

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This is our opinion independently of authority. But it is said that *Tassell v. Smith* (1) is an authority the other way. The reasons given by the learned Judges who decided that case are very short, and there may have been special circumstances which influenced their judgment; but, in our opinion, that case as reported is an authority in favour of the Defendant's contention. We think the real question is whether we ought to follow that decision. It was urged that, independently of the high authority of the Judges who decided that case, it was a case as to the law of real property, and ought not to be disturbed. But it is not a decision on which the titles to real estates depend. Even if *Tassell v. Smith* has been in practice followed, no title will be rendered bad by a decision overruling that case. With the exception of the case now under appeal none has been quoted to us in which *Tassell v. Smith* has been followed. But in *Baker v. Gray* (2) Vice-Chancellor *Hall*, whose experience in conveyancing makes his opinion on such a point of great value, though he felt himself bound by the decision, disapproved the principle on which, in our opinion, the judgment, as reported, is based, namely, that a subsequent mortgage can be consolidated as against a purchaser of an equity of redemption. With all respect for the Lords Justices who decided that case, we think they did not sufficiently consider that they were allowing a subsequent act of a vendor to defeat the right acquired by the purchaser from him. The principle laid down by their judgment would enable any settlor or vendor of an equity of redemption to throw a burden on those interested under the settlement or purchase, and practically to defeat the settlement or sale by a subsequent mortgage of an entirely different estate to secure a sum far beyond its value, which the mortgagee would be induced to advance in reliance on his right to consolidate it with the mortgage of which the equity of redemption had been settled or sold. As a rule, this Court ought to treat the decisions of the Court of Appeal in Chancery as binding authorities, but we are at liberty not to do so where there is a sufficient reason for overruling them. As the decision in *Tassell v. Smith* may lead to consequences so serious, we think that we are at liberty to reconsider and review the decision in that case as if it were being re-heard in the old Court of Appeal in

(1) 2 De G. & J. 718.

(2) 1 Ch. D. 491.

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Chancery, as was not uncommon. In our opinion, the principle on which the rule as to consolidation of securities is based was misapplied, and, to some extent, departed from in that case. We therefore decline to follow that decision so far as it authorizes a subsequent mortgage effected by a vendor to be consolidated as against a purchaser from him of the equity of redemption of another estate.

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Before leaving this part of the case we ought to mention an argument of Sir *H. Jackson* that the Court cannot dispose of the question whether the Defendant *Jennings* can, as against the Plaintiff, consolidate the *Union Street* mortgage without having before it the parties interested in the equity of redemption of that property. The Defendant *Jennings* by his contention seeks to throw a larger burden on the Plaintiff, but not on the owners of this equity of redemption, and in our opinion the Court ought not to require persons to be present in order to argue whether the law is such that they ought or ought not to be parties when, as here, it has before it the parties interested in the point on which that question depends.

This further question was argued on behalf of the Defendant *Jennings*, namely, that even if that Defendant is not entitled as against the Plaintiff to consolidate the *Union Street* mortgage, neither the Plaintiff nor the Defendant *Price* sufficiently represents the parties interested under the settlement of which they respectively are trustees. Under Order xvi., rule 7, trustees may, both as Plaintiffs and Defendants, sufficiently represent the trust estate without any of the parties beneficially interested being before the Court, with power nevertheless for the Court or a Judge to direct any of such last-mentioned persons to be made parties. But this rule is in substance a repetition of rule 9, sect. 42, of the *Chancery Act*, 1852; and it was argued that, in suits relating to mortgages, it had been held, as in *Goldsmid v. Stonehewer* (1), that trustees did not sufficiently represent their adult *cestuis que trust* unless it was probable that the trustee, from being executor or otherwise, had funds in hand sufficient to enable him to redeem. But that case was a suit for foreclosure, in which the trustee was a defendant whom the plaintiff sought to foreclose; and there is a reason

(1) 9 Hare, App. xxxviii.



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in such a case for not giving the plaintiff the relief he seeks unless he brings before the Court all those interested in the equity of redemption who may probably have the means of redeeming the mortgage. Here the Plaintiff trustee is seeking to redeem, and the dismissal of his bill will be effectual in favour of the Defendant *Jennings*, so as to prevent any further proceedings for redemption in respect of the property vested in the Plaintiff as trustee. Moreover, as between the Plaintiff and *Jennings*, the only decree will be that the Plaintiff redeem such mortgage as *Jennings* is entitled to consolidate, and that in default his action be dismissed; and the Defendant *Price* sufficiently represents all parties interested in the estate of which he is trustee for the purpose of being bound by any accounts of the Defendant *Jennings* which must be taken in order to work out the decree between that Defendant and the Plaintiff, and *Price* does not suggest that, as between himself and the Plaintiff, he does not sufficiently represent the persons for whom he is trustee. In our opinion, therefore, the objection that the Plaintiff and *Price* do not sufficiently represent the estates of which they are trustees cannot prevail.

The result is that the judgment of the Vice-Chancellor dismissing the action was erroneous, and the order appealed from must be discharged.

With respect to the form of the judgment,
COTTON, L.J., said :—

We have considered the case of *Beevor v. Luck* (1), which was cited by Sir *H. Jackson*. It is no authority for the proposition that *Price*, as the owner of the equity of redemption of the estate first mortgaged, is entitled to the first right of redemption of the two estates. That was a suit for foreclosure. The Plaintiff is entitled to the first right of redemption of both estates, and in default he will be foreclosed, and then *Price* will have a right to redeem or be foreclosed in the same manner.

Solicitors: *Waterhouse & Winterbotham*, agents for *Winterbotham, Bell, & Winterbothams, Cheltenham*; *Bischoff, Bompas, & Co.*

(1) Law Rep. 4 Eq. 517.

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[HOUSE OF LORDS.]

H. L. (E.)*

YOUNG APPELLANT ;
AND
BRISTOL AEROPLANE COMPANY
LIMITED RESPONDENTS.

1945
July 24, 25,
26; Nov 2.

*Workmen's compensation—Injury to workman—Alternative remedies—
Receipt of compensation—Claim to recover damages at common law
—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84),
s. 29, sub-s. 1.*

By s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925 :
" When the injury was caused by the personal negligence or wilful
" act of the employer or of some person for whose act or default
" the employer is responsible, nothing in this Act shall affect any
" civil liability of the employer, but in that case the workman may,
" at his option, either claim compensation under this Act or take
" proceedings independently of this Act ; but the employer shall
" not be liable to pay compensation for injury to a workman
" by accident arising out of and in the course of the employment
" both independently of and also under this Act, and shall not be
" liable to any proceedings independently of this Act, except in
" case of such personal negligence or wilful act as aforesaid."

On April 3, 1942, the appellant was injured at work while in the
respondents' employment. On April 30, he attended at their
works and was paid a sum equal to the compensation due under
the Workmen's Compensation Act, 1925, in respect of four weeks.
Thereafter, until October, when he returned to work, he was paid
1l. 15s. od. a week at the works and on each occasion he was shown
a pay-sheet indicating that the payments were made under the
Act. On July 24 his solicitor wrote to the respondents claiming
compensation under the Act and alternatively damages on the
ground that the machine which had injured him was not guarded,
and in February, 1943, he commenced an action for damages at
common law :—

Held, that however difficult it might be to determine what
steps taken by the workman must be held in law to be evidence
of an irrevocable exercise of his statutory option (on which point
their Lordships expressed different opinions) that " option,"
in s. 29, is not equivalent to equitable election, and as the appellant
having become aware in July, 1942, of the choice given to him by
the sub-section, had with that knowledge chosen to continue in
receipt of compensation until he returned to work, and so enforced
in full the liability of the employer to pay compensation under the

* Present : VISCOUNT SIMON, LORD RUSSELL OF KILLOWEN, LORD
MACMILLAN, LORD PORTER and LORD SIMONDS.

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Act, he had irrevocably exercised his statutory option and was debarred from taking proceedings independently of the Act.

Perkins v. Hugh Stevenson & Sons, Ltd. [1940] 1 K. B. 56;
Selwood v. Townley Coal & Fireclay Coal, Ltd. [1940] 1 K. B. 180,
and *Brown v. William Hamilton & Co.*, 1944 S. L. T. 282;
37 B. W. C. C. Supp. 52 discussed.

Per Viscount Simon, approving the decision of the Court of Appeal on this point: A decision of a division of the Court of Appeal is authority binding on the full Court of Appeal in a later case.

Decision of the Court of Appeal [1944] K. B. 718 affirmed.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON and LORD PORTER, were as follows: On April 3, 1942, the appellant lost three fingers of his left hand by amputation, while operating a guillotine sheet-metal cutter in the respondents' factory. It was not disputed that this accident arose out of and in the course of his employment in such circumstances as to create a liability in the respondents to pay compensation for his injury under s. 1 of the Workmen's Compensation Act, 1925. About three weeks after the accident he saw at the respondents' works one Howarth, assistant to their commercial manager. Howarth's duty was to deal with payments under the Act and he saw about fifteen to twenty men on days specially appointed for that purpose. He told the appellant that no authority had yet come from the respondents' insurance company to make any payment and asked him whether, in view of the seriousness of his injury, he would seek advice, and probably mentioned his trade union. The appellant next visited Howarth at the respondents' works on April 30 and on that occasion Howarth passed over the pay sheet for him to read and explained that that although only twenty-four days' compensation was then due, he proposed to pay up to the end of the fourth week. The appellant read and understood the form, which plainly showed that it dealt with weekly payments under the Workmen's Compensation Acts. He then filled in the form and signed the appropriate receipt, receiving 6*l.* 15*s.* 0*d.* At that time he had not yet taken legal advice. Thereafter he attended at the works and was paid by Howarth, week after week, the sum of 1*l.* 15*s.* 0*d.* until he returned to work on October 2. No notice was given or assertion made that the receipt was without prejudice to the bringing of a claim for damages. Meanwhile, on July 24, the appellant's solicitor wrote to the respondents: "I understand that your

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“ firm was prosecuted for not having a machine guarded, and “ I desire to claim compensation under the Workmen’s “ Compensation Act, and alternatively, I desire to claim “ damages.” On August 4, the respondents’ solicitors wrote to the appellant’s solicitors that the matter had been passed on to their insurance company. On August 19 the insurance company wrote: “ We would state that liability is only “ admitted under the Workmen’s Compensation Act and your “ client has been in receipt of compensation under the statute “ since his cessation following the injuries.” After some further communications between the parties a writ was issued on behalf of the appellant on February 5, 1943, claiming damages for negligence and breach of statutory duty. The substantial defences to the action were (1.) that the appellant had been guilty of contributory negligence, and (2.) that, in any event, having claimed and received compensation under the Workmen’s Compensation Act, 1925, he was debarred from recovering damages. At the Manchester Assizes, at which the case was tried, Mr. Commissioner Laski K.C. negatived the first defence but held that the second must succeed. He said: “ I am satisfied that the [appellant] “ did not claim for compensation ‘ as such ’ The “ [appellant], as I find, received the payments made to him “ as compensation under the Workmen’s Compensation Act “ and the payments were paid to him as such. I also find that “ at the time the [appellant] received his first payment on “ April 30, 1942, and until such time as he consulted his “ solicitor (the date was not fixed with any precision, but was “ clearly shortly prior to the letter of July 24, 1942), he “ did not know that he had a right under s. 29, sub-s. 1, of “ the Workmen’s Compensation Act, to elect as between two “ alternative remedies. It follows that the [appellant], not “ knowing of the existence of his right to elect, could not be “ said to have exercised the option given to him by the sub- “ section.” He held himself bound by *Perkins v. Hugh Stevenson & Sons, Ltd.* (1) and *Selwood v. Townley Coal & Fireclay Co., Ltd.* (2) to give judgment for the respondents. The Court of Appeal (Lord Greene M.R., Scott, MacKinnon, Luxmoore, Goddard and du Parc L.J.J.) was specially constituted to hear the appellant’s appeal, which was dismissed. The appellant appealed to the House of Lords.

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(1) [1940] 1 K. B. 56.

(2) [1940] 1 K. B. 180.

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Paul K.C. and *H. Burton* for the appellant. The appellant did not exercise an "option" within the provisions of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, and was not committed irrevocably to his claim under the Act, for unless it can be found that the workman has exercised an option, the second half of the sub-section does not arise. The appellant's choice remained alive. The second part of sub-s. 1 is not an independent and separate provision but, on the contrary, is exegetical or explanatory of the first, meaning that the workman may at his option pursue either remedy, provided that by so doing he does not ultimately impose a liability on his employer to pay both damages and compensation: see *Avery v. London and North Eastern Ry. Co.* (1); *London Brick Co., Ltd. v. Robinson* (2), and *Kinneil Cannel & Coking Coal Co., Ltd. v. Waddell* (3). These three authorities crystallize the legal position. The point of imposing a double liability on the employer is not reached unless either a judgment has been obtained in the workman's favour in a claim for damages or an award has been made in his favour or an agreement or compensation registered: see *Rouse v. Dixon* (4) and *Edwards v. Godfrey* (5). The words "shall not be liable to pay" do not cover the case of a mere payment of a weekly sum by the employer as workmen's compensation accepted by the employee as such. Such a payment does not necessarily import a liability to go on paying: *Nomeracsky v. Canterbury Dressing Works* (6). The words must not be read as though they were "shall not pay." The liability arises not at the time of the accident but at the time of the order of the court: see s. 23 of the Act. The matter depends on the precise meaning of the words "claim compensation." The object of the sub-section is to protect the employer from being proceeded against more than once, not to protect him only from being made to pay more than once. In this case there had been no proceedings at all under the Workmen's Compensation Act and in such a case there can be no irrevocable exercise of the option on the part of the workman. In giving the workman an "option" between two courses the Act has put him to his "election" in a sense analogous to the use of the word in equity. Such an election can only be made where the workman knows of the alternatives and has

(1) [1938] A. C. 606.

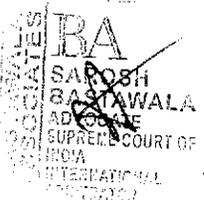
(2) [1943] A. C. 341.

(3) [1931] A. C. 575, 588.

(4) [1904] 2 K. B. 628, 632, 634.

(5) [1899] 2 Q. B. 333.

(6) (1928) 21 B. W. C. C. 41.



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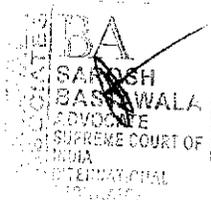
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full information of the advantages and disadvantages of adopting one or the other: see *Coe v. London and North Eastern Ry. Co.* (1). Any other construction gives no meaning to the words "at his option." The decisions in *Perkins v. Hugh Stevenson & Sons, Ltd.* (2) and *Selwood v. Townley Coal & Fireclay Co., Ltd.* (3) were wrong. They cannot stand with *Kinneil Cannel & Coking Coal Co., Ltd.* (4) and *Perkins' case* (2) is not consistent with *Stimpson v. Standard Telephones & Cables, Ltd.* (5). [They referred to *Powell v. Main Colliery Co., Ltd.* (6); *Cribb v. Kynoch, Ltd. (No. 1)* (7); *Harrison v. Wythemoor Colliery Co., Ltd.* (8); *King v. Edinburgh Collieries Co., Ltd.* (9); *Bennett v. L. & W. Whitehead, Ltd.* (10); *Unsworth v. Elder Dempster Lines, Ltd.* (11) and *Brown v. William Hamilton & Co.* (12), and to the Workmen's Compensation Act, 1925, ss. 3 and 14.]

Sellers K.C. and *Matabele Davies* for the respondents. The appellant accepted from the respondents payments of compensation under the Workmen's Compensation Act, 1925. By virtue of s. 29, sub-s. 1, of the Act, such a payment and receipt bars the recovery of damages at common law by the same person "independently of the Act." The acceptance either of damages or of compensation as such is a bar to recovery under the alternative remedy. The sub-section protects the employer from being made to pay more than once. Its two halves must be read separately. Claiming compensation means asking for it, and the appellant did inferentially "claim compensation" under the Act. If one puts one's foot on a shoeblock's box without expressly asking for a shine, one is taken to have asked for it inferentially. The whole Act is intended to be informal and to work without there necessarily being any proceedings. There is no arbitration unless a question arises, e.g., if compensation has been claimed and refused in whole or in part. The commencement of legal proceedings is not necessarily contemplated by the sub-section: *Powell v. Main Colliery Co., Ltd.* (13); *Bennett v. L. & W. Whitehead, Ltd.* (14) and *Page v. Burtwell* (15): see also s. 21 of the Act, and r. 8 of the Workmen's Compensation

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| (1) [1943] 2 K. B. 531. | (9) 1924 S. C. 167, 171, 172. |
| (2) [1940] 1 K. B. 56. | (10) [1926] 2 K. B. 380, 405. |
| (3) [1940] 1 K. B. 180. | (11) [1940] 1 K. B. 658, 671, 672. |
| (4) [1931] A. C. 575. | (12) 1944 S. L. T. 282; |
| (5) [1940] 1 K. B. 342, 353. | 37 B. W. C. C. Supp. 52. |
| (6) [1900] A. C. 366. | (13) [1900] A. C. 366, 371. |
| (7) [1908] 2 K. B. 551, 554. | (14) [1926] 2 K. B. 380, 387. |
| (8) [1922] 2 K. B. 674, 686. | (15) [1908] 2 K. B. 758. |



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Rules, 1926. In accepting these payments under the Act the appellant deliberately took one course, exercising his "option" irrevocably, and he cannot now go back on it. There must be imputed to the ordinary man a knowledge of his legal rights and it is erroneous to say that some special knowledge must be brought home to the appellant. It is enough that he should simply have knowledge that he has a right to choose. What was in his mind is immaterial; the relevant thing is what he did. The matter does not turn on the exercise of an option in the sense of an equitable election, though, on any interpretation, there has here been, on the facts, a concluded election. [They referred to *Little v. P. & W. MacLellan, Ltd.* (1); *Burton v. Chapel Coal Co., Ltd.* (2); *Mackay v. Rosie* (3); *Guest, Keen & Nettlefolds, Ltd. v. Williams* (4); *Lewis v. Cammel Laird & Co., Ltd.* (5) and *Birch v. Pease & Partners* (6).]

Paull K.C. in reply. Acceptance of a payment under the Act is not conclusive evidence that the workman has chosen to proceed under it, but if the respondents' contention is right even one payment would bar his claim to damages, though made to him personally by his employer while he was still in hospital. The Act gives him the right to get the remedy that he chooses and while his solicitor is still finding out the facts of the case he cannot be taken to have exercised his option. All the circumstances must be considered in deciding on the evidence whether he has made a choice. [He referred to *Kinneil Cannel & Coking Coal Co., Ltd. v. Waddell* (7) and *Bennett v. L. & W. Whitehead, Ltd.* (8).]

The House took time for consideration.

Nov. 29. VISCOUNT SIMON. My Lords, this is the appeal of the plaintiff, in an action brought for damages at common law against his employers, the respondents, for failure to fence dangerous machinery. The appeal is from a unanimous decision of the Court of Appeal. That court was specially constituted to hear the appellant's appeal from the judgment given against him by Mr. Commissioner Laski K.C., at Manchester Assizes. Besides Lord Greene M.R., who delivered

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| (1) 1900 ² F. 387, 389. | (4) (1925) 18 B. W. C. C. 68. |
| (2) 1909 S. C. 430; 2 B. W. C. C. | (5) (1929) 22 B. W. C. C. 410. |
| 120. | (6) [1941] 1 K. B. 615, 623. |
| (3) 1908 S. C. 174; 1 B. W. C. C. | (7) [1931] A. C. 575, 584. |
| 52. | (8) [1926] 2 K. B. 380, 405. |

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the considered judgment of the whole court, Scott, MacKinnon, Luxmoore, Goddard and du Parcq L.JJ. were parties to the decision. One of the conclusions reached in the judgment of the Master of the Rolls, with which I agree, is that if the Court of Appeal, when sitting in one of its divisions, has in a previous case pronounced on a point of law which necessarily covers a later case coming before the court, the previous decision must be followed (unless, of course, it was given per incuriam, or unless the House of Lords has in the meantime decided that the law is otherwise), and that this application of the rules governing the use of precedents binds the full Court of Appeal no less than a division of the court as usually constituted. Thus, the previous decisions of the Court of Appeal in *Perkins v. Hugh Stevenson & Sons, Ltd.* (1) and *Selwood v. Townley Coal & Fireclay Co., Ltd.* (2), upon the correctness of which the respondents rely, but which the appellant challenges, could not be overruled in that court; and since these decisions were held to apply to the present case in a sense adverse to the appellant, his appeal was necessarily dismissed.

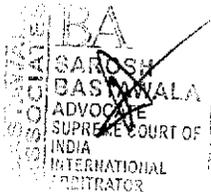
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The present appeal, therefore, is in substance a submission that the decisions in *Perkins' case* (1) and *Selwood's case* (2) are wrong, or at any rate that they are not conclusive against the appellant's claim. The question involves the interpretation and application of s. 29, sub-s. 1, of the Workmen's Compensation Act—a section which is in the same form as s. 1, sub-s. 2 (a) of the original Act of 1896 and one which has given rise to many difficulties and to a multitude of decisions. [His Lordship read the sub-section and continued:]

In *Perkins' case* (1), the injured workman had actually applied to his employers for compensation under the Act and was paid weekly sums accordingly for about a year, after which no further compensation was due as he had recovered from his injuries. About two months after the accident, however, his solicitor had written referring to his alternative claim apart from the Act and attempted unsuccessfully to secure that the weekly payments should be regarded as being made without prejudice to the alternative claim. The Court of Appeal held that this alternative claim was barred, because from the date of the solicitor's letter the workman must be regarded as having material for exercising his "option" and as having exercised it; the employer had already been made liable under the Act and had paid in full all that the Act

(1) [1940] 1 K. B. 56.

(2) [1940] 1 K. B. 180.



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prescribed and could not, therefore, be also liable independently of the Act. It is true that in the course of his judgment the Master of the Rolls expressed the view (1) that "where the employer, in response to a claim under the Act, has made a payment of compensation under the Act, that payment discharges once and for ever, in whole or pro tanto, the statutory liability under the Act," and Finlay L.J. appears to agree with him. But this view is not essential to the decision, and the Master of the Rolls goes on to point out that in that case the workman had in fact exercised his option. The actual decision can be supported by reason of that circumstance, apart from the fact that the workman had claimed and received compensation without knowledge that another remedy was available to him if he chose to adopt it. In *Selwood's* case (2), the workman had made no application for compensation but he had received a number of weekly sums from his employers which were, as he knew, payments under the Act. Later, and while still gravely incapacitated, he refused, on the advice of his solicitor, to accept any more weekly payments and subsequently brought an action at common law against his employers for damages for personal injuries. The Court of Appeal held that the principle of *Perkins' case* (1) applied; he could not succeed in his action, according to the Court of Appeal, because, if he did, his employers would be paying both under the Act and independently of the Act. One difficulty I feel about this latter decision is that it involves the conclusion that if an injured workman receives one single weekly payment, knowing it is tendered as compensation under the Act, he loses all chance of suing successfully at common law. On this view, he takes the first payment, even though he has never asked for it, at his peril. The employers have paid for one week "under this Act," and are liable to pay it, and therefore, it is suggested, they cannot thenceforth be liable to any proceedings by the workman "independently of this Act." It is to be observed that in *Selwood's* case (2) there is no trace of a suggestion that the workman had effectively exercised an "option." The decision turned on nothing else than that one or more weekly payments had been offered and accepted. Having regard to the general scheme of the Act and to its obvious purpose of preserving remedies apart from the Act if the

(1) [1940] 1 K. B. 56, 66.

(2) [1940] 1 K. B. 180.

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workman chose to avail himself of the alternative, I cannot accept this view. *Perkins'* case (1), on its actual facts, seems to me to be correctly decided: there the workman, by persisting in receiving weekly compensation as long as his injury lasted, although he long before had appreciated that the law offered him an alternative remedy, must be regarded as having effectively exercised "his option." But, with all respect to the members of the Court of Appeal in *Selwood's* case (2), which was decided three months later, I do not agree that this decision necessarily followed from the principle laid down in *Perkins'* case (1), and I think that the decision in *Selwood's* case (2) was wrong. Lord Patrick in *Brown v. William Hamilton & Co.* (3) develops the view which I would uphold with much clearness and cogency. I think that the Scotch authorities quoted by Lord Patrick (4) are right in treating the final part of s. 29 ("but the employer," etc.), as exegetical of the preceding part ("but in that case the "workman may, at his option," etc.), and not as further restricting by an added condition the workman's right of option. As Lord Patrick points out, and as was also laid down by the present Lord Goddard in the Court of Appeal in *Unsworth v. Elder Dempster Lines, Ltd.* (5), no difficulty in adopting this construction arises from the rule that the employer is not to be bound to pay twice over. If, before the workman can be regarded as having really exercised his option, he receives one or more weekly payments under the Act, and he then opts to issue a writ and recovers damages, the damages in the action would be reduced by the amounts already received. This view secures what Lord Greene M.R. in *Perkins'* case (6), described as the effect of the final words, namely, that "the employer is not to be made to pay twice "over to the same person." I cannot agree that the deduction from damages of a sum already paid in respect of the same injury is contrary to any "principle of law" (7). On the contrary, I would adopt Lord Patrick's statement that "when "the workman sues at common law, if the sum awarded in "name of damages exceeds the sums already paid to him in "name of workmen's compensation, these sums will form

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| (1) [1940] 1 K. B. 56. | (4) 1944 S. L. T. 282, 285; |
| (2) [1940] 1 K. B. 180. | 37 B. W. C. C. Supp. 52, 60. |
| (3) 1944 S. L. T. 282, 286; | (5) [1940] 1 K. B. 658, 674. |
| 37 B. W. C. C. Supp. 52, 63, 84. | (6) [1940] 1 K. B. 56, 65. |
| | (7) <i>Ibid.</i> 67. |



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“a good set-off or will have to be taken into account in “diminution of damages” (1). In the present case, I agree that the appeal must be dismissed on the ground that the appellants, who knew of his “option” in July, nevertheless continued to draw weekly compensation till the following October, and must consequently have deliberately and consciously chosen to claim compensation under the Act, instead of proceeding independently of the Act.

As the House has heard a full discussion of the difficulties of construction arising under s. 29, I venture to add the following observations as representing my view of the general effect of the clause: 1. The statutory provisions for workmen’s compensation are not to be understood as substituted for remedies against his employer previously available to the workman injured by the personal negligence or wilful act of the employer or of those for whom the employer is responsible. (One of the remedies so preserved is a right of action based upon breach of a statutory duty: *Lochgelly Iron & Coal Co., Ltd. v. M’Mullan* (2); see especially per Lord Atkin.) The previous remedies remain available as an alternative for the cases which they cover. 2. But the two remedies are not to be pursued together. For a workman to issue a writ for damages independently of the Act and also to “claim” compensation under the Act is forbidden. This prohibition of double process applies to the initiation and carrying on of proceedings whether either or both of them would ultimately succeed or not. It is presumably inserted for the protection of the employer, so that he shall not be vexed with both demands concurrently. The protection so given him could in proper cases be secured by stay or injunction. 3. There thus being an option between two kinds of proceedings, who is to have the right to exercise the option? The employer cannot insist on being called on to pay by one process rather than by the other. It is the workman who opts. It is “his” option. This option is not equivalent to equitable election and I deprecate the use of the latter word as a substitute for the word in the section. If “election,” in the full sense, were meant, it would be necessary for the workman to know all that was material to determine his choice. Scott L.J. is perfectly logical, in *Coe v. London and North Eastern Ry. Co.* (3), in saying that if “option” means “election” there

(1) 1944 S. L. T. 282, 286; (2) [1934] A. C. 1, 9.
37 B. W. C. C. Supp. 52, 64. (3) [1943] K. B. 531, 540.

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can be no effective exercise of option " without full knowledge " of all material facts affecting his choice." But this, in my opinion, is not the meaning of " option " in this connexion. " Election " has two meanings, as Viscount Maugham pointed out in *Lissenden v. C.A.V. Bosch, Ltd.* (1) when he said : " The equitable doctrine of election has no connexion with the " common law principle which puts a man to his election " (to give a few instances only) whether he will affirm a contract " induced by fraud or avoid it, whether he will in certain " cases waive a tort and claim as in contract, or whether in " a case of wrongful conversion he will waive the tort and " recover the proceeds in an action for money had and " received. These cases mainly relate to alternative remedies " in a court of justice. The history of the common law rules, " the principles that apply to them, and the effect of the " election are all very different from those which prevail " where the equitable principle is in question." See also Lord Atkin's speech (2). Here we are dealing with a statutory " option," in its setting in the section, and I am willing to adopt the view, which has constantly been expressed and enforced, that the workman does not lose his alternative remedy merely because he accepts some payments under the Act, when the option is unknown to him. But if the circumstances amount to this, that he persists in taking weekly compensation after knowing of the alternative course, he is debarred from changing the nature of his claim. This view, in my opinion, is confirmed by the exegetical character of the prohibition against double liability. In conclusion, I would venture to express the hope that, if there is to be new statutory enactment on the subject of alternative remedies when workmen meet with industrial accident, the legislation will be so framed as to get rid of the doubts and difficulties which have led to so much controversy, and have given rise to such fine distinctions, in the interpretation and application of s. 29. My Lords, I move that the appeal be dismissed with costs.

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LORD RUSSELL OF KILLOWEN (read by LORD PORTER). My Lords, the question debated on this appeal, while it admits of easy statement, is difficult of solution. The question is whether the appellant workman having accepted from his employers (the respondents) payments of compensation under the Workmen's Compensation Act, 1925, knowing them to be

(1) [1940] A. C. 412, 418.

(2) Ibid. 429.

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payments under that Act, is debarred by reason of s. 29, sub-s. 1, of that Act from taking proceedings independently of that Act for the recovery of damages from his employers. [His Lordship stated the sub-section and continued :]

The relevant dates are these :—The accident occurred on April 3, 1942; the appellant received payment of the appropriate compensation (viz. 1*l.* 15*s.* a week) until he returned to work on October 2, 1942; on February 5, 1943, he issued the writ in the present litigation, claiming damages for negligence and breach of statutory duty. The only defence on which the respondents now rely is s. 29, sub-s. 1, of the Act. Mr. Commissioner Laski, who tried the action at the Manchester Assizes, found the following facts :—(1.) that on and after April 30, 1942, the appellant accepted the weekly payments knowing them to be made as compensation under the Act; (2.) that the appellant when he began to receive those payments did not know " that he had a right under s. 29, sub-s. 1, of " the Workmen's Compensation Act to elect as between two " alternative remedies " ; and (3.) that in or about July, 1942, he did become aware of that right. The learned Commissioner, on the finding first above-mentioned, felt bound to dismiss the action in view of two authorities in the Court of Appeal, namely, *Perkins v. Hugh Stevenson & Sons, Ld.* (1) and *Selwood v. Townley Coal & Fireclay Co., Ld.* (2), which may, I think, be accurately described as having decided that a workman who has knowingly accepted as such payments of compensation under the Act, is precluded from recovering compensation independently of the Act.

My Lords, let me say at once, that in my opinion the present appeal must fail whatever view be taken as to the correctness of the decisions of the Court of Appeal, or the true interpretation of s. 29, sub-s. 1. The appellant knew in July, 1942, of the choice given to him by the sub-section, and with that knowledge chose to continue in receipt of compensation under the Act until he returned to work. Having thus, in exercise of the option given to him by the sub-section, enforced to the full one liability of the employer, he cannot enforce any other; in other words, having, in exercise of his option, enforced to the full the employer's liability to pay compensation under the Act, he cannot take proceedings to make the employer pay compensation independently of the Act. He has deliberately selected and exhausted one of the

(1) [1940] 1 K. B. 56.

(2) [1940] 1 K. B. 180.

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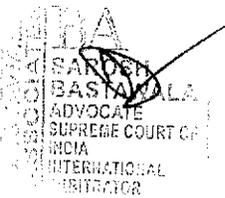
two rights which the sub-section offers for his choice. In view, however, of the course taken by the debate before your Lordships, I may be permitted to state my views upon the true construction of the sub-section. It contains four provisions to the following effect:—1. The civil liability of the employer is not affected by the Act when the injury was caused by the personal negligence or wilful act therein described. 2. If the injury was so caused the workman is given a choice as to which liability he will seek to enforce. 3. The employer is not to have to pay compensation to the workman both independently of the Act and under its provisions. 4. No action may be brought against the employer in respect of an injury to a workman by accident arising out of or in the course of his employment, unless the injury was caused by the personal negligence or wilful default as aforesaid. The sub-section only applies when the injury was caused by the personal negligence or wilful default described in the opening words, but when it applies, it operates for the benefit of both the workman and the employer. On the one hand the first provision preserves to the workman the civil liability of the employer, and the second provision gives him a choice between enforcing that liability and enforcing the liability imposed on the employer by the Act. On the other hand, the third provision protects the employer from being obliged to meet both liabilities. The fourth provision may for the present purpose be disregarded. The second and third provisions are the ones which create the difficulty. The Court of Appeal has treated the third provision as an enactment in favour of the employer which operates independently of the first and second provisions, and which in some way detracts from or qualifies the express saving in favour of the workman of the civil liability of the employer. It has construed the sub-section as meaning that once some compensation for injury to a workman has been paid under the Act, and has been accepted by him as such, the employer is freed from all liability to pay compensation independently of the Act. My Lords, I find myself unable so to construe the third provision. It is a construction which, in my opinion, should only be adopted if none other is open, because it destroys to a great extent the primary object of the sub-section, namely, the preservation in favour of the workman of the employer's civil liability. So long as in the long run an employer is not made to pay more than his total liability under the particular

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head of liability which the workman, knowing of his choice, chooses to enforce, the protection given to the employer by the third provision will be secured to him. He will not have paid two sets of compensation, but only the compensation payable under his liability independently of or under the Act as the case may be. For myself I would construe the sub-section as follows:—The object of the sub-section is to keep the civil liability of the employer alive, and it gives the workman a choice as to what liability he will enforce against the employer. But to make a choice the workman must be aware of his right to choose, and of the alternatives open to his choice. In the case of a workman who, owing to ignorance in these respects, has been unable to exercise his option under the sub-section, but who has been paid and has accepted compensation under the Act, even to the full amount, I cannot see how he can be prevented, on discovering his right to choose, from recovering compensation independently of the Act, if he be not barred by lapse of time. On the other hand, if a workman, who knows of his right to choose and of the alternatives open to his choice, has enforced his claim to compensation independently of or under the Act, he cannot thereafter seek to enforce any other liability of the employer. By the words "has enforced his claim," I mean that he has obtained a judgment for damages at common law or compensation under the Employers Liability Act, 1880, or that he has obtained an award or an agreement for recording under s. 23 of the Act, determining the employer's liability under the Act. When the workman has so made his choice of the liability which he desires to enforce, and has so enforced it, the sub-section has been worked out, and the chapter is closed. But unless and until he has so enforced the liability of his choice, I find nothing in the sub-section to prevent him from changing his mind, abandoning any pending proceedings in reference to one liability, and commencing proceedings to enforce the other liability.

In coming to this conclusion I find myself in substantial agreement with the views expressed by Lord Patrick in the case of *Brown v. William Hamilton & Co.*, (1), although I do not think that the rights of the workman under the sub-section are (as is indicated or suggested in many authorities) to be judged in the light of the strict rules applicable to the equitable doctrine of election. As I have said, the primary

(1) 1944 S. L. T. 282; 37 B. W. C. C. Supp. 52.

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object of the section is to preserve the civil liability of the employer, making it plain on the one hand that it is the workman who may choose which liability shall be enforced against the employer, and on the other hand that the employer cannot be made to pay more than the measure of his liability independently of, or under, the Act as the case may be. Lord Patrick has pointed out the harsh results and the difficulties which would ensue if a workman is to be held to be deprived of his rights against the employer which are independent of the Act, by the mere acceptance as such of compensation paid under the Act. I need not repeat them, but they appear to me very real; and while no suggestion is or could be made against the employers in the present case, it is obvious that instances might arise in which, on the construction of the subsection adopted by the Court of Appeal, very grave injustice might be inflicted on a workman by his employer. As already indicated, however, this appeal must, in my opinion, fail.

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LORD MACMILLAN (read by LORD SIMONDS). My Lords, on the facts of the present case I have no doubt that the decision of the Court of Appeal was right in law. But as certain views on the proper interpretation of s. 29 of the Workmen's Compensation Act, 1925, are implied in that decision and as the opportunity has been taken of bringing under review the many and varying judicial expositions of this much-debated enactment, I agree with your Lordships that the House ought to pronounce on the matter generally. The remedy of compensation which the Act provides for accidents to workmen arising out of and in the course of their employment is expressly declared to be exclusive of all other remedies except in the single case of the accident having been caused by the employer's personal negligence or wilful act. In that case, but in that case only, the injured workman is given an option; he may either claim compensation under the Act or take proceedings independently of the Act under the pre-existing law. One thing at least is clear on the terms of the enactment: the injured workman is not entitled to make claims against his employer simultaneously for compensation under the Act and for damages independently of the Act. The remedies are mutually exclusive. The option given to the workman is no doubt important and valuable, but it should not be overlooked that the legislature in fixing the scale of statutory compensation must be taken to have regarded it as affording

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in the normal case fair and adequate compensation for the injury sustained, which physically is the same whether the accident was due to the employer's personal negligence or not. The reluctance manifested in some of the cases to hold that the workman has exercised his option in favour of the statutory compensation and the ingenuity exhibited in avoiding such a decision would seem to suggest that this consideration has not always been borne in mind.

The main controversy has centred round the question of what in law is to be held as committing the workman irrevocably to one or other of the two courses open to him when he has sustained an accident arising out of and in the course of his employment which has been caused by his employer's personal negligence or wilful act, the only case in which the statute gives him an option. The problem has in my opinion been confused by the importation of the refinements of the equitable doctrine of election. It has been said that in giving the workman an option between two courses the statute has put him to his "election"; an "election" to be valid and irrevocable can only be made where there is on the part of the workman knowledge of the alternatives and full information as to the advantages and disadvantages of deciding to adopt the one or the other. Consequently the workman cannot be held to have exercised his option and to have committed himself irrevocably to the one or the other remedy unless he was possessed of such knowledge and information. The result of this argument is to make the determination of the question whether the workman has irrevocably exercised his option dependent not upon what he has done but upon what he knew. In my view this is an erroneous approach to the matter. Carried to its logical conclusion the argument would entitle a workman who for years had received compensation under the Act from his employer, either by agreement or under an award, to turn round and institute proceedings for damages independently of the Act on the plea that he did not know, when he claimed and accepted or was awarded compensation under the Act, that he had any right to redress outside the Act. If he could prove that this was so, then he must be held never to have exercised his statutory option, never to have made an "election." Similarly, on this argument, if the workman had intimated a claim of damages outside the Act and obtained from his employer, with or without proceedings in court,



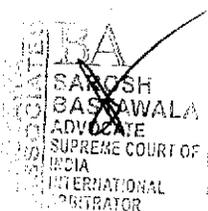
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a sum in full satisfaction of his claim, he could nevertheless throw over the settlement and have recourse to a claim for compensation under the Act if he could show that he had not been aware of his rights under the Act when he made the settlement. Such an interpretation of the enactment would, in my opinion, be clearly contrary both to its letter and to its spirit. In one case the Act permits a locus pœnitentiæ. If the workman exercises his option by bringing an action to recover damages independently of the Act and fails in that action, he may move the court to assess and award him compensation under the Act, if otherwise entitled to it, subject to deduction of the costs caused to his employer by his unsuccessful action. There is no parallel provision in the case of an unsuccessful claim under the Act. The inference is clear that the workman cannot try his luck first under the Act and then if unsuccessful independently of the Act or vice versa, apart from the single special concession which I have just mentioned. It would be a singular situation if the employer could have no assurance that finality had been reached in settling a claim either under or independently of the Act unless he had taken steps to satisfy himself of the state of the workman's mind and that the workman had made a fully informed "election" between the alternative courses open to him. It would be grotesque to suggest that the employer to whom a claim under the Act has been made must ask the workman if he has considered the possibility of bringing an action against him for personal negligence or wilful fault, lest otherwise any settlement of the claim under the Act might have no finality because there had been no "election" on the part of the workman. The workman, like any other citizen, must be presumed to know the rights which the statute has given him, and must be judged according to what he does in the exercise of these rights and not according to the extent of his knowledge of them. I quote and adopt the words of Scrutton L.J. : " If by statute you have an option to do A or " B, but not both, and you have done A, it does not seem to me " relevant to say ' I have done A, but I have not elected " ' to do it '." (*Bennett v. L. & W. Whitehead, Ltd.* (1). If one of the alternatives is adopted the other is excluded, no matter what failure there has been to appreciate the respective merits of the one or the other. But this unfortunately is far from ending the matter. It still remains to consider what

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(1) [1926] 2 K. B. 380, 405.



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steps taken by the workman must be held in law to be evidence of an irrevocable exercise of his statutory option. This has proved a highly controversial point as the diversity of judicial opinions shows. It is best elucidated by discussing the possible cases.

I begin with the easiest case, on which there appears to be general agreement. If the workman's claim either under or outside the Act is contested and he institutes proceedings which are carried through to their conclusion and result in an award of compensation under the Act or in a judgment for damages outside the Act, all are apparently now agreed that finality has been reached. The workman cannot be heard to say that in proceeding in the one way or the other he was unaware of his rights and had never truly exercised his option. But what if the workman fails in the proceedings which he has taken? Is he entitled then to resort to the alternative proceedings which he might have taken but did not take? The answer in my opinion is in the negative. I quote and adopt the words of Cozens-Hardy M.R. in *Cribb v. Kynoch, Ltd. (No. 2)* (1): "I think that the true meaning of the Act is "that a workman cannot proceed to trial under the Act and "fail and then proceed by common law action, and also "cannot proceed by common law action and having failed in "that action then proceed under the Act," subject of course to the special right accorded under sub-s. 2 of s. 29. The workman by persisting to a conclusion in the proceedings which he has taken has irrevocably committed himself. He cannot be heard to say that he has exercised his option only conditionally on success. This view was emphatically approved in Scotland by a court of seven judges in the case of *Burton v. Chapel Coal Co., Ltd. (2)*. But in that case a qualification was admitted, based on the Scottish decisions in *Blain v. Greenock Foundry Co. (3)* and *M'Donald v. James Dunlop & Co., (1909), Ltd. (4)*, and the English case of *Rouse v. Dixon (5)*. If the reason of the workman's failure to recover compensation in proceedings under the Act was that his case did not fall within the Act, then, it was said, he was not barred from proceeding outside the Act. The ground for this view, as stated by Lord Low in *Burton's case (6)*, is that the

- (1) [1908] 2 K. B. 551, 555. (4) (1905) 7 F. 533.
(2) 1909 S. C. 430; 2 B. W. C. C. (5) [1904] 2 K. B. 628.
120. (6) 1909 S. C. 430, 441, 442.
(3) (1903) 5 F. 893.

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enactments were "intended to meet the case of a workman "who has, in fact, an option between a claim under the Act "and a claim independently of the Act, and therefore have no "application to the case of a workman who does not fall "within the purview of the Act, and has no title to claim "compensation under it." I do not accept this qualification. In contested claims for compensation the employer's most frequent answer, apart from questions of quantum, is that the claim does not fall within the Act because the accident did not arise out of or in the course of the employment. If the employer succeeds in this plea he is nevertheless, if the qualification is well-founded, to be exposed to entirely new proceedings outside the Act. This is, in my opinion, contrary to the true interpretation of the Act. I agree with Scrutton L.J. that if the workman's case fails it makes no "difference "whether the applicant fails because he is not, or fails "although he is, a 'workman' or 'dependant' within the "Act" (*Bennett's case* (1)). If the workman takes proceedings under the Act and carries them to a conclusion, then he has exhausted his rights, notwithstanding that the conclusion may be that his case does not fall within the Act, for example, because the accident did not arise out of or in the course of his employment. He cannot be heard to say that he has exercised his option only conditionally on his case being held to fall within the Act. The proceedings are under the Act none the less that the result of the proceedings may be that the workman's case is held not to come within it. "Proceedings carried to a determination are conclusive "evidence of a final election" (*per* Bankes L.J. in *Bennett's case* (2)).

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Next, what if the workman, having instituted proceedings either under or outside the Act, withdraws from them before a decision is reached? As the law stands, under the authority of the case of *Bennett*, notwithstanding the vigorous dissent by Scrutton L.J., the workman is not held to have irrevocably committed himself by the initiation of proceedings from which he has resiled. Bankes L.J., who was in the majority, seems nevertheless to have thought (3) that it was a question of circumstances and that a workman might in some circumstances be held to have irrevocably committed himself by taking proceedings not persisted in to a conclusion. This

(1) [1926] 2 K. B. 380, 385.

(3) *Ibid.* 390.

(2) *Ibid.* 391.



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leaves the law in an unsatisfactory state. It has been suggested that there are two and only two rival constructions of the section, (1.) that it protects the employer from being proceeded against more than once; (2.) that it protects him only from being made to pay more than once. But this clean-cut choice of interpretations has not been accepted or logically applied. The mere intimation of a claim for compensation, although a step in proceedings, has not been held to be an irrevocable exercise of the workman's option. The hardship of so holding has moved the courts not to do so, though on a strict and literal reading of the section it looks very like as if this was intended and Scrutton L.J. so thought. Suppose a workman makes a claim on his employer under the Act—it may be quite informal and need not even be in writing—and the employer declines to admit it, pointing out that he has an irrefutable answer to it, the validity of which the workman at once recognizes. Is the workman by having made this abortive claim finally precluded from resorting to an action of damages for which he may have an excellent prima facie case? Similarly if the workman has issued a writ in an action of damages and on seeing the defence at once recognizes that he has no case, must he go on with the action to its inevitable conclusion against him in order to obtain a "determination" that the injury is one for which the employer is not liable and so enable himself to obtain compensation under sub-s. 2 of s. 29 less the costs of the action? While I have thus indicated the sort of considerations involved, I am not disposed in the present case, in which the point does not arise, to express a concluded opinion upon it. It may never have to be decided by this House, in view of the general revision of the law of workmen's compensation which the Government has announced that it has in contemplation.

I pass now to consider the position where there have been no proceedings either by way of arbitration under the Act or by way of action independently of the Act. If the injured workman intimates a claim against his employer on the ground of the employer's personal negligence or wilful act and the employer admits liability and settles with the workman by payment of an agreed sum, in such a case I think there can be no question that the workman must be held to have exercised his option irrevocably. If on the other hand the workman intimates a claim under the Act and the employer admits liability and proceeds to make to the workman the



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payments due under the Act, I equally see no reason why the workman should not be held to have exercised his option irrevocably. The Act contemplates that in the normal case claims will be settled by agreement without resort to proceedings, and the vast majority of cases are so settled. I cannot see any good reason for holding that finality is reached where as a result of proceedings in a contested case there has been a determination of the matter in favour of or against the workman, but that where a contest has been avoided by agreement the workman should be entitled to maintain that he has never exercised his option. An agreement can under the Act be rendered as enforceable as an award after proceedings. It is, of course, essential that there be a real agreement between the parties for the payment and acceptance of compensation under the Act. But where there is sufficient evidence of such an agreement I do not think that it is open to the workman to challenge it on the ground that he has never exercised his option because he did not know that he might have brought an action against his employer for damages or had not information to enable him to weigh the comparative advantages of claiming under the Act and claiming independently of the Act. An agreement under the Act need not be in writing. It may be oral or inferred from the facts and circumstances. It does not seem to me to make any difference whether the agreement results from a claim by the workman admitted by the employer or from an offer by the employer accepted by the workman or from the conduct of the parties. What is essential is that the agreement should be an agreement under the Act ; that is to say, that the parties should understand that they are transacting about the right to compensation which the Act confers. And of course it must be a real agreement ; it must not be vitiated by mutual error, fraud, undue influence or any of the other grounds on which the validity of an agreement may be assailed. A fortiori if there has been not only agreement under the Act but payments under the Act on the faith of the agreement, the evidence of the workman having finally exercised his option is conclusive. Further, the acceptance by the workman of payments expressly made under the Act and accepted by him as such is sufficient evidence of the agreement of the parties and of the workman having irrevocably committed himself.

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In the present case the appellant workman did not take



H. L. (E.) advice as to the course he should adopt, although the respondent's representative was so fair as to inquire of him whether he intended to take advice before committing himself, and he was not proved to have known that he had any rights independently of the Act. But week after week he accepted payments made to him expressly under the Act and received by him as such. That being so, I agree with Lord Greene M.R. (1) that the case is covered by the decisions of the Court of Appeal in *Perkins v. Hugh Stevenson & Sons, Ltd.* (2), and *Selwood v. Townley Coal & Fireclay Co., Ltd.* (3), in which it was held that "a workman who has been paid compensation under the Act, which he has knowingly accepted as such compensation, is thereby precluded from recovering damages from his employers at common law." I am of opinion that these cases were decided rightly and in consonance with a sound interpretation of the Act. Consequently, while I appreciate, I cannot accept the views expressed by Lord Patrick in his judgment in the Scottish case of *Brown v. William Hamilton & Co.* (4), to which the attention of the House was specially drawn on behalf of the appellant.

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The appeal should, in my opinion, be dismissed and the judgment of the Court of Appeal be affirmed.

LORD PORTER. My Lords, this case raises again a question which has many times been before the courts of this country. In the action the substantial defences were that the appellant was guilty of contributory negligence and that in any event, having claimed and received compensation under the Workmen's Compensation Act, he was debarred from recovering damages. The learned judge negatived the former of these two defences, but, whilst making the findings set out above, felt himself bound by authority to hold that the latter must succeed. This defence is the creature of statute and depends on the construction to be placed on s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, which, so far as is material, is in the following terms. [His Lordship stated the sub-section and continued:] The wording is not very artistic, but the aim is, I think, clear enough, namely, to leave the workman his choice of two remedies whilst preventing the employer from having to pay both damages and

(1) [1944] K. B. 718, 721.

(2) [1940] 1 K. B. 56.

(3) [1940] 1 K. B. 180.

(4) 1944 S. L. T. 282; 37
B. W. C. C. Supp. 52.

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compensation. Apart from authority, I should have thought it reasonably plain that whereas the workman can choose which of his two types of remedy he would pursue, he cannot recover both damages and compensation, and at some time or other he must reach the position when he is bound to the one and debarred from the other. Your Lordships have to determine when and by what means that position is reached. The appellant maintained that the choice continues until the workman can be said to have exercised the option which the Act gives him. The true construction of the sub-section was, he said, to be found by reading the second part as exegetical or explanatory of the first, i.e., by interpreting it as meaning that the workman might at his option pursue either remedy, provided that by doing so he did not ultimately impose a liability upon his employer to pay both damages and compensation. In his contention that point would not be reached unless either a judgment had been obtained in his favour in a claim for damages or an award made in his favour or an agreement for compensation registered. In support of this argument he cited the observation of Kennedy J. in *Rouse v. Dixon* (1): "It is not impossible to construe s. 1, "sub-s. 2 (b)" (the corresponding section in the Act of 1897) "as meaning that the option may be exercised unless and "until a claim has proceeded to a decision." The respondents, on the other hand, urged that the two parts of the sub-section were to be read separately; that the choice made by the workman was irrevocable if he received workmen's compensation as such, and in any case that, as the Court of Appeal has held, the acceptance of either damages or compensation as such was a bar to recovery under the alternative remedy. Even though the respondents' argument be, as I think it is, unsound, yet in the present case I can have no doubt but that, after his solicitor's letter of July 24, the appellant knew that he could claim damages and with this knowledge continued to accept compensation. Up till then in my view he might have withdrawn his claim under the Act, but after that time he was confined to the remedy of which he continued to take advantage. Conversely, if he had brought an action knowing what he did and failed, he could not thereafter have applied for workmen's compensation were it not for the terms of s. 29, sub-s. 2, which expressly make provision for this contingency. See *Edwards v. Godfrey* (2), and *Cribb v. Kynoch, Ltd.* (No. 2) (3).

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(1) [1904] 2 K. B. 628, 634.

(3) [1908] 2 K. B. 551.

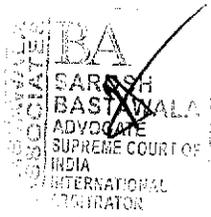
(2) [1899] 2 Q. B. 333.



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The general principle is founded on Lord Blackburn's dictum in *Kendall v. Hamilton* (1) : "There cannot be election until " there is knowledge of the right to elect." It finds support in such cases as *Rouse v. Dixon* (2), *Bennett v. L. & W. Whitehead, Ld.* (3), and *Unsworth v. Elder Dempster Lines, Ld.* (4), and is not inconsistent with *Burton v. Chapel Coal Co., Ld.* (5), where it was decided that a workman cannot sue for damages after failure to recover under the Act in a case where he has brought his action with full knowledge of the alternative remedy. Moreover, cases such as *Mackay v. Rosie* (6), and *Birch v. Pease & Partners, Ld.* (7), are not antagonistic in deciding that acts may be evidence of choice. Whether the workman has chosen is a matter of fact, but the effect of his knowledge or ignorance that he has alternative remedies is a matter of law. In so far as *Perkins v. Hugh Stevenson & Sons, Ld.* (8), and *Selwood v. Townley Coal & Fireclay Co., Ld.* (9), depart from these principles and decide that the mere acceptance of compensation as such, but in ignorance of the existence of an alternative remedy, is a fatal bar to a claim for damages, I think they are wrong. I prefer the reasoning of Lord Patrick in the more recent case of *Brown v. William Hamilton & Co.* (10), where he reviews the Scotch cases and refuses to follow the two last-mentioned English cases. I should be content to follow his conclusion and reasoning, but as the matter has been fully argued I think I ought give the grounds for my preference. In the English cases, as I understand them, the Court of Appeal construed s. 29, sub-s. 1, as divisible into two parts. Under the first they acknowledged the existence of the workman's option, at any rate unless and until he accepted compensation under the Act as such, but under the second they held that a workman who had claimed and received compensation or had accepted compensation as such had precluded himself from suing for damages even though he did not know that he had an alternative remedy ; it was enough that he knew he was receiving workman's compensation as such. The Court of Appeal, as I understand them, in so holding relied solely on the

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| (1) (1879) 4 App. Cas. 504, 542. | (6) 1908 S.C. 174; 1 B.W.C.C. 52. |
| (2) [1904] 2 K. B. 628. | (7) [1941] 1 K. B. 615. |
| (3) [1926] 2 K. B. 380. | (8) [1940] 1 K. B. 56. |
| (4) [1940] 1 K. B. 658. | (9) [1940] 1 K. B. 180. |
| (5) 1909 S. C. 430 ; 2 B. W. C. C. | (10) 1944 S. L. T. 282 ; 37 |
120. B. W. C. C. Supp. 52.



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second half of the sub-section and thought it unnecessary to have regard to the earlier part which gave the workman a choice. The mere payment and receipt of compensation was said to free the employer from the alternative liability, inasmuch as to expose him to such a claim would be to render him liable to pay twice over. So long as it was thought that, if compensation was paid, there was no method of recovering what had been so paid or of setting it off against any damages afterwards awarded, there was force in this argument (see *Perkins' case* (1) and *Selwood's case* (2)), but once it was acknowledged, as it was in *Unsworth v. Elder Dempster Lines Ltd.* (3), that this view was mistaken and that any compensation previously paid could be deducted from damages when awarded, the argument loses its efficacy. In a case where this course is adopted the employer does not pay twice nor has his liability to pay been finally determined. In my view, unless the dispute has reached the stage at which the employer is at least compellable to pay, either by judgment in an action or by award or registered agreement under the Act, he cannot be said to be liable to pay within the wording of the sub-section. Even a failure at law or the dismissal of a claim for compensation would not be enough; there must be some binding decision under which the employer is liable to pay. The provisions of this part of the sub-section are a defence against a legal liability to pay twice, not a method of ascertaining whether the workman has or has not made an irrevocable choice. But a choice has to be made under the first part of the sub-section and must at some time become irrevocable. When does this occur? I can find no answer, except that it comes when the workman is fully aware of the alternatives and deliberately makes his choice between them. He must not only know that he has claimed, or is offered or is receiving, workman's compensation as such, he must also know that he has an alternative remedy.

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The opinion I have been expressing is, I think, in accordance with the view of your Lordships' House as expressed in *Kinneil Cannel & Coking Coal Co., Ltd. v. Waddell* (4). In *Cotling v. John Mowlem & Co., Ltd.* (5), Atkin J., as he then was, had said that the provisions referred to in the latter part of the section give to the employer the right, independent of

(1) [1940] 1 K. B. 56.
(2) [1940] 1 K. B. 180.
(3) [1940] 1 K. B. 658.

(4) [1931] A. C. 575.
(5) [1914] 2 K. B. 61, 69.



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the exercise by anyone of the option, not to pay twice over, and further that this would be the result although payment under the statute was made without the knowledge and consent of the plaintiff who was seeking to enforce common law rights. Lord Buckmaster did not agree, and Lord Dunedin, said (1) : "What I think the section means to say, and what involves "no absurdity, is that no individual is to get two payments, "one at common law and the other under the Act." If the workman, knowing of the alternative, makes his choice, I should regard the option as exercised. But if he had not this knowledge, a claim for damages which either was not brought to a conclusion, or if brought to a conclusion failed, need not be a final election. Even judgment in favour of the workman would not of itself necessarily be a final choice, but it would bar a claim under the Act because the employer, being thereby liable to pay independently of the Act, could not be made liable to pay under it ; the wording of the second half of the sub-section would protect him. For the same reason an award or registered agreement under the Act would likewise protect the employer. But short of such a conclusion I do not see why the workman should not withdraw from one claim and proceed in the other, always provided he has not deliberately chosen the one or the other with full knowledge that the alternative is open to him. In the present case I think the appellant did make such a choice, and I would for that reason, but for that alone, dismiss the appeal.

LORD SIMONDS. My Lords, I concur in the motion that this appeal, the facts of which I need not rehearse, should be dismissed and will add only some observations on the meaning and effect of s. 29 of the Workmen's Compensation Act, 1929, which, having caused so much controversy in the English, Scotch and Irish courts, is now, I hope, to be replaced by a provision more easily intelligible. The section in question is, I suppose, introduced for the benefit of both the employer and the workman. The Workmen's Compensation Acts provided a new remedy for an injured workman but they could not be read so as to take away from him an existing right at common law in the absence of a provision to that effect. Yet it was clearly unfair to the employer that in respect of the same act or omission he should be doubly liable : therefore some provision against that event had to be made. It was made

(1) [1931] A. C. 575, 584.



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by s. 29 of the Act of 1929 as similar provision had been made by the earlier Acts: the question for your Lordships' consideration is, what does the section mean? My Lords, there are, I think, two separate questions involved. The first is what is meant by saying that the workman may at his option do one of two things. Having done one of those two things is he debarred from doing the other of them, only if (as some would say) he knew that he had a choice, or (as others would say) he both knew that he had a choice and was aware of all the facts relevant to the making of the particular choice? Or having done one of those two things, is he, whatever his state of mind may have been, altogether debarred from doing the other of them on the footing that his act proclaims his choice? The second question is, what act or acts amount to claiming compensation under the Act or taking proceedings independently of it, as the case may be, so that after such acts the workman is debarred from his other remedy? That is a question that arises whatever answer may be given to the first question.

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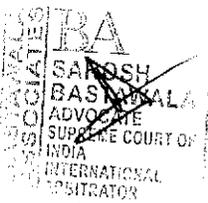
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Upon the first question I respectfully concur in what has been said by my noble and learned friend Lord Macmillan, whose opinion I have had the advantage of reading. I agree in thinking that much confusion has arisen from importing into the consideration of this section the niceties of the equitable doctrine of election. I do not understand how a workman, being given the statutory choice between what I will for brevity call claim and action, can make his claim and later say, "I will now bring my action, for when I made my claim I was unaware that I could bring an action." It is not clear to me whether the contention that he can do so is based solely on the words "at his option" which are found in the section. I do not think that it is logical that it should. For without those words the section gives the choice "the workman may . . . claim compensation . . . or take proceedings . . .", and if where there is a choice, an act, however unequivocal, is not decisive unless the actor is aware of his rights, the words "at his option" add nothing. In *Bennett v. L. & W. Whitehead, Ltd.* (1), Scrutton L.J. said: "I do not think you can escape the statutory prohibition against doing a thing by saying that, though you have done it, you have not elected to do it." This expresses my own view with admirable terseness. If the statute says that

(1) [1926] 2 K. B. 380, 404.

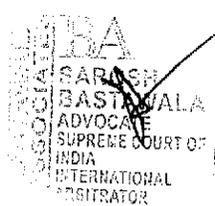


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a man may do one of two things, that involves that he may not do both. If he does one of them he cannot escape by saying: "I did not choose or elect to do it." He has done it. *Res ipsa locuta est*. If it is said that this gives no meaning to the words "at his option," I should be inclined to agree, but in any event they are superfluous since he, who has the choice, has also the option. The value of the words, as it appears to me, lies in this, that they make doubly clear, what was already clear enough, that it is for the workman not the employer to say which remedy shall be pursued. But that does not mean that, when the workman has pursued one remedy, he can deny that it was his choice.

My Lords, in coming to this conclusion on what I conceive to be the first question, I am assisted by a consideration of the difficulties, overwhelming as they appear to me to be, if the alternative view is accepted, viz., that, whatever a workman may have done, he is not debarred from his alternative remedy unless he has made a conscious choice between the two remedies. It is significant that, as I pointed out earlier in this opinion, it is not agreed amongst those who adopt this view, what degree of knowledge is sufficient to make the choice effective. On the one hand it is said that there must be knowledge that there is a right to choose: no more apparently is needed. On the other hand it is said—and I will take the latest statement of this kind from the judgment of Scott L.J. in *Coe v. London and North Eastern Ry. Co.* (1): "That option is, beyond doubt, a legal right of election, and no election can be exercised by the elector without full knowledge of all material facts affecting his choice." In this view there must be knowledge not only of the possibility of choice in general but of all the material facts affecting the particular choice. If indeed it is relevant to ascertain the state of the workman's mind, when he makes his claim or brings his action, the latter view appears to me more consistent and logical, for it is of little use to the workman to know in general that he has a choice unless he knows also all the facts which should guide him in making it. The theory postulates that the workman is instructed before he acts. I see no justification for stopping half-way and saying that it is sufficient for him to know that he has a choice and that it does not matter how much or how little he knows of the facts relevant to that choice. But, my Lords, if the view so

(1) [1943] K. B. 531, 540.



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expressed by Scott L.J. is the right one, the practical difficulties are grave indeed. There are no doubt regions of the law in which it is necessary to inquire into the state of a man's mind. But the inquiry must always be a difficult one, not lightly to be undertaken. Here "all material facts affecting his choice" must include the very facts which can perhaps only be ascertained on a judicial determination of his claim or action, and, even when they have been ascertained, there may be nice questions as to their bearing upon such problems as the doctrines of contributory negligence or "volenti non fit injuria" introduce. It would appear that the workman can make no fully instructed choice until he has been taught by failure or success in the claim or action that he has made or brought, and that it is only after that that any act on his part is final or irrevocable. If so, it is strange that it should have been thought necessary in a certain event and subject to certain conditions to preserve to him his alternative remedy namely, to permit him, if he brings his action and fails in it, to ask the court to assess and award him compensation under the Act. My Lords, I would say, expanding what I venture to think was in the mind of Scrutton L.J. in the passage that I have cited, that this is but an example of the fundamental proposition that a man intends the natural consequences of his acts. He is judged by what he does, not by what he thinks. Given alternative rights against his employer he exercises one of them: the employer, for whose benefit has been introduced, the limitation of alternative remedy, is bound neither to enlighten him nor to inquire into his state of mind. He is entitled to assume that that which the workman has done he has intended to do, that he has "at his option" made his claim or brought his action, as the case may be. I think, with deference to those who think or have thought otherwise, that Lord Blackburn's dictum in *Kendall v. Hamilton* (1), that there cannot be an election without knowledge of the right to elect (a dictum uttered in a widely different context) does not assist your Lordships in the construction of this section.

Answering the first question that I have posed by saying that it is what the appellant did, not what he knew or thought, that matters, I turn to the second question and ask whether he so acted that he was debarred from taking proceedings independently of the Act. Upon this question I understand that no doubt is entertained by your Lordships that, however

(1) 4 App. Cas. 504, 542.

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much the simple words, "claim compensation under this Act," where they occur in this section, may be expanded or refined, however liberally the section may be construed in favour of the workman, the present appellant so acted and, if it be material, continued so to act with knowledge of his rights, as to debar him from his alternative remedy of action. Under those circumstances, fully concurring in the conclusion, I do not think it necessary to consider the widely divergent views that have been held upon this subject. But I would safeguard myself in any future consideration of the matter, if it should come again before this House, by saying that I am far from satisfied that a somewhat strained and unnatural meaning has not been placed upon simple words. It is clear, I think, what the words "take proceedings independently of this Act" mean. That is one remedy open to the workman. The other remedy is to "claim compensation under this Act." If it becomes material, I should wish to consider how far it is legitimate to construe these plain words as importing anything more than a demand for compensation as of right, which I understand to be the natural and primary meaning of "claim." Nor should I, unless constrained by authority, be prepared without further consideration to accept the view that it is only against an ultimate double liability that the section protects the employer. That it has that result is certainly true, but as at present advised I do not see why it does not further protect him from proceedings independently of the Act if a claim for compensation under the Act has been already made. That is what the section seems in clear language to say. It may be thought desirable to give a greater latitude to the workman in the pursuit of his alternative remedies. That is a matter for the legislature. I am for my part unable by judicial interpretation of the section in its present form to achieve that result. The appeal should in my opinion be dismissed.

Appeal dismissed.

Solicitor for appellant : *W. H. Thompson.*
Solicitors for respondents : *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester.*



1926 SCC OnLine Rang 38 : AIR 1927 Rang 4 : ILR (1926) 4 Rang 313

**Rangoon High Court
Full Bench**

(BEFORE RUTLEDGE, C.J. AND HEALD, CARR, DUCKWORTH, CUNLIFFE, CHARI, DAS, OTTER AND MAUNG BA, JJ.)

In re, Ma Mya ... Appellant;

Versus

Ma Thein ... Respondent.

Civil Reference No. 10 of 1926

Decided on July 12, 1926

The Judgment of the Court was delivered by

RUTLEDGE, C.J.:— The questions referred for the decision of this Full Bench are:

1. Is the High Court in exercise of its ordinary original jurisdiction bound by the authorized reports of decisions of the Chief Court of Lower Burma, and, if so, to what extent?

2. Is the High Court in exercise of its-appellate jurisdiction bound by the authorised reports of the Chief Court of Lower Burma, and if so, to what extent? Before answering the questions referred it is necessary to consider the general questions of the authoritative character of judicial decisions.

3. The English Law on the subject has been stated clearly in 18 *Halsbury's Laws of England*, p. 210, S. 535.

4. It may be laid down as a general rule that part alone of a decision of a Court of law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often called ratio decidendi. Statements which are not necessary to the decision, which go beyond the occasion, and lay down a rule that is unnecessary for the purpose in hand (usually termed dicta) have no binding authority on another Court, though they may have some merely persuasive efficacy.

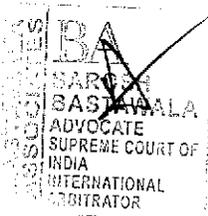
5. The same thing is stated by Sir George Jessel in another form in *Osborne v. Rowlett*⁽¹⁾:

The only thing in a Judge's decision binding upon a subsequent Judge is the principle upon which the case was decided.

6. To decide whether the decisions of the late Chief Chief Court are binding upon this Court we must decide whether it is a Court of co-ordinate jurisdiction. Admittedly, it is not so in respect of territorial jurisdiction, as the Chief Court's jurisdiction was confined to Lower Burma, while the High Court's jurisdiction extends to Upper Burma as well. In

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origin the Chief Court was the creation of the Indian Legislature and it was not a Court of Record. The High Court by its Letters Patent is the creation of the King-Emperor and is declared to be a Court of Record. It is in fact the King's Court which the Chief Court never was. Its jurisdiction in certain respects, such as contempt and mandamus is greater than that of the Chief Court. I am therefore of opinion that the Chief Court



cannot be held to be a Court of co-ordinate jurisdiction with the High Court. That being so, according to the principles of judicial comity, its decisions are not binding upon the High Court. It has been urged that the Lahore High Court in several decisions has regarded itself as bound by decisions of the Punjab Chief Court. In *Mahomed Ibrahim v. Allah Baksh*⁽²⁾ a Bench of the High Court observe:

We are bound by the Full Bench ruling of this Court which in our opinion lays down the correct law on the point.

7. The Full Bench ruling here referred to was that of *Ganesh v. Mool Chand*⁽³⁾ and the learned Judges are so impressed with the continuity of the Court that they refer to the Punjab Chief Court as this Court. Again in *Gurbhaj v. Lachman*⁽⁴⁾ Le Rossignol, J., observes:

The conclusion in *Gujar v. Sham Das*⁽⁵⁾ is binding on us but the theories by which the learned Judges attempted to explain the custom have no such binding force.

8. With regard to these observations I would remark that the position of the Chief Courts and the High Courts respectively in the Punjab and Burma are not quite analogous, and that the question of the binding effect of Chief Court decisions seems to have come before the Court incidentally. Moreover, the observations may have been by way of applying the legal principle of stare decision rather than holding that the Punjab Chief Court was a Court of co-ordinate jurisdiction with the Lahore High Court. The fact that the High Courts in India treated the decisions of the previous Supreme Courts as binding do not help us, as the Supreme Courts were as much the creation of the Royal Prerogative as the High Courts and were like them Courts of Record. The question of the decision of the Sudder Dewani Adawiat and the Sudder Nizamat Adawiat both Superior Courts to whose jurisdiction the High Court also succeeded, is more to the point. And a Bench of the Madras High Court in *M. Achutha Menon v. V.C. Sankara Nair*⁽⁶⁾ observes:

The learned vakil for the appellant relies on the opinion of the Sudder Court of its proceedings of the 5th August 1856. The proceedings have always been treated as authoritative and may be relied on in the absence of any precedents.

9. This, however, suggests a conditional and not an absolute authority and is reconcilable with the principle of stare decisis rather than of the Sudder Court being a Court of co-ordinate jurisdiction with the High Court of Madras.

10. The further question arises in respect of the Original Side of this Court by reason of S. 17 of the Letters Patent which runs as follows:

And we do further ordain that with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction such law shall be the law which would have been applied by the Chief Court of Lower Burma to such cases if these Letters Patent had not issued.

11. At first sight this would seem to apply the law as decided by the decisions which were binding upon the Original Side of the Chief Court; for Judge-made law is as much law as the enactments of the Legislature. I agree with the learned Government Advocate that it is necessary to consider certain legislation as regards the Courts in Burma to understand Ss. 17 and 18 of the Letters Patent. The first of these is Act 21 of 1863 for establishing Recorder Courts in Rangoon, Akyab and Moulmein. This Act gave an appeal from the Recorder to the High Court of Calcutta in suits above the value of Rs. 3,000 and in S. 21 prescribed that the law of the Court should be that of the Calcutta High Court except as to suits relating to marriage, succession and inheritance where the defendant was a native of the country. As the Calcutta High Court was the appellate Court in appeals from British Burma, this provision is easily understood. Various modifications of the provisions of this Act were subsequently

made by the Burma Courts Act of 1872 and 1875 and the Lower Burma Courts Act, 1889, to which I need not refer. In 1898 the Burma Laws Act was

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passed and by S. 13(1) Buddhist, Mahomedan and Hindu Law was prescribed in cases of succession, inheritance, marriage, caste, religious usage or institution. Then S. 13 (2) goes on:

Subject to the provisions of sub-Section (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original jurisdiction.

12. While an appeal lay from the Recorder's Court to the Calcutta High Court, the decisions of that Court were followed when they differed from those of other High Courts, vide: *Pethapermall Chetty v. Phillips*⁽²⁾. The Lower Burma Courts Act, which established the Chief Court, took away the right of appeal from Rangoon to Calcutta, and during the 22 years that the Chief Court of Lower Burma was in existence I have been unable to remember any occasion where the decisions of the Calcutta High Court were considered of greater authority than those of Madras or Bombay by reason of the Section 13(2) of the Burma Laws Act. This is of considerable importance for if the word "law" in that sub-section included the judicial decisions binding on the Original Side of the Calcutta High Court, it would clearly have been otherwise. The several learned Judges have construed the word "law" as covering not merely legislative enactments but also the English Common Law and they must be taken to have considered that it did not include the judicial decisions of the Calcutta High Court. In this construction I consider that they were justified. And, if so, there is no ground for giving the word "law" in S. 17 of the Letters Patent a wider meaning than the same word in Section 13 (2) of the Burma Laws Act, since it is evident that the latter was the direct source which inspired the former.

13. The authority of legal precedents has been classified as absolute or conditional (*Salmond's Jurisprudence*, 7th edition, page 192). Decisions of Their Lordships of the Privy Council on all Courts of this Province, decisions of Full Benches of this Court on all Courts of this Province, decisions of Benches of this Court on all single Judges of this Court and all inferior Courts of the Province and the decisions of single Judges of this Court on all inferior Courts of the Province are in my opinion absolute authorities for the reasons already given the decisions of the Chief Court of Lower Burma are not absolute authorities binding this Court on either the Original or Appellate Side and I answer both questions of the reference accordingly.

14. The decisions, however, of the Chief Court are conditional authorities of the highest value to which the greatest weight and respect must be attached. Though for the reasons given I do not consider that the Chief Court is a Court of co-ordinate jurisdiction with the High Court, it was, for 22 years, the highest Court in the larger and more important part of the Province subject only to appeal to His Majesty in Council. It consisted of men of great learning and experience with an intimate knowledge of the legal customs and habits of the people of the Province, and it would be disastrous if the Judges of this Court should consider themselves free to set those decisions at naught except for the best and most urgent of reasons. In my opinion the principle of stare decisis should be applied to these decisions in no narrow or technical spirit. The reasons for this principle have been often declared, but I may refer to them as stated by Broom and Sir John Salmond, as those reasons apply with great force to

the question under consideration.

15. It is then an established rule to abide by former precedents, stare decisis, where the same points come again in litigation, as well to keep the scale of justice steady and liable to waver with every new judges opinion, as also because the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter according to his private sentiments: he being sworn to determine not according to his own private judgment, but according to the known laws of the land—not delegated to pronounce a new law, but to maintain the old—*Jus dicere et non jus dare* (*Broom's Legal Maxims*, page 103, 9th Edition).

16. It does not follow that a principle once established should be reversed simply because it is not as perfect and rational as it ought to be; it is often more important that the law should be certain than that it should be ideally perfect. These two requirements are to a great extent inconsistent with each other, and we must often choose between them Whenever a decision is departed from, the certainty of the law is sacrificed to its

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rational development, and the evils of uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it; important contracts may have been made on the strength of it; it may have become to a great extent a basis of expectation and the ground of mutual dealings. Justice may therefore imperatively require that the decision though founded in error, shall stand inviolate none the less communis error facit jus.

"It is better,"
said Lord Eldon,

that the law should be certain than that every Judge should speculate upon improvements in it. *Salmond's Jurisprudence*, p. 194, 7th edition.

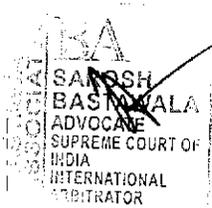
17. The reasons given by these learned authors apply with undiminished force in this Province where the Courts have to a great extent been interpreting local law and custom and enactments of only local application.

18. Lest there should be any misapprehension on the part of the Subordinate Courts of the Province it is as well to declare that they should consider themselves bound by the decisions of the Chief Court which have been reported under the authority of the Court itself. They are not bound by any report published without that authority, nor is any duty thrown upon the Court when such report is cited before it to apply for a certified copy since, in my opinion, such an examination would entail an unreasonable interference with the despatch of the work of the Court.

19. I would add that the reports published under the authority of the Judicial Commissioner of Upper Burma should be considered as of like binding effect, subject to this qualification that such decisions are those of a single Judge and must yield when they are in conflict with a decision of a Bench of the Chief Court which has not been overruled.

MAUNG BA, J.:— I concur.

HEALD, J.:— I have had the advantage of reading the judgment of the learned Chief Justice and I agree with him that this Court is not absolutely bound in either its original or appellate jurisdiction, whether civil or criminal, by the decisions of the Chief



Court of Lower Burma whether authoritatively reported or not.

20. Clauses 17 and 18 of the Letters, Patent of this Court say that in cases coming before this Court in the exercise of its original civil jurisdiction the law and equity to be applied are the law which would have been applied by the Chief Court of Lower Burma and the equity, as nearly as may be, which the High Court at Port William in Bengal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such cases. So far as the extraordinary original jurisdiction was concerned, Clause 18 of the Letters Patent says that the law or equity and rule of good conscience to be applied in any case within that jurisdiction shall be that which would have been applied by a local Court having jurisdiction in the cases.

21. Similarly, as regards cases within the civil appellate jurisdiction Clause 26 says that the law or equity and rule of good conscience to be applied by this Court shall be that which the trial Court ought to have applied in the particular case which is before the Court. As regards the law to be administered by this Court in the exercise of its criminal jurisdiction all that the Letters Patent say is that persons who are brought for trial before the Court either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference, or revision, and are charged with any offence for which provision is made by the Penal Code, 1860 or by any Act amending or excluding that Code, shall be liable to punishment under the said Code or Acts and not otherwise.

22. It is contended that Clause 17 in so far as it provides that the law which is to be administered by this Court in its ordinary original civil jurisdiction "shall be the law which would have been applied by the Chief Court," makes the decisions of the Chief Court binding on this Court on the Original Side, and it is necessary to consider whether or not that contention is sound. The law by which Courts are bound may be regarded as being of two kinds, namely, Statute Law and Case Law. The statute law which is in force is absolutely binding on all Courts provided that the Legislature was acting *intra vires* in making it.

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23. Case-law is absolutely binding only on certain Courts. The decisions of the Privy Council are absolutely binding on all Courts in India. The authorised reports of decisions of the highest Court of a Province are absolutely binding on all Subordinate Courts in that Province, and ordinarily, the decisions of a Full Bench of a Superior Court are binding on Benches other than Full Benches of that Court and on all Judges of that Court sitting singly, and decisions of Benches are binding on single Judges. Decisions of inferior Courts are never binding on superior Courts. Where Courts have co-ordinate jurisdiction the practice in India is, I believe, that the decisions of one such Court are not regarded as binding another. So far as this Court is concerned, it has been laid down that whenever one Bench shall differ from any other Bench, not being a Full Bench, on any question of law or custom having the force of law or of the construction of any document or of the admissibility of any evidence, the case shall be referred for decision by a Full Bench, and provision has also been made for a Bench decision of such question arising before a single Judge.

24. It seems clear that the High Court is not a Court of entirely co-ordinate jurisdiction with the Chief Court which was one of the two Courts which it replaced. The High Court is a King's Court and a Court of Record, which the Chief Court was not, and it has, in certain respects, wider powers than the Chief Court ever had. It is true



that, in many respects, the two Courts may be regarded as co-ordinate,; but, even if they were regarded as entirely co-ordinate, I do not think that, on the principles which I have stated above, the decisions of the Chief Court would be binding on this Court. In my opinion what Clause 17 of the Letters Patent meant was that the institution of the High Court did not involve any change in the law to be administered by the Court its Original Side, and that the ??? and the principles of law which would have been followed by the Chief Court should be followed by the High Court. It would, in my opinion, have been contrary to principle to prescribe that the High Court should be bound by decisions of the Chief Court and a strict interpretation of the words of the Letters Patent in that sense would mean that the case law must be regarded as having been stereotyped at the time when the Chief Court ceased to exist and as having from that time become incapable of change. Similarly, I read Clause 18 as meaning that the same principles of equity as are applied in the High Court of Judicature of Fort William on its Original Side are to be applied on the Original Side of this Court and not that the decisions of the High Court of Calcutta on its Original Side should be absolutely binding on this Court.

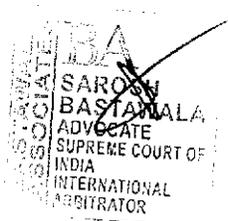
25. All that I have said above is, of course, subject to the proviso that in any case what is to be regarded as binding is not the actual decision but the ratio decidendi. It is also subject to the operation of the principle of stare decisis which has been clearly enunciated by the learned Chief Justice in his judgment. When I say that this Court is not bound by the decisions of the Chief Court, I do not mean that this Court ought to disregard those decisions. What I mean is that the Judges of this Court are not bound to follow them as they are bound to follow the decisions of the Privy Council, but are entitled to consider whether they declare the law correctly; that we should pay due respect to the authority of the learned Judges whose decisions they are, and if we think that they do not expound the law as it should have been expounded, we should consider whether or not in view of the principle of stare decisis we should be justified in taking steps to have what we think to be the true state of the law authoritatively declared by this Court.

26. The only matter as to which I am with the greatest respect not in entire agreement with the learned Chief Justice in one which, strictly speaking, does not arise out of the reference, namely, the question whether the change in the constitution of the highest Court of the Province relieved the Subordinate Courts from the necessity of holding themselves bound by the rulings of the Courts to which this Court has succeeded. It is, of course, clear that all Subordinate Courts are bound by the decisions of this Court and that until this Court was instituted the Subordinate Courts of Lower Burma were bound by the rulings of the Chief Court and those of Upper Burma by the Upper Burma rulings. The question is whether in cases where there is

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no decision of this Court by which they are bound, they are still bound by the rulings of the Chief Court of Lower Burma or of the Judicial Commissioner (or the Court of the Judicial Commissioner) of Upper Burma according as the case arises in Lower or in Upper Burma.

27. It follows from what I have said above that this Court is not bound by the Upper Burma rulings any more than it is bound by the rulings of the Chief Court of Lower Burma; but it seems to me to be contrary to principle that a mere change in the constitution of the superior Court should relieve Subordinate Courts of the duty of following the decisions of the superior Courts which this Court has replaced, and I would hold that on points where there is no decision of this Court, Subordinate Courts



in Lower Burma are still bound by the authoritatively-reported rulings of the Chief Court and that Subordinate Courts in Upper Burma are still bound by the decisions reported in Upper Burma rulings. No practical inconvenience would be caused by a decision to that effect since the differences between the law as laid down in Lower and Upper Burma are now few and tend to disappear quickly, this Court being now the Court of appeal for both the Lower and Upper Provinces and being certain in the near future to declare the law in one sense or the other in cases where there is still conflict. I would add that I see no reason to doubt that this Court in the exercise of the superintendence conferred on it by Section 107 of the Government of India Act has power, if it considers it desirable, to direct the Subordinate Courts in Upper Burma to regard themselves as bound by the decisions of a Bench of the Chief Court of Lower Burma or even of a single Judge of that Court in preference to the decisions of the Judicial Commissioner or the Court of the Judicial Commissioner of Upper Burma and that when such a direction shall have been given those Courts will be so bound.

28. I would answer the questions referred as follows:

- (1) The High Court, in the exercise of its ordinary original jurisdiction, is not bound by the authorized reports of decisions of the Chief Court of Lower Burma.
- (2) The High Court in the exercise of its appellate jurisdiction is not bound by the authorized reports of the Chief Court of Lower Burma.

CARR, J.:— I am in general agreement with the views expressed by the learned Chief Justice and am prepared to accept his conclusions that neither the Original nor the Appellate Sides of this Court are absolutely bound by decisions of the late, Chief Court of Lower Burma.

29. The learned Chief Justice has very strongly emphasized the importance of the principle of stare decisis. I agree with all that he has said on this subject but desire to lend it, if that is possible, even greater emphasis. In this connexion I quote the following from Lord *Halsbury's Laws of England*, Volume 18, para. 536:

Apart from any question as to the Courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the legal procedure or in other ways will generally be followed by Courts of higher authority than the Court establishing the rule, even though the Court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. But where the course of practice is founded upon an erroneous construction of an Act of Parliament there is no principle which precludes, at any rate, the highest Court of appeal from correcting the error. The same considerations do not apply where the decision, though followed, has been frequently questioned and doubted. In such a case it may be overruled by any Court of superior jurisdiction.

30. We see from this that even Courts of superior jurisdiction do, except in very special cases, follow rules well established by decisions of inferior Courts. There are, I think, very special reasons why this Court should adopt this attitude towards decisions of the Chief Court. Although that was a Court of inferior jurisdiction it was nevertheless for over twenty years the highest Court in the Province, and was subject only to the superior jurisdiction of the Privy Council. Its decisions were absolutely binding on all Courts in the province unless overruled by itself or by the Privy Council. They must still retain that authority in respect of all Courts in the Province except this Court, and this Court though not absolutely bound by them, should follow them unless impelled to do otherwise by the strongest and gravest reasons.

DUCKWORTH, J.:— I concur in the answers to the reference given by the learned Chief Justice, and have little to say in addition.

31. It seems to me that the word Law, as used in Clause 17 of the Letters Patent,

merely means the legal enactments of the

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Indian and Burmese Legislatures, the English Common law and Equity, etc., which was applied by the late Chief Court of Lower Burma. I cannot see that of necessity it must be read so as to include the published decisions of that Court, which decisions, until merged in an enactment, or used to modify or repeal any enactment, are not strictly speaking law; at any rate to the extent to which case law in England is Law. We have, in this matter, to free our minds from British preconceptions.

32. The High Court of Judicature, as a King's Court, is not merely the successor of the Chief Court of Lower Burma, but is, to my mind, an entirely new creation and, as such, should be free and unshackled by the decisions of an inferior Court.

33. This is not to say that the principle of stare decisis should not be carefully observed, in all cases where the previous decisions appeal to our notions of what is the right law.

34. I would take this view for both the Original and Appellate Sides of this Court.

35. At the same time, I would indorse all that the learned Chief Justice has said in regard to the extent to which Subordinate and Mofussil Courts in Burma should feel bound by the decisions of the Chief Court of Lower Burma.

36. In this way, it cannot be urged that we are endangering rights created by, or depending upon, decisions of the late Chief Court.

CUNLIFFE, J.:— In this important reference I much regret that I am unable to concur in the conclusions arrived at by my Lord, and I only do so with the greatest deference to the reasons as put forward.

37. The two questions referred for decision are:

- (i) Is the High Court, in exercise of its ordinary original jurisdiction, bound by the authorized reports of decisions of the late Chief Court of Lower Burma; and, if so, to what extent?
- (ii) Is the High Court, in exercise of its appellate jurisdiction, bound by, the authorized reports of the late Chief Court of Lower Burma; and, if so, to what extent?

38. I prefer to answer the second question first.

39. The whole matter appears to me to be a question of the respective legal status of the old Chief Court of Lower Burma constituted by the Lower Burma Courts Act, 1900, and the present High Court constituted by the Burma Courts Act, 1922, and the Letters Patent of the 11th November of the same year. The classification of Courts in relation to their superior or inferior status may be regarded from several points of view. A division may be insisted upon between Courts of the King and Courts which are not of the King. Another division may be made between Courts of Record and Courts not of Record. I question, however, whether either of these classifications can be regarded as a guide in respect to the reference now before us.

40. The Chief Court was not directly, at any rate, a Court of the King. Undoubtedly, the present High Court, by virtue of its Letters Patent, is a Court of the King. The old Chief Court was not a Court of Record. The present High Court is, undoubtedly, a Court of Record. It was with reference to these two tests that the learned Government Advocate invited us to hold that, generally, the decisions of the Chief Court, from a strictly legal point of view, were not binding upon us in this Court to-day.

41. The second test seems to me to involve the question of jurisdiction. The

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inherent power of a Court of Record is to fine and imprison and to have its proceedings preserved in its archives as records which are conclusive evidence of the accuracy of what is recorded in them. A further distinction which used to be drawn in relation to Courts of Record and Courts not of Record was that, in Courts of Record a writ of error lay, and in Courts not of Record any proceeding by way of error had to be taken by means of a writ or judgment. To my mind the true test to be applied in solving this difficult problem is to regard both the present High Court and the old Chief Court from the point of view of their main civil and criminal jurisdiction and also from the point of view of their status in relation to the Court of appeal immediately above them.

42. Apart from the concomitants inherent to a Court of Record, I am unable to find any difference between the actual civil and criminal jurisdiction of the old Chief Court and of the present High Court. It is true that territorially the present High Court has a larger jurisdiction, but the actual powers of the two Courts

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with the exception above mentioned, appear to me to be co-extensive.

43. As to their status, from the point of view of the position they occupy in Burma, by Section 8 of the Lower Burma Courts Act, 1900, the Chief Court was constituted as the highest Civil Court of Appeal and the highest Court of Criminal Appeal and Revision in and for Lower Burma. It was also the High Court for the whole of Burma inclusive of the Shan States in respect of the proceedings against European British subjects and persons jointly charged with European British subjects. It had power as a Court of original jurisdiction, to try European British subjects and persons charged jointly with Europeans committed by any Magistrate exercising jurisdiction in any part of Burma, and it had the Civil and Criminal original jurisdiction in any part of Burma, and it had the Civil and Criminal jurisdiction for Rangoon.

44. By S. 44, the appellate jurisdiction of the Calcutta High Court was withdrawn and the Chief Court became the highest appellate tribunal in the Province. From the Chief Court, appeals lay to the Privy Council. From the High Court, as at present constituted, appeals lie to the same tribunal. I find it difficult, therefore, to Judge any substantial distinction between the present High Court and the old Chief Court. If the distinction between the Courts is not a substantial one, in my view it would be contrary to public policy, having regard to the great necessity for preserving a continuity of all legal decisions, to hold that the Judges of this Court are not bound by the mass of considered judgments delivered by the Judges of the late Chief Court acted upon by the people of this Province and on a number of occasions considered by the learned Law Lords of the Privy Council.

45. The difference between a Court of Record and a Court not of Record appears to me not to affect in any way at all the legal value of a tribunal's decision. The territorial jurisdiction does not appear to me to influence the status of a Court one way or the other from the point of view we are endeavouring to consider. For these reasons I am of the opinion that the High Court generally is bound by the authorised reports of the late Chief Court of Lower Burma.

46. The question of the position of the Original Side outlined in the first proposition in this reference seems to me to be a subordinate one. I think that the legal position of the Original Side with regard to the old rulings depends not on the reasons I have adduced above, except in a general sense and from an a fortiori standard, but upon S. 17 of the Letters Patent. The section runs as follows:

And we do further ordain that, with respect to the law to be applied to each case



coming before the High Court of Judicature at Rangoon, in the exercise a its ordinary original civil jurisdiction such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued.

47. The law then to which we have to look is the law which would have been administered immediately before the constitution of the present High Court, the law prevailing in Burma in the earlier part of the year 1922. In that year the Chief Court had been established 22 years. For 22 years the Chief Court had been engaged in deciding questions of Buddhist Law, of interpretation of local status and of general law appropriate to the Province by the old Burma Acts. Before 1900 the law administered in Burma was based on the law prevailing at Fort William in Bengal which territory, by a legal fiction, had always been understood to be English soil.

48. It is easy to see why such basis was laid for the administration of the common law and equity in this Province. The Court of Appeal for Burma before 1900 was the High Court of Calcutta. Such appellate power was taken away from the High Court in Bengal by the Act of 1900. I do not think that it is stretching the legal point too far to say that, when the Chief Court of Lower Burma was constituted, the final appeal for the Province in 1900 with all vestige of Calcutta control of the administration of justice in Burma disappeared.

49. I have searched in vain through the reports of the Chief Court decisions to find whether the Judges held any contrary view to this. I have been unable to find a single judgment that would uphold the view which we are invited to adopt by the learned Government Advocate that the ordinary original civil jurisdiction should administer the law prevailing in Calcutta and not the law which had grown up during the 22 years

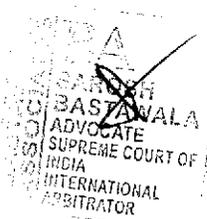
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which elapsed before the foundation of the present High Court.

50. I, therefore, am of the opinion that the High Court, in exercise of its ordinary original jurisdiction and its appellate jurisdiction is bound by the authorised reports of decisions of the late Chief Court of Lower Burma. And I am fortified in holding this opinion by the fact that I have been unsuccessful in finding any other opinion held by the Judges of Indian High Courts, in circumstances, it is true, not precisely similar to those which we are at present considering, but which, to my mind, are sufficiently parallel to afford a valuable guide to this difficult question.

CHARI, J.:— In this Full Bench Reference I am in agreement with the conclusions arrived at by his Lordship the Chief Justice and in the reasons on which those conclusions are based. I agree with him that the position of the High Court at Rangoon and the old Chief Court of Lower Burma is analogous not to the position of the Supreme Courts in the Presidency Towns and the High Courts which superseded them which were both of them King's Courts, but to the position of the old Sudder Dewani Adawiat and the High Courts which succeeded them.

51. I have gone through some of the older rulings of the High Courts to see if in any of them, though there is no direct decision on this point, there are indications to show whether the High Courts considered themselves bound by the previous decisions of the Sudder Dewani Adawiat. I was not able to find any case in the Bombay Reports nor in the Reports of the Madras High Court which give a clear indication on the point. The case of *M. Achutha Menon v. V.C. Sankara Nair*⁽¹⁾ has been brought to our notice by the learned Advocate for the respondent. In that case the learned Judges at page 381 (36 M.) say:



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The learned vakil for the appellant relies on the opinion of the Sudder Court in its proceedings of the of August 1858. The proceedings have always been treated as authoritative and may be relied on in the absence of any precedent.

52. The learned advocate for the respondent wanted us to consider the concluding portion of this passage as meaning.

53. In the absence of any precedents to show that the rulings of the Sudder Dewani Adawlut should not be followed.

54. This, however, is not its meaning. The word "precedent" is used in the older reports in reference to the ruling's of the Court which are treated as precedents. The meaning of the passage therefore is "in the absence of any rulings of the High Court to the contrary." In another Madras case, *Nagabhushanam v. Seshammagaru*⁽⁸⁾ a ruling of the Sudder Dewani Adawlut was not followed by the Madras High Court. That Court gave as the reason for not following the older ruling the fact that the Sudder Dewani Adawlut's decision was merely based on the opinion of the Pandits which opinion itself was not based on any text cited by them. No inference could be drawn from this ruling of the Madras High Court as to whether that Court considered itself bound or not bound by the earlier decisions of the Sudder Dewani Adawlut. Turning to the Allahabad High Court in the case of *Bhawani Gir v. Dalmordan Gir*⁽⁹⁾ the Chief Justice (Sir Robert Stuart) at page 146 says:

Allusion is made by Pearson and Oldfield, JJ., to two cases, one decided by the Sudder Court in 1864 and which is, no doubt in favour of the appellant's contention, if the law it lays down could be accepted by this Court. But I am distinctly of opinion that the ruling in that case was erroneous and ought not to be followed.

55. In a later case of the same High Court, *Thamman Singh v. Jamai-ud-din*⁽¹⁰⁾ Mr. Justice Mahmood at page 444 says:

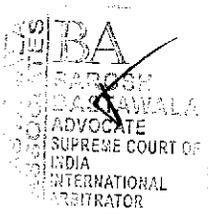
I am of the same opinion as my learned brother Oldfield, and I wish only to refer to two cases which were cited by the learned counsel for the respondent in support of his client. One of these cases is *Motee Sah v. Goklee* (a decision of the North-Western Provinces Sudder Dewani Adawlut). I do not regard that case as by any means on all fours with the present, and I wish to say that I do not accept the rule of law as to acquiescence or estoppel which was there laid down, and from which I have already expressed my dissent upon a former occasion.

56. The remarks contained in the above two judgments of the Allahabad High Court seem to show, though not very clearly, that High Court did not consider itself bound by the decisions of the Sudder Dewani Adawlut of the Province. We get much clearer indications in some of the older cases of the Calcutta High Court. In the case of *Mugun Ghunder Chutturaj v. Surbessur Chuckerbutty*

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⁽¹¹⁾ the learned Judges Kemp and Glover at page 480 say:

In support of the first objection we have been referred to a decision of the late Sudder Dewani Adawlut No. 412 of 1854, Sudder Dewani Adawlut Reports, 1858, page 513 in the case of *Ranee Surno Moyee, plaintiff-appellant v. Pertap Chunder Burooah, defendant-respondent* in which it is laid down generally that a party in bona fide possession of land, in possession that is without knowledge of the defect in his title, is not liable to the legitimate owner for mesne profits. We have been unable to find, and the special appellant's pleader has not referred us, to any later cases in which the same doctrine is enunciated; and although we have great respect for the opinion of the learned Judges who passed that decision, we are not



in any way bound to follow it as a precedent.

57. In a later case, *Lakhoo Koer v. Huree Kishen Roy*⁽¹²⁾, the same learned Judges made a clearer statement. Glover, J., says in his judgment (with which Kemp, J., concurred):

I do not understand that a Divisional Bench of this Court is bound by a decision of the late Court of Sudder Dewani Adawlut, or that if we held a different opinion to that expressed in former judgments of that Court, we should be obliged to refer the question to a Full Bench.

58. These are the only cases I have been able to find on the point and it seems to me that so far as the Calcutta High Court, at all events, is concerned, it did not hold itself bound by the decisions of the Sudder Dewani Adawlut. I am in entire agreement with the remarks of the learned Chief Justice about the applicability of the principle of stare decisis. That principle ought to be applied wherever it can be and, as the learned Chief Justice says, should not be applied in a narrow or technical spirit.

59. For these reasons I concur in the answers proposed by his Lordship the Chief Justice.

DAS, J.:— The questions referred for the decision of this Full Bench are as follows:

- (1) Is the High Court in exercise of its ordinary original jurisdiction bound by the authorized reports of decisions of the Chief Court of Lower Burma; and, if so, to what extent?
- (2) Is the High Court in exercise of its appellate jurisdiction bound by the authorized reports of the Chief Court of Lower Burma; and, if so, to what extent?

60. I have had the advantage of reading the judgment of my Lord the Chief Justice and I agree with him that this Court is not bound by the authorized reports of the Chief Court of Lower Burma either in exercise of its ordinary original jurisdiction or in exercise of its appellate jurisdiction.

61. Clause 17 of the Letters Patent runs as follows:

And we do further ordain that, with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued.

62. It is necessary here to consider what law would have been applied by the Chief Court of Lower Burma in exercise of its ordinary original civil jurisdiction. That is stated in Section 13(2) of the Burma Laws Act, which runs as follows:

Subject to the provisions of sub-S. (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

63. So the Chief Court in the exercise of its ordinary original civil jurisdiction was bound to administer the law administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction. The question then arises as to the meaning of the word "law" in Cl. 17 of the Letters Patent and Section 13(2) of the Burma Laws Act. Does the word "law" there include case law also? If so, the result would be that the Chief Court of Lower Burma in the exercise of its ordinary original civil jurisdiction would be bound by the case law of the Calcutta High Court which governed original suits instituted in Calcutta. If that be so, then the High Court would also be bound by the case law governing original suits in Calcutta. I do not think that the Legislature in stating that the Chief Court would be bound by the law administered by the High Court of Judicature at Fort William meant that the Chief

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Court would be bound by the case law of the Calcutta High Court. During the 23 years of the existence of the Chief Court, it had never been contended before the Chief Court that the Original Side of the Chief Court was bound by the case law of the Calcutta High Court. I think the word "law" in Section 13(2) of the Burma, Laws Act means simply general law and

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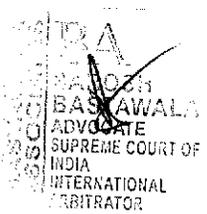
statutory law and does not mean case law; and the word "law" in Cl. 17 of the Letters Patent does not mean that the Original Side of this Court would be bound by the decisions of the Chief Court in the exercise of its original civil jurisdiction. I do not think the Chief Court was a Court of co-ordinate jurisdiction with the High Court. The Chief Court was a Court created by the Indian Legislature and the High Court is a creation of the King. The High Court is a Court of Record and the Chief Court was not a Court of Record. The territorial jurisdiction of the Chief Court was much less than the territorial jurisdiction of the High Court. Though the decisions of the Chief Court are entitled to respect, I am of opinion that they are not binding on the High Court. A point was raised as to the binding effect of authorized decisions of the Chief Court on Courts subordinate to this Court, though the matter is not raised by the reference. But I think it necessary to state that, in my opinion, Subordinate Courts must follow the decisions of the Chief Court published in authorized reports, unless the same have been overruled by or dissented from by this Court.

OTTER, J.:— I agree with the judgment of the learned Chief Justice upon both, the questions referred to us. No useful purpose therefore would be served by any further elaborations by me of the views he has expressed. I have no doubt at all upon the answer which should be made to the second of the two questions referred to us. With regard to the first question I have been in some doubt upon the matter owing to the wording of S. 17 of the Letters Patent. After careful consideration, it seems to me, however, that a flood of light is thrown upon this matter by the words contained in the provisions of the Burma Laws Act quoted by the learned Chief Justice. It seems to me that the word "law" occurring in S. 13(2) of that Act must be interpreted in the same manner as the word "law" when it occurs in S. 13(1) of that Act. It seems to me that its use in S. 13(1) must be taken to include "legal principles" as for example the legal principles of Burmese Buddhist or Mahomedan Law so far as they are known and not necessarily so far only as they have received effect by legislation or have been rightly (or it may be wrongly) interpreted by the Court. If therefore the same method of interpretation of the word "law" is adopted, where it occurs in sub-S. (2), the legal principles of the English Common Law must it seems be taken to be included.

64. With the observations of the learned Chief Justice upon the principle of stare decisis I am in complete agreement. It seems to me of the greatest importance to bear this principle in mind in view of the varied local conditions and customs peculiar to this Province.

65. Reference answered in the negative.

- (1) [1880] 13 Ch. D. 785 : 49 L.J. Ch. 310.
(2) [1919] 1 L.L.J. 138 : 52 I.C. 327 : 145 P.R. 1919.
(3) [1912] 95 P.R. 1912 : 15 I.C. 161 : 159 P.W.R. 1912 (F.B.).
(4) A.I.R. 1925 Lah. 341 : 6 Lah. 87.



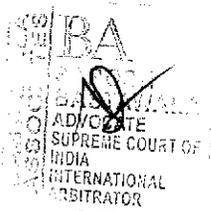
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- (5) [1887] P.R. 107.
(6) [1917] 36 Mad. 380 : 22 M.L.J. 118 : 12 I.C. 1007 : (1911) 2 M.W.N. 529.
(7) [1891] Selected Judgments 555.
(8) [1881] 3 Mad. 180.
(9) [1881] 3 All. 144.
(10) [1885] 7 All. 442 : (1885) A.W.N. 70.
(11) 8 W.R. 479.
(12) 12 W.R. 3 : 3 B.L.R. A.C. 226.

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1954 SCR 786 : AIR 1954 SC 245 : (1954) 2 LLJ 678 : 1954 BP 127**In the Supreme Court of India**(BEFORE MEHR CHAND MAHAJAN, C.J. AND BIJAN KUMAR MUKHERJEA, SUDHI RANJAN DAS,
VIVIAN BOSE AND GHULAM HASAN, JJ.)

STATE OF BIHAR ... Appellant;

Versus

ABDUL MAJID ... Respondent.

Civil Appeal No. 70 of 1952¹, decided on February 11, 1954

The Judgment of the Court was delivered by

MEHR CHAND MAHAJAN, C.J.— This is an appeal by the State of Bihar against the judgment of the High Court of Judicature at Patna whereby the High Court passed a decree for arrears of salary of the respondent against the State from 30th July, 1940, up to the date of the institution of the suit.

2. The undisputed facts of the case are: That the respondent was appointed a Sub-Inspector of Police by the Inspector General of Police, Bihar and Orissa, in January 1920. In the year 1937 departmental proceedings were taken against him and he was found guilty of cowardice and of not preparing search lists and was punished by demotion for ten years. On appeal, the Deputy Inspector-General of Police held that the respondent was guilty of cowardice but acquitted him of the other charge. By an order dated 23rd July, 1940, which was communicated to the respondent on the 29th of July, 1940, the Deputy Inspector General of Police having found him guilty of cowardice made an order dismissing him from service. Further appeals by the respondent to the Inspector General of Police and to the Governor of Bihar were unsuccessful.

3. Aggrieved by the departmental action taken against him, the respondent filed the suit out of which this appeal arises in the Court of Additional Subordinate Judge against the State of Bihar for a declaration that the order of the Deputy Inspector General of Police dismissing him from service was illegal and void and that he should be regarded as continuing in office. He also claimed a sum of Rs 4241 from 30th July, 1940, to the date of the suit on account of arrears of salary. The State contested the claim and pleaded that the plaintiff held his service at the pleasure of the Crown, and could not call in question the grounds or the reasons which led to his dismissal, and that in any case he had been reinstated in service from the 30th of July, 1940, and the order of dismissal therefore was no longer operative, and the suit had thus become infructuous. The Additional Subordinate Judge by his judgment dated 2nd February, 1945, dismissed the suit on the finding that the Government having reinstated the respondent he had no cause of action. As regards the arrears of salary, it was held that the claim to it could only be made according to the procedure prescribed under Rule 95 of Section 4 of Chapter IV of Bihar and Orissa Service Code. This decision was confirmed in appeal by the Additional District Judge. On further appeal the High Court reversed these decisions and decreed the claim for arrears of salary in the sum of Rs 3099-12-0. It was held that Rule 95 of the Bihar and Orissa Service Code had no application because the respondent had never been dismissed within the meaning of that Rule. It was further held that the plaintiff was entitled to maintain the suit for arrears of pay in view of the decision of the Federal Court in *Tara Chand Pandit's case*¹ the correctness of which was not affected by decisions of the Privy Council in cases of *I.M. Lal*² and *Suraj Narain Anand*³.

"The principal questions involved in this appeal are:

(1) Whether the High Court correctly held that Rule 95 above mentioned had no application to the case?

(2) Whether a suit for arrears of salary by a civil servant is competent in a civil court?

Rule 95 of the Bihar and Orissa Service Code provides:

"95. When the suspension of a Government servant as a penalty for misconduct is, upon reconsideration or appeal, held to have been unjustifiable or not wholly justifiable; or when a Government servant who has been dismissed or removed, or suspended pending enquiry into alleged misconduct is reinstated;

the revising or Appellate Authority may grant to him for the period of his absence from duty

(a) if he is honourably acquitted, the full pay to which he would have been entitled if he had not been dismissed, removed or suspended and, by an order to be separately recorded, any allowance of which he was in receipt prior to his dismissal, removal or suspension; or

(b) if otherwise, such proportion of such pay and allowances as the revising or Appellate Authority may direct."

4. The provisions of this rule enable an appellate or revising authority, when making an order of reinstatement to grant the reliefs mentioned in the Rule. Obviously these provisions have no application to the situation that arose in the present case. The respondent here was dismissed by the Deputy Inspector-General of Police, though he was appointed by the Inspector-General of Police. This was clearly contrary to the 1954 provisions of Section 240(3) of the Government of India Act, 1935, which provides that no person shall be dismissed from the service of His Majesty by an authority subordinate to that by which he was appointed. But nevertheless the appeal preferred by Inspector-General of Police was rejected and his petition to the Government of the State met with the same fate, so that he was never reinstated by the order of any revising or Appellate Authority. It was only after the present suit was filed that the Government reinstated him. This was no proceeding in revision or appeal. In these circumstances the enabling provisions of Rule 95 had no application whatsoever to the case of the plaintiff. What happened subsequently is a matter wholly outside the contemplation of the Rule. After the institution of the suit, the Chief Secretary to the Government of Bihar realising the untenability of the Government's position wrote to the Inspector-General of Police that the order of dismissal should be treated as null and void and that the respondent should be reinstated. Thus the reinstatement of the plaintiff following the telegram of the 30th December, 1943, was not made at the instance of any of the authorities mentioned in the Rule in exercise of their jurisdiction, appellate or revisional, but was made at the instance of the defendant in the suit who had realised that it was not possible to defend the order of dismissal. For the reasons given above we are of the opinion that the High Court was right in holding that Rule 95 had no application to the facts and circumstances of this case and that the enabling provisions of this rule did not operate as a bar to the plaintiff's action.

5. The next contention of the learned Solicitor-General that a suit by a public servant against the State for recovery of arrears of salary cannot be maintained in a civil court is again, in our opinion, without substance. We think that the matter is covered by the decision of the Federal Court in *Tara Chand Pandit's case*¹ with which we find ourselves in respectful agreement. In that case the learned Attorney-General had argued with great force all the points that were urged in this appeal before us by the learned Solicitor-General and were dealt with by the Federal Court in great detail. It was there held that the prerogative right of the Crown to dismiss its servants at will having been given statutory form in sub-section (1) of Section 240 of the Government

of India Act, 1935, it could only be exercised subject to the limitations imposed by the remaining sub-sections of that section and that it must follow as a necessary consequence that if any of those limitations was contravened the public servant concerned had a right to maintain an action against the Crown for appropriate relief and that there was no warrant for the proposition that that relief must be limited to a declaration and should not go beyond it. It was further held that even if apart from the prerogative of the Crown to terminate the service of any of its servant at will, the further prerogative could be invoked that no servant of the Crown could maintain an action against the Crown to recover arrears of pay even after the pay had been earned and had become due and that the prerogatives of the Crown had been preserved in the case of India by Section 2 of the Constitution Act, it must be presumed that this further prerogative had been abandoned in the case of India by the provisions of the Code of Civil Procedure and that it was not possible to subscribe to the proposition that while a creditor of a servant of the Crown was entitled as of right to compel the Crown to pay to him a substantial portion of the salary of such servant in satisfaction of a decree obtained against him the servant himself had no such right. Mr Justice Kania, as he then was, in a separate but concurring judgment, negatived the contention of the Attorney-General in these terms:

"The question whether the law in England and India is the same on this point should be further considered having regard particularly to the provisions found in the Civil Procedure Code. In this connection, Section 60(1) and clauses (i) and (j) of the proviso, and explanation (2) should be noted. Under Section 60 all property belonging to the judgment debtor is liable to be attached. In stating the particulars of what may not be attached and sold, exemption to a limited extent is given in respect of the salary of a public servant. These provisions of the Code of Civil Procedure were not noticed in *Lucas v. Lucas and High Commissioner for India*⁴, as the application was made in England and the Civil Procedure Code of 1908 did not apply there. The provisions of Section 60 of the Civil Procedure Code give a right to the creditor to attach the salary of a servant of the Crown. There can be no dispute about that. If the contention of the appellant was accepted, the result will be that while the civil servant cannot recover the money in a suit against the Crown, his creditor can recover the same in execution of a decree against the civil servant. This right of the creditor to receive money in that manner has been recognised in innumerable decisions of all High Courts. There were similar provisions in the Civil Procedure Code of 1882 also. By reason of Section 292 of the Constitution Act, the Code of Civil Procedure, 1908, continues in force, in spite of the repeal of the Government of India Act of 1915. Could the Imperial Parliament in enacting Section 240 and being deemed aware of the provisions of Section 60 of the Civil Procedure Code, have thought it proper to give this privilege to a creditor, while denying it to the officer himself? To hold so, the words of Section 240 of the Constitution Act will have to be unduly and unnaturally strained. Moreover in explanation (2) of Section 60 the word 'salary' is defined. In the proviso to Section 60 clause (i) the word 'salary' is used as applicable to private employees and to Government servants also. The word 'salary' in respect of a private employee must mean an enforceable right to receive the periodical payments mentioned in the Explanation. In that connection it is not used in the sense of a bounty. It will therefore be improper to give the same word, when used with regard to a civil servant under the Crown a different meaning in the same clause. It seems to me therefore that the Imperial Parliament has not accepted the principle that the Crown is not liable to pay its servant salary for the period he was in service, as applicable to British India or as forming part of the doctrine that service under the Crown is at His Majesty's pleasure."

6. The learned Solicitor-General contended that the decision in *Tara Chand Pandit's case*¹, was no longer good law and should be deemed to have been dissented from and

overruled by the decision of their Lordships of the Privy Council in *I.M. Lal's case*², and that in any event the view expressed in that decision should be preferred to the view expressed in *Tara Chand Pandit's case*. We are unable to uphold this contention. It seems that during the arguments in *Lal's case* attention of their Lordships was not drawn to the decision of the Federal Court in *Tara Chand Pandit's case* because the point was not directly involved therein. In that case no claim had been made by the plaintiff for arrears of his pay. The plaintiff had sued for a declaration simpliciter that the order of his removal from the office was illegal and that he was still a member of the Indian Civil Service. The High Court granted that declaration. The Federal Court, on appeal, substituted for the declaration made by the High Court a declaration that the plaintiff had been wrongfully dismissed. The case was remitted to the High Court with a direction to take such action as it thought necessary in regard to any application by the plaintiff for leave to amend the claim for recovery of damages. On appeal to the Privy Council the decree and the order made by the Federal Court was modified and their Lordships held that in their opinion the declaration should be varied so as to declare that the purported dismissal of the respondent on 10th August, 1940, was void and inoperative and the respondent remained a member of the Indian Civil Service at the date of the institution of the suit, 20th of June, 1942. The High Commissioner for India had also appealed against the order of the Federal Court remitting the case to the High Court for amendment of the plaint. The plaintiff did not want to maintain the order of the Federal Court to remit, before the Privy Council. He however urged that he was entitled to recover in the suit his arrears of pay from the date of the purported order of dismissal up to the date of action, though this was not one of the reliefs claimed. This relief claimed by him in the suit at all before the Board was negatived by their Lordships on the ground that no action in tort could lie against the Crown and that such an action must either be based on contract or conferred by statute. Their Lordships approved of the judgment of Lord Blackburn in the Scottish case of *Mulvenna v. The Admiralty*², in which that learned Judge laid down the rule in the following terms after reviewing various authorities:

"These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to when the engagement was made or not. If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based on public policy which has been enforced against military servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant. It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a civil Court of justice, and that their only remedy under their contract lies 'in an appeal of official or political kind'."

7. The observations made in *Mulvenna v. The Admiralty*², which is a Scottish case, could not have been made if in the law of that country there were provisions similar to the provisions made in various sections of the Code of Civil Procedure referred to by the Federal Court in *Tara Chand Pandit's case*¹. It was further urged that the same

SAROSH
BASTAWALA
ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
ARBITRATOR

view was taken by Pilcher J. in *Lucas v. Lucas and the High Commissioner for India*². There the question for consideration was whether the Sterling overseas pay of an Indian civil servant was a debt owing and accruing within the meaning of Rule 1 of Order XLV of the Rules of the Supreme Court and which could be attached in satisfaction of an order for the payment of alimony. The real point for decision in that case was whether the whole or any portion of the salary of a member of the Indian Civil Service was liable to attachment in England in satisfaction of the judgment debt. It appears that the attention of the learned Judge was not invited to the provisions of Section 60 and other relevant provisions of the Code of Civil Procedure and the learned Judge applied the dictum of Lord Blackburn in *Mulvanna v. The Admiralty*³, to the case of a civil servant from India. As the application was made in England and the Civil Procedure Code did not apply there, the provisions of the Code were not noticed in that case. We are therefore of the opinion that the rule laid down by their Lordships of the Privy Council in *I.M. Lal's case*², without a consideration of the provisions of the Code of Civil Procedure relevant to the inquiry and without a consideration of the reasoning of the Federal Court in *Tara Chand Pandit's case*¹, cannot be treated, particularly because the matter was not directly involved in the suit, as the final word on the subject. We are in no way bound by the decision given either in *Tara Chand Pandit's case*¹, or by the decision given by the Privy Council in *I.M. Lal's case*². But on a consideration of the reasons given in the two judgments we think that the rule of English law that a civil servant cannot maintain a suit against the State or against the Crown for the recovery of arrears of salary does not prevail in this country and that it has been negated by the provisions of the Statute law in India.

8. Reliance was also placed by the learned Solicitor-General on the decision of the Federal Court in *Suraj Narain Anand v. North West Frontier Province*⁶. In that case Suraj Narain having been appointed a Sub-Inspector of Police posted in the North West Frontier Province by the Inspector-General of Police of the Province was subsequently dismissed by the Deputy Inspector-General of Police. Failing to get relief by departmental proceedings he instituted a suit in the Court of the Senior Subordinate Judge, Peshawar. The Subordinate Judge dismissed the suit as being unsustainable. This decision was upheld by the Court of the Judicial Commissioner. The Federal Court held that the Courts below were not justified in dismissing the suit, that the plaintiff was at least entitled to a declaration that the order of dismissal passed against him was void. That court accordingly set aside the decree of the Judicial Commissioner and remitted the case with a declaration that there shall be substituted for the decree appealed against a declaration in the terms above stated, with such further directions as the circumstances of the case may require in the light of the observations of their judgment. The Province appealed to the Privy Council allowing the appeal of the North West Frontier Province and reversing the decision of the Federal Court of India, that the North West Frontier Province Police Rules, 1937, had become operative in 1938 at some date before 25-4-1938, when the respondent was dismissed, and that Rule 16(1) was a valid rule made under the authority conferred on the appellant by Section 243 of the Government of India Act, 1935, and that the respondent's suit was rightly dismissed, but subsequently on the petition of the respondent asking the Board to reconsider their decision on the ground that it had been ascertained that the Police Rules of 1937 were in fact printed and published on 29-4-1938, that was, four days after the date of his dismissal, the Board heard the appeal further, when the respondent's allegation was admitted and, applying the reasoning in their previously delivered judgment, the Board reversed their former decision and affirmed the judgment of the Federal Court which had held that the respondent's dismissal was void and inoperative. During the arguments before the Privy Council reference was made to Section 60 of the Code of Civil Procedure and to

the decision of the Federal Court in *Tara Chand Pandit's case*¹, and it was also noticed that following on the remit of the case to the Judicial Commissioner by the order of the Federal Court dated 4-12-1941, the respondent had obtained a decree for payment of Rs 2283 against the appellant in respect of arrears of pay from the date of dismissal to the institution of the suit. When the appeal came before the Board for further hearing their Lordships on 6th August, 1948, caused a letter to be addressed to the solicitor representing the appellant, informing him that their Lordships now proposed humbly to advise His Majesty that the appeal should be dismissed, and stating that the order as to costs would not be varied. The letter pointed out that if this advice were tendered, and if His Majesty were pleased to accept it, the effect would be that the declaratory judgment of the Federal Court would stand. Finally, the letter referred to the award of Rs 2283 to the respondent by the Court of the Judicial Commissioner which, according to a submission made by the appellant's counsel, was open to challenge, and inquired whether the appellant wished to have an opportunity of satisfying their Lordships that the point was open, and of being heard on it. By their Lordships' direction a copy of this letter was sent to the respondent. An intimation was received by the Privy Council that the appellant did not wish to offer any further arguments on the case. The respondent also did not desire an opportunity of arguing that he should now be awarded arrears of pay from the date of the institution onwards. In these circumstances the Board refused to deal further with the matter and advised His Majesty that the declaratory judgment of the Federal Court be restored and proceeded to observe that it would be open to the respondent to pursue any remedy which flows from that declaratory judgment in an appropriate court. Their Lordships concluded the judgment with the following observations:

"Their Lordships must not be understood, however, as expressing an opinion that the respondent was entitled as of right to recover the sum of Rs 2283 which was awarded to him, or that he has any claim to a further sum in respect of arrears of pay. It is unnecessary, owing to the very proper attitude of the appellant, to express any view as to the former question, and the latter question does not arise in this appeal which is from the decision of the Federal Court. If that decision is affirmed the respondent who did not himself enter an appeal, cannot now ask for anything more."

It is thus clear that in express terms in this decision their Lordships declined to give any opinion on the question whether the respondent was entitled as of right to recover arrears of pay awarded to him by the Judicial Commissioner, in spite of the circumstance that their attention had been drawn to the decision of the Federal Court in *Tara Chand Pandit's case*². This decision therefore cannot be said to support the view contended for by the learned Solicitor-General. On the other hand, it must be assumed that in spite of their decision in *I.M. Lal's case*², their Lordships in this case, the judgment in which was delivered subsequent to the decision in *I.M. Lal's case*², on 4-11-1948, did not reaffirm the propositions laid down in that case but preferred to express no opinion on the point.

9. It was suggested that the true view to take is that when the statute says that the office is to be held at pleasure, it means "at pleasure", and no rules or regulations can alter or modify that; nor can Section 60 of the Code of Civil Procedure, enacted by a subordinate legislature be used to construe an Act of a superior legislature. It was further suggested that some meaning must be given to the words "holds office during His Majesty's pleasure" as these words cannot be ignored and that they bear the meaning given to them by the Privy Council in *I.M. Lal's case*².

10. In our judgment, these suggestions are based on a misconception of the scope of this expression. The expression concerns itself with the tenure of office of the civil servant and it is not implicit in it that a civil servant serves the Crown or that his salary is in the nature of a bounty. It has again no relation or connection with the

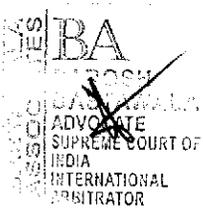
question whether an action can be filed to recover arrears of salary against the Crown. The origin of the two rules is different and they operate on two different fields.

11. The rule that a civil servant holds office at the pleasure of the Crown has its origin in the Latin phrase "*durante bene placito*" ("during pleasure") meaning that the tenure of office of a civil servant, except where it is otherwise provided by statute, can be terminated at any time without cause assigned. The true scope and effect of this expression is that even if a special contract has been made with the civil servant the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is, that they cannot claim damages for premature termination of their services. (See *Fraser's Constitutional Law*, pp. 126; *Chalmer's Constitutional Law*, p. 186; *Shenton v. Smith*²; *Dunn v. The Queen*³.)

12. This rule of English law has not been fully adopted in Section 240. Section 240 itself places restrictions and limitations on the exercise of that pleasure and these restrictions must be given effect to. They are imperative and mandatory. It follows therefore that whenever there is a breach of restrictions imposed by the statute by the Government or the Crown the matter is justiciable and the party aggrieved is entitled to suitable relief at the hands of the court. As pointed out earlier in this judgment, there is no warrant for the proposition that the relief must be limited to the declaration and cannot go beyond it. To the extent that the rule that Government servants hold office during pleasure has been departed from by the statute, the Government servants are entitled to relief like any other person under the ordinary law, and that relief therefore must be regulated by the Code of Civil Procedure.

13. Section 292 of the Government of India Act, 1935, provides that the law in force in British India immediately before the commencement of the Act shall continue in force until altered, repealed or amended by a competent legislature. Section 100 to 104 of the Government of India Act, 1935, confer legislative powers on the different legislatures in the country. Item 4 of the Concurrent List in the Seventh Schedule reads thus: "Civil Procedure, and all matters *cluded* in the Code of Civil Procedure, at the date of the passing of this Act". It is clear therefore that the Indian Legislatures were conferred by the Government of India Act, 1935, power to regulate the procedure in regard to actions against the Crown and to make provision for reliefs that could be granted in such actions. These provisions of the Government of India Act, 1935, stand by themselves independently of what is contained in Section 240, and therefore no question arises that Section 60 of the Code of Civil Procedure which has the section of the Government of India Act, 1935, itself is in status lower than the rule laid down in Section 240.

14. The rules of English law that the Crown cannot be sued by a civil servant by money or salary or for compensation has its origin in the feudal theory that the Crown cannot be sued by its vassals or subjects in its own courts. From this theory the Common Law Lawyers in England deduced two rules, namely, (1) that the King can do no wrong, and (2) that as a matter of procedure no action can lie in the King's courts against the Crown. (See *Ridge's Constitutional Law*, 8th Edn., p. 295, and *Fraser's Constitutional Law*, p. 164.) The subject, in this situation, could only proceed by way of a petition of right which required the previous permission of the Crown. Permission was given by a fiat justitia issued by the Crown. It was not in practice refused to a petitioner who had any shadow of a claim, so that probably the disadvantages of this form of procedure were more theoretical than substantial. Petitions of right and various other special forms of English procedure applicable exclusively to actions by and against the Crown were abolished by the Crown Proceedings Act, 1947, which provides that in future claims against the Crown might be enforced as of right and without the fiat of His Majesty, and that they should be enforceable by ordinary procedure in



accordance with the rules of the High Court or the County Court as the case might be. Arrears of salary were being actually recovered by the procedure of Petition of Right in England. (See *Bush v. R.*²). There the judgment resulted in favour of the suppliant. The claim was in respect of the amount of salary due to him as Master of the Court of Queen's Bench in Ireland. (*Robertson's Civil Proceedings by or against the Crown*, p. 338.)

15. In India, from the earliest times, the mode of procedure to proceed against the Crown has been laid down in the Code of Civil Procedure and the procedure of Petition of Right was never adopted in this country, and the same seems to have been the rule in Australia and other Colonies. Section 56 of the Judiciary Act, 1903, relating to the Commonwealth of Australia provides:

"Any person making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arose."

Under the New South Wales Act, 39 Vict. No. 38, the Government of the Colony is liable to be sued in an action of tort as well as in contract. Section 65 of the Government of India Act, 1858, conferred the right of suit against the Government. It provided that "all persons and bodies politic shall and may have and take the same suits, remedies and proceedings legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company" (the East India Company). This was replaced by Section 32 of the Government of India Act, 1915. Sub-section (2) of that section ran as follows:

"Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed."

This was replaced by Section 176(1) of the Government of India Act, 1935, which substantially reproduced these provisions. From these provisions it is clear that the Crown in India was liable to be sued in respect of acts, which in England could be enforced only by a Petition of Right. As regards torts of its servants in exercise of sovereign powers, the company was not, and the Crown in India was not, liable unless the act had been ordered or ratified by it. Be that as it may, that rule has no application to the case of arrears of salary earned by a public servant for the period that he was actually in office. The present claim is not based on tort but is based on quantum meruit or contract and the court is entitled to give relief to him. The Code of Civil Procedure from 1859 right up to 1908 has prescribed the procedure for all kinds of suits and Section 60 and the provision of Order XXI substantially stand the same as they were in 1859 and those provisions have received recognition in all the Government of India Acts that have been passed since the year 1858. The salary of its civil servants in the hands of the Crown has been made subject to the writ of civil court. It can be seized in execution of a decree attached. It is thus difficult to see on what grounds the claim that the Crown cannot be sued for arrears of salary directly by the civil servant, though his creditor can take it, can be based or substained. What could be claimed in England by a Petition of Right can be claimed in this country by ordinary process.

16. For the reasons given above we are of the opinion that this appeal is without force and we accordingly dismiss it with costs.

* On Appeal by Special Leave granted by the Supreme Court of India by its Order dated 11th January 1951 from the Judgment and Decree dated the 5th May 1949 of the High Court of Judicature at Patna (Manohar Lall and Mahabir Prasad, JJ.) in Appeal from Appellate Decree No. 2091 of 1946.

² 1947 FCR 89



² 75 IA 225

³ 75 IA 343

⁴ 1943 P 68

⁵ 1926 SC 842

⁶ 1941 FCR 37

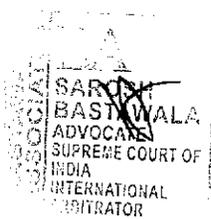
⁷ 1895 AC 229 at p. 234 (G)

⁸ (1896) 1 QB 116 (H)

⁹ (1869) *Times News*, May 29

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**1954 SCC OnLine AP 108 : AIR 1955 AP 87 (FB) : 1955 Cri LJ 770 : (1955) 1 An
WR 151 (FB)**

**In the High Court of Andhra Pradesh
(Full Bench)**

(BEFORE SUBBA RAO, C.J. AND BHIMASANKARAM AND SATYANARAYANA RAJU, JJ.)

M. Subbarayudu and others ... Accused-Petitioners;
Versus

The State ... Respondent.

Criminal Revn. Case No. 603 of 1954 and Criminal Revn. Petn. No. 563 of 1954
Decided on December 6, 1954

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The Judgment of the Court was delivered by

SUBBA RAO, C.J.— This Full Bench has been constituted to decide a fundamental question, which is arising every day, namely, whether and to what extent the Andhra High Court is bound by the decisions of the Madras High Court delivered before 5-7-1954.

2. The facts of the case that led to the reference may be briefly stated. The petitioners were the accused in P.R.C. No. 2 of 1953. The Sub-Divisional Magistrate, Dharmavaram, discharged the accused for an offence under S. 395, Penal Code, and converting the case into a Calendar case, directed the accused to be tried for the other offences with which they were charged. In revision, the District Magistrate, Gooty, set aside that Order under Sections 435 and 436 of the Cr PC and directed the Sub-Divisional Magistrate to commit the accused to the Court of Session to take their trial for all the offences with which they were charged. The accused have filed this Criminal Revision Petition against that Order. In revision, the main question raised was whether under Section 209(i) of the Cr PC, when a Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such persons to be tried before himself, the revisional powers under S. 437 can be exercised even before the conclusion of the trial before such Magistrate. Chandra Reddy J., who admitted the revision directed the same to be posted before a Division Bench as it was represented to him that a Full Bench decision of the Madras High Court covering the point required re-consideration. The Revision Petition was accordingly posted before a Division Bench. The respondent relied upon the Full Bench decision of the Madras High Court in — '*Nalla Baligadu In re*', AIR 1953 Mad 801 (FB) (A), wherein it was ruled that the powers under Section 437 of the Cr PC can be exercised even before the conclusion of the trial before the Magistrate. If the Full Bench decision of the Madras High Court was binding on this Court, it would follow that the Revision Petition was liable to be dismissed.

3. In the circumstances, the learned Counsel for the petitioners contended that the Andhra High Court would not be bound by the decisions of the Madras High Court. Reliance was placed upon the decision of our learned brother Umamaheswaram, in — '*Subba Reddi v. Govinda Reddi*', (S) AIR 1955 Andhra 49 (B), wherein the learned

Judge observed that the Andhra High Court, which was inaugurated in July 1954 is not bound by the decisions of the Full Bench, of the Madras High Court, or other High Courts, and is at liberty to examine the question in the light of well established legal principles and arrive at a proper conclusion. As this question, is arising very often in this Court, the Division Bench thought that the said question should be decided finally and authoritatively by a Full Bench. Hence, the Revision Petition was directed to be posted before a Full Bench.

4. The argument of Mr. Chinnappa Reddy, the learned counsel for the petitioner may be put thus: The binding nature of the decision of one Court over another depends upon the fact whether both the Courts are Courts of co-ordinate jurisdiction. If so, on a principle of judicial comity, the decision of one Court is binding on another. The Andhra High Court and the Madras High Court are not Courts of co-ordinate jurisdiction, for, the idea of co-ordination implies a concurrent and simultaneous jurisdiction. Whatever may be said about the decisions of the composite High Court between 1-10-1953 and 5-7-1954, the decisions prior to 1-10-1953 are not decisions of a Court of co-ordinate jurisdiction. In any view, the said principle has no application to criminal cases. The Advocate General who appeared as amicus curiae at our request, conceded that the High Courts of Andhra and Madras are not Courts of co-ordinate jurisdiction, but argued that on the principle of stare decisis the decisions of the Madras High Court prior to 5-7-1954 should be followed by this High Court. The learned Public Prosecutor, who appeared for the State, further contended that the provisions of the Andhra State Act (30 of 1953) would indicate that the law of the Madras High Court which term is wide enough to include Judge made law, is also binding on the Andhra High Court.

5. We shall first trace the history of the Constitution of the Andhra High Court to discover, if possible, any principle regulating the binding nature of the decisions of the Madras High Court. The Madras High Court, before Independence, was constituted by Letters Patent and was governed by the various Acts passed from time to time by the Parliament of England. When India became a Dominion by virtue of the Indian Independence Act of 1947 which took effect on 15-8-1947, there was no change in the constitution of the High Court. When India, became a Republic, the jurisdiction and powers of the Madras High Court were regulated by the Constitution of India, which came into force on 26-1-1950. The former High Courts were continued in respect of the respective States. Under Article 225, subject to the provisions of the Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature by the Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court was declared to be the same as immediately before the commencement of the Constitution. In some

directions, additional powers were also conferred.

6. The Parliament, by passing Act 30 of 1953, constituted the Andhra State, which came into effect on 1-10-1953. Under Section 28 of the said Act, it was provided that there shall be a separate High Court for the State of Andhra from the 1st day of January 1956 or such an earlier date as may be appointed under sub-section (2). Section 40 of the Act provided that the jurisdiction of the High Court of Madras shall extend to the State of Andhra and the said High Court shall, in relation to the territories of that State, continue to have such jurisdiction as it had immediately before the appointed day. By virtue of the said provision, the High Court of Madras

continued to have such jurisdiction over the area comprised in the Andhra State.

7. Under sub-s. (2) of S. 28, the President notified. 5-7-1954 as the date for the inauguration of the High Court of Andhra and the Andhra High Court was duly constituted on that date. Section 30 provides that the said High Court of Andhra shall have, in respect of the territories for the time being included in the State of Andhra, all such original, appellate and other jurisdiction as, under the law, in force immediately before the prescribed day, is exercisable in respect of the said territories, or any part thereof by the High Court at Madras. Section 53 which prescribes in respect of the said territories, the territorial extent of the laws, says that the provisions of Part II which deal with the formation of the Andhra State, shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial references in any such law to the State of Madras shall, until otherwise provided by a competent Legislature or other competent authority, continue to have the same meaning.

8. Section 32 prescribes that the law in force immediately before the prescribed day with respect to practice and procedure in the High Court at Madras, shall with necessary modifications, apply in relation to the High Court of Andhra. It also lays down that the rules or orders which are in force immediately before the prescribed day with respect to practice and procedure in the High Court at Madras shall, until varied or revoked by rules or orders made by the High Court of Andhra, apply with the necessary modifications in relation to practice and procedure in the High Court of Andhra as if made by that Court.

9. It will therefore be seen that, in effect and substance, the territorial jurisdiction of the composite Madras High Court was split up from 3-7-1954 and the Madras and the Andhra High Courts have the same jurisdiction subject to some exceptions with which we are not concerned now, over the area comprised in the two different States. The composite High Court, which was His Majesty's Court, before the Constitution, became one governed by the Constitution. For a short period, the same High Court exercised jurisdiction over the two States. After 5-7-1954, two different Courts came into existence. The same procedure governing the Madras High Court continued to govern the Andhra High Court till it was modified in accordance with law. The splitting up of territorial jurisdiction had not the effect of changing the law obtaining in the respective territories. The Andhra High Court is, therefore, in a real sense an offshoot of the Madras High Court exercising the same jurisdiction and administering the same laws, which the Madras High Court had exercised before 5-7-1954 in the territories included in the Andhra State. To use a convenient terminology, the Andhra High Court may be treated as one succeeding to the High Court of Madras and exercising all the powers and administering the same law which the Madras High Court exercised in the territories comprised in the Andhra State.

10. It may be convenient at this state to notice the case law and the passages from the text-books cited at the bar on the Law of Precedents. The English Law on the subject has been succinctly summarised in 18 Halsbury's Laws of England page 210, para. 535:

"It may be laid down as a general rule that part alone of a decision of a Court of Law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined."

11. The principle, underlying the aforesaid proposition, has been clearly stated by Odgers in his Book "*In the Common Law*", 3rd Edition, Vol. I, pages 64-65 as follows:

"There is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank; it does so simply from what may be called the comity among Judges. In the same way, there is no common law or a statutory rule



to oblige a court to bow to its own decisions; it does so on the ground of judicial comity. This so-called comity has, however, been formulated into rules which, though unwritten, are habitually followed by our Courts."

12. The scope of the rule was elucidated by the Court of Appeal in — '*Young v. Bristol Aeroplane Co.*', 1944-2 All ER 293 (C). The question there was whether the Court of Appeal was not bound by its own earlier decisions. Lord Greene, M.R., exhaustively considered the question and came to the following conclusion:

"On a careful examination of the whole matter, we have come to the clear conclusion that this Court is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise (i) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow, (ii) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords, (iii) The Court is not bound to follow a decision of its own if it is satisfied that decision was given per incuriam."

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13. The statement of law is clear but the decision does not define what are Courts of co-ordinate jurisdiction. The question whether the Rangoon High Court in exercise of its ordinary original and appellate jurisdiction was not bound by the reports of decisions of the Chief Court of Lower Burma was raised and decided by the Full Bench of the Rangoon High Court in — '*Ma Mya v. Ma Thein*', AIR 1927 Rang 4 (D). The Full Bench, Cunliffe J. dissenting, held that the High Court was not bound by the said reports. The decision turned upon the question whether the Chief Court of Lower Burma, which was replaced by the High Court, which had territorial jurisdiction not only in respect of lower Burma but also upper Burma, was a Court of co-ordinate jurisdiction. Rutledge C.J. held that

"to decide whether the decisions of the late Chief Court are binding upon this Court, we must decide whether it is a Court of co-ordinate jurisdiction."

14. A Division Bench of the Travancore-Cochin High Court in — '*Unni Kunchu Moideen v. Subramonia Iyer*', AIR 1953 Trav-C 283 (E) had to consider whether the decisions of the former Travancore and Cochin High Courts were binding on the post-Constitution High Courts of Travancore-Cochin. The Full Bench disposed of the question with the observation that it had been repeatedly told by that Court that decisions of the former Travancore and Cochin High Courts were only of persuasive value for them and that those decisions did not bind them. That decision was obviously based upon the assumption that the former State High Courts, whose jurisdiction extended only over parts of the present State, were not Courts of co-ordinate jurisdiction with the present High Court. Neither of the former Courts had jurisdiction over the entire area of the present Travancore-Cochin State.

15. So too, a Full Bench of the Madhya Bharat High Court in — '*Chandulal v. Babulal*', AIR 1952 Madh B 171 (F) held that the Madhya Bharat High Court could not be looked upon as successor to Indore High Court or any High Court of any covenanting State and, therefore, the High Courts of the former covenanting States could not be regarded as Courts of co-ordinate jurisdiction. In that view, they held that the judgments of those Courts were not binding on the High Court.

16. The Supreme Court in — '*State of Bihar v. Abdul Majid*', AIR 1954 SC 245 (G),



held that the Supreme Court of India was in no way bound by the decisions given by the former Federal Court of India or by the Privy Council. There is no discussion but the conclusion may be sustained on the basis that, in the view of the Supreme Court, neither the Privy Council nor the Federal Court were Courts of co-ordinate jurisdiction with the Supreme Court. It is, therefore, manifest that the binding nature of the precedents of one Court on another depends upon the fact whether such Courts are Courts of co-ordinate jurisdiction or not.

17. This leads us to a more difficult question, viz., what are Courts of co-ordinate jurisdiction? The learned counsel for the petitioners contended that courts of co-ordinate jurisdiction are those, which exercise simultaneous jurisdiction over the same area, or in respect of the same subject-matter. The learned Advocate General on the other hand, equated the words "co-ordinate jurisdiction" with the word "concurrent jurisdiction". Though the decisions already cited may afford illustration, they do not definitely define the term "co-ordinate jurisdiction". In my view, co-ordinate jurisdiction does not connote the same idea as concurrent jurisdiction or simultaneous jurisdiction.

18. Concurrent jurisdiction is defined in Wharton's Law Lexicon to mean the jurisdiction of several different tribunals, both authorised to deal with the same subject-matter at the choice of the suitor. But no definition is given of co-ordinate jurisdiction in any of the Law Dictionaries. In *Chamber's Twentieth Century Dictionary* (Mid-Century Version), the meaning of the word "co-ordinate" is given as "of the same order or rank". Roget in "*Thesaurus of English Words and Phrases*" gives that word under the heading "comparative quantity". According to the author, it connotes an idea of sameness of quantity or degree.

19. It is, therefore, clear that the connotation of the word "co-ordination" is not the same as that of the words concurrence or simultaneity. Simultaneity or co-existence is not a necessary ingredient of co-ordination. Co-ordination is more comprehensive and takes in successive acts of the same status or level. It would not be inappropriate to call a successor Court a Court of co-ordinate jurisdiction, with its predecessor if their jurisdictions at the point of time they exercised it are similar to or co-extensive with each other. The cases cited at the Bar amply show that the said word was understood in the wider sense indicated by me. If it was not used in the sense indicated by me, the entire discussion of Rutledge C.J., in AIR 1927 Rang 4 (D) would be unnecessary, for the Rangoon High Court could have disposed of the matter on the basis that the successor High Court could not be a Court of co-ordinate jurisdiction with its predecessor the Chief Court of Lower Burma. But, on the other hand, the learned Chief Justice assumed that they would be Courts of co-ordinate jurisdiction if the other tests laid down by him were satisfied. At pp. 4-5, the learned Judge laid down the following tests:

"To decide whether the decisions of the late Chief Court are binding upon this Court we must decide, whether it is a Court of co-ordinate jurisdiction. Admittedly, it is not so in respect of territorial jurisdiction, as the Chief Court's jurisdiction was confined to Lower Burma, while the High Court's jurisdiction extends to Upper Burma as well. In origin, the Chief Court was the creation of the Indian Legislature, and it was not a Court of Record. The High Court by its Letters Patent is the creation of the King Emperor and is declared to be a Court of Record. It is in fact the King's Court which the Chief Court never was. Its jurisdiction in certain respects such as contempt and mandamus is greater than that of the Chief Court. I am, therefore, of opinion that the Chief Court cannot be held to be a



Court of co-ordinate jurisdiction with the High Court.”

20. If the tests laid down by the learned Judge were satisfied, he would have certainly held that the Chief Court of Lower Burma was a Court of co-ordinate jurisdiction with the High Court. Though Lord Greene, M.R., in (1944) 2 All ER 293 (C) was only considering the question of the binding nature of the earlier decisions of the Court of Appeal on the same Court or a Division of that Court, the learned Judge did not expressly or by necessary implication indicate that a predecessor Court could not be a Court of co-ordinate jurisdiction with its successor or vice versa. When the decision of — ‘*Mills v. Jennings*’, (1880) 13 Ch D 639 (H) was cited, Lord Greene pointed out that in that case, Cotton L.J., justified his dissent from an earlier decision of the old Court of Appeal in Chancery on the ground that it was not uncommon to reconsider decisions given by the old Court of appeal in Chancery. That passage is relied upon in support of the argument that the simultaneous exercise of jurisdiction by two Courts is a necessary condition for the application of the doctrine of co-ordinate jurisdiction. I do not think that the learned Lord meant to make any such distinction. He only pointed out the practice followed by the Court of Appeal in dealing with the earlier decisions of the old Court of Appeal in Chancery. Nor can the decision of the Division Bench of the Travancore-Cochin High Court be legitimately invoked by the learned Counsel for the petitioners in support of his contention. There, if I may say so, the learned Judge rightly assumed that the High Courts of Travancore and Cochin, which exercised only jurisdiction over small areas were not Courts of co-ordinate jurisdiction with the High Court of Travancore-Cochin. This was not on the principle that the earlier Courts were not exercising jurisdiction simultaneously with the present High Court, but because of the fact that their jurisdiction was not co-extensive with that of the present High Court.

21. In AIR 1952 Madh B 171 (FB) (P), Chaturvedi J., who delivered the judgment, based his conclusion on the following principle:

“It is true that these smaller units had integrated to form the new Madhya Bharat State; but it is not true that the High Courts of covenanting States had also integrated to form the present Madhya Bharat High Court. In fact the High Courts in covenanting States were altogether abolished and an independent High Court with power and stability and fresh outlook had come into existence. Consequently High Courts of former covenanting States cannot be regarded of equal rank with the present Madhya Bharat High Court.”

“It is not a case where a High Court had succeeded either a Chief Court or a Court of Judicial Commissioner and so the ratio decidendi in — ‘AIR 1927 Rang 4 (D), — ‘*Gurbhaj v. Lachhman*’, AIR 1925 Lah 341 (I); — ‘*Sherkhan v. Muzaffar Khan*’, AIR 1920 Lah 321(1) (J) and — ‘*Lachhman Singh v. Naman*’, AIR 1929 Lah 174 (K) cannot be made applicable to the case before us. The relation between the Court of Appeal and the Court of Exchequer chamber in England is also not in any way genuinely applicable to the relation of Madhya Bharat High Court and the former High Court of Indore State.”

22. It will be seen from the above said observations that the learned Judge did not equate a Court of co-ordinate jurisdiction with that of simultaneous jurisdiction. Indeed he applied the test whether the former High Court could be regarded as of equal rank with the present Madhya Bharat High Court. He also distinguished the decisions, which recognised successor Courts as Courts of co-ordinate jurisdiction with its predecessor as inapplicable as, in his view, the Madhya Bharat High Court was not a successor to the earlier Courts of the covenanting States.

23. The decision of the Supreme Court in — ‘AIR 1954 SC 245 (G)’ is not of much help in the present case for neither His Majesty deciding a case on the advice of the



Privy Council nor the Federal Court entrusted only with a limited jurisdiction could be considered to be Courts of co-ordinate jurisdiction with that of the present Supreme Court of India.

24. The question, therefore, is whether the Madras High Court is a Court of co-ordinate jurisdiction with the Andhra High Court. As aforesaid, the Andhra High Court in effect and substance succeeded to the entire jurisdiction exercised by the Madras High Court within the territories comprised in the Andhra State. At first, the Madras High Court exercised jurisdiction over the entire composite State. After the constitution of the Andhra High Court the composite High Court exercised jurisdiction over the territories of the two States. After the inauguration of the Andhra High Court, the jurisdiction was split up and two High Courts are now exercising jurisdiction separately over the two States. The jurisdiction exercised by the Madras High Court over the composite State till 1-10-1953 and over the two States from 1-10-1953 to 5-7-1954 was coextensive with the present jurisdiction exercised by the Andhra High Court in all respects except in regard to territorial jurisdiction. The content of the jurisdiction exercised by the Madras High Court and the present Andhra High Court is the same, though the area over which the said jurisdiction is exercised is now limited in the case of both the Courts. If the Andhra High Court is not a Court of co-ordinate jurisdiction, it could reasonably be argued that the present Madras High Court is also not a Court of co-ordinate jurisdiction with its predecessor, the composite High Court, or, at any rate with the Madras High Court before the Constitution. I would, therefore, apply the following test to ascertain whether the two High Courts are of co-ordinate jurisdiction or not, viz.,

“Whether the two Courts are of equal rank and status or of equal authority and exercised similar jurisdiction.”

25. Applying the test, I have no hesitation to hold that the Madras High Court and the Andhra High Court are Courts of co-ordinate jurisdiction.

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26. Even if they are not Courts of co-ordinate jurisdiction, in my view, the principle of *Stare decisis* may usefully be invoked in public interests. In *Broome's Legal Maxims*, p. 103, 9th edition, the said doctrine was stated as follows:

“It is then an established rule to abide by former precedents *stare decisis*, where the same points come again in litigation, as well to keep the scale of Justice steady and not liable to waver with every new Judge's opinion, as also because the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter according to his private sentiments; he being sworn to determine not according to his own private judgment, but according to the known laws of the land — not delegated to pronounce a new law, but to maintain the old “*Jus dicere et non jus dare*”.

27. In *Salmond's Jurisprudence*, 10th Edition, p. 183, the principle was further elaborated in the following manner:

“It does not follow that a principle once established should be reversed simply because it is not as perfect and rational as it ought to be. It is often more important that the law should be certain than that it should be ideally perfect. These two requirements are to a great extent inconsistent with each other, and we must often choose between them. Whenever a decision is departed from, the certainty of the



law is sacrificed to its rational development and the evils of the uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it; important contracts may have been made on the strength of it; it may have become to a great extent a basis of expectation and the ground of mutual dealings. Justice may, therefore, imperatively require that the decision, though founded in error, shall stand inviolate none the less "Communis error facit jus". "It is better", said Lord Eldon, that "the law should be certain than that every Judge shall speculate upon improvements in it".

28. There is no reason why the aforesaid salutary principle should not be followed in the case of decisions delivered by the Madras High Court when the Andhra area was under its jurisdiction. During that period, titles were settled transactions took place, settlements made, agreements entered into, wills executed and expectations raised on the basis of the decisions of the Madras High Court. If the Andhra High Court is now free to start from scratch, it would be introducing confusion in the law of the land and disturbing titles acquired. It would also become a fruitful source of litigation. Further the Madras High Court has had long and well-established traditions and was presided over by some of the Distinguished Judges of our land. This High Court would do well in its own interests and that of the Public to continue the great and abiding traditions laid down by the Madras High Court for generations and to be inspired by its noble examples.

29. The learned counsel for the petitioners contended that this legal position could lead to the anomaly of this High Court being bound by a judgment of a Division Bench of the Madras High Court though reversed by a Full Bench of that Court after 5-7-1954. I do not think the difficulty pointed out is insurmountable. The Division Bench of the Andhra High Court in the said contingency, if they agree with the Full Bench, would be at liberty to refer the question to a Full Bench of the Andhra High Court. I would, therefore, hold that even if the two High Courts are deemed to be not Courts of co-ordinate jurisdiction, this High Court shall follow the Madras decisions in the same manner that the Madras High Court follows its own decisions and subject to the same limitations.

30. Even so, the learned Counsel for the petitioners contended that the principle of stare decisis is not applicable where the liberty of the subject is concerned and, in support of his contention, reliance is placed upon — '*R v. Taylor*', (1950) 2 All ER 170 (L) Lord Goddard C.J., at p. 172 observed:

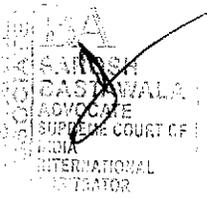
"In civil matters it is essential in order to preserve the rule of stare decisis that should be so, but this Court has to deal with the liberty of the subject and if, on reconsideration, in the opinion of a full court the law has been either misapplied or misunderstood and a man has been sentenced for an offence, it will be the duty of the Court to consider whether he has been properly convicted. The practice observed in civil cases ought not to be applied in such a case".

31. It is not necessary to express my final opinion on this question as I have held that the Andhra High Court and the Madras High Court prior to 5-7-1954 are Courts of co-ordinate jurisdiction.

32. It then remains to consider the argument of the learned Public Prosecutor that Section 53 of the Andhra State Act (Act 30 of 1953) would have the effect of making the decisions of the Madras High Court binding on the Andhra High Court.

33. Section 53 reads:

"The provision of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends



or applies, and territorial differences in any such law to the State of Madras or of Mysore, shall until otherwise provided by a competent Legislature or other competent authority, continue to have the same meaning”.

34. Part II of the Act provides for the formation of the Andhra State and the transfer of territory from Madras to Mysore. A combined reading of the two provisions can only mean that the change of territories provided for by Part II of the Act will not make any change in the law obtaining in that territory before the change, till otherwise provided by a competent Legislature. If there was a law obtaining in the Andhra area before the Constitution of the Andhra State to the effect that the Madras High Court decisions would be binding on the Andhra High Court, this

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provision can legitimately be involved. But obviously there could not have been any such law, for the simple reason that there was no High court of Andhra in existence prior to its constitution. On this simple ground, this contention should be negated.

35. I shall now consider the procedure to be followed by this High Court in dealing with decisions of the Madras High Court prior to 5-7-1954. The general principle is that this High Court shall follow the decisions of the Madras High Court prior to the said date in the same manner in which the Madras High Court would follow its own decisions. The conditions when a Court can differ from a Court of co-ordinate jurisdiction have been succinctly stated by Lord Greene M.R., in 1944-2 All ER 293 (C) in a passage already referred to.

36. That summary was given in considering the question whether the Court of Appeal was bound to follow its previous decisions. In the course of the judgment, Lord Greene M.R., pointed out that, for the application of that principle, there could not be a distinction between a Full Court or a Division of that Court. It does not purport to deal with the rules to be followed to solve the conflict that may arise between the various Divisions of the same Court or between individual Judges thereof. As a Judge of the Madras High Court, I dealt with that question in — ‘K.C. Nambiar v. State of Madras’, AIR 1953 Mad 351 (M). There, after considering the English and Indian decisions on the subject, I said:

“I am not therefore prepared on the English Authorities cited and on the arguments advanced, to depart from the well recognised practice and the salutary conventions established in this Court.

If I did, I would be introducing only confusion and uncertainty and put the subordinate judiciary in a very unenviable position. I would, therefore, unreservedly follow the procedure obtaining in our Court which is supported by principle and found satisfactory in practice. A single Judge is bound by a decision of a Divisional Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Bench decision, as I am asked to do on the ground that some observation of the Supreme Court made in a different context might indicate a different line of reasoning. A Divisional Bench must ordinarily respect another Divisional Bench of co-ordinate jurisdiction, but if it differs, the case should be referred to a Full Bench. This procedure would avoid unnecessary conflict and conclusion that otherwise would prevail”.

37. I do not see any reason why the aforesaid practice obtaining in the Madras High

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Court shall not be followed in this High Court. To the aforesaid statement, I would add that even a single Judge shall not differ from the judgment of another Judge of the same Court. If he does not agree, the proper course for him is to refer the case to a Bench of two Judges. If this procedure is followed from the beginning, there will not be any confusion created by conflict of decisions. The public will know their rights and the Subordinate Courts will be in a position to administer the settled law without any difficulty. I hope and trust that in the interests of the smooth and efficient judicial administration of the State, this High Court will in future follow strictly the aforesaid procedure without any deviation.

38. As the Full Bench Decision of the Madras, High Court covers the exact point raised in the present case, we follow it and dismiss the revision petition.

39. BHIMASANKARAM, J.:— I am of the same opinion, but I would like to add a few words of my own particularly because my learned brother Umamaheswaram J., has taken the opposite view (Vide (S) AIR 1955 Andhra 49 (B)). I propose to approach the consideration of the matter by propounding two questions (1) Is there a rule of law, statutory or otherwise, which makes it obligatory on this Court to follow the precedents in question? (2) Even if there is no such rule, and this Court can elect to follow them or not — what should be our choice — to be bound or to be free?

40. I prefer to rest my decision primarily on my answer to the second question. To start with, the territory over which the Andhra High Court exercises jurisdiction is part of the territory over which the composite Madras High Court exercised jurisdiction. There is no doubt that, if the Madras High Court had continued to exercise jurisdiction, the precedents of the Madras High Court would have been enforced over the whole of this territory. Should the mere constitution of a new High Court make any difference to the Judge-made law that ought to prevail here? Now, for instance, it is well known that quite a large body of the rules of the Hindu Law as administered in India is Judge-made. Why should we rouse apprehension in the minds of the citizens of the Andhra State that those rules so long held to obtain in this part of India are subject to reconsideration and possibly to reversal, all because a new High Court has been ushered into existence? Lawyers and the litigant public alike will be perplexed and confused. The security of titles to property based on the law as previously understood will be needlessly imperilled. The very idea that what has been recognised to be well-established law will be re-examined by this Court will, I entertain no doubt, be a prolific source of undesirable and speculative litigation. Indeed, it seems to me, the whole object of the rule of stare decisis will be defeated. I think it is our clear duty to do everything to avoid that result.

41. There is nothing in the genesis of our Courts which gives us a free hand to deal with the earlier law as laid down by the Madras High Court. There may be cases where the constitution of a new Court involves the welding of two or more jurisdictions each previously under a different Court. In such a case, regions governed

by different judge-made rules of law are brought together for the first time and a new Court administering justice over the new jurisdiction cannot properly hold itself bound by the precedents established in one or other of the earlier jurisdictions without making an invidious distinction and without upsetting one set of precedents or other. That, to my mind, is the case with the Travancore and Cochin High Court. It would not be in accordance with the reasonable expectations of the citizens of that new State that the new Court should follow either the Travancore or the Cochin Judge-made law. The decision therefore, in AIR 1953 Trav-C. 283 (E) seems to me unexceptionable.



42. Again, where small territorial units are integrated to form a new State, and a new and independent High Court is established with jurisdiction over the whole State without reference to the jurisdiction of the previous local Courts as is the case with Madhya Bharat, according to the Chief Justice of that Court, the new Court may have no precedents of a parent Court to follow, or would have to apply the precedents of a former Court with a narrower territorial jurisdiction to a very wider and an entirely new jurisdiction. In such cases, the Court cannot help starting with a clean state. In breaking new ground therefore, it would not be disappointing any natural expectations on the part of the people as to established rules of law. The view taken in AIR 1952 Madh-B 171 (PB) (F) may with respect be considered right.

43. On the other hand, where territories under the jurisdiction of one High Court are divided into two, each to be under the jurisdiction of a separate High Court, it seems to me that the principle underlying the rule of precedents requires the continuity of case-law to be maintained, because there is no reason at all why the certainty of the law should be affected. The Andhra High Court is, in one sense, new of course but its jurisdiction is a jurisdiction which was once subject to one High Court and until 5-7-1954 governed by the case law as laid down by that High Court. A Court should be reluctant to favour innovations unless they are indispensable. Precedents are followed in the words of Blackstone.

"as well to keep the scales of justice steady and not liable to waver with a new Judge's opinion as also because.....What before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter according to his private sentiments".

44. Those reasons point to the need for conformity and operate with equal force now after the creation of the Andhra High Court as they did before. "It is better that the law should be certain than that Judges should be free to speculate upon improvements in it" to use the words of Lord Eldon. Reference has been made in the course of argument to the Supreme Court. It seems to me that the position of the Supreme Court in relation to the earlier Federal Court and the Judicial Committee of the Privy Council is quite different from the position of the Andhra High Court in relation to the composite Madras High Court. The Supreme Court is the creation of the Constitution of India, brought into existence by the solemn resolution of the people to constitute India into a Sovereign Democratic Republic. It does not inherit its power, authority or jurisdiction from any other Court. If it respects the authority of the decisions of Courts prior to its own establishment, it does so of its own volition because they embody rules of law of long standing and not because it is bound by any anterior authority. Indeed, one might venture to state that it would have savoured of constitutional impropriety for the highest court of an independent nation to bow to the decision of a foreign Tribunal.

45. Even the Federal Court of India was not in relation to the Supreme Court a Court of co-ordinate or similar jurisdiction. If the Supreme Court felt itself bound by the decisions of the Federal Court, it would be following precedents of a Court with a narrower and very limited jurisdiction and constituted under a different authority; indeed, a foreign authority — the Parliament of England. That analogy has no application to the relationship between the composite High Court and this Court. It seems to me, therefore, that there are absolutely no reasons whatsoever why the wholesome rule "to stand by matters decided and not to stir up points set at rest" should not apply to our High Court so far as the decisions of the Madras High Court before 5-7-1954 are concerned. No section of the litigant public can complain if we are following established rule, since there is no part of our territorial jurisdiction which was not under the old Madras. High Court.

46. As regards the first question which I raised, I am content to adopt the



reasoning of My Lord the Chief Justice. I respectfully agree with him that this Court is a Court of co-ordinate jurisdiction in relation to the old Madras High Court. There is one minor point to which reference must however be made. The learned Counsel for the petitioner pointed out that there may be cases where decisions rendered by Madras High Court before 5-7-1954 may be overruled by the Madras High Court itself, but which in the above view may none the less be binding on the Andhra High Court. I see no difficulty, however. In such cases, where it is brought to the notice of this Court that the earlier decisions have been departed from in Madras this Court will reconsider them in the light of the subsequent rulings. Mr. Chinnappa Reddy has also referred to the decision in (1950) 2 All ER 170 (L). He would have it that the law of precedents is not to be applied in criminal matters with the same strictness as in civil matters and relies on the following passage in that judgment:

"In civil matters, it is essential to preserve the rule of stare decisis that should be so, but this Court has to deal with the liberty of the subject and if, on reconsideration, in the opinion of a full court, the law has been either misapplied or misunderstood and a man has been sentenced for an offence, it will be the duty of the Court to consider whether he has been properly convicted. The practice observed

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in civil cases ought not to be applied in such a case".

47. As I understand, this passage, it does not mean that Courts are all equally governed by precedents in criminal cases as in civil matters. All that it says is that a Court will not allow a wrong decision in a criminal case to stand on the ground of stare decisis if, on further consideration by a fuller court, it appears that the law has been misapplied or misunderstood.

48. In civil matters, on the other hand, even a wrong decision is not set aside except "for the best and most urgent reasons". The liberty of the subject being one of the strongest of reasons always, a wrong decision relating to it should not be allowed to stand.

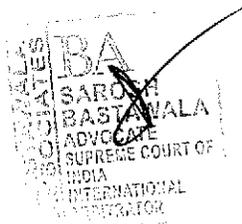
49. For these reasons, I agree that the Full Bench decision of the Madras High Court in AIR 1953 Mad 801 (A) should be followed and Criminal Revision 603/54 dismissed.

50. SATYANARAYANA RAJU, J.:— I agree with My Lord, the Chief Justice.

K.S.B.

51. Revision dismissed.

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Section 33-B merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of service of notice under Section 34 cannot, therefore, be applied to a proceeding under Section 33-B.

5. For the reasons mentioned above, we allow Civil Appeals Nos. 1161 to 1171 of 1971, discharge the answer given by the High Court to the question set out earlier and answer that question as follows:

“The notice issued did not contravene Section 33-B and the Commissioner validly exercised his jurisdiction under Section 33-B. But as the High Court has not considered the other questions referred to it, these cases will now go back to the High Court for considering those questions.”

6. Civil Appeals Nos. 2376 to 2379 of 1968, are dismissed as being not maintainable, as the certificates on the basis of which those appeals were brought to this Court are not in accordance with law. But in those appeals there will be no order as to costs.

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(From Andhra Pradesh High Court)

[BEFORE K. S. HEODE AND A. N. GROVER, JJ.]

SRI VENKATESWARA RICE, GINNING AND
GROUNDNUT OIL MILL CONTRACTORS
CO. AND OTHERS

Appellants;

Versus

STATE OF ANDHRA PRADESH AND OTHERS

Respondents.

Civil Appeals Nos. 1809 to 1812 of 1968†, decided on August 23, 1971

Sales Tax—Andhra Pradesh General Sales Tax Act, 1956—Section 6 and Item 6 of Schedule III—Purchase of groundnut by millers—When becomes exigible to purchase-tax—Whether event that gave rise to tax liability is ‘first purchase’, crushing of groundnut or ‘last purchase’.

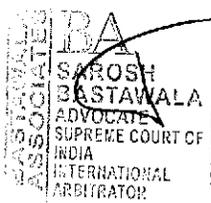
Sales Tax—Central Sales Tax Act, 1956 (74 of 1956)—Sections 14 and 15 read with Section 6 of Andhra Pradesh Sales Tax Act, 1956—Purchasing millers selling a part of the groundnut purchased—Whether subsequent purchasers also liable to pay purchase-tax.

Precedent—High Court bound by earlier decision—Reconsideration only by a larger Bench.

Held:

- (i) It is now well settled that even under the Sales Tax Laws, the charge in respect of a sale or purchase becomes effective as soon as the sale in the case of sales-tax and purchase in the case of Purchase-Tax is made, though the liability of the dealer can be computed only at the end of the year. The incurring of the charge is one thing and its computation is a totally different thing. Hence the turnover relating to the purchases in question became

† Appeals from the Judgment and Order, dated April 20, 1967, of the Andhra Pradesh High Court in T. R. C. Nos. 48, 43, 49 and 74 of 1966.



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charged with the liability to pay tax as soon as those purchases were made by the assessee millers. This means that as soon as a first miller purchases groundnut the turnover relating to that purchase, the question of exemption apart, becomes liable to tax. (Para 6)

(ii) In view of Section 14 and Section 15 of the Central Sales Tax Act, 1956 and Section 6 of the Andhra Pradesh General Sales Tax Act, 1956, purchase of groundnut can be taxed only at one stage. Once a particular quantity of groundnut has been subjected to payment of tax, the State's power to tax in respect of these goods gets exhausted and any further dealing in those goods cannot be brought to tax. This is clear from the scheme of the Act. There was no need for Legislature to say "when purchased by first miller" in Column 2 of Item 6 of Schedule III, to the Andhra Pradesh General Sales Tax Act, 1956, because from the language employed therein, it is clear that the first purchase becomes exigible to tax and in view of Section 6 of the Andhra Pradesh General Sales Tax Act, 1956, the subsequent purchases of the same goods cannot be subjected to tax. (Para 7)

(iii) It is strange that a co-ordinate Bench of the same High Court should have tried to sit on judgment over a decision of another Bench of that Court. It is regrettable that the learned Judges who decided the latter case overlooked the fact that they were bound by the earlier decision. If they wanted that the earlier decision should be reconsidered, they should have referred the question in issue to a larger Bench and not to ignore the earlier decision. (Para 9)

M. Nadar Khan and Co. v. Assistant Commissioner (Commercial Taxes), Anantpur, 27 STC 18, overruled.

Appeals dismissed.

Advocates who appeared in this case :

M. C. Chagla, Senior Advocate (*C. A. Karyaka Prasad*, *R. Gopalakrishnan* and *D. P. Mahanty*, Advocates, with him) for Appellants (in all the appeals);
P. Ram Reddy, Senior Advocate (*G. S. Rama Rao*, Advocate, with him) for Respondents (in all the Appeals).

The Judgment of the Court was delivered by

Hegde, J.—In these appeals by certificate a common question of law arises for decision, viz., on the facts and circumstances of these cases what is the point of levy of purchase tax in respect of certain transactions relating to purchase of groundnut or groundnut kernel by the assessee-appellants under the Andhra Pradesh General Sales Tax Act, 1956 (in brief 'the Act')?

2. The Commercial Tax Officer came to the conclusion that a critical event took place when the assessee purchased the groundnut with which we are concerned in these appeals. In appeal the Assistant Commissioner upheld the order of the Commercial Tax Officer. On a further appeal by the assessee, the Sales Tax Appellate Tribunal disagreeing with the conclusion reached by the Commercial Tax Officer as well as the Assistant Commissioner came to the conclusion that the turnovers relating to the purchases of groundnut in question became exigible to tax either when the groundnut purchased was crushed by the millers or when the same was purchased by the last purchasers. But when the matter was taken up in revision to the High Court, the High Court reversed the decision of the Tribunal and restored the order of the Commercial Tax Officer.

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3. In all these appeals, the assessees are admittedly millers. They are registered dealers under the Act. The groundnut purchased by them was either entirely used by them for extracting oil or partly used for extracting oil and partly sold to others. The levy with which we are concerned in these appeals is purchase tax. The question for decision, as mentioned earlier, is which were the events that gave rise to tax liability—'first purchase', the crushing of the groundnut purchased or the 'last purchase'?

4. The groundnut is one of the "declared goods" to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales Tax Act, 1956 and therefore in view of Section 15(a) of that Act, the State is not empowered to levy purchase tax of more than 3% on the turnover in respect of those purchases and further the tax cannot be levied at more than one stage. Herein we are not concerned with inter-State sales or purchases.

5. Now turning to the Act, Section 2(f) defines "declared goods" as meaning goods declared under Section 14 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956) to be of special importance in inter-State trade or commerce. In compliance with the mandate of Sections 14 and 15 of the Central Sales Tax Act, 1956, Section 6 of the Act provides that notwithstanding anything contained in Section 5 (the charging section), the sales or purchases of declared goods by a dealer shall be liable to tax at the rate, and only at the point of sale or purchase specified against each in the Third Schedule on his turnover of such sales or purchases for each year irrespective of the quantum of his turnover in such goods; and the tax shall be assessed, levied and collected in such manner as may be prescribed. Here again we need not refer to that part of Section 6 which deals with inter-State trade. The only other provision which we have to notice is Item 6 of the Third Schedule which deals with groundnut. The point of levy in respect of that item is when purchased by a miller other than a decorticating miller in the State, at the point of purchase by such miller and in all other cases at the point of purchase by the last dealer who buys in the State. The rate of tax is 2 paise in the rupee.

6. None of the assessees before us is a decorticating miller. Hence we have to see whether the purchases of groundnut made by them did not become taxable as soon as they made those purchases. It is now well settled that even under the Sales Tax Laws, the charge in respect of a sale or purchase becomes effective as soon as the sale in the case of sales tax and purchase in the case of purchase tax is made, though the liability of the dealer can be computed only at the end of the year. The incurring of the charge is one thing and its computation is a totally different thing. Hence the turnover relating to the purchases with which we are concerned in these appeals became charged with the liability to pay tax as soon as those purchases were made by the assessee-millers. To restate the position, whenever a miller purchases groundnut, the turnover relating to that purchase becomes exigible to tax subject to such exemptions as may be given under the Act. This means that as soon as a first miller purchases groundnut, the turnover relating to that purchase, the question of exemption apart, becomes liable to tax. This is also the view taken by the High Court.

7. It was urged on behalf of the assessees that if we place that interpretation then even the turnovers relating to subsequent purchases of the same groundnut made by the other millers would become exigible to tax despite the fact that only a single point purchase tax is leviable under the

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(2)SCC] VENKATESWARA RICE MILL V. STATE OF A. P. (Hegde, J.) 653

Act. It was further urged that we should not read into Item 6 of the Third Schedule the word "first" before the word "Miller" under Column 2 thereof. We see no merit in these contentions. Quite clearly in view of Section 14 and Section 15 of the Central Sales Tax Act and Section 6 of the Act, purchase of groundnut can be taxed only at one stage. Once a particular quantity of groundnut has been subjected to payment of tax, the State's power to tax in respect of those goods gets exhausted and any further dealing in those goods cannot be brought to tax. This is clear from the scheme of the Act. There was no need for the Legislature to say "when purchased by first miller" in Column 2 of Item 6 of the Third Schedule, because from the language employed therein, it is clear that the first purchase becomes exigible to tax and in view of Section 6 of the Act, the subsequent purchases of the same goods cannot be subjected to tax. Therefore there is no question of adding any word into that item, as contended by Mr. M. C. Chagla on behalf of the assesseees.

8. The next argument advanced on behalf of the assesseees is that in the case of some of the assesseees a part of the groundnut purchased had been sold to other millers; hence in those cases, the assesseees must be taxed only in respect of that part of the turnover which relates to groundnut which they had crushed for extracting oil and in the case of remaining part, it is the last dealer who purchased the same should be taxed. This contention again is unacceptable. As mentioned earlier the event which attracted tax is the act of the miller purchasing groundnut and not his act of crushing the groundnut purchased or dealing with that groundnut in any other manner. We have earlier mentioned that the very act of purchase by a miller attracted the liability to pay tax under Section 5 read with Schedule 3, Item 6. His subsequent dealings in those goods becomes irrelevant. In none of the cases before us it was shown that any of the assesseees had purchased groundnut with a view to sell them. Hence we need not go into the question as to what would be the position in law where a miller purchases some groundnut for milling and the rest for sale.

9. Our approach to the question before us is similar to that adopted by the High Court in the decision under appeal. We are in entire agreement with the reasoning of the High Court. But our attention was invited to a latter decision of the same High Court in *M. Nadar Khan & Co. v. Assistant Commissioner (Commercial Taxes), Anantpur and Others*,¹ which took a view contrary to that taken in the decision under appeal. It is strange that a co-ordinate Bench of the same High Court should have tried to sit on judgment over a decision of another Bench of that Court. It is regrettable that the learned Judge who decided the latter case overlooked the fact that they were bound by the earlier decision. If they wanted that the earlier decision should be reconsidered, they should have referred the question in issue to a larger Bench and not to ignore the earlier decision.

10. For the reasons mentioned above, these appeals fail and they are dismissed with costs.

1. 27 STC 18.

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- (3) That gratification should be other than legal remuneration as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to the person.

When the first two ingredients are proved by evidence then a rebuttable presumption arises in respect of the third ingredient. In absence of the proof of the first two facts, the presumption does not arise. On mere recovery of certain money from the person of an accused without the proof of its payment by or on behalf of some person to whom official favour was to be shown the presumption cannot arise. We are not very much impressed with the argument of Mr. Sen that the presumption, even if it arose, stood rebutted on the finding of the High Court that the prosecution has failed to prove that the appellant had demanded any gratification from the complainant. The charge against the appellant was not that he had agreed to accept gratification. But the charge was that he had accepted gratification. If the accusation against the appellant would have been the former the argument put forward on his behalf as to the rebuttal of the presumption could have been acceptable. But the contention put in that form does not stand scrutiny in respect of the charge of acceptance of gratification. On the proof of the charge of acceptance of gratification from the complainant unless the contrary was proved it could have been presumed against the appellant as has been done by the courts below that the acceptance of the gratification was taking a bribe within the meaning of Section 161 of the Penal Code. But on reversal of the finding of the High Court on the question of acceptance of money by the appellant from the complainant and being against the prosecution, the rule of presumption cannot be pressed into service. In the circumstances we are constrained to hold that the conviction of the appellant under Section 161 of the Penal Code cannot be sustained.

11. In the result the appeal succeeds and is allowed. The convictions of the appellant and the sentences imposed upon him are set aside. He is acquitted of the charges levelled against him. His bail bond will be cancelled.

(1975) 2 Supreme Court Cases 232

(Before A. N. Ray, C.J. and K. K. Mathew and V. R. Krishna Iyer, JJ.)

MAMLESHWAR PRASAD AND ANOTHER .. Appellants ;

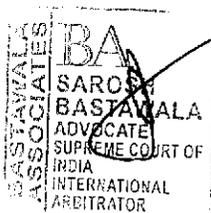
Versus

KANHAIYA LAL (DEAD)
THROUGH L. Rs. .. Respondents.

Civil Appeals Nos. 2167 to 2169 of 1968†, decided on March 4, 1975

Precedent — Supreme Court judgment — When binding — Judgment per incuriam — When amounts to — Constitution of India — Article 141

†From the Judgment and Order, dated August 16, 1966 of the Delhi High Court in L. P. A. Nos. 63-D, 65-D and 66-D of 1965.



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MAMLESHWAR PRASAD V. KANHAIYA LAL (*Krishna Iyer, J.*)

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The appellants filed four appeals against a common judgment of the Delhi High Court. The applicants moved the Court that with a view to save money and energy, one of the four appeals may be directed to be got ready and disposed of, and others may follow the fate of the first. Accordingly, C. A. No. 2556 of 1966 was heard at length and decided adversely to the appellants. The Court had considered the civil court's power to go into the question relating to the Delhi Land Reforms Act with reference to relevant provisions barring suits. It was contended by the appellants that the earlier adjudication amounted to a judgment per incuriam and did not bind them.

Held :

(a) Certainty of the law, consistency of rulings and comity of courts — all flowering from the same principle — converge to the conclusion that a decision once rendered must later bind like cases. The Court does not intend to detract from the rule that in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and the Court will not embark on the principle of judgment per incuriam. A prior decision of the Supreme Court on identical facts and law binds the Court on the same points in a later case. (Paras 7 and 8)

(b) In the present case the decision was admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind. The appellants had prayed for the consolidation of appeals and stated that they could be disposed of by a common judgment. This was granted and they got the benefits like reduced security deposit and consolidation for purposes of printing and hearing of the appeals, on their representation to the Court that the points arising in all the appeals were common and the disposal of one would govern the rest. A litigant cannot play fast and loose with the Court. His word to the Court is as good as his bond and it must without more ado, negative the present shift in stand by an astute discovery of a plea that the earlier judgment was rendered per incuriam. (Paras 4, 5 and 8)

Whether judgment per incuriam binds none except the particular parties to the lis not gone into.

Ex parte Pratt, 52 QB 334, 341; *Young v. Bristol Aeroplane Co. Ltd.*, (1944) 1 KB 718, 729; *Young v. Bristol Aeroplane Co. Ltd.*, 1946 AC 163, 169; *Nicholas v. Penny*, (1950) 2 KB 466; *Bengal Immunity Co. v. State of Bihar*, (1955) 2 SCR 603; AIR 1955 SC 661; (1955) 6 STC 446; *Cassel & Co. Ltd. v. Broome*, (1972) 1 All ER 801; (1972) 2 WLR 645; *Rookes v. Barnard*, 1964 AC 1129 and *Morrell v. Wakeling*, (1955) 2 QB 372, referred to.

Appeals dismissed

I-M/2392/C

Advocates who appeared in this case :

N. S. Bindra, Senior Advocate (*S. S. Dalal* and *D. D. Sharma*, Advocates, with him), for the Appellants;

V. D. Mahajan, Advocate, for the Respondents (in C. As. Nos. 2168-69).

Sarjoo Prasad, Senior Advocate (*Miss Uma Mehta*, *R. K. Mehta* and *M. L. Jain*, Advocates, with him), for the Respondent (in C. A. No. 2167/68).

The Judgment of the Court was delivered by

KRISHNA IYER, J.—A common judgment of the Division Bench of the Delhi High Court disposed of four appeals, the points covered by all being admittedly identical. Special leave was granted by this Court and thus four appeals came into existence here. However, the appellants before us moved this Court that with a view to save money and energy, one of the four may be directed to be got ready and disposed of and the others may, thereafter, follow the fate of the first. On this basis C.A. No. 2556 of 1966 was heard at length and decided adversely to the present appellants. Shri Bindra, learned Counsel for the appellants,



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submits that the earlier adjudication by this Court amounted to a judgment *per incuriam* and did not bind him or the Court. He was thus free to argue on the merits, especially the holding on the civil court's jurisdiction, and the matter was at large. We have to consider this contention on its merits.

2. Certain background facts bearing on the narrow question above posed serve to appreciate the point made. The present batch of appeals, as already stated, emanated from a judgment covering them all rendered by the Delhi High Court which itself arose out of a like common judgment of a Single Judge of the High Court and so on down the pyramid to the base viz., the decree of the trial Court. The present appellant had lost the battle all along the line. For brevity's sake, we may content ourselves with the statement that the courts had been invited to pronounce upon the jurisdiction of the civil court to adjudicate upon the controversy which related to the Delhi Land Reforms Act with special reference to relevant provisions barring suits. In short the point about the civil court's power to go into a land reform litigation had been considered and adversely decided, so much so it is not correct for the appellants to say that the matter had, by grave inadvertence, been missed. We are not examining the soundness of the actual decision on the merits since indeed we feel that the appeals must fail *in limine* and no principle of *judgment per incuriam* can salvage the case.

3. At an early stage, an application was made before this Court embracing all the appeals, including the present three, which runs thus :

In the matter of Civil Appeal No. 2556 of 1966
and

In the matter of Appeals arising from the orders dated 14.8.1968 of the Delhi High Court in S.C.A. No. 186-D/66, 189-D of 1966 and 190-D/66
and

In the matter of Mamleshwar Pershad and another.
* * *

The petitioners (appellants) accordingly pray that this Hon'ble Court may be pleased to pass orders

- (1) Consolidating the 4 appeals above-mentioned.
- (2) Modifying the orders dated 8.12.1966 in S.L.P. 1366 of 1966 so that the security for the respondents' costs deposited in the said appeal may be considered also as security for the costs of the respondents in the 3 appeals arising from the S.C.As. Nos. 186-D, 189-D and 190-D of 1966.
- (3) That in case the appellants are required to furnish further security apart from the amount deposited in Civil Appeal No. 2556 of 1966, time may be suitably extended for such deposit and delay in depositing within the time allowed by the Rules may be condoned.
- (4) Modifying the directions regarding the preparation of record so that the proceedings in the High Courts to be printed in the appeal No. 2556 of 1966 be read as record in the three other appeals afore-mentioned and that the record for the said three other appeals may be printed only so as to include the proceedings in the trial Court and the First Appellate Courts; and
- (5) Such further or other directions may be made as this Hon'ble Court may deem fit in the circumstances of the case.

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4. What needs to be underscored is the appellant's own prayer that the four appeals be consolidated. The reason given is tell-tale :

That only one judgment of the High Court in the Letters Patent Appeals is impugned before your Lordships in all the 4 appeals above-mentioned. It is therefore in the interest of justice that the 4 appeals viz., the Civil Appeal No. 2556 of 1966 and the other 3 appeals arising from SCAs Nos. 186-D, 189-D and 190-D of 1966 deserve to be consolidated and would be disposed of by one argument (sic) common to all of them. That there is nothing to be decided by this Hon'ble Court in any of the Appeals which is not common to any of the rest of them. (Emphasis, ours)

This prayer was granted and thus the appellants got the benefits like reduced security deposit and consolidation for purposes of printing and hearing of the appeals, on their representation to the Court that the points arising in all the appeals were common and the disposal of one would govern the rest.

5. A litigant cannot play fast and loose with the Court. His word to the Court is as good as his bond and we must, without more ado, negative the present shift in stand by an astute discovery of a plea that the earlier judgment was rendered *per incuriam*.

6. The wisdom which has fallen from Bowen, L.J. in *Ex Parte Pratt*¹, though delivered in a different context, has wider relevance to include the present position. The learned Lord Justice observed :

There is a good old-fashioned rule that no one has a right to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, "You have no jurisdiction".

7. Certainty of the law, consistency of rulings and comity of courts — all flowering from the same principle — converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of *judgment per incuriam*.

8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind.

9. Shri Bindra, learned Counsel has cited a few decisions before us to substantiate his submission that judgments *per incuriam* bind none except the particular parties to the *lis*. In this context, he has drawn our attention to the observations in *Young v. Bristol Aeroplane Co. Ltd.*² which has been approved by the House of Lords in *Young v. Bristol Aeroplane Co. Ltd.*³. Similar statements are found in brief terms in the rulings reported as *Nicholas v. Penny*⁴ and *The Bengal Immunity*

1. 52 QB 334, 341.
2. (1944) 1 KB 718, 729.

3. 1946 AC 163, 169.
4. (1950) 2 KB 466.

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*Company Ltd. case*⁵. We need not debate, in the present case, this fresh ground to undermine otherwise conclusive judgments for other paramount rules governing justice administration prevail, as earlier indicated. But it is extremely significant that this facile theory was frowned upon by the House of Lords in *Cassel & Co. Ltd. v. Broome*⁶. In that case the highest Court, viz., the House of Lords

rejected in condemnatory terms the Court of Appeal's decision to the effect that the decision of the House of Lords in *Rookes v. Barnard*⁷ on the issue of exemplary damages had been reached *per incuriam* because of two previous decisions of the House. Lord Hailsham, L.C., in the course of the leading speech for the majority asserted that

"it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way"

while Lord Reid took the view that it was 'obvious that the Court of Appeal failed to understand Lord Devlin's speech'. The *per incuriam* principle is of limited application. Very few decisions have subsequently been regarded as having been reached *per incuriam* and in *Morelle v. Wakeling*⁸ a Master of the Rolls stated that such instances should be 'of the rarest occurrence', and should be limited to 'decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned'. Thus the doctrine will not be extended to cases which were merely not fully argued or which appear to take a wrong view of the authorities or to misinterpret a statute.⁹

10. Now to costs. A compassionate submission was made by Shri Bindra that the parties do bear their costs in this Court. We direct accordingly.

(1975) 2 Supreme Court Cases 236

(Before A. Alagiriswami, P. N. Bhagwati and P. K. Goswami, JJ.)

K. P. POULOSE Appellant ;
Versus
STATE OF KERALA AND ANOTHER Respondents.

Civil Appeal No. 1485 of 1974†, decided on April 21, 1975

Arbitration Act, 1940 — Section 30(a) — When award can be set aside under — Misconduct — Meaning of — Relevant documents not considered by arbitrator — Effect

The appellant was a successful tenderer for construction of 3 zonal R. C. C. overhead reservoirs. The schedule annexed to the notification stated that 'the soil at the site for reservoir No. 1 and reservoir No. 2 is loose clay and for reservoir No. 3, sandy'. After receipt of the opinion of the Kerala Engineering Research Institute as to the conditions of the soil, respondent No. 8 instructed the contractor to adopt the process of jetting for driving piles for the tank at

5. *The Bengal Immunity Co. v. State of Bihar*, (1955) 2 SCR 603: AIR 1955 SC 661: (1955) 6 STC 446.

6. (1972) 1 All ER 801: (1972) 2 WLR 645.

7. 1964 AC 1129.

8. (1955) 2 QB 379.

9. "The English Legal System" by R. J. Walker and M. G. Walker, III Edit., Butterworths, 1972.

†Appeal by special leave from the Judgment and Order, dated January 29, 1975 of the Kerala High Court in A. S. No. 357 of 1972.

or cheese to a government hospital can ask for a constitutional remedy under Article 226 in the event of a breach of a contract, bypassing the normal channels of civil litigation. We are not convinced that a mere contract agreeing to a quota of promotions can be exalted into a service rule or statutory duty. What is immediately relevant is not whether the respondent is State or public authority but whether what is enforced is a statutory duty or sovereign obligation or public function of a public authority. Private law may involve a State, a statutory body, or a public body in contractual or tortious actions. But they cannot be siphoned off into the writ jurisdiction.

12. The controversy before us in substance will turn on the construction and scope of the agreement when the claim to a quota as founded cannot be decided in writ jurisdiction without going back on well-settled guidelines and even subverting the normal processual law — except perhaps in extreme cases which shock the conscience of the Court or other extraordinary situation, an aspect we are not called upon to explore here. We are aware of the wide amplitude of Article 226 and its potent use to correct manifest injustice but cannot agree that contractual obligations in the ordinary course, without even statutory complexion, can be enforced by his short, though, wrong cut.

13. On this short ground the appeal must fail and be dismissed. We do so, but without costs.

(1976) 3 Supreme Court Cases 832

(Before V. R. Krishna Iyer and N. L. Untwalia, JJ.)

THE MUMBAI KAMGAR SABHA, BOMBAY .. Appellant ;

Versus

M/s. ABDULBHAI FAIZULLABHAI AND OTHERS .. Respondents.

Civil Appeal No. 61 of 1971†, decided on March 10, 1976

Labour and Industrial Law — Bonus — Non-profit-based bonus such as customary bonus or contractual bonus — Existence of not barred by the Bonus Act, 1965 — Demand for continuation of ex gratia payments made in the past years — Held, demand, on facts, was one of customary bonus as a condition of service and not of profit-based statutory bonus — Nexus with any festival not necessary — Consideration of the directives in Part IV of the Constitution — Payment of Bonus Act, 1965, Sections 17 and 34

Words and Phrases — Bonus — Meaning of

Constitution of India — Article 136 — Practice and procedure — Labour dispute — Labour union will be allowed to contest on behalf of the workmen — Technical flaw will not be allowed to defeat the cause they seek to justify — Broader conception of locus standi and liberal approach to procedural technicalities called for

The workmen were employed in more than a thousand tiny establishments in the Nag Devi locality of Bombay producing small hardware items. Only

†Appeal by Special Leave from the Award dated July 14, 1971 of the Industrial Tribunal, Maharashtra at Bombay in Reference (I. T.) No. 116 of 1970.

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four of the several establishments had more than 20 workmen, Ex gratia payments of small amounts were however being paid for several years to such workmen till 1965, when it stopped.

There was an association of employers and a union of the workers. The matter of bonus was raised by the union leading to appointment of Board of Arbitrators. The arbitral board rejected the demand and such further payments were discontinued. Matter was ultimately referred to the Industrial Tribunal. The terms of reference were:

1. Whether the establishments have been giving bonus to their workmen till 1965? If so, how long before 1965 have the employers been giving bonus to their workmen? And at what rate?
2. Whether the payment of bonus by the employers to their workmen has become custom or usage or condition of service in these establishments? If so, what should be the basis on which employers should make payment of bonus to their workmen for the years ending on any date in 1966, 1967, 1968 and 1969?

The tribunal made short shrift of the matter by holding the reference barred by res judicata and hence untenable. Hence the appeal by special leave.

Preliminary objection was taken on behalf of the respondent employers that the union could not be the appellant since the dispute was between the workers and the establishments.

Counsel on behalf of the respondents besides raising the plea of res judicata pleaded that the claim being for profit-based bonus it was clearly impermissible under the Bonus Act since all but four of the establishments employed less than 20 workmen.

Held:

(a) Preliminary objection cannot stand since in substance the union represents the workers. The objection is purely technical and is not justified on facts. (Paras 6 to 9)

Bar Council of Maharashtra v. M. V. Dabholkar, (1975) 2 SCC 702 and *Newabganj Sugar Mills v. Union of India*, (1976) 1 SCC 120, referred to.

(b) On facts, a perusal of the demands, the reference by the State Government and the statement by the respondents themselves before the tribunal shows that the demand was not based on profits and was one based on custom or usage or a condition of service. (Paras 13 to 16)

It is not essential that customary bonus be linked with any festival even though traditionally religious festivals provide the occasion for payment of such amounts. (Para 17)

Profit-based bonus is not the only kind of bonus recognised by law. Customary bonus has been recognised and is well-settled by the decisions of the Supreme Court and High Courts. There are yet other kinds of bonus. (Paras 18 to 23)

Churakulam Tea Estate v. Workmen, (1969) 1 SCR 931; AIR 1969 SC 998; (1969) 2 LLJ 403; *Ispahani Ltd v. Employees' Union*, (1960) 1 SCR 24; AIR 1959 SC 1147; (1959) 2 LLJ 4; *Mahalaxmi Cotton Mills Ltd. v. Workers' Union*, 1952 LAC 370; *Graham Trading Co. (I) Ltd. v. Workmen*, (1960) 1 SCR 107, 111; AIR 1959 SC 1151; (1959) 2 LLJ 393; *Bombay Co. Ltd. v. Workmen*, (1964) 7 SCR 477; AIR 1964 SC 1770; (1964) 2 LLJ 109; *Jardine Henderson Ltd. v. Workmen*, 1962 Supp 3 SCR 582; AIR 1963 SC 474; (1962) 1 LLJ 405 and *Tulsidas Khimji v. Workmen*, (1963) 1 SCR 675; AIR 1963 SC 1007; (1962) 1 LLJ 435, referred to.

Howrah-Amra Light Rly. Co. Ltd. v. Central Govt. Industrial Tribunal, (1966) 2 LLJ 294, 302 (Pat) and *M. Tilak & Co. v. Third Industrial Tribunal*, AIR 1959 Cal 797, approved.

Any extra consideration given for what is received, or something given in

addition to what is ordinarily received by, or strictly due to the recipient is a bonus. When industrial jurisprudence speaks of 'bonus', it enters the area of right and claim to what is due beyond strict wages. So that if the Bonus Act deals wholly and solely with profit bonus, it cannot operate as a bar to a different species of claim merely because the word bonus is common to both. (Para 24)

A study of history and background of the Bonus Act, 1965 shows that the paramount purpose of the Payment of Bonus Act was to regulate profit bonus, with incidental incursions into other allied claims like customary or attendance bonus. If such be the design of the statute, its scheme cannot be stretched to supersede what it never meant to touch or tackle. The conclusion is that the Bonus Act dealt with only profit bonus and matters connected therewith and did not govern customary, traditional or contractual bonus. (Paras 25 to 36)

The Bonus Act speaks, and speaks as a whole code, on the sole subject of profit-based bonus but is silent on, and cannot therefore annihilate by implication, other distinct and different kinds of bonus such as the one oriented on custom. There is no categorical provision in the Bonus Act nullifying all other kinds of bonus, nor does such a conclusion arise by necessary implication. (Paras 37 and 38)

Sanghi Jeevaraj Ghewar Chand v. Secretary, Madras Chillies, Grains Kirana Merchants Workers' Union, (1969) 1 SCR 366 : AIR 1969 SC 590 : (1969) 1 LLJ 719, distinguished.

Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Union, (1967) 1 SCR 15 : AIR 1967 SC 691 : (1966) 2 LLJ 546, relied on.

Likewise, reference to agreements and settlements providing for bonus being exempted from the applicability of the Act does not militate against the survival of contractual bonus (subject of course to impact of amendment by the 1975 ordinance). (Para 38)

In sum, the Bonus Act (as it stood in 1965) does not bar claims to customary bonus or those based on conditions of service. (Para 42)

Labour and Industrial Law — Industrial Disputes Act, 1947 — Sections 10, 10A — Res judicata — Applicability to industrial adjudication — C. P. C., 1908, Section 11

Held :

Industrial litigation is no exception to the general principle underlying the doctrine of res judicata. However there is doubt about the extension of the sophisticated doctrine of constructive res judicata to industrial law which is governed by special methodology of conciliation, adjudication and considerations of peaceful industrial relations, where collective bargaining and pragmatic justice claim precedence over formalised rules of decision based on individual contests, specific causes of action and findings on particular issues. (Para 40)

Bombay Gas Co. v. Jagannath Pandurang, (1975) 4 SCC 690 : 1975 SCC (L & S) 388, distinguished.

Constitution of India — Article 141 — Only the ratio is binding — Position restated

Held :

It is trite, going by anglophonic principles, that a ruling of a superior court is binding law. It is not of scriptural sanctity but is of ratiowise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decision, exalting the doctrine of precedents into a prisonhouse of bigotry, regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position

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of subordinate courts, casual observations, generalisations and sub silentio determinations must be judiciously read by courts of coordinate jurisdiction. (Para 38)

Appeal allowed

M/2913/CL

Advocates who appeared in this case:

V. M. Tarkunde, Senior Advocate (P. H. Parakh, H. K. Swami and Manju Jetley, Advocates, with him), for the Appellant;

G. B. Pai, Senior Advocate (Shri Narain and O. C. Mathur, Advocates of M/s J. B. Dadachanji & Co., Advocates, with him), for Respondent Nos. 27, 68, 160, 182, 226, 265, 312, 403, 522, 722 and 903.

The Judgment of the Court was delivered by

KRISHNA IYER, J.—A narration of the skeletal facts, sufficient to get a hang of the four legal issues debated at the Bar in this appeal, by special leave, will help direct the discussion along a disciplined course, although the broader social arguments addressed have spilled over the banks of the jurial stream.

2. Nag Devi, a locality in the city of Bombay, is studded with small hardware businesses where pipes and fittings, nuts and bolts, tools and other small products, are made and/or sold. These establishments, well over a thousand, employ a considerable number of workmen in the neighbourhood of 5000, although each unit has (barring four), less than the statutory minimum of 20 workmen. This heavy density of undertakings and workers naturally produced an association of employers and a union of workmen, each recognising the other, for the necessary convenience of collective bargaining. Apparently, these hardware merchants huddled together in the small area, were getting on well in their business and in their relations with their workmen, and this goodwill manifested itself in *ex gratia* payments to them of small amounts for a number of years prior to 1965, when trouble began.

3. Although rooted in goodness and grace, the annual repetition of these payments ripened, in the consciousness of the workers, into a sort of right — nothing surprising when we see in our towns and temples a trek of charity-seekers claiming benevolence as of right from shopkeepers and pilgrims, especially when this kindly disposition has been kept up over long years. The compassion of yesterday crystallises as the claim of today, and legal right begins as that which is humanistically right. Anyway, the hardware merchants of Nag Devi, made of sterner stuff, in the year 1965, abruptly declined to pay the goodwill sums of the spread-out past and the frustrated workmen frowned on this stoppage by setting up a right to bonus averring considerable profits for the industry (if one may conveniently use that expression for a collective coverage of the conglomeration of hardware establishments). The defiant denial and the consequent dispute resulted in the appointment of a Board of Arbitrators under Section 10A of the Industrial Disputes Act to arbitrate upon twelve demands put forward by the Mumbai Kamgar Sabha, Bombay (the union which represents the bulk of workers employed in the tiny, but numerous, establishments). The charter of demands included, inter alia, claim for 4 months' wages as bonus for the year 1965. The arbitral board, however, rejected the demand for bonus. The respondents-establishments

discontinued these payments thereafter and the union's insistence on bonus led to conciliation efforts. The Deputy Commissioner of Labour mediated but since his intervention did not melt the hardened mood of the employers, formal demands for payment of bonus were made by the union and government was persuaded to refer the dispute for adjudication to an industrial tribunal. The tribunal formulated two issues as arising from the statements of the parties and rendered his award dismissing the reference.

4. At this stage, it may be useful to set out the terms of reference made under Section 10(1)(d) of the Industrial Disputes Act, 1947 (for short, the I. D. Act), for adjudication by the tribunal :

1. Whether the establishments (mentioned in the annexure) have been giving bonus to their workmen till 1965? If so, how long before 1965 have the employers been giving bonus to their workmen? And at what rate?
2. Whether payment of bonus by the employers to their workmen has become custom or usage or condition of service in these establishments? If so, what should be the basis on which employers should make payment of bonus to their workmen for the years ending on any date in 1966, 1967, 1968 and 1969?

Following upon the statements of parties, the tribunal framed two issues which ran thus :

1. Whether the Award of the Arbitration Board made in Reference (VA) No. 1 of 1967 and published in M.G.G. Part I-1 dated October 31, 1968, pages 4259-4286, operates as res judicata to the demands of the workmen.
2. Whether the reference in respect of the demands is tenable and legal.

He answered the first in the affirmative and the second in the negative.

5. The union, representing the workers in the mass, has assailed the findings of the tribunal, the reasonings he has adopted and the misdirection he has allegedly committed. The tribunal did not enter the merits of the claim but dismissed it in limine on the score that the demand for bonus was barred by res judicata, the arbitral board's decision negating the bonus for 1965 being the basis of this holding. The second ground for reaching the same conclusion was that the Bonus Act was a comprehensive and exhaustive law dealing with the entire subject of bonus and its beneficiaries. In short, in his view, the Bonus Act was a complete code and no species of bonus could survive outside the contours of that statute. Admittedly, here the claim for bonus for the relevant four years was founded on tradition or custom or condition of service and, in that light, the tribunal made short shrift of the workmen's plea in these words :

In my opinion, the demand pertaining to the practice or custom prevailing in the establishments before 1965 is not such a matter as has to be adjudicated and it also does not fall under the provisions of Bonus Act. I, therefore, find that the reference in that respect also is not tenable and legal.

6. The submissions of Counsel may be itemised into four contentions which may be considered seriatim. They are :

- (a) Was the industrial tribunal competent to entertain the dispute at all?
- (b) Was the claim for bonus for the years 1966-69 barred by res judicata?

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- (c) Was there, apart from profit-based bonus, customary bonus or bonus as a condition of service?
- (d) If answer to (c) is in favour of the workmen, does the Bonus Act interdict such a demand since it does not provide for those categories of bonus and confines itself to profitbased bonus, or does the Bonus Act speak on the topic of bonus of all species and, therefore, stands foursquare between a claim for bonus and its grant, unless it finds statutory expression in the provisions of that Act?

The first contention which, curiously enough, has appealed to the industrial tribunal, need not be investigated as it is devoid of merit and has rightly been given up by Counsel for the respondent. A casual perusal of the provisions bearing on the jurisdiction of the labour court and the industrial tribunal as well as the relevant schedules will convince anyone that this industrial dispute comes within the wider ambit of the industrial tribunal's powers. It is unfortunate that the tribunal has made this palpable error. It is right to give plausible reasons for one's verdict and not mar it by bad, perfunctory supplementaries.

7. Fairness to respondent's Counsel constrains us to consider in limine a flawsome plea forcibly urged that the union figured as the appellant before us but being no party to the dispute (which was between the workers on the one hand and the establishments on the other) had no *locus standi*. No right of the union *qua* union was involved and the real disputants were the workers. Surely, there is terminological lapse in the cause title because, in fact, the aggrieved appellants are the workers collectively, not the union. But a bare reading of the petition, the description of parties, the grounds urged and grievances aired, leave us in no doubt that the battle is between the workers and employers and the union represents, as a collective noun, as it were, the numerous humans whose presence is indubitable in the contest, though formally invisible on the party array. The substance of the matter is obvious and formal defects, in such circumstances, fade away. We are not dealing with a civil litigation governed by the Civil Procedure Code but with an industrial dispute where the process of conflict resolution is informal, rough-and-ready and invites a liberal approach. Procedural prescriptions are hand-maids, not mistresses, of justice and failure of fair play is the spirit in which courts must view processual deviances. Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical misdescriptions and deficiencies in drafting pleadings and setting out the cause title create a secret weapon to non-suit a party. Where foul play is absent, and fairness is not faulted, latitude is a grace of processual justice. Test litigations, representative actions, *pro bono publico* and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral, procedural shortcomings. Even Article 226, viewed in wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents, has opted for the narrower alternative. Public interest is

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promoted by a spacious construction of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law. Therefore, the decisions cited before us founded on the jurisdiction under Article 226 are inept and themselves somewhat out of tune with the modern requirements of jurisprudence calculated to benefit the community. Two rulings of this Court more or less endorse this general approach : *Dabholkar*¹ and *Newabganj Sugar Mills*².

8. All this apart, we are dealing with an industrial dispute which, in some respects, lends itself to more informality especially in the matter of union representation. Technically, the union cannot be the appellant, the workmen being the real parties. But the infelicity of drafting notwithstanding, the union's role as merely representing the workers is made clear in the description of the parties. Learned Counsel took us through Section 36(1) and (4) of the Act, Rules 29 and 36 of the Central Rules under that Act, Section 15(2) of the Payment of Wages Act and some rulings throwing dim light on the rule regarding representation in industrial litigation. We deem it needless to go deeper into this question, for in industrial law, collective bargaining, union representation at conciliations, arbitrations, adjudications and appellate and other proceedings is a welcome development and an enlightened advance in industrial life.

9. Organised labour, inevitably involves unionisation. Welfare of workers being a primary concern of our Constitution (Part IV), we have to understand and interpret the new norms of procedure at the prelitigative and litigative stages, conceptually recognising the representative capacity of labour unions. Of course, complications may arise where inter-union rivalries and kilkeny cat competitions impair the peace and solidarity of the working class. It is admitted, in this case, that there is only one union and so we are not called upon to visualize the difficult situations Counsel for the respondents invited us to do, where a plurality of unions pollute workers' unity and create situations calling for investigation into the representative credentials of the party appearing before the tribunal or court. It is enough, on the facts of this case, for us to take the union as an abbreviation for the totality of workmen involved in the dispute, a convenient label which, for reasons of expediency, converts a lengthy party array into a short and meaningful one, group representation through unions being familiar in collective bargaining and later litigation. We do not expect the rigid insistence on each workman having to be a party *eo nomine*. The whole body of workers, without their names being set out, is, in any case, sufficient, according to the Counsel for the respondents, although strictly speaking, even there an amount of vagueness exists. For these reasons, we decline to frustrate this appeal by acceptance of a subversive technicality. We regard this appeal as one by the workmen compendiously projected and impleaded through the union.

1. *Bar Council of Maharashtra v. M. V. Dabholkar*, (1976) 1 SCR 306 : (1975) 2 SCC 702.
2. *Newabganj Sugar Mills Co. Ltd. v. Union of India*, (1976) 1 SCC 120.

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10. Next we come upon the plea of *res judicata*, as a roadblock in the way of the appellant. But we will deal with it last, as was done by Counsel, and so straight to the *piece de resistance* of this *lis*. Points (b) and (c) bearing on bonus therefore claim our first attention and, in a sense, are integrated and amenable to common discussion.

11. Shri G. B. Pai, appearing for the respondents, contended that the claim put forward by the appellant before the tribunal was, on the face of it, unsustainable on the short ground that what was pleaded was profit-based bonus only and, therefore, fell squarely within the Bonus Act. That Act being a complete code, it expressly excluded by Section 1(3) all establishments employing less than 20 workmen and all but four of the respondents were admittedly such small undertakings, with the result that the death knell to the plea of bonus was tolled by the Act itself. Therefore, the conclusion was irresistible, argued Counsel for the respondents, that the plea for a profit-based bonus, being negated by the statute, stands self-condemned.

12. This argument drives us into an enquiry as to whether the claim before the tribunal was for profit-based bonus. 'Yes' was his holding, and so he said 'no' to the workmen. The answer is the same, if the claim is founded on a similar basis.

13. Shri Tarkunde, for the appellant, countered this seemingly fatal submission by urging, that whatever might have been the species of bonus demanded in 1965, the present dispute referred by the State Government related to a totally different type of bonus, namely, customary bonus or one which was a term of employment itself. Even if this be true, Shri G. B. Pai has his case that the Bonus Act is all-comprehensive and no kind of bonus can gain legal recognition if it falls outside the sweep and scope of the Bonus Act itself. No brand of bonus has life left if it does not find a place in the oxygen tent of the complete code called the Bonus Act.

14. What thus first falls for our examination is the reference by the State Government to the tribunal, the pleading of the workmen before the tribunal and the counter statement by the employers before the tribunal with a view to ascertain the character of the bonus demanded by the workers and covered by the dispute. It must be remembered that the award has rejected the claim not substantively but on the ground of two legal bars and care must be taken not to mix up maintainability with merits. A short cut is a wrong cut oftentimes and the tribunal's easy recourse to dismissal on preliminary grounds may well lead — and it has, as will be presently perceived — to a reopening of the case many years later if the higher court reverses the legal findings. Be that as it may, let us test the validity of the plea that only a profit-based bonus has been claimed by the workers.

15. The demands referred by the State Government under Section 10(1)(d) specifically speak of payment of bonus by the employers which 'has become *custom or usage or a condition* of service in the establishments'. The subsidiary or rather consequential point covered by the reference is 'if so, what should be the basis on which employers should make

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payment of bonus to their workmen for the years. . .'. It is plain that the subject-matter of the dispute, as referred by the Government, deals with bonus based on custom or condition of service. The tribunal is therefore bound to investigate this question, the terms of reference being the operational basis of its jurisdiction.

16. The workmen, in their statement, have asserted that bonus had been paid for several years and what transpired at the conciliation stages is clear from the letter of the Commissioner of Labour who adverts to the 'usual custom and practice of payment of bonus'. The colour of the workers' claim has been clarified further in paragraphs 10 to 12 of their statement before the tribunal. While they do mention that the hardware merchants of Nag Devi have been making large profits during the years in question and, therefore, can afford to pay bonus according to the standards and criteria applicable to large and prosperous industrial establishments, the real foundation of their claim is set out in indubitable language as attributable to 'custom, usage and condition of service'. Surely, they have no case of bonus dependent upon the quantum of profits of the establishments nor of uniformity regionwise. On the other hand, the amount of bonus, the time of payment, etc. vary from establishment to establishment. The constant factor, however, is allegedly that there is 'consistency, predictability and uniformity', continuity and payment 'without reference to the fluctuations in the financial performance and profits of each firm'. The Sabha does not mince words when, in praying for relief, it states that the tribunal 'be pleased to restore the custom, usage and conditions of service represented by the payment of bonus in these firms'. In short, the bedrock of the bonus claim of the workers is custom and usage and/or implied condition of service. Nor have the establishments, who are the respondents before the tribunal and before us, made any mistake about the nature of the demand. In their statement before the tribunal they have urged that a scrutiny of the accounts of the firms is unnecessary 'since the demand is not based on the profits or the financial results of the employers but is based on custom'.

The contentions of the Sabha that the conditions of service under all these employers should be governed by one standard and one criteria, is not tenable. Since all the shops are not owned by one person and since every shop is a different entity there is no question of uniformity of service conditions. Moreover, there is no law which lays down that the service conditions of the employees under all these employers should be uniform. It is submitted that the reference to the capita-turn-over ratio in this paragraph is irrelevant. It is also submitted that the Sabha's demand that a sample scrutiny of the accounts of the firms should be made by the tribunal is irrelevant in this respect since the demand is not based on the profits or the financial results of the employers but is based on custom.

Moreover, *ex gratia* payments for the pre-Bonus Act period are admitted by the respondents. They seek sanctuary in the counter-plea that free acts of grace, even if repeated, can neither amount to a custom, usage or condition of service. In sum, a study of the pleadings, the term of reference and the surrounding circumstances supports the only conclusion that, peripheral reference to the profits of the establishments notwithstanding, the core of the cause of action or the kernel of the claim for bonus

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is custom and/or term of service, not sounding in or conditioned by profits.

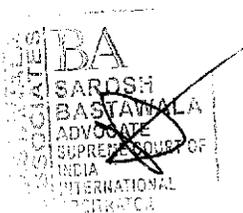
17. Shri G. B. Pai did urge that the precedents of this Court have linked custom-based bonus with some festival or other and that bonus founded on custom de hors some festival is virtually unknown to case-law on the point. From this he argues that since the bonus has not been related by reference to any festival by the workmen in their pleadings (reference to Diwali as the relevant festival in the statement of the case in this Court is an ingenious innovation to fit into the judge-made law, according to Shri Pai) the claim must fail. Legal life is breathed into customary bonus only by nexus with Puja or other festival. We are unable to agree with this rather meretricious submission. Surely, communal festivals are occasions of rejoicing and spending and employers make bonus payments to employees to help them meet the extra expenses their families have to incur. Ours is a festival-ridden society with many religions contributing to their plurality. That is why our primitive practice of linking payment of bonus with some distinctive festival has sprouted. As we progress on the secular road, maybe the Republic Day or the Independence Day or the Founder's Day may well become the occasion for customary bonus. The crucial question is not whether there is a festival which buckles the bonus and the custom. What is legally telling is whether by an unbroken flow of annual payments a custom or usage has flowered, so that a right to bonus based thereon can be predicated. The custom itself precipitates from and is proved by the periodic payments induced by the sentiment of the pleasing occasion, creating a mutual consciousness, after a ripening passage of time, of an obligation to pay and a legitimate expectation to receive. We are, therefore, satisfied that the omission to mention the name of a festival, as a matter of pleading, does not detract from the claim of customary bonus. The impact of this omission on proof of such custom is a different matter with which we are not concerned at this stage since the tribunal has not yet enquired into the merits.

18. Shri Pai urged that the custom, even if true, stood broken in 1965 and, therefore, during the post-1965 period, customary bonus stood extinguished. The effect of the arbitral board's negation of the profit-based bonus claim in 1965 on custom-based bonus for the subsequent period is again relevant, if at all, as evidence, which falls outside our consideration at present. In the event of the tribunal having to adjudicate upon the question, maybe this rather anaemic circumstance will be urged by the employer and explained by the employees.

19. There is hardly any doubt that custom has been recognised in the past as a source of the right to bonus, as the several decisions cited before us by Shri Tarkunde make out and Section 17(a) of the Bonus Act, in a way, recognizes such a root of title. In *Churakulam Tea Estate*³ this Court surveyed the relevant case law at some length. *Ispahani*⁴ implied as a term of the contract the payment of bonus from an unbroken,

3 *Management of Churakulam Tea Estate v. Workmen*, (1969) 1 SCR 931: AIR 1969 SC 998: (1969) 2 LLJ 403.

4 *M/s. Ispahani Ltd. v. Employees' Union*, (1960) 1 SCR 24: AIR 1959 SC 1147: (1959) 2 LLJ 4.



long spell. Vaidialingam, J. in *Churakulam* referring to some of the precedents, observed :

In *Ispahani's* case this Court had to consider a claim for Puja bonus, in Bengal, and the essential ingredients, for sustaining such a claim when it is based on an implied agreement. After stating that the claim, for Puja bonus, can be based either as a matter of implied agreement between the employers and employees, creating a term of employment for payment of Puja bonus, or that even where no implied agreement can be inferred, it may be payable as a customary bonus, this Court, in the said decision, specifically dealt with a claim for payment of bonus as an implied condition of service. This Court further accepted as correct the tests laid down by the appellate tribunal in *Mahalaxmi Cotton Mills Ltd., Calcutta v. Mahalaxmi Cotton Mills Workers' Union*⁵ for inferring that there is an implied agreement for grant of such bonus. The three circumstances, laid down by the appellate tribunal, were: (1) that the payment must be unbroken; (2) that it must be for a sufficiently long period; and (3) that the circumstances, in which payment was made should be such as to exclude that it was paid out of bounty.

This Court, again, had had to consider the essential ingredients to be established when payment of bonus, as customary or traditional, is claimed — again related to a festival — in *Graham Trading Co. (India) Ltd. v. Its Workmen*⁶ and dealt with the question as follows :

In dealing with Puja bonus based on an implied term of employment, it was pointed out by us in *Messrs. Ispahani Ltd. v. Ispahani Employees' Union* that a term may be implied, even though the payment may not have been at a uniform rate throughout and the industrial tribunal would be justified in deciding what should be the quantum of payment in a particular year taking into account the varying payments made in previous years. But when the question of customary and traditional bonus arises for adjudication, the considerations may be somewhat different. In such a case, the tribunal will have to consider: (i) whether the payment has been over an unbroken series of years; (ii) whether it has been for a sufficiently long period though the length of the period might depend on the circumstances of each case; even so the period may normally have to be longer to justify an inference of traditional and customary Puja bonus than may be the case with Puja bonus based on an implied term of employment; (iii) the circumstance that the payment depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in years of loss. In dealing with the question of custom, the fact that the payment was called *ex gratia* by the employer when it was made, would, however, make no difference in this regard because the proof of custom depends upon the effect of the relevant factors enumerated by us; and it would not be materially affected by unilateral declarations of one party when the said declarations are inconsistent with the course of conduct adopted by it; and (iv) the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern. It will be seen that these tests are in substance more stringent than tests applied for proof of Puja bonus as an implied term of employment.

It will be seen from the above extract that an additional circumstance has also been insisted upon, in the case of customary or traditional bonus; that the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such a rate had become customary and traditional in the particular concern. (pp. 936-937)

20. In *Bombay Co.*⁷ this Court, after pointing out the distinction in the ingredients of customary and contractual bonus, affirmed the

5. 1952 LAC 370.

6. (1960) 1 SCR 107, 111; AIR 1959 SC 1151; (1959) 2 LLJ 393.

7. *Management of Bombay Co. Ltd v. Workmen*, (1964) 7 SCR 477; AIR 1964 SC 1770; (1964) 2 LLJ 109.

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existence of categories like customary bonus which are different from and unconnected with profit-based bonus. The learned Judge discussed *Jardine Henderson*⁸ and other rulings, but the judicial chorus of legally claimable customary or contractual bonus is not marred by any discordant note.

21. It may be otiose to refer to holdings of High Court when this Court has laid down the law. Even so, two decisions, one of Patna and the other of Calcutta, deserve mention. One of us, (Untwalia, J. as he then was) speaking for the Division Bench, observed in *Howrah-Amta Light Rly.*⁹ thus :

Apart from the profit bonus, the sense of social justice has led to the recognition in law of the right of the workmen to get other kinds of bonus which do not depend upon nor are necessarily connected with the earnings of profits by the industrial concern. One such kind of bonus is that which is paid on the occasion of special festival well celebrated in particular parts of India, as for example, Puja bonus in Bengal and Divali bonus in Western India.

The Court, referring to *Tulsidas Khimji*¹⁰ restated the tests for the claim of customary bonus and rightly held that these tests are but circumstances and not conditions precedent, that it is not necessary to show that such bonus has been paid even in years of loss. The grounds to be made out for customary, as distinguished from contractual, bonus overlap in many respects but differ in some aspects.

22. Justice P. B. Mukharji, as he then was, in *Tilak Co.*¹¹ observed :

Akin to this conception of bonus is the case of a bonus annexed to the employment by custom or social practices such as customary bonus and Puja or festivity bonus. In case of such customary and traditional bonus, the question of profit may or may not arise at all and such customary and traditional bonus will depend on the content and terms of that custom or the tradition on which the claim for bonus is made.

Each claim for bonus must depend on the facts of such claim. No doctrinaire view about bonus is possible or desirable. This much however is judicially settled that bonus is not deferred wages. It is a narrow and static view that considers bonus as always an ex gratia payment or a glorified tip or 'bakshish' or a mere cash patronage payable at the pleasure of the employer. In the industrial jurisprudence or a modern economic society, it is a legal claim and a legal category, whose potentialities are not as yet fully conceived, but whose types and boundaries the courts in India are struggling to formulate. It is a vital instrument of industrial peace and progress, dynamic in its implication and operation.

Since we are not called upon to investigate the veracity of the claim we stop with stating that the employers' awareness of social justice, which fertilises the right of his employees for bonus, blooms in many ways of which, profit-based bonus is but one — not the only one. All this is the indirect bonanza of Part IV of the Constitution which bespeaks the conscience of the nation, including the community of employers. Law is not petrified by the past, but responds to the call of the changing times. So too the social consciousness of employers. Of course, Labour has its legal-moral duty to the

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| <p>8. <i>Jardine Henderson Ltd v. Workmen</i>, 1962 Supp 3 SCR 582. AIR 1963 SC 474: (1962) 1 LLJ 405.</p> <p>9. <i>Howrah-Amta Light Railway Co. Ltd. v. Central Government Industrial Tribunal</i>, (1966) 2 LLJ 294, 302 (Pat HC).</p> | <p>10. <i>Tulsidas Khimji v. Workmen</i>, (1963) 1 SCR 675: AIR 1963 SC 1007: (1962) 1 LLJ 435.</p> <p>11. <i>M. Tilak & Co. v. Third Industrial Tribunal</i>, AIR 1959 Cal 797: 63 CWN 697.</p> |
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community of a disciplined contribution to the health and wealth of the Industry. Law is not always an organiser of one-way traffic.

23. This general survey of the case-law conclusively makes out that Labour's claim for bonus is *not* inflexibly and solely pegged to profit as the one and only right. Bonus is a word of many generous connotations and, in the Lord's mansion there are many houses. There is profit-based bonus which is one specific kind of claim and perhaps the most common. There is customary or traditional bonus which has its emergence from long, continued, usage leading to a promissory and expectancy situation materialising in a right. There are attendance bonus, production bonus and what not. An examination of the totality of pertinent materials drives us to the inevitable result that what has been claimed by the workmen in the present case is bonus based on custom and service condition — not one based on profit. But the critical question pops up: Is the Bonus Act a killer of every other kind of bonus not provided for by it?

24. We have thus to move on to a study of the scheme of the Bonus Act in order to ascertain whether it extinguishes claims founded on customary bonus or contractual bonus. In one sense, a bonus may be a mere gift or gratuity as a gesture of goodwill or it may be something which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled. Any extra consideration given for what is received, or something given in addition to what is ordinarily received by, or strictly due to the recipient is a bonus (*Black's Legal Dictionary*). But when industrial jurisprudence speaks of 'bonus', it enters the area of right and claim to what is due beyond strict wages. Viewed from this angle, *prima facie* one is led to the conclusion that if the Bonus Act deals wholly and solely with profit bonus, it cannot operate as a bar to a different species of claim merely because word bonus is common to both. Of course, if the statute has spoken so comprehensively, as it can, effect must be given to it.

25. The cosmos of bonus is expanding as working class contentment and prosperity become integral components of industrial peace and progress. The bone of contention between the parties before us is as to whether the Bonus Act is the *alpha* and *omega* of all extra claims, outside wages and salaries, labelled bonus with separate adjectives demarcating the identity of each species. But this issue has to be sized up not in *vacuo* but against the backdrop of the progressive change around us.

26. Today it is accepted doctrine that Labour is the backbone of the nation, particularly in the area of economic self-reliance. This means the welfare of the working classes is not only a human problem but a case where the success of the nation's economic adventures depends on the cooperation of the working classes to make a better India. Indeed, on the national agenda is the question of Labour participation in Management. Against such a perspective of developmental jurisprudence there is not much difficulty in recognising customary bonus and contractual bonus as permissible in Industrial Law, given proper averments and sufficient proof.

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27. Shri G. B. Pai has raised what he regards as a lethal infirmity in the claim of the Sabha. In his submission the Bonus Act is a complete code and what is not covered by its provisions cannot be awarded by the tribunal. It is true that if the Bonus Act is a complete code and is exhaustive of the subject, whatever the species of bonus, there may be a bar, but it is quite conceivable that the codification may be of everything relating to profit bonus in which case other types of bonus are left untouched. Merely calling a statute a code is not to silence the claimant for bonus under heads which have nothing to do with the subject-matter of the code. On listening to the intricate argument about implicit codification of the law of bonus by this Act, one is reminded of Professor Gilmore who put the case against codification thus¹² :

The law, codified, has proved to be quite as unstable, unpredictable, and uncertain — quite as mulishy unruly — as the common law, uncoded, had ever been. The rules of law, purified, have remained the exclusive preserve of the lawyers; the people are still very much in our coils and clutches as they ever were if not more so.

28. The argument of the Bonus Act being an all-inclusive code is based on the anatomy of the Act and the ruling in *Ghewar Chand*¹³. So the judicial task is to ascertain the history and object of the Act, the relevant surrounding circumstances leading upto it, its scheme and the prohibitions, exclusions, exemptions and savings which reveal the intent and ambit of the enactment. Long ago, Plowden, with Sibyline instinct, pointed out that the best way to construe the scope of an Act of Parliament is not to stop with the words of the sections.

Every law consists of two parts viz., of body and soul. The letter of the law is the body of the law, and the sense and reason of the law is the soul of the law. The 'social conscience' of the judge hesitates to deprive the working class, for whom Part IV of the Constitution has shown concern, of such rights as they currently enjoy by mere implication from a statute unless there are compulsive provisions constraining the court to the conclusion. From this perspective, let us examine the exclusionary contention based on the body and soul of the Bonus Act. If the Bonus Act is a complete code, on a true decoding of its scheme and spirit, the industrial court cannot take off the ground with any other forms of bonus — yes, that is the implication of 'a complete code'.

29. Bonus has varying conceptual contents in different branches of law and life. We are here concerned with its range of meanings in industrial law but, as expatiated earlier, there is enough legal room for plural patterns of bonus, going by lexicographic or judicial learning. It implies no disrespect to legal dictionaries if we say that precedents notwithstanding, the critical word 'bonus' is so multiform that the judges have further to refine it and contextually define it. Humpty Dumpty's famous words in *Through the Looking Glass*, 'When I use a word . . . it means just what I choose it to mean . . . neither more nor less' is an exaggerated

12 *Aspects of Comparative Commercial Law*, 1969 Edn., Siegel and Foster, at pp. 449-450—*Modern Law Review*, 1975 January part, p. 30.

13. *Sanghi Jeevaraj Ghewar Chand v. Secretary, Madras Chillies, Grains K.ana Merchants Workers' Union*, (1969) 1 SCR 366: AIR 1969 SC 530: (1969) 1 LLJ 719.



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cynicism. We have to bring in some legal philosophy into this linguistic problem as it incidentally involves doctrinal issues where the Constitution is not altogether nonaligned. Statutory interpretation, in the creative Indian context, may look for light to the lodestar of Part IV of the Constitution e.g., Article 39(a) and (c) and Article 43. Where two judicial choices are available, the construction in conformity with the social philosophy of Part IV has preference.

30. In *Jalan Trading Co.*¹⁴ Shah, J. (as he then was) gave a synopsis of the development of the branch of industrial law relating to bonus from the days of the First World War to the report of the Bonus Commission culminating in the Bonus Act, 1965. The story of 'war bonus', the Full Bench formula and this Court's view that

bonus is not a gratuitous payment made by the employer to his workmen, nor a deferred wage, and that where wages fall short of the living standard and the industry makes profit part of which is due to the contribution of labour, a claim for bonus may be legitimately made by the workmen

are set out in that decision. The Full Bench formula was based on profits and the terms of reference to the Commission put *profit* in the forefront as the foundation of the scheme

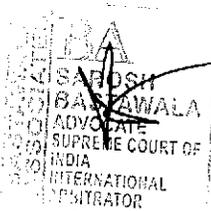
to define the concept of bonus, to consider in relation to industrial employments the question of payment of bonus based on profits and to recommend principles for computation of such bonus and methods of payment.

A glance at the various chapters of the report brings home the point that bonus based on profits is its central theme. The conclusions and recommendations revolve round the concept of profit bonus. Little argument is needed to hold that the bonus formula suggested by the Commission was profit-oriented. Indeed, that was its only concern. The Act, substantially modelled on these proposals, has adopted a blueprint essentially worked out on profit. The presiding idea being a simplified version of bonus linked to profits over a period, shedding the complex calculations in the Full Bench formula, the statute did not cover other independent species like customary or contractual bonus which had become an economic reality and received judicial recognition. There were marginal references to and accommodation of other brands of bonus but they were for better effectuating the spirit and substance of profit-based bonus.

31. The question then is: Was the Bonus Act only a simpler re-incarnation of the Full Bench formula as argued by Shri Tarkunde, or was it, going by the provisions and precedents, a full codification of multiform bonuses, thus giving a knockdown blow to any customary but illegitimate demand for bonus falling outside the statute, as contended by Shri Pai? Indeed, we were taken through the well-known categories of bonus vis-a-vis the statutory provisions with impressive and knowledgeable thoroughness by Shri Pai with a view to strengthen his perspective that the Act encompassed the whole law and left nothing outside its scope.

32. To begin with, the history of the Act, the Full Bench formula

14. *Jalan Trading Co. Pvt. Ltd. v. Mill Mazdoor Union*, (1967) 1 SCR 15; AIR 1967 SC 691; (1966) 2 LLJ 546.



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which was its judicial ancestor, the Commission Report which was its immediate progenitor and the statutory milieu as also the majuscule pattern of bonus prevalent in the Indian industrial world, converge to the point that the paramount purpose of the Payment of Bonus Act was to regulate *profit bonus*, with incidental incursions into other allied claims like customary or attendance bonus. If such be the design of the statute, its scheme cannot be stretched to supersede what it never meant to touch or tackle.

33. The objects and reasons of the Bonus Act indicate that the subject-matter of the statute is 'the question of payment of bonus based on profit to employees employed in establishments'. The report of the Commission is also referred to in the objects and reasons and the tenor is the same. The long title of the Act is noncommittal, but the concept of 'profit' as the basis for bonus oozes through the various provisions. For instance, the idea of accounting year, gross profit and the computation thereof, the methodology of arriving at the available surplus and the items deductible from gross profits, have intimate relevance to profit bonus — and may even be irrelevant to customary or traditional bonus or contractual bonus. Similarly, the provision for *set-on* and *set-off* of allocable surplus and the like are pertinent to profit-based bonus. Schematically speaking, *statutory bonus is profit bonus*. Nevertheless, there is provision for avoidance of unduly heavy burden under different heads of bonus. For this reason it is provided in Section 17 that where an employer has paid any Puja bonus or other customary bonus, he will be entitled to deduct the amount of bonus so paid from the amount of bonus payable by him under the Act. Of course, if the customary bonus is thus recognised statutorily and, if in any instance it happens to be much higher than the bonus payable under the Act, there is no provision totally cutting off the customary bonus. The provision for deduction in Section 17, on the other hand, indicates the independent existence of customary bonus although, to some extent, its quantum is adjustable towards statutory bonus. Again Section 34 provides for giving effect to the Bonus Act thus :

Notwithstanding anything inconsistent therewith contained in any other law . . . or in the terms of any award, agreement, settlement or contract of service made before May 29, 1965.

This does not mean that there cannot be contractual bonus or other species of bonus. This provision only emphasises the importance of the obligation of the employer, in every case, to pay the statutory bonus. The other sub-sections of Section 34 also do not destroy the survival of other types of bonus than provided by the Bonus Act. Shri G. B. Pai used the provisions of the Coal Mines Provident Fund and Bonus Scheme Act, 1948, referred to in Section 35 of the Bonus Act, for the purpose of making good his thesis that the Bonus Act has comprehensive coverage except where it expressly saves any other scheme of bonus. Our understanding of Section 35 is different. Coal mines are extremely hazardous undertakings and they are largely located in agrarian areas where the agricultural workers absent themselves for long periods to attend to agricultural work and do not report themselves for mining work. Coal mines have many peculiarities and the workmen employed there have to be treated separately from the point of view of incentive for attendance. Therefore, attendance bonus

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for a miner is a separate subject attended with peculiarities deserving of special treatment and has been expressly saved from the Bonus Act. This does not mean that whatever has not been expressly saved is, by necessary implication, included in the Bonus Act. Of course, there are provisions for exemptions and exclusions in the Bonus Act itself, particularly, vis-à-vis small establishments and public sector undertakings. There is also marginal reference in Section 2(21) to Section 2(21)(iv) to other kinds of bonus, including incentive, production and attendance bonus. The heart of the statute, plainly read from its object and provisions, reveals that the Act has no sweep wider than profit bonus.

34. There was reference to the Payment of Bonus (Amendment) Ordinance, 1975 by Counsel on both sides. We find that the long title has been expanded and now covers bonus

on the basis of profit or on the basis of production or productivity.

This amendment itself implies that formerly a narrower species of bonus, namely, that based on profit had alone been dealt with. The limits on contractual bonus also tends to feed our conclusions. The implications of the ceiling set by the recent amendment to the law falls outside our scope and we keep away from determining it. Sufficient unto the day is the evil thereof.

35. It is clear further from the long title of the Bonus Act of 1965 that it seeks to provide for bonus to persons employed 'in certain establishments' not in *all* establishments. Moreover, customary bonus does not require calculation of profits, available surplus because it is a payment founded on long usage and justified often by spending on festivals and the Act gives no guidance to fix the quantum of festival bonus; nor does it expressly wish such a usage. The conclusion seems to be fairly clear, unless we strain judicial sympathy contrarywise, that the Bonus Act dealt with only profit bonus and matters connected therewith and did not govern customary, traditional or contractual bonus.

36. The end-product of our study of the anatomy and other related factors is that the Bonus Act spreads the canvas wide to exhaust profit-based bonus but beyond its frontiers is not void but other cousin claims bearing the caste name 'bonus' flourish — 'miniatures of other colours'. The Act is neither proscriptive nor predicative of other existences.

37. The trump card of Shri G. B. Pai is the ruling in *Ghewar Chand*. If the ratio there is understood the way Shri Pai would have it, the workmen have no case to present. For, establishments employing less than 20 workers are excluded from the benignant campus of the Act and the appellants fall outside the grace of the statute for that reason alone. Does the decision exhaust the branch of jurisprudence on every kind of bonus or merely lays down that profit-based bonus — the most common one and complicated in working out on the mathematics of the Full Bench formula — has been picked out for total statutory treatment and for that pattern of bonus the Act operates as a complete code? The tribunal understood the former way and followed it up with a rejection, on the ground of a legal bar, of the admittedly non-profit-based claim for bonus.



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Shri Tarkunde argues the reasoning to be a misunderstanding of the meaning of the ruling. We hold that the Bonus Act speaks, and speaks as a whole code, on the sole subject of profit-based bonus but is silent on, and cannot therefore annihilate by implication, other distinct and different kinds of bonus such as the one oriented on custom. We confess that the gravitational pull on judicial construction, of Part IV of the Constitution, has, to some extent, influenced our choice.

38. It is trite, going by anglophonic principles, that a ruling of a superior court is binding law. It is not of scriptural sanctity but is of ratiowise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and *de hors* the milieu we cannot impart eternal vernal value to the decision, exalting the doctrine of precedents into a prisonhouse of bigotry, regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position of subordinate courts, casual observations, generalisations and *sub silentio* determinations must be judiciously read by courts of coordinate jurisdiction and, so viewed, we are able to discern no impediment in reading *Ghewar Chand* as confined to profit-bonus, leaving room for non-statutory play of customary bonus. The case dealt with a bonus claim by two sets of workmen, based on profit of the business but the workmen fell outside the ambit of the legislation by express exclusion or exemption. Nothing relating to any other type of bonus arose and cannot be impliedly held to have been decided. The governing principle we have to appreciate as a key to the understanding of *Ghewar Chand* is that it relates to a case of profit bonus urged under the Industrial Disputes Act by two sets of workmen employed by establishments which are either excluded or exempted from the Bonus Act. The major inarticulate premise of the statute is that it deals with — *and only with* profit-based bonus as has been explained at some length earlier. There is no categorical provision in the Bonus Act nullifying all other kinds of bonus, nor does such a conclusion arise by necessary implication. The ruling undoubtedly lays down the law thus :

Considering the history of the legislation, the background and the circumstances in which the Act was enacted, the object of the Act and its scheme, it is not possible to accept the construction suggested on behalf of the respondents that the Act is not an exhaustive Act dealing comprehensively with the subject-matter of bonus in all its aspects or that Parliament still left it open to those to whom the Act does not apply by reason of its provisions either as to exclusion or exemption to raise a dispute with regard to bonus through industrial adjudication under the Industrial Disputes Act or other corresponding law.

But this statement, contextually construed, means that profit-bonus not founded on the provisions of the Bonus Act and by resort to an adventure in industrial dispute under the Industrial Disputes Act is no longer permissible. When Parliament has expressly excluded or exempted certain categories from the Bonus Act, they are bowled out so far as profit-based bonus is concerned. You cannot resurrect profit bonus by a backdoor method, viz. resort to the machinery of the Industrial Disputes Act. The

pertinence of the following observations of Shelat, J. becomes self-evident, understood in this setting :

We are not impressed by the argument that Parliament in excluding such petty establishments could not have intended that employees therein who were getting bonus under the Full Bench formula should lose that benefit. As aforesaid, Parliament was evolving for the first time a statutory formula in regard to bonus and laying down a legislative policy in regard thereto as to the classes of persons who would be entitled to bonus thereunder. It laid down the definition of an 'employee' far more wider than the definition of a 'workman' in the Industrial Disputes Act and the other corresponding Acts. If, while doing so, it expressly excluded as matter of policy certain petty establishments in view of the recommendation of the Commission in that regard, viz., that the application of the Act would lead to harassment of petty proprietors and disharmony between them and their employees, it cannot be said that Parliament did not intend or was not aware of the result of exclusion of employees of such petty establishments.

Likewise, reference to agreements and settlements providing for bonus being exempted from the applicability of the Act does not militate against the survival of contractual bonus (we are not referring to the impact of the latest amendment by ordinance of 1975). Viewed thus and in the light of the observations earlier extracted, the following passage fits into the perspective we have outlined :

Section 32(vii) exempts from the applicability of the Act (the Bonus Act) those employees who have entered before May 29, 1965 into an agreement or settlement with their employers for payment of bonus linked with production or productivity in lieu of bonus based on profits and who may enter after that date into such agreement or settlement for the period for which such agreement or settlement is in operation. Can it be said that in cases where there is such an agreement or settlement in operation, though this clause expressly excludes such employees from claiming bonus under the Act during such period, the employees in such cases can still resort to the Industrial Disputes Act and claim bonus on the basis of the Full Bench formula? The answer is obviously in the negative for the object in enacting clause (vii) is to let the parties work out such an agreement or settlement. It cannot be that despite this position, Parliament intended that those employees had still the option of throwing aside such an agreement or settlement, raise a dispute under the Industrial Disputes Act and claim bonus under the Full Bench formula. The contention, therefore, that the exemption under Section 32 excludes those employees from claiming bonus under the Act only and not from claiming bonus under the Industrial Disputes Act or such other Act is not correct.

39. The core question about the policy of the Parliament that was agitated in that case turned on the availability of the Industrial Disputes Act as an independent method of claiming profit bonus *de hors* the Bonus Act and the Court took the view that it would be subversive of the scheme of the Act to allow an invasion from the flank in that manner. The following observations strengthen this approach :

Surely, Parliament could not have intended to exempt these establishments from the burden of bonus payable under the Act and yet have left the door open for their employees to raise industrial disputes and get bonus under the Full Bench formula which it has rejected by laying down a different statutory formula in the Act. For instance, is it to be contemplated that though the Act by Section 32 exempts institutions such as the universities or the Indian Red Cross Society or hospitals, or any of the establishments set out in clause (ix) of that section, they would still be liable to pay bonus if the employees of those institutions were to raise a dispute under the Industrial Disputes Act and claim bonus in accordance with the Full Bench formula? The legislature would, in

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that case, be giving exemption by one hand and taking it away by the other, thus frustrating the very object of Section 32. Where, on the other hand, Parliament intended to retain a previous provision of law under which bonus was payable, or was being paid it has expressly saved such provision. Thus, under Section 35 the Coal Mines Provident Fund and Bonus Schemes Act, 1946 and any scheme made thereunder are saved. If, therefore, Parliament wanted to retain the right to claim bonus by way of industrial adjudication for those who are either excluded or exempted from the Act, it would have made an express saving provision to that effect as it has done for employees in coal mines.

A discerning and concrete analysis of the scheme of the Act and the reasoning of the court leaves us in no doubt that it leaves untouched customary bonus.

40. The plea of constructive res judicata is based on the 'might and ought' doctrine. Shri Pai's argument is that before the Arbitration Board no case of customary or contract bonus was urged for the year 1965 and so, in later years, such a ground is barred by the general principles of res judicata. Sections 10A, 18 and 19(3) of the Industrial Disputes Act were pressed before us to demonstrate the prior award was binding on the workers and reading it in the light of *Pandurang*¹⁵ the bar was spelt out. It is clear law, so long as the above ruling stands, that industrial litigation is no exception to the general principle underlying the doctrine of res judicata. We do entertain doubt about the extension of the sophisticated doctrine of constructive res judicata to industrial law which is governed by special methodology of conciliation, adjudication and considerations of peaceful industrial relations, where collective bargaining and pragmatic justice claim precedence over formalised rules of decision based on individual contests, specific causes of action and findings on particular issues, but we are convinced that *Pandurang* does not apply at all to our case. There, overtime wages were claimed earlier under the Factories Act and the case was rejected by the tribunal. After this rebuff, a like claim was repeated but sustaining it on the Bombay Shops and Establishments Act. This new ground to support the same claim was held to be barred because the workmen could and ought to have raised the issue that the Factories Act failing, the Shops Act was available to them to back up their demand. The fallacy in invoking this decision lies in the fact that as early as 1950 there was a binding award of the industrial tribunal relating to the claim, which had not been put an end to, and so this Court took the view that so long as that award stood, the same claim under a different guise (the Shops Act) could be subversive of the rule of res judicata. The decisive circumstance which distinguishes that case is contained in the observation :

If the workers are dissatisfied with any of the items in respect of which their claim has been rejected it is open to them to raise a fresh industrial dispute. That is to say, if a fresh dispute had been raised, after terminating the prior award, no bar of res judicata could have been urged. Here, the Arbitration Board dealt with one dispute; the industrial tribunal, with a fresh dispute. The Board enquired into one cause of action based on profit bonus: the tribunal was called upon, by the terms of reference, to go into a different claim. This basic difference was lost sight of by

15. *Bombay Gas Co. Ltd. v. Jagannath Pandurang*, (1975) 4 SCC 690: 1975 SCC (I. & S) 388.

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(1976) 3 SCC

the tribunal and so he slipped into an error. The dangers of constructive res judicata in the area of suits vis-a-vis writ petitions under Article 226 and as between proceedings under Article 226 and Article 32 are such as to warrant a closer study. To an extent the Law Commission of India in its report¹⁶ has touched on this topic. Industrial disputes are an *a fortiori* case.

41. Dispute-processing is not by court litigation alone. Industrial peace best flourishes where non-litigative mechanisms come into cheerful play before tensions develop or dispute brew. Speaking generally, alternatives of the longish litigative process is a joyous challenge to the Indian *activist* jurist and no field is in need of the role of avoidance as a means of ending or pre-empting disputes as industrial life. Litigation, whoever wins or loses, is often the funeral of both. We are a developing country and need techniques of maximising mediatory methodology as potent processes even where litigation has erupted. This socially compulsive impulse prompted the setting in motion of a statesmanlike effort by the senior Counsel on both sides, with helpful promptings from the Bench, to advise their clients into a conciliatory mood. Should we have at all hinted to the advocates to resolve by negotiation or stick to our traditional function of litigative adjudication? In certain spheres, 'judicious irreverence to judicialised argumentation is a better homage to justice'. Regrettably, the exercise proved futile and we have to follow up our conclusions with necessary directions.

42. The findings we have reached may now be formally set down. We hold that the Bonus Act (as it stood in 1965) does not bar claims to customary bonus or those based on conditions of service. Secondly we repel the plea of res judicata. There is no merit in the view that the industrial tribunal has no jurisdiction to try the dispute referred to it. We set aside the award and direct the tribunal to decide on the merits the subject-matter of the dispute referred to it by the State Government. The appeal is hereby allowed but, having regard to the overall circumstances, the parties will bear their costs.

(1976) 3 Supreme Court Cases 852

(Before H. R. Khanna, R. S. Sarkaria and Jaswant Singh, JJ.)

SONE VALLEY PORTLAND CEMENT CO. LTD. . . . Appellant ;

Versus

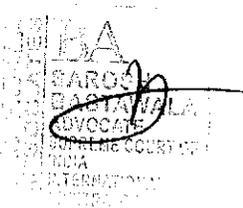
THE GENERAL MINING SYNDICATE PVT. LTD. . . . Respondent.

Civil Appeal No. 1250 of 1968†, decided on August 24, 1976

Mines and Minerals — Bihar Land Reforms Act, 1950 — Sections 4(a) and 10 — Lease of mines and minerals held by a head lessee after vesting of the estate in the State held unaffected — Liability whether of the sub-lessee or the head lessee to pay enhanced royalty rates to the State not decided — Mines

16. 54 SC Report.

†From the Judgment and Order dated April 17, 1967 of the Calcutta High Court in appeal from Original Decree 255 of 1969.



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(1996) 6 SCC

(1996) 6 Supreme Court Cases 100

(BEFORE K. RAMASWAMY, B.L. HANSARIA AND S.B. MAJMUDAR, JJ.)

RAMESHWARLAL

.. Petitioner;

Versus

MUNICIPAL COUNCIL, TONK AND OTHERS

.. Respondents.

SLP (C) No. 16339 of 1996[†], decided on August 27, 1996

Limitation Act, 1963 — S. 14 — Exclusion of time of proceedings before High Court — Permissibility — Where in a writ petition filed by a municipal employee for arrears of salary the High Court refused to exercise its discretionary power under Art. 226, relegating the writ-petitioner to a civil suit and the limitation for suit, though had not expired at the time of filing of the writ petition, expired during the pendency of the same, held, the entire time from the date of institution of the writ petition till its disposal should be excluded under S. 14 — Limitation — Constitution of India, Art. 226

Held :

Normally for application of Section 14, the court dealing with the matter in the first instance, which is the subject of the issue in the later case, must be found to have lack of jurisdiction or other cause of like nature to entertain the matter. However, since the High Court expressly declined to grant relief relegating the petitioner to a suit in the civil court, the petitioner cannot be left remediless. Accordingly, the time taken in prosecuting the proceedings before the High Court and the Supreme Court, diligently and bona fide, needs to be excluded. The petitioner is permitted to issue notice to the Municipality within four weeks and after expiry thereof, he can file suit within two months.

(Paras 2 and 3)

Advocates who appeared in this case :

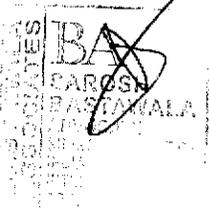
B.D. Sharma and Piyush, Advocates, for the Petitioner.

ORDER

1. The petitioner claims that he has been denied salary for the period from 10-9-1987 to 18-8-1988. He claims to have worked in the office of the Municipal Council, Tonk. He filed writ petition in the High Court in February 1990. The learned Single Judge held that since it is a claim recoverable in a civil action, the discretionary power under Article 226 of the Constitution is not exercisable. Accordingly, he dismissed the writ petition. The same came to be confirmed in the impugned order of the Division Bench made on 6-5-1996 in Special Appeal No. 218 of 1996. Thus, this special leave petition.

2. It is not necessary for us to go into the question of the legality of the order of the High Court in refusing to grant the relief. It is axiomatic that the exercise of the power under Article 226 being discretionary, the learned Single Judge as well as the Division Bench have not exercised the same to direct the respondent to pay the alleged arrears of salary alleged to be due and payable to the petitioner. Under these circumstances, the only remedy

[†] From the Judgment and Order dated 6-5-1996 of the Rajasthan High Court in DBCSA No 218 of 1996



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a open to the petitioner is to avail of the action in the suit. Since the limitation has run out to file a civil suit by now, which was not so on the date of the filing of the writ petition, the civil court is required to exclude, under Section 14 of the Limitation Act, 1963, the entire time taken by the High Court in disposing of the matter from the date of the institution of the writ petition.

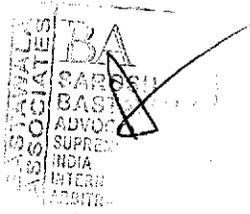
b 3. Normally for application of Section 14, the court dealing with the matter in the first instance, which is the subject of the issue in the later case, must be found to have lack of jurisdiction or other cause of like nature to entertain the matter. However, since the High Court expressly declined to grant relief relegating the petitioner to a suit in the civil court, the petitioner cannot be left remediless. Accordingly, the time taken in prosecuting the proceedings before the High Court and this Court, obviously pursued diligently and bona fide, needs to be excluded. The petitioner is permitted to issue notice to the Municipality within four weeks from today. After expiry thereof, he could file suit within two months thereafter. The trial court would consider and dispose of the matter in accordance with law on merits.

4. The special leave petition is disposed of accordingly.

d (1996) 6 Supreme Court Cases 101
(BEFORE A.M. AHMADI, C.J. AND N.P. SINGH AND S.C. SEN, JJ.)
TAPAN KUMAR SADHUKHAN .. Appellant;
versus
FOOD CORPORATION OF INDIA AND OTHERS .. Respondents.

e Civil Appeal No. 10685 of 1996[†], decided on August 20, 1996
A. Food Corporation Act, 1964 — S. 13(2)(b) — Functions of the Corporation — Processing of foodgrains — Setting up plant for upgrading substandard rice — Corporation being an agency of the State must act in conformity with Art. 47 to improve public health — Substandard rice stock which is suitable and could be upgraded for human consumption can be sold to registered/licensed rice dealers only after upgrading the same and cannot be sold as such merely on the basis of undertaking given by such dealers that they would themselves upgrade the rice and then only release it for human consumption — Work of upgrading the rice should preferably be done by the Corporation itself by setting up a plant — Alternatively Ministry concerned in Govt. of India should evolve guidelines so that the substandard rice may not reach the market for human consumption without prior upgrading — Third alternative would be to dispose of the unupgraded stock for purposes other than human consumption, such as for cattle/chicken feed etc. — However, substandard rice which is unsuitable and cannot be upgraded for human consumption cannot in any case be sold to any rice dealer and will have to be disposed of for purposes other than human consumption — Constitution of India, Art. 47

h [†] From the Judgment and Order dated 13-10-1993 of the Calcutta High Court in F.M.A.T. No. 2947 of 1993



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(1997) 3 Supreme Court Cases 261

(BEFORE A.M. AHMADI, C.J. AND M.M. PUNCHHI, K. RAMASWAMY,
S.P. BHARUCHA, S. SAGHIR AHMAD, K. VENKATASWAMI
AND K.T. THOMAS, JJ.)

a

L. CHANDRA KUMAR

.. Appellant;

Versus

UNION OF INDIA AND OTHERS

.. Respondents.

b

Civil Appeal No. 481 of 1989[†] with SLP (C) No. 16052 of 1992, W.P. (C) No. 918 of 1992, R.P. (C) No. 704 of 1990 in C.As. Nos. 1212 of 1990, 3 of 1992, 169 of 1994, 1532-33 of 1993, SLPs. (C) Nos. 3986 of 1993, 11596 of 1994, C.As. Nos. 2350 of 1993, 3518-19 of 1992, SLP (C) No. 17549 of 1994, C.As. Nos. 7614 of 1994, 884 of 1995, 2196 of 1994, 5149-51 of 1992, W.Ps. (C) Nos. 789 and 1274 of 1990, SLP (C) No. 1069 of 1996 with

c

I.A. No. 5, SLPs. (C) Nos. 10643-47, 12735, 19496 of 1996, W.Ps. (C) Nos. 247 and 412 of 1995, decided on March 18, 1997

d

A. Constitution of India — Arts. 368 and 13 — Basic and essential features of the Constitution — Power of judicial review, held, is a basic and essential feature of the Constitution — Hence jurisdiction conferred on the High Courts under Arts. 226/227 and on the Supreme Court under Art. 32, held, is a part of the basic structure of the Constitution — Concept of judicial review in India — Its need, origin and nature — Its place and significance in our constitutional scheme — Components of power of judicial review — Need for securing independence of the judiciary for effective exercise of the power of judicial review — Compared with power of judicial review under the U.S. Constitution — Judicial review

Held :

e

To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The doctrine of basic structure was evolved in *Kesavananda Bharati case*. In *Kesavananda Bharati case* a thirteen-Judge Constitution Bench, by a majority of 7:6, held that though, by virtue of Article 368, Parliament is empowered to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or to destroy its basic structure. The identification of the features which constitute the basic structure of our Constitution has been the subject-matter of great debate in Indian Constitutional law. The difficulty is compounded by the fact that even the judgments for the majority are not unanimously agreed on this aspect. The aspect of judicial review does not find elaborate mention in all the majority judgments. *Kesavananda Bharati case* did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution.

f

(Paras 62 and 76)

g

The origin of the power of judicial review of legislative action may well be traced to the classic enunciation of the principle by Chief Justice John Marshall of the US Supreme Court in *Marbury v. Madison*. (But the origins of the power of judicial review of legislative action have not been attributed to one source alone.) So

h

[†] From the Judgment and Order dated 2-11-1988 of the Madras High Court in W.P. No 8673 of 1988

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when the Framers of our Constitution set about their monumental task, they were well aware that the principle that courts possess the power to invalidate duly-enacted legislations had already acquired a history of nearly a century and a half.

(Paras 56, 61, 63 and 65)

National Mutual Insurance Co. of the Dist. of Columbia v. Tidewater Transfer Co., 93 L Ed 1556 : 337 US 582 (1948), *Thomas S. Williams v. United States*, 77 L Ed 1372 : 289 US 553 (1932); *Cooper v. Aaron*, 3 L Ed 2d 5 : 358 US 1 (1958), *Northern Pipeline Construction Co. v. Marathon Pipeline Co. and United States*, 73 L Ed 2d 59 : 458 US 50, referred to

Broadly speaking, judicial review in India comprises three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. Herein, we are concerned only with judicial review of legislative action and of judicial decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. (Paras 55, 53, 54 and 78)

Marbury v. Madison, 1 Cranch 137 : 2 L Ed 60 (1803), relied on

Henry J. Abraham: *"The Judicial Process"*, 4th Edn., Oxford University Press (1980), p. 296, considered

The Constitution of India while conferring power of judicial review of legislative action upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. (Para 78)

See Chapter VII, *"The Judiciary and the Social Revolution"* in Granville Austin, *The Indian Constitution : Cornerstone of a Nation*, Oxford University Press, 1972; the chapter includes exhaustive references to the relevant preparatory works and debates in the Constituent Assembly

The statement of Dr Ambedkar in the Drafting Committee of the Constituent Assembly that Article 32 was the "most important" article and that it "is the very soul of the Constitution and the very heart of it" has been specifically reiterated in several judgments of the Supreme Court to emphasise the unique significance attributed to Article 32 in our constitutional scheme. So also the power of constitutional courts in India in respect of judicial review of legislative action has been affirmed in several decisions. (Paras 74, 57 and 58)

The Supreme Court has always considered the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme. While several judgments have made specific references to this aspect [Gajendragadkar, C.J. in *Keshav Singh case*, Beg, J. and Khanna, J. in *Kesavananda Bharati case*, Chandrachud, C.J. and Bhagwati, J. in *Minerva Mills*, Chandrachud, C.J. in *Fertilizer Kamgar*, K.N. Singh, J. in *Delhi Judicial Service Assn.*, etc.] the rest have made general observations highlighting the significance of this feature. (Para 77)

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *Fertilizer Corpn. Kamgar Union (Regd) v. Union of India*,

a (1981) 1 SCC 568; *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124 : (1987) 2 ATC 82; *State of Madras v. V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196; *Bidi Supply Co. v. Union of India*, 1956 SCR 267 : AIR 1956 SC 479 : 29 ITR 717; *Special Reference No. 1 of 1964 (Keshav Singh, Re)*, (1965) 1 SCR 413 : AIR 1965 SC 745; *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651; *Delhi Judicial Service Assn. v. State of Gujarat*, (1991) 4 SCC 406, *relied on*

CAD, Vol. VII, p. 953, *relied on*

b *Bribery Commr. v. Pedrick Ranasinghe*, 1965 AC 172 : (1964) 2 All ER 785, PC; *Union of India v. Pratibha Bonnerjea*, (1995) 6 SCC 765 : 1996 SCC (L&S) 92 : (1996) 32 ATC 58, *referred to*

c We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded. (Para 78)

We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided. (Para 79)

d **B. Constitution of India — Arts. 323-A(2)(d) & 323-B(3)(d) (introduced by the Constitution 42nd Amendment), 368 & Preamble and 32, 226/227 and 136 — Constitutionality of Arts. 323-A and 323-B insofar as they empower Parliament and State Legislatures to totally exclude the jurisdiction of “all courts” (except of the Supreme Court under Art. 136) in relation to disputes and complaints referred to in Art. 323-A(1) and matters specified in Art. 323-B(2) — Impact of Arts. 323-A and 323-B on the power of the judicial review and superintendence of the constitutional courts, namely, High Courts under Arts. 226/227 and of the Supreme Court under Art. 32 — Held, such tribunals not a proper and adequate substitute for the High Courts — Clause 2(d) of Art. 323-A and cl. 3(d) of Art. 323-B offend the basic and essential features of the Constitution and are therefore unconstitutional — So also S. 28 of the Administrative Tribunals Act, 1985 divesting the High Courts of their jurisdiction under Art. 226 in relation to service matters, held, unconstitutional — Similar exclusion clauses in all other legislations enacted under the aegis of Art. 323-A and Art. 323-B are also unconstitutional — But such tribunals can perform a supplemental role — Administrative Tribunals Act, 1985, S. 28 — W.B. Taxation Tribunal Act, 1987 — Rajasthan Taxation Tribunal Act, 1995 — T.N. Land Reforms (Fixation of Ceiling on Land) (Amendment) Act, 1985 — T.N. Taxation Special Tribunal Act, 1992**

Held :

g Clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. (Para 99)

Section 28 of the Administrative Tribunals Act, 1985 and the “exclusion of jurisdiction” clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B are, to the same extent, unconstitutional. (Para 99)

h The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the

inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. (Para 99)

Sakinala Hari Nath v. State of A.P., (1993) 2 An WR 484 : (1994) 1 APLJ 1(FB), approved
S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124 : (1987) 2 ATC 82; *S.P. Sampath Kumar v. Union of India*, (1985) 4 SCC 458 : 1985 SCC (L&S) 986; *L. Chandra Kumar v. Union of India*, (1995) 1 SCC 400 : 1995 SCC (L&S) 321 : (1995) 29 ATC 120, referred to

C. Constitution of India — Arts. 323-A & 323-B and 32, 226/227 and 136 and Sch. VII, List I Entries 77, 78, 79 and 95, List II, Entry 65, List III, Entry 46 — Tribunals constituted under Arts. 323-A and 323-B — Powers and jurisdiction of — Mode and avenues for assailing decisions of — Genesis of such tribunals — Adoption of theory of alternative institutional mechanism keeping in view the tremendous growth in litigation and the need of specialisation if still warranted and justified by the experience of the working of the Tribunals — Necessary changes to be made in the powers, jurisdiction and working of such Tribunals — Whether such Tribunals should have power to adjudicate upon the vires of statutory provisions keeping in view the power of Parliament to effect changes in the jurisdiction of the Supreme Court and similarly of the State Legislatures in respect of High Court — Held, the constitutional safeguards which ensure independence of the superior judiciary not being available for members of the Tribunals, such Tribunals cannot be considered full and effective substitutes for the High Courts — Yet they can perform a supplemental role whereby they can adjudicate the vires of any statutory provision provided however that all such decisions will be subject to the High Court's writ jurisdiction under Arts. 226/227 before a Division Bench of their respective High Courts — This rule however to operate only prospectively, that is, only in respect of the decisions rendered hereafter — Such Tribunals however cannot adjudicate upon the vires of their own parent statute — In other respects these Tribunals would continue to be the courts of first instance in the areas of law for which they have been constituted — As a consequence no direct appeal from any judgment/order of the Tribunals will lie to the Supreme Court under Art. 136 — SLP under Art. 136 can only be filed against the decision of Division Bench of the High Court under Arts. 226/227 — Service Law — Administrative Tribunals Act, 1985, Ss. 14, 15, 16 and 28 — Customs, Excise and Gold Control (Appellate) Tribunal established under Customs Act, 1962, S. 129 — Central Excise Act, 1944, S. 35-L

Held :

If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of the Supreme Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Administrative Tribunals Act or upon Tribunals created under Article 323-B of the Constitution. Apart from the authorisation that flows from Articles 323-A and 323-B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the

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State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose. (Para 81)

- a There are pressing reasons why the conferment of such a power on these Tribunals be preserved. In the five decades that have ensued since Independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. The decision in *Sampath Kumar case* was rendered against such a backdrop. So when a Constitution Bench of this Court in *Sampath Kumar case* adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. (Para 82)

S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124 : (1987) 2 ATC 82; *Kamal Kanti Dutta v. Union of India*, (1980) 4 SCC 38 : 1980 SCC (L&S) 485, referred to

R.K. Jain v. Union of India, (1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464, relied on

- c That the various Tribunals have not performed up to the expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them. (Para 89)

- d Clearly, the constitutional safeguards which ensure the independence of the Judges of the superior judiciary are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. (Para 78)

- e However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental — as opposed to a substitutinal — role in this respect. (Para 80)

- f The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. (Para 93)

- g However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. The Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly

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approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. (Para 93)

We, therefore, hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls. This will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter. (Paras 91 and 90)

These directions being issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective overruling so as not to disturb the procedure in relation to decisions already rendered. (Para 94)

Under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party can move the Supreme Court under Article 136 of the Constitution. (Para 92)

Therefore, the Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. (Para 99)

The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. (Para 99)

J.B. Chopra v. Union of India, (1987) 1 SCC 422 : (1987) 2 ATC 344; *M.B. Majumdar v. Union of India*, (1990) 4 SCC 501 : 1991 SCC (L&S) 233 : (1990) 14 ATC 804; *Amulya Chandra Kalita v. Union of India*, (1991) 1 SCC 181 : 1991 SCC (L&S) 145 : (1990) 14 ATC 911; *R.K. Jain v. Union of India*, (1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464; *Mahabal Ram (Dr) v. Indian Council of Agricultural Research*, (1994) 2 SCC 401 : 1994 SCC (L&S) 642 : (1994) 27 ATC 97, considered

L. Chandra Kumar v. Union of India, (1995) 1 SCC 400 : 1995 SCC (L&S) 321 : (1995) 29 ATC 120, referred to

D. Service Law — Administrative Tribunals Act, 1985 — Ss. 5(1) & (2) and 6 — Appointment of Administrative Members held should not be discontinued — Need for changes in respect of appointments to Tribunals and supervision of their functioning by an independent body or authority

a It has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. It is difficult to accept such a contention since setting up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, there is reason to believe that the Committee would take care to ensure that Administrative Members are chosen from amongst those who have some background to deal with such cases.

(Para 95)

b Until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

(Para 96)

c These suggestions made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of expert bodies like the LCI and the Malimath Committee in this regard. It is, therefore, recommended that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.

(Para 97)

f **E. Service Law — Administrative Tribunals Act, 1985 — S. 5(6) — Constitutionality of — Challenged on the ground that it empowers a Single Member Bench or a Bench which does not consist of a Judicial Member to adjudge the constitutionality of any statutory provision or rule, the Tribunal not being a substitute of the High Court — Held, the constitutionality of S. 5(6) can be saved by making the proviso automatically applicable in such situations — Hence, whenever a question involving the constitutionality of any provision arises the matter shall be referred to a two-member Bench, one of whom is a Judicial Member — Hence, S. 5(6) is valid and constitutional**

g Regarding Section 5(6) of the Administrative Tribunals Act, where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a Single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a Single Member Bench or a Bench which does not consist of a

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Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality and is therefore valid and constitutional. (Paras 98 and 99)

J.B. Chopra v. Union of India, (1987) 1 SCC 422 : (1987) 2 ATC 344; *M.B. Majumdar v. Union of India*, (1990) 4 SCC 501 : 1991 SCC (L&S) 233 : (1990) 14 ATC 804; *Amulya Chandra Kalita v. Union of India*, (1991) 1 SCC 181 : 1991 SCC (L&S) 145 : (1990) 14 ATC 911; *R.K. Jain v. Union of India*, (1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464; *Mahabal Ram (Dr) v. Indian Council of Agricultural Research*, (1994) 2 SCC 401 : 1994 SCC (L&S) 642 : (1994) 27 ATC 97, considered

M/T/17663/CLA

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3. (1994) 2 SCC 401 : 1994 SCC (L&S) 642 : (1994) 27 ATC 97, <i>Mahabal Ram (Dr) v. Indian Council of Agricultural Research</i>	270g, 279g-h, 285e, 288h, 311a
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The Judgment of the Court was delivered by

f AHMADI, C.J.— The special leave petitions, civil appeals and writ petitions which together constitute the present batch of matters before us owe their origin to separate decisions of different High Courts and several provisions in different enactments which have been made the subject of challenge. Between them, they raise several distinct questions of law; they have, however, been grouped together as all of them involve the consideration of the following broad issues:

g (1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by sub-clause (d) of clause (2) of Article 323-A or by sub-clause (d) of clause (3) of Article 323-B of the Constitution, to totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323-A or with regard to all or any of the matters specified in clause (2) of Article 323-B, runs counter to the power of judicial review conferred on the High Courts

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under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?

(2) Whether the Tribunals, constituted either under Article 323-A or under Article 323-B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule? a

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives? b

2. We shall confine ourselves to the larger issues raised in this batch of matters without adverting to the specific facts of each of the matters; we shall, however, selectively refer to some of the impugned decisions and the provisions involved to the extent we find it necessary to do so in order to appreciate the policy-conflicts in, and to draw the parameters of, the controversy before us. The broad principles enunciated in this judgment will, at a later time, be applied by a Division Bench to resolve the disputes involved in each of the individual cases. c

3. The present controversy has been referred to us by an order of a Division Bench of this Court, reported in *L. Chandra Kumar v. Union of India*¹, which concluded that the decision rendered by a five-Judge Constitution Bench of this Court in *S.P. Sampath Kumar v. Union of India*², needs to be comprehensively reconsidered. The Order of the Division Bench, dated 2-12-1994, was rendered after it had considered the arguments in the first matter before us, CA No. 481 of 1989, where the challenge is to the validity of Section 5(6) of the Administrative Tribunals Act, 1985. After analysing the relevant constitutional provisions and the circumstances which led to the decision in *Sampath Kumar case*², the referring Bench reached the conclusion that on account of the divergent views expressed by this Court in a series of cases decided after *Sampath Kumar case*², the resulting situation warranted a "fresh look by a larger Bench over all the issues adjudicated by this Court in *Sampath Kumar case*² including the question whether the Tribunal can at all have an Administrative Member on its Bench, if it were to have the power of even deciding constitutional validity of a statute or (Article) 309 rule, as conceded in *Chopra case*³". The "post-*Sampath Kumar cases*" which caused the Division Bench to refer the present matter to us are as follows: *J.B. Chopra v. Union of India*³; *M.B. Majumdar v. Union of India*⁴; *Amulya Chandra Kalita v. Union of India*⁵; *R.K. Jain v. Union of India*⁶; and *Mahabal Ram (Dr) v. Indian Council of Agricultural Research*⁷. d
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1 (1995) 1 SCC 400 . 1995 SCC (L&S) 321 : (1995) 29 ATC 120

2 (1987) 1 SCC 124 (1987) 2 ATC 82

3 *J B Chopra v Union of India*, (1987) 1 SCC 422 : (1987) 2 ATC 344

4 (1990) 4 SCC 501 : 1991 SCC (L&S) 233 : (1990) 14 ATC 804

5 (1991) 1 SCC 181 · 1991 SCC (L&S) 145 · (1990) 14 ATC 911

6 (1993) 4 SCC 119 · 1993 SCC (L&S) 1128 · (1993) 25 ATC 464

7 (1994) 2 SCC 401 1994 SCC (L&S) 642 (1994) 27 ATC 97 h

4. Before we record the contentions of the learned counsel who appeared before us, we must set out the legal and historical background relevant to the present case.

5. Part XIV-A of the Constitution was inserted through Section 46 of the Constitution (42nd Amendment) Act, 1976 with effect from 1-3-1977. It comprises two provisions, Articles 323-A and 323-B, which have, for the sake of convenience, been fully extracted hereunder:

PART XIV-A
TRIBUNALS

323-A. *Administrative tribunals.*—(1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

(2) A law made under clause (1) may—

- (a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;
- (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
- (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
- (d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1);

323-B. *Tribunals for other matters.*— (1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.

(2) The matters referred to in clause (1) are the following, namely—

- (a) levy, assessment, collection and enforcement of any tax;
- (b) foreign exchange, import and export across customs frontiers;
- (c) industrial and labour disputes;
- (d) land reforms by way of acquisition by the State of any estate as defined in Article 31-A or of any rights therein or the extinguishment or modification of any such rights or by way of



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- ceiling on agricultural land or in any other way;
- (e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
- (f) repeal or amend any order made by the President under clause (3) of Article 371-D;
- (g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.
- (3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.
- (e) ceiling on urban property; a
- b
- (f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329-A; c
- (g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods; d
- (h) offences against laws with respect to any of the matters specified in sub-clauses (a) to (g) and fees in respect of any of those matters; f
- (i) any matter incidental to any of the matters specified in sub-clauses (a) to (h).
- (3) A law made under clause (1) may— g
- (a) provide for the establishment of a hierarchy of tribunals;
- (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be h

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- exercised by each of the said tribunals;
- (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
- (d) exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals;
- (e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
- (f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.
- (4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.
- Explanation.*—In this article, “appropriate Legislature”, in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI.
- (emphasis added)

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6. We may now examine the manner in which these constitutional provisions have been sought to be implemented, the problems that have consequently arisen, and the manner in which courts have sought to resolve them. Such an analysis will have to consider the working of the two provisions separately. a

Article 323-A

7. In pursuance of the power conferred upon it by clause (1) of Article 323-A of the Constitution, Parliament enacted the Administrative Tribunals Act, 1985 (Act 13 of 1985) (hereinafter referred to as "the Act"). The Statement of Objects and Reasons of the Act indicates that it was in the express terms of Article 323-A of the Constitution and was being enacted because a large number of cases relating to service matters were pending before various courts; it was expected that "the setting up of such Administrative Tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of the various courts and thereby giving them more time to deal with other cases expeditiously but would also provide to the persons covered by the Administrative Tribunals speedy relief in respect of their grievances". b

8. Pursuant to the provisions of the Act, the Central Administrative Tribunal, with five Benches, was established on 1-11-1985. However, even before the Tribunal had been established, several writ petitions had been filed in various High Courts as well as this Court challenging the constitutional validity of Article 323-A of the Constitution as also the provisions of the Act; the principal violation complained of being the exclusion of the jurisdiction of this Court under Article 32 of the Constitution and of that of the High Courts under Article 226 of the Constitution. Through an interim order dated 31-10-1985, reported as *S.P. Sampath Kumar v. Union of India*⁸, this Court directed the carrying out of certain measures with a view to ensuring the functioning of the Tribunal along constitutionally-sound principles. Pursuant to an undertaking given to this Court at the interim stage by the erstwhile Attorney General, an Amending Act (Act 19 of 1986) was enacted to bring about the changes prescribed in the aforesaid interim order. c

9. When *Sampath Kumar case* was finally heard, these changes had already been incorporated in the body and text of the Act. The Court took the view that most of the original grounds of challenge — which included a challenge to the constitutional validity of Article 323-A — did not survive and restricted its focus to testing only the constitutional validity of the provisions of the Act. In its final decision, the Court held that though judicial review is a basic feature of the Constitution, the vesting of the power of judicial review in an alternative institutional mechanism, after taking it away from the High Courts, would not do violence to the basic structure so long as it was ensured that the alternative mechanism was an effective and real substitute for the High Court. Using this theory of effective alternative d

⁸ (1985) 4 SCC 458 · 1985 SCC (L&S) 986

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a institutional mechanisms as its foundation, the Court proceeded to analyse the provisions of the Act in order to ascertain whether they passed constitutional muster. The Court came to the conclusion that the Act, as it stood at that time, did not measure up to the requirements of an effective substitute and, to that end, suggested several amendments to the provisions governing the form and content of the Tribunal. The suggested amendments were given the force of law by an Amending Act (Act 51 of 1987) after the conclusion of the case and the Act has since remained unaltered.

b 10. We may now analyse the scheme and the salient features of the Act as it stands at the present time, inclusive as it is of the changes suggested in *Sampath Kumar case*². The Act contains 37 sections which are housed in five Chapters. Chapter I ("Preliminary") contains three sections; Section 3 is the definition clause.

c 11. Chapter II ("*Establishment of Tribunals and Benches thereof*") contains Sections 4 to 13. Section 4 empowers the Central Government to establish: (1) a Central Administrative Tribunal with Benches at separate places; (2) an Administrative Tribunal for a State which makes a request in this behalf; and (3) a Joint Administrative Tribunal for two or more States which enter into an agreement for the purpose. Section 5 states that each Tribunal shall consist of a Chairman and such number of Vice-Chairmen and d Judicial and Administrative Members as may be deemed necessary by the appropriate Government. Sub-section (2) of Section 5 requires every Bench to ordinarily consist of one Judicial Member and one Administrative Member. Sub-section (6) of Section 5, which enables the Tribunal to function through Single Member Benches is the focus of some controversy, as will subsequently emerge, and is fully extracted as under:

e "5. (6) Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other Member authorised by the Chairman in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may f by general or special order specify:

g Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members the case or matter may be transferred by the Chairman or, as the case may be, referred to him for transfer to, such Bench as the Chairman may deem fit."

12. Section 6 deals with the qualifications of the personnel of the Tribunal. Since the first few sub-sections of Section 6 are required to be considered subsequently, they may be reproduced hereunder:

h "6. *Qualifications for appointment of Chairman, Vice-Chairman or other Members.*—(1) A person shall not be qualified for appointment as the Chairman unless he—

(a) is, or has been, a Judge of a High Court; or

(b) has, for at least two years, held the office of Vice-Chairman;

(c) * * * * * a

(2) A person shall not be qualified for appointment as the Vice-Chairman unless he—

(a) is, or has been, or is qualified to be a Judge of a High Court; or

(b) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India; or b

(bb) has for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or c

(c) has, for a period of not less than three years, held office as a Judicial Member or an Administrative Member.

(3) A person shall not be qualified for appointment as a Judicial Member unless he— d

(a) is, or has been, or is qualified to be, a Judge of a High Court; or

(b) has been a member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years.

(3-A) A person shall not be qualified for appointment as an Administrative Member unless he— e

(a) has, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or f

(b) has, for at least three years, held the post of a Joint Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India.

and shall, in either case, have adequate administrative experience.” g

13. Sub-sections (4), (5) and (6) of Section 6 provide that all the Members of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals shall be appointed by the President; in the case of the State Administrative Tribunals and the Joint Administrative Tribunals, the President is required to consult the Governor(s) concerned. Sub-section (7) stipulates that the Chief Justice of India is also to be consulted in the appointment of the Chairman, Vice-Chairman and Members of all the Tribunals under the Act. h



14. Section 8 prescribes the terms of office of the personnel of the Tribunal as being for a duration of five years from the date of entering into office; there is also provision for reappointment for another term of five years. The maximum age-limit permissible for the Chairman and the Vice-Chairman is 65 years and for that of any other Member is 62 years. Section 10 stipulates that the salaries, terms and conditions of all Members of the Tribunal are to be determined by the Central Government; such terms are, however, not to be varied to the disadvantage of any Member after his appointment.

15. Chapter III ("*Jurisdiction, powers and authority of Tribunals*") consists of Sections 14 to 18. Sections 14, 15 and 16 deal with the jurisdiction, powers and authority of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals respectively. These provisions make it clear that except for the jurisdiction of this Court, the Tribunals under the Act will possess the jurisdiction and powers of every other court in the country in respect of all service-related matters. Section 17 provides that the Tribunals under the Act will have the same powers in respect of contempt as are enjoyed by the High Courts.

16. Chapter IV ("*Procedure*") comprises Sections 19 to 27. Section 21 specifies strict limitation periods and does not vest the Tribunals under the Act with the power to condone delay.

17. Chapter V ("*Miscellaneous*"), the final Chapter of the Act, comprising Sections 28 to 37, vests the Tribunals under the Act with ancillary powers to aid them in the effective adjudication of disputes. Section 28, the "exclusion of jurisdiction" clause reads as follows:

"28. *Exclusion of jurisdiction of courts except the Supreme Court under Article 136 of the Constitution.*—On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except—

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force,

shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters."

18. A facet which is of vital relevance to the controversy before us, and consequently needs to be emphasised, is that Section 28, when originally enacted, was in the express terms of clause (2)(d) of Article 323-A of the Constitution and the only exception made in it was in respect of the jurisdiction of this Court under Article 136 of the Constitution. However, before the final hearing in *Sampath Kumar case*² the provision was further

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amended to also save the jurisdiction of this Court under Article 32 of the Constitution; this aspect has been noted in the judgment of Misra, J. in *Sampath Kumar case*² (at para 14). Since the Court in *Sampath Kumar case*² had restricted its focus to the provisions of the Act, it expressed itself to be satisfied with the position that the power of judicial review of the Apex Court had not been tampered with by the provisions of the Act and did not venture to address the larger issue of whether clause (2)(d) of Article 323-A of the Constitution also required a similar amendment. a

19. Section 29 provides for the transfer to the Tribunals under the Act, of all service matters pending in every existing fora before their establishment. The only exception carved out is in respect of appeals pending before High Courts. Section 35 vests the Central Government with rule-making powers and Section 36 empowers the appropriate Government to make rules to implement the provisions of the Act and the matters specified in it. By virtue of Section 37, the rules made by the Central Government are required to be laid before Parliament and, in the case of rules made by State Governments, before the State Legislature(s) concerned. b

20. The Act and its provisions will be analysed in the course of this judgment. However, a preliminary appraisal of the framework of the Act would indicate that it was intended to provide a self-contained, almost wholly exclusive (the exceptions being specified in Section 28) forum for adjudication of all service-related matters. The Tribunals created under the Act were intended to perform a substitutional role as opposed to — and this distinction is of crucial significance — a supplemental role with regard to the High Courts. c

21. According to the information provided to us by Mr K.N. Bhat, the learned Additional Solicitor General, apart from the Central Administrative Tribunal which was established on 1-11-1985, eight States have set up State Administrative Tribunals, all of which are presently functioning. The States, along with the date of establishment of the particular State Administrative Tribunals, are as follows: Andhra Pradesh (1-11-1989), Himachal Pradesh (1-9-1986), Karnataka (6-10-1986), Madhya Pradesh (2-8-1988), Maharashtra (8-7-1989), Orissa (14-7-1986), Tamil Nadu (12-12-1988) and West Bengal (16-1-1995). d

22. We may now analyse the “post-*Sampath Kumar cases*” which find mention in the order of the referring Bench. In *J.B. Chopra case*³ a Division Bench of this Court had occasion to consider one of the specific questions that has now arisen for our consideration, viz., whether the Central Administrative Tribunal constituted under the Act has the authority and the jurisdiction to strike down a rule framed by the President of India under the proviso to Article 309 of the Constitution as being violative of Articles 14 and 16(1) of the Constitution. When the matter came up before the Division Bench, the issue was still being considered by the Constitution Bench in *Sampath Kumar case*². The Division Bench, therefore, deferred its judgment till the final pronouncement of the decision in *Sampath Kumar case*². e

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Thereafter, it analysed the Constitution Bench's decision to arrive at the conclusion that (SCC p. 423, para 2)

- a "the Administrative Tribunal being a substitute of the High Court had the necessary jurisdiction, power and authority to adjudicate upon all disputes relating to service matters including the power to deal with all questions pertaining to the constitutional validity or otherwise of such laws as offending Articles 14 and 16(1) of the Constitution".
- b 23. An aspect which needs to be emphasised is that the Constitution Bench in *Sampath Kumar case*² had not specifically addressed the issue whether the Tribunals under the Act would have the power to strike down statutory provisions or rules as being constitutionally invalid. However, the Division Bench in *J.B. Chopra case*³ felt that this proposition would follow as a direct and logical consequence of the reasoning employed in *Sampath Kumar case*².
- c 24. In *M.B. Majumdar case*⁴ a Division Bench of this Court had to confront the contention, based on the premise that in *Sampath Kumar case*² this Court had equated the Tribunals established under the Act with High Courts, that the Members of the Central Administrative Tribunal must be paid the same salaries as were payable to Judges of the High Court. The Court, after analysing the text of Article 323-A of the Constitution, the provisions of the Act, and the decision in *Sampath Kumar case*², rejected the contention that the Tribunals were the equals of the High Courts in respect of their service conditions. The Court clarified that in *Sampath Kumar case*², the Tribunals under the Act had been equated with High Courts only to the extent that the former were to act as substitutes for the latter in adjudicating service matters; the Tribunals could not, therefore, seek parity for all other purposes.
- d 25. In *Amulya Chandra case*⁵ a Division Bench of this Court had to consider the question whether a dispute before the Central Administrative Tribunal could be decided by a single Administrative Member. The Court took note of sub-section (2) of Section 5 of the Act which, as we have seen, stipulates that a Bench of a Tribunal under the Act should ordinarily consist of a Judicial Member and an Administrative Member, as also the relevant observations in *Sampath Kumar case*², to conclude that under the scheme of the Act, all cases should be heard by a Bench of two Members. It appears that the attention of the Court was not drawn towards sub-section (6) of Section 5 which, as we have noticed, enables a single Member of a Tribunal under the Act to hear and decide cases.
- e 26. The same issue arose for consideration before another Bench of this Court in *Dr Mahabal Ram case*⁷. The Court took note of the decision in *Amulya Chandra case*⁵ and, since the vires of sub-section (6) of Section 5 of the Act was not under challenge, held that sub-sections (2) and (6) of Section 5 are to be harmoniously construed in the following manner: (SCC at p. 404 para 6)
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“... There is no doubt that what has been said in *Sampath Kumar case*² would require safeguarding the interest of litigants in the matter of disposal of their disputes in a judicious way. Where complex questions of law would be involved the dispute would require serious consideration and thorough examination. There would, however, be many cases before the Tribunal where very often no constitutional issues or even legal points would be involved.... We are prepared to safeguard the interests of claimants who go before the Tribunal by holding that while allocating work to the Single Member — whether judicial or administrative — in terms of sub-section (6), the Chairman should keep in view the nature of the litigation and where questions of law and for interpretation of constitutional provisions are involved they should not be assigned to a Single Member. In fact, the proviso itself indicates Parliament’s concern to safeguard the interest of claimants by casting an obligation on the Chairman and Members who hear the cases to refer to a regular bench of two members such cases which in their opinion require to be heard by a Bench of two Members. We would like to add that it would be open to either party appearing before a Single Member to suggest to the Member hearing the matter that it should go to a Bench of two Members. The Member should ordinarily allow the matter to go to a Bench of two Members when so requested. This would sufficiently protect the interests of the claimants and even of the administrative system whose litigations may be before the Single Member for disposal.... The vires of sub-section (6) has not been under challenge and, therefore, both the provisions in Section 5 have to be construed keeping the legislative intention in view. We are of the view that what we have indicated above brings out the true legislative intention and the prescription in sub-section (2) and the exemption in sub-section (6) are rationalised.” (emphasis supplied)

27. In *R.K. Jain v. Union of India*⁶ a Division Bench of this Court consisting of three of us [Ahmadi, J. (as he then was), and Punchhi and Ramaswamy, JJ.] had occasion to deal with complaints concerning the functioning of the Customs, Excise and Gold Control (Appellate) Tribunal, which was set up by exercising the power conferred by Article 323-B. In his leading judgment, Ramaswamy, J. analysed the relevant constitutional provisions, the decisions in *Sampath Kumar*², *J.B. Chopra*³ and *M.B. Majumdar*⁴ to hold that the Tribunals created under Articles 323-A and 323-B could not be held to be substitutes of High Courts for the purpose of exercising jurisdiction under Articles 226 and 227 of the Constitution. Having had the benefit of more than five years’ experience of the working of these alternative institutional mechanisms, anguish was expressed over their ineffectiveness in exercising the high power of judicial review. It was recorded that their performance had left much to be desired. Thereafter, it was noted that the sole remedy provided, that of an appeal to this Court under Article 136 of the Constitution, had proved to be prohibitively costly while also being inconvenient on account of the distances involved. It was

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suggested that an expert body like the Law Commission of India should study the feasibility of providing an appeal to a Bench of two Judges of the High Court concerned from the orders of such Tribunals and also analyse the working of the Tribunals since their establishment, the possibility of inducting members of the Bar to man such Tribunals etc. It was hoped that the recommendations of such an expert body would be immediately adopted by the Government of India and remedial steps would be initiated to overcome the difficulties faced by the Tribunals, making them capable of dispensing effective, inexpensive and satisfactory justice.

28. In a separate but concurring judgment, Ahmadi, J. (as he then was) speaking for himself and Punchhi, J., endorsed the recommendations in the following words: ⁶ (SCC p. 134, para 8)

“... [T]he time is ripe for taking stock of the working of the various tribunals set up in the country after the insertion of Articles 323-A and 323-B in the Constitution. A sound justice delivery system is a sine qua non for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which the litigating public has faith and confidence alone can deliver the goods. After the incorporation of these two articles, Acts have been enacted whereunder tribunals have been constituted for dispensation of justice. Sufficient time has passed and experience gained in these last few years for taking stock of the situation with a view to finding out if they have served the purpose and objectives for which they were constituted. Complaints have been heard in regard to the functioning of other tribunals as well and it is time that a body like the Law Commission of India has a comprehensive look-in with a view to suggesting measures for their improved functioning. That body can also suggest changes in the different statutes and evolve a model on the basis whereof tribunals may be constituted or reconstituted with a view to ensuring greater independence. An intensive and extensive study needs to be undertaken by the Law Commission in regard to the constitution of tribunals under various statutes with a view to ensuring their independence so that the public confidence in such tribunals may increase and the quality of their performance may improve. We strongly recommend to the Law Commission of India to undertake such an exercise on priority basis. A copy of this judgment may be forwarded by the Registrar of this Court to the Member-Secretary of the Commission for immediate action.”

29. During the hearing, we requested the learned Additional Solicitor General of India, Mr K.N. Bhat, to inform us of the measures undertaken to implement the directions issued by this Court in *R.K. Jain case*⁶. We were told that the Law Commission had in fact initiated a performance analysis on the lines suggested in the judgment; however, when the Division Bench issued its order indicating that *Sampath Kumar case*² might have to be reviewed by a larger Bench, further progress on the study was halted.

30. We may now apply ourselves to analysing the decision which has been impugned in one of the matters before us, CA No. 169 of 1994. The judgment, *Sakinala Hari Nath v. State of A.P.*⁹, rendered by a Full Bench of the Andhra Pradesh High Court, has declared Article 323-A(2)(d) of the Constitution to be unconstitutional to the extent it empowers Parliament to exclude the jurisdiction of the High Courts under Article 226 of the Constitution; additionally, Section 28 of the Act has also been held to be unconstitutional to the extent it divests the High Courts of jurisdiction under Article 226 in relation to service matters. a

31. The judgment of the Court, delivered by M.N. Rao, J. has, in an elaborate manner, viewed the central issues before us against the backdrop of several landmark decisions delivered by Constitution Benches of this Court as also the leading authorities in comparative constitutional law. The judgment has embarked on a wide-ranging quest, extending to the American, Australian and British jurisdictions, to ascertain the true import of the concepts of "judicial power", "judicial review" and other related aspects. The judgment has also analysed a contention based on Article 371-D of the Constitution, but, since that aspect is not relevant to the main controversy before us, we shall avoid its discussion. b c

32. The judgment of the Andhra Pradesh High Court has, after analysing various provisions of our Constitution, held that under our constitutional scheme the Supreme Court and the High Courts are the sole repositories of the power of judicial review. Such a power, being inclusive of the power to pronounce upon the validity of statutes, actions taken and orders passed by individuals and bodies falling within the ambit of the expression "State" in Article 12 of the Constitution, has only been entrusted to the constitutional courts, i.e., the High Courts and this Court. For this proposition, support has been drawn from the rulings of this Court in *Kesavananda Bharati v. State of Kerala*¹⁰, *Special Reference No. 1 of 1964 (Keshav Singh, Re)*¹¹, *Indira Nehru Gandhi v. Raj Narain*¹², *Minerva Mills Ltd. v. Union of India*¹³, *Kihoto Hollohan v. Zachillhu*¹⁴ and certain other decisions, all of which have been extensively analysed and profusely quoted from. d e

33. Analysing the decision in *Sampath Kumar case*² against this backdrop, it is noted that the theory of alternative institutional mechanisms established in *Sampath Kumar case*² is in defiance of the proposition laid down in *Kesavananda Bharati case*¹⁰, *Keshav Singh, Re*¹¹ and *Indira Gandhi case*¹², that the constitutional courts alone are competent to exercise the power of judicial review to pronounce upon the constitutional validity of statutory provisions and rules. The High Court, therefore, felt that the f g

9 (1993) 2 An WR 484 : (1994) 1 APLJ 1 (FB)

10 (1973) 4 SCC 225

11 (1965) 1 SCR 413 : AIR 1965 SC 745

12 1975 Supp SCC 1

13 (1980) 3 SCC 625

14 1992 Supp (2) SCC 651 h

a decision in *Sampath Kumar case*², being *per incuriam*, was not binding upon it. The High Court also pointed out that, in any event, the issue of constitutionality of Article 323-A(2)(d) was neither challenged nor upheld in *Sampath Kumar case*² and it could not be said to be an authority on that aspect.

b 34. Thereafter, emphasising the importance of service matters which affect the functioning of civil servants, who are an integral part of a sound governmental system, the High Court held that service matters which involve testing the constitutionality of provisions or rules, being matters of grave import, could not be left to be decided by statutorily created adjudicatory bodies, which would be susceptible to executive influences and pressures. It was emphasised that in respect of constitutional courts, the Framers of our Constitution had incorporated special prescriptions to ensure that they would be immune from precisely such pressures. The High Court c also cited reasons for holding that the sole remedy provided, that of an appeal under Article 136 to this Court, was not capable of being a real safeguard. It was also pointed out that even the saving of the jurisdiction of this Court under Article 32 of the Constitution would not help improve matters. It was, therefore, concluded that although judicial power can be d vested in a Court or Tribunal, the power of judicial review of the High Court under Article 226 could not be excluded even by a constitutional amendment.

Article 323-B

e 35. This provision of the Constitution empowers Parliament or the State Legislatures, as the case may be, to enact laws providing for the adjudication or trial by Tribunals of disputes, complaints or offences with respect to a wide variety of matters which have been specified in the nine sub-clauses of clause (2) of Article 323-B. The matters specified cover a wide canvas including inter alia disputes relating to tax cases, foreign exchange matters, industrial and labour cases, ceiling on urban property, election to State Legislatures and Parliament, essential goods and their distribution, criminal f offences etc. Clause (3) enables the Legislature concerned to provide for the establishment of a hierarchy of Tribunals and to lay down their jurisdiction, the procedure to be followed by them in their functioning, etc. Sub-clause (d) of clause (3) empowers the Legislature concerned to exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136 of the Constitution, with respect to all or any of the matters g falling within the jurisdiction of the Tribunals. The constitutional provision, therefore, invests Parliament or the State Legislatures, as the case may be, with powers to divest the traditional courts of a considerable portion of their judicial work.

h 36. According to the information provided to us by Mr K.N. Bhat, the learned Additional Solicitor General, until the present date, only four Tribunals have been created under Article 323-B pursuant to legislations enacted by the Legislatures of three States. The first of these was the West

Bengal Taxation Tribunal which was set up in 1989 under the West Bengal Taxation Tribunal Act, 1987. Similarly, the Rajasthan Taxation Tribunal was set up in 1995 under the Rajasthan Taxation Tribunal Act, 1995. The State of Tamil Nadu has set up two Tribunals by utilising the power conferred upon it by Article 323-B. The first of these was the Tamil Nadu Land Reforms Special Appellate Tribunal which was established on 1-11-1990 under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1985 to deal with all matters relating to land reforms arising under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. Later, the Tamil Nadu Taxation Special Tribunal was established on 22-12-1995 under the Tamil Nadu Taxation Special Tribunal Act, 1992 to deal with cases arising under the Tamil Nadu General Sales Tax Act and Additional Sales Tax Act.

37. Certain problems have arisen in the functioning of these Tribunals especially in respect of the manner in which they exclude the jurisdiction of their respective High Courts. This aspect can be illustrated by briefly adverting to the broad facts of two of the matters before us. CAs Nos. 1532-33 of 1993 arise as a result of conflicting orders issued by the West Bengal Taxation Tribunal and the Calcutta High Court. Certain petitioners had challenged the constitutional validity of some provisions in three legislations enacted by the West Bengal Legislature before the West Bengal Taxation Tribunal. After examining the matter and hearing the arguments advanced in response by the State of West Bengal, the West Bengal Taxation Tribunal, by its Order dated 9-10-1991, upheld the constitutional validity of the impugned provisions. Thereafter, the constitutional validity of the same provisions was challenged in a writ petition before the Calcutta High Court. During the proceedings, the State of West Bengal raised the preliminary objection that by virtue of Section 14 of the West Bengal Taxation Tribunal Act, 1987, which excluded the jurisdiction of the High Court in all matters within the jurisdiction of the Taxation Tribunal, the Calcutta High Court had no jurisdiction to entertain the writ petition. However, the High Court proceeded with the case and, by its judgment dated 25-11-1992, declared the impugned provisions to be unconstitutional. These developments have resulted in an interesting situation, where the same provisions have alternately been held to be constitutional and unconstitutional by two different fora, each of which considered itself to be empowered to exercise jurisdiction.

38. SLP No. 17768 of 1991 seeks to challenge a judgment of the Madras High Court which has held that the establishment of the Tamil Nadu Land Reforms Special Appellate Tribunal will not affect the powers of the Madras High Court to issue writs. This decision is based on the reasoning that the Legislature of the State had no power "to infringe upon the High Courts" power to issue writs under Article 226 of the Constitution and to exercise its power of superintendence under Article 227 of the Constitution".

39. It is against these circumstances that we must now test the propositions put forth for our consideration.

Submissions of the counsel

40. We have heard the submissions of several learned Senior Counsel who appeared for the various parties before us. Mr Rama Jois and Mr Shanti Bhushan, through their respective arguments, urged us to review the decision in *Sampath Kumar case*² and to hold Article 323-A(2)(d) and Article 323-B(3)(d) of the Constitution to be unconstitutional to the extent they allow Tribunals created under the Act to exclusively exercise the jurisdiction vested in the High Courts under Articles 226 and 227 of the Constitution. On the other hand, Mr Bhat, the learned Additional Solicitor General, Mr P.P. Rao, and Mr K.K. Venugopal urged us to uphold the validity of the impugned constitutional provisions and to allow such Tribunals to exercise the jurisdiction under Article 226 of the Constitution. We have also heard arguments advanced on behalf of the Registrar of the Principal Bench of the Central Administrative Tribunal, who was represented before us by Mr Kapil Sibal. Mr V.R. Reddy, the learned Additional Solicitor General, urged us to set aside the judgment of the Madras High Court which affects the jurisdiction of the Tamil Nadu Land Reforms Special Appellate Tribunal. Certain other counsel have also addressed us in support of the main arguments advanced.

41. Mr Rama Jois, learned counsel for the petitioner in WP No. 918 of 1992, contended as follows:

(i) Section 5(6) of the Act, insofar as it allows a Single Member Bench of a Tribunal to test the constitutional validity of a statutory provision, is unconstitutional. This proposition flows from the decisions in *Sampath Kumar case*, *Amulya Chandra case*⁵ and *Dr Mahabal Ram case*⁷. In *Sampath Kumar case*⁸ this Court had required a Bench of a Tribunal to ordinarily consist of a Judicial Member and an Administrative Member. Consequently, Section 5(2) of the Act was accordingly amended; however, since Section 5(6) was not amended simultaneously, the import of the observations in *Sampath Kumar case*⁸ can still be frustrated. Even if the theory of alternative institutional mechanisms adopted in *Sampath Kumar case*, is presumed to be correct, Section 5(6) of the Act will have to be struck down as a Single Member Bench of a Tribunal cannot be considered to be a substitute for the exercise of the power of a High Court under Article 226 of the Constitution.

(ii) The impugned provisions of the Constitution, insofar as they exclude the jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 of the Constitution, are unconstitutional. This is for the reason that:

(a) Parliament cannot, in exercise of its constituent power, confer power on Parliament and the State Legislatures to exclude the constitutional jurisdiction conferred on the High Courts as the power to amend the Constitution cannot be conferred on the Legislatures; and

(b) these provisions violate the basic structure of the Constitution insofar as they take away the power of judicial review vested in the Supreme Court under Article 32 of the Constitution and the High Courts under Articles 226 and 227 of the Constitution. While the Tribunals constituted under Articles 323-A and 323-B can be vested with the power of judicial review over administrative action, the power of judicial review of legislative action cannot be conferred upon them. This proposition flows from *Kesavananda Bharati case*¹⁰ where it was held that under our constitutional scheme, only the constitutional courts have been vested with the power of judicial review of legislative action. a b

(iii) While the provisions of the Act do not purport to affect the sacrosanct jurisdiction of the Supreme Court under Article 32 of the Constitution, Articles 323-A and 323-B allow Parliament to pursue such a course in future and are therefore liable to be struck down. c

(iv) The decision in *Sampath Kumar case* was founded on the hope that the Tribunals would be effective substitutes for the High Courts. This position is neither factually nor legally correct on account of the following differences between High Courts and these Tribunals:

(a) The High Courts enjoy vast powers as a consequence of their being courts of record under Article 215 of the Constitution and also possess the power to issue Certificates of Appeal under Articles 132 and 133 of the Constitution in cases where they feel that a decision of this Court is required. This is not so for Tribunals. d

(b) The qualifications for appointment of a High Court Judge and the constitutional safeguards provided ensure the independence of and efficiency of the Judges who man the High Courts. The conditions prescribed for Members of Tribunals are not comparable. e

(c) While the jurisdiction of the High Courts is constitutionally protected, a Tribunal can be abolished by simply repealing its parent statute.

(d) While the expenditure of the High Courts is charged to the Consolidated Fund of the States, the Tribunals are dependent upon the appropriate Government for the grant of funds for meeting their expenses. These and other differences give rise to a situation whereby the Tribunals, being deprived of constitutional safeguards for ensuring their independence, are incapable of being effective substitutes for the High Courts. f g

(v) Under our constitutional scheme, every High Court has, by virtue of Articles 226 and 227 of the Constitution, the power to issue prerogative writs or orders to all authorities and instrumentalities of the State which function within its territorial jurisdiction. In such a situation, no authority or Tribunal located within the territorial jurisdiction of a High Court can disregard the law declared by it. The impugned constitutional provisions, insofar as they seek to divest the High Courts h

a of their power of superintendence over all Tribunals and Courts situated within their territorial jurisdiction, violate the basic structure of the Constitution.

(vi) In view of the aforesaid propositions, the decision in *Sampath Kumar case*² requires a comprehensive reconsideration.

42. Mr Shanti Bhushan, appearing for the respondent in CAs Nos. 1532-33 of 1996, advanced the following submissions:

b (i) The 42nd Amendment to the Constitution, which introduced the impugned constitutional provisions, must be viewed in its historical context. The 42nd Amendment, being motivated by a feeling of distrust towards the established judicial institutions, sought, in letter and spirit, to divest constitutional courts of their jurisdiction. The aim was to vest such constitutional jurisdiction in creatures whose establishment and functioning could be controlled by the executive. Such an intent is manifest in the plain words of Articles 323-A and 323-B which oust the jurisdiction vested in this Court and the High Courts under Articles 32, 226 and 227 of the Constitution.

c (ii) The validity of the impugned provisions has to be determined irrespective of the manner in which the power conferred by them has been exercised. In *Sampath Kumar case*² this Court restricted its enquiry to the Act, which did not oust the jurisdiction under Article 32, and did not explore the larger issue of the constitutionality of Article 323-A(2)(d), which in express terms permits Parliament to oust the jurisdiction of the Supreme Court. This was not the correct approach as the constitutionality of a provision ought not to be judged only against the manner in which power is sought to be exercised under it. The correct test is to square the provision against the constitutional scheme and then pronounce upon its compatibility. The vice in Article 323-A(2)(d) is that it permits Parliament to enact, at a future date, a law to exclude the jurisdiction of this Court under Article 32. Being possessed of such potential for unleashing constitutional mischief in the future, its vires cannot be sustained.

d (iii) The power of judicial review vested in this Court under Article 32 and the High Courts under Article 226 is part of the basic structure of the Constitution. The relevant portions of the decisions in *Kesavananda Bharati case*¹⁰, *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India*¹⁵ and *Delhi Judicial Service Assn. v. State of Gujarat*¹⁶, highlight the importance accorded to Article 32 of the Constitution.

e (iv) The theory of alternative institutional mechanisms advocated in *Sampath Kumar case*² ignores the fact that judicial review vested in the High Courts consists not only of the power conferred upon the High Courts but also of the High Courts themselves as institutions endowed with glorious judicial traditions. The High Courts had been in existence

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h 15 (1981) 1 SCC 568

16 (1991) 4 SCC 406



since the 19th century and were possessed of a hoary past enabling them to win the confidence of the people. It is this which prompted the Framers of our Constitution to vest such constitutional jurisdiction in them. A Tribunal, being a new creation of the executive, would not be able to recreate a similar tradition and environment overnight. Consequently, the alternative mechanisms would not, in the absence of an atmosphere conducive to the building of traditions, be able to act as effective alternatives to High Courts for the exercise of constitutional jurisdiction. In *Union of India v. Pratibha Bonnerjea*¹⁷ this Court has analysed the special constitutional status of Judges of High Courts and explained how they are distinct from other tiers of the judiciary.

43. Mr A.K. Ganguli, appearing for the second and third respondents in CAs Nos. 1532-33 of 1993, adopted the arguments of Mr Rama Jois and Mr Bhushan. In addition, he cited certain authorities in support of his contention that the power to interpret the provisions of the Constitution is one which has been solely vested in the constitutional courts and cannot be bestowed on newly-created quasi-judicial bodies which are susceptible to executive influences.

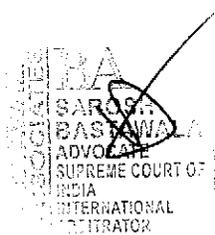
44. Mr K.N. Bhat, the learned Additional Solicitor General of India represented the Union of India which is a party in CA No. 169 of 1994 and CA No. 481 of 1989. His contentions are as follows:

(i) Clause 2(d) of Article 323-A and clause 3(d) of Article 323-B ought not to be struck down on the ground that they exclude the jurisdiction of this Court under Article 32 of the Constitution. On account of several decisions of this Court, it is a well-established proposition in law that the jurisdiction of this Court under Article 32 of the Constitution is sacrosanct and is indisputably a part of the basic structure of the Constitution. This position had been clearly enunciated well before the 42nd Amendment to the Constitution was conceived. Therefore, Parliament must be deemed to have been aware of such a position and it must be concluded that the jurisdiction under Article 32 was not intended to be affected. However, the jurisdiction of the High Courts under Article 226 was sought to be removed by creating alternative institutional mechanisms. The theory enunciated in *Sampath Kumar case*² is based on sound considerations and does not require any reconsideration.

(ii) Alternatively, Articles 323-A and 323-B do not seek to exclude the supervisory jurisdiction of the High Courts over all Tribunals situated within their territorial jurisdiction. Viewed from this perspective, the High Courts would still be vested with constitutional powers to exercise corrective or supervisory jurisdiction.

(iii) Since the decisions of this Court in *Amulya Chandra case*⁵ and *Dr Mahabal Ram case*⁷ had clearly held that matters relating to the vires of a provision are to be dealt with by a Bench consisting of a Judicial

17 (1995) 6 SCC 765 : 1996 SCC (L&S) 92 · (1996) 32 ATC 58



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Member and these guidelines will be followed in future, there is no vice of unconstitutionality in Section 5(6).

a 45. Mr P.P. Rao, learned counsel for the State of Andhra Pradesh in CA No. 196 of 1994 and the connected special leave petitions, put forth the following submissions:

(i) The matter before us involves a very serious, live problem which needs to be decided by adopting a pragmatic, cooperative approach instead of by a dogmatic, adversarial process. It is a fact that the Administrative Tribunals which were conceived as substitutes for the High Courts have not lived up to the expectations and have instead, proved to be inadequate and ineffective in several ways. However, the striking down of the impugned constitutional provisions would, instead of remedying the problem, contribute to its worsening. The problem of pendency in High Courts which has been a cause for concern for several decades, has been focussed upon by several expert committees and commissions. The problem of enormous increase in the volume of fresh institution coupled with massive arrears has necessitated the seeking of realistic solutions in order to prevent the High Courts from becoming incapable of discharging their functions. The consistent view of these expert committees has been that the only manner in which the situation can be saved is by transferring some of the jurisdiction of the High Courts, in relatively less important areas, to specially constituted Tribunals which would act as substitutes for the High Courts. In *Sampath Kumar case*² this Court was required to test the constitutional validity of providing for such a substitute to the High Courts in the shape of Administrative Tribunals. While deciding the case, this Court had actually monitored the amendments to the Act by a series of orders and directions given from time to time as the learned Attorney General had offered to effect the necessary amendments to the Act to remove its defects. After the necessary amendments were made to the Act, this Court was satisfied that there was no need to strike it down as it was of the view that the Act would provide an effective alternative forum to the High Courts for the resolution of service disputes. However, the actual functioning of the Tribunals during the last decade has brought forth several deficiencies which need to be removed. The remedy, however, lies not in striking down the constitutional provisions involved but in allowing the Union of India to further amend the Act so as to ensure that the Tribunals become effective alternative fora.

g (ii) Article 323-A(2)(d) does not violate the basic structure of the Constitution. The relevant observations in *Kesavananda Bharati case*¹⁰ show that there is an inherent distinction between the individual provisions of the Constitution and the basic features of the Constitution. While the basic features of the Constitution cannot be changed even by amending the Constitution, each and every provision of the Constitution can be amended under Article 368. The majority judgments in *Kesavananda Bharati case*¹⁰ emphatically state that the concept of

separation of powers is a basic feature of the Constitution. It, therefore, follows that the power of judicial review, which is a necessary concomitant of the independence of the judiciary, is also a basic feature of our Constitution. However, it does not follow that specific provisions such as Article 32 or Article 226 are by themselves part of the basic structure of the Constitution. In this regard, the history of Article 31, which contained a Fundamental Right to Property and was shifted from Part III to Chapter IV of Part XII can be cited by way of an example.

(iii) The essence of the power of judicial review is that it must always remain with the judiciary and must not be surrendered to the executive or the legislature. Since the impugned provisions save the jurisdiction of this Court under Article 136, thereby allowing the judiciary to have the final say in every form of adjudication, it cannot be said that the basic feature of judicial review had been violated. The constitutional bar is against the conferment of judicial power on agencies outside the judiciary. However, if within the judicial set-up, arrangements are made in the interests of better administration of justice to limit the jurisdiction under Articles 32 and 226 of the Constitution, there can be no grievance. In fact, it is in the interest of better administration of justice that this Court has developed a practice, even in the case of violation of Fundamental Rights, of requiring parties to approach the High Court concerned under Article 226 instead of directly approaching this Court under Article 32 of the Constitution. This, undoubtedly, has the effect of limiting the jurisdiction of this Court under Article 32 but, being necessary for proper administration of justice, cannot be challenged as unconstitutional. Service matters, which are essentially in the nature of in-house disputes, being of lesser significance than those involving Fundamental Rights, can also be transferred to Tribunals on the same reasoning.

(iv) By virtue of Order XXVII-A, Rule 1-A, ordinary civil courts are empowered to adjudicate upon questions of vires of statutory rules and instruments. In view of this situation, there is no constitutional difficulty in empowering Tribunals to have similar powers.

(v) Alternatively, in case we are inclined to take the view that the power of judicial review of legislative enactments cannot in any event be conferred on any other Court or Tribunal, we may use the doctrine of reading down to save the impugned constitutional provisions. So construed, the High Courts would continue to have jurisdiction to decide the vires of an Act even in the area of service disputes and would, therefore, perform a supervisory role over Tribunals in respect of matters involving constitutional questions.

46. Mr K.K. Venugopal, representing the State of West Bengal in SLP No. 1063 of 1996 and CAs Nos. 1532-33 of 1993, began by reiterating the contention that the impugned provisions do not seek to oust the jurisdiction of this Court under Article 32 which is a basic feature of the Constitution.

His alternative contention was that since the provisions do not exclude the jurisdiction under Article 136 and since Article 32(3) itself conceives of the delegation of that jurisdiction, the ouster of the jurisdiction under Article 32 was not unconstitutional. This submission was based on the reasoning that, in the absence of any specific constitutional prohibition, both Parliament and the State Legislatures were vested with sufficient legislative powers to effect changes in the original jurisdiction of this Court as well as the High Courts. He then stated that in the event that we are not inclined to hold in accordance with either of the earlier contentions, the doctrine of severability should be applied to excise the words "under Article 136" from the provisions and thus save them from the vice of unconstitutionality. Thereafter, he endeavoured to impress upon us the jurisprudential soundness of the theory of alternative institutional mechanisms propounded in *Sampath Kumar case*². He then contended that the shortfalls in the constitution of the Tribunals, the selection of their personnel, the methods of their appointment etc. are a consequence of legislative and executive errors of judgment; these shortfalls cannot affect the constitutionality of the parent constitutional provisions. He concluded by declaring that these constitutional amendments were lawfully incorporated by the representatives of the people in exercise of the constituent power of Parliament to remedy the existing problem of inefficacious delivery of justice in the High Courts. He counselled us not to substitute our decision for that of the policy evolved by Parliament in exercise of its constituent power and urged us to suggest suitable amendments, as was done in *Sampath Kumar case*, to make up for the shortfalls in the existing system.

47. Mr Kiran K. Shah, the petitioner in WP No. 789 of 1990, who is a lawyer practising before the Ahmedabad Bench of the Central Administrative Tribunal, sought to apprise us of the practical problems faced by advocates in presenting their cases before the Central Administrative Tribunal and of several complaints regarding the discharge of their official duties.

48. The Registrar of the Principal Bench of the Central Administrative Tribunal, who is the second respondent in CA No. 481 of 1989, was represented before us by Mr Kapil Sibal. The case of the Registrar is that the Tribunals, as they are functioning at present, are not effective substitutes for the High Courts. However, the creation of alternative institutional mechanisms is not violative of the basic structure so long as it is as efficacious as the constitutional courts. He urged us to discontinue the appointment of Administrative Members to the Tribunals and to ensure that the members of the Tribunals have security of tenure, which is a necessary prerequisite for securing their independence.

49. Mr V.R. Reddy, the learned Additional Solicitor General of India, drew our attention towards the judgment of the Madras High Court which is the subject of challenge in SLP No. 17768 of 1991. Mr Reddy endeavoured to convince us that the amendments incorporated in the legislation which created the Tamil Nadu Land Reforms Special Appellate Tribunal after the

decision in *Sampath Kumar case*² have the effect of making it a proper and effective substitute for the High Courts. He also submitted that the functioning of the Land Reforms Tribunal was essential for the effective resolution of disputes in that branch of law. a

50. We may now address the main issues which have been identified at the beginning of this judgment as being central to the adjudication of this batch of matters. This would involve an appreciation of the power of judicial review and an understanding of the manner and the instrumentalities through which it is to be exercised. b

51. The underlying theme of the impugned judgment of the A.P. High Court rendered by M.N. Rao, J. is that the power of judicial review is one of the basic features of our Constitution and that aspect of the power which enables courts to test the constitutional validity of statutory provisions is vested exclusively in the constitutional courts, i.e., the High Courts and the Supreme Court. In this regard, the position in American Constitutional law in respect of courts created under Article III of the Constitution of the United States has been analysed to state that the functions of Article III Courts (constitutional courts) cannot be performed by other legislative courts established by the Congress in exercise of its legislative power. The following decisions of the US Supreme Court have been cited for support: *National Mutual Insurance Co. of the Dist. of Columbia v. Tidewater Transfer Co.*¹⁸, *Thomas S. Williams v. United States*¹⁹, *Cooper v. Aaron*²⁰, *Northern Pipeline Construction Co. v. Marathon Pipeline Co. and United States*²¹. c d

52. We may briefly advert to the position in American Constitutional law to the extent that it is relevant for our purpose. As pointed out by Henry J. Abraham, an acclaimed American Constitutional law scholar, judicial review in the United States comprises the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon a law or any other action by a public official that it deems to be in conflict with the basic law, in the United States, its Constitution.* It is further stated that in the United States, the highly significant power of judicial review is possessed, theoretically, by every court of record, no matter how high or low on the judicial ladder. Though it occurs only infrequently, it is quite possible for a Judge in a low-level court of one of the 50 States to declare a federal law unconstitutional. e f

53. The position can be better appreciated by analysing the text of Section 1 of Article III of the US Constitution: g

“Article III, Section 1.—The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the

18 93 L.Ed 1556 · 337 US 582 (1948)

19 77 L.Ed 1372 · 289 US 553 (1932)

20 3 L.Ed 2d 5 · 358 US 1 (1958)

21 73 L.Ed 2d 59 · 458 US 50 (1982) h

* Henry J Abraham: *The Judicial Process*, 4th Edn., Oxford University Press (1980), p 296

a Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” (emphasis added)

b 54. The judgment of the A.P. High Court is, therefore, correct in asserting that the judicial power vested in Article III of the US Constitution can only be exercised by courts created under Section 1 of Article III. However, what must be emphasised is the fact that Article III itself contemplates the conferment of such judicial power by the US Congress upon inferior courts so long as the independence of the Judges is ensured in terms of Section 1 of Article III. The proposition which emerges from this analysis is that in the United States, though the concept of judicial power has been accorded great constitutional protection, there is no blanket prohibition on the conferment of judicial power upon courts other than the US Supreme Court.

c 55. Henry J. Abraham’s definition of judicial review in the American context is, subject to a few modifications, equally applicable to the concept as it is understood in Indian Constitutional law. Broadly speaking, judicial review in India comprises three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. We are, for the present, concerned only with understanding the first two aspects.

d 56. In the modern era, the origin of the power of judicial review of legislative action may well be traced to the classic enunciation of the principle by Chief Justice John Marshall of the US Supreme Court in *Marbury v. Madison*²²:

e “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.... A law repugnant to the Constitution is void; ... Courts as well as other departments are bound by that instrument.” (emphasis added)

f The assumption of such a power unto itself by the US Supreme Court was never seriously challenged and, over the years, it has exercised this power in numerous cases despite the persisting criticism that such an exercise was undemocratic. Indeed, when the Framers of our Constitution set about their monumental task, they were well aware that the principle that courts possess the power to invalidate duly-enacted legislations had already acquired a history of nearly a century and a half.

g 57. At a very early stage of the history of this Court, when it was doubted whether it was justified in exercising such a power, Patanjali Sastri, C.J., while emphatically laying down the foundation of the principle held as follows : (*State of Madras v. V.G. Row*²³, SCR at pp. 605-606)

h 22 1 Cranch 137 ; 2 L Ed 60 (1803)

23 1952 SCR 597 AIR 1952 SC 196

*"[O]ur Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the 'fundamental rights', as to which this Court has been assigned the role of a sentinel on the *qui vive*. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."* (emphasis added)

58. Over the years, this Court has had many an opportunity to express its views on the power of judicial review of legislative action. What follows is an analysis of the leading pronouncements on the issue.

59. While delivering a separate but concurring judgment in the five-Judge Constitution Bench decision in *Bidi Supply Co. v. Union of India*²⁴ (SCR at p. 284) Bose, J. made the following observations which are apposite to the present context:

"The heart and core of a democracy lies in the judicial process, and that means independent and fearless Judges free from executive control brought up in judicial traditions and trained to judicial ways of working and thinking. The main bulwarks of liberty and freedom lie there and it is clear to me that uncontrolled powers of discrimination in matters that seriously affect the lives and properties of people cannot be left to executive or quasi-executive bodies even if they exercise quasi-judicial functions because they are then invested with an authority that even Parliament does not possess. Under the Constitution, Acts of Parliament are subject to judicial review particularly when they are said to infringe fundamental rights, therefore, if under the Constitution Parliament itself has not uncontrolled freedom of action, it is evident that it cannot invest lesser authorities with that power." (emphasis supplied)

60. *Keshav Singh, Re*¹¹ was a case where a seven-Judge Constitution Bench of this Court had to express itself on the thorny issue of parliamentary privileges. While doing so, the Court was required to consider the manner in which our Constitution has envisaged a balance of power between the three wings of Government and it was in this context that Gajendragadkar, C.J. made the following observations:

"[W]hether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it

²⁴ 1956 SCR 267 : AIR 1956 SC 479 · 29 ITR 717

a *has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not.* Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. *Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country....*" (emphasis added)

c 61. It is interesting to note that the origins of the power of judicial review of legislative action have not been attributed to one source alone. While Sastri, C.J. found the power mentioned expressly in the text of the Constitution, Gajendragadkar, C.J. preferred to trace it to the manner in which the Constitution has separated powers between the three wings of Government.

d 62. In *Kesavananda Bharati case*¹⁰ a thirteen-Judge Constitution Bench, by a majority of 7:6, held that though, by virtue of Article 368, Parliament is empowered to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or to destroy its basic structure. The identification of the features which constitute the basic structure of our Constitution has been the subject-matter of great debate in Indian Constitutional law. The difficulty is compounded by the fact that even the judgments for the majority are not unanimously agreed on this aspect. [There were five judgments for the majority, delivered by Sikri, C.J., Shelat and Grover, JJ., Hegde and Mukherjea, JJ., Jaganmohan Reddy, J. and Khanna, J. While Khanna, J. did not attempt to catalogue the basic features, the identification of the basic features by the other Judges are specified in the following paras of the Court's judgments: Sikri, C.J. (para 292), Shelat and Grover, JJ. (para 582), Hegde and Mukherjea, JJ. (paras 632 & 661) and Jaganmohan Reddy, J. (paras 1159 & 1161).] The aspect of judicial review does not find elaborate mention in all the majority judgments. Khanna, J. did, however, squarely address the issue (at para 1529): (SCC p. 818)

g "... The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; *the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution....* As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened.... *Judicial review has thus become an*

integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statute are found to be violative of any article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions.”

(emphasis added)

63. Shelat and Grover, JJ., while reaching the same conclusion in respect of Articles 32 and 226, however, adopted a different approach to the issue (at para 577): (SCC p. 452)

“There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States’ Constitution but it envisages such a separation to a degree as was found in *Ranasinghe case*²⁵. *The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances.*”

(emphasis added)

64. In *Indira Nehru Gandhi v. Raj Narain*¹² a five-Judge Constitution Bench had to, inter alia, test the constitutional validity of the provisions which ousted the jurisdiction of all courts including the Supreme Court, in election matters. Consequently, the Court was required to express its opinion on the concept of judicial review. Though all five Judges delivered concurring judgments to strike down the offending provision, their views on the issue of judicial review are replete with variations. Ray, C.J., was of the view that the concept of judicial review, while a distinctive feature of American Constitutional law, is not founded on any specific article in our Constitution. He observed that judicial review can and has been excluded in several matters; in election matters, judicial review is not a compulsion. He, however, held that our Constitution recognises a division of the three main functions of Government and that judicial power, which is vested in the judiciary cannot be passed to or shared by the executive or the legislature. (paras 32, 43, 46, 52) Khanna, J. took the view that it is not necessary, within a democratic set-up, that disputes relating to the validity of elections be settled by courts of law; he, however, felt that even so the legislature could not be permitted to declare that the validity of a particular election would not be challenged before any forum and would be valid despite the existence of disputes. (para 207) Mathew, J. held that whereas in the United States of America and in Australia, the judicial power is vested exclusively in courts, there is no such exclusive vesting of judicial power in the Supreme Court of India and the courts subordinate to it. Therefore, Parliament could, by

²⁵ *Bribery Commr v. Pedrick Ranasinghe*, 1965 AC 172 · (1964) 2 All ER 785, PC



- a passing a law within its competence, vest judicial power in any authority for deciding a dispute. (paras 322 and 323) Beg, J. held that the power of courts to test the legality of ordinary laws and constitutional amendments against the norms laid down in the Constitution flows from the "supremacy of the Constitution" which is a basic feature of the Constitution. (para 622) Chandrachud, J. felt that the contention that judicial review is a part of the basic structure and that any attempt to exclude the jurisdiction of courts in respect of election matters was unconstitutional was too broadly stated. He
- b pointed out that the Constitution, as originally enacted, expressly excluded judicial review in a large number of important matters. The examples of Articles 136(2) and 226(4) (exclusion of review in laws relating to armed forces), Article 262(2) (exclusion of review in river disputes), Article 103(1) (exclusion of review in disqualification of Members of Parliament), Article 329(a) (exclusion of review in laws relating to delimitation of constituencies and related matters), were cited for support. Based on this analysis,
- c Chandrachud, J. came to the conclusion that since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basic structure insofar as elections to the legislatures are concerned.
- d 65. The foregoing analysis reveals that the Judges in *Indira Gandhi case*¹², all of whom had been party to *Kesavananda Bharati case*¹⁰, did not adopt similar approaches to the concept of judicial review. While Beg, J. clearly expressed his view that judicial review was a part of the basic structure of the Constitution, Ray, C.J. and Mathew, J. pointed out that unlike in the American context, judicial power had not been expressly vested
- e in the judiciary by the Constitution of India. Khanna, J. did not express himself on this aspect, but in view of his emphatic observations in *Kesavananda Bharati case*¹⁰, his views on the subject can be understood to have been made clear. Chandrachud, J. pointed out that the Constitution itself excludes judicial review in a number of matters and felt that in election matters, judicial review is not a necessary requirement.
- f 66. In *Minerva Mills v. Union of India*¹³ a five-Judge Constitution Bench of this Court had to consider the validity of certain provisions of the Constitution (42nd Amendment) Act, 1976 which, inter alia, excluded judicial review: The judgment for the majority, delivered by Chandrachud, C.J. for four Judges, contained the following observations: (SCC at p. 644, para 21)
- g "... Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled."
- h (emphasis supplied)

67. The majority judgment held the impugned provisions to be unconstitutional. While giving reasons in support, Chandrachud, C.J. stated as follows: (SCC p. 660, para 73)

“... It is for the courts to decide whether restrictions are reasonable and whether they are in the interest of the particular subject. Apart from other basic dissimilarities, Article 31-C takes away the power of judicial review to an extent which destroys even the semblance of a comparison between its provisions and those of clauses (2) to (6) of Article 19. Human ingenuity, limitless though it may be, has yet not devised a system by which the liberty of the people can be protected except through the intervention of courts of law.”

68. It may, however, be noted that the majority in *Minerva Mills*¹³ did not hold that the concept of judicial review was, by itself, part of the basic structure of the Constitution. The judgment of Chandrachud, C.J. in the *Minerva Mills case*¹³ must be viewed in the context of his judgment in *Indira Gandhi case*¹² where he had stated that the Constitution, as originally enacted, excluded judicial review in several important matters.

69. In his minority judgment in *Minerva Mills case*¹³, Bhagwati, J. held as follows: (SCC pp. 677-78, para 87)

“... The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. *This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution.... The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations.* That is the essence of the rule of law, which inter alia requires that ‘the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law’. *The power of judicial review is an integral part of our constitutional system ... the power of judicial review ... is unquestionably ... part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament.*” (emphasis added)

70. The A.P. High Court has, through the judgment of M.N. Rao, J., pointed out that the theory of alternative institutional mechanisms enunciated by Bhagwati, J. in his minority judgment in *Minerva Mills case*¹³

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a was not supported by or even mentioned in the majority judgment. In fact, such a theory finds no prior mention in the earlier decisions of this Court and, in the opinion of the A.P. High Court, did not represent the correct legal position. It is to be noted that in *Sampath Kumar case*², both Bhagwati, C.J. and Misra, J. in their separate judgments have relied on the observations in the minority judgment of Bhagwati, J. in *Minerva Mills case*¹³ to lay the foundation of the theory of alternative institutional mechanisms.

b 71. We may, at this stage, take note of the decision in *Fertilizer Corpn. Kamgar Union v. Union of India*¹⁵, where Chandrachud, C.J. appears to have somewhat revised the view adopted by him in *Indira Gandhi case*¹². In that case, speaking for the majority, Chandrachud, C.J. held that "the jurisdiction conferred on the Supreme Court by Article 32 is an important and integral part of the basic structure of the Constitution". (at para 11)

c 72. In *Kihoto Hollohan v. Zachillhu*¹⁴ a five-Judge Constitution Bench had to, inter alia, consider the validity of para 7 of the Tenth Schedule to the Constitution which excluded judicial review. The judgment for the minority, delivered by Verma, J. struck down the provision on the ground that it violated the rule of law which is a basic feature of the Constitution requiring that decisions be subject to judicial review by an independent outside authority. (paras 181-182) Though the majority judgment delivered by d Venkatachaliah, J. also struck down the offending provision, the reasoning employed was different. The judgment for the majority contains an observation to the effect that, in the opinion of the Judges in the majority, it was not necessary for them to express themselves on the question whether judicial review is part of the basic structure of the Constitution. (para 120)

e 73. We may now analyse certain other authorities for the proposition that the jurisdiction conferred upon the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution respectively, is part of the basic structure of the Constitution. While expressing his views on the significance of draft Article 25, which corresponds to the present Article 32 of the Constitution, Dr B.R. Ambedkar, the Chairman of the Drafting Committee of the Constituent Assembly stated as follows: (CAD, Vol. VII, f p. 953)

"If I was asked to name any particular article in this Constitution as the most important — an article without which this Constitution would be a nullity — I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance." (emphasis added)

g 74. This statement of Dr Ambedkar has been specifically reiterated in several judgments of this Court to emphasise the unique significance attributed to Article 32 in our constitutional scheme. [See for instance, Khanna, J. in *Kesavananda Bharati case*¹⁰ (p. 818), Bhagwati, J. in *Minerva Mills*¹³ (p. 678), Chandrachud, C.J. in *Fertilizer Kamgar*¹⁵ (para 11), R. h Misra, J. in *Sampath Kumar*² (p. 137).]

75. In *Keshav Singh, Re*¹¹, while addressing this issue, Gajendragadkar, C.J. stated as follows: (SCC at pp. 493-494)

"If the power of the High Courts under Article 226 and the authority of this Court under Article 32 are not subject to any exceptions, then it would be futile to contend that a citizen cannot move the High Courts or this Court to invoke their jurisdiction even in cases where his fundamental rights have been violated. The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the Court in that behalf, otherwise the power conferred on the High Courts and this Court would be rendered virtually meaningless. Let it not be forgotten that the judicial power conferred on the High Courts and this Court is meant for the protection of the citizens' fundamental rights, and so, in the existence of the said judicial power itself is necessarily involved the right of the citizen to appeal to the said power in a proper case." (emphasis added)

76. To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The doctrine of basic structure was evolved in *Kesavananda Bharati case*¹⁰. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat and Grover, JJ., Hegde and Mukherjea, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In *Indira Gandhi case*¹², Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country. (*supra* at pp. 751-752). This approach was specifically adopted by Bhagwati, J. in *Minerva Mills case*¹³ (at pp. 671-672) and is not regarded as the definitive test in this field of Constitutional Law.

77. We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme. While several judgments have made specific references to this aspect [Gajendragadkar, C.J. in *Keshav Singh case*¹¹, Beg, J. and Khanna, J. in *Kesavananda Bharati*

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*case*¹⁰, Chandrachud, C.J. and Bhagwati, J. in *Minerva Mills*¹³, Chandrachud, C.J. in *Fertilizer Kamgar*¹⁵, K.N. Singh, J. in *Delhi Judicial Service Assn.*¹⁶, etc.] the rest have made general observations highlighting the significance of this feature.

78. The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary.* These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within

* See Chapter VII, "The Judiciary and the Social Revolution" in Granville Austin, *The Indian Constitution - Cornerstone of a Nation*, Oxford University Press, 1972; the chapter includes exhaustive references to the relevant preparatory works and debates in the Constituent Assembly



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their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided. a

80. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental — as opposed to a substitutional — role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses clause (3) of Article 32 of the Constitution which reads as under: b

“32. Remedies for enforcement of rights conferred by this Part.—

- (1) * * *
- (2) * * *

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

(emphasis supplied) d

81. If the power under Article 32 of the Constitution, which has been described as the “heart” and “soul” of the Constitution, can be additionally conferred upon “any other court”, there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323-B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 323-A and 323-B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose. e

82. There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity of litigation before the High f

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Courts has exploded in an unprecedented manner. The decision in *Sampath Kumar case*² was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in *Sampath Kumar case*² adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

83. We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in *Sampath Kumar case*². In his leading judgment, Ranganath Misra, J. refers to the fact that since Independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted. Reference was also made to the decision in *Kamal Kanti Dutta v. Union of India*²⁶ where this Court had, while emphasising the need for speedy resolution of service disputes, proposed the establishment of Service Tribunals.

84. The problem of clearing the backlogs of High Courts, which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to half a century. Over time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions, not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India (hereinafter referred to as "the LCI") or similar high-level committees appointed by the Central Government, and are particularly noteworthy.^{***}

85. An appraisal of the daunting task which confronts the High Courts can be made by referring to the assessment undertaken by the LCI in its 124th Report which was released sometime after the judgment in *Sampath Kumar case*². The Report was delivered in 1988, nine years ago, and some changes have occurred since, but the broad perspective which emerges is still, by and large, true:

26 (1980) 4 SCC 38 : 1980 SCC (L&S) 485

^{***} Report of the High Court Arrears Committee 1949; LCI, 14th Report on Reform of Judicial Administration (1958); LCI, 27th Report on Code of Civil Procedure, 1908 (1964); LCI, 41st Report on Code of Criminal Procedure, 1898 (1969); LCI, 54th Report of Code of Civil Procedure, 1908 (1973); LCI, 57th Report on Structure and Jurisdiction of the Higher Judiciary (1974); Report of High Court Arrears Committee, 1972; LCI, 79th Report on Delay and Arrears in High Courts and other Appellate Courts (1979); LCI, 99th Report on Oral Arguments and Written Arguments in the Higher Courts (1984); Satish Chandra Committee Report 1986; LCI, 124th Report on the High Court Arrears — A Fresh Look (1988); Report of the Arrears Committee (1989-90)

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“... The High Courts enjoy civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The source of the jurisdiction is the Constitution and the various statutes as well as letters patent and other instruments constituting the High Courts. The High Courts in the country enjoy an original jurisdiction in respect of testamentary, matrimonial and guardianship matters. Original jurisdiction is conferred on the High Courts under the Representation of the People Act, 1951, Companies Act, 1956, and several other special statutes. The High Courts, being courts of record, have the power to punish for its contempt as well as contempt of its subordinate courts. The High Courts enjoy extraordinary jurisdiction under Articles 226 and 227 of the Constitution enabling it to issue prerogative writs, such as, the one in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. Over and above this, the High Courts of Bombay, Calcutta, Delhi, Himachal Pradesh, Jammu and Kashmir and Madras also exercise ordinary original civil jurisdiction. The High Courts also enjoy advisory jurisdiction, as evidenced by Section 256 of the Indian Companies Act, 1956, Section 27 of the Wealth Tax Act, 1957, Section 26 of the Gift Tax Act, 1958, and Section 18 of the Companies (Profits) Surtax Act, 1964. Similarly, there are parallel provisions conferring advisory jurisdiction on the High Courts, such as, Section 130 of the Customs Act, 1962, and Section 354 of the Central Excises and Salt Act, 1944. The High Courts have also enjoyed jurisdiction under the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936. Different types of litigation coming before the High Court in exercise of its wide jurisdiction bear different names. The vast area of jurisdiction can be appreciated by reference to those names, viz., (a) first appeals; (b) appeals under the letters patent; (c) second appeals; (d) revision petitions; (e) criminal appeals; (f) criminal revisions; (g) civil and criminal references; (h) writ petitions; (i) writ appeals; (j) references under direct and indirect tax laws; (k) matters arising under the Sales Tax Act; (l) election petitions under the Representation of the People Act; (m) petitions under the Companies Act, Banking Companies Act and other special Acts and (n) wherever the High Court has original jurisdiction, suits and other proceedings in exercise of that jurisdiction. This varied jurisdiction has to some extent been responsible for a very heavy institution of matters in the High Courts.”

86. After analysing the situation existing in the High Courts at length, the LCI made specific recommendations towards the establishment of specialist Tribunals thereby lending force to the approach adopted in *Sampath Kumar case*². The LCI noted the erstwhile international judicial trend which pointed towards generalist courts yielding their place to specialist Tribunals. Describing the pendency in the High Courts as “catastrophic, crisis-ridden, almost unmanageable, imposing ... an immeasurable burden on the system”, the LCI stated that the prevailing view in

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a Indian Jurisprudence that the jurisdiction enjoyed by the High Court is a holy cow required a review. It, therefore, recommended the trimming of the jurisdiction of the High Courts by setting up specialist courts/Tribunals while simultaneously eliminating the jurisdiction of the High Courts.

b 87. It is important to realise that though the theory of alternative institutional mechanisms was propounded in *Sampath Kumar case*² in respect of the Administrative Tribunals, the concept itself — that of creating alternative modes of dispute resolution which would relieve High Courts of their burden while simultaneously providing specialised justice — is not new. In fact, the issue of having a specialised tax court has been discussed for several decades; though the Report of the High Court Arrears Committee (1972) dismissed it as “ill-conceived”, the LCI, in its 115th Report (1986) revived the recommendation of setting up separate Central Tax Courts. Similarly, other Reports of the LCI have suggested the setting up of “Gram Nyayalayas” [LCI, 114th Report (1986)], Industrial/Labour Tribunals [LCI, 122nd Report (1987)] and Education Tribunals [LCI, 123rd Report (1987)].

c 88. In *R.K. Jain case*⁶ this Court had, in order to understand how the theory of alternative institutional mechanisms had functioned in practice, recommended that the LCI or a similar expert body should conduct a survey of the functioning of these Tribunals. It was hoped that such a study, conducted after gauging the working of the Tribunals over a sizeable period of more than five years would provide an answer to the questions posed by the critics of the theory. Unfortunately, we do not have the benefit of such a study. We may, however, advert to the Report of the Arrears Committee (1989-90), popularly known as the Malimath Committee Report, which has elaborately dealt with the aspect. The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, “*Alternative Modes and Forums for Dispute Resolution*”, deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up “Gram Nyayalayas”, Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunals set up under Articles 323-A and 323-B of the Constitution. The relevant observations in this regard, being of considerable significance to our analysis, are extracted in full as under:

“Functioning of Tribunals

g 8.63 Several tribunals are functioning in the country. *Not all of them, however, have inspired confidence in the public mind.* The reasons are not far to seek. *The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of calibre are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in*

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judicial functioning. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.

8.64 Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decision of the State Administrative Tribunals are not appealable except under Article 136 of the Constitution. On account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the States where they have been established for their abolition.

Tribunals — Tests for Including High Court's Jurisdiction

8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. *Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach.* When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision-making process, especially when the Government is a litigant in most of the cases coming before such tribunal. (See *S.P. Sampath Kumar v. Union of India*².) The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to overlook these vital and important aspects. *It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself.* Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid.

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a 8.66 The overall picture regarding the tribunalisation of justice in our country is not satisfactory and encouraging. There is a need for a fresh look and review and a serious consideration before the experiment is extended to new areas of fields, *especially if the constitutional jurisdiction of the High Courts is to be simultaneously ousted*. Not many tribunals satisfying the aforesaid tests can possibly be established.”

(emphasis added)

b Having expressed itself in this manner, the Malimath Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned. Instead, it recommended that institutional changes be carried out within the High Courts, dividing them into separate divisions for different branches of law, as is being done in England. It stated that appointing more Judges to man the separate divisions while using the existing infrastructure would be a better way of remedying the problem of pendency in the High
c Courts.

d 89. In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. That the various Tribunals have not performed up to the expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such
e Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

f 90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot wholly be excluded. It has been contended before us that the
g Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of
h which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be

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subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter. a

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In *R.K. Jain case*⁶, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforesaid contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls. b
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92. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution. f
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93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of h

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a the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

b 94. The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective overruling so as not to disturb the procedure in relation to decisions already rendered.

c 95. We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the Administrative Members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of Judicial Members and those with grassroot experience would best serve this purpose. To hold that the Tribunal should consist only of Judicial Members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have

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reason to believe that the Committee would take care to ensure that Administrative Members are chosen from amongst those who have some background to deal with such cases.

96. It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

97. The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of expert bodies like the LCI and the Malimath Committee in this regard. We, therefore, recommend that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.



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98. Since we have analysed the issue of the constitutional validity of Section 5(6) of the Act at length, we may now pronounce our opinion on this aspect. Though the vires of the provision was not in question in *Dr Mahabal Ram case*⁷, we believe that the approach adopted in that case, the relevant portion of which has been extracted in the first part of this judgment, is correct since it harmoniously resolves the manner in which Sections 5(2) and 5(6) can operate together. We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a Single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a Single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality.

99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

100. All these matters may now be listed before a Division Bench to enable them to be decided upon their individual facts in the light of the observations contained in this judgment.

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report of the valuers appointed for the purpose of finding out the value of the plant and machinery. These valuers are technical persons who have while valuing the plant and machinery taken into consideration all aspects of valuation including the life of the plant and machinery. The valuations made both by the Enquiry Committee as well as the valuers are mostly based on the documents produced by the appellant itself. Hence, we cannot accept the argument that the valuation accepted by the Collector and confirmed by the revisional authority is either not based on any material or a finding arrived at arbitrarily. Once we are convinced that the method adopted by the authorities for the purpose of valuation is based on relevant materials then this Court will not interfere with such a finding of fact. That apart, as observed above, even the counsel for the appellant before the High Court did not seriously challenge the valuation and as emphasised by the High Court, rightly so. Therefore, we do not find any force in the last contention of the appellant also.

16. For the reasons stated above, this appeal fails and the same is dismissed with costs.

(2000) 1 Supreme Court Cases 644

(BEFORE S.P. BHARUCHA, R.C. LAHOTI AND N. SANTOSH HEGDE, JJ.)

SUB-INSPECTOR ROOPLAL AND ANOTHER

.. Appellants;

Versus

LT. GOVERNOR THROUGH CHIEF SECRETARY,
DELHI AND OTHERS

.. Respondents. e

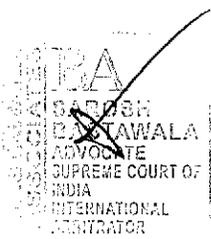
Civil Appeals Nos. 5363-64 of 1997 with Nos. 5643-44 of 1997[†], WP (C) No. 191 of 1999 & TC (C) No. 56 of 1999, decided on December 14, 1999

A. Service Law — Seniority — Deputationist — Service rendered on equivalent post in parent department before absorption in deputation department — Held, counts for seniority — Govt. of India, OM dated 29-5-1986 — Offending portion of the OM which denied benefit of previous service, declared unconstitutional — Delhi Police (Appointment and Recruitment) Rules, 1980, Rr. 5(h) and 17

B. Service Law — Equation of — Posts — Criteria for determination of — Law on this point discussed and held, question of equivalence could not be resolved solely on the basis of pay scales

C. Service Law — Absorption — Permanent Absorption — Deputationist, held in the context, if were not to be given benefit of service rendered by them on equivalent post in their parent department, should have been informed of it so that they could decide to seek or not to seek permanent absorption — Option

[†] From the Judgment and Order dated 4-11-1993 of the Central Administrative Tribunal, Delhi in OAs Nos. 1414 and 1415 of 1994



D. Administrative Law — Subordinate legislation — Office Memorandum — Not making it known to the affected persons (deputationists here) shows that the OM was in fact never acted upon — Hence cannot be relied upon by the Govt. to support its case

E. Constitution of India — Arts. 14 and 16 — Fairness and reasonableness — Executive instructions (OM dated 29-5-1986 issued by Govt. of India) denying benefit of service rendered by a deputationist on equivalent post in his parent department — This was against the law already laid down by Supreme Court — Use of the expression “whichever is later” in the instructions also making them self-contradictory — No logic could be seen behind use of this expression — The offending portion declared unreasonable and therefore struck down as violative of Art. 14 — Statute Law — Doctrine of severability — Applied — Only offending portion which was severable from rest of executive instructions, struck down

The appellants were Sub-Inspectors of Border Security Force (BSF) who were initially taken on deputation in Delhi Police as Sub-Inspectors (Executive) and were later on absorbed in Delhi Police in the same capacity. While fixing their seniority in Delhi Police, service already rendered by them as Sub-Inspector in BSF was not taken into consideration on the ground that pay scale of Sub-Inspector in BSF was not equivalent to pay scale in Delhi Police. Besides, the respondents also relied on Government of India OM dated 29-5-1986 to support their action. Clause (iv) of the OM reads as follows: “In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provided ‘Transfer on deputation/transfer’), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has already been holding (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from the date he has been holding the post on deputation, or the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department, whichever is later.” (emphasis supplied).

Earlier, there was a similar case in which the Central Administrative Tribunal had held that benefit of service already rendered in parent department could not be denied but in the present case, the Tribunal instead of honouring its earlier precedent, held that the appellants were not entitled to benefit of service rendered by them as Sub-Inspector in their parent department, i.e. BSF.

The Supreme Court apart from considering validity of the order of the Tribunal, also considered constitutional validity of the expression “whichever is later” occurring in the OM. This expression was challenged as violative of Articles 14 and 16.

Held :

There is no reason why the appellants on being absorbed in equivalent cadre in the transferred post should not be permitted to count their service in the parent department. This question is not *res integra* and is squarely covered by the ratio of the Supreme Court judgments in *K. Madhavan*, *R.S. Makashi* and *Wing Commander J. Kumar* cases. Applying the principles laid down in these cases, it is held that the appellants are entitled to count substantive service rendered by

them in the post of Sub-Inspector in the BSF while counting their service in the post of Sub-Inspector (Executive) in Delhi Police. (Paras 15 and 16)

K. Madhavan v. Union of India, (1987) 4 SCC 566 : 1987 SCC (L&S) 496 : (1987) 5 ATC 91 : AIR 1987 SC 2291 : (1988) 1 SCR 421; *R.S. Makashi v. I.M. Menon*, (1982) 1 SCC 379 : 1982 SCC (L&S) 77; *Wing Commander J. Kumar v. Union of India*, (1982) 2 SCC 116 : 1982 SCC (L&S) 177 : (1982) 3 SCR 453, applied

In law, it is necessary that if the previous service of a transferred official is to be counted for seniority in the transferred post, then two posts should be equivalent. One of the objections raised by the respondents was that the post of Sub-Inspector in the BSF is not equivalent to the post of Sub-Inspector (Executive) in Delhi Police. This argument is solely based on the fact that pay scale of two posts are not equal. Equivalence of two posts is not judged solely by equal pay. While determining equation of posts, many factors other than pay will have to be taken into consideration, like the nature of duties, responsibilities, minimum qualifications, etc. The Supreme Court way back in 1968 accepted in *P.K. Roy case* that equation of posts has to be determined by taking into account the following factors, — (i) nature and duties of post; (ii) responsibilities and powers exercised by officer holding a post; extent of territorial or other charge held or responsibilities discharged; (iii) minimum qualifications, if any, prescribed for recruitment to the post; and (iv) salary of the post. It would thus be seen that salary of a post is the last criterion for the purpose of finding equivalence of posts. If the first three criteria are fulfilled, the fact that salaries of two posts are different would not in any way make the post not equivalent. (Para 17)

[Ed.: See in this context *M. Hara Bhupal v. Union of India*, (1997) 3 SCC 561 and *Kulwant Rai Sharma v. Union of India*, 1995 Supp (4) SCC 451.]

It is not the case of the respondents that the first three criteria are in any manner different for appellants' post in their parent office and their post in Delhi Police. View taken by the Administrative Tribunal that the two posts do not carry same pay scale and therefore are not equivalent, has to be rejected.

(Paras 17 and 18)

Union of India v. P.K. Roy, AIR 1968 SC 850 : (1968) 2 SCR 186; *Vice-Chancellor, L.N. Mithila University v. Dayanand Jha*, (1986) 3 SCC 7 : 1986 SCC (L&S) 378 : (1986) 1 ATC 42, relied on

There is considerable force in the arguments addressed on behalf of the appellants that the OM dated 29-5-1986 had neither been made public nor the existence thereof made known to anybody concerned with the controversy in question. The respondents ought not be permitted to rely upon this document because there is no material produced by them to show that the OM which was issued by Government of India was either ipso facto applicable to Delhi Police or the same was adopted and applied by Delhi Police force. Right of the deputationist to count his service for the purpose of seniority in the transferred department was settled way back in 1982 itself in *R.S. Makashi* and *Wing Commander J. Kumar case* (if not earlier). It is therefore reasonable to expect that when a deputationist is absorbed in a department, he would certainly have expected that his seniority in the parent department would be counted. If at all the conditions stipulated in the OM were to be made applicable to such persons, it was the duty of the respondents to have made known the conditions of the OM to the deputationists before absorbing them, so that such a deputationist would have had the option of accepting or refusing permanent absorption in Delhi

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Police. The very fact that such steps were not taken, shows that the OM was in fact never acted upon. (Para 19)

- a A perusal of clause (iv) of the OM shows that its author has taken inconsistent views in regard to right of a deputationist to count his seniority in the parent department. While in the beginning of clause (iv) it is said in clear terms that if a deputationist holds an equivalent grade on regular basis in the parent department, such regular service in the grade shall also be taken into account in fixing seniority. In the latter part, the OM says, "subject to the condition that he will be given seniority from the date he has been holding the post or the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department whichever is later". The use of words "whichever is later" negatives the right which was otherwise sought to be conferred under the previous paragraph of clause (iv) of the OM. No logic can be seen behind this. The use of the word "whichever is later" being unreasonable, it offends Article 14. The appellants were regularly appointed Sub-Inspectors in BSF on the date of their deputation. It has already been held that the post of Sub-Inspector held by appellants in BSF is equivalent to the post of Sub-Inspector (Executive) in Delhi. In view of the judgments in *R.S. Makashi* and *Wing Commander J. Kumar cases* the appellants are entitled to count service rendered by them in the post of Sub-Inspector in BSF for the purpose of seniority as Sub-Inspector (Executive) in Delhi Police. Such right cannot be taken away by applying the OM. (Para 20)

- d The ratio of *K. Anjaiah case* is that any rule, regulation or executive instruction which has the effect of taking away service rendered by a deputationist in an equivalent cadre in the parent department while counting his seniority in the deputed post would be violative of Articles 14 and 16 of the Constitution, and therefore, is liable to be struck down. The impugned OM in its entirety does not take away the above right of the deputationists. By striking down the offending part of the OM, as has been prayed in the writ petition, the rights of the appellants can be preserved. Accordingly, the offending words "whichever is later" in the OM are held violative of Articles 14 and 16. Those words are quashed from the text of the OM. Consequently, right of the appellants to count their service from the date of their regular appointment in the post of Sub-Inspector in BSF for computing their seniority as Sub-Inspector (Executive) in Delhi Police, is restored. (Para 23)

- f *R.S. Makashi v. I.M. Menon*, (1982) 1 SCC 379 : 1982 SCC (L&S) 77; *Wing Commander J. Kumar v. Union of India*, (1982) 2 SCC 116 : 1982 SCC (L&S) 177 : (1982) 3 SCR 453; *K. Anjaiah v. K. Chandraiah*, (1998) 3 SCC 218 : 1998 SCC (L&S) 801, *relied on*

- g **F. Practice and Procedure — Precedent — Held, a subordinate court is bound by the precedent of superior court, and a Bench in a court is bound by the precedent of a Coordinate Bench — Jurisprudential basis for honouring a precedent also explained — A Bench of CAT in the present case, though aware of a judgment of a Coordinate Bench on a similar issue, taking a contrary view — Such an approach deprecated — Held, the latter Bench should have referred the matter to a larger Bench if it did not feel persuaded to agree with the earlier Bench — Service Law — Administrative Tribunals Act, 1985, S. 5(4)(b) — Larger Bench — Reference to — When imperative**

- h The question involved in this case was whether a deputationist who was permanently absorbed in the deputation department was entitled to count service

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rendered by him on equivalent post in his parent department, for the purpose of seniority. In an earlier case, the Central Administrative Tribunal had decided that such service had to be counted but in the present case, the Tribunal, disregarding its earlier precedent, decided that it could not be counted. The Supreme Court

Held :

The manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal is most dissatisfying. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that difference of opinion between two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under the Indian system. This is a fundamental principle which every Presiding Officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in the judicial system in India. The Supreme Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. (Para 12)

Tribhovandas Purshottamas Thakkar v. Ratilal Motilal Patel, AIR 1968 SC 372 : (1968) 1 SCR 455, *relied on*

Pinjare Karimbhai v. Sukla Hariprasad, (1962) 3 Guj LR 529; *Haridas v. Ratansey*, AIR 1922 Bom 149(2) : 23 Bom LR 802; *Bhagwan v. Ram Chand*, AIR 1965 SC 1767, *cited*

The Tribunal in this case, after noting the earlier judgment of a Coordinate Bench and after noticing judgment of the Supreme Court, still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment, thereby creating a judicial uncertainty in regard to declaration of law involved in this case. It is on account of this approach of the latter Bench of the Tribunal in this case, a lot of valuable time of the Supreme Court is wasted and the parties to this case have been put to considerable hardship. (Para 13)

G. Practice and Procedure — Remand — Not justified if considerable time had already elapsed and the cost and hardship and inconvenience suffered by the appellants is kept in view

Normally the case should have been remanded to the Tribunal for decision of issue involved in this case by a larger Bench of the Tribunal but keeping in view that time already consumed by this case and cost and inconvenience already suffered by the parties concerned because of the indiscretion of the Tribunal, it is considered in the interest of justice that the matter be put to rest. (Para 14)

H. Practice and Procedure — State as a litigant/party — Dispute inter se employees — Held, Govt. should play an impartial role and act as an amicus curiae — Once the matter is judicially decided, Govt. should not



further agitate the matter so as to give an impression of playing a partisan role — Approach of Delhi Govt. not appreciated in this case — Costs imposed — Costs — Imposition of — When warranted

- a The issue relating to inter se seniority involved in this case had already been settled by a decision of the Central Administrative Tribunal against which Government filed an SLP. The SLP and a review petition of the Government was dismissed by the Supreme Court. Government however did not extend benefit of the judgment to other similarly situated employees and therefore they were constrained to approach the Tribunal again. Government resisted their claim and this time, it succeeded in the Tribunal. The individual employees filed SLP in the Supreme Court. The SLP was again opposed by the Government. Controversy kept alive by Government gave rise to dispute between permanently absorbed deputationists and other employees who were already appointed. The Supreme Court
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Held :

- c Role played by respondents (i.e. Government) in this litigation is far from satisfactory. After laying down appropriate rules governing service conditions of its employees, a State should only play the role of an impartial employer in inter se dispute between its employees. If any such dispute arises, the State should apply the rules laid down by it fairly. Still if the matter is dragged to a judicial forum, the State should confine its role to that of an *amicus curiae* by assisting the judicial forum to arrive at a correct decision. Once a decision is rendered by a judicial forum, thereafter the State should not further involve itself in litigation. The matter should be left to the parties concerned to agitate further, if they so desire. When a State, after the judicial forum delivers a judgment, files review petition, appeal, etc., it gives an impression that it is espousing the cause of a particular group of employees against another group of its employees, unless there are compelling reasons to resort to such further proceedings. In the instant case, it is felt that the respondents have taken more than necessary interest which is uncalled for. This act of the State has only resulted in waste of time and money of all concerned. Delhi Administration shall pay costs in these matters.
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(Paras 24 and 25)

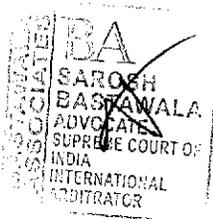
K-M/ATZ/21922/CL

Advocates who appeared in this case :

- f Mukul Rohatgi, Additional Solicitor General, P.P. Rao and S.K. Dholakia, Senior Advocates (Mahabir Singh, Uma Datta, Tarun Sharma, Ms Binu Tamta, S.W.A. Qadri, Ms Sushma Suri, S.N. Terdal, Y.P. Mahajan, B.K. Prasad, D.S. Mahra, Ms Varuna Bhandari Gugnani, Naresh Kaushik, Ms Lalita Kaushik, Lalit Kr. Khanna, Ms Gargi, P.N. Puri, Ranbir Yadav, Atul Kumar, Bimal Roy Jad, Mukul Gupta, T.N. Singh and Debasis Misra, Advocates, with them) for the appearing parties.

g **Chronological list of cases cited** on page(s)

1. (1998) 3 SCC 218 : 1998 SCC (L&S) 801, *K. Anjiah v. K. Chandraiah* 660b-c
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3. (1986) 3 SCC 7 : 1986 SCC (L&S) 378 : (1986) 1 ATC 42, *Vice-Chancellor, L.N. Mithila University v. Dayanand Jha* 657f-g
- h 4. (1982) 2 SCC 116 : 1982 SCC (L&S) 177 : (1982) 3 SCR 453, *Wing Commander J. Kumar v. Union of India* 656f-g, 656g, 658d, 660a-b, 661b



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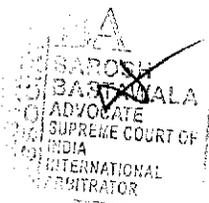
5. (1982) 1 SCC 379 : 1982 SCC (L&S) 77, *R.S. Makashi v. I.M. Menon* 656f-g, 656g, 658d, 660a-b, 661a
6. AIR 1968 SC 850 : (1968) 2 SCR 186, *Union of India v. P.K. Roy* 657c-d a
7. AIR 1968 SC 372 : (1968) 1 SCR 455, *Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel* 654h
8. AIR 1965 SC 1767, *Bhagwan v. Ram Chand* 655c
9. (1962) 3 Guj LR 529, *Pinjare Karimbhai v. Sukla Hariprasad* 655a-b
10. AIR 1922 Bom 149(2) : 23 Bom LR 802, *Haridas v. Ratansey* 655a-b

The Judgment of the Court was delivered by

SANTOSH HEGDE, J.— Civil Appeals Nos. 5363-64 of 1997 are preferred against the order dated 28-10-1994 made by the Central Administrative Tribunal, Principal Bench, New Delhi, in OAs Nos. 1414-15 of 1994. WP (C) No. 191 of 1999 filed before this Court under Article 32 of the Constitution of India challenges the constitutional validity of Office Memorandum No. 20020/7/80-Estt.(D) dated 29-5-1986 issued by the Government of India. TC (C) No. 56 of 1999 is a transfer case filed seeking transfer of WP (C) No. 4128 of 1998 pending on the file of the High Court of Delhi which involves the same question as is involved in the civil appeals referred to above. b

2. In all the above cases, the question involved is whether a Sub-Inspector who was appointed as such in the Border Security Force (for short "BSF") when transferred on deputation to the Delhi Police in the cadre of Sub-Inspector (Executive) on being permanently absorbed in the transferred post, is entitled to count his substantive service as Sub-Inspector in BSF for the purpose of his seniority in the cadre of Sub-Inspector (Executive) in the Delhi Police or not. c

3. To appreciate the controversy involved in these cases, it is necessary to note the background of these transfers from various police organisations to the Delhi Police. A perusal of the letter issued by the Commissioner of Police, Delhi, No. 15413/Est. dated 10-9-1985 shows that in the year 1985 with a view to strengthen the existing security system in the capital, the Delhi Police had created 12 new police stations in Delhi. Consequent to the same and in view of the prevailing conditions, it was felt necessary to fill up the required posts in the Delhi Police within the shortest possible time so that there was an immediate impact on the law and order situation in Delhi. In the said letter, the Commissioner noted that in the normal course the recruitment at different levels and training of the recruits would take a longer time and in view of the urgent need of the hour, a decision was taken to take suitable persons on deputation in the ranks of Inspector, Sub-Inspector, Assistant Sub-Inspector, Head Constable, Constable and Drivers (Head Constable and Constable). In the said letter, a request was made to the Director General of BSF to forward the names of suitable persons desirous of joining the Delhi Police on initial deputation for a period of one year. The letter also stated that those officials taken on deputation were likely to be considered for permanent absorption after one year if they were found suitable. From the above letter it is clear that the Delhi Police were in dire need of additional e f g h



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a hands to man the twelve newly-created police stations in Delhi. In this background, certain Sub-Inspectors who were working in BSF were at first sent on deputation to the Delhi Police in the cadre of Sub-Inspector (Executive) and subsequently they were permanently absorbed.

b 4. The Delhi Police (Appointment and Recruitment) Rules, 1980 provide for the mode of recruitment in the Delhi Police. Rule 5(h) of the said rules provides that if the Commissioner is of the opinion that it is necessary or expedient in the interest of work to do so, he may make appointment(s) to all non-gazetted categories of both executive and ministerial cadres of the Delhi Police on *deputation basis* (emphasis supplied) by drawing suitable persons from any other State, Union Territory, Central police organisation or any other force. It is not in dispute that in exercise of the said power the appellants herein and other similarly situated persons were deputed on transfer from BSF to the Delhi Police.

c 5. Rule 17 of the above rules, which was incorporated on 31-3-1983, empowers the Commissioner of Police, Delhi, to sanction permanent absorption of persons sent on deputation with the consent of the deputed official in the Delhi Police of upper and lower subordinates and with the concurrence of the Head of Police Force from which the said official is deputed. It is also not in dispute that the absorption of the appellants and other similarly situated officials in the Delhi Police in the cadre of Sub-Inspector (Executive) was done in exercise of the above power vested in the Commissioner under Rule 17 of the rules.

d 6. In view of the fact that when the inter se seniority list of the Sub-Inspectors in the Delhi Police was drawn, the authorities concerned did not take into consideration the service put in by the transferee officials like the appellants in their parent department, namely, BSF, one of the aggrieved persons by the name of Antony Mathew filed an application before the Central Administrative Tribunal (CAT) in OA No. 470 of 1991 wherein he claimed that for determination of his seniority in the Delhi Police, the date of his continuous officiation on a substantive basis as Sub-Inspector in BSF has to be counted. A Principal Bench of the Tribunal in the said application, vide its judgment dated 2-3-1993 held as follows:

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h "The petitioner was appointed as Sub-Inspector in Border Security Force on 21-4-1980. He was appointed as Sub-Inspector on substantive basis w.e.f. 1-10-1984. He came to be sent on deputation basis to Delhi Police on 19-11-1985. He came to be absorbed in the Delhi Police in the same grade of Sub-Inspector w.e.f. 19-6-1987. He has in due course been confirmed in that position. The petitioner's claim in this case is for determining his seniority taking into consideration the date of continuous officiation as Sub-Inspector in the Border Security Force, i.e. from 21-4-1980, on which date he was appointed as Sub-Inspector in the Border Security Force or w.e.f. 1-10-1984, the date of his substantive appointment in the Border Security Force. The respondents have decided to accord seniority to the petitioner with effect from the date of his

absorption, namely 19-6-1987. The contention of the petitioner is that he is entitled to the benefit of service rendered by him with the Border Security Force for the purpose of reckoning his seniority. So far as the principle of law is concerned, the learned counsel for the petitioner relies upon the judgment of the Supreme Court in *K. Madhavan v. Union of India*¹. The relevant discussion in para 21 of the judgment makes it clear that full credit must be given to the petitioner for the services rendered by him on a substantive basis in the Border Security Force w.e.f. 1-10-1984. The petitioner contends that he should be given seniority taking the date of his initial appointment or in the alternative his seniority may be counted w.e.f. 1-10-1984 when he was appointed on substantive basis with the Border Security Force. The petitioner has not produced any material showing that he was appointed w.e.f. 21-4-1980 on permanent basis. In the absence of clear material, we will not be justified in taking 21-4-1980 as the correct date. There is no dispute that the petitioner was appointed as Sub-Inspector with the Border Security Force w.e.f. 1-10-1984 on a substantive basis. That is the date which should be taken into account for determining the seniority of the petitioner.

2. For the reasons stated above, this petition is allowed. The respondents are directed to accord seniority to the petitioner in the Delhi Police taking 1-10-1984 as the date of appointment as Sub-Inspector in the Border Security Force on a substantive basis. He shall be accorded all other benefits flowing from determination of such seniority. No costs."

7. It is seen from the above order of the Tribunal that it relied upon a judgment of this Court in the case of *K. Madhavan v. Union of India*¹ which judgment required that full credit must be given to the official for substantive service in the equivalent post in the transferred department while computing his seniority in the transferred department.

8. The Delhi Administration which was the respondent in the said application (hereinafter referred to as "the respondent") filed a review petition against the said judgment of the Tribunal, urging new ground, inter alia, that the post of Sub-Inspector in BSF was not equivalent to the post of Sub-Inspector in the Delhi Police because the pay scales of the two posts were not the same. Hence, their service in the parent department cannot be counted for seniority in the transferred post. The said review petition came to be dismissed by the Tribunal by a reasoned order. It held that equal pay scales was not the sole determinative factor while determining the equivalency of the two posts. It also reiterated its finding that the law laid down by this Court in *Madhavan case*¹ was applicable on all fours to the facts of the case.

9. On not being satisfied with the order of the Tribunal in the review application also, the respondent filed an SLP before this Court against the original judgment and the order in review vide SLP (C) No. 2575/75-A of 1993. In the said SLP, the respondent specifically contended that the ratio of

¹ (1987) 4 SCC 566 : 1987 SCC (L&S) 496 : (1987) 5 ATC 91 : AIR 1987 SC 2291 : (1988) 1 SCR 421



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a this Court in *Madhavan case*¹ was not applicable to the case of Antony Mathew, on the ground that the post held by Antony Mathew in BSF was not equivalent to the post of Sub-Inspector in the Delhi Police. A three-Judge Bench of this Court vide its order dated 22-4-1994 found no merit in the petition filed by the Delhi Administration and dismissed the same. It is worthwhile to note that the above-referred dismissal order of this Court shows that the respondents in the SLP were represented by a counsel and the Court passed an order after hearing the counsel. Strangely enough, the respondent which was the employer of both the originally recruited Sub-Inspectors of the Delhi Police as well as subsequently transferred and absorbed officials was still not satisfied even with this decision of the Apex Court and filed a review petition against the said order of dismissal of the SLP, which review petition came to be dismissed by this Court with the following order:

c "Apart from the fact that the petitions are delayed by 444 days, even on merits we see no reason to entertain these petitions. Hence the review petitions are dismissed."

d Thus, the first bout of litigation which originated with regard to a simple question of counting the seniority, in the year 1991 came to an end in February 1996. But, so far as the respondent is concerned, it was not prepared to accept the law laid down in *Antony Mathew case*. Though it gave the benefit of the order of the Tribunal, as affirmed by this Court, to Antony Mathew, it was not ready to extend the same benefit to the persons similarly situated like the appellants herein. As stated above, the appellants were also originally appointed like Antony Mathew in BSF as Sub-Inspectors and subsequently transferred and absorbed as such in the Delhi Police Force and, as a matter of fact, the first appellant was even senior to Antony Mathew in the cadre of Sub-Inspectors in BSF and was also absorbed in the Delhi Police on a date anterior to that of Antony Mathew. The refusal of the Delhi Administration to give benefit of the judgment in the case of Antony Mathew to the appellants despite their repeated representations and consequent denial of their seniority, compelled these appellants to file original applications being OAs Nos. 1414 and 1415 of 1994 before another Principal Bench of CAT at Delhi.

g 10. Surprisingly, even though the case of the applicants before the Tribunal in the above-referred original applications from which the present civil appeals arise, was identical to the case of Antony Mathew both on facts and in law, the Tribunal in total disregard to the rule of precedence, in spite of having noticed the earlier judgment of a Coordinate Bench of the same Tribunal and having noticed the fact that the review petition filed before the Tribunal, SLP filed before this Court and review petition filed before this Court were dismissed, it still proceeded to consider the application independent of the law laid down in the previous case and came to an entirely contra conclusion and further held that the judgment in *Madhavan case*¹ had no bearing to the facts of the present case. In this process it relied on an official memorandum dated 29-5-1986, the existence of which was

unknown to all concerned and reference to which was not made by the respondent either as a defence in the original application of *Antony Mathew case* or in review filed thereafter or before this Court in the SLP or in the review petition filed before this Court. In this second round of litigation, the Tribunal came to the conclusion that the post held by the present appellants in BSF was not an equivalent post of Sub-Inspector in the Delhi Police and also in view of the language employed in the OM dated 29-5-1986, held that the appellants herein were not entitled to count the service rendered by them prior to their absorption in the Delhi Police for the purpose of their seniority in the cadre of Sub-Inspectors (Executive) in the Delhi Police. It is against this order of the Tribunal that the appellants have preferred SLPs in which leave to appeal was granted by this Court. a b

11. Before us in these matters, Mr P.P. Rao and Mr S.K. Dhólakia, learned Senior Counsel appearing for the parties contended that the latter Bench of the Tribunal committed a judicial impropriety in taking a contra view from the earlier judgment without following the rule of precedent. They questioned the correctness of the finding of the Tribunal in the impugned judgment as to equation of the two posts of Sub-Inspector based only on an unequal pay scale. The reliance on the OM dated 29-5-1986 was also questioned on the ground that the same was not acted upon earlier and the existence of the same was not made known to all concerned at any relevant point of time. It is to be noted that the constitutional validity of the said OM is also challenged before us in WP No. 191 of 1999. We have heard the learned Additional Solicitor General and Shri Bimal Roy Jad on behalf of the respondents. c d

12. At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. This Court in the case of *Tribhovandas* e f g h

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*Purshottamdas Thakkar v. Ratilal Motilal Patel*² while dealing with a case in which a Judge of the High Court had failed to follow the earlier judgment of

a a larger Bench of the same Court observed thus:

"The judgment of the Full Bench of the Gujarat High Court was binding upon Raju, J. If the learned Judge was of the view that the decision of Bhagwati, J., in *Pinjare Karimbhai case*³ and of Macleod, C.J., in *Haridas case*⁴ did not lay down the correct law or rule of practice, it was open to him to recommend to the Chief Justice that the question be considered by a larger Bench. Judicial decorum, propriety and discipline required that he should not ignore it. Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by courts of coordinate authority or of superior authority. Gajendragadkar, C.J., observed in *Bhagwan v. Ram Chand*⁵:

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'It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that inquiry sitting as a Single Judge, but should refer the matter to a Division Bench, or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety.'

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13. We are indeed sorry to note the attitude of the Tribunal in this case which, after noticing the earlier judgment of a Coordinate Bench and after noticing the judgment of this Court, has still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment thereby creating a judicial uncertainty in regard to the declaration of law involved in this case. Because of this approach of the latter Bench of the Tribunal in this case, a lot of valuable time of the Court is wasted and the parties to this case have been put to considerable hardship.

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14. In our opinion, the above error on the part of the Tribunal in the normal course should have made us remand this case to the Tribunal to be decided by a larger Bench of the Tribunal to decide the issue involved in this case, but then taking into consideration the time already consumed by this case and cost and inconvenience already suffered by the parties concerned because of the above-referred indiscretion of the Tribunal we think in the interest of justice we should put to rest the controversies involved in these appeals.

2 AIR 1968 SC 372 : (1968) 1 SCR 455

h 3 *Pinjare Karimbhai v. Sukla Hariprasad*, (1962) 3 Guj LR 529

4 *Haridas v. Ratansey*, AIR 1922 Bom 149(2) : 23 Bom LR 802

5 AIR 1965 SC 1767



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15. We will now take up the question whether the appellants are entitled to count their service rendered by them as Sub-Inspectors in BSF for the purpose of their seniority after absorption as Sub-Inspectors (Executive) in the Delhi Police or not. We have already noticed the fact that it is pursuant to the needs of the Delhi Police that these officials were deputed to the Delhi Police from BSF following the procedure laid down in Rule 5(h) of the rules and subsequently absorbed as contemplated under the said rules. It is also not in dispute that at some point of time in BSF, the appellants' services were regularised in the post of Sub-Inspector and they were transferred as regularly appointed Sub-Inspectors to the Delhi Police Force. Therefore, on being absorbed in an equivalent cadre in the transferred post, we find no reason why these transferred officials should not be permitted to count their service in the parent department. At any rate, this question is not res integra and is squarely covered by the ratio of judgments of this Court in more than one case. Since the earlier Bench of the Tribunal relied upon *Madhavan case*¹ to give relief to the deputationists, we will first consider the law laid down by this Court in *Madhavan case*¹. This Court in that case while considering a similar question, came to the following conclusion: (SCC p. 580, para 21)

"21. We may examine the question from a different point of view. There is not much difference between deputation and transfer. Indeed, when a deputationist is permanently absorbed in the CBI, he is under the rules appointed on transfer. In other words, deputation may be regarded as a transfer from one government department to another. *It will be against all rules of service jurisprudence, if a government servant holding a particular post is transferred to the same or an equivalent post in another government department, the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The transfer cannot wipe out his length of service in the post from which he has been transferred.* It has been observed by this Court that it is a just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected and presented by taking the same into account in determining their ranking in the new service cadre. See *R.S. Makashi v. I.M. Menon*⁶; *Wing Commander J. Kumar v. Union of India*⁷." (emphasis supplied)

16. Similar is the view taken by this Court in the cases of *R.S. Makashi*⁶ and *Wing Commander J. Kumar*⁷ which judgments have been followed by this Court in *Madhavan case*¹. Hence, we do not think it is necessary for us to deal in detail with the view taken by this Court in those judgments. Applying the principles laid down in the above-referred cases, we hold the appellants are entitled to count the substantive service rendered by them in

⁶ (1982) 1 SCC 379 : 1982 SCC (L&S) 77

⁷ (1982) 2 SCC 116 : 1982 SCC (L&S) 177 : (1982) 3 SCR 453



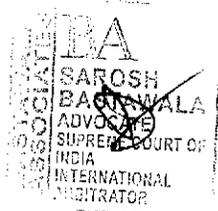
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the post of Sub-Inspector in BSF while counting their service in the post of Sub-Inspector (Executive) in the Delhi Police Force.

- a 17. In law, it is necessary that if the previous service of a transferred official is to be counted for seniority in the transferred post then the two posts should be equivalent. One of the objections raised by the respondents in this case as well as in the earlier case of Antony Mathew is that the post of Sub-Inspector in BSF is not equivalent to the post of Sub-Inspector (Executive) in the Delhi Police. This argument is solely based on the fact that
- b the pay scales of the two posts are not equal. Though the original Bench of the Tribunal rejected this argument of the respondent, which was confirmed at the stage of SLP by this Court, this argument found favour with the subsequent Bench of the same Tribunal whose order is in appeal before us in these cases. Hence, we will proceed to deal with this argument now. Equivalency of two posts is not judged by the sole fact of equal pay. While
- c determining the equation of two posts many factors other than "pay" will have to be taken into consideration, like the nature of duties, responsibilities, minimum qualification etc. It is so held by this Court as far back as in the year 1968 in the case of *Union of India v. P.K. Roy*⁸. In the said judgment, this Court accepted the factors laid down by the Committee of Chief Secretaries which was constituted for settling the disputes regarding equation
- d of posts arising out of the States Reorganisation Act, 1956. These four factors are: (i) the nature and duties of a post; (ii) the responsibilities and powers exercised by the officer holding a post, the extent of territorial or other charge held or responsibilities discharged; (iii) the minimum qualifications, if any, prescribed for recruitment to the post; and (iv) the salary of the post. It is seen that the salary of a post for the purpose of finding
- e out the equivalency of posts is the last of the criteria. If the earlier three criteria mentioned above are fulfilled then the fact that the salaries of the two posts are different would not in any way make the post "not equivalent". In the instant case, it is not the case of the respondents that the first three criteria mentioned hereinabove are in any manner different between the two posts concerned. Therefore, it should be held that the view taken by the Tribunal in
- f the impugned order that the two posts of Sub-Inspector in BSF and Sub-Inspector (Executive) in the Delhi Police are not equivalent merely on the ground that the two posts did not carry the same pay scale, is necessarily to be rejected. We are further supported in this view of ours by another judgment of this Court in the case of *Vice-Chancellor, L.N. Mithila University v. Dayanand Jha*⁹ wherein at SCC para 8 of the judgment, this Court held: (SCC pp. 10 & 11)

- g "Learned counsel for the respondent is therefore right in contending that equivalence of the pay scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent posts. We are inclined to agree with him that the real criterion to adopt is whether they could be regarded of equal status and responsibility. ... The true criterion

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8 AIR 1968 SC 850 : (1968) 2 SCR 186
9 (1986) 3 SCC 7 : 1986 SCC (L&S) 378 : (1986) 1 ATC 42



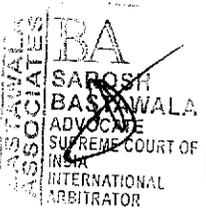
for equivalence is the status and the nature and responsibility of the duties attached to the two posts.”

18. Therefore, in our opinion, the finding of the Tribunal that the posts of Sub-Inspector in BSF and Sub-Inspector (Executive) in the Delhi Police are not equivalent, is erroneous, and the same is liable to be set aside. a

19. This leaves us to consider the validity of the office memorandum which was relied upon by the Tribunal in the impugned judgment. We have noticed earlier in the judgment that the constitutional validity of this memorandum is independently challenged by the appellants in WP (C) No. 191 of 1999. There is considerable force in the argument addressed on behalf of the appellants that this memorandum had neither been made public nor the existence thereof made known to anybody concerned with the controversy in question. We have already referred to this fact. Hence, we do not want to repeat the same in detail. On facts, we are of the opinion that the respondents ought not to have been permitted to rely upon this document because there is no material whatsoever produced by the respondents to show that this memorandum which was issued by the Government of India was either ipso facto applicable to the Delhi Police Force or the same was adopted and applied by the Delhi Police Force. It is to be noted that the law in regard to the right of a deputationist to count his service for the purpose of seniority in the transferred department was settled as far back as in the year 1982 itself in the cases of *R.S. Makashi*⁶ and *Wing Commander J. Kumar*⁷ (if not earlier). Therefore, it is reasonable to expect that a deputationist, when his service is sought to be absorbed in the transferred department would certainly have expected that his seniority in the parent department would be counted. In such a situation, it was really the duty of the respondents, if at all the conditions stipulated in the impugned memorandum were applicable to such person, to have made the conditions in the memorandum known to the deputationist before absorbing his services, in all fairness, so that such a deputationist would have had the option of accepting the permanent absorption in the Delhi Police or not. The very fact that such steps were not taken shows that this memorandum was, in fact, never acted upon. Apart from the above question of equity, the appellants have challenged the constitutional validity of the above memorandum on the ground that the same violates Articles 14 and 16 of the Constitution. One of the grounds raised is that their vested right of counting the seniority in the deputed department, after absorption in an equivalent post, is arbitrarily taken away, if the memorandum in question is applicable to them. Therefore, they had prayed for a declaration that the memorandum be declared as ultra vires to the extent it offends their fundamental right. b
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20. The relevant part of the memorandum impugned in the writ petition referred to above, reads thus:

“Even in the type of cases mentioned above, that is, where an officer initially comes on deputation and is subsequently absorbed, the normal principles that the seniority should be counted from the date of such absorption, should mainly apply. Where, however, the officer has already h



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a been holding on the date of absorption in the same or equivalent grade on regular basis in his parent department, it would be equitable and appropriate that such regular service in the grade should also be taken into account in determining his seniority subject only to the condition that at the most it would be only from the date of deputation to the grade in which absorption is being made. It has also to be ensured that the fixation of seniority of a transferee in accordance with the above principle will not effect any regular promotions made prior to the date of absorption. Accordingly it has been decided to add the following sub-para (iv) to para 7 of general principles communicated vide OM dated 22-12-1959:

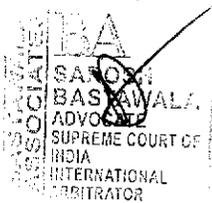
c '(iv) In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "transfer on deputation/transfer"), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has so ever been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from—

d — the date he has been holding the post on deputation, or
— the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department, whichever is later.' " (emphasis supplied)

e A perusal of clause (iv) of the memorandum shows that the author of this memorandum has taken inconsistent views in regard to the right of a deputationist to count his seniority in the parent department. While in the beginning part of clause (iv) in clear terms he says that if a deputationist holds an equivalent grade on regular basis in the parent department, such regular service in the grade shall also be taken into account in fixing the seniority. In the latter part the author proceeds to say—

f "... subject to the condition that he will be given seniority from the date he has been holding the post or the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department, whichever is later."

g The use of the words "whichever is later" negatives the right which was otherwise sought to be conferred under the previous paragraph of clause (iv) of the memorandum. We are unable to see the logic behind this. The use of the words "whichever is later" being unreasonable, it offends Article 14 of the Constitution. It is also argued on behalf of the appellants that this memorandum is further violative of Articles 14 and 16 of the Constitution inasmuch as it arbitrarily takes away the service rendered by the deputationist when he is absorbed in the Delhi Police which right of a civil servant cannot be taken away without the authority of law. We have noticed earlier that the petitioners, who are the appellants in the civil appeals, were regularly



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appointed as Sub-Inspectors in BSF on the date of their deputation. We have also accepted the fact that the post of Sub-Inspector held by them in BSF is equivalent to the post of Sub-Inspector (Executive) in the Delhi Police to which they stood deputed. That being the case, in view of the judgment in the cases of *R.S. Makashu*⁶, *Wing Commander J. Kumar*⁷ and *Madhavan*¹ it is clear that they are entitled to count the service rendered by them in the post of Sub-Inspector in BSF for the purpose of seniority in the cadre of Sub-Inspector (Executive) in the Delhi Police. Therefore, such a right of the appellants-petitioners could not have been taken away in the garb of an office memorandum which is impugned in the above writ petition. This view of ours finds support from a judgment of this Court in the case of *K. Anjaiah v. K. Chundraiah*¹⁰. In that case this Court was considering a statutory regulation which in almost similar terms used in the office memorandum with which we are concerned, deprived the civil servants of their past service in the parent department. The Regulation involved in the said case reads:

“9. (1) The persons drawn from other departments will carry on their service and they will be treated as on other duty for a tenure period to be specified by the Commission or until they are permanently absorbed in the Commission whichever is earlier.

(2) The services of those staff members working in the Commission on deputation basis and who opted for their absorption in the Commission, shall be appointed regularly as the staff in the Commission, in the cadre to which they belong, as per the orders of Government approving their appointments batch by batch and to determine the seniority accordingly. For this purpose the Commission may review the promotions already affected.”

21. The validity of the said Regulation was challenged and the same was struck down by the Administrative Tribunal in that case and when the matter was brought up in appeal before this Court, the argument of the aggrieved persons that the offending Regulation did not violate Articles 14 and 16 was repelled by this Court and it upheld the argument of the deputationist which was as follows: (SCC p. 222, para 5)

“[T]hat when persons from different sources are drafted to serve in a new service, their pre-existing length of service in the parent department should be respected and preserved by taking the same into account in determining their ranking in the new service cadre and this has been done under Regulation 9(1) that benefit cannot be taken away for determination of the inter se seniority as per Regulation 9(2) and, therefore, the Tribunal was justified in striking down Regulation 9(2).”

22. However, in that case this Court instead of striking down the said Regulation, upholding the contention that a deputationist is entitled to count his seniority when absorbed in the deputed post, observed thus: (SCC p. 223, para 7)

“When the Commission finally takes a decision to permanently absorb these deputationists after obtaining their option the question of

¹⁰ (1998) 3 SCC 218 : 1998 SCC (L&S) 801



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a their inter se seniority in the Commission crops up and Regulation 9(2) deals with the said situation. In the case of *R.S. Makashi v. I.M. Menon*⁶ this Court had indicated that it is a just and wholesome principle commonly applied to persons coming from different sources and drafted to serve a new service to count their pre-existing length of service for determining their ranking in the new service cadre. The said principle was reiterated by this Court in *K. Madhavan case*¹. A three-Judge Bench judgment of this Court in the case of *Wing Commander J. Kumar*⁷ also reiterated the aforesaid well-known principle in the service jurisprudence,”

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d 23. It is clear from the ratio laid down in the above case that any rule, regulation or executive instruction which has the effect of taking away the service rendered by a deputationist in an equivalent cadre in the parent department while counting his seniority in the deputed post would be violative of Articles 14 and 16 of the Constitution. Hence, liable to be struck down. Since the impugned memorandum in its entirety does not take away the above right of the deputationists and by striking down the offending part of the memorandum, as has been prayed in the writ petition, the rights of the appellants could be preserved, we agree with the prayer of the appellant-petitioners and the offending words in the memorandum “whichever is later” are held to be violative of Articles 14 and 16 of the Constitution, hence, those words are quashed from the text of the impugned memorandum. Consequently, the right of the appellant-petitioners to count their service from the date of their regular appointment in the post of Sub-Inspector in BSF, while computing their seniority in the cadre of Sub-Inspector (Executive) in the Delhi Police, is restored.

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g 24. Before concluding, we are constrained to observe that the role played by the respondents in this litigation is far from satisfactory. In our opinion, after laying down appropriate rules governing the service conditions of its employees, a State should only play the role of an impartial employer in the inter se dispute between its employees. If any such dispute arises, the State should apply the rules laid down by it fairly. Still if the matter is dragged to a judicial forum, the State should confine its role to that of an amicus curiae by assisting the judicial forum to arrive at a correct decision. Once a decision is rendered by a judicial forum, thereafter the State should not further involve itself in litigation. The matter thereafter should be left to the parties concerned to agitate further, if they so desire. When a State, after the judicial forum delivers a judgment, files review petition, appeal etc. it gives an impression that it is espousing the cause of a particular group of employees against another group of its own employees, unless of course there are compelling reasons to resort to such further proceedings. In the instant case, we feel the respondent has taken more than necessary interest which is uncalled for. This act of the State has only resulted in waste of time and money of all concerned.

h 25. In the light of the view taken by us, the civil appeals and WP (C) No. 191 of 1999 are allowed to the extent mentioned above. WP (C) No. 4128 of



1998 pending on the file of the Delhi High Court which has been registered here as TC (C) No. 56 of 1999 is withdrawn to the file of this Court and the same is dismissed. The respondent (Delhi Administration) shall pay costs in all the above matters. a

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(BEFORE G.B. PATTANAİK AND M.B. SHAH, JJ.)

SATNAM SINGH .. Appellant; b

Versus

STATE OF RAJASTHAN .. Respondent.

Criminal Appeal No. 64 of 1998†, decided on December 17, 1999

A. Penal Code, 1860 — S. 304-A or S. 302 — Appreciation of evidence — Homicidal death of deceased on being run over by a speeding truck established — FIR lodged immediately by PW 4 giving a vivid account as to how scooter of the deceased came under the truck belonging to appellant accused — Fact that the truck belonged to the accused read with the evidence of PW 5 that he saw the accused getting down from the truck and running away after the accident, establishing the fact that at the relevant point of time appellant was driving the truck which dashed against the scooter on which deceased was going — But evidence of two other eyewitnesses, PWs 6 and 8, found to be unreliable — On facts, held, prosecution failed to establish that the accused intentionally dashed against the scooter and crushed the deceased — Hence conviction under S. 302 set aside — Appellant liable to be convicted under S. 304-A and sentenced to two years' RI (Para 5) c

B. Criminal Trial — Appreciation of evidence — Though PW lodged FIR immediately after the occurrence but names of the eyewitnesses not mentioned therein by him — Held, that would not by itself impeach the credibility of the eyewitnesses — Criminal Trial — Witnesses — Eyewitness — Name not mentioned in FIR — Effect (Para 5) d

Satnamsingh v. State of Rajasthan, 1997 Cri LJ 1778 (Raj), reversed e

Appeal allowed R-M/ATZ/21933/CR f

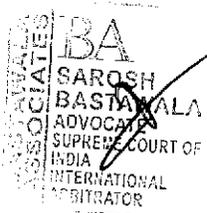
Advocates who appeared in this case :

Sushil Kr. Jain, Additional Advocate General for Rajasthan, Sushil Kumar and U.R. Lalit, Senior Advocates, (V.J. Francis, A. Radhakrishnan, R.P. Wadhvani, Ms Mirdula Agarwal, Mahabir Singh, A. Mishra and Ms Anjali Doshi, Advocates, with him) for the appearing parties.

The Judgment of the Court was delivered by g

PATTANAİK, J.— The appellant, a truck driver was convicted under Section 302 IPC and was sentenced to imprisonment for life by the learned Additional Sessions Judge, Sri Ganganagar in Sessions Case No. 33 of 1994. On appeal, the said conviction and sentence has been upheld by the High h

† From the Judgment and Order dated 31-1-1997 of the High Court of Rajasthan, Jodhpur in DB CrI. Appeal No. 132 of 1995



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is otherwise in consonance with the principles of law and not dehors the same. The statute itself expressly provides that it is only after registration that the Registrar or an officer authorised in that behalf can take certain steps and in the wake of such a statutory provision question of taking steps before the registration does not and cannot arise and it is this conclusion which has prompted the High Court to decry the validity of the circular. We also think it fit to lend our concurrence therewith. The judgment decrying the validity of the circular cannot possibly be faulted in any way whatsoever. a

13. Mr Mohan next contended that the conclusions as recorded in para 97 of the judgment in *Park View Enterprises v. State of T.N.*¹ (AIR at p. 301) however, cannot in any event be sustained since they tantamount to the issuance of a mandamus. While it is true that the direction of the nature as contained in sub-paras 1-16 under para 97 may be with a bit of stretch can be termed to be so but they themselves do not pose any difficulty in the matter of their implementation. In any event, however, since, some contentions have been raised in that regard and to avoid all future confusions we would clarify the same by recording that the authority concerned ought to act in accordance with the provisions of law and the same thus stands substituted for paragraphs noted above. With that clarification, the appeals are dismissed, with however no order as to costs. b

Civil Appeals Nos. 5914 A-E and 4597 of 1997 c

14. In view of the above judgment, these appeals are also dismissed with no order as to costs. d

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(BEFORE G.B. PATTANAIK, U.C. BANERJEE AND N. SANTOSH HEGDE, JJ.) e

GOVERNMENT OF ANDHRA PRADESH
AND OTHERS

.. Appellants;

Versus

A.P. JAISWAL AND OTHERS

.. Respondents.

Civil Appeals Nos. 4799-844 of 1997[†], decided on December 6, 2000

A. Service Law — Seniority — States Reorganisation — Integration of service and equation of posts — Determination of inter se seniority of Assistant Engineers of PWD of State of A.P. coming from Andhra and Telangana areas — Administrative Tribunal decision of 1982 in RP No. 910/77 as affirmed in *S.N. Murthy case* 1988 Supp SCC 540 — Extent of f

¹ AIR 1990 Mad 251

[†] From the Judgment and Order dated 14-7-1995 of the Andhra Pradesh Administrative Tribunal, Hyderabad in RP No. 2089 of 1989, OAs Nos. 37144, 36542 of 1990, 35574 of 1991, 6393 of 1992, 7318 of 1993, R. Nos. 3413 of 1989, 5995 of 1992, 7311 of 1993, RP No. 2765 of 1989, OA No. 6134 of 1992, RP No. 3405 of 1989, MA No. 6069 of 1992, RP No. 3478 of 1989, OAs Nos. 7250 of 1993, 2769 of 1993, 196 of 1994, 44343 of 1991, 36865 of 1990, 43975 of 1990, 6341, 46 of 1992 and 1323 of 1994, MA No. 2189 of 1994, OA No. 1465 of 1994, MA No. 1248 of 1994, RPs Nos. 1731, 1805 of 1989, MA No. 371 of 1995, MASR No. 1450 of 1995, MA No. 1319 of 1990, RP No. 11418 of 1989, OAs Nos. 6294, 6682 of 1992, MA No. 3958 of 1993, OAs Nos. 6400 of 1993, 3682 of 1994, 6195 of 1992, 151 of 1994, RP No. 3434 of 1989, OAs Nos. 44602-6 of 1990, 307 of 1993, OAs Nos. 308 and 306 of 1993. g



a finality of — Finding given in the said case that the retrospective regularisation of qualified Andhra Officers was valid, held, conclusive — What was left open therein, held, was only the question of applying the effects of the said finding — Hence, in the instant case, a Coordinate Bench of the Administrative Tribunal erred in reopening the question of retrospective regularisation and taking a divergent view — Precedents — Generally — Necessity to follow the rules of precedents, emphasised

b B. Service Law — Promotion — Non-promotion/Denial of promotion/Supersession — Relief — Administrative Tribunal's straight away direction for promoting the claimants, even it had found them to be senior to those who had superseded them, held, erroneous — Hence, grant of consequential benefits, held, also improper — Relief — Non-promotion — Court's direction for promoting the claimant — Propriety

c On the formation of the new State of Andhra Pradesh, a number of Engineers who were then holding the post of Assistant Engineers/Supervisors temporarily stood transferred to the new State. The Engineers from the Andhra State claimed that they were regularly appointed to clear vacancies and were therefore entitled, after regularisation, to count their seniority in the initial grade from the date of their original appointment and consequently in the promoted cadres also. This claim was disputed by the Engineers of the erstwhile Hyderabad State (to be called "Telangana Engineers") who further contended that the post of Sub-Engineer in the erstwhile State of Hyderabad was equivalent

d to the post of Assistant Engineer of Andhra. This matter came before the Supreme Court in *K.V. Narsimha Rao v. Union of India* 1981 2 SCC 706 : 1981 SCC (L&S) 452 and the Supreme Court remanded the matter to the A.P. Administrative Tribunal for a fresh decision. In the remanded petition (RP No. 910 of 1977) the Administrative Tribunal gave a decision in 1982 holding that:

e (i) those temporary Andhra Officers who by 1-11-1956 satisfied all the requirements of the rules regarding completion of probation should be treated not as a stopgap and fortuitous arrangement and that the length of service in consequence of such appointment would count towards seniority, and (ii) as to equation of posts the decision of the Central Government did not require any interference, but as and when the gradation list was finalised, if it was discovered that the Telangana Officers were entitled to be considered for

f appointment to any vacancy which had occurred before 1-11-1956, the State Government should revise the retrospective regularisation orders of such Andhra Officers so as to make room for the Telangana Officers who might have a claim to be appointed to such vacancies on the basis of their seniority in the common gradation list. This decision was affirmed by the Supreme Court in *Government of A.P. v. M.S.N. Murthy* 1988 Supp SCC 540 : 1988 SCC (L&S) 875. Pursuant to these decisions, the Government of A.P. issued a common gradation list of Assistant Engineers on 22-5-1989 (and a supplementary list on 22-8-1992) and a

g common gradation list of juniors/supervisors on 21-9-1992. Not satisfied with the said gradation lists, the Telangana Officers once again approached the Administrative Tribunal raising pleas similar to those taken in RP No. 910 of 1977. Treating that decision to be provisional, a Coordinate Bench of the Administrative Tribunal reconsidered those questions and gave a decision to the contrary. It also directed the Government to treat the Telangana Engineers as

h seniors to Andhra Engineers and to give the former pro forma promotions at various stages which were given to their Andhra counterparts and then to pay

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them all consequential monetary benefits with interest @ 10%. Allowing the State's appeals, the Supreme Court

Held :

In RP No. 910 of 1977, the Administrative Tribunal had specifically held that the regularisation of the temporary services of qualified Andhra Officers with retrospective effect was legally valid. It, however, left open the question of fixing the seniority of Andhra Engineers vis-à-vis Telangana Engineers taking into consideration whether Telangana Engineers had any claim to be appointed to any vacancy prior to 1-11-1956 based on the ranking obtained by them in the common gradation list. In the order impugned in the present case, the Administrative Tribunal has taken a totally divergent view as to the validity of such retrospective regularisation. The findings of the subsequent Bench of the Administrative Tribunal were rendered on the assumption that the finding of the earlier Bench was only provisional. There was no room for coming to such conclusion. The finding of the earlier Bench of the Tribunal was a conclusive finding and what was said to be provisional in that judgment was only the question of applying the effects of the said retrospective regularisation while considering the allotment of seniority in the gradation list to be prepared. In other words, such Telangana Engineers who had not acquired any right to hold any particular post prior to 1-11-1956, will be placed below the Andhra Engineers who got an earlier date of entry into service because of the retrospective regularisation. Therefore, the subsequent Bench of the Tribunal could not have reopened the main question of retrospective regularisation by the impugned judgment. (Paras 22 and 23)

K.V. Narsthma Rao v. Union of India, (1981) 2 SCC 706 : 1981 SCC (L&S) 452; *Government of A.P. v. M.S.N. Murthy*, 1988 Supp SCC 540 : 1988 SCC (L&S) 875, referred to

Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. With a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice, which is visible in plenty in the present case. The Administrative Tribunal has erred in reopening the question of retrospective regularisation of Andhra Engineers. (Paras 24 and 25)

Sub-Inspector Rooplal v. Lt. Governor, (2000) 1 SCC 644 : 2000 SCC (L&S) 213 : (1999) 7 Scale 466, applied

Moreover, the directions given to the Government by the Administrative Tribunal in the order impugned herein are without jurisdiction. Under the service conditions applicable to the respondents, there is no absolute right to them for promotion from stage to stage. They only had right to be considered for such promotion as and when a vacancy arose. Assuming for argument's sake that the Tribunal in the impugned judgment was justified in holding that the respondents were entitled to seniority over their Andhra counterparts, even then it could not have straight away directed their promotion and granted them all consequential monetary benefits, that too with interest. (Para 26)

State of Mysore v. P.N. Nanjundiah, (1969) 3 SCC 633, followed



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a Therefore, it is held that the Tribunal by the impugned order grossly erred in directing the promotions of the respondents as also the payment of consequential monetary benefits. The Supreme Court having held the retrospective regularisation of the Andhra Engineers as valid, the gradation lists prepared on that basis, therefore, must be held to be valid gradation lists. (Para 26)

Appeals allowed

H-M/23542/CL

Advocates who appeared in this case :

b P.P. Rao and Subodh Markandeya, Senior Advocates (Ms T. Anamika, Guntur Prabhakar, A.P. Jaiswal, K. Anant Reddy, M. Nagendra and M.L. Bajaj, Advocates, In-person) for the Respondents.

Ms Feroz Bano and Ms Chitra Markandeya, Advocates, with him, for the appearing parties.

Chronological list of cases cited

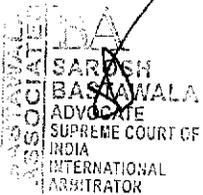
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- c 1. (2000) 1 SCC 644 : 2000 SCC (L&S) 213 : (1999) 7 Scale 466, *Sub-Inspector Rooplal v. Lt. Governor* 761c-d
2. (1969) 3 SCC 633, *State of Mysore v. P.N. Nanjundiah* 762d-e

The Judgment of the Court was delivered by

d **SANTOSH HEGDE, J.**— The State of Andhra Pradesh was formed w.e.f. 1-11-1956 by integration of erstwhile State of Andhra and the erstwhile State of Hyderabad. The constitution of the new State of Andhra Pradesh with the merger of civil service belonging to the two erstwhile States paved way for disputes between the civil servants of the two merging States and the present appeals are a group of one such continuing dispute which has not yet found a solution. These appeals involve the claim of the Engineers belonging to the Departments of Public Works of the two States. The dispute in particular pertains to the retrospective regularisation of service of the Engineers belonging to the former State of Andhra in the cadre of Assistant Engineers/Supervisors etc. as also the equation of posts then existing in the said Engineering services of the two States. Dozens of petitions filed before the High Court and the Service Tribunal, and over half a dozen visits to this Court did not finally conclude the pending dispute between the parties. e Consequently, the seniority/gradation list of these officers could not be finalised and the respective seniority of the officers remained nebulous. Ad hoc promotions given on the basis of various interim arrangements added to the heartburn of the officers. Thus, even after a lapse of over four decades, the officers concerned are in the portals of this Court. Though in their judgments the Tribunals and the courts have repeatedly blamed the State and the Central Government for the delay in finalising the seniority/gradation list, f the fact still remains that every attempt to finalise such list, though belatedly, could not succeed because of the intervening judicial orders. The blame for this protracted litigation should be shared by everyone concerned equally. It will be our endeavour in these appeals to finalise all the pending disputes between this group of litigants once and for all. g

h 2. For the purpose of disposal of these appeals, it may not be necessary for us to trace the history of this litigation in its entirety. Suffice it to say that on the formation of the new State of Andhra Pradesh, a number of Engineers



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who were then holding the post of Assistant Engineers/Supervisors temporarily stood transferred to the new State. It is the contention of the Engineers from the erstwhile State of Andhra that though they were regularly appointed to clear vacancies, orders as to their regular appointment were delayed by the administration due to administrative exigencies and for no fault of theirs, hence ultimately when their services were regularised, they were entitled to count their seniority in the initial grade from the date of their original appointment and consequently in the promoted cadres also. While the Engineers of the erstwhile Hyderabad State (to be called "Telangana Engineers") contend that these Engineers of Andhra were never appointed regularly, their appointments were temporary and fortuitous, hence they were not entitled to count their seniority on the basis of their initial service i.e. on the basis of their date of initial appointment and their seniority could be counted only from the date from which their services were regularised by the successor State, and also it was the contention of the Telangana Engineers that the post of Sub-Engineer in the erstwhile State of Hyderabad is equivalent to the post of Assistant Engineer of Andhra.

3. The State of Andhra Pradesh and the Union of India took different decisions at different stages and ultimately in the course of the litigation, the matter came up before this Court when the aggrieved party challenged the order of the Tribunal dated 27-6-1980, and this Court as per its decision dated 5-2-1981[†] gave the following directions: (SCC p. 709, paras 5 and 6)

"(1) The Central Government will consider the rival contention of Andhra Officers and Telangana Area Officers as to whether the services of the Andhra Officers were on stopgap and fortuitous arrangements.

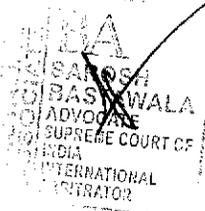
(2) The Central Government will have to decide whether the regularisation of promotions of Andhra Engineers and relaxation of Rules and retrospective regularisation was permissible.

(3) Whether the retrospective regularisation and relaxation of rules will amount to any change in the conditions of service or will result in denial of fair and equitable treatment to any of the officers affected thereby.

The Central Government will reach a decision afresh after affording an opportunity to the officers concerned i.e. officers of the erstwhile States of Andhra and Hyderabad and submit its findings with reasons thereof to this Court within two months from today."

4. As directed by this Court in the abovesaid decision, the Central Government after hearing the officers concerned submitted a report to this Court dated 10-7-1981 and after considering the said report, this Court took the view that the pending civil appeals could not be decided by it unless the parties concerned were given an opportunity of placing the respective contentions before the Administrative Tribunal and also came to the

[†] *K.V. Narsimha Rao v. Union of India*, (1981) 2 SCC 706 : 1981 SCC (L&S) 452



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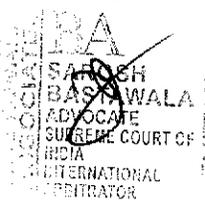
- conclusion that since the Tribunal while passing the impugned order, did not have the benefit of the finding of the Central Government, it felt that it could
- a be eminently just and proper to set aside the judgment of the Administrative Tribunal dated 27-6-1986 and remand the matter to the said Tribunal for fresh decision and while doing so this Court specifically stated that it was not expressing any opinion as to the correctness or otherwise of the finding reached by the Central Government or on the merits of the case or even on the judgment of the Tribunal which was under appeal. It thus left to the
- b Tribunal to re-examine the correctness or otherwise of all issues including the finding given by the Central Government dated 10-7-1981. It further directed the Tribunal to afford all opportunities to the parties concerned to place their respective claims and contentions on merits in the form of additional pleadings with respect to the latest decision of the Central Government. Thus, the ball was transferred once again to the Tribunal. On
- c remand, the Tribunal took up for consideration the matter all over again in RP No. 910/77 and other connected matters. In this bout of litigation, the Tribunal framed the following questions for its consideration:

“The main points on which there is controversy between Andhra and Telangana Region Officers are as follows:

- d (A) Whether appointments of the Andhra Engineers under Rule 10(a)(i)(1) of the Madras/Andhra State and Subordinate Service Rules prior to 1-11-1956 were a stopgap and fortuitous arrangement.
- (B) Whether the ‘retrospective regularisation’ of the services of the Andhra Engineers referred to in Item (A) ordered by the Andhra Government after 1-11-1956 was valid.
- e (C) Whether those of the Andhra Engineers whose services were so regularised could be allowed to count temporary service as Junior Engineers, Draughtsmen for the purpose of eligibility to be promoted as Assistant Engineers as required in Rule 5 of the Special Rules for the Madras Engineering Service and whether the claim that Rule 6 of the Special Rules which authorised the State Government to promote
- f officers who had not completed 5 years’ service as Junior Engineers could be availed of in the case of the Andhra Engineers concerned.
- (D) The Telangana Officers have also questioned the final decision of the Central Government on the question of equation of posts.”

- g 5. The question of regularisation of temporary Andhra Engineers transferred to the new State of Andhra Pradesh was discussed by the Tribunal in this round of litigation with regard to all its facets as it was argued before it and in regard to the points which arose for its consideration, the Tribunal considered the arguments elaborately and came to the following conclusion and issued appropriate directions:

- h “To sum up, our findings on the various issues discussed earlier in this part are as follows:



(1) As regard the question whether the appointments of the Andhra Officers who were appointed temporarily under Rule 10 (a)(i)(1) of the Madras/Andhra State and Subordinate Service Rules were a stopgap and fortuitous arrangements, it is our opinion that the temporary appointments made before 1-11-1956 of only those officers who were not fully qualified for appointment by 1-11-1956 and in whose case, therefore, it would not have been possible for the State Government without relaxation of the Rules relating to probation and length of service to make a reference to the Public Service Commission before 1-11-1956 for approval of their temporary appointments, should be treated as having been made as a stopgap or fortuitous arrangement. We consider that the findings of the Central Government in this respect should be implemented with the modification that the services of those Andhra Officers who had satisfactorily completed their probation and also had the required length of service in lower rank before 1-11-1956 should not be treated as having been made as a stopgap or fortuitous appointment even if the approval for the Public Service Commission had not been obtained in their case before 1-11-1956. The common gradation lists of Assistant Engineers, Executive Engineers and Superintending Engineers should be finalised on the basis of the Central Government's finding with the modification mentioned above. If there are any gaps in the period of temporary service before 1-11-1956 and if on examination of such gaps it is discovered that they were due to reasons which could show that the earlier period of appointment was purely stopgap or fortuitous then such earlier periods should be excluded from the period which could be counted for seniority.

(2) We consider that the retrospective regularisation by the State Government of the services put in by the Andhra Engineers who had been appointed temporarily under Rule 10(a)(i)(1) before 1-11-1956 should be treated as provisional and should be reviewed after the finalisation of the common gradation lists in the manner stated above and if it is discovered that any particular Telangana Officers are entitled, on the basis of their seniority in the common gradation lists, to be considered for appointment to any vacancies which had occurred before 1-11-1956, the State Government should revise the retrospective regularisation orders of the Andhra Officers concerned so as to make room for the Telangana Officers who might have any claim to be appointed in such vacancies.

(3) We are of the opinion that the Central Government's finding that for the purpose of counting the minimum necessary service in the lower rank required for acquiring eligibility to be promoted to the next higher rank, only regular service in the lower rank should be taken into consideration is quite equitable and fair. We also consider that the provisions of Rule 6 of the Special Rules, which permits the

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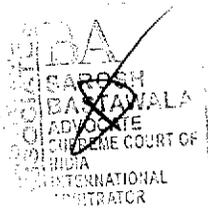
a State Government to make appointments to the posts of Assistant Engineers of those persons who had not satisfied the requirements of Rule 5 of the Special Rules is only an enabling provision and does not make the provisions of Rule 5 redundant. Hence, it would not be correct to state that all those appointed as Assistant Engineers without satisfying the requirement of Rule 5 could be treated as having been appointed under Rule 6.

b (4) We consider that in regard to the equation of posts the decision of the Central Government does not need any re-examination.”

c 6. While coming to this conclusion, it observed that all services under Rule 10(a)(i)(1) are not necessarily of a stopgap and fortuitous nature although initially the appointments in some cases may have been intended to be temporary in nature and the authorities concerned have subsequently examined the nature of service during the period in which a person held the appointment under the abovesaid Rule and have regularised such portions of their services as is considered by them to be neither stopgap nor fortuitous. It also held that it is quite clear that the temporary appointment of Andhra Officers before 1-11-1956 could not have been a part of stopgap or fortuitous arrangement because the arrangement was in most case, of a long-term nature and that it is clear that the length of service put in by the Andhra Officers in any category in consequence of the temporary appointments before 1-11-1956 cannot be summarily excluded for the purpose of counting the length of continuous service put in by them in that category as being made in a purely stopgap or fortuitous arrangement. It further held that in its opinion the temporary appointments of all Andhra Officers who by 1-11-1956 had satisfied all the requirements of the Rules regarding compulsory completion of probation and completion of length of service in the lower rank have to be treated as not having been made as a stopgap or fortuitous arrangement.

f 7. In regard to the equation of posts, it came to the conclusion that the said exercise is purely an administrative function and in the ordinary course, it is not open to the court to consider whether the equation of posts made by the Central Government is right or wrong. The area available for judicial interference in such executive action, according to the Tribunal, was to find out whether the four principles agreed upon at the Chief Secretaries' Conference have been properly taken into account or not. Apart from this narrow area, it held that the courts have no jurisdiction to reassess the decision arrived at by the Central Government, thus upheld the equation undertaken by the Central Government.

g 8. It also rejected the argument of the Telangana Engineers that by retrospective regularisation of the Andhra Officers, there has been any violation of Articles 14 and 16 of the Constitution, and further held that the State Government concerned was competent to issue the said regularisation order as per the prevailing rules. It also rejected the contention of the h Telangana Engineers that the act of regularisation of Andhra Officers was



opposed to the States Reorganisation Act. It, however, held that as decided by the Central Government, these Andhra Engineers were not entitled to count the temporary service for the purpose of Rule 5 of the Special Rules and such temporary period cannot be counted for seniority in the gradation list of the Andhra and Telangana Officers. But for this limited exclusion the Andhra Engineers were held to be entitled to count their seniority from the date of their initial entry into service in the erstwhile State of Andhra. a

9. Against the said decision of the Tribunal delivered in RP No. 910/77, the aggrieved parties preferred special leave petitions before this Court. In the said petitions, this Court vide its order dated 26-10-1987[‡] held thus: (SCC p. 541, paras 1-3) b

“1. The Andhra Pradesh Administrative Tribunal rendered a decision in 1982 (RPs Nos. 910 of 1977 and 1051 of 1978) by a three-member Bench in regard to employees of the State Government in the category of Junior Engineers and Assistant Engineers. In the absence of any challenge to the judgment of the Administrative Tribunal, it became final and the State became obliged to give effect to it in due course. c

2. In 1984 a Coordinate Bench of the Tribunal adopted a different view in regard to the same matter. A challenge has been raised against that decision and the matter is pending in this Court. The question that arises for consideration now is whether the decision of 1982, which became final, should or should not be implemented. In the absence of any impediment in the matter of implementation of the 1982 decision, we see no reason why implementation should be delayed. After all, the decision has become final and is binding on parties including the State Government. No contrary direction has been given by this Court in the other matter, which is still pending. d e

3. In the circumstances, we do not want to entertain the special leave petitions and would like to reiterate that the decision of the Tribunal rendered in 1982 be enforced only subject to any other direction that may be given by this Court while disposing of the pending matter. The State Government is directed to fully implement the order of 1982 as indicated above within a period of six months from today. We hope and trust that this order will be allowed to be implemented and no order may be made by any other court to restrain the implementation of this order.” f

10. Thus, we notice that the order made by the Tribunal in RP No. 910/77 came to be approved by this Court as having become final.

11. After the orders of this Court in the above special leave petitions and taking into consideration the directions of the Tribunal in RP No. 910/77 the Government of Andhra Pradesh prepared a fresh provisional common gradation list dated 3-10-1985 of the Assistant Engineers and called for objections. It is stated that after considering the objections and receiving the approval of the State Government, it finalised a common gradation list in the category of Assistant Engineers and the same was issued on 22-5-1989. g h

[‡] *Govt. of A.P. v. M.S.N. Murthy*, 1988 Supp SCC 540 : 1988 SCC (L&S) 875

a Subsequently, as it was found that there was some mistake in regard to 11 Assistant Engineers in the abovementioned list, a supplementary list dated 22-8-1992 was issued. Similarly, a final common gradation list in respect of juniors/supervisors was also issued on 21-9-1992.

b 12. Having not been satisfied with the said gradation list prepared consequent to the directions issued by the Tribunal in RP No. 910/77, as approved by this Court, the Telangana Officers came back to the Tribunal once again by way of a batch of petitions numbered as RP No. 2089/89 and connected matters seeking quashing of the impugned gradation list and praying for consequential benefits. It is to be noted that by the time these petitions were preferred before the Tribunal, nearly 33 years had already gone by and naturally most of the Engineers who were in service on 1-11-1956 had retired by then and the object of litigation had boiled down to the entitlement of consequential benefits only. In this batch of petitions before c the Tribunal, almost similar contentions as those raised before the Tribunal in RP No. 910/77 were again raised. Primarily, it was contended that the retrospective regularisation of the services of Andhra Engineers was bad in law, hence, seniority assigned to them in the impugned gradation list based on such regularisation is unsustainable in law. They also questioned the non-equation of Telangana Sub-Engineers with the Assistant Engineers of d Andhra. It was also contended that there was phenomenal delay in preparation of these gradation lists. Consequently, many of their promotions were denied to them. It was also the argument on behalf of Telangana Engineers that as per the existing Rules of Madras Engineering Service, the appointments of the Andhra Engineers who stood transferred to the new State of Andhra Pradesh; not having been regularised at the time of merger, the e said appointments were only temporary and fortuitous, hence they could not have been treated as permanent Engineers for which reliance was placed on Rules 10 and 39 of the abovesaid Rules.

f 13. In the impugned judgment before us now, the Tribunal came to the conclusion that the finding given by the earlier Bench in RP No. 910/77 was only provisional, hence it proceeded to reconsider all those questions once again independently and came to the conclusion that the power conferred under Rules 10 and 39 of the Madras Rules is a power coupled with a duty to act reasonably and fairly on relevant material. It held that the said power cannot be exercised to alter the list of approved candidates prepared by the Public Service Commission for direct recruitment or even recruitment by transfer by giving any earlier date of commencement of probation to those g lower in the ranking list. It also held that the said power cannot be exercised for affecting the rights of persons already on probation in the service. It reiterated that the power conferred on the Government cannot be exercised to give a date of commencement of probation without the existence of a vacancy in the cadre to be filled up from that particular source of appointment, namely, the various categories mentioned in Rule 2 in the ratio h prescribed. It also came to the conclusion that without these essential ingredients existing, the theory of power of retrospective regularisation of the

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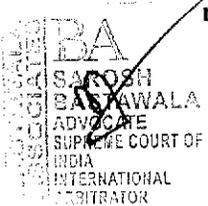
services will sabotage the scheme of Rules and also the concept of seniority and also violates Articles 14 and 16 of the Constitution. With the above finding, the Tribunal by the impugned judgment held that in view of the prevailing circumstances, the occasion to the Government to exercise the jurisdiction under Article 23-A (*sic* Rule 23(a) did not arise, and in spite of the same the Government did exercise the power under Rule 23 giving retrospective regularisation of services of Andhra Engineers which is not contemplated by any statutory provision. It held that by retrospective regularisation, all Junior Engineers and Supervisors in the feeder category coming only from Andhra State stood to benefit by which process the Government had ignored the rights of Telangana Engineers and this, according to the Tribunal, was contrary to the earlier judgment in RP No. 910/77. a
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14. It levelled a serious charge on the State Government for delaying the preparation of the common gradation list. On the above basis, it came to the specific conclusion that the Andhra Engineers who were transferred to the new State of Andhra Pradesh on its merger on 1-11-1956 who came in as temporary Engineers could not have had the benefit of regularisation of their services by the successor State since they were persons holding temporary, ad hoc and fortuitous posts. It held that under the existing Rules, the Governments concerned did not have the power to make such retrospective regularisation and those regularisations, when effected, would affect the rights of other allottees to that State and also will be in violation of Articles 14 and 16 of the Constitution. It also specifically held that the Sub-Engineers of Telangana ought to have been equated with the Assistant Engineers of Andhra. c
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15. Having found that the quashing of the lists based on the above finding would be futile, the Tribunal by the impugned order directed to promote the applicant/petitioner Engineers before it from a date on which the Andhra Engineers whose regularisations were challenged before it, were so promoted to different posts in the hierarchy of PWD. It also directed that they should be paid all consequential monetary benefits with 10% interest on such amount payable. It also issued different directions in the connected matters based on its findings in the main matter. e
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16. Being aggrieved by the said judgment of the Tribunal dated 14-7-1985 made in RP No. 2089/89 and other connected matters, the State of Andhra Pradesh has preferred the above-noted civil appeals by leave of this Court.

17. We have heard Shri P.P. Rao, learned Senior Advocate for the appellant, Shri Subodh Markandeya, learned Senior Advocate for some of the contesting respondents, Shri K. Anant Reddy and some other respondents-in-person. We had permitted the parties to submit written submissions which have been filed. In the written submissions filed on behalf of the respondents appearing in person, a statement is made that they were not heard sufficiently by us. We must record that this statement is factually g
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a incorrect. After we heard the learned counsel for the appellant, we did hear the individual respondents-in-person to the extent we thought it necessary. It is only when we found that the arguments addressed were not to the point and there was digression, we restricted the arguments of the parties-in-person, but gave them opportunity to file their written submissions which we have perused.

b 18. Mr P.P. Rao, learned Senior Counsel appearing for the State of Andhra Pradesh contended that the Tribunal by the impugned order has practically sat in review against the judgment delivered by an earlier Coordinate Bench of the same Tribunal which he contends is without jurisdiction inasmuch as the points which have been finally decided by the Tribunal in RP No. 910/77 having attained finality, the same could not have been reopened by the successor Bench. He also contended that the Tribunal by the impugned order erred in issuing a mandamus to the State Government c to straight away grant pro forma promotions to the applicants before the Tribunal and further direct payment of retrospective monetary benefits with interest. He contended that courts normally do not have such power of directing promotions.

d 19. He also contended that the various directions issued in other connected matters are based on the question of retrospective regularisation granted to Andhra Engineers and based on the erroneous equation of Sub-Engineers of Telangana. Hence, if his argument in regard to these points is correct, none of these applicants/petitioners will be entitled to any such direction.

e 20. On the contrary on behalf of the respondents, it was contended that the Tribunal in the impugned order was justified in holding that the retrospective regularisation of the Andhra Engineers was illegal, without authority of law and opposed to Articles 14 and 16 of the Constitution. It was further argued that various directions issued by this Court in the earlier cases were ignored by the Government in preparing the gradation list and by the ranking assigned to the Telangana Engineers in the gradation list, great f injustice is caused to them and all their promotional prospects were destroyed and they were put to great humiliation of having to work under their juniors. They contended that it was because of the enormous delay caused in preparing the gradation list that many of them could not get timely promotions, hence had to retire without the legitimate due promotions, so the Tribunal was justified in directing the pro forma promotions and also the issuance of direction to pay the consequential monetary benefits.

g 21. In deciding the question whether the Tribunal in the impugned order was justified in reopening the question earlier decided by the Tribunal in RP No. 910/77, we will have to first decide the question whether the finding of the Tribunal in RP No. 910/77 was final or not, and if so, to what extent. In this process even at the cost of repetition, we will have to consider what exactly the Tribunal in RP No. 910/77 decided and what is the finding of the Tribunal in the impugned order.

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SAROSH BASTAWALA
ADVOCATE
SUPREME COURT OF
INDIA
INTERNATIONAL
OPERATOR

22. The Tribunal as per its earlier order in RP No. 910/77 came to the specific conclusion that the temporary appointments of the Andhra Officers made before 1-11-1956 could not have been a part of stopgap or fortuitous arrangement. It also held to so treat these appointments would be discriminatory merely because the State Government did not obtain the approval of the Public Service Commission for these appointments prior to 1-11-1956. Therefore, the Tribunal in that case was of the final opinion that those temporary Andhra Officers who by 1-11-1956 satisfied all the requirements of the rules regarding completion of probation should be treated not as a stopgap and fortuitous arrangement. The Tribunal also held that it was satisfied that it would be perfectly in accordance with the principles laid down at the Chief Secretaries' Conference to count for seniority the temporary services rendered by such officers. It was also the opinion that such regularisation was in no way contrary to the States Reorganisation Act and that such regularisation was necessary in the interest of equity and justice. In regard to the question of equation of posts involved, it held that the decision of the Central Government did not require any interference, but to a limited extent, the said Tribunal held that as and when the gradation list was finalised, if it was discovered that the Telangana Officers were entitled to be considered for appointment to any vacancy which had occurred before 1-11-1956, the State Government should revise the retrospective regularisation orders of such Andhra Officers so as to make room for the Telangana Officers who may have a claim to be appointed to such vacancies on the basis of their seniority in the common gradation list. In our opinion, by this finding the earlier Bench of the Tribunal specifically held that the regularisation of the temporary services of qualified Andhra Officers with retrospective effect was legally valid. It, however, left open the question of fixing the seniority of Andhra Engineers vis-à-vis Telangana Engineers taking into consideration the fact whether Telangana Engineers had any claim to be appointed to any vacancy prior to 1-11-1956 based on the ranking obtained by them in the common gradation list.

23. The Tribunal by the impugned order took a totally divergent view as to the validity of such retrospective regularisation. It held that the power under Rules 10, 23(a) and 30 of the Madras Rules which governed the situation at the relevant point of time did not provide for retrospective regularisation. It held that these Rules which confer power are coupled with duty to act reasonably. Based on the above conclusion, this Bench of the Tribunal held:

“Without these essential ingredients existing, the theory of power of retrospective regularisation of services will sabotage the scheme of the Rules and also concept of seniority and also violating Articles 14 and 16 of the Constitution.” It also held the Government guilty of delay in preparation of gradation list. These findings of the subsequent Bench of the Tribunal in the impugned judgment were rendered proceeding on a basis that the earlier finding of the Tribunal was only provisional. We have already noticed that there is no room for coming to such conclusion



a and that the finding of the earlier Bench of the Tribunal was a conclusive finding and what was said to be provisional in that judgment was only the question of applying the effects of the said retrospective regularisation while considering the allotment of seniority in the gradation list to be prepared. In other words, with reference to such
b Telangana Engineers who had not acquired any right to hold any particular post prior to 1-11-1956, they will be placed below the Andhra Engineers who got an earlier date of entry into service because of the retrospective regularisation. Therefore, in our opinion, the subsequent Bench of the Tribunal could not have reopened the main question of retrospective regularisation by the impugned judgment.

c 24. Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice, which we see in plenty in this case. This Court in the case of *Sub-Inspector Rooplal v. Lt. Governor*¹ held thus: (SCC p. 654, para 12)

d “At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was
e incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law from the foundation of
f administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate
g court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement.”

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1 (2000) 1 SCC 644 : 2000 SCC (L&S) 213 : (1999) 7 Scale 466



25. Applying the above principle to the facts of the case in hand, in our opinion, the Tribunal in the impugned judgment has erred in reopening the question of retrospective regularisation of Andhra Engineers. a

26. The Tribunal, in this case, after holding retrospective regularisation of Andhra Engineers to be erroneous committed another error in proceeding to grant relief to the respondents without quashing the gradation list. In this regard, it held in view of the fact that the respondents had already retired, no purpose will be served by quashing the list, therefore, it directed the Government to treat the Telangana Engineers as seniors to the Andhra Engineers of the same cadre and issued a further direction to give these Telangana Engineers pro forma promotions at various stages which were given to their Andhra counterparts and then to pay all consequential monetary benefits with interest @ 10%. These directions, in our opinion, are without jurisdiction. Under the service conditions applicable to the respondents, there is no absolute right to them for promotion from stage to stage. They only has right to be considered for such promotion as and when a vacancy arose. Assuming for argument's sake that the Tribunal in the impugned judgment was justified in holding that the respondents were entitled to seniority over their Andhra counterparts, even then it could not have straight away directed their promotion and granted them all consequential monetary benefits, that too with interest. This Court has held in a number of cases that the courts cannot issue a mandamus to promote. In the case of *State of Mysore v. P.N. Nanjundiah*² this Court held as follows: (SCC Headnote) b

“As to the issuance of *mandamus* by the High Court, the High Court ought not to issue writs directing the State Government to promote the aggrieved officers with retrospective effect. The correct procedure for the High Court was to issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to his seniority and fitness the 1st respondent should have been promoted on the relevant date and so what consequential benefits should be allowed to him.” c

This decision has been consistently followed by this Court in a catena of other cases. We are sorry to note that the Tribunal did not apply these principles in the instant case. Therefore, we are of the opinion that the Tribunal by the impugned order grossly erred in directing the promotions of the respondents as also the payment of consequential monetary benefits. We, having held the retrospective regularisation of the Andhra Engineers as valid, the gradation lists prepared on that basis, therefore, must be held to be valid gradation lists. The impugned order of the Tribunal holding otherwise, has to be set aside. In view of this finding of ours, the consequential relief granted to the applicants in the main batch of petitions has to be quashed, and it is ordered accordingly. d

27. The Tribunal has also issued some specific directions in favour of the applicants in OA No. 37144 of 1990 and other connected matters considered e

² (1969) 3 SCC 633 f



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by it in the impugned judgment. These directions are also issued consequent to its finding in the main issue, namely, the retrospective regularisation of

a Andhra Engineers. If the said retrospective regularisation is valid, as held by us, then the applicants in the above connected cases also will not be entitled to any such directions as have been issued in the impugned orders. Therefore, the directions issued in these cases also will have to be set aside so far as they are dependent on the question of retrospective regularisation of the Andhra Engineers concerned.

- b 28. Accordingly, these appeals are allowed, the judgment and orders impugned in these appeals are set aside and the applications/petitions from which these appeals arise are dismissed. No orders as to costs.

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END OF THE VOLUME

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