BEFORE THE NATIONAL GREEN TRIBUNAL (SZ), SITTING AT CHENNAI

I.A. No. 48/2020

In

Appeal No. 14/2020

BETWEEN:
Yelahanka Puttenahalli Lake
and Bird Conservation Trust
(Regd) …**APPLICANT/APPELLANT**

AND
Ministry of Environment & Forest
And Ors. …**RESPONDENTS/RESPONDENTS**

INDEX

Place: Bangalore Advocate for Respondent No. 4

Date: 11/06/2021

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WRITTEN SUBMISSIONS ON BEHALF OF RESPONDENT NO.4 TO THE APPLICATION FOR CONDONATION OF DELAY

The Respondent No.4 seeks to submit as follows:

1. The present appeal has been filed inter-alia seeking to challenge the Environmental Clearance ('EC') granted to the Respondent No.4. The EC itself provides that appeal lies to this Hon'ble Tribunal within 30 days. The appeal is filed under Section 16 of the National Green Tribunal Act, 2010 ('NGT Act'). The proviso to the section provides that delay of up to 60 days can be condoned by this Hon'ble Tribunal provided sufficient cause is shown. The NGT Act does not provide for condonation of delay beyond 60 days.

2. In order to overcome the statutory bar, the Appellant has filed the instant Interlocutory Applications bearing IA 48/2020 to condone the delay in filing the said Appeal claiming that, the liberty granted by the Hon'ble Supreme Court in SLP (C) 10555/2019 *vide* its Order dated 10.06.2020 would vest this Hon'ble Tribunal with jurisdiction to hear the Appeal. However, the Supreme Court by way of its Order dated 09/09/2020 in M.A No. 1527 of 2020 has clarified that all contentions including that of limitation is to be decided by this Hon'ble Tribunal. Therefore, the liberty granted stands modified. The parties have argued on the jurisdictional point of limitation. In terms of *Ujjam*

Bai v. State of UP, (AIR 1962 SC 1621) the jurisdictional point of limitation has to be decided prior to entertaining the appeal on merits.

Submissions of Respondent No.4

3. **The Appeal is barred by time:** This Hon'ble Tribunal has been created under the NGT Act and vested with jurisdiction under Section 14 and 16 of the NGT Act to entertain challenges to EC only if such appeals are filed within 30 days from the date of publication of the EC in newspaper and are further vested with jurisdiction to condone delay of up to 60 days if sufficient cause is shown. In the present case, the delay is more than 1700 days. If the delay is condoned, the entire statutory scheme will be bypassed and it will be contrary to the intent and object of the NGT Act. The Hon'ble Supreme Court could not have intended to grant liberty so as to reduce the statutory scheme, object and intent to naught. Hence, the liberty granted ought to be understood in the context of the pleadings and contentions raised before the Hon'ble Supreme Court.

4. **Appeal would be barred by limitation even after excluding the period under Section 14 of the Limitation Act-** The Writ Petition before the Hon'ble High Court of Karnataka was filed only on 11.06.2018 i.e. more than 2.5 years after expiry of limitation *(Pg 229 of the Appeal)*. Even assuming without conceding that Section 14 of the Limitation Act was applicable to the instant matter, and the period the date of filing Writ Petition till the date of disposal of the SLP is excluded, the instant appeal would still be barred by more than 1000 days. It is evident that only to overcome the statutorily prescribed period of limitation, the Appellants chose to approach the Hon'ble High Court and not the statutory special tribunal.

5. **Appellant was aware of the EC in the year 2016-** It is submitted that the Environmental Clearance was issued on 01.09.2015 by the SEIAA and was advertised in two newspapers (English and Vernacular) on 06/08/2015 and 08/08/2015 by the Respondent No.4. *(Annexure R2 of the Counter Statement*

to IA for Condonation of Delay) The representative of the Appellant has clearly admitted in the Application for Condonation that he was well aware of the Power Plant and was familiar with the EC since the year 2016. *(Pg 5 of Affidavit for condonation of delay, Para 6)* The present appeal is filed in 2020 without any justification or sufficient cause. Therefore, the present appeal ought to be rejected solely on that the ground that the Appellant, even with constructive as well as actual notice of the grant of EC, elected not to file a challenge for over 1000 days and rendering itself estopped from thereafter raising the challenge.

6. **The Order of Supreme Court does not condone the delay:** The order of the Supreme Court does not expressly or impliedly condone the delay in the filing of the Appeal. The Appellants had not challenged the EC granted to Respondent No.4 in Writ Petition bearing No.25189/2018 *(Reliefs sought for in the Writ Petition are found on Pg 245 of the Appeal*). Therefore, the scope of the present appeal is completely different from the SLP in which liberty was granted. Hence, the liberty granted by the Hon'ble Supreme Court could not be stretched so as to include and condone delay in filing of a relief which was never sought for in the writ or appeal proceedings.

7. **The Order dated 10.06.2020 was clarified by the Supreme Court *vide* Order dated 09.09.2020**- As the Appellant sought to misuse the liberty granted by the Hon'ble Supreme Court by filing of the present appeal, the Respondent No.4 had filed M.A No. 1527 of 2020 before the Hon'ble Supreme Court seeking a clarification in this regard. The M.A has been disposed of with the following observation: "*However, all contentions of the parties are left open to be decided by the National Green Tribunal*". This was because the Hon'ble Supreme Court could not prejudge the matter before this Hon'ble Tribunal as the present Appeal was already pending. The Hon'ble Supreme Court felt it appropriate not to issue any further clarification regarding the scope of the liberty granted when the matter was pending before this Hon'ble Tribunal and sought that this Hon'ble Tribunal look into

the all contentions including whether the scope of the liberty granted would cover the present appeal. Therefore, it is submitted that this Hon'ble Tribunal has complete jurisdiction to decide all contentions including as to whether the delay ought to be condoned or not. Therefore, the delay cannot be deemed to be condoned on the basis of the order of the Hon'ble Supreme Court dated 10/06/2020.

8. **Hon'ble Supreme Court could not have directed any statutory tribunal to act outside its scope of powers and contrary to the statute even if the said Order was passed under Section 142 of the Constitution-** It is a settled principle that no directions can be passed to any statutory tribunal to act outside the scope of its powers. This is so even when an order is passed under Article 142 as it is settled law that vesting of jurisdiction cannot be in violation of statute. In ***Nidhi Kaim vs. State of M.P.*** (2017) 4 SCC 1, (Para 91) the Hon'ble Supreme Court has stated that "*In terms of the judgment in **Supreme Court Bar Assn case**, with which we express our unequivocal concurrence, it is not possible to accept that the words 'complete justice' used in Article 142 of the Constitution, would include the power to disregard even statutory provisions…."(para 91 of the Judgment attached at Pg.7 herein*).

9. **Bar of laches ought not to be ignored so as to have the effect of reviving a claim otherwise barred by the law of limitation**. In *C Jacob v. Director of Geology & Mining*, (2008) 10 SCC 115, Para 8-16,*(Attached herewith at Pg 77)* and *Union of India v MK Sarkar,* (2010) 2 SCC 59 *(Attached herewith at Pg 90)* it was made clear that the law of limitation or the bar of laches ought not to be ignored, so as to have the effect of reviving a 'stale claim', i.e. a claim otherwise barred by the law of limitation. It was further held that an order directing consideration of issue/representation on merits does not revive the limitation, which is still to be determined with reference to the original cause of action. In the instant matter, it is the Appellant's case that the cause

of action stood revived by virtue of the Order dated 10.06.2020 and such a contention is thus unsustainable.

10. **Finding on Jurisdiction made at the time of dismissal cannot confer jurisdiction where lacking-** As per the judgments of *Govindasami Pillai v TM Srinivasa Chettiar*, AIR 1969 Mad 172,at Para 8 (herewith attached at Pg No.101) and *Union of India v. Zarin Taj Begum* 1997-2LW-845 at Para 3 *(herewith attached at Pg No.107)* , the Hon'ble Madras High Court has held that a finding on jurisdiction made at the time of dismissal cannot confer jurisdiction which is otherwise lacking. Therefore, once the Court refused to exercise jurisdiction citing this Hon'ble Tribunal as the appropriate forum, it is submitted that none of the observations made by the High Court (of which Para 5 of Pg. 267, Appellant's Volume was relied upon by the Appellant) on the interpretation of reliefs sought hold any value.

11. **The appeal deserves to be dismissed at the threshold on ground of limitation-** The Hon'ble Supreme Court in the case of *Ujjam Bai v. State of UP*, AIR 1962 SC 1621, at Para 19 *(attached herewith at Pg No.112)* states that "*The question, whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable 'at the commencement, not at the conclusion, of the inquiry'.* Therefore, the issue of jurisdiction ought to be disposed of at the threshold before merits are examined. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of *Hardesh Ores v. Hede and Co. (2007) 5 SCC 614 at Paras 25 and 33 (attached herewith at Pg No.190)*, wherein it was emphasised that when it is evident from the averments from the plaint that a suit is barred by time on the face of it, Courts should refuse to entertain the same at the very outset by rejection of plaint under Order VII Rule 11(d) of the Code of Civil Procedure, 1908. In the instant matter, the condonation of delay application should therefore be considered and disposed of by the Tribunal at the threshold, otherwise if the Tribunal should proceed on the

merit of the case it would have the effect of having allowed the Application of the Appellant and the delay having been condoned.

Wherefore, it is prayed that the instant application for condonation of delay be dismissed in the interests of Justice and Equity.

Place: Bangalore

Date: Advocate for the Respondent No.4

THE SUPREME COURT CASES

(2017) 4 SCC

(2017) 4 Supreme Court Cases 1

(BEFORE JAGDISH SINGH KHEHAR, C.J. AND KURIAN JOSEPH AND ARUN MISHRA, JJ.)

NIDHI KAIM AND ANOTHER .. Appellants;

Versus

STATE OF MADHYA PRADESH AND OTHERS .. Respondents.

Civil Appeals No. 1727 of 2016† with Nos. 1720-24, 1726, 1728-29, 1733-74, 1776-1820, 1822-28, 1830-52 of 2016, 2503-504 of 2017‡ and 2505 of 2017††, decided on February 13, 2017

A. **Education and Universities — Examination — Unfair means/Cheating/Leakage of question paper/Cancellation of examination — Mass copying and use of unfair means on large scale — Cancellation of examination/illegal admissions/course of study based thereon — Students completing MBBS courses on basis of illegal admissions — Scope of relief, if any — National character and message that Supreme Court would be sending out to the Nation vis-à-vis immediate social gains, if such fraudulently obtained admissions and all consequences thereof, were not held to be void/cancelled — Vyapam Scam — Appellants who had participated in a well thought out and meticulously orchestrated fraudulent plan to get MBBS admissions/degrees, held, not entitled to any relief in exercise of extraordinary power under Art. 142 of the Constitution — Hence, their admissions and results in MBBS examinations based thereon, held, rightly cancelled**

† From the Judgment and Order dated 7-10-2014 of the High Court of Madhya Pradesh, Bench at Jabalpur in WP No. 7676 of 2014 : *Nidhi Kaim* v. *State of M.P.*, 2014 SCC OnLine MP 8642
‡ Arising out of SLPs (C) Nos. 101-102 of 2015
†† Arising out of SLP (C) No. 182 of 2015

— If Court is unable to decide whether it should exercise jurisdiction under Art. 142 of the Constitution or not, best test is to choose the side based on truth, honesty, fair play and legitimacy rather than the side resorting to deceit and fraud — Judicial conscience must only support the righteous cause — Our national character should not be compromised for immediate societal gains — Thus allowing persons such as appellants to serve as doctors by overlooking their fraudulently obtained MBBS admissions, must not be permitted even if it is for immediate societal gains — Depending on situation even civil liberty or life itself may be too trivial a sacrifice, when national interest is involved — It all depends upon the desired goal — Even the trivialist act of wrongdoing, based on a singular act of fraud, cannot be countenanced in the name of justice — Present case unfolds a mass fraud — Truthful conduct must always remain the hallmark of the rule of law — No matter the gains, or the losses — Art. 142 cannot ever be invoked to salvage and legitimise acts of fraudulent character — Fraud cannot be allowed to trounce on the stratagem of public good — Action of appellants constitutes deceit invading into righteous societal order — Therefore, appellants cannot be given benefit under Art. 142

— In any case, nothing obtained by fraud can be sustained — Fraud unravels everything — Present case is a scam based on fraud — Fact that appellants had got admission through a vitiated process has attained finality — Fraud in present case was not confined to a single academic session but extended from years 2008 to 2013 — Thus deceit by appellants is not a simple affair which can be overlooked — Their admission to MBBS course was outcome of a well-orchestrated strategy of deceit and deception and involvement of appellants was conscious and most grave and extreme

— Therefore, giving relief to appellants would amount to espousing cause of "the unfair" — It would be akin to allowing a thief to retain stolen property — It would compromise integrity of academic community — Thus in name of doing complete justice, Court cannot support vitiated actions of appellants

— Fraud/Forgery/Mala Fides — Fraud unravels everything — Constitution of India — Arts. 142 and 14 — Exercise of jurisdiction under, when fraud and deceit are involved — If Court is unable to decide whether it should exercise jurisdiction under Art. 142 of the Constitution or not, best test is to choose the side based on truth, honesty, fair play and legitimacy rather than the side resorting to deceit and fraud — Judicial conscience must only support the righteous cause

B. **Constitution of India — Art. 142 — Scope of relief — Knowledge acquired by illegal means i.e. fraudulently obtained admissions — Plea that such knowledge acquired cannot be restituted to rightful owners and thus must be used for societal gain by validating illegal admissions of appellants, not tenable — (See in detail Shortnotes *A* and *C*)**

C. **Constitution of India — Art. 142 — Sympathy as a ground — Pleas based on absence of legislation with regard to juveniles illegally breaching norms and showing sympathy to them, who were otherwise meritorious though resorted to illegal means for their admission, not tenable — There is no straitjacket formula for exercise of jurisdiction under Art. 142 — No doubt in the absence of any legislation court can give relief, but present case is not one such case**

— Plea that appellants were juveniles, or too immature and innocent not tenable — Even juveniles have to face consequences of crime — Consequences of law brook no exception — Manifestly, appellants cannot be regarded as innocent or too immature to understand consequences of their action — Appellants after completing school education were on verge of entering professional course and even school children know the consequences of copying in examination — Appellants were clearly beneficiaries of their own conscious, well-considered deceit and deception

— Plea that appellants were otherwise meritorious also not tenable — On the contrary, appellants were not sure of getting admission, hence they resorted to unfairness

D. **Courts, Tribunals and Judiciary — Judicial Process — Approach/ Bases for judicial decision — Generally — Basis of judicial decisions — Public perception vis-à-vis adjudicating experience of Judges — Considered — Constitution of India, Arts. 142 and 136 (Paras 76 to 80)**

E. **Constitution of India — Art. 142 — Words "complete justice" — Doing complete justice vis-à-vis mandate of statutes and law laid down in judicial precedents — Principles summarised (Paras 90 and 91)**

F. **Constitution of India — Art. 142 — Exercise of jurisdiction — Parameters for exercise of jurisdiction under Art. 142 are: (1) larger interest of administration of justice, and (2) prevention of manifest injustice — If Court is unable to decide whether it should exercise jurisdiction under Art. 142 of the Constitution or not, best test is to choose the side based on truth, honesty, fair play and legitimacy rather than the side resorting to deceit and fraud — Judicial conscience must only support the righteous cause — In present case cancellation of admission of appellants to MBBS course which was fraudulently obtained, cannot be said to be unjust — By said cancellation no manifest injustice is done to appellants — Rather, restoring academic benefits obtained out of improper MBBS admissions would not serve larger public interest of administration of justice and would cause manifest injustice**

Madhya Pradesh Professional Examination Board (Vyapam) cancelled the results of the appellants, of their professional MBBS course, on the ground that the appellants had gained admission to the course by resorting to unfair means, deception, manipulation and fraud during the Pre-Medical Test. These orders were passed with reference to candidates who had been admitted to the above course

during the years 2008 to 2012. The High Court by the impugned order upheld the said cancellation and it was not disturbed by the Supreme Court. The reference to the present Constitution Bench is on sole question of moulding of relief in favour of the appellants.

The question which arises for consideration is, whether the consequence of established fraud, as repeatedly declared by the Supreme Court, can be ignored to do complete justice in a matter, in exercise of jurisdiction vested in the Supreme Court under Article 142 of the Constitution? And also, whether the consequences of fraud can be overlooked in the facts and circumstances of this case in order to render complete justice to the appellants?

Answering in the negative and denying any relief to the appellants, the Supreme Court

Held :

The issue is one of national character. There is a saying—when wealth is lost, nothing is lost; when health is lost, something is lost; but when character is lost, everything is lost. This lesson has been taught since time immemorial, by parents and teachers. The issue in hand has an infinitely vast dimension. If we were to keep in mind immediate social or societal gains, the perspective of consideration would be different. The submission canvassed, needs to be considered in the proper perspective. We may well not have won our freedom, if freedom fighters had not languished in jails, and if valuable lives had not been sacrificed. Depending on the situation, even civil liberty or life itself may be too trivial a sacrifice, when national interest is involved. It all depends on the desired goal. The Preamble of the Indian Constitution rests on the foundation of governance on the touchstone of justice. The basic fundamental right of equality before law and equal protection of the laws is extended to citizens and non-citizens alike through Article 14 of the Constitution on the fountainhead of fairness. The actions of the appellants are founded on unacceptable behaviour, and in complete breach of the Rule of Law. Their actions constitute acts of deceit invading into a righteous social order. National character cannot be sacrificed for benefits — individual or societal. If we desire to build a nation, on the touchstone of ethics and character, and if our determined goal is to build a nation where only the Rule of Law prevails, then the claim of the appellants for the suggested societal gains cannot be accepted. Viewed in the aforesaid perspective, there is no difficulty whatsoever in concluding in favour of the Rule of Law. Such being the position, it is not possible to extend to the appellants any benefit under Article 142 of the Constitution. (Para 99)

Public perception should not be allowed to weigh so heavy in the mind of a court as would prevent it from rendering complete justice. Taking into consideration public perception would render effectuating justice extremely difficult. By sheer experience gained by the Judges, they are fully equipped to determine at their own whether or not the facts of a case required to be dealt with differently, under Article 142 of the Constitution — so as to render complete justice. Moreover, public perception is usually not based on complete data of the dispute. And, unless the public is provided with the complete facts and is required to consciously take a call on the matter, the perception entertained by the public would be fanciful and imaginative and it would be full of deficiencies and inadequacies

and it may also be an opinion based on lack of rightful understanding. Thus, public perception despite being of utmost significance, cannot be sought except after an onerous exercise. Thus, any opinion, without the benefit of the entire sequence of facts may not be a dependable hypothesis. It is also true that disseminating full facts for seeking public opinion would be an immeasurably daunting task. An endeavour which is unlikely to yield any reasoned response based on logic and rationale. Hence, the Court should attempt a consideration at its own based on its experience and training in adjudicating disputes of unlimited variety ... and of inestimable proportions. (Paras 76 to 80)

E.M. Sankaran Namboodripad v. *T. Narayanan Nambiar*, (1970) 2 SCC 325 : 1970 SCC (Cri) 451; *People's Union for Civil Liberties* v. *Union of India*, (2005) 5 SCC 363, *considered*

Stated simply, nothing ... nothing ... and nothing, obtained by fraud, can be sustained, as fraud unravels everything. (Para 81)

Lazarus Estates Ltd. v. *Beasley*, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA), *approved*

Collins v. *Blantern*, (1767) 2 Wils KB 341 : 95 ER 847; *Duchess of Kingston case, In re*, (1776) 1 Leach 146 : 168 ER 175; *Master* v. *Miller*, (1791) 4 Term Rep 320 : 100 ER 1042, *cited*

It is important to understand the extent and proportion of the shenanigans of the appellants. It is not in dispute that none of the appellants would have been admitted to the MBBS course as their merit position in the Pre-Medical Test was not as a result of their own efforts, but was based on extraneous assistance. The appellants were helped in answering the questions in the Pre-Medical Test by meritorious candidates. The manipulation by which the appellants obtained admission involved not only a breach in the computer system whereby roll numbers were allotted to the appellants to effectuate their plans. It also involved the procurement of meritorious candidates/persons, who would assist them in answering the questions (in the Pre-Medical Test). The appellants' position, next to the helper concerned at the examination was also based on further computer interpolations. Not only were the seating plans distorted for achieving the purpose, even the institutions where the appellants were to take the Pre-Medical Test were arranged in a manner as would suit the appellants, again by a similar process of computer falsification. This could only be effectuated by a corrupted administrative machinery. Whether the nefarious and crooked administrative involvement was an inside activity, or an outside pursuit, is inconsequential. All in all, the entire scheme of events can well be described as a scam, a racket of sorts. The appellants or their parents would obviously have had to pay large amounts of money to the Vyapam authorities. The appellants' admission to the MBBS course was therefore clearly based on a well-orchestrated plan which is based on established fraud. Furthermore, the factual and the legal position with reference to the admission of the appellants to the MBBS course being vitiated has attained finality. The fact that the appellants had gained admission to the MBBS course by established fraud does not (as it indeed, cannot) require any further consideration. (Paras 81 to 85)

Nidhi Kaim v. *State of M.P.*, (2017) 4 SCC 73; *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611, *affirmed*

The controversy in the present case does not relate to a singular academic session. Whether or not this vitiated process of obtaining admission to the MBBS course was adopted during the year 2007, and prior thereto, is not known. Because MBBS admissions prior to 2008 were not investigated. Investigation was initiated

in the first instance with reference to admissions for the year 2013. Thereafter, investigation was extended to those who had gained admission to the MBBS course during the years 2008 to 2012. Investigation revealed a well thought out, unethical plan, involving administrative support during six consecutive academic sessions from 2008 to 2013. Vyapam was certain about the system having been manipulated at the hands of at least 634 candidates (during the years 2008 to 2012 itself). There may well have been others but no action was taken against them as their cases fell beyond the realm of suspicion (on the parameters approved and adopted by Vyapam). (Para 84)

Thus, the deception and deceit adopted by the appellants is not a simple affair which can be overlooked. In fact, admission of the appellants to the MBBS course is the outcome of a well-orchestrated strategy of deceit and deception. And therefore, it is not possible to accept that the involvement of the appellants was not serious. In fact, it was indeed the most grave and extreme. (Para 86)

Hence, it is not possible to overlook the consequences of the declared legal position with reference to the consequence of fraud on the ground that the involvement of the appellants in the acts of fraud was not serious. (Para 87)

The jurisdiction of the Supreme Court under Article 142 extends inter alia to deal "… with any extraordinary situation in the larger interest of administration of justice and from preventing manifest injustice being done …". The two important parameters for consideration are, "larger interest of administration of justice" and "preventing manifest injustice". (Para 89)

The facts and circumstances of the present case do not reveal the existence of either of the aforesaid factors. With Vyapam having cancelled the appellants' admission to the MBBS course, and with the above orders having been upheld by the High Court, as well as by the Supreme Court it cannot be said that the cancellation orders were unjust. No, not at all. If the admission of the appellants to the MBBS course was improper, the cancellation orders were obviously proper. If the academic benefits of the appellants arising out of their admission are restored, the cancellation orders would be set at naught. That would undo the Vyapam orders upheld by the High Court and the Supreme Court. This would not serve the "larger interest of administration of justice". On the contrary, such an initiative would cause "manifest injustice". It is therefore not possible in the facts of the present case to invoke Article 142 of the Constitution — in the larger interest of the administration of justice. No manifest injustice would be done to the appellants if their admissions are cancelled. Rather, to do justice in the matter, the order passed by Vyapam must be upheld without any further modification or alteration. (Para 89)

Union Carbide Corpn. v. *Union of India*, (1991) 4 SCC 584, *explained* and *applied on facts*

State v. *Sanjeev Nanda*, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Cri) 899; *Sushil Ansal* v. *State*, (2015) 10 SCC 359 : (2016) 1 SCC (Cri) 28; *Priya Gupta* v. *State of Chhattisgarh*, (2012) 7 SCC 433 : (2012) 2 SCC (L&S) 367 : 4 SCEC 555; *Academy of Nutrition Improvement* v. *Union of India*, (2011) 8 SCC 274, *referred to*

Union Carbide Corpn. v. *Union of India*, (1989) 1 SCC 674 : 1989 SCC (Cri) 243; *Harbans Singh* v. *State of U.P.*, (1982) 2 SCC 101 : 1982 SCC (Cri) 361; *K. Veeraswami* v. *Union of India*, (1991) 3 SCC 655 : 1991 SCC (Cri) 734; *Kalyan Chandra Sarkar* v. *Rajesh Ranjan*, (2005) 3 SCC 284 : 2005 SCC (Cri) 705; *Vinay Chandra Mishra, In re*, (1995) 2 SCC 584, *cited*

There cannot be any defined parameters within the framework whereof the Supreme Court would exercise jurisdiction under Article 142 of the Constitution. The complexity of administration and of human affairs would give room for the exercise of the power vested in the Supreme Court under Article 142 in a situation where clear injustice appears to have been caused to any party to a lis. In the absence of any legislation to the contrary, it would be open to the Supreme Court to remedy the situation. (Para 93)

Outstanding legal practitioners undeniably have the brilliance to mould the best of minds, and thereby, to persuade a court, to accept their sense of reasoning, so as to override statutory law and/or a declared pronouncement of law. It is this, which every court should consciously keep out of its reach. Thus, the hypothesis — that the Supreme Court can do justice as it perceives, even when contrary to statute (and, declared pronouncement of law), should never as a rule be entertained by any court/Judge, however high or noble. Can it be overlooked, that legislation is enacted, only with the object of societal good, and only in support of societal causes? Legislation, always flows from reason and logic. Debates and deliberations in Parliament, leading to a valid legislation, represent the will of the majority. That will and determination, must be equally "trusted", as much as the "trust" which is reposed in a court. Any legislation which does not satisfy the above parameters would per se be arbitrary, and would be open to being declared as constitutionally invalid. In such a situation, the legislation itself would be struck down. It is difficult to visualise a situation wherein a valid legislation would render injustice to the parties, or would lead to a situation of incomplete justice — for one or the other party. Imagination, perception and comprehension of future events have inherent limitations. Yet still, the window for further thought and consideration is not being closed, and it is left to the conscience of the court concerned to deal with such an exceptional situation (where it might want to ignore statutory law or a declared pronouncement under Article 141) if it ever arises. However, in the facts and circumstances of the present case, the cause of the appellants is not furthered even by the approach suggested by relying on the above hypothesis. (Para 91)

Keeping in mind the conscious involvement of the appellants in gaining admission to the MBBS course, by means of a fraudulent stratagem of trickery, it is not possible to ignore or overlook the declaration of law with reference to fraud. Nothing obtained by fraud can be sustained. This declared proposition of law must apply to the case of the appellants as well. This is the outcome of the "trust" reposed in the Supreme Court, as being fully equipped to determine at its own, when Article 142 of the Constitution can be invoked to render complete justice, and when it cannot be so invoked. (Para 91)

Supreme Court Bar Assn. v. *Union of India*, (1998) 4 SCC 409, *explained* and *followed*

Priyanka Estates International (P) Ltd. v. *State of Assam*, (2010) 2 SCC 27 : (2010) 1 SCC (Civ) 283; *Ramji Veerji Patel* v. *Revenue Divisional Officer*, (2011) 10 SCC 643 : (2012) 3 SCC (Civ) 1062; *State of Punjab* v. *Rafiq Masih*, (2014) 8 SCC 883 : (2014) 4 SCC (Civ) 657 : (2014) 6 SCC (Cri) 154 : (2014) 3 SCC (L&S) 134, *referred to*

One of the contentions advanced by the appellants also was that the appellants had acquired "knowledge" while pursuing the MBBS course. It was pointed out that even in the present age of scientific development it was not possible to transfer "knowledge" (intellectual property) acquired by the appellants to those who may have been the rightful beneficiaries thereof. It was submitted that besides the

individual loss which the appellants would suffer, the nation would suffer a societal and monetary loss if their admission to the MBBS course was not preserved. A detailed reference in this behalf was made to the vacancies of medical doctors in the State of Madhya Pradesh at all levels of healthcare. To demonstrate authenticity of this submission, findings recorded by the World Health Organisation were also brought on record. (Para 92)

Based on the above factual position, it was submitted that in extending relief to the appellants, the Supreme Court would be extending relief to the society and would be allowing the appellants to serve humanity. It was submitted that in case the Supreme Court exercised its jurisdiction in favour of the appellants (under Article 142 of the Constitution), there would be societal gains, as the appellants would apply their "knowledge" to serve humanity. It was therefore pleaded that the facts and circumstances of the present case constituted a good ground to preserve the "knowledge" acquired by the appellants. It was also pointed out that if the suggested course was adopted no one would suffer any loss. (Para 92)

This contention must be rejected. Conferring rights or benefits on the appellants, who had consciously participated in a well thought out, and meticulously orchestrated plan, to circumvent well laid down norms, for gaining admission to the MBBS course, would amount to espousing the cause of "the unfair". It would seem like allowing a thief to retain the stolen property. It would seem as if the Court was not supportive of the cause of those who had adopted and followed rightful means. Such a course would cause people to question the credibility of the justice-delivery system itself. The exercise of jurisdiction in the manner suggested on behalf of the appellants would surely depict the Court's support in favour of the sacrilegious. It would also compromise the integrity of the academic community. In the name of doing complete justice it is not possible for the Supreme Court to support the vitiated actions of the appellants through which they gained admission to the MBBS course. (Para 92)

The appellants then submitted that they fell in this category, namely, that there was no legislative provision to deal with admissions to academic institutions involving juveniles who had innocently breached legal norms, and had strayed into forbidden territory. The appellants urged that they should not be identified as a part of the syndicate engaged in manipulating their admissions, even though they were the beneficiaries thereof. It was submitted that the appellants were young, and not mature enough to understand the consequences of their actions. It was pointed out that the appellants were students engaged in the pursuit of education. The appellants asserted on the basis of their past academic record and on the strength of their performance in the MBBS course itself, that they could very well have been successful in gaining entry into the MBBS course, on their own merit, had they not chosen to seek the assistance of the syndicate. That, they had done so because of their lack of understanding of the ways of the world, should not be overlooked while dealing with the relief being sought. It was submitted that the consequence of affirmation of the Vyapam order(s) and its implications would expose them to such hardship as they did not deserve. It was pointed out that having gained entry into medical institutions, they had spent a number of years of their lives in academic pursuit. They had also spent their parents' hard earned money. It was submitted that all that the appellants had achieved should not be allowed to go waste. Especially

because there would be no gainer. It was contended that it needed to be seriously considered, whether or not they were entitled to retain and use the "knowledge" acquired by them, for their own benefit, and for the benefit of the society at large. During the course of hearing, the counsel for the appellants pleaded for differential action. It was submitted that all the appellants were at a very important crossroad of life, and were under immense pressure, both parental and societal, at the relevant time, when they strayed into forbidden territory. In these circumstances, it was contended that they may not be dealt with so harshly as would scar their fragile minds. Or, would leave them with no future. (Para 93)

Roscoe Pound: *An Introduction to the Philosophy of Law*, *referred to*

It is held without hesitation that all these submissions deserve an outright rejection. Even in situations where a juvenile indulges in crime, he has to face trial, and is subjected to the postulated statutory consequences. Law, has consequences. And the consequences of law brook no exception. The appellants in this case, irrespective of their age, were conscious of the regular process of admission. They breached the same by devious means. They must therefore, suffer the consequences of their actions. It is not the first time that admissions obtained by deceitful means would be cancelled. The Supreme Court has consistently annulled academic gains arising out of wrongful admissions. Acceptance of the prayer made by the appellants on the parameters suggested by them would result in overlooking the large number of judgments on the point. Adoption of a different course for the appellants would trivialise the declared legal position. (Para 94)

Moreover, neither were the appellants innocent, nor immature in understanding the consequences of their actions. Each one of the appellants was aware of the fact that their admission to the MBBS course would be determined on the basis of their performance in the Pre-Medical Test. Rather than appearing in the qualifying test on their own they chose to seek assistance of meritorious students to garner higher marks. The appellants were quite sure that they would not be able to gain admission to the MBBS course on their own merit. That is why they had to strategise their admission to the MBBS course. Thus, the contention advanced on behalf of the appellants that the appellants were meritorious students, and as such, their admission to the MBBS course deserved to be preserved, must be rejected. If this is where the truth lies (which we are sure, it does), namely, that the appellants were quite sure that they would not be able to gain admission to the MBBS course on their own merit, surely the appellants are not entitled to any equitable consideration. In that view of the matter, it would not be proper to extend to the appellants relief under Article 142 of the Constitution. (Para 95)

State of Punjab v. *Rafiq Masih*, (2014) 8 SCC 883 : (2014) 4 SCC (Civ) 657 : (2014) 6 SCC (Cri) 154 : (2014) 3 SCC (L&S) 134, *referred to*

Indian Bank v. *ABS Marine Products (P) Ltd.*, (2006) 5 SCC 72; *Ram Pravesh Singh* v. *State of Bihar*, (2006) 8 SCC 381 : 2006 SCC (L&S) 1986; *State of U.P.* v. *Neeraj Awasthi*, (2006) 1 SCC 667 : 2006 SCC (L&S) 190; *Chandi Prasad Uniyal* v. *State of Uttarakhand*, (2012) 8 SCC 417 : (2012) 4 SCC (Civ) 450, *cited*

Even a child, in the very first year of entering primary school, is aware of the consequences of copying during an examination. Teachers supervise examinations to make sure that students do not copy. Children caught copying are dealt with severely. Every child observes this process year after year. Hence, the appellants, who had completed school education, and are on the verge of entering

a professional course, certainly cannot be treated as novices — unaware of the consequence of copying. It is therefore not possible to extend any benefit to the appellants, either on account of their juvenility, or on account of their alleged lack of understanding of the consequences of their actions. Manifestly, the appellants had consciously sought the assistance of a syndicate engaged in manipulating admissions to medical institutions. They were beneficiaries of acts of deceit and deception. Thus, the case of the appellants is not a matter deserving of any sympathetic consideration. The admission of the appellants to the MBBS course, cannot be legalised (or legitimised), in the name of justice. (Para 96)

The controversy may be examined from yet another perspective. Let us presume that the position is equally balanced for the two sides. Let us attempt to apply the test of a court's conscience to a situation where on principle a court is not in a position to decide, whether it should, or it should not, exercise its discretion in favour of a party to a lis. A situation, wherein the court's conscience commends to it (in a matter, as the one in hand), to exercise its discretion under Article 142, to preserve the benefit of the appellants' admission to the MBBS course; and at the same time, equally commends to it, not to so exercise its jurisdiction (i.e. not to preserve to the appellants, the benefit of their admission to the MBBS course), in favour of the appellant. How should the Supreme Court deal with such a situation? (Para 97)

Where two options are open to a court, and both are equally beckoning, it would be most prudent to choose the one which is founded on truth and honesty and the one which is founded on fair play and legitimacy. Siding with the option founded on deceit or fraud, or on favour as opposed to merit, or by avoiding the postulated due process, would be imprudent. Judicial conscience must only support the righteous cause. If, despite its being righteous, a decision is seen as causing manifest injustice, the exercise of the power under Article 142 of the Constitution would be prudent. In such situations, an onerous duty is cast on the court to step in to render complete justice. This is the manner that the judicial exercise of discretion under Article 142 of the Constitution is commended. By adopting the above course, a court would feel satisfied in having exercised its discretion on the touchstone of justice — the concept which triggers the invocation of Article 142 of the Constitution. (Para 97)

In the facts and circumstances of the present case, there is absolutely no cause to legitimise the admissions of the appellants to the MBBS course, since the same clearly fall in the imprudent category. (Para 97)

It was the repeated submission of the appellants that there would be significant societal benefit if the academic pursuit of the appellants is legitimised. During the course of hearing, the counsel even went to the extent of suggesting that individual benefits that may be drawn by the appellants may be drastically curtailed and their academic pursuit be regularised for societal benefit. The submission is attractive. It needs a considered response. (Para 98)

No matter how extensive the societal gains may be, the jurisdiction conceived of under Article 142 of the Constitution to do complete justice in a matter cannot be invoked in a situation as the one in hand. Even the trivialist act of wrongdoing, based on a singular act of fraud, cannot be countenanced in the name of justice. The present case unfolds a mass fraud. The course suggested, if accepted, would not only be imprudent but would also be irresponsible. It would encourage others to

follow the same course. Truthful conduct must always remain the hallmark of the rule of law. No matter the gains, or the losses. The jurisdiction exercisable by the Supreme Court under Article 142 cannot ever be invoked to salvage and legitimise acts of fraudulent character. Fraud cannot be allowed to trounce on the stratagem of public good. (Para 98)

Priya Gupta v. *State of Chhattisgarh*, (2012) 7 SCC 433 : (2012) 2 SCC (L&S) 367 : 4 SCEC 555, *explained* and *followed*

Thus, in the facts and circumstances of the case in hand, it would not be proper to legitimise the admission of the appellants to the MBBS course in exercise of the jurisdiction vested in the Supreme Court under Article 142 of the Constitution. Hence the prayer made in this behalf by the appellants is rejected. (Para 108)

Nidhi Kaim v. *State of M.P.*, 2014 SCC OnLine MP 8642, *affirmed*

Nidhi Kaim v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611, *view of Sapre, J. on this point, affirmed*

Nidhi Kaim v. *State of M.P.*, SLP (C) No. 28054 of 2014, order dated 24-2-2016 (SC); *Gaurav Jain* v. *Union of India*, (1998) 4 SCC 270; *Pratibha Singh* v. *State of M.P.*, 2014 SCC OnLine MP 4064; *Sumit Sinha* v. *State of M.P.*, (2016) 7 SCC 615 (footnote 6); *Neetu Singh Markam* v. *State of M.P.*, 2014 SCC OnLine MP 5588 : (2014) 4 MPLJ 203; *Vinod Bhandari* v. *State of M.P.*, (2015) 11 SCC 502 : (2015) 4 SCC (Cri) 480; *Vinod Bhandari* v. *State of M.P.*, 2014 SCC OnLine MP 8633; *Mridul Dhar (5)* v. *Union of India*, (2005) 2 SCC 65 : 2 SCEC 673; *Gurdeep Singh* v. *State of J&K*, 1995 Supp (1) SCC 188 : 1995 SCC (L&S) 378; *Tanvi Sarwal* v. *CBSE*, (2015) 6 SCC 573 : (2015) 3 SCC (Cri) 253 : 7 SCEC 357; *Abhyudya Sanstha* v. *Union of India*, (2011) 6 SCC 145 : (2011) 3 SCC (Civ) 241 : 4 SCEC 185; *Dr Ambedkar Institute of Hotel Management, Nutrition and Catering Technology* v. *Vaibhav Singh Chauhan*, (2009) 1 SCC 59 : 3 SCEC 473; *Kerala Solvent Extractions Ltd.* v. *A. Unnikrishnan*, (2006) 13 SCC 619 : (2008) 2 SCC (L&S) 155; *Nidhi Kaim* v. *State of M.P.*, (2017) 4 SCC 71; *Empress of India* v. *Idu Beg*, 1881 SCC OnLine All 103 : ILR (1881) 3 All 776; *Pooja Yadav* v. *State of M.P.*, SLPs (C) Nos. 13629-30 of 2014, decided on 19-5-2014 (SC), *referred to*

Bihar School Examination Board v. *Subhas Chandra Sinha*, (1970) 1 SCC 648; *Board of High School and Intermediate Education* v. *Bagleshwar Prasad*, AIR 1966 SC 875, *cited*

SS-D/58299/C

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Chronological list of cases cited ***on page(s)***

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45. (1767) 2 Wils KB 341 : 95 ER 847, *Collins* v. *Blantern* 59*b*

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, C.J.— Leave granted in the special leave petitions. The orders were passed by the Madhya Pradesh Professional Examination Board (hereinafter referred to as "Vyapam"), cancelling the results of the appellants, of their professional MBBS course, on the ground that the appellants had gained admission to the course by resorting to unfair means during the Pre-Medical Test. These orders were passed with reference to candidates who had been admitted to the above course during the years 2008 to 2012. A challenge to the orders of cancellation was raised by the appellants by invoking the jurisdiction of the High Court of Madhya Pradesh (hereinafter referred to as "the High Court") under Article 226 of the Constitution. All writ petitions raising the above challenge were dismissed[1]. Resultantly, the appellants approached this Court.

1 *Nidhi Kaim* v. *State of M.P.*, 2014 SCC OnLine MP 8642

2. The orders of the High Court were affirmed by a Division Bench (hereinafter referred to as "the former Division Bench"), on 12-5-2016[2]. However, in exercise of jurisdiction vested in this Court, under Article 142 of the Constitution, J. Chelameswar, J. (the Hon'ble Presiding Judge of the former Division Bench) expressed the view that complete justice in the matter would be rendered if the qualifications successfully acquired by the appellants were not annulled and the knowledge gained by them was not wasted. This, for the simple reason that knowledge could not be transferred to those who had been wrongfully deprived of admission, and cancellation of the results of the appellants would not serve any purpose. Abhay Manohar Sapre, J. (the Hon'ble Companion Judge in the former Division Bench) expressed his disinclination for invoking jurisdiction under Article 142 to sustain the benefit of education acquired by the appellants through a separate order of the same date — 12-5-2016[2]. This, for the simple reason that those who had adopted unfair means could not be extended any indulgence.

3. On account of the divergence of opinion expressed by the former Division Bench through their separate orders (dated 12-5-2016[2]) referred to above, Hon'ble the Chief Justice of India, constituted this larger Division Bench to deal with the matter.

4. During the course of hearing, Mr Shyam Divan, learned Senior Counsel submitted that this Court had granted leave in the petition filed by his client (and many others, similarly situated) on 24-2-2016[3]. It was pointed out that all these appeals had remained pending before this Court wherein the correctness of the impugned judgment(s) rendered by the High Court was under consideration. It was submitted that leave having been granted, the principle underlying the doctrine of merger would entail that the judgments rendered by the High Court

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2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611

3 *Nidhi Kaim* v. *State of M.P.*, SLP (C) No. 28054 of 2014, order dated 24-2-2016 (SC), wherein it was directed:

"*1.* WP (C) No. 140 of 2015 and SLPs (C) Nos. 394-401 of 2015 are detagged from the batch of matters and be listed on 6-4-2016. In the meantime, permission to file certain documents is granted. Contempt Petitions (C) Nos. 338-43 of 2015 in SLPs (C) Nos. 29979-84 of 2014 are detagged from the batch of matters. SLP (C) No. 28763 of 2015 is detagged from the batch of matters. In rest of the matters, heard the learned counsel for the parties at length. Leave granted.

2. Application(s) for exemption from filing OT are allowed. Application(s) for exemption from filing c/c of the impugned order are allowed. Application(s) for permission to file lengthy list of dates are allowed. Application(s) for permission to file additional documents are allowed. Application(s) for permission to file synopsis and list of dates are allowed. Application(s) for permission to bring additional facts and documents on record are allowed. Delay condoned in SLP (C) No. ... CC No. 10294 of 2015. Application(s) for impleadment filed in SLPs (C) Nos. 32717-24 of 2014 and SLPs (C) Nos. 29744-51 of 2014 are allowed. Delay condoned in SLP (C) No. 7174 of 2015.

3. Arguments concluded. Judgment reserved."

would eventually merge in the final or operative determination of this Court. It was also pointed out that in terms of Article 145(5) of the Constitution, no judgment could be delivered by this Court, save with the concurrence of majority of Judges, present and hearing the case. It was submitted that there was no majority judgment on 12-5-2016[2] when the two Hon'ble Judges constituting the former Division Bench passed separate orders. According to the learned counsel, in the absence of merger, all the civil appeals in hand must be deemed to have remained on the docket of this Court, awaiting decision by an appropriate Bench. It was contended that the correct course to be followed where there is a divergence of opinion between the two Hon'ble Judges was a rehearing of the entire matter by a larger Bench. The above determination, according to the learned counsel, emerges from the legal position expressed by this Court in *Gaurav Jain* v. *Union of India*[4]. It was submitted that in the absence of a majority judgment, in terms of Article 145(5), and consequently in the absence of an effective judgment of this Court (despite the two separate orders passed by the former Division Bench on 12-5-2016[2]), there existed no judgment in the eye of the law. It was accordingly submitted that the present Division Bench (of three Judges) by a mandate of law was required to adjudicate upon the civil appeals fully, on all issues. It is therefore, that this Bench passed the following order on 28-7-2016[5]: (SCC p. 72, paras 1-4)

> "*1*. After hearing had gone on for some time, wherein the limited issue canvassed was whether this Court was justified in exercising jurisdiction under Article 142 of the Constitution of India, our attention was invited to the mandate contained in Article 145(5) of the Constitution so as to suggest that the entire controversy needed to be heard afresh, in view of the following order passed by the Bench on 12-5-2016[2]: (*Nidhi Kaim case*[2], SCC p. 683, para 137)
>
> > '*137*. In view of the divergence of opinion in terms of separate judgments pronounced by us in these appeals today, the Registry is directed to place the papers before the Hon'ble the Chief Justice of India for appropriate further orders.'
>
> *2*. We are of the view that the instant issue can be resolved by referring the matter back to the Bench for a clarification of the order dated 12-5-2016[2], whether the reference required rehearing of the entire matter, and if not, the limited issue referred for consideration.
>
> *3*. We have chosen to adopt the above course so as to save precious time of the Court. In the above view of the matter, the Registry is directed to place the files of this case before the Hon'ble the Chief Justice of India for seeking clarification of the Division Bench which passed the order dated 12-5-2016[2].

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611
4 (1998) 4 SCC 270
5 *Nidhi Kaim* v. *State of M.P.*, (2017) 4 SCC 71

4. Post the matters for hearing, after clarification."

5. On 30-8-2016[6], the former Division Bench passed another order, in furtherance of the order extracted above. Relevant extract of the same is reproduced below: (SCC p. 74, paras 1-7)

"*1*. Pursuant to the order dated 28-7-2016[5] of the larger Bench, the matter was placed before this Bench. Heard the learned counsel.

2. It appears from the abovementioned order that it was argued before the larger Bench that by the Order of this Bench dated 12-5-2016[2], a reference was made to a larger Bench. The submission is factually incorrect.

3. It is clear from the order dated 12-5-2016[2] that there was a disagreement between both of us regarding the final order to be passed in the appeals before us. Both of us recorded a concurrent opinion that the examination process in issue in these appeals conducted by Vyapam for the years 2008 to 2012 was vitiated with reference to the appellants before this Court and few others. We also agreed upon the conclusion that the appellants herein are the beneficiaries of such vitiated process.

4. The only point of divergence between both of us is that whether the appellants should be disentitled to retain the benefits of the training in medical course which they secured by virtue of their being beneficiaries of a tainted examination process conducted for the purpose of admitting them for training in medical colleges?

5. While one of us (Abhay Manohar Sapre, J.) is clearly of the opinion that the case of the appellants deserves no further consideration, the moment we concluded that they are the beneficiaries of such tainted examination process, the other (J. Chelameswar, J.) opined for the reasons recorded that their cases deserve some consideration and also opined that the appellants should be permitted to pursue their medical course and complete the same subject to certain conditions indicated in the order.

6. We completely fail to understand the reference made to Article 145(5) of the Constitution in the order dated 28-7-2016[5]. We are of the opinion that neither the Constitution of India nor any other law of this country provides an intra-court appeal insofar as the Supreme Court is concerned. A rehearing of the entire matter as apparently suggested to the larger Bench, in our opinion, would amount to an intra-court appeal. If the larger Bench of this Court wishes to create such an intra-court appeal, we obviously are powerless to stop it. We can only record our understanding of the law on the question and it is as recorded above.

7. Ordered accordingly."

6 *Nidhi Kaim* v. *State of M.P.*, (2017) 4 SCC 73
5 *Nidhi Kaim* v. *State of M.P.*, (2017) 4 SCC 71
2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611

In view of the order extracted above, it is apparent that, we are only dealing with the issue whether the jurisdiction vested in this Court under Article 142 of the Constitution, should be invoked in favour of the appellants in order to render complete justice in the matter.

6. According to Mr R. Venkataramani, learned Senior Counsel appearing for the appellants in Civil Appeals Nos. 1727, 1720-24, 1726, 1728, 1776-87 and 1846 of 2016, the invocation of Article 142 in favour of the appellants was a just and rightful determination inasmuch as complete justice was sought to be rendered without adversely affecting or impinging upon the rights of any other party. It was submitted that there is a distinction between "inherent jurisdiction" and "inherent power". Likewise, there is a distinction between ensuring that the ends of justice are met as against rendering of complete justice. It was pointed out that Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") provide for situations, wherein a court can exercise inherent powers. It was submitted that inherent powers as contemplated under Section 151 CPC, and Section 482 CrPC, are controlled and had limitations. It was asserted that the power conferred on the Supreme Court under Article 142 of the Constitution was aimed at allowing this Court to do complete justice in any cause or matter. The instant power vested in this Court, it was submitted, is unlimited. It was pointed out that the expanse of Article 142 was clearly distinct from the inherent power contemplated under the two procedural enactments referred to above.

7. In order to substantiate his contention, the learned counsel placed reliance on a treatise by Roscoe Pound — *An Introduction to the Philosophy of Law*, [6th Indian Reprint — 2012, published by the Universal Law Publishing Co. (P) Ltd.]. The learned counsel invited the Court's attention to the following opinion expressed by the author:

> "III. *The Application of Law*
>
> If we look back at the means of individualizing the application of law which have developed in our legal system, it will be seen that almost without exception they have to do with cases involving the moral quality of individual conduct or of the conduct of enterprises, as distinguished from matters of property and of commercial law. *Equity uses its powers of individualizing to the best advantage in connection with the conduct of those in whom trust and confidence has been reposed. Jury lawlessness is an agency of justice chiefly in connection with the moral quality of conduct where the special circumstances exclude that "intelligence without passion" which, according to Aristotle, characterizes the law.* It is significant that in England today the civil jury is substantially confined to cases of fraud, defamation, malicious prosecution, assault and battery, and breach of promise of marriage. Judicial individualization through choice of a rule is most noticeable in the law of torts, in the law of domestic relations, and in passing upon the conduct of enterprises. The elaborate system of individualization in criminal procedure has to do wholly with

individual human conduct. The informal methods of petty courts are meant for tribunals which pass upon conduct in the crowd and hurry of our large cities. The administrative tribunals, which are setting up on every hand, are most called for and prove most effective as means of regulating the conduct of enterprises.

A like conclusion is suggested when we look into the related controversy as to the respective provinces of common law and of legislation. Inheritance and succession, definition of interests in property and the conveyance thereof, matters of commercial law and the creation, incidents, and transfer of obligations have proved a fruitful field for legislation. In these cases the social interest in the general security is the controlling element. But where the questions are not of interests of substance but of the weighing of human conduct and passing upon its moral aspects, legislation has accomplished little. No codification of the law of torts has done more than provide a few significantly broad generalizations. On the other hand, succession to property is everywhere a matter of statute law, and commercial law is codified or codifying throughout the world. Moreover the common law insists upon its doctrine of stare decisis chiefly in the two cases of property and commercial law. *Where legislation is effective, there also mechanical application is effective and desirable. Where legislation is ineffective, the same difficulties that prevent its satisfactory operation require us to leave a wide margin of discretion in application, as in the standard of the reasonable man in our law of negligence and the standard of the upright and diligent head of a family applied by the Roman law, and especially by the modern Roman law, to so many questions of fault, where the question is really one of good faith. All attempts to cut down this margin have proved futile. May we not conclude that in the part of the law which has to do immediately with conduct complete justice is not to be attained by the mechanical application of fixed rules? Is it not clear that in this part of the administration of justice the trained intuition and disciplined judgment of the Judge must be our assurance that causes will be decided on principles of reason and not according to the chance dictates of caprice, and that a due balance will be maintained between the general security and the individual human life*?" (emphasis supplied)

8. Based on the aforesaid, it was submitted that matters involving individual conduct, or conduct of enterprises, need to be distinguished from matters of property and commercial law. It was pointed out that the rule of equity in dealing with individual conduct or conduct of enterprises was a tool adopted to the best advantage of the parties concerned, especially when the controversy did not relate to property matters or commercial law. Referring to the law of inheritance and succession which had a direct nexus to interest in property (and conveyance), it was submitted that there was a feeling that social interest was generally the controlling element in such matters. However, where the question was not of substance but of human conduct (or the moral aspect thereof),

legislation could not be depended upon, to furnish any answer. According to the learned counsel, on the subject being dealt with, there is no express legislation. Therefore, it is necessary to keep in mind that the controversy in hand is not one which would return a finding of breach of any existing legislative enactment. It was submitted that if there had been any such legislation on the issue being dealt with, the matter would have to be examined differently. However, in the absence of legislation, or in situations where legislation is ill-effective, courts have a wide margin of discretion. For such situations, determination has to be made on the touchstone of reasonableness founded on good faith. It was submitted that in the facts and circumstances of the present controversy, a trained intuition and disciplined judgment of the adjudicator would have to be invoked. Because the cause would have to be adjudicated on the principle of prudence and rationality. Herein, according to the learned counsel, the remedy provided would have to be handcrafted, rather than the routine — mechanical exercise of enforcing legislative intent. Herein, the events would have to be evaluated, keeping in mind the special circumstances — and their significance, in order to render complete justice.

9. It was submitted that in exercise of judicial intuition and judicial discretion, J. Chelameswar, J. had categorised the controversy as one where the appellants had acquired "knowledge". The cancellation of their admission would not be of any advantage to the more meritorious candidates, who were deprived of admission, as it is not possible to transfer the "knowledge" acquired by the appellants. In the present situation, it was submitted that it was not possible to restore status quo ante. The instant controversy, it was pointed out, could not be dealt with like a dispute concerning immovable property, wherein on the culmination of the lis, the property can be restored to the rightful owner. Herein, the meritorious candidates who ought to have been admitted in place of the appellants, cannot have the advantage of transfer of "knowledge" acquired by the appellants. It was submitted that to deal with the acquired "knowledge", J. Chelameswar, J. had taken recourse to Article 142 to legitimise only the "knowledge" acquired by the appellants, and not their actions or conduct. This determination was also considered to be of societal advantage. It would take five years (— the duration of medical course) of national resources to acquire what had been annulled by Vyapam. Invalidation of the fruits of gained "education" was considered by the Hon'ble Presiding Judge of the former Division Bench as an inappropriate means to deal with the situation. It was submitted that this advantage was far superior to the individual gains which would accrue to the appellants, or the individual loss which may have been suffered by the meritorious candidates deprived of admission. It was also asserted that while invoking Article 142 to the advantage of the appellants, the situations wherein the jurisdiction could not be invoked, were dealt with in detail. Only after arriving at the conclusion that the situation in hand would not trample upon the determined legal position, the Hon'ble Presiding Judge had chosen to exercise his discretion to do complete justice in the matter. It was submitted that in the absence of violation of any laid down parameters, it would be unjust, if this Court was to set at naught long years of educational endeavour

successfully undertaken by the appellants, which had resulted in acquisition of "knowledge" — an ability which would enable the appellants to render valuable service to the society — and thereby serve the citizens of this country.

10. It was also the contention of the learned counsel that at the time of their admission, most of the appellants (— if not all) were juvenile, and as such, could not be blamed of the irregularity and/or illegality in the procurement of admission to the MBBS course. It was submitted that this Court must also take into consideration the fact that the impugned orders set at naught admissions gained by the appellants to the MBBS course, during the years 2008 to 2012, and as such, may be well beyond the purview of consideration, under the law of limitation, even for examining their culpability/criminality.

11. As a special emphasis, the learned counsel invoked the conscience of this Court, by reiterating that the "knowledge" acquired by the appellants, could not be described as tainted, even though the means of acquiring the "knowledge", may have been tainted. As such, it was submitted that the purity of "knowledge" acquired by the appellants consequent upon their admission to the professional institutions needed to be preserved through the invocation of Article 142 — to do complete justice.

12. Based on an analysis of the judgments rendered by this Court, it was submitted that in the judgments of this Court wherein Article 142 had been invoked would demonstrate that whenever the law applicable to, and governing a particular cause, was found to be inadequate, or whenever the law applicable did not provide means for a complete resolution of the dispute, the endeavour of a court ought to be to discover and to address the manner of doing complete justice. It was submitted that even though the law provided for the situation obtaining in a particular cause, and there was scope for a better and more fulfilling outcome, this Court should search for the same, and give effect to it. It was contended that this Court had found good reason to invoke the power vested in it to do complete justice between the parties (— through the reasoned order of the Hon'ble Presiding Judge of the former Division Bench). It was submitted that whenever legal resources and materials were found to be in a state of indeterminacy calling for articulation of new principles and fashioning new remedies, this Court would reach out to a just cause, by invoking Article 142, by filling up the lacuna. It was pointed out that indeterminacy or lack of completeness of law and legal resources, in a given case, was the foundation for invocation of Article 142. The learned counsel ventured to clarify that in doing complete justice whilst a court would not act in disregard to binding provisions of law, the said restraint was applicable only with reference to an available statutory regime/scheme. Thus viewed, whenever there was an available statutory scheme, courts would not ordinarily take recourse to Article 142, but in the absence thereof, the field would always remain wide open for this Court to intervene, and render complete justice. It was pleaded that there could not have been a better case, than the one in hand, to invoke such power.

13. It was also submitted that the power conferred on this Court through Article 142 could not be put in a straitjacket. Being constitutional in

conferment, this Court whenever persuaded for a just cause, would step in to render complete justice, by exercising its inherent power. This exercise of inherent power, according to the learned counsel, was free from any fetters. And for exercise of such power, this Court ought never and never, close the doors for creative engagement. Whenever a situation for exercise of such power is triggered by its conscience, this Court should not be lax in providing the desired relief. It was submitted that the present controversy exhibited an important perception for doing justice. Based on an exploration of a relevant legal principle, the Hon'ble Presiding Judge of the former Division Bench had invoked the inherent power to render complete justice. According to the learned counsel, the Hon'ble Presiding Judge had balanced the cause of justice by extending societal benefits to the citizens of the country and at the same time provided for measures to be taken against the appellants and also made sure that there was sufficient deterrence. It was submitted that the course adopted for the invocation of Article 142 had successfully preserved the "knowledge" acquired by the appellants which constituted a national resource. It was contended that by requiring the appellants to render service in the field of medicine, on the payment of nominal charges, would result in a win-win situation for all concerned. It was asserted that trained minds should not be lost merely because the appellants had gained admission to the MBBS course by foul means. Service by the appellants to the nation for a period of 5 years (postulated in the order passed by the Hon'ble Presiding Judge), according to the learned counsel, was an apt balancing factor which would also act as a deterrent to others in future.

14. It was also submitted that on a composite understanding of various facts and circumstances of the case, it was clear that the view taken by the Hon'ble Presiding Judge (of the former Division Bench), cannot be described outlandish. Nor could it be considered as being violative of any accepted principle of law and not even in contravention of any statutory scheme. It was submitted that the exercise of jurisdiction under Article 142 by one of the Hon'ble Judges of the former Division Bench could be termed as an act of rendering corrective justice. Justice which was particularly invoked to ameliorate the ruinous effect, which the appellants would have to suffer, consequent to the cancellation of their admission to the MBBS course.

15. It was submitted that in ordinary circumstances of wrongful gain principles of law can be invoked to legitimately require the beneficiary to surrender the fruits of his gains. Such wrongful fruits of gain would then be transferred to the rightful beneficiary. Referring to the present controversy, it was submitted that the alleged wrong committed by the appellants in the present case had resulted in the acquisition of "knowledge". It was submitted that the appellants were beneficiaries of intellectual property. Such intellectual property cannot be withdrawn from the appellants and transferred to those who ought to have been granted admission (in place of the appellants). Since the "knowledge" wrongfully gained by the appellants was not transferable, according to the learned counsel the principles ordinarily invoked whereby gains are transferred to the rightful beneficiary cannot be implemented in

this case. It was pointed out that the State and the students have invested considerable resources, both monetary and human, ever since the appellants had been admitted to the MBBS course. Based whereon, the appellants had pursued their academic careers, and thereby gained knowledge in the field of medicine. By any order cancelling the appellants' admission to the MBBS course — the institutions would lose, the State would lose, and the appellants would also lose. It needed to be kept in mind that such cancellation would not result in a reciprocal gain for those who had been deprived of admission. And as such, this Court should affirm the invocation of Article 142 in the manner expressed by the Hon'ble Presiding Judge (of the former Division Bench), so that, all is not lost.

16. It was also the submission of the learned counsel that the prosecution(s) which had been initiated, and were pending against some of the appellants, or which may be launched against them, should not restrain this Court from taking such action as it considers just and proper. Alternatively, it was submitted that if the appellants were to be acquitted none of these adverse or impinging consequences would follow. It was submitted that while examining the controversy in hand, the criminality of the charges which the appellants may be blamed of should be kept apart, as the relevant statutory provisions provide for appropriate measures of punishment. Insofar as the civil aspect of the matter is concerned, namely, the validity of the "knowledge" acquired by the appellants, in pursuit of their academic qualifications, should not be jeopardised. Rather, according to the learned counsel, the way forward suggested by the Hon'ble Presiding Judge (of the former Division Bench), was the most appropriate course for dealing with the controversy, as it rendered complete justice in the matter. The course adopted, according to the learned counsel, while benefiting the appellants would also benefit the citizens of this country and would not result in any consequential loss.

17. It was pointed out that the proceedings which the appellants have pursued, whilst challenging the cancellation of their admission, through the current litigation(s), and the proceedings which the appellants might have to suffer, consequent upon the criminal cases which have been commenced or which may be instituted against them, would result in an unfathomable amount of strain and suffering, which will always remain with them, for the rest of their lives, as an inseparable shadow. According to the learned counsel, this pain and sorrow would serve the purpose of justice in the facts and circumstances of this case. In this behalf, it was also submitted that the diminished respect of the appellants, in the eyes of the general public (which the public would perceive, because of the wrongful admission of the appellants), should also weigh with the Court as a relevant consideration for the invocation of Article 142. It was submitted that the conclusions drawn on relevant and acceptable parameters in favour of the appellants (by the Hon'ble Presiding Judge of the former Division Bench), should not be negated, so as to deny to the appellants the right of utilisation of the "knowledge" acquired by them.

18. On the issue in hand, the learned counsel placed reliance on *Union Carbide Corpn.* v. *Union of India*[7] and referred to Contentions (A) and (B) delineated in para 55 thereof, which are being extracted hereinbelow: (SCC p. 622)

"*55. … Contention (A)*

The proceedings before this Court were merely in the nature of appeals against an interlocutory order pertaining to the interim compensation. Consistent with the limited scope and subject-matter of the appeals, the main suits themselves could not be finally disposed of by the settlement. The jurisdiction of this Court to withdraw or transfer a suit or proceeding to itself is exhausted by Article 139-A of the Constitution. Such transfer implicit in the final disposal of the suits having been impermissible suits were not before the Court so as to be amenable to final disposal by recording a settlement. The settlement is, therefore, without jurisdiction.

Contention (B)

Likewise the pending criminal prosecution was a separate and distinct proceeding unconnected with the suit from the interlocutory order in which the appeals before this Court arose. The criminal proceedings were not under or relatable to the "Act". The Court had no power to withdraw to itself those criminal proceedings and quash them. The orders[8] of the Court dated 14-2-1989 and 15-2-1989, insofar as they pertain to the quashing of criminal proceedings are without jurisdiction."

19. In order to invite our attention to the conclusions recorded by this Court, with reference to the above two contentions, the learned counsel pointed out to the following paragraphs of the above judgment: (*Union Carbide Corpn. case*[7], SCC p. 627, paras 62-63)

"*62.* The purposed constitutional plenitude of the powers of the Apex Court to ensure due and proper administration of justice is intended to be co-extensive in each case with the needs of justice of a given case and to meeting any exigency. Indeed, in *Harbans Singh* v. *State of U.P.*[9], the Court said: (SCC pp. 107-08, para 20)

'*20. Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Articles 32 and 136 of the Constitution, I am of the opinion that this Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice. Having regard to the facts and circumstances of this*

7 (1991) 4 SCC 584

8 *Union Carbide Corpn.* v. *Union of India*, (1989) 1 SCC 674 : 1989 SCC (Cri) 243. Orders dated 14-2-1989 and 15-2-1989 published together.

9 (1982) 2 SCC 101 : 1982 SCC (Cri) 361

case, I am of the opinion that this is a fit case where this Court should entertain the present petition of Harbans Singh and this Court should interfere.'

63. We find absolutely no merit in this hypertechnical submission of the petitioners' learned counsel. We reject the argument as unsound." (emphasis supplied)

Based on the aforesaid conclusions, it was submitted that a similar approach should be adopted in this matter also as it was rightful to preserve the "knowledge" acquired by the appellants to enable them to use the same to the best advantage of the society, and the citizens of the country.

20. In his endeavour to persuade this Court that the exercise of jurisdiction under Article 142 had rightly been invoked in favour of the appellants (by the Hon'ble Presiding Judge of the former Division Bench), our attention was drawn, to a treatise by Fali S. Nariman, *India's Legal System: Can it be Saved*? published by Penguin Books India (P) Ltd., wherein the author also expressed his views with reference to the exercise of jurisdiction by this Court under Article 142. Relevant extract of the opinion is reproduced below:

"If the Framers of the Constitution had contemplated an era when judicial power (not prompted by any legal provision) would be exercised in the vacuum created by governmental or State inaction, they may have been a little surprised; but then (I like to believe) they may have felt the compulsion to remove the fetter of Article 37, making the Directive Principles of State Policy directly enforceable by the courts!

Individual notions of justice according to individual Judges, unguided by law, sometimes known as "palm tree justices" or "Cadi justice" appear to be excluded under our Constitution. As if to emphasise this, the oath required to be taken by all Judges of the higher judiciary significantly omit any reference to "justice". Every Judge of a High Court or Supreme Court takes an oath to perform the duties of his or her office without fear or favour, without affection or ill will, and to "uphold the Constitution and the law".

But some Judges are more equal than others, and in our three-tier system of court administration, Judges of the Supreme Court are constitutionally placed in a class apart.

Under Article 136 of the Constitution, 'the Supreme Court may in its discretion grant special leave to appeal from any judgment, appeal, determination, sentence or order, in any cause or matter passed or made by any court or tribunal in the territory of India'. The governing words are "in its discretion". *And there is a plethora of case law to support the proposition that even where a court or tribunal below the Supreme Court has transgressed the law, the Supreme Court is not bound to interfere, and will not interfere and set it aside under its extraordinary jurisdiction under Article 136, if it is satisfied that the interests of justice have been served. There is no compulsion for the highest court to set aside even incorrect or illegal decisions of lower courts, High Courts or tribunals, if the overriding*

considerations of justice do not so warrant. Even after special leave is granted under Article 136, and an appeal gets admitted, the appellant must show that exceptional and special circumstances do exist, and that if there is no interference by the highest court, substantial and grave injustice would result.

Under our Constitution, Judges of the Supreme Court have been conferred a special and unique power, not conferred on Judges of High Courts or Judges of any other courts in the country. Article 142(1) provides that the Supreme Court, in the exercise of its jurisdiction, may pass such decree or make such order as is necessary 'for doing complete justice in any cause or matter pending before it', and any decree so passed, or order so made, is enforceable throughout the territory of India. Judges of the highest court, conferred with this extraordinary power, are apparently empowered to disregard statutory prohibitions—'apparently' because there has been a flip-flop in the approach of the court—Judges speaking in different voices at different times.

In 1991, reading Article 142, a Constitution Bench of the Court said[7] *that any prohibition, stipulation or restriction contained in ordinary law could not act as a limitation on its constitutional powers under Article 142. But seven years later, another Constitution Bench of five Justices read*[10] *Article 142(1) as not empowering the Supreme Court to bypass or override a specific statutory provision. The latter was an instance of a hard case making bad law. For the shocking behaviour in Court of an advocate (always an officer of the Court), the advocate was not only punished*[11] *(by a Bench of three Justices of the Supreme Court) for contempt of court, but he was also suspended from practise for a period of three years. Since the power of suspension was statutorily vested only in the Bar Council of India, and could be reviewed by the highest court only on an appeal from a decision of the Bar Council to it, a Bench of five Justices set aside the earlier order of suspension, holding that the Bench of three Justices ought not to have overlooked an express statutory provision.*

In my view, the Apex Court has virtually denuded itself of its constitutional power to do 'complete justice'. To be at all meaningful, the words 'complete justice' must comprehend a power to disregard statutory provisions in exceptional circumstances, unless the provisions are themselves based on some fundamental principles of public policy.

When declining to exercise its extraordinary jurisdiction under Article 136 of the Constitution, the Supreme Court may (and often does) refuse to correct orders and decisions passed by High Courts and other courts and tribunals even where they are illegal and contrary to law i.e. where the justice of the case calls for no interference. Yet under the law as now declared by the Constitution Bench, the highest court whilst deciding a

7 *Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584
10 *Supreme Court Bar Assn.* v. *Union of India*, (1998) 4 SCC 409
11 *Vinay Chandra Mishra, In re*, (1995) 2 SCC 584

particular case before it cannot consciously overlook or bypass enacted law when exercising its wide powers under Article 142. An obvious inconsistency in approach. If the Supreme Court can be trusted under Article 136 to cock a blind eye at a decision of a High Court which is contrary to law (but which is otherwise 'just'), the highest court must be likewise trusted when it deliberately ignores the law in the overriding interest of doing complete justice in a particular case before it under Article 142." (emphasis supplied)

21. The learned counsel then drew our attention to the decision in *State* v. *Sanjeev Nanda*[12] and pointed out to the following observations recorded therein: (SCC p. 493, para 122)

"*122.* Convicts in various countries, now, voluntarily come forward to serve the community, especially in crimes relating to motor vehicles. Graver the crime, greater the sentence. But, serving the society actually is not a punishment in the real sense where the convicts pay back to the community what they owe. Conduct of the convicts will not only be appreciated by the community, it will also give a lot of solace to them, especially in a case where because of one's action and inaction, human lives have been lost."

Based on the above, it was the contention of the learned counsel for the appellants that courts can consider whether it was necessary to travel one extra mile to do complete justice. It was submitted that the question whether this Court should travel an extra mile, in the facts of this case, is not difficult to answer. It was submitted that this Court must travel the extra mile to preserve the "knowledge" acquired by the appellants, which would enable them to give effect to the same, by effectively utilising it for the welfare of the nation. According to the learned counsel, in his opinion the case in hand did not present a situation where anyone could have a second thought, simply because there would be no one adversely affected by adoption of such a course.

22. The learned counsel also placed reliance on *Sushil Ansal* v. *State*[13] and highlighted the position expressed in para 11, which is extracted below: (SCC p. 365)

"*11.* In view of the aforestated undisputed facts, the issue with regard to imposition of sentence upon the appellants is to be decided by us. We are concerned with imposition of sentence in a criminal case and not with awarding damages in a civil case. Principles for deciding both are different."

It was submitted that on the basis of the aforesaid determination, cumulative benefit of the society in receiving service rendered by professionals (like the appellants) should also be taken into consideration.

12 (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Cri) 899
13 (2015) 10 SCC 359 : (2016) 1 SCC (Cri) 28

23. Last of all, reliance was placed on *Priya Gupta* v. *State of Chhattisgarh*[14] wherein also illegal admissions were dealt with. In the above judgment, this Court held as under: (SCC pp. 459-60, paras 71 & 73-74)

> "*71*. In the present case, we have no doubt in our mind that the fault is attributed to all the stakeholders involved in the process of admission i.e. the Ministry concerned of the Union of India, the Directorate of Medical Education in the State of Chhattisgarh, the Dean of Jagdalpur College and all the three members of the Committee which granted admission to both the appellants on 30-9-2006. But the students are also not innocent. They have certainly taken advantage of being persons of influence. The father of Appellant 2 Akansha Adile was the Director of Medical Education, State of Chhattisgarh at the relevant time and as noticed above, the entire process of admission was handled through the Directorate. The students well knew that the admissions can only be given on the basis of merit in the entrance test and they had not ranked so high that they were entitled to the admission on that basis alone. In fact, they were also aware of the fact that no other candidate had been informed and that no one was present due to non-intimation. Out of favouritism and arbitrariness, they had been given admission by completing the entire admission process within a few hours on 30-9-2006.
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> * * *
>
> *73*. In the present case, we are informed that the students have already sat for their final examination and are about to complete their courses. Even if we have to protect their admissions on the ground of equity, they cannot be granted such relief except on appropriate terms. By their admissions, firstly, other candidates of higher merit have been denied admission in the MBBS course. Secondly, they have taken advantage of a very low professional college fee, as in private or colleges other than the government colleges, the fee payable would be Rs 1,95,000 per year for general admission and for management quota, the fee payable would be Rs 4,00,000 per year, but in government colleges, it is Rs 4000 per year. So, they have taken a double advantage. As per their merit, they obviously would not have got admission into Jagdalpur College and would have been given admission in private colleges. The ranks that they obtained in the competitive examination clearly depict this possibility because there were only 50 seats in Jagdalpur College and there are hundreds of candidates above the appellants in the order of merit. They have also, arbitrarily and unfairly, benefited from lower fees charged in Jagdalpur College.
>
> *74*. On the peculiar facts and circumstances of the case, though we find no legal or other infirmity in the judgment under appeal, but to do complete justice between the parties within the ambit of Article 142 of the Constitution of India, we would permit the appellants to complete their professional courses, subject to the condition that each one of them pay a

14 (2012) 7 SCC 433 : (2012) 2 SCC (L&S) 367 : 4 SCEC 555

sum of Rs 5 lakhs to Jagdalpur College, which amount shall be utilised for developing the infrastructure in Jagdalpur College."

24. In order to further illustrate the scope of the exercise of jurisdiction vested in this Court under Article 142, the learned counsel placed reliance on *Academy of Nutrition Improvement* v. *Union of India*[15]. It was submitted that in the above case the controversy related to a ban on non-iodised salt. The said ban was unsustainable in law. Be that as it may, the Court in exercise of its jurisdiction under Article 142 invoked the ground of public health to continue the existing position till such time as remedial action was taken by Parliament. In this behalf, our attention was drawn to the following observations of this Court: (SCC pp. 297-99, paras 68-72)

"*What Relief*?

68. We have already noticed that as at present there is no material to show that universal salt iodisation will be injurious to public health (that is to the majority of populace who do not suffer from iodine deficiency). But we are constrained to hold that Rule 44-I is ultra vires the Act and therefore, not valid. The result would be that the ban on sale of non-iodised salt for human consumption will be raised, which may not be in the interest of public health. We are therefore, of the view that the Central Government should have at least six months' time to thoroughly review the compulsory iodisation policy (universal salt iodisation for human consumption) with reference to latest inputs and research data and if after such review, is of the view that universal iodisation scheme requires to be continued, bring appropriate legislation or other measures in accordance with law to continue the compulsory iodisation programme.

69. The question is having held that Rule 44-I to be invalid, whether we can permit the continuation of the ban on sale of non-iodised salt for human consumption for any period. Article 142 of the Constitution vests unfettered independent jurisdiction to pass any order in public interest to do complete justice, if exercise of such jurisdiction is not contrary to any express provision of law.

70. In *Supreme Court Bar Assn.* v. *Union of India*[10], this Court observed: (SCC p. 432, para 48)

> '*48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is *necessary for doing complete justice* "between the parties in any cause or matter pending before it". The very nature of the power must lead the court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating*

15 (2011) 8 SCC 274
10 (1998) 4 SCC 409
* **Ed.**: The matter between two asterisks has been emphasised in *Supreme Court Bar Assn. case*, (1998) 4 SCC 409.

*parties by "ironing out the creases" *in a cause or matter before it*.* Indeed this Court is not a court of restricted jurisdiction of only dispute settling. *It is well recognised and established that this Court has always been a lawmaker and its role travels beyond merely dispute settling. It is a "problem solver in the nebulous areas"* (see *K. Veeraswami* v. *Union of India*[16]) *but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be *controlled* by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise *may come directly in conflict* with what has been expressly provided for in statute dealing expressly with the subject.*'

71. In *Kalyan Chandra Sarkar* v. *Rajesh Ranjan*[17], this Court after reiterating that this Court in exercise of its jurisdiction under Article 142 of the Constitution would not pass any order which would amount to supplanting substantive law applicable to the case or ignoring express statutory provisions dealing with the subject, observed as follows: (SCC p. 294, para 27)

'*27. It may therefore be understood that, the plenary powers of this Court under Article 142 of the Constitution are inherent in the court and are *complementary* to those powers which are *specifically conferred on the court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties ... and are in the nature of *supplementary* powers ... (and) may be put on a different and perhaps even wider footing than ordinary inherent powers of a court *to prevent injustice*. The advantage that is derived from a constitutional provision couched in such a wide compass is that it prevents "clogging or obstruction of the stream of justice".* (See: *Supreme Court Bar Assn.*[10])'

72. In view of the above and to do complete justice between the parties in the interest of public health, in exercise of our jurisdiction under Article 142 of the Constitution, we direct the continuation of the ban contained in Rule 44-I for a period of six months. The Central Government may within that period review the compulsory iodisation programme and if it decides to continue, may introduce appropriate legislative or other measures. It is

* **Ed.**: The matter between two asterisks has been emphasised in *Supreme Court Bar Assn. case*, (1998) 4 SCC 409.

16 (1991) 3 SCC 655 : 1991 SCC (Cri) 734

17 (2005) 3 SCC 284 : 2005 SCC (Cri) 705

* **Ed.**: The matter between two asterisks has been emphasised in *Rajesh Ranjan case*, (2005) 3 SCC 284.

10 *Supreme Court Bar Assn.* v. *Union of India*, (1998) 4 SCC 409

needless to say that if it fails to take any action within the expiry of six months from today, Rule 44-I shall cease to operate." (emphasis supplied)

Based on the conclusions drawn in the above judgments, it was submitted that in the same manner in which judicial notice was taken by this Court, on the ground of "public health", this Court needed to take into consideration, the "knowledge" component (acquired by the appellants), and the impossibility of transferability of the intellectual property to invoke Article 142 of the Constitution to legitimise the curriculum successfully completed by the appellants. As such, it was pointed out that the present consideration also falls within the permissible constitutional parameters. It was accordingly pleaded that the view expressed by the Hon'ble Presiding Judge (of the former Division Bench) should be affirmed.

25. Having adverted to the situations wherein this Court has positively exercised power under Article 142 to provide relief to the parties concerned, the learned counsel also placed for our consideration, two judgments rendered by this Court, wherein the Court had declined to exercise the power vested in it under Article 142. First of all, reference was made to *Priyanka Estates International (P) Ltd.* v. *State of Assam*[18], wherein this Court held as under: (SCC p. 43, paras 58-62)

"*58.* In the case in hand, it is noted that a number of occupiers were put in possession of the respective flats by the builder/developer constructed unauthorisedly in violation of the laws. Thus, looking to the matter from all angles it cannot be disputed that ultimately the flat owners are going to be the greater sufferers rather than builder who has already pocketed the price of the flat.

59. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the reliefs of granting compensation to the victims in exercise of the powers conferred on it. In doing so, the courts are required to take into account not only the interest of the petitioners and the respondents but also the interest of public as a whole with a view that public bodies or officials or builders do not act unlawfully and do perform their duties properly.

60. In the case in hand, admittedly, at no point of time was Appellant 1, Priyanka Estates International (P) Ltd. able to show to its prospective purchasers the occupancy certificate or completion certificate issued by the authorities concerned. The same could not even be shown to us and without it, Appellant 1 could not have embarked into sale of flats as it was mandatorily required.

61. The instant case is not a case of breach of contract. It is a clear case of breach of the obligation undertaken to erect the building in accordance with building regulations and failure to truthfully inform the warranty of title and other allied circumstances.

18 (2010) 2 SCC 27 : (2010) 1 SCC (Civ) 283

62. Even though at the first instance, we thought of invoking this Court's jurisdiction conferred under Article 142 of the Constitution of India so as to do complete justice between the parties and to direct awarding of reasonable/suitable compensation/interest to the flat owners, whose flats are ultimately going to be demolished, but, with a heavy heart, we have restrained ourselves from doing so, for variety of reasons and on account of various disputed questions that may be posed in the matter. However, we grant liberty to those, whose flats are ultimately going to be demolished, to exhaust the remedy that may be available to them in accordance with law." (emphasis supplied)

It was submitted that the aforesaid judgment pertained to violations of building norms, and the Court considered it inappropriate to provide relief to the persons who had purchased flats, despite their vehement contention that they were not guilty of violating the building regulations (as the builders who had sold the flats to them had raised constructions in violation of the building norms).

26. Additionally, reference was made to *Ramji Veerji Patel* v. *Revenue Divisional Officer*[19], wherein our attention was invited to the following observations: (SCC pp. 651-52, paras 29-31)

"*29.* Mr Pallav Shishodia, learned Senior Counsel also urged that the appellants are migrants from Gujarat. They had settled in Chidambaram about thirty years back and the livelihood of the entire family of the appellants which comprised of about 40 members is dependent on the sawmill existing on the subject land. Having regard to these facts, he would submit that we invoke our jurisdiction under Article 142 of the Constitution and declare the acquisition of the appellants' land bad in law to do complete justice.

30. There is no doubt that by compulsory acquisition of their land, the appellants have been put to hardship. As a matter of fact, the RDO was alive to this problem. In his report dated 14-9-1989, the RDO did observe that the landowners have spent considerable money to raise the level of the land for constructing compound wall and running the sawmill. He was, however, of the opinion that the appellants' land was very suitable for the expansion of the depot and that suitable compensation can be paid to the landowners to enable them to purchase an alternative land. The appellants, however, proceeded to challenge the acquisition. The litigation has traversed up to this Court and taken about 22 years. The public purpose has been stalled for more than two decades.

31. Being the highest court, an extraordinary power has been conferred on this Court under Article 142 to pass any decree, order or direction in the matter to do complete justice between the parties. The power is plenary in nature and not inhibited by constraints or limitations. However, the power under Article 142 is not exercised routinely. It is rather exercised sparingly and very rarely. In the name of justice to the appellants, under Article 142,

19 (2011) 10 SCC 643 : (2012) 3 SCC (Civ) 1062

nothing should be done that would result in frustrating the acquisition of land which has been completed long back by following the procedure under the Act and after giving full opportunity to the appellants under Section 5-A. The possession of the land has also been taken as far back as on 25-7-2001." (emphasis supplied)

27. It was submitted by the learned counsel that the contours and parameters of the consideration recorded in the two cases referred to by him, could not be extended to the case of the appellants, which is unique and distinguishable from the cited cases, for reasons already expressed above.

28. Our attention was also drawn to the judgment rendered in *State of Punjab* v. *Rafiq Masih (Whitewasher)*[20], wherein this Court recorded the distinction between the exercise of jurisdiction vested in this Court under Article 136 as against Article 142. The relevant determination was expressed in the following paragraphs: (SCC pp. 889-91, paras 8 & 12)

"*8*. In our view, the law laid down in *Chandi Prasad Uniyal case*[21], no way conflicts with the observations made by this Court in the other two cases†. In those decisions, directions were issued in exercise of the powers of this Court under Article 142 of the Constitution, but in the subsequent decision this Court under Article 136 of the Constitution, in laying down the law had dismissed the petition of the employee. This Court in a number of cases had battled with tracing the contours of the provision in Articles 136 and 142 of the Constitution of India. Distinctively, although the words employed under the two aforesaid provisions speak of the powers of this Court, the former vests a plenary jurisdiction in the Supreme Court in the matter of entertaining and hearing of appeals by granting special leave against any judgment or order made by a court or tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under the specific provisions for appeal contained in the Constitution or other laws. Article 142 of the Constitution of India, on the other hand is a step ahead of the powers envisaged under Article 136 of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing "complete justice" in any cause or matter.

* * *

12. Article 142 of the Constitution of India is supplementary in nature and cannot supplant the substantive provisions, though they are not limited by the substantive provisions in the statute. It is a power that gives preference to equity over law. It is a justice-oriented approach as against the strict rigours of the law. The directions issued by the Court can normally be categorised into one, in the nature of moulding of relief and the other, as the declaration of law. "Declaration of law" as contemplated in Article 141 of

20 (2014) 8 SCC 883 : (2014) 4 SCC (Civ) 657 : (2014) 6 SCC (Cri) 154 : (2014) 3 SCC (L&S) 134
21 *Chandi Prasad Uniyal* v. *State of Uttarakhand*, (2012) 8 SCC 417 : (2012) 4 SCC (Civ) 450
† **Ed.**: The reference is to *Shyam Babu Verma* v. *Union of India*, (1994) 2 SCC 521 : 1994 SCC (L&S) 683 and *Sahib Ram* v. *State of Haryana*, 1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248.

the Constitution: is the speech express or necessarily implied by the highest court of the land. This Court in *Indian Bank* v. *ABS Marine Products (P) Ltd.*[22], *Ram Pravesh Singh* v. *State of Bihar*[23] and in *State of U.P.* v. *Neeraj Awasthi*[24] has expounded the principle and extolled the power of Article 142 of the Constitution of India to new heights by laying down that the directions issued under Article 142 do not constitute a binding precedent unlike Article 141 of the Constitution of India. They are directions issued to do proper justice and exercise of such power cannot be considered as law laid down by the Supreme Court under Article 141 of the Constitution of India. The Court has compartmentalised and differentiated the relief in the operative portion of the judgment by exercise of powers under Article 142 of the Constitution as against the law declared. The directions of the Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case in hand from the rigour of the law in view of the peculiar facts and circumstances do not comprise the ratio decidendi and therefore lose their basic premise of making it a binding precedent. This Court on the qui vive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case."

Based on the above distinction between the exercise of jurisdiction under Articles 136 and 142 of the Constitution, it was submitted that the power to do complete justice under Article 142, was far far beyond the power vested in this Court under Article 136. It was, therefore, the submission of the learned counsel, that this Court should not refrain from extending complete justice to the appellants, in the manner expressed by the Hon'ble Presiding Judge (of the former Division Bench).

29. Mr Shyam Divan, learned Senior Counsel, entered appearance on behalf of an appellant (in CA No. 1752 of 2016). Some of the submissions advanced by the learned counsel were the same as were canvassed by Mr R. Venkataramani. Rather than repeating the same, we have incorporated the said submissions, along with the contentions advanced by Mr R. Venkataramani. Mr Shyam Divan during the course of advancing his submissions pointed out that even though the appellant represented by him was admitted to the MBBS course in 2008, he had not yet qualified all the professional examinations of the course. It was submitted that the cancellation order in the case of the appellant was passed after 6 years of his admission (— in April 2014). Referring to the factual position noticed in the impugned judgment dated 7-10-2014[1] (rendered by the High Court of Madhya Pradesh), it was submitted that in the Pre-Medical Test conducted for admissions in the year 2008, the candidatures of 42 students were cancelled on account of discovery of tampering in their roll numbers. It was highlighted that only 10 of the above 42 candidates, whose roll numbers

22 (2006) 5 SCC 72
23 (2006) 8 SCC 381 : 2006 SCC (L&S) 1986
24 (2006) 1 SCC 667 : 2006 SCC (L&S) 190
1 *Nidhi Kaim* v. *State of M.P.*, 2014 SCC OnLine MP 8642

were discovered to have been tampered with, had actually taken admission to the MBBS course. And 32 of the said candidates, who could have been admitted, did not even come forward to enrol themselves for the course. This, according to the learned counsel, is a vital factor which needs to be taken into consideration.

30. In addition, the learned counsel invited the Court's attention to certain observations made by the Hon'ble Presiding Judge, which are extracted hereunder: (*Nidhi Kaim case*[2], SCC pp. 632, 634 & 650, paras 7, 12 & 46)

> "*7.* The enquiry was conducted. The pattern of the enquiry is similar to the one conducted concerning PMT 2013. Based on the enquiry reports, the Board came to two conclusions:
>
> (*i*) there was a tampering with the examination process in each one of the abovementioned five years; and
>
> (*ii*) the appellants as well as some other students resorted to unfair means at the said examinations. They were beneficiaries of such tampered examination process.
>
> The Board, therefore, cancelled the admissions of the appellants and some others. …
>
> * * *
>
> *12. Admittedly, there was no show-cause notice to any one of the students before cancelling their admissions. No speaking order indicating the reasons which formed the basis for the cancellation of the admissions was either passed or served on any one of the appellants. Reasons were spelt out for the first time in the High Court. It appears from the impugned judgment and the submissions made before us that respondents relied upon circumstantial evidence to reach the two conclusions referred to in para 7* (supra).
>
> * * *
>
> *46. There is nothing inherently irrational or perverse in the Board's conclusions*:
>
> (*i*) *that the examination process was tampered with; and*
>
> (*ii*) *that all the appellants herein who are identified to be members of the "pairs" (referred to earlier) are beneficiaries of such manipulated examination process, relying upon the circumstances (mentioned in Footnote 12 supra) if they are unimpeachable.*
>
> *Each one of the circumstances is an inference which flows from certain basic facts which either individually or in combination with some other facts constituted the circumstance.* One or more of such facts [constituting circumstances mentioned in paras (*iii*) to (*vi*) of Footnote 12 supra] are demonstrated to be not true (with reference to some of the appellants)." (emphasis supplied)

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611

Footnote 12, referred to in para 46 extracted above, is reproduced below: (SCC p. 634)

"The circumstances are:

(*i*) *With respect to each of the five years in question, a definite pattern was followed by the Board in allotment of roll numbers as well as examination centres. But, it is detected on enquiry that allotment of both the roll number and the examination centre with respect to some of the students was in deviation from the pattern adopted for the year.*

(*ii*) *Such deviations with reference to several centres occurred in pairs. The logical pattern employed for the generation of roll numbers was broken with respect to some pairs of students. They were allotted sequential roll numbers, though they could not have been allotted those numbers if the logical pattern were followed. Further, such pairs of students were allotted examination centres which they could not have been allotted having regard to roll numbers allotted to them, and the pattern of the roll numbers allotted to the particular examination centre.*

(*iii*) *In such pairs, once again there is a pattern i.e. the more accomplished student is made to sit in front of the other of the pair (referred to in the impugned judgment as "scorer" and "beneficiary" respectively). Such an arrangement was made in order to enable the "beneficiary" to copy from the "scorer".*

(*iv*) *With reference to most of the identified pairs, the candidates not only got substantially similar (if not identical) marks, but also their answers, both correct and incorrect, with reference to each one of the questions answered by them matched to a substantial extent.*

(*v*) *In most of the cases of the identified pairs, the "scorer" did not belong to Madhya Pradesh.*

(*vi*) *Such "scorers" in most of the cases though secured sufficiently high marks in the PMT, did not take admission in any one of the medical colleges of Madhya Pradesh. The respondents, therefore, believe that the "scorers" were not genuinely interested in securing admission in any medical college of MP and they appeared in the examination only to facilitate the "beneficiary" to obtain good marks to enable the beneficiary to secure admission.*" (emphasis supplied)

31. Based on the aforesaid observations, the learned counsel was emphatic in highlighting that even the Hon'ble Presiding Judge (of the former Division Bench) was conscious of the fact that some of the findings recorded with reference to some of the appellants were not correct in respect of the parameters adopted. Stated differently, it was submitted that the Hon'ble Presiding Judge had a lurking feeling that some of the appellants were innocent. It was submitted that this was one of the considerations which must have weighed with the Hon'ble Presiding Judge to invoke Article 142 to render complete justice in the matter.

32. In continuation of the above submission, the learned counsel invited our attention to the principles culled out by the Bench for recording its conclusions, based on the analysis of the judgments relied upon by the learned counsel for the rival parties which are extracted hereunder: (*Nidhi Kaim case*[2], SCC p. 649, paras 42-44)

"*42*. From an analysis of the above decisions, the following principles emerge:

42.1. Normally, the rule of audi alteram partem must be scrupulously followed in the cases of the cancellation of the examinations of students on the ground that they had resorted to unfair means (copying) at the examinations.

42.2. But the abovementioned principle is not applicable to the cases where unfair means were adopted by a relatively large number of students and also to certain other situations where either the examination process is vitiated or for reasons beyond the control of both students and the examining body, it would be unfair or impracticable to continue the examination process to insist upon the compliance with audi alteram partem rule.

42.3. The fact that unfair means were adopted by students at an examination could be established by circumstantial evidence.

42.4. The scope of judicial review of the decision of an examining body is very limited. If there is some reasonable material before the body to come to the conclusion that unfair means were adopted by the students on a large scale, neither such conclusion nor the evidence forming the basis thereof could be subjected to scrutiny on the principles governing the assessment of evidence in a criminal court.

43. Cases such as the one on hand where there are allegations of criminal conspiracies resulting in the tampering with the examination process for the benefit of a large number of students would be certainly one of the exceptional circumstances indicated in Sinha case[25] *provided there is some justifiable material to support the conclusion that the examination process had been tampered with.*

44. In the light of the principles of law emerging from scrutiny of the abovementioned judgments, we are of the opinion that the case on hand can fall within the category of exceptions to the rule of audi alteram partem if there is reliable material to come to the conclusion that the examination process is vitiated. That leads me to the next question — whether the material relied upon by the Board for reaching the conclusion that the examination process was contaminated insofar as the appellants (and also some more students) are concerned and the appellants are the beneficiaries of such contaminated process, is tenable?" (emphasis supplied)

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611
25 *Bihar School Examination Board* v. *Subhas Chandra Sinha*, (1970) 1 SCC 648

33. Based on the principles culled out the Hon'ble Presiding Judge recorded the following conclusion in paras 48-51: (*Nidhi Kaim case*[2], SCC pp. 651-52)

"*48*. The other submission of the appellants in this regard is that if there is a deviation from the general pattern with regard to the allotment of roll numbers and the examination centres, the appellants could not be blamed or "penalised" because the entire process of the allotment was done by the Board and its officials.

49. In my opinion, the question of either "blame" or "penalty" does not arise in the context. If tampering with the examination process took place, whether all or some of the appellants are culpable is a matter for a criminal court to examine as and when any of the appellants is sought to be prosecuted. *But the fact that the examination process was tampered with is relevant for administrative action such as the one impugned herein. The said fact formed the foundation for the further enquiry for identifying the beneficiaries of such contaminated process. Having regard to the circumstances relied upon, I do not see anything illogical or untenable in the conclusions drawn by the Expert Committee which formed the basis for the impugned action of the Board.* It is argued that the formula adopted by the Board to record the conclusion that the members of the identified pairs resorted to unfair means at the examination is without any scientific basis. *I do not see any irrationality either in the formula or the decision of the Board to assign greater weightage to the incorrect matching answers. There is nothing inherently suspicious about two candidates sitting in close proximity in an examination and giving the same correct answer to a question because there can be only one correct answer to a question. On the other hand, if they give the same wrong answer to a given question and if the number of such wrong answers is high, it can certainly generate a doubt and is a strong circumstance indicating the occurrence of some malpractice. Such a test was approved by this Court in Bagleshwar Prasad case*[26].

50. Even otherwise, in my opinion, it would be futile to pursue the inquiry in this regard. Assuming for the sake of argument that the submission of the appellants is right and there are some cases (of the appellants) *where the appellants can demonstrate* (if an opportunity is given to them) *that the circumstantial evidence is not foolproof and therefore, the impugned order must be set aside on the ground of failure of natural justice, the Board would still be entitled* (in fact it would be obliged in view of the allegation of systematic tampering with the examination process year after year) *in law to conduct afresh enquiry after giving notice to each of the appellants. That would mean spending enormous time both by the Board and by the appellants for the enquiry and the consequential (inevitable) litigation regarding the correctness of the eventual decision of the Board.*

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611
26 *Board of High School and Intermediate Education* v. *Bagleshwar Prasad*, AIR 1966 SC 875

51. For the abovementioned reasons, I do not propose to interfere with the impugned judgment on the count that the rule of audi alteram partem was not complied with by the respondents before cancelling the admissions of the appellants herein." (emphasis supplied)

A perusal of the aforesaid consideration, according to the learned counsel, leads to the inevitable impression that the Hon'ble Presiding Judge (of the former Division Bench) was of the view that the question of holding an inquiry in the matter was futile, even if the contention advanced at the hands of the appellants was correct (namely, that the appellants could demonstrate that the material relied upon by the authorities would not have the effect of being absolutely conclusive). It was accordingly submitted that it was apparent from the order itself that the Hon'ble Presiding Judge did not allow the appellants an opportunity to substantiate their claim(s) of innocence before the authorities, as that would take "enormous time". Be that as it may, it was the submission of the learned counsel, that the conclusions recorded by the Hon'ble Presiding Judge (in paras 48-51, extracted above), reveal a lurking impression in the Court's mind that some of the appellants may not have been blameworthy of what they were being accused of.

34. Likewise, for the same purpose, the learned counsel placed reliance on the observations recorded by the Hon'ble Presiding Judge (of the former Division Bench): (*Nidhi Kaim case*[2], SCC p. 652, para 52)

"*52. The next question that requires examination is the legality of the action of the respondents after a lapse of considerable time. It varies between one to five years with reference to each of the appellants. The decision of the respondents necessarily led to litigation which consumed another three years. The net result is that the appellants, who belong to 2012 batch, spent four years undergoing the training in medical course; others progressively longer periods extending up to eight years but could not acquire their degrees because of the impugned action and the pendency of this litigation. Most of the appellants would have acquired their degree in medicine by now if they had been successful at the examinations.*" (emphasis supplied)

Relying on the above observations, it was submitted that the lapse of considerable time also weighed heavily in the mind of the Hon'ble Presiding Judge for not interfering with the determination rendered by Vyapam. It was therefore, that the Hon'ble Presiding Judge expressed the view that adoption of the aforesaid course would prolong the process of litigation for another three years, which in turn would result in the prolongation of the period required by the appellants to clear their professional examinations (by a further period of three years). It was, therefore, submitted that the decision rendered by the Hon'ble Presiding Judge, by taking recourse to Article 142, was aimed at putting a quietus to the judicial process, and thereby, alleviating young fertile minds from the rigors of any strict interpretation of law.

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611

35. For the same purpose, as has been recorded hereinabove, the learned counsel for the appellants placed reliance on para 60 of the judgment dated 12-5-2016[2]. The same is reproduced below: (*Nidhi Kaim case*[2], SCC p. 655)

> "*60.* Coming to the case in hand, the number of students involved is relatively huge.† In view of the conclusion recorded by me earlier that neither the procedure adopted by the respondents nor the evidence relied upon by the respondents for taking impugned action against the appellants could be characterised as illegal, is it permissible for this Court to interfere with the impugned action of the respondents either on the ground that there is a considerable time lapse or that such action would have ruinous effect on the lives and careers of the appellants and therefore, inequitable, is a troubling question."

It was submitted on the basis of the observations extracted above that the Hon'ble Presiding Judge (of the former Division Bench) was conscious of the ruinous effect on the lives and careers of the appellants, and therefore, felt the necessity of rendering justice to the appellants, by taking recourse to the power vested in this Court, under Article 142 of the Constitution.

36. Last of all, it was the submission of the learned counsel for the appellants that the Hon'ble Presiding Judge, in his order dated 12-5-2016[2], was also conscious of the fact that most of the appellants may well have been juvenile, and as such, could not have been blamed for the role attributed to them in the process of having gained wrongful admission to the MBBS course. This aspect of the matter was noticed in para 71 of the judgment dated 12-5-2016[2], wherein the Hon'ble Presiding Judge observed as under: (*Nidhi Kaim case*[2], SCC p. 661)

> "*71. Another important consideration in the context is that most of (if not all) the appellants, whatever be their respective role, if any, in the tampering of the examination process, must have been "juveniles" as defined under the Juvenile Justice (Care and Protection of Children) Act, 2000. They cannot be subjected to any "punishment" prescribed under the criminal law even if they are not only the beneficiaries of the tampered examination process but also the perpetrators of the various acts which constitute offences contaminating the examination process.*" (emphasis supplied)

Taking note of the observations extracted above, according to the learned counsel, it would not be incorrect to suggest that the Hon'ble Presiding Judge felt the necessity of taking recourse to Article 142, and thereby, the compulsion to render complete justice to the appellants.

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611

† They are the beneficiaries of a tampered examination process. The tampering took place systematically and repeatedly for a number of years virtually destroying the credibility of the examination process. It deprived a number of other more deserving students from securing admissions to the medical colleges.

37. Mr Shyam Divan, learned Senior Counsel canvassed that it was essential for us to take into consideration all the aspects referred to above. It was submitted that each one of the aforesaid aspects must be deemed to have been consciously taken into consideration by the Hon'ble Presiding Judge (of the former Division Bench) for eventually taking recourse to Article 142 of the Constitution to render complete justice to the appellants. These reasons, according to the learned counsel, should be read in conjunction with the submissions advanced at the hands of Mr R. Venkataramani, Senior Advocate, wherein the emphasis laid on was that the appellants had gained "knowledge", which could not be transferred/transposed to those who may have been better claimants for admission to the MBBS course than the appellants.

38. All put together, the learned counsel for the appellants endeavoured to demonstrate an absolute justification for the exercise of jurisdiction at the hands of the Hon'ble Presiding Judge, vested in this Court under Article 142 of the Constitution. The learned counsel accordingly beseeched this Court repeatedly to give expression to each and every facet of the understanding of the proposition at the hands of the Hon'ble Presiding Judge (of the former Division Bench), and to uphold the order passed by him in favour of the appellants.

39. Mr Sidharth Luthra, Senior Advocate, represented the appellants in Civil Appeals Nos. 1729, 1761-68, 1813-14 and 1838 of 2016. At the outset, it was submitted that the appellants in the abovementioned civil appeals were seeking directions in terms of Article 142 of the Constitution, which provides plenary powers to this Court, whereby, this Court can pass such orders, as may be necessary for doing complete justice. It was submitted that in the instant case, the instant prayer was also being made by keeping the larger public interest in mind. The learned counsel adverted to the divergent views expressed by the members of the former Division Bench (through their respective orders, dated 12-5-2016[2]) with respect to the exercise of the above power. Referring to the order passed by the Hon'ble Presiding Judge (of the former Division Bench), our attention was drawn to the following view expressed by him: (*Nidhi Kaim case*[2], SCC p. 661, para 73)

> "*73. Society must receive some compensation from the wrongdoers. Compensation need not be monetary and in the instant case it should not be. In my view, it would serve the larger public interests, by making the appellants serve the nation for a period of five years as and when they become qualified doctors, without any regular salary and attendant benefits of service under the State, nor any claim for absorption into the service of the State* subject of course to the payment of some allowance (either in cash or kind) for their survival. *I would prefer them serving the Indian Armed Forces subject to such conditions and disciplines to which the Armed Forces normally subject their regular medical corps. I would prefer that the appellants be handed over the certificates of their medical degrees only after they complete the abovementioned five*

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611

years. The abovementioned exercise would require the ascertainment of the views of the Ministry of Defence, Government of India, and passing of further appropriate orders by this Court thereafter. In view of the disagreement of views in this regard, I am not proposing such an exercise." (emphasis supplied)

40. Thereupon, our attention was drawn to the order of the Hon'ble Companion Judge (of the former Division Bench), who expressed his views as under: (*Nidhi Kaim case*[2], SCC pp. 679 & 681, paras 123 & 126)

"*123. Applying the aforesaid law to the facts of the case at hand, I find that the appellants are not entitled to claim any equitable relief on the ground that they have almost completed their course during the interregnum period and hence, no action on the basis of their PMT examination results is called for.*

* * *

126. In these circumstances, the State may consider permitting the appellants and other candidates alike the appellants to appear in the competitive examination whenever it is held and consider granting age relaxation to those candidates who have crossed the age-limit, if prescribed. Such liberty, if granted, would not cause any prejudice to any one and at the same time would do substantial justice to all such candidates as was done in *Bihar School Examination*[25]. *Beyond this, in my view, the appellants are not entitled to claim any indulgence*." (emphasis supplied)

41. The learned counsel, to support the cause of the appellants, drew our attention to the year of admission and status of the appellants. It was submitted that the appellant in Civil Appeal No. 1729 of 2016 had completed her medical courses by clearing all four professional examinations, while the appellants in Civil Appeals Nos. 1767-68, 1813-14 and 1838 of 2016 had cleared the second/third professional examinations, under orders of the High Court and/or of this Court. Their academic record in school (Classes X and XII results) was also highlighted to demonstrate that they were meritorious students. It was also pointed out that none of these appellants were named in any first information report, nor were they ever subjected to any criminal investigation/prosecution, as on date. It was further pointed out that their admissions were cancelled, not on finding of any overt act being proved on their part but based on conclusions recorded by the Expert Computer Committee constituted by Vyapam, which had evolved a formula to examine whether the candidates sitting in pairs had adopted unfair means during their Pre-Medical Test. It was submitted that the conclusions drawn against the appellants were based on a general analysis and not on any individual determination of guilt.

42. The learned counsel pointed out that in a report prepared by the Ministry of Health and Family Welfare, Government of India, it had been concluded that there was an acute shortage of medical professionals (medical

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611
25 *Bihar School Examination Board* v. *Subhas Chandra Sinha*, (1970) 1 SCC 648

doctors) in India, especially at the primary care level, both in the government and the private sector, as a consequence of which citizens were deprived of basic health care including preventive care. It was also highlighted that the rural health statistics compiled by the Ministry of Health and Family Welfare, Government of India affirm for the year 2015 that the State of Madhya Pradesh had vacancies of 659 doctors in Primary Health Centres alone. According to data compiled by the WHO for 2015, India had one doctor per 1681 people. It was contended that although the number of health facilities had risen in the past decade, workforce shortages were substantial. Relying on statistics of 31-3-2015, it was submitted that more than 8% of the 25,300 Primary Health Centres in the country were without a doctor, 38% were without a laboratory technician, and 22% had no pharmacist. And, nearly 50% of posts of female health assistants and 61% of male health assistants were vacant. In Community Health Centres, it was submitted, the shortage was huge — surgeons were short by 83% — and paediatricians by 82%. Even in health facilities where doctors, specialists and paramedical staff were posted, their availability remained in question because of a high rate of absenteeism (for the above data, reliance was placed on an article titled "India Still Struggles with Rural Doctor Shortages", <www.thelancet.com> of 12-12-2015).

43. Keeping in view the factual position stated above, it was prayed that the appellants be granted such relief as would enable them to serve society and humanity. This, according to the learned counsel, can be achieved by allowing the appellants to put their medical education to use — by allowing them to serve the needs of society. It was contended that an element of sympathetic consideration towards the appellants was called for.

44. It was submitted that many of the appellants may have crossed the maximum age-limit for entry to any other graduate course, and may not be able to undertake another course of education. To permit them, as proposed by the Hon'ble Companion Judge, to retake the examination after having completed years of medical education would put them at an extremely disadvantageous position. It was submitted that such action would not further public interest. Even though it was acknowledged that the same would act as a deterrent on account of years of academic career lost. The learned counsel also highlighted that most of the appellants were juvenile at the relevant time. It was submitted that the utilitarian principle commended the use of the appellants' education and training for the public policy of promoting healthcare. It was submitted that the principle that "fraud vitiates everything", should not be allowed to trounce the cause of public good. Further, if the undertaking as given was considered, and accepted, that itself would act as a deterrent for other students in future. The undertaking given by these appellants is extracted below:

> "*The appellants would serve in government hospitals/government health centres* on an undertaking or on a bond for 10 years' period or any higher period as may be directed by this Court.
>
> And/Or

The appellants would serve in rural areas and rural health centres on an undertaking or on a bond for 10 years' period or any higher period as may be directed by this Court.

And/Or

The appellants would serve in medical centres of National Rural Health Mission for 10 years' period or any higher period as may be directed by this Court.

Note I.— Based on the directions as may be issued, the appellants could undertake to serve in Madhya Pradesh or such other place as may be directed by this Court.

Note II.— The effect of directing the appellants to serve in government hospitals for the rest of their professional career would have the effect of entitling the appellants to be considered as government servants and would entitle them to dues payable to government servants including protection accorded to government servants and hence they could be put to bonds for the period specified.

B. Alternatively, the appellants can do community service for a 2-year period under the aegis of the State Social Welfare Department followed by medical service as per Para A above.

C. The appellants can teach at government schools for a 2-year period followed by medical service as per Para A above.

D. Quantum of compensation per candidate may be fixed at Rs 10 lakhs or as directed to be deposited in the Chief Minister's Welfare Fund or State Treasury within a prescribed time period (refer *State* v. *Sanjeev Nanda*[12]).

E. Additionally, a percentage of the yearly income of the appellants could be deposited in the Chief Minister's Welfare Fund or State Treasury for such period as may be prescribed by this Court."

45. In this behalf, reliance was placed on *Rafiq Masih case*[20], wherein the scope of Article 142 of the Constitution and the nature of the power vested in this Court under the above provisions was considered. In the above judgment it was pointed out that it was held as under: (SCC pp. 890-91, para 12)

"*12. Article 142 of the Constitution of India is supplementary in nature and cannot supplant the substantive provisions, though they are not limited by the substantive provisions in the statute. It is a power that gives preference to equity over law. It is a justice-oriented approach as against the strict rigours of the law*. The directions issued by the Court can normally be categorised into one, in the nature of moulding of relief and the other, as the declaration of law. "Declaration of law" as contemplated in Article 141 of the Constitution: is the speech express or necessarily implied by the highest court of the land. This Court in *Indian Bank* v.

12 (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Cri) 899

20 *State of Punjab* v. *Rafiq Masih*, (2014) 8 SCC 883 : (2014) 4 SCC (Civ) 657 : (2014) 6 SCC (Cri) 154 : (2014) 3 SCC (L&S) 134

ABS Marine Products (P) Ltd.[22], *Ram Pravesh Singh* v. *State of Bihar*[23] and in *State of U.P.* v. *Neeraj Awasthi*[24] *has expounded the principle and extolled the power of Article 142 of the Constitution of India to new heights by laying down that the directions issued under Article 142 do not constitute a binding precedent unlike Article 141 of the Constitution of India. They are directions issued to do proper justice and exercise of such power, cannot be considered as law laid down by the Supreme Court under Article 141 of the Constitution of India. The Court has compartmentalised and differentiated the relief in the operative portion of the judgment by exercise of powers under Article 142 of the Constitution as against the law declared. The directions of the Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case in hand from the rigour of the law in view of the peculiar facts and circumstances do not comprise the ratio decidendi and therefore lose its basic premise of making it a binding precedent. This Court on the qui vive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case.*" (emphasis supplied)

46. Even in criminal law, it was pointed out that a distinction was made between acts having the same consequences, but done with differing intent and different level of culpability. In *Empress of India* v. *Idu Beg*[27], the Allahabad High Court, it was pointed out, had explained the varying degrees of culpability in cases of murder, rash and negligent acts, and culpable homicide, whereupon it was held as under: (SCC OnLine All)

"... The category of intentional acts of killing, or of acts of killing committed with the knowledge that death, or injury likely to cause death, will be the most probable result, or with the knowledge that death will be a likely result, is contained in the provisions of Sections 299 and 300 of the Penal Code. Section 304 creates no offence, but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted, where, an intention to kill being present, the act would have amounted to murder but for its having fallen within one of the Exceptions to Section 300, and those cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is knowledge that death will be a likely result, but intention to cause death or bodily injury likely to cause death is absent. *Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with knowledge, that death must be the most probable result, are prima facie murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder. Now*

22 (2006) 5 SCC 72
23 (2006) 8 SCC 381 : 2006 SCC (L&S) 1986
24 (2006) 1 SCC 667 : 2006 SCC (L&S) 190
27 1881 SCC OnLine All 103 : ILR (1881) 3 All 776

it is to be observed that Section 304-A, is directed at offences outside the range of Sections 299 and 300, and obviously contemplates those cases into which neither intention nor knowledge of the kind already mentioned enters. For the rash or negligent act which is declared to be a crime is one "not amounting to culpable homicide", and it must therefore be taken that intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded. Section 304-A does not say every unjustifiable or inexcusable act of killing not hereinbefore mentioned shall be punishable under the provisions of this section, but it specifically and in terms limits itself to those rash or negligent acts which cause death but fall short of culpable homicide of either description." (emphasis supplied)

47. Mr Raju Ramachandran, learned Senior Counsel, appearing for the appellants in Civil Appeals Nos. 1795-98 of 2016, canvassed their claim from a completely different angle. He acknowledged that there was unanimity in the courts, which had adjudicated upon the controversy (first the High Court, and thereafter, this Court), that the appellants were party to a tainted admission process. They were, admittedly, beneficiaries of such process. Even though the appellants were not issued notices, and therefore, were not afforded an opportunity to tender any explanation in their defence, it was acknowledged that the formula adopted by Vyapam for cancelling the results of the appellants was found to be fair by all courts. The determination rendered by Vyapam was accordingly upheld. It was contended that the submissions advanced by him were despite the aforestated acknowledged factual (— and legal) position.

48. It was asserted by the learned counsel that admissions to academic institutions of higher learning involved a cut-throat competition. The admission competition, according to the learned counsel, was maximum in the case of medical institutions. It was submitted that in the above competitive environment, children of tender years find themselves pressurised on account of the availability of limited seats. Not only that, it was pointed out that pressure in the matter of admissions, as stated above, was also fuelled by parents. It was pointed out that parents on their own part felt a sense of personal failure in case their children were not successful in gaining admission to prestigious courses (— or, in acclaimed institutions). And therefore it was highlighted that parents also derived great pleasure and satisfaction when their wards gained admission to important courses and/or in prestigious institutions. Children as also parents, therefore, strive for societal recognition when they compete for admission to professional courses. It was therefore submitted that the actions of the appellants in the present controversy required to be viewed by keeping all the above factors in mind.

49. The learned counsel also submitted that the overwhelming desire of candidates as well as the expectation of their parents had created inroads into the system of admission to professional courses, and the admission system had become rotten. It was acknowledged that this has not been the position only in the recent past but had been ongoing for many years. In the present case, in the first instance admissions of the year 2013 were annulled. Based on the manner

in which wrongful admissions were made, during the year 2013, an inquiry was conducted for the preceding years as well. This led to the cancellation of the admission of the appellants (and others, similarly situated as them), in respect of admissions during 2008 to 2012. It was submitted that the present controversy should be viewed from the aforestated background (and perspective).

50. It was emphasised by the learned counsel that the appellants were not perpetrators of a fraud. It was an ongoing fraud which had been in existence for many years. The appellants were merely a willing party to the existing fraud. Their willingness to seek benefit thereof was based on a compelling atmosphere including their own ambition. It was submitted that the appellants should not be dealt with by using a common brush which would wipe out their career(s) on the ground that they were party to a fraud. It was reiterated that the appellants were innocent. The appellants, it was pointed out, were not mature enough to debate within their minds the cause and effect of their actions. It was submitted that all the appellants (or at least, most of them) were juvenile when they had appeared for the Pre-Medical Test, and even for this reason, they could not be held responsible for any wrongdoing, whether it emanated from a misrepresentation simpliciter, or misrepresentation having the trappings of fraud.

51. It was submitted that the Hon'ble Presiding Judge (of the former Division Bench) had approached the issue in the right perspective. It was pointed out that the Hon'ble Presiding Judge not only approved the formula adopted for shortlisting the candidates who had obtained admissions by manipulating the process of admission but had also upheld the orders passed by Vyapam, cancelling the admission of the appellants to the MBBS course. And yet, for societal benefit, and certainly not for the benefit of the appellants, invoked Article 142 to uphold the validity of the academic course (or part thereof) successfully completed by them. This invocation of Article 142 of the Constitution by the Hon'ble Presiding Judge, it was submitted, not only took away the trauma from the minds of the young appellants who had undoubtedly committed a serious mistake but had also taken care of a societal need in the field of professional medicine. The route adopted by the Hon'ble Presiding Judge in preserving the academic career(s) successfully completed by the appellants, according to the learned counsel, was founded on a regime of penance to be served by the appellants.

52. The learned counsel repeatedly emphasised that his solitary contention was that societal benefit was of much greater significance as compared to individual punishment. It was submitted that in the manner in which Article 142 has been interpreted by this Court, the determination rendered by the Hon'ble Presiding Judge should be endorsed by the instant Division Bench also. In order to persuade us to adopt the aforesaid course, reliance was placed on *Sanjeev Nanda case*[12] and our attention was drawn to the following: (SCC pp. 493-94, paras 122-23)

12 *State* v. *Sanjeev Nanda*, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Cri) 899

"*Community service for avoiding jail sentence*

122. Convicts in various countries, now, voluntarily come forward to serve the community, especially in crimes relating to motor vehicles. Graver the crime, greater the sentence. *But, serving the society actually is not a punishment in the real sense where the convicts pay back to the community what they owe. Conduct of the convicts will not only be appreciated by the community, it will also give a lot of solace to them, especially in a case where because of one's action and inaction, human lives have been lost.*

123. In the facts and circumstances of the case, where six human lives were lost, we feel, to adopt this method would be good for the society rather than incarcerating the convict further in jail. Further sentence of fine also would compensate at least some of the victims of such road accidents who have died, especially in hit-and-run cases where the owner or driver cannot be traced. We, therefore, order as follows:

(*1*) *The accused has to pay an amount of Rs 50 lakhs (Rupees fifty lakhs) to the Union of India within six months, which will be utilised for providing compensation to the victims of motor accidents, where the vehicle owner, driver, etc. could not be traced, like victims of hit-and-run cases*. On default, he will have to undergo simple imprisonment for one year. This amount be kept under a different head to be used for the aforesaid purpose only.

(*2*) *The accused would do community service for two years which will be arranged by the Ministry of Social Justice and Empowerment within two months*. On default, he will have to undergo simple imprisonment for two years." (emphasis supplied)

The learned counsel whilst placing reliance on the observations in *Sanjeev Nanda case*[12] submitted that personal ambition, parental pressure, a corrupted system which had built inroads over the years (for gaining admission, through administrative assistance), the juvenility of the appellants, and the societal benefit, should be assessed wholesomely by this Court before recording its final conclusions.

53. Ms Indu Malhotra, learned Senior Counsel, representing some of the appellants adopted the submissions advanced by her learned colleagues. In addition, the learned counsel illustratively explained, by inviting the Court's attention to the factual position relating to some of the individual appellants, that the parameters adopted by Vyapam to determine the culpability of the students concerned could not conclusively justify the guilt of some of the appellants.

54. It was submitted that some of the appellants had a commendable academic record during their school education. And therefore, it would not be right to assume that the appellants would not have been in a position, on their own merit, to gain admission to the MBBS course. It was emphatically

12 *State* v. *Sanjeev Nanda*, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Cri) 899

highlighted that the conclusion drawn by Vyapam, against the appellants, was based on a generalised formula which could not be assumed to be correct with reference to all the appellants. But then, it was also contended that even if the formula was assumed to be correct, the findings recorded by Vyapam were clearly incorrect in respect of some of the parameters (incorporated in the formula), with reference to some of the appellants. In this behalf, it may be acknowledged that the learned counsel was at pains to highlight some illustrative instances with reference to some of those whose admissions were cancelled by Vyapam.

55. We find no reason or cause to delineate the facts relating to some of the individual appellants brought to our notice. This, because the former Division Bench through their separate orders dated 12-5-2016[2], and their subsequent order dated 30-8-2016[6], affirmed the recording of a concurrent opinion that the examination process for the years 2008 to 2012 was vitiated with reference to the appellants and others. Both the Hon'ble Judges comprising of the former Division Bench held that the appellants herein were beneficiaries of a vitiated process. In the above view of the matter, we would restrain ourselves from a reappreciation of a finding concurrently recorded by the former Division Bench despite the submissions emphatically advanced. We have placed on record (in para 5 hereinabove), the observations recorded by the former Division Bench in its order dated 30-8-2016[6]. We record our concurrence with the said observations. Needless to mention that by passing our order dated 28-7-2016[5], seeking a clarification from the former Division Bench, we were successful in saving a number of days of precious time of the Court which would have otherwise been utilised in hearing and determining the submission canvassed on behalf of the appellants founded on Article 145(5) of the Constitution. In fact that was the precise reason (recorded in our order dated 28-7-2016[5]) for which the clarification was sought.

56. Mr Purushaindra Kaurav, learned counsel appearing for the M.P. Professional Examination Board (Vyapam), drew our attention to the sequence of facts which eventually culminated in the cancellation of the results of the appellants (to the professional MBBS course). It was pointed out that on 6-7-2013, the Crime Branch of Indore received information that around twenty students from outside States (outside the State of Madhya Pradesh) like U.P., Bihar, etc. had appeared in the Pre-Medical Test, with a fake identity, just to facilitate other students (as the appellants herein) to gain higher marks. It was submitted that these outside students were not themselves desirous of gaining admission to the MBBS course. Their object was only to help the appellants, and others similarly situated. Based on the above information, the Crime Branch, Indore conducted a raid. During the course of the raid, 20 students with suspicious identity were detected. Crime Case No. 539 of 2013 was accordingly registered on 7-7-2013 at Rajendra Nagar Police Station, Indore.

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611
6 *Nidhi Kaim* v. *State of M.P.*, (2017) 4 SCC 73
5 *Nidhi Kaim* v. *State of M.P.*, (2017) 4 SCC 71

57. Arrests of the accused in Crime No. 539 of 2013 were made on 7-7-2013 itself. Based on the information furnished by those arrested, it emerged that a racket/scam supported by private doctors (as well as, other individuals) was operating. The main accused were identified as Sanjiv Shiplkar, Jagdish Sagar, Tarang Sharma, Bharat Mishra, etc. After the arrest of the above persons, it became known that Vyapam's officials were also involved. The names of Vyapam officials involved were — Pankaj Trivedi (Controller/ Director), Nitin Mohindra, (Principal System Analyst), Ajay Kumar Sen (Senior System Analyst), Chandrakant Mishra (Assistant Programmer), etc. All the aforesaid Vyapam officials were also arrested between July and September 2013.

58. It was submitted that the investigation of Crime Case No. 539 of 2013 was handed over to a Special Task Force which recovered incriminating data from a computer hard disc. The information derived from the hard disc led to the registration of other crime cases pertaining to the examinations conducted by Vyapam, for admission to academic courses. Seeing the gravity and extent of the criminality and the highly placed persons involved, the investigation came to be entrusted to the Central Bureau of Investigation (CBI).

59. It was pointed out that after conducting a detailed inquiry in the Pre-Medical Examination, 2013, Vyapam cancelled the results of 415 candidates. This was done through two orders dated 9-10-2013 and 6-12-2013 (345 candidates by the former and 70 candidates by the latter). The aforesaid orders cancelling the results of 415 candidates were assailed by the aggrieved candidates through Writ Petition No. 20342 of 2013 (*Pratibha Singh* v. *State of M.P.*), and other connected matters. All the writ petitions were dismissed by the High Court on 11-4-2014[28]. The High Court upheld the orders dated 9-10-2013 and 6-12-2013 (cancelling the candidature of 415 candidates). It was pointed out that the order passed by the High Court on 11-4-2014[28] was assailed before this Court through SLPs (C) Nos. 13629-30 of 2014 (*Pooja Yadav* v. *State of M.P.*) and 16257 of 2014 (*Sumit Sinha* v. *State of M.P.*). This Court dismissed the former special leave petitions on 19-5-2014[29], and the latter on 8-8-2014[30]. It was, therefore, contended that on a controversy identical to the one in hand, this Court has already concluded the matter against the appellants.

60. Having carried out a similar exercise, it was pointed out, with reference to admissions to the MBBS course, during the years 2008 to 2012, Vyapam had passed similar orders (cancelling the candidature of students) on 15-4-2014 and 9-5-2014. Writ Petition No. 1918 of 2014 (*Neetu Singh Markam* v. *State of M.P.*) and connected matters were yet again dismissed by the High Court of Madhya Pradesh, on 24-9-2014[31]. It is therefore apparent, according to the learned counsel, that the challenge raised by the candidates who had gained admission during the period 2008 to 2012 was not accepted by the High Court

28 *Pratibha Singh* v. *State of M.P.*, 2014 SCC OnLine MP 4064
29 *Pooja Yadav* v. *State of M.P.*, SLPs (C) Nos. 13629-30 of 2014, decided on 19-5-2014 (SC)
30 *Sumit Sinha* v. *State of M.P.*, (2016) 7 SCC 615 (footnote 6)
31 *Neetu Singh Markam* v. *State of M.P.*, 2014 SCC OnLine MP 5588 : (2014) 4 MPLJ 203

for exactly the same reasons as were recorded by the High Court for upholding the cancellation orders pertaining to admissions made during 2013.

61. The above order dated 24-9-2014[31] was assailed by the appellants herein, wherein the members of the former Division Bench passed separate orders on 12-5-2016[2] details whereof have already been recorded hereinabove.

62. For the reason that the appellants had not gained admission to the MBBS course on their own merit, it was contended by the learned counsel that they would not enjoy the trust of the society as they would always carry a stigma of having obtained their qualifications by deceit and fraud. It was pointedly asserted that on account of the trust deficit between the appellants and their likely patients, a feeling of faith and confidence would never be entertained by their patients, however brilliant or outstanding the appellants may actually be. It was submitted that the candidature of 634 students admitted to the MBBS course during the years 2008 to 2012 had been cancelled. Out of the students whose candidature was cancelled, the appellants before this Court numbered only 139. It was clarified that out of the 634 students whose candidatures were cancelled, only 268 candidates had actually taken admission to the MBBS course. Based on the aforesaid data, it was submitted that a large number of students whose admission to the MBBS course had been cancelled had already accepted the decision of Vyapam and/or of the High Court gracefully. It was pointed out that for the few appellants who have been agitating their claim before this Court, it would be unjust and improper to invoke the jurisdiction vested with this Court under Article 142 of the Constitution.

63. Premised on the factual position narrated above, it was submitted that all kinds of manipulation and fraud were adopted by the appellants to gain admission to the MBBS course. It was asserted that this was not a simple case of mass copying. It was submitted that the instant case constituted a deep-rooted conspiracy involving parents, students, government officials, racketeers and various middlemen. The instant scam, it was pointed out, was going on for years together, which had resulted in tarnishing the good name and veracity of Vyapam. It was submitted that the need of the hour was to assuage the reputation of Vyapam by dealing with those involved and the beneficiaries, with a strong hand. It was pleaded that Article 142 of the Constitution needed to be invoked towards that end.

64. The learned counsel representing Vyapam highlighted persons similarly situated as the appellants, who were admitted to the MBBS course during the year 2013, were not allowed any equitable relief, as is presently claimed by the appellants. After the dismissal of the challenge raised by them by the High Court, this Court also unequivocally rejected their claims (on 19-5-2014[29] and 8-8-2014[30]). It was submitted that it was not open to the appellants to seek a relief which was not granted to others similarly situated.

31 *Neetu Singh Markam* v. *State of M.P.*, 2014 SCC OnLine MP 5588 : (2014) 4 MPLJ 203
2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611
29 *Pooja Yadav* v. *State of M.P.*, SLPs (C) Nos. 13629-30 of 2014, decided on 19-5-2014 (SC)
30 *Sumit Sinha* v. *State of M.P.*, (2016) 7 SCC 615 (footnote 6)

65. It was also pointed out by the learned counsel representing Vyapam that criminal cases had also been initiated against a number of appellants for having adopted fraudulent means to gain admission to the MBBS course. It was submitted that as against the remaining appellants investigation was ongoing and as soon as the same would be completed, criminal proceedings would be initiated against them as well. It was asserted that the actions of the appellants and of those with whose connivance they gained entry into the MBBS course constituted a scam. In such circumstances, there could be no question of considering any contention advanced on behalf of the appellants, which would validate any acquisition based on fraud and deceit. This, according to the learned counsel, would amount to giving premium to the appellants for their wrongful actions.

66. It was also submitted by the learned counsel representing Vyapam that such an attempt at the hands of this Court would demoralise meritorious candidates. Such relief to the appellants, as has been accorded by the Hon'ble Presiding Judge (of the former Division Bench), would encourage all and sundry to gain admission in future as well by adopting malpractice of all kinds. In the instant view of the matter, it was submitted that benevolence shown to the appellants would not be in the larger public interest.

67. On behalf of Vyapam, it was also asserted that the appellants were mostly juvenile at the time when they gained entry into the MBBS course. As such, it was pointed out that they were still young and could turn a fresh leaf in their life by working hard so as to re-achieve the benefits of their individual merit. It was submitted that such of the appellants who had faith in themselves would not lag behind. It was pointed out that the appellants and others similarly situated may well be granted the relief of competing in the Pre-Medical Test by relaxation of their age and qualification in exercise of the power vested in this Court under Article 142. It was submitted that the appellants deserved no more.

68. It was also asserted on behalf of Vyapam that the fact that the appellants had undergone the entire MBBS course, or a substantial part thereof, should not weigh with this Court as a determinative factor whether or not the appellants were entitled to any sympathetic consideration. It was submitted that the delayed action against the appellants was based on the fact that the instant scam remained a guarded secret which came out for the first time on account of the information received by the Crime Branch of Indore on 6-7-2013. As already noticed hereinabove, in the first instance, investigations were limited to the admission to the MBBS course on the basis of the Pre-Medical Test conducted in the year 2013. Only when it was realised that there had been an ongoing racket for admission to the MBBS course, the investigating agency widened the scope of inquiry, leading to the discovery of adoption of similar unfair means in the matter of admissions even during the years 2008 to 2012. As a matter of overall consideration, it was submitted that keeping in mind the maxim "fraud vitiates everything", no benefit could be claimed by the appellants on the basis of any statutory rights including the law of limitation. It was therefore

asserted that it would not be proper, in the facts and circumstances of the instant case, to exercise the jurisdiction vested in this Court under Article 142 of the Constitution to extend any benefit to the appellants.

69. The learned counsel representing Vyapam placed reliance on *Vinod Bhandari* v. *State of M.P.*[32] The instant judgment pertained to an application filed by an accused in the Vyapam scam, seeking bail. Bail having been declined[33] to him by the High Court he approached this Court. This Court noticing the fact that the appellant was the Managing Director of Shri Aurobindo Institute of Medical Sciences, Indore, and that crores of rupees were collected to help undeserving students to pass the entrance examination to the MBBS course, arrived at the conclusion that an offence of a high magnitude leading to illegal admissions to large number of undeserving candidates by corrupt means undermined the trust of the people, and the integrity of the medical profession itself. In the aforesaid view of the matter, this Court also declined the prayer for bail.

70. Reliance was also placed on *Mridul Dhar (5)* v. *Union of India*[34]. The instant case also related to admission to the MBBS course. The seriousness of the process of admission was noticed by this Court in para 7 of the above judgment, which is extracted below: (SCC p. 72)

> "*7.* It is a matter of anguish that despite various decisions of this Court and laying down of a time schedule for completion of admission process, the time schedule has not been adhered to at various stages by various authorities resulting in otherwise avoidable discontentment and hardship to the candidates. The observance of the time schedule is paramount for effective utilisation to all-India quota of medical and dental seats. *The denial of a seat in the college of choice on the basis of one's merit position leads to frustration and results in injustice to the young students. The admission to a professional course based on merit position is paramount for the career of a student. The omission and commission in respect of admissions this year, as is evident from the orders aforenoted, adversely affected the career of meritorious students in their not getting admission in the college of their choice. Any frustration and feeling of injustice at an impressionable age at which the students compete in all-India competition is neither desirable from the point of view of either the young students nor for the country's future.* We are concerned with the career of those bright candidates who compete in a tough all-India competition. In this background, it is necessary to examine the acts of omission and commission at various levels, the suggestions that have been made and submissions put forth, to consider the issuance of directions for streamlining admissions from the next academic year in MBBS/BDS courses." (emphasis supplied)

32 (2015) 11 SCC 502 : (2015) 4 SCC (Cri) 480
33 *Vinod Bhandari* v. *State of M.P.*, 2014 SCC OnLine MP 8633
34 (2005) 2 SCC 65 : 2 SCEC 673

Based on the aforesaid observations, it was contended that unlike the submissions advanced at the behest of the appellants it was also necessary to keep in mind the effect of regularisation of a tainted admission process on those who had been deprived of admission despite their merit.

71. Reliance was also placed on *Gurdeep Singh* v. *State of J&K*[35]. The instant case also pertained to admission to the MBBS course wherein this Court observed as under: (SCC p. 192, paras 11-12)

> "*11.* In the result, we find that the denial of the seat to the appellant in the sports category, cannot be justified. As Respondent 6 was not eligible, there was no question of a tie. The appellant should now be given the seat. By an earlier interlocutory order, a seat had been directed to be kept vacant for the appellant's benefit in the event of his success. We direct the authorities to admit the appellant to the course within two weeks from today. We therefore, allow this appeal, set aside the order dated 10-8-1992 of the High Court and grant the reliefs claimed in the writ petition.
>
> *12. What remains to be considered is whether the selection of Respondent 6 should be quashed. We are afraid, unduly lenient view of the courts on the basis of human consideration in regard to such excesses on the part of the authorities, has served to create an impression that even where an advantage is secured by stratagem and trickery, it could be rationalised in courts of law. Courts do and should take human and sympathetic view of matters. That is the very essence of justice. But considerations of judicial policy also dictate that a tendency of this kind where advantage gained by illegal means is permitted to be retained will jeopardise the purity of selection process itself; engender cynical disrespect towards the judicial process and in the last analysis embolden errant authorities and candidates into a sense of complacency and impunity that gains achieved by such wrongs could be retained by an appeal to the sympathy of the court. Such instances reduce the jurisdiction and discretion of courts into private benevolence. This tendency should be stopped. The selection of Respondent 6 in the sports category was, on the material placed before us, thoroughly unjustified. He was not eligible in the sports category. He would not be entitled on the basis of his marks, to a seat in general merit category. Attribution of eligibility long after the selection process was over, in our opinion, is misuse of power. While we have sympathy for the predicament of Respondent 6, it should not lose sight of the fact that the situation is the result of his own making. We think in order to uphold the purity of academic processes, we should quash the selection and admission of Respondent 6. We do so, though, however, reluctantly.*" (emphasis supplied)

Based on the aforesaid observations, it was contended that this Court clearly and unequivocally arrived at the conclusion that there should be no judicial sympathy to the advantage of persons who secured admission by stratagem and trickery. It was accordingly submitted that any act of bestowing legality

35 1995 Supp (1) SCC 188 : 1995 SCC (L&S) 378

on admissions acquired through such a selection process would constitute a misuse of power vested in this Court under Article 142 of the Constitution.

72. Reliance was also placed on *Tanvi Sarwal* v. *CBSE*[36]. This case also pertained to admission to the MBBS course. Herein, question papers were leaked and large-scale cheating and malpractices were adopted. Such fraudulent admissions were aided by an organised gang for monetary consideration. The learned counsel for Vyapam therefore asserted that the conclusions drawn in the cited case were of extreme relevance to the present controversy, herein also, similar allegations had been established. From the above judgment, the learned counsel placed reliance on the following observations: (SCC pp. 594-95, paras 18-19)

> "*18*. As has been noticed hereinabove, the disclosures in the investigation suggest that the benefit of answer key has been availed by several candidates taking the examination, by illegal means. Though as on date, 44 such candidates have been identified, having regard to the modus operandi put in place, the numbers of cellphones and other devices used, it is not unlikely that many more candidates have availed such undue advantage, being a part of the overall design and in the process have been unduly benefited qua the other students who had made sincere and genuine endeavours to solve the answer paper on the basis of their devoted preparation and hard labour. *In view of the widespread network, that has operated, as the status reports disclose and the admission of the persons arrested including some beneficiary candidates, we are of the opinion, in view of the strong possibilities of identification of other candidates as well involved in such malpractices, that the examination has become a suspect. As it is, the system of examination pursued over the decades has been accepted by all who are rational, responsible and sensible, to be an accredited one, for comparative evaluation of the merit and worth of candidates vying for higher academic pursuits. It is thus necessary, for all the role players in the process, to secure and sustain the confidence of the public in general and the student fraternity in particular in the system by its unquestionable trustworthiness. Such a system is endorsed because of its credibility informed with guarantee of fairness, transparency, authenticity and sanctity. There cannot be any compromise with these imperatives at any cost.*
>
> *19*. Segregation only of the already 44 identified candidates stated to be the beneficiaries of the unprincipled manoeuvre by withholding their results for the time being, in our comprehension cannot be the solution to the problem that confronts all of us. Not only thereby, if the process is allowed to advance, it would be pushed to a vortex of litigation pertaining thereto in the foreseeable future, the prospects of the candidates would not only remain uncertain and tentative, they would also remain plagued with prolonged anguish and anxiety if involved in the ordeal of court cases. Acting on this option, would in our estimate, amount to driving knowingly

36 (2015) 6 SCC 573 : (2015) 3 SCC (Cri) 253 : 7 SCEC 357

the students, who are not at fault, to an uncertain future with their academic career in jeopardy on many counts. *Further, there would also be a lurking possibility of unidentified beneficiary candidates stealing a march over them, on the basis of the advantages availed by them through the underhand dealings as revealed. Having regard to the fact, that the course involved with time would yield the future generations of doctors of the country, who would be in charge of public health, their inherent merit to qualify for taking the course can by no means be compromised.*" (emphasis supplied)

Based on the above observations, it was submitted that in matters pertaining to fraudulent admissions, the consistent course adopted by this Court has been to ensure the purity of the process and not to extend any benefit to undeserving candidates.

73. Reliance was then placed on *Abhyudya Sanstha* v. *Union of India*[37]. This case also pertained to adoption of a tainted process of admission to educational courses, wherein the institute (and not the students), had approached this Court. The learned counsel drew the Court's attention to the following observations: (SCC p. 160, paras 22-24)

"*22*. The question which remains to be considered is whether the Court should direct regularisation of the admission of the students, who were allotted to the appellants by the State Government, etc. pursuant to the directions given by this Court. Although, in the absence of cogent material, it is not possible to record a finding that the students were party to the patently wrong and misleading statement made by the appellants, the Court cannot overlook the fact that none of the appellants has been granted recognition by WRC, Bhopal and in view of the prohibition contained in Section 17-A of the Act read with Regulation 8(12), the appellants could not have admitted any student. However, *with a view to make business and earn profit in the name of education, the appellants successfully manipulated the judicial process for allocation of the students. Therefore, there is no valid ground much less justification to confer legitimacy upon the admission made by the appellants in a clandestine manner. Any such order by the Court will be detrimental to the national interest. The students who may have taken admission and completed the course from an institution, which had not been granted recognition, will not be able to impart value based education to the future generation of the country. Rather, they may train young minds as to how one can succeed in life by manipulations. Therefore, we do not consider it proper to issue direction for regularising the admissions made by the appellants on the strength of the interim orders passed by this Court.*

23. In the result, the appeals are dismissed. Each of the appellants is saddled with costs of Rs 2 lakhs, which shall be deposited with the Maharashtra State Legal Services Authority within a period of three months. If the needful is not done, the Secretary, Maharashtra State Legal

37 (2011) 6 SCC 145 : (2011) 3 SCC (Civ) 241 : 4 SCEC 185

Services Authority shall be entitled to recover the amount of costs as arrears of land revenue.

24. We also declare that none of the students, who had taken admission on the basis of allotment made by the State Government, etc. shall be eligible for the award of degree, etc. by the affiliating body. If the degree has already been awarded to any such student, the same shall not be treated valid for any purpose whatsoever. WRC, Bhopal shall publish a list of the students, who were admitted by the appellants pursuant to the interim orders passed by this Court and forward the same to the Education Department of the Government of Maharashtra, which shall circulate the same to all government and aided institutions so that they may not employ the holders of such degrees." (emphasis supplied)

Based on the aforesaid observations, it was submitted that this Court in the above judgment consciously refused to regularise the admission of the students. Not only that, this Court declared that the students admitted to the course by manipulation would not be entitled to be awarded degrees, etc. by the affiliating body. Even if such a degree had already been awarded the same was to be treated as invalid for all purposes.

74. The learned counsel briefly invited our attention to *Dr Ambedkar Institute of Hotel Management, Nutrition and Catering Technology* v. *Vaibhav Singh Chauhan*[38] and highlighted the following observations recorded therein: (SCC p. 66, para 12)

"*12*. The learned Single Judge in the interim order has then emphasised on the fact that the respondent had apologised and had confessed to the possession of the chit. In our opinion this again is a misplaced sympathy. We are of the firm opinion that in academic matters there should be strict discipline and malpractices should be severely punished. If our country is to progress we must maintain high educational standards, and this is only possible if malpractices in examinations in educational institutions are curbed with an iron hand."

The learned counsel having referred to the above observations emphasised that there could be no leniency for manipulations in dealing with the matter of admissions.

75. Last of all, the learned counsel placed reliance on *Kerala Solvent Extractions Ltd.* v. *A. Unnikrishnan*[39], so as to emphasise on the words of caution expressed by a three-Judge Division Bench of this Court wherein it observed as under: (SCC p. 621, paras 9-10)

"*9*. Shri Vaidyanathan, learned Senior Counsel for the appellant, submitted, in our opinion not without justification, that the Labour Court's reasoning bordered on perversity and such unreasoned, undue liberalism and misplaced sympathy would subvert all discipline in the administration.

38 (2009) 1 SCC 59 : 3 SCEC 473
39 (2006) 13 SCC 619 : (2008) 2 SCC (L&S) 155

He stated that the management will have no answer to the claims of similarly disqualified candidates which might have come to be rejected. *Those who stated the truth would be said to be at a disadvantage and those who suppressed it stood to gain. He further submitted that this laxity of judicial reasoning will imperceptibly introduce slackness and unpredictability in the legal process and, in the final analysis, corrode legitimacy of the judicial process.*

10. We are inclined to agree with these submissions. In recent times, there is an increasing evidence of this, perhaps well-meant but wholly unsustainable tendency towards a denudation of the legitimacy of judicial reasoning and process. *The reliefs granted by the courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability.*" (emphasis supplied)

Relying on the above observations, it was contended that legitimising "knowledge", which had been obtained by unfair means would be perceived as an exercise of sympathy towards actions of fraud, and would have the effect of eroding the integrity of the judicial process.

76. We have given our thoughtful consideration to the submissions advanced on behalf of the rival parties. Before we deal with the contentions, we may record that there is logic and legitimacy in the submissions advanced on both sides. But only one out of them can be accepted. The one which has to be accepted should be based on legality supported by reasons. Our consideration and reasons are as follows.

77. During the course of hearing, the learned counsel were asked to assist this Court, on the likely public perception, in case this Court decided to exercise its jurisdiction in favour of the appellants under Article 142. In response, it was pointed out that public perception could never be homogeneous. It was submitted that public perception had inevitably to be heterogeneous, as the society itself was heterogeneous. According to the learned counsel, perception of the public would depend on the section of the society to which the query was addressed. Each section of the public could have a different view on the matter. This assertion made by the learned counsel was sought to be substantiated by placing reliance on *E.M. Sankaran Namboodripad* v. *T. Narayanan Nambiar*[40] and *People's Union for Civil Liberties* v. *Union of India*[41].

40 (1970) 2 SCC 325 : 1970 SCC (Cri) 451
41 (2005) 5 SCC 363

78. In view of the position expressed by this Court, in the above judgments, it was submitted that public perception should not be allowed to weigh so heavy in the mind of a court as would prevent it from rendering complete justice. According to the learned counsel taking into consideration public perception would render effectuating justice extremely difficult. It was pointed out that by sheer experience gained by the Judges, they were fully equipped to determine at their own whether or not the facts of a case required to be dealt with differently, under Article 142 — so as to render complete justice.

79. It was also the contention of the learned counsel that public perception was usually not based on a complete data of the dispute. And, unless the public was provided with the complete facts and was required to consciously take a call on the matter, the perception entertained by the public would be fanciful and imaginative and it would be full of deficiencies and inadequacies and it may also be an opinion based on lack of rightful understanding.

80. We are of the view that public perception despite being of utmost significance cannot be sought except after an onerous exercise. And that, any opinion, without the benefit of the entire sequence of facts may not be a dependable hypothesis. It is also true that disseminating full facts for seeking public opinion would be an immeasurably daunting task. An endeavour which was unlikely to yield any reasoned response based on logic and rationale. We are accordingly of the view that the suggestion of the learned counsel needs to be respected, and we should attempt a consideration at our own based on our experience and training in adjudicating disputes of unlimited variety … and of inestimable proportions. Our determination is as follows.

81. During the course of hearing, it could not be seriously disputed at the hands of the learned counsel for the appellants that the appellants' admission to the MBBS course was based on established deception and manipulation. All the same, we will expressly deal with the instant aspect of the matter and the extent of the appellants' involvement in the following paragraph. It was also not disputed at the hands of the learned counsel that the cause and effect of fraud was determined by the Court of Appeal in *Lazarus Estates Ltd.* v. *Beasley*[42]. The consequences of fraud, as determined by the Court of Appeal (in the above judgment), have been repeatedly approved by this Court. In the above judgment Denning, L.J. had observed as under: (QB pp. 712-13)

> "*We are in this case concerned only with this point: can the declaration be challenged on the ground that it was false and fraudulent*? It can clearly be challenged in the criminal courts. The landlord can be taken before the Magistrate and fined £30 (*see* Schedule 2, para 6) or he can be prosecuted on indictment, and (if he is an individual) sent to prison (*see* Section 5 of the Perjury Act, 1911). *The landlords argued before us that the declaration could not be challenged in the civil courts at all, even though it was false and fraudulent, and that the landlords can recover and keep the increased rent even though it was obtained by fraud. If this argument is correct, the landlords would profit greatly from their fraud.*

42 (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA)

The increase in rent would pay the fine many times over. I cannot accede to this argument for a moment. *No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever*; see, as to deeds, *Collins* v. *Blantern*[43], as to judgments, *Duchess of Kingston case, In re*[44] and, as to contracts, *Master* v. *Miller*[45]. *So here I am of opinion that, if this declaration is proved to have been false and fraudulent, it is a nullity and void and the landlords cannot recover any increase of rent by virtue of it.*" (emphasis supplied)

We need to say no more in the manner how fraud has to be dealt with whenever it is established. However, stated simply, nothing … nothing … and nothing, obtained by fraud, can be sustained, as fraud unravels everything. The question which arises for consideration is, whether the consequence of established fraud, as repeatedly declared by this Court, can be ignored, to do complete justice in a matter, in exercise of jurisdiction vested in this Court under Article 142 of the Constitution? And also, whether the consequences of fraud can be overlooked in the facts and circumstances of this case in order to render complete justice to the appellants?

82. The learned counsel for the appellants attempted to persuade us very strongly to overcome the law declared by this Court on the issue of established fraud. Is it possible to accept such a contention? If the appellants' involvement is not serious, it may well be possible to accept the contention. Therefore, before we deal with the submissions canvassed, it is important to understand the extent and proportion of the shenanigans of the appellants. It is not in dispute that none of the appellants would have been admitted to the MBBS course, as their merit position in the Pre-Medical Test was not as a result of their own efforts but was based on extraneous assistance. The appellants were helped in answering the questions in the Pre-Medical Test by meritorious candidates. The manipulation by which the appellants obtained admission involved not only a breach in the computer system whereby roll numbers were allotted to the appellants to effectuate their plans. It also involved the procurement of meritorious candidates/persons, who would assist them in answering the questions (in the Pre-Medical Test). The appellants' position, next to the helper concerned, at the examination, was also based on further computer interpolations. Not only were the seating plans distorted for achieving the purpose, even the institutions where the appellants were to take the Pre-Medical Test were arranged in a manner as would suit the appellants, again by a similar process of computer falsification. This could only be effectuated by a corrupted administrative machinery. Whether the nefarious and crooked administrative

43 (1767) 2 Wils KB 341 : 95 ER 847
44 (1776) 1 Leach 146 : 168 ER 175
45 (1791) 4 Term Rep 320 : 100 ER 1042

involvement was an inside activity, or an outside pursuit, is inconsequential. All in all, the entire scheme of events can well be described as a scam … a racket of sorts. The appellants or their parents would obviously have had to pay large amounts of money to the Vyapam authorities. The appellants' admission to the MBBS course was therefore clearly based on a well-orchestrated plan which we can safely conclude as based on established fraud.

83. The challenge raised by the appellants had failed before the High Court because the High Court had arrived at the conclusion that the appellants' admission to the MBBS course was vitiated. The order of the High Court was assailed before this Court. Both the Hon'ble Judges of the former Division Bench wrote separate orders. Both affirmed the conclusion drawn by the High Court through their separate orders dated 12-5-2016[2]. On a reference by us, the former Division Bench passed a common order on 30-8-2016[6] affirming: (SCC p. 74, para 3)

> "*3.* … Both of us recorded a concurrent opinion that the examination process in issue in these appeals conducted by Vyapam for the years 2008 to 2012 was vitiated with reference to the appellants before this Court and few others. We also agreed upon the conclusion that the appellants herein are the beneficiaries of such vitiated process."

The fact that the appellants had gained admission to the MBBS course through a vitiated process has attained finality.

84. The controversy in the present case does not relate to a singular academic session. Whether or not this vitiated process of obtaining admission to the MBBS course was adopted during the year 2007, and prior thereto, is not known. Because, MBBS admissions prior to 2008 were not investigated. Investigation was initiated in the first instance with reference to admissions for the year 2013. Thereafter, investigation was extended to those who had gained admission to the MBBS course during the years 2008 to 2012. Investigation revealed a well-thought out, unethical plan, involving administrative support, during six consecutive academic sessions … from 2008 to 2013. Vyapam was certain about the system having been manipulated at the hands of at least 634 candidates (during the years 2008 to 2012 itself). There may well have been others but no action was taken against them as their cases fell beyond the realm of suspicion (on the parameters approved and adopted by Vyapam).

85. This Court, while dealing with admissions during the years 2008 to 2012, followed the earlier judgment[2] wherein admissions to the MBBS course during the year 2013 were annulled. The High Court in all the matters consistently upheld the cancellation orders passed by Vyapam. This Court also reiterated the validity of the orders passed by the High Court, and thereby, upheld the Vyapam orders. In the above view of the matter, the factual and the legal position with reference to the admission of the appellants to the MBBS course being vitiated has attained finality. The fact that the appellants had

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611
6 *Nidhi Kaim* v. *State of M.P.*, (2017) 4 SCC 73

gained admission to the MBBS course by established fraud does not (as it indeed, cannot) require any further consideration.

86. In view of the sequence of facts narrated above, it is not possible for us to accept that the deception and deceit adopted by the appellants was a simple affair which can be overlooked. In fact, admission of the appellants to the MBBS course was the outcome of a well-orchestrated strategy of deceit and deception. And therefore, it is not possible to accept that the involvement of the appellants was not serious. In fact, it was indeed the most grave and extreme, as discussed above.

87. In the above view of the matter, it is not possible for us to overlook the consequences of the declared legal position with reference to the consequence of fraud on the ground that the involvement of the appellants in the acts of fraud was not serious.

88. We shall now examine the other submissions advanced on behalf of the appellants to determine whether or not the jurisdiction vested in this Court under Article 142 can be invoked in this matter. Our instant consideration i.e. whether to invoke (in the appellants' favour) Article 142 of the Constitution or not must obviously proceed on the position expressed by the two Hon'ble Judges (of the former Division Bench) through their separate orders dated 12-5-2016[2], and by their common order dated 30-8-2016[6], that the admission of the appellants to the MBBS course had been gained through a vitiated process. And also, on the basis of the conclusions recorded by us in paras 82 to 87 hereinabove.

89. We may first examine whether the appellants can seek relief from this Court under Article 142 of the Constitution as the provision is generally perceived. In *Union Carbide case*[7], while dealing with the scope of Article 142 of the Constitution, this Court felt that the jurisdiction of this Court under the above provision extended inter alia to deal "… with any extraordinary situation in the larger interest of administration of justice and from preventing manifest injustice being done …". The two important parameters for consideration are, "larger interest of administration of justice" and "preventing manifest injustice". The facts and circumstances of the present case, as have been debated and discussed at great length, do not reveal the existence of either of the aforesaid factors. With Vyapam having cancelled the appellants' admission to the MBBS course, and with the above orders having been upheld by the High Court, as well as by this Court, can it be said that the cancellation orders were unjust? No, not at all. If the admission of the appellants to the MBBS course was improper, the cancellation orders were obviously proper. If we restore the academic benefits of the appellants arising out of their admission, cancelled by Vyapam, the cancellation orders would be set at naught. That would undo the Vyapam orders upheld by the High Court and this Court. And this, we are satisfied, would not serve the "larger interest of administration of justice". On

2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611
6 *Nidhi Kaim* v. *State of M.P.*, (2017) 4 SCC 73
7 *Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584

the contrary, such an initiative would cause "manifest injustice". It is therefore not possible for us to accept that it is possible in the facts of the present case to invoke Article 142 of the Constitution — in the larger interest of the administration of justice. It is also not possible for us to accept that any manifest injustice would be done to the appellants if their admissions are cancelled. In our considered view, to do justice in the matter, the order passed by Vyapam must be upheld without any further modification or alteration. Needless to mention that the instant consideration does not take into account the different submissions advanced on behalf of the appellants. We will now endeavour to deal with the remaining submissions, which according to the learned counsel would persuade this Court to override the straitjacket examination of the matter dealt with in the manner recorded hereinabove.

90. We shall now consider the submission, founded on the interpretation placed by Mr Fali S. Nariman (*see* para 20, and onwards), on Article 142 of the Constitution. If the instant contention is acceptable then surely, according to the learned counsel, it would be possible to overlook the consequences of fraud (refer to para 81, hereinabove), in case sufficient justification was shown for taking a different course for doing complete justice. Mr Nariman's suggestion that the Supreme Court must be "trusted", and that, this Court can even ignore statutory law in the overriding interest of doing complete justice under Article 142 of the Constitution has been put forth for our consideration. The said view was sought to be extended by the learned counsel, even to a declared pronouncement of law under Article 141 of the Constitution (in addition to statutory law). Accepting the proposition canvassed, we are sure, would substantially enhance the authority of this Court. And for that reason, the hypothesis of Mr Nariman is extremely attractive. It is, however, not possible for us to ignore the decision of a Constitution Bench of this Court, in *Supreme Court Bar Assn.* v. *Union of India*[10]. The projection of Mr Fali S. Nariman, that this Court had virtually denuded itself of its constitutional power to do complete justice through the above judgment, is an expression of his opinion, which we respect. We are indeed bound by the declaration of the Constitution Bench.

91. In terms of the above judgment in *Supreme Court Bar Assn. case*[10], with which we express our unequivocal concurrence, it is not possible to accept that the words "complete justice" used in Article 142 of the Constitution, would include the power to disregard even statutory provisions, and/or a declared pronouncement of law under Article 141 of the Constitution, even in exceptional circumstances. Undoubtedly, the proposition can certainly be acceptable to a very limited extent — to the extent of self-aggrandisement. The "trust", Mr Nariman reposes in this Court, is indeed heartening and reassuring. But then, Mr Nariman, and a number of other outstanding legal practitioners like him, undeniably have the brilliance to mould the best of minds. And thereby, to persuade a court, to accept their sense of reasoning, so as to override statutory law and/or a declared pronouncement of law. It is this, which every court, should consciously keep out of its reach. In our considered view the

10 (1998) 4 SCC 409

hypothesis — that the Supreme Court can do justice as it perceives, even when contrary to statute (and, declared pronouncement of law), should never as a rule, be entertained by any court/Judge, however high or noble. Can it be overlooked, that legislation is enacted, only with the object of societal good, and only in support of societal causes? Legislation, always flows from reason and logic. Debates and deliberations in Parliament, leading to a valid legislation, represent the will of the majority. That will and determination, must be equally "trusted", as much as the "trust" which is reposed in a court. Any legislation which does not satisfy the above parameters would per se be arbitrary, and would be open to being declared as constitutionally invalid. In such a situation, the legislation itself would be struck down. It is difficult to visualise a situation wherein a valid legislation would render injustice to the parties, or would lead to a situation of incomplete justice — for one or the other party. Imagination, perception and comprehension of future events, have inherent limitations. We would therefore refrain ourselves from saying anything beyond what we have. At the cost of repetition, we would reiterate, that such a situation, as is contemplated by Mr Nariman, does not seem to be possible. We would however not like to close the window for such thought and consideration. We would rather leave it to the conscience of the court concerned to deal with such an exceptional situation if it ever arises. In our view, in the facts and circumstances of the present case, the cause of the appellants is not furthered even by the approach suggested by relying on the hypothesis of Mr Nariman. We can only conclude by observing that keeping in mind the conscious involvement of the appellants in gaining admission to the MBBS course, by means of a fraudulent stratagem of trickery, it is not possible for us to ignore or overlook the declaration of law with reference to fraud. Nothing obtained by fraud can be sustained. This declared proposition of law must apply to the case of the appellants as well. This is the outcome of the "trust" reposed in this Court, as being fully equipped to determine at its own, when Article 142 of the Constitution can be invoked to render complete justice, and when it cannot be so invoked.

92. One of the contentions advanced by the learned counsel for the appellants also was that the appellants had acquired "knowledge" while pursuing the MBBS course. It was pointed out that even in the present age of scientific development it was not possible to transfer "knowledge" (intellectual property) acquired by the appellants to those who may have been the rightful beneficiaries thereof. It was submitted that besides the individual loss which the appellants would suffer, the nation would suffer a societal and monetary loss if their admission to the MBBS course was not preserved. A detailed reference in this behalf was made to the vacancies of medical doctors in the State of Madhya Pradesh at all levels of healthcare. To demonstrate authenticity, findings recorded by the World Health Organisation were also brought to our notice (*see* para 42 hereinabove). Based on the above factual position, it was submitted that in extending relief to the appellants, this Court would be extending relief to the society and would be allowing the appellants to serve humanity. It was submitted that in case this Court exercised its jurisdiction in favour of the appellants (under Article 142 of the Constitution), there would

be societal gains, as the appellants would apply their "knowledge" to serve humanity. It was therefore pleaded that the facts and circumstances of the present case constituted a good ground to preserve the "knowledge" acquired by the appellants. It was also pointed out that if the suggested course was adopted no one would suffer any loss. Having given our thoughtful consideration to the above submission, we are of the considered view that conferring rights or benefits on the appellants, who had consciously participated in a well thought out, and meticulously orchestrated plan, to circumvent well laid down norms, for gaining admission to the MBBS course, would amount to espousing the cause of "the unfair". It would seem like allowing a thief to retain the stolen property. It would seem as if the Court was not supportive of the cause of those who had adopted and followed rightful means. Such a course would cause people to question the credibility of the justice-delivery system itself. The exercise of jurisdiction in the manner suggested on behalf of the appellants would surely depict the Court's support in favour of the sacrilegious. It would also compromise the integrity of the academic community. We are of the view that in the name of doing complete justice it is not possible for this Court to support the vitiated actions of the appellants through which they gained admission to the MBBS course.

93. Irrespective of what has been debated and concluded hereinabove, we are of the view that there cannot be any defined parameters within the framework whereof this Court would exercise jurisdiction under Article 142 of the Constitution. The complexity of administration, and of human affairs, would give room for the exercise of the power vested in this Court under Article 142 in a situation where clear injustice appears to have been caused to any party to a lis. In the absence of any legislation to the contrary, it would be open to this Court to remedy the situation. The appellants submitted that they fell in this category, namely, that there was no legislative provision to deal with admissions to academic institutions involving juveniles who had innocently breached legal norms, and had strayed into forbidden territory. The appellants urged that they should not be identified as a part of the syndicate engaged in manipulating their admissions, even though they were the beneficiaries thereof. It was submitted that the appellants were young, and not mature enough to understand the consequences of their actions. It was pointed out that the appellants were students engaged in the pursuit of education. The appellants asserted on the basis of their past academic record and on the strength of their performance in the MBBS course itself, that they could very well have been successful in gaining entry into the MBBS course, on their own merit, had they not chosen to seek the assistance of the syndicate. That, they had done so because of their lack of understanding of the ways of the world, should not be overlooked while dealing with the relief being sought. It was submitted that the consequence of affirmation of the Vyapam order(s) and its implications would expose them to such hardship as they did not deserve. It was pointed out that having gained entry into medical institutions, they had spent a number of years of their lives in academic pursuit. They had also spent their parents' hard-earned money. It was submitted that all that the appellants had achieved should

not be allowed to go waste. Especially because there would be no gainer. It was contended that it needed to be seriously considered, whether or not they were entitled to retain and use the "knowledge" acquired by them, for their own benefit, and for the benefit of the society at large. During the course of hearing, the learned counsel for the appellants pleaded for differential action. It was submitted that all the appellants were at a very important crossroad of life, and were under immense pressure, both parental and societal, at the relevant time, when they strayed into forbidden territory. In these circumstances, it was contended that they may not be dealt with so harshly as would scar their fragile minds. Or, would leave them with no future.

94. Having given our thoughtful consideration to the issues canvassed on behalf of the appellants, as has been narrated in the foregoing paragraphs, we have no hesitation to state that all these submissions deserve an outright rejection. Even in situations where a juvenile indulges in crime, he has to face trial, and is subjected to the postulated statutory consequences. Law, has consequences. And the consequences of law brook no exception. The appellants in this case, irrespective of their age, were conscious of the regular process of admission. They breached the same by devious means. They must therefore, suffer the consequences of their actions. It is not the first time that admissions obtained by deceitful means would be cancelled. This Court has consistently annulled academic gains arising out of wrongful admissions. Acceptance of the prayer made by the appellants on the parameter suggested by them would result in overlooking the large number of judgments on the point. Adoption of a different course, for the appellants, would trivialise the declared legal position. Reference in this behalf may be made to the judgments relied upon by the learned counsel representing Vyapam.

95. It is also not possible for us to accept the contention under consideration, and vehemently canvassed on behalf of the appellants (recorded in para 93 above), for yet another reason. Because, it is not possible for us to accept either that the appellants were innocent, or that they were immature in understanding the consequences of their actions. Each one of the appellants was aware of the fact that their admission to the MBBS course would be determined on the basis of their performance in the Pre-Medical Test. Rather than appearing in the qualifying test on their own they chose to seek assistance of meritorious students to garner higher marks. We may not be completely wrong in our understanding if we conclude that the appellants were quite sure that they would not be able to gain admission to the MBBS course on their own merit. That is why they had to strategise their admission to the MBBS course. We, therefore, reject the contention advanced on behalf of the appellants that the appellants were meritorious students, and as such, their admission to the MBBS course deserved to be preserved. If this is where the truth lies (which we are sure, it does), namely, that the appellants were quite sure that they would not be able to gain admission to the MBBS course on their own merit, surely the appellants are not entitled to any equitable consideration. And, in that view of the matter, it would not be proper to extend to the appellants relief under Article 142 of the Constitution.

96. We wish to attempt to examine the matter from another perspective. Even a child, in the very first year of entering primary school, is aware of the consequences of copying during an examination. Teachers supervise examinations to make sure that students do not copy. Children caught copying are dealt with severely. Every child observes this process year after year. Can the appellants, who had completed school education, and are on the verge of entering a professional course, be treated as novices—unaware of the consequence of copying? In our considered view, certainly not. It is therefore not possible for us to extend any benefit to the appellants, either on account of their juvenility, or on account of their alleged lack of understanding of the consequences of their actions. In our considered view, the appellants had consciously sought the assistance of a syndicate engaged in manipulating admissions to medical institutions. They were beneficiaries of acts of deceit and deception. In the above view of the matter, the case of the appellants does not commend to us as a matter deserving of any sympathetic consideration. In our considered view, the admission of the appellants to the MBBS course cannot be legalised (or legitimised) in the name of justice.

97. We may examine the controversy from yet another perspective. Let us presume that the position is equally balanced for the two sides. Let us attempt to apply the test of a court's conscience to a situation where on principle a court is not in a position to decide, whether it should, or it should not, exercise its discretion in favour of a party to a lis. A situation, wherein the Court's conscience commends to it (in a matter, as the one in hand), to exercise its discretion under Article 142, to preserve the benefit of the appellants' admission to the MBBS course; and at the same time, equally commends to it, not to so exercise its jurisdiction (i.e. not to preserve to the appellants, the benefit of their admission to the MBBS course), in favour of the appellant. How should this Court deal with such a situation? We are of the considered view that where two options are open to a court, and both are equally beckoning, it would be most prudent to choose the one, which is founded on truth and honesty, and the one which is founded on fair play and legitimacy. Siding with the option founded on the deceit or fraud, or on favour as opposed to merit, or by avoiding the postulated due process, would be imprudent. Judicial conscience must only support the righteous cause. If, despite its being righteous, a decision is seen as causing manifest injustice, the exercise of the power under Article 142 of the Constitution would be prudent. In such situations, an onerous duty is cast on the Court, to step in, to render complete justice. This is the manner that we commend judicial exercise of discretion under Article 142 of the Constitution. By adopting the above course, a Court would feel satisfied, in having exercised its discretion, on the touchstone of justice — the concept which triggers the invocation of Article 142 of the Constitution. In the facts and circumstances of the present case, there seems to be absolutely no cause for us to legitimise the admissions of the appellants to the MBBS course, since the same clearly fall in the imprudent category.

98. It was the repeated submission of the learned counsel representing the appellants that there would be significant societal benefit, if the academic pursuit of the appellants is legitimised. During the course of hearing, the learned counsel even went to the extent of suggesting that individual benefits that may be drawn by the appellants may be drastically curtailed and their academic pursuit be regularised for societal benefit. The submission is attractive. It needs a considered response. We are of the considered view, no matter how extensive the societal gains may be, the jurisdiction conceived of under Article 142 of the Constitution to do complete justice in a matter cannot be invoked in a situation as the one in hand. Even the trivialist act of wrongdoing, based on a singular act of fraud, cannot be countenanced in the name of justice. The present case unfolds a mass fraud. The course suggested, if accepted, would not only be imprudent, but would also be irresponsible. It would encourage others to follow the same course. We must compliment all the learned counsel appearing for the appellants in projecting the claim(s) of the appellants from all conceivable angles. We are however not persuaded to accept the legitimacy of the same. Truthful conduct must always remain the hallmark of the rule of law. No matter the gains, or the losses. The jurisdiction exercisable by this Court under Article 142 cannot ever be invoked to salvage and legitimise acts of fraudulent character. Fraud cannot be allowed to trounce on the stratagem of public good.

99. Besides the consideration recorded by us in the foregoing paragraphs, we may confess, that we felt persuaded for taking the view that we have, for a very important reason — national character. There is a saying—when wealth is lost, nothing is lost; when health is lost, something is lost; but when character is lost, everything is lost. This is attributed to Billy Graham, an American clergyman, born on 7-1-1918. One cannot be certain about the above attribution because the same lesson has been taught in India since time immemorial by parents and teachers. The issue in hand has an infinitely vast dimension. If we were to keep in mind immediate social or societal gains, the perspective of consideration would be different. The submission canvassed needs to be considered in the proper perspective. We shall venture to drive home the point by an illustration. We may well not have won our freedom, if freedom fighters had not languished in jails … and if valuable lives had not been sacrificed. Depending on the situation, even civil liberty or life itself, may be too trivial a sacrifice, when national interest is involved. It all depends on the desired goal. The Preamble of the Indian Constitution rests on the foundation of governance on the touchstone of justice. The basic fundamental right of equality before law and equal protection of the laws is extended to citizens and non-citizens alike through Article 14 of the Constitution on the fountainhead of fairness. The actions of the appellants are founded on unacceptable behaviour, and in complete breach of the Rule of Law. Their actions constitute acts of deceit invading into a righteous social order. National character, in our considered view, cannot be sacrificed for benefits — individual or societal. If we desire to build a nation on the touchstone of ethics and character and if our determined

goal is to build a nation where only the Rule of Law prevails, then we cannot accept the claim of the appellants for the suggested societal gains. Viewed in the aforesaid perspective, we have no difficulty whatsoever in concluding in favour of the Rule of Law. Such being the position, it is not possible for us to extend to the appellants any benefit under Article 142 of the Constitution.

100. We shall now, last of all, deal with a common submission advanced at the hands of most of the learned counsel representing the appellants. Actually, the instant submission is of no serious consequence because of the conclusions already recorded by us in the preceding paragraphs. But then, all submissions must be considered, and answered. The instant last submission was based on the judgment of this Court in *Priya Gupta case*[14]. It is necessary to emphasise that the learned counsel had placed reliance on the above judgment to contend that the instant controversy should not be considered as the first occasion for this Court to have exercised its jurisdiction under Article 142 to legitimise admissions to the MBBS course. It was pointed out that the facts of *Priya Gupta case*[14] would disclose that admission in the above case had also not been obtained by rightful means. In *Priya Gupta case*[14], admissions were gained by the appellants through acts of conscious manipulation. And yet, this Court had sustained the same, and had legitimised the admission of the appellants. The appellants herein seek a similar treatment.

101. In the case relied upon, the parents of the appellants were persons wielding authority. They exercised their influence, whereby their wards gained admission to the MBBS course. To achieve their objective, intimation of the unfilled seats was not published. Resultantly, students with higher merit came to be overlooked as they were unaware of the vacancies and therefore could not apply for the same. Wards, having support of officialdom, who could exercise influence, were successful in gaining admission, surreptitiously. It was therefore pointed out by the learned counsel that even in *Priya Gupta case*[14], the action of gaining admission was based on manipulation through fraud and deception. And since the position of the case in hand was similar, the appellants herein were also entitled to a similar relief.

102. The facts of the cited case (as canvassed, on behalf of the appellants) reveal that the appellants in *Priya Gupta case*[14] had occupied free seats in a government institution. After their admission, the appellants had already taken their final examination (of the MBBS course), and had therefore, almost completed the MBBS curriculum. By the time this Court heard the matter, the appellants were through with the course. In the above background, it was contended that this Court considered it just to legitimise the admission of the appellants to the MBBS course. However, while doing so, the appellants were required to reimburse the financial benefits gained by them. In this behalf, it is necessary to record that the appellants paid a highly subsidised fee at the

14 *Priya Gupta* v. *State of Chhattisgarh*, (2012) 7 SCC 433 : (2012) 2 SCC (L&S) 367 : 4 SCEC 555

government college wherein they had manipulated their admission. If they had been admitted to a private college, they would have had to pay a much higher fee — approximately one hundred times more. It was submitted that the appellants were willing to pay whatever costs this Court may impose, and also willing to suffer any additional public/social service, as this Court would consider appropriate.

103. Based on the factual position noticed above, it was simply contended that the appellants having already completed the MBBS course (or in any case — a substantial part thereof) successfully, they should be protected in the same manner as the appellants in *Priya Gupta case*[14]. It was pleaded that the course of studies successfully completed by the appellants should be legitimised.

104. We have given our thoughtful consideration to the submission advanced on behalf of the appellants by placing reliance on the judgment rendered by this Court in *Priya Gupta case*[14]. In examining the instant contention we shall proceed on the assumption that the admission of the appellants in the cited case had not been obtained by rightful means but had been gained by conscious manipulations.

105. It is important to highlight that in the adjudication of *Priya Gupta case*[14], this Court was conscious of the fact that the appellants would have, in any case, obtained admission to the same course, on their own merit — but in a private college. The admission of the appellants in the cited case to the MBBS course was therefore rightful. Their admission to the MBBS course could not have been interfered with and was accordingly not interfered with. The wrong committed by their manipulation was that they moved from a costly seat in a private college to a cheaper option in a government college.

106. To do complete justice between the parties, within the ambit of Article 142, this Court in *Priya Gupta case*[14] permitted the appellants to complete their professional courses in the institutions where they had gained admission "… subject to the condition that each one of them pay a sum of Rs 5 lakhs to Jagdalpur College, which amount shall be utilised for developing the infrastructure in Jagdalpur College". (SCC p. 460, para 74) The instant course was adopted, because that would negate the wrongful gain acquired by the appellants (in the cited case) through their acts of conscious manipulation. The appellants would have had to pay a much higher fee, if they had taken admission in a private college in terms of their merit position. They were beneficiaries (on the basis of their manipulations) only to the extent that they had paid a much lower fee by gaining admission to a government college.

107. Having had an insight to the factual position noticed above, it is not possible for us to accept that the ground on the basis of which this Court preserved the admission of the appellants, in *Priya Gupta case*[14] can

14 *Priya Gupta* v. *State of Chhattisgarh*, (2012) 7 SCC 433 : (2012) 2 SCC (L&S) 367 : 4 SCEC 555

be extended to the appellants herein. In *Priya Gupta case*[14], the appellants would have got admission to the MBBS course on the basis of their own merit position, in any case. The instant distinguishing feature sets the two matters apart. Actually, we have by our determination fully adopted the position expressed in *Priya Gupta case*[14], inasmuch as we have also not allowed the appellants to retain the benefit of whatever was obtained by their interpolations and was not their legitimate due. That is exactly what this Court had done in *Priya Gupta case*[14].

108. For the reasons recorded hereinabove, we respectfully concur with the judgment dated 12-5-2016[2] rendered by the Hon'ble Companion Judge (of the former Division Bench). In the facts and circumstances of the case in hand, it would not be proper to legitimise the admission of the appellants to the MBBS course in exercise of the jurisdiction vested in this Court under Article 142 of the Constitution. We, therefore, hereby decline the above prayer made on behalf of the appellants.

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14 *Priya Gupta* v. *State of Chhattisgarh*, (2012) 7 SCC 433 : (2012) 2 SCC (L&S) 367 : 4 SCEC 555
2 *Nidhi Kaim* v. *State of M.P.*, (2016) 7 SCC 615 : 7 SCEC 611

(2008) 10 Supreme Court Cases 115

(BEFORE R.V. RAVEENDRAN AND L.S. PANTA, JJ.)

C. JACOB .. Petitioner;

Versus

DIRECTOR OF GEOLOGY AND MINING
AND ANOTHER .. Respondents.

SLP (C) No. 25795 of 2008† (CC No. 11425 of 2008),
decided on October 3, 2008

A. **Service Law — Delay/Laches — Court's direction to the department to "consider" stale claim — Held, court should be circumspect in issuing such direction as it ultimately leads to consideration of case on merits at subsequent stages of litigation as if the cause of action stood revived due to fresh consideration — Further held, the department can reject a stale case on the ground of delay alone without examining merits — Reply given to an individual does not give rise to fresh cause of action or acknowledgement of jural relationship — Observations made in a case where terminated employee submitted representations after 18 years and Administrative Tribunal directed disposal of representations within four months — In subsequent litigation, staleness of the claim ignored and relief given to employee because the department, in compliance with court's earlier direction had passed a detailed speaking order — "Representation and relief" — Administrative Tribunals Act, 1985, Ss. 20 and 21**

B. **Service Law — Abandonment of service — Automatic termination — Held, where an employee reappears after two decades, he cannot be treated as having continued in service, nor can he be given benefit of qualifying service for pension — Pension — Qualifying service**

C. **Service Law — Departmental enquiry — Records relating to — Inability to produce records after a long time — Termination challenged after about 20 years — Burden of proof whether enquiry was conducted — Held, the burden was on the individual to prove what he alleges — Adverse inference could not be drawn against department which might have lost relevant records in the meantime, or the department concerned itself might have been wound up — Reinstatement with back wages cannot be ordered in such circumstances — Reinstatement and back wages — Unauthorised absence — Reappearance after 20 years — Reinstatement with back wages — Not justified — Misconduct — Evidence Act, 1872 — S. 114 Ill. (g) — Old records**

D. **Service Law — Back wages — Award of, based on misplaced sympathy, held, encourages indiscipline, leads to unjust enrichment of employee and drain on public exchequer — Hence, there must be application of mind and should not be awarded as a routine — Restitution**

The petitioner's services were terminated in 1982 after issuing a show-cause notice dated 8-7-1982 to him. Nearly 18 years thereafter, he submitted two

† From the Final Judgment and Order dated 28-1-2008 of the High Court of Judicature at Madras in WA No. 1097 of 2006

departmental representations dated 5-5-2000 and 21-7-2000 requesting that he may be taken back in service. He received a reply from the department that a copy of the show-cause notice enclosed by him with his representation was incomplete and therefore he should submit complete copy of notice. Instead of doing so, the petitioner filed an application in the Administrative Tribunal which was disposed of by the Tribunal on 19-12-2002 without issuing notice to the opposite party, directing that the petitioner's representation should be considered and an order passed thereon within four months. In compliance with this direction, Respondent 1 passed a detailed speaking order rejecting the representation (detailed order reproduced in para 3 of the judgment). The petitioner again approached the Tribunal challenging the order passed by Respondent 1. The Tribunal transferred petitioner's application to the High Court. The Single Judge of the High Court decided the case on merits, holding that the respondent Department had failed to establish that procedure of enquiry, as prescribed in relevant rules, was followed before terminating the petitioner's service. The Single Judge therefore held that the petitioner was deemed to have retired w.e.f. 18-7-1982. The Single Judge also directed sanction of pension to the petitioner. The Division Bench of the High Court, however, held that the petitioner had not completed 20 years of qualifying service as on the deemed date of his retirement i.e. 18-7-1982, and therefore was not entitled to pension.

Important issues involved in this case were: (*i*) whether the Tribunal ought to have directed the respondent Department to consider the petitioner's representations dated 5-5-2000 and 21-7-2000 which were badly delayed (about 18 years), (*ii*) whether the respondent Department was bound to consider the representations on merits, (*iii*) whether the burden of proof at such a belated stage was on the petitioner or the respondent Department to show that requisite procedure of enquiry was followed while terminating the petitioner's services.

Dismissing the special leave petition, the Supreme Court

Held :

There is need for circumspection and care in issuing directions for "consideration". If the representation on the face of it is stale, or does not contain particulars to show that it is regarding a live claim, courts should desist from directing "consideration" of such claims. (Para 14)

The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly, they assume that a mere direction to consider and dispose of representation does not involve any "decision" on rights and obligations of parties. Little do they realise the consequences of such a direction to "consider". If the representation is considered and accepted, an ex-employee gets a relief, which he would not have got on account of long delay, all by reason of the direction to "consider". If representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The tribunals/High Courts routinely entertain such applications/ petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored. (Para 9)

Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot create a fresh cause of action or revive a stale or dead claim. (Para 10)

When a direction is issued by a court/tribunal to consider or deal with the representation, usually the directee (person directed) examines the matter on merits, being under the impression that failure to do so may amount to disobedience of court order. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of "acknowledgement of a jural relationship" to give rise to a fresh cause of action. (Para 11)

When a government servant abandons service to take up alternative employment or to attend to personal affairs, and does not bother to send any letter seeking leave or letter of resignation or letter of voluntary retirement, and the records do not show that he is treated as being in service, he cannot after two decades, represent that he should be taken back to duty. Nor can such employee be treated as having continued in service, thereby deeming the entire period as qualifying service for the purpose of pension. That will be a travesty of justice. (Para 12)

Where an employee unauthorisedly absents himself and suddenly appears after 20 years and demands that he should be taken back and approaches the court, the department naturally will not or may not have any record relating to the employee at that distance of time. In such cases, when the employer fails to produce records of enquiry and the order of dismissal/removal, court cannot draw an adverse inference against the employer for not producing records, nor direct reinstatement with back wages for 20 years, ignoring the cessation of service or the lucrative alternative employment of the employee. Misplaced sympathy in such matters will encourage indiscipline, lead to unjust enrichment of the employee at fault and result in drain of public exchequer. Many a time there is also no application of mind as to the extent of financial burden, as a result of a routine order for back wages. (Para 13)

The present case is a typical example of "representation and relief". The petitioner kept quiet for 18 years. A stage was reached when no record was available regarding his previous service. The Single Judge of the High Court ought not have found fault with the Department, for failing to prove that termination made in 1982, was preceded by an enquiry in a proceedings initiated after 22 years, when the Department in which the petitioner had worked had been wound up as long back as in 1983 itself and the new Department had no records of his service. The petitioner neither produced the order of termination, nor disclosed whether the termination was by way of dismissal, removal, compulsory retirement or whether it was a case of voluntary retirement or resignation or abandonment. He produced only the first sheet of a show-cause notice dated 8-7-1982 and failed to produce the second or subsequent sheets of the said show-cause notice in spite of being called upon to produce the same.

There was no material to show that the termination was not preceded by an enquiry. When a person approaches a court after two decades after termination, the burden would be on him to prove what he alleges. The Single Judge dealt with the matter as if he the petitioner had approached the court immediately after the termination. All this happened, because of grant of an innocuous prayer to "consider" a representation relating to a stale issue. (Paras 15 and 16)

E. **Service Law — Pension — Entitlement to — In a government department — Pension Rules framed by State of Tamil Nadu and Central Government reviewed — Held, the scheme of Rules was such that an employee claiming pension should in the first instance fall in particular category of pension, like retiring pension, invalid pension, voluntary retirement pension, etc. — Question of determination of amount of pension with reference to length of qualifying service comes afterwards — Petitioner's case not falling within any of the specified categories of pensions mentioned in Ch. V of T.N. Pension Rules, 1978 — Held, mere fact that he had 10 years' qualifying service and a particular rule relating to determination of amount of pension referred to 10 years qualifying service, did not entitle him to pension — T.N. Pension Rules, 1978 — Chs. V and VI, R. 43(2) — Central Civil Services (Pension) Rules, 1972, Ch. VII R. 49(2)(b)**

The Single Judge of the High Court took the view that the petitioner's services were illegally terminated because relevant rules of enquiry were not followed. However, by the time the Single Judge decided the matter, the petitioner was already 59 years old and therefore holding of enquiry at that time was not considered desirable on account of the petitioner's poor health condition. The Single Judge therefore ordered that the petitioner was deemed to have retired from service from 18-7-1982 and therefore he should be granted pension. The respondent Department's contention was that the petitioner had not completed 20 years' qualifying service and therefore was not entitled to pension. The petitioner's contention was that he had completed 10 years' qualifying service and was therefore entitled to pension under Rule 43(2) of the Tamil Nadu Pension Rules, 1978.

The Supreme Court reviewed the relevant provisions of the Tamil Nadu Pension Rules, 1978 and corresponding provisions of the Central Civil Services (Pension) Rules, 1972, and

Held :

A government servant, whose case does not fall under any of the classes of pensions enumerated in Chapter V, is not entitled to pension. If a government servant is not able to make out entitlement to any class of pension specified in Chapter V of the Pension Rules, there is no question of having recourse to the Rules in the Chapter dealing with regulation of amount of pension (Chapter VI of the TNP Rules or Chapter VII of the CCSP Rules) for determining the quantum of pension. (Para 20)

The petitioner was not "superannuated"; nor was he absorbed in any corporation/company/body owned by the State/Central Government; nor did he retire on account of any infirmity which incapacitated him for service; nor was he discharged on abolition of his post. Nor is he claiming compassionate allowance (on being dismissed/removed after putting in service to an extent which would entitle him to pension but for the dismissal/removal). The only other categories of pension are compulsory retirement pension and the retiring pension. If a government servant is not otherwise entitled to pension, he cannot

obviously be granted pension on compulsory retirement. There is no such grant in this case. (Para 21)

The provision relating to retiring pension makes it clear that a minimum of 20 years' qualifying service is required for retiring pension. It does not entitle a government servant to retiring pension on completion of ten years' service. Therefore, the petitioner is not entitled to retiring pension. (Para 22)

K-M/39316/CL

Advocates who appeared in this case :

M. Gireesh Kumar, Avijeet K. Lala and Vijay Kumar, Advocates, for the Petitioner.

The Order of the Court was delivered by

R.V. RAVEENDRAN, J.— IA No. 1 is allowed and the delay of 56 days condoned. We find no merit in this special leave petition. However, as the questions raised in this petition arise repeatedly, we propose to pass a reasoned order after referring to the relevant facts.

2. The petitioner joined service as a Drill Helper in June 1967, in the Regional Mining Cell, Trichy, in the erstwhile State Geology Branch of Department of Industries and Commerce, State of Tamil Nadu. According to him, his services were terminated in the year 1982, in pursuance of a show-cause notice dated 8-7-1982. Nearly eighteen years later, the petitioner gave representations dated 5-5-2000 and 21-7-2000 to the first respondent requesting that he may be taken back into service. As the enclosure (show-cause notice dated 8-7-1982) to the said representation was incomplete, the first respondent called upon him to send the complete document. Instead of complying with the said request, the petitioner approached the Tamil Nadu Administrative Tribunal seeking a direction to the first respondent to dispose of his representation.

3. The Administrative Tribunal disposed of the said application on 19-12-2002, without notice to the respondents, with a direction to the Director of Geology and Mining (the first respondent), to consider the petitioner's representation dated 21-7-2000 and pass an order thereon within four months. In compliance with the said direction, the first respondent considered and rejected the petitioner's representations by order dated 9-4-2002. The relevant portions of the said order referring to the facts, are extracted below:

> "The individual was sanctioned unearned leave on medical certificate for 25 days from 7-10-1980 to 31-10-1980 and he did not rejoin duty after the expiry of this leave. On perusal of the first page of Memo No. 19093/E2/80 dated 8-7-1982, the individual has taken up private employment and has applied for leave on loss of pay for two years from 1-1-1981 onwards vide his letter dated 1-1-1981. In the memo dated 19-2-1981 of the State Geologist, he was informed that his private employment is against the Government Servants' Conduct Rules and hence, disciplinary action would be taken against him if his explanation on the above was not received within 15 days from the date of receipt of the memo. The above memo was sent by registered post to the address at Marthandam in Kanyakumari District through the Assistant Geologist,

Regional Mines Cell, Tiruchi. The memo was returned to the Assistant Geologist, RMC, Tiruchi, undelivered.

Then another memo dated 6-8-1981 was issued to him calling for his explanation in 15 days' time as to why disciplinary action should not be taken against him and his services terminated if explanations were not received in time. The above memo was sent by registered post acknowledgement due to the address 'Singaliar Street, Marthandam Post, Kanyakumari District'. The receipt of the above memo was acknowledged by his wife Smt C. Stella Jacob, on 31-8-1981.

On 10-9-1981 Thiru M. Ramaswamy, Assistant Geologist, RMC, Tirunelveli contacted his wife with his Geological Assistant and had the information that he was working in India and refused to inform the exact concern where he was employed. The above information was reported by the Assistant Geologist, RMC, Tirunelveli in his letter dated 14-9-1981.

In spite of so many efforts taken by the office, he has not even responded to the memo, which was received by his wife. Therefore, show-cause notice was issued to him vide memo dated 8-7-1982 by the State Geologist, Guindy by registered post (acknowledgement due) and the above memo was received by him. He absented himself from duty and kept silent for a long period (1-11-1980 to 4-5-2000). He has submitted representations (dated 5-5-2000 and 19-7-2000) and requested to permit him to rejoin duty. In his letter dated 5-5-2000, he has stated that due to illness he has not attended duty and subsequently, he was also terminated from service.

In this office letter (dated 28-8-2000) he has been requested to produce the copies of the memorandum and other records issued by the State Geologist to him. But, he has not produced the copies of the same.

The erstwhile State Geology Branch of the Department of Industries and Commerce was upgraded as a separate Department of Geology and Mining and is functioning as a separate Department with effect from 14-4-1983. The Government issued Order dated 15-3-1989 permanently transferring the officers and staff of the State Geology Branch to the new Department of Geology and Mining. The name of Thiru C. Jacob is not finding a place in this G.O....

Thiru C. Jacob absented from attending duties without proper leave application. He has taken up private employment without prior permission which is against the Government Servants' Conduct Rules and he has not turned up for duty in time. He has absconded from duty from 1-11-1980 to 4-5-2000 without intimating the reasons for absenting himself. As he had completely absconded from duty his name did not find a place in the list of officers and staff transferred to the new Department of Geology and Mining vide GOMs No. 1/Industries (SIA 2) Department dated 15-3-1989 from the erstwhile State Geology Branch of the Department of Industries and Commerce. This clearly brings to light that the applicant was not considered as a regular employee of the

Department of Industries and Commerce as he had not followed the relevant Rules and absented from attending duties without proper leave application.

Thiru C. Jacob has not produced the second and subsequent pages of the memo issued to him by the State Geologist, Madras in RC No. 19093/E2/80 dated 8-7-1982 for perusal. It is evident from the available records that the individual had stayed away from duty without any information to the office and taken up private employment without prior permission. Therefore, his request for permitting him to rejoin duty after a lapse of twenty years cannot be complied with."

4. On 10-3-2003 the petitioner filed an original application before the Tamil Nadu Administrative Tribunal for the following relief:

"... the applicant prays that this Hon'ble Tribunal be pleased to call for the records of the first respondent dated 9-4-2002 and direct the respondents to grant service benefits to the applicant within a time-frame to be fixed by this Hon'ble Tribunal...."

5. In its counter to the said application, the respondents reiterated the reasons for rejection of the request given in the order dated 9-4-2002. They also specifically pleaded:

"It is submitted that the erstwhile State Geology Branch was under the control of the Director of Industries and Commerce and during the year 1983 this Department of Geology and Mining was formed as a separate Department and is functioning with effect from 14-4-1983 under the control of the respondent. Orders were issued by the Government on GOMs No. 1/Industries (SIA 2) Department dated 15-3-1989 permanently, transferring the officers and staff of the erstwhile State Geology Branch of the Industries and Commerce Department to the new Department of Geology and Mining and the name of the applicant is not finding a place in the G.O. which clearly brings to light that the applicant was not considered as a regular employee of the Department of Industries and Commerce and it is evident that the applicant's services were already terminated.

It is submitted that every efforts were taken to process the representations submitted by the applicant and the available records with the respondent were carefully examined. Since some of the records are destroyed due to efflux of time, the applicant was requested to furnish the second page of the memo issued to him by the State Geologist, Madras, dated 8-7-1982 for perusal and the applicant has not furnished the same but only furnished the first page of the above memo with his representation dated 5-5-2000. It is submitted that in the second page there may be specific orders of the State Geologist with reasons for termination of the services of the applicant."

6. The said original application was transferred from the Tribunal to the Madras High Court. A learned Single Judge of the High Court by order dated 13-4-2006 held that the Department failed to establish that it had followed

the mandatory requirements of Section 17(*b*) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules by issuing a charge-memo, holding an enquiry and passing an order of punishment. He, therefore, declared that the termination of the petitioner's service in 1982 was illegal. As the petitioner was already 59 years old and it was impractical to hold an enquiry on account of the employee's health condition, the learned Single Judge disposed of the writ petition by declaring that the petitioner was deemed to have retired from service from 18-7-1982 and directing that pension be sanctioned from that date and that the entire arrears should be calculated and paid in eight weeks.

7. The order of the learned Single Judge was challenged by the respondents in an intra-court appeal. The Division Bench allowed the writ appeal by order dated 28-1-2008. The Division Bench held that the petitioner had not completed 20 years of qualifying service as on 18-7-1982, and therefore, he was not entitled to pension. The said order is under challenge in this petition. We propose to examine the following two issues arising in this case:

(*i*) The modus of representation adopted by several claimants/petitioners to get over the bar of limitation/delay and laches.

(*ii*) Common error in assuming that 10 years' service entitles a government servant to pension under the Pension Rules.

The modus of "representation"

8. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected at the threshold on the ground of delay (if the application is made before tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying to such representations relating to old matters. Taking advantage of this position, the ex-employee files an application/writ petition before the tribunal/High Court seeking a direction to the employer to consider and dispose of his representation. The tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation.

9. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly, they assume that a mere direction to consider and dispose of the representation does not involve any "decision" on rights and obligations of parties. Little do they realise the consequences of such a direction to "consider". If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to "consider". If the representation is considered and rejected, the ex-employee

files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored.

10. Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim.

11. When a direction is issued by a court/tribunal to consider or deal with the representation, usually the directee (person directed) examines the matter on merits, being under the impression that failure to do so may amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of "acknowledgement of a jural relationship" to give rise to a fresh cause of action.

12. When a government servant abandons service to take up alternative employment or to attend to personal affairs, and does not bother to send any letter seeking leave or letter of resignation or letter of voluntary retirement, and the records do not show that he is treated as being in service, he cannot after two decades, represent that he should be taken back to duty. Nor can such employee be treated as having continued in service, thereby deeming the entire period as qualifying service for the purpose of pension. That will be a travesty of justice.

13. Where an employee unauthorisedly absents himself and suddenly appears after 20 years and demands that he should be taken back and approaches the court, the department naturally will not or may not have any record relating to the employee at that distance of time. In such cases, when the employer fails to produce the records of the enquiry and the order of dismissal/removal, court cannot draw an adverse inference against the employer for not producing records, nor direct reinstatement with back wages for 20 years, ignoring the cessation of service or the lucrative alternative employment of the employee. Misplaced sympathy in such matters will encourage indiscipline, lead to unjust enrichment of the employee at fault and result in drain of public exchequer. Many a time there

is also no application of mind as to the extent of financial burden, as a result of a routine order for back wages.

14. We are constrained to refer to the several facets of the issue only to emphasise the need for circumspection and care in issuing directions for "consideration". If the representation on the face of it is stale, or does not contain particulars to show that it is regarding a live claim, courts should desist from directing "consideration" of such claims.

15. The present case is a typical example of "representation and relief". The petitioner keeps quiet for 18 years after the termination. A stage is reached when no record is available regarding his previous service. In the representations which he makes in 2000, he claims that he should be taken back to service. But on rejection of the said representation by order dated 9-4-2002, he filed a writ petition claiming service benefits, by referring the said order of rejection as the cause of action. As noticed above, the learned Single Judge examined the claim, as if it was a live claim made in time, finds fault with the respondents for not producing material to show that termination was preceded by due enquiry and declares the termination as illegal. But as the petitioner has already reached the age of superannuation, the learned Single Judge grants the relief of pension with effect from 18-7-1982, by deeming that he was retired from service on that day. We fail to understand how the learned Single Judge could declare a termination in 1982 as illegal in a writ petition filed in 2005. We fail to understand how the learned Single Judge could find fault with the Department of Mines and Geology, for failing to prove that a termination made in 1982, was preceded by an enquiry in a proceedings initiated after 22 years, when the Department in which the petitioner had worked had been wound up as long back as in 1983 itself and the new Department had no records of his service.

16. The petitioner neither produced the order of termination, nor disclosed whether the termination was by way of dismissal, removal, compulsory retirement or whether it was a case of voluntary retirement or resignation or abandonment. He significantly and conveniently, produced only the first sheet of a show-cause notice dated 8-7-1982 and failed to produce the second or subsequent sheets of the said show-cause notice in spite of being called upon to produce the same. There was absolutely no material to show that the termination was not preceded by an enquiry. When a person approaches a court after two decades after termination, the burden would be on him to prove what he alleges. The learned Single Judge dealt with the matter as if he the petitioner had approached the court immediately after the termination. All this happened, because of grant of an innocuous prayer to "consider" a representation relating to a stale issue.

Pension for service of less than 20 years

17. In this case, taking advantage of the fact that the Department did not have any records and by not producing the order terminating his service, the petitioner vaguely alleged that he was "terminated" from service in the year 1982, without specifying whether it was by way of dismissal, removal or

compulsory retirement or otherwise. If his termination was by way of dismissal or removal, he would have forfeited his past service as also his pension and gratuity under the Pension Rules. Even if it is assumed that he was not dismissed or removed, but was retired from service, the question is whether he is entitled to pension on the basis of 14 years of service.

18. The appellant relied on Rule 43(2) of the Tamil Nadu Pension Rules, 1978 ("the TNP Rules", for short) to contend that on completion of 10 years of service, a government servant is entitled to pension. Relevant portion of the said Rule is extracted below:

> "43. (2) In the case of a government servant, *retiring in accordance with the provisions of these Rules after completing qualifying service of not less than 10 years*, the amount of pension shall be appropriate amount as set out below namely:" (emphasis supplied)

As similar contention is frequently raised under the corresponding Rule 49(2)(*b*) of the CCS Pension Rules ("CCSP Rules", for short), we will for convenience refer to the corresponding provisions of the CSSP Rules also.

19. Rule 43(2) relied on by the petitioner falls under Chapter VI of the TNP Rules [corresponding to Rule 49(2)(*b*) in Chapter VII of the CCSP Rules] dealing with "regulation of amount of pension". The said Rule relates to quantum and lays down how the pension of a retired government servant should be calculated if he is entitled to pension. Entitlement to pension is governed by Chapter V of the said Rules, which enumerates the classes of pension and conditions for entitlement. The enumerated classes of pension are:

	Classes of Pension (vide Chapter V of the Pension Rules)	*CCSP Rules*	*TNP Rules*
(*i*)	Superannuation pension	Rule 35	Rule 32
(*ii*)	Retiring pension	Rule 36	Rule 33
(*iii*)	Pension on absorption in or under a corporation, company or body owned/controlled by the State/ Central Government	Rule 37 Rule 37-A	Rule 34
(*iv*)	Invalid pension	Rule 38	Rule 36
(*v*)	Compensation pension payable on discharge owing to abolition of the post	Rule 39	Rule 38
(*vi*)	Compulsory retirement pension	Rule 40	Rule 39
(*vii*)	Compassionate allowance to government servants who forfeit their pension on being dismissed or removed	Rule 41	Rule 40

20. A government servant, whose case does not fall under any of the classes of pensions enumerated in Chapter V, is not entitled to pension. If a government servant is not able to make out entitlement to any class of pension specified in Chapter V of the Pension Rules, there is no question of having recourse to the Rules in the Chapter dealing with regulation of amount of pension (Chapter VI of the TNP Rules or Chapter VII of the CCSP Rules) for determining the quantum of pension.

21. Admittedly, the petitioner was not "superannuated"; nor was he absorbed in any corporation/company/body owned by the State/Central Government; nor did he retire on account of any infirmity which incapacitated him for service; nor was he discharged on abolition of his post. Nor is he claiming compassionate allowance (on being dismissed/removed after putting in service of an extent which would entitle him to pension but for the dismissal/removal). The only other categories of pension are compulsory retirement pension and the retiring pension. A government servant compulsorily retired from service as a penalty, may be granted by the authority competent to impose such penalty, pension at a rate not less than two-third admissible to him on the date of his compulsory retirement. If a government servant is not otherwise admissible to pension, he cannot obviously be granted pension on compulsory retirement. There is no such grant in this case. That leaves us with retiring pension.

22. Rule 33 of the TNP Rules provides that a retiring pension shall be granted to a government servant who retires, or is retired, in accordance with the provisions of Rule 42 of the said Rules. Rule 42 of the TNP Rules provides that a government servant, who under Fundamental Rule 56(*d*), retires voluntarily or is required by the appointing authority to retire in public interest shall be entitled to a retiring pension (corresponding Rule 36 of the CCSP Rules which provides that a retiring pension shall be granted to a government servant who retires, or is retired, in advance of the age of compulsory retirement in accordance with the provisions of Rules 48 or 48-A of those Rules or Rule 56 of the Fundamental Rules or Article 459 of the Civil Service Regulations and to a government servant who on being declared surplus, opts for voluntary retirement in accordance with Rule 29 of those Rules). The provision relating to retiring pension makes it clear that a minimum of 20 years' qualifying service is required for retiring pension. It does not entitle a government servant to retiring pension on completion of ten years' service. Therefore, the petitioner is not entitled to retiring pension.

23. The petitioner contends that if the minimum service for entitlement to retiring pension was 20 years and not 10 years, Rule 43(2) would not have stated "qualifying service of not less than 10 years". He contended that as Rule 43(2) of the TNP Rules [Rule 49(2)(*b*) of the CCSP Rules] refers to "not less than 10 years' service", any government servant who has put in service of 10 years or more is entitled to retiring pension. The said contention is misconceived. As stated earlier, the said Rule does not relate to "entitlement" of pension nor does it prescribe the conditions for eligibility, but only provides how the amount of pension should be calculated in cases where the retiring government servant is entitled to pension under Chapter V of the Pension Rules. The said Rule regulates the "amount" of pension not only in case of retiring pension, but in case of all classes of pension.

24. Under Chapter V, in certain situations, a government servant may be eligible for pension even where the service is less than ten years. Rules 32, 36 and 38 of the TNP Rules [Rules 35, 38 and 39 of the CCSP Rules] do not prescribe any minimum service for being entitled to pension, where the

cessation of service is on account of superannuation, or on account of bodily or mental infirmity or on account of abolition of his post. When Rule 43(2) of the TNP Rules [Rule 49(2)(*b*) of the CCSP Rules] refers to payment of pension to a person who has a qualifying service of not less than 10 years, it does not mean that the minimum period of service prescribed for retirement pension is reduced to 10 years or that government servants who are dismissed/removed/compulsorily retired by way of punishment, or those who voluntarily retire before reaching the age of superannuation with less than 20 years of qualifying service, become entitled to pension. Rule 43(2) of the TNP Rules [Rule 49(2)(*b*) of the CCSP Rules], as noticed earlier, comes into play only when the government servant is entitled to any of the classes of pension enumerated under Chapter V of the Pension Rules. Therefore, when Rule 43(2) of the TNP Rules [or Rule 49(2)(*b*) of the CCSP Rules] dealing with the quantum of pension refers to a government servant retiring in accordance with the said Rules after completing qualifying service of not less than 10 years, it does not mean that pension is payable to persons who have not completed the required minimum number of years (20 years) of service or to persons who have forfeited their service on dismissal/removal from service. Therefore, the petitioner is not entitled to pension.

25. Special leave petition is therefore dismissed as having no merit.

(2008) 10 Supreme Court Cases 127

(BEFORE TARUN CHATTERJEE AND AFTAB ALAM, JJ.)

STATE OF KERALA AND ANOTHER . . Appellants;

Versus

WILSON K.C. AND OTHERS . . Respondents.

Civil Appeal No. 5679 of 2008†, decided on September 16, 2008

Practice and Procedure — High Court — Writ appeal — Delay in filing — Condonation — Explanation — Delay of 116 days — Having heard the parties, perused the application for condonation, explanation given by appellant State and objections filed thereto, held, appellant made out sufficient cause for condonation — Hence writ appeal restored to its original file — Division Bench of High Court requested to dispose of the appeal after hearing the parties and for passing a reasoned order within 6 months — Constitution of India, Art. 226

Appeal allowed R-M/39023/C

Advocates who appeared in this case :
G. Prakash, Advocate, for the Appellants;
C.K. Rai, Ms Babita Sant, Ms Soma Patnaik, Ms Malini Poduval, Vipin Nair, P.B. Suresh and Vivek Sharma (for M/s Temple Law Firm), Advocates, for the Respondents.

† Arising out of SLP (C) No. 9532 of 2007. From the Final Judgment and Order dated 20-3-2007 of the High Court of Kerala at Ernakulam in WA No. 2342 of 2006

(2010) 2 Supreme Court Cases 59

(BEFORE R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.)

UNION OF INDIA AND OTHERS . . Appellants;

Versus

M.K. SARKAR . . Respondent.

Civil Appeal No. 8151 of 2009†, decided on December 8, 2009

A. **Service Law — Pension — Option — Exercise of option — Change of option from provident fund to pension — Laches and delay in seeking — Long after retirement respondent opting for pension scheme — Entitlement to, after declining to exercise option therefor earlier — Railway employee governed by CPF Scheme not opting for pension scheme despite being given chances on several (eight) occasions, and deliberately choosing CPF Scheme — Receiving entire PF amount on retirement — 22 years after retirement seeking to opt for the pension scheme — Willingness to refund amount received under PF Scheme — Relevance**

— Held, when a scheme stipulates that benefits thereunder will be available only to those who exercise the option within a specified time, option should obviously be exercised within such time — If request of respondent is accepted, effect would be to permit him to secure double benefit of both provident fund scheme as also pension scheme, which would be unjust and impermissible — There was no recurring or continuing cause of action — Respondent's representation ought to have been straightaway rejected as barred by limitation/delay and laches — Respondent not exercising option available when he retired, not entitled to exercise option after expiry of validity period for option, that too after 22 years — Contract and Specific Relief — Formation of contract — Offer and acceptance — Acceptance — Contract Act, 1872, S. 8 (Paras 9, 10, 13 and 17)

Krishena Kumar v. *Union of India*, (1990) 4 SCC 207 : 1991 SCC (L&S) 112 : (1990) 14 ATC 846, *followed*

Union of India v. *D.R.R. Sastri*, (1997) 1 SCC 514 : 1997 SCC (L&S) 555, *distinguished on facts*

B. **Service Law — Pension — Option — Failure to exercise — Notice of option, if adequate — Individual written intimation — If mandatory — Knowledge of option on part of optee clearly inferable — Tribunal and High Court held that being "aware" of scheme was not sufficient notice to retiree, individual written communication being mandatory — Validity — Held, assumption not sound — A person, who is aware of the availability of option, cannot contend he was not served a written notice of the availability of the option, that too after 22 years — Practice and Procedure — Notice — Civil Procedure Code, 1908 — Or. 5 R. 20 — Words and Phrases — "Notice"**

Held :

In his application before the Tribunal the respondent refers to all the options. He is careful to say that he was not "intimated" about the contents of the last

† Arising out of SLP (C) No. 15031 of 2006. From the Judgment and Order dated 25-1-2006 of the High Court of Calcutta in WPCT No. 467 of 2005

order relating to extension of the option, but does not say that he was unaware of the order extending the benefit of option. The Tribunal assumed that being "aware" of the scheme was not sufficient notice to a retiree to exercise the option and individual written communication was mandatory. The High Court has impliedly accepted and affirmed this view. This assumption is not sound. Even if the Railway Administration was represented before the forums below, it was not reasonable to expect the department to maintain the records of such intimation(s) of individual notice to each employee after 22 years. Further, when notice or knowledge of the availability of the option was clearly inferable, the employee cannot after a long time be heard to contend that in the absence of written intimation of the option, he is still entitled to exercise the option.

(Paras 11, 12, 21 and 22)

Nilkantha Sidramappa Ningashetti v. *Kashinath Somanna Ningashetti*, AIR 1962 SC 666, *relied on*

C. **Service Law — Delay/Laches/Limitation — Reckoning of date of accrual of cause of action — Tribunal allowing respondent's application without examining merits directing Railway Administration to "consider" stale claim — Unnecessary litigation and avoidable complications arising out of — Propriety and warrantedness of**

— Held, when a stale or dead issue/dispute is considered and decided, date of such decision cannot furnish a fresh cause of action for reviving dead issue or time-barred dispute — Issue of limitation or delay and laches has to be considered with reference to original cause of action and not with reference to date on which an order is passed in compliance with a court's direction — Moreover, court or tribunal, should not direct consideration or reconsideration of a dead or stale issue or dispute — Administrative Tribunals Act, 1985 — Ss. 20 and 21 — Practice and Procedure — Directions to "consider" — Scope and effect — Limitation — Reckoning of date of accrual of cause of action when it originally arose — Limitation Act, 1963, S. 3

Held :

The order of the Tribunal allowing the first application of the respondent without examining the merits, and directing the appellants to consider his representation has given rise to unnecessary litigation and avoidable complications. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches. Moreover, a court or tribunal, before directing "consideration" of a claim or representation should examine whether the claim or representation is with reference to a "live" issue or whether it is with reference to a "dead" or "stale" issue. If it is with reference to a "dead" or "stale" issue or dispute, the court/tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or tribunal deciding to direct

such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect. (Paras 14 to 16)

C. Jacob v. *Director of Geology and Mining*, (2008) 10 SCC 115 : (2008) 2 SCC (L&S) 961, *relied on*

D. **Service Law — Relief — Permissible grounds — Relief claimed on ground of applicability of Art. 14 for extension of same relief though improperly granted in some other case — Untenability — Held, someone wrongly extended a benefit, cannot be cited as a precedent for claiming similar benefit by others — A claim on basis of guarantee of equality, is permissible only when the person similarly placed has been lawfully granted a relief and the person claiming relief is also lawfully entitled to the same — If he wants, he can challenge the benefit illegally granted to others — Constitution of India — Art. 14 (Paras 24 to 26)**

Chandigarh Admn. v. *Jagjit Singh*, (1995) 1 SCC 745; *Gursharan Singh* v. *NDMC*, (1996) 2 SCC 459; *Faridabad CT Scan Centre* v. *D.G. Health Services*, (1997) 7 SCC 752; *State of Haryana* v. *Ram Kumar Mann*, (1997) 3 SCC 321 : 1997 SCC (L&S) 801; *State of Bihar* v. *Kameshwar Prasad Singh*, (2000) 9 SCC 94 : 2000 SCC (L&S) 845; *Union of India* v. *International Trading Co.*, (2003) 5 SCC 437, *relied on*

Union of India v. *D.R.R. Sastri*, (1997) 1 SCC 514 : 1997 SCC (L&S) 555, *distinguished on facts*

Appeal allowed B-D/A/44340/CL

Advocates who appeared in this case :

Mohan Jain, Additional Solicitor General (Dinesh Thakur, Ms Rohini Mukherjee, A.K. Srivastava, Y.P. Mahajan, A.K. Sharma and D.S. Mahra, Advocates) for the Appellants;

Jaideep Gupta, Senior Advocate (Raja Chatterjee, Sachin Das, Malay Kr. Singh and G.S. Chatterjee, Advocates) for the Respondent.

Chronological list of cases cited ***on page(s)***

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.— Leave granted. The respondent joined the railway service on 10-2-1947. He was a subscriber to the Contributory Provident Fund Scheme. The Railways introduced the pension scheme vide Railway Board's Letter dated 16-11-1957. Under the said scheme, those who entered railway service on or after 16-11-1957, were automatically governed by the pension scheme. Those employees who were in service as on 1-4-1957 and those who joined between 1-4-1957 and 16-11-1957 were given an option to switch over to pension scheme instead of continuing under the Contributory Provident Fund Scheme.

2. Those who did not opt for the pension scheme were given further opportunities to exercise options to switch over to the pension scheme, whenever the pension scheme was liberalised or made more beneficial, vide Notifications dated 17-9-1960, 26-10-1962, 17-1-1964, 3-3-1966, 13-9-1968, 15-7-1972, and 23-7-1974. The validity period of the Eighth Option under the Notification dated 23-7-1974, which was from 1-1-1973 to 22-1-1975, was extended from time to time up to 31-12-1978. Under the terms of the option, a retired railway employee who opted for the pension scheme had to refund the Government's contributions to the provident fund.

3. The respondent though aware of the introduction of the pension scheme and the options given on eight occasions between the years 1957 to 1974, consciously did not opt for the pension scheme and continued with the Contributory Provident Fund Scheme. Ultimately the respondent while serving as Controller of Stores, took voluntary retirement with effect from 15-10-1976. As on the date of his retirement, the Eighth Option to shift to pension scheme, was still open for exercise. But the respondent did not opt for the pension scheme but received the contributory provident fund dues on his retirement.

4. More than 22 years after his retirement, and after receiving his dues under the Provident Fund Scheme, the respondent made a representation dated 8-10-1998, requesting that he may be extended the benefit of the pension scheme. He stated that he was willing to refund the amount received under the Provident Fund Scheme (by way of adjustment against the arrears of pension that would become payable to him on acceptance of his request for switch over to the pension scheme). The said request was not accepted. The respondent therefore approached the Central Administrative Tribunal, in OA No. 657 of 1999, seeking a direction to the Railway Administration to permit him to exercise an option to switch over to pension scheme. The Tribunal by order dated 11-2-2004 disposed of the application by directing the appellants to take a decision on the representation of the respondent by a reasoned order, making it clear that it did not examine the claim on merits.

5. In compliance with the said direction of the Tribunal, the Chairman, Railway Board, considered the representation and passed a reasoned order dated 15-5-2004, rejecting the belated request of the respondent for switching over to the pension scheme as being untenable. He also distinguished the

cases of other employees who were allegedly extended the benefit of exercising the option for belated switch overs, cited and relied upon by the respondent. The relevant portion of the order is extracted below:

> "Thus, the cases referred to in the preceding para are not relevant to the case of Shri Sarkar who had eight occasions to come over to the pension scheme during his service period. By the time, Eighth Pension Option was thrown open, vide Board's Letter dated 23-7-1974 as extended from time to time up to 31-12-1978, Shri Sarkar was in service till 15-10-1976. He resumed as COS/NF Railway on 11-6-1976. The Board's instructions dated 30-6-1976 extending the last date for exercising of option available under the Board's Letter dated 23-7-1974 to come over to the pension scheme up to 31-12-1978 was circulated by NF Railway vide their Letter dated 17-7-1976. The said letter was circulated as per standard mailing list including HODs. Shri Sarkar, being the HOD himself at the relevant time, cannot deny having knowledge of the aforesaid Railway Board's instructions.

6. The respondent challenged the order dated 15-5-2004 by filing a second application before the Tribunal. The following averments in the application made by the respondent are relevant:

> "... those employees appointed earlier (1-4-1957), however continued to be on PF system, but were periodically given the opportunity to opt for pension, on inspection of merits of the scheme as and when new pension scheme was offered. ... The applicant retired in 1976 and that in the meantime periodically for certain range of time, the employees were asked to submit options. ... A considerable number of employees including the applicant did not submit option as the then scheme for pension introduced for the said limited period was not considered beneficial, since up to Seventh Amended Option, the scheme would hardly give any benefit to the said employees including the applicant. Later on, however, came the Eighth Option, through which a breakthrough order vide Railway Board's Letter No. PC II (75) PB/3 dated 23-7-1974 was issued on the acceptance of the recommendation of the Third Pay Commission. The validity of the order although initially for six months was extended from time to time till 31-12-1978. It was, inter alia, laid down in the said order that in the case of those railway servants who are eligible for exercising option under this order but who have retired and settled up under the SRPF (Contributory) Rules, the option for pension will be valid if they refund the entire Government contribution. The Railway Administration was accordingly to take urgent steps to bring the contents of the said letter to the notice of all employees concerned under their administrative control including those on leave or on deputation, etc. It was also laid down that to facilitate circulation of this order, the Board desired that the contents of the order should be published by the Railway in their gazette in an extraordinary issue as well as suitable press releases also be issued.

The applicant states that he was on deputation from June 1972 to 8-1-1975. Moreover on 28-7-1974 the applicant suffered an acute heart attack almost coinciding with the date of the issue of this order. Thereafter he was hospitalised for post-cardiac convalescence and accordingly was on leave for a long period. He was not even intimated about the content of the order by the respondents through any communication during his deputation. ... The applicant also states that after retirement in October 1976 the applicant was cut off from Railways and was in darkness about their pension policy. In 1998 the applicant came to know that some officers of administrative grades were given pensionary benefit with or without intervention of court since they had not been informed about option for pension."

7. The Tribunal by order dated 25-7-2005 allowed the application of the respondent and directed the appellants to permit the respondent to opt for pension scheme and also inform the respondent the amount that was required to be refunded in case he exercised the option. The Tribunal extracted the reasons assigned by the Chairman of the Railway Board in his order dated 15-5-2004 rejecting the request of respondent. Significantly, the Tribunal did not disagree with the said finding nor referred to the enormous delay in making the claim. The Tribunal allowed the application, as the Railways had remained unrepresented and had not contested the claim, even though in the entire application there was no averment denying knowledge of the availability of the Eighth Option dated 23-7-1974.

8. The appellants challenged the order of the Tribunal in WP (CT) No. 467 of 2005. The High Court dismissed the writ petition by order dated 25-1-2006. The said order of the High Court is challenged in this appeal by special leave. The question for consideration is whether the respondent was entitled to exercise an option to switch over to pension scheme, beyond the stipulated last date, that too twenty-two years after retirement and receipt of the retirement dues under the Contributory Provident Fund Scheme.

9. When a scheme extending the benefit of option for switch over, stipulates that the benefit will be available only to those who exercise the option within a specified time, the option should obviously be exercised within such time. The option scheme made it clear that no option could be exercised after the last date. In this case, the respondent chose not to exercise the option and continued to remain under the Contributory Provident Fund Scheme, and more importantly, received the entire PF amount on his retirement.

10. The fact that the respondent was the Head of his Department and all communications relating to the offer of the Eighth Option and the several communications extending the validity period for exercising the option for pension scheme, were sent to the Heads of the Departments for being circulated to all eligible employees/retired employees, is not in dispute. Therefore, the respondent who himself was the Head of his Department

could not feign ignorance of the Eighth Option or the extensions of the validity period of the Eighth Option.

11. In fact, as noticed above, in his application before the Tribunal the respondent refers to all the options. He is careful to say that he was not "intimated" about the contents of the last order relating to extension of the option, but does not say that he was unaware of the order extending the benefit of option. The respondent consciously chose not to exercise the option as he admittedly thought that receiving a substantial amount in a lump sum under the provident fund scheme (which enabled creation of a corpus for investment) was more advantageous than receiving small amounts as monthly pension under the pension scheme. In those days (between 1957 when the pension scheme was introduced and 1976 when the respondent retired) the benefits under the provident fund scheme and pension scheme were more or less equal; and there was a general impression among employees that having regard to average life expectancy and avenues for investment of the lump sum PF amount, it was prudent to receive a large PF amount on retirement rather than receive a small pension for a few years (particularly as there was a ceiling on the pension and as dearness allowance was not included in the pay for computing the pension).

12. From 1980 onwards, gradually the pension scheme became more and more attractive as compared to the Contributory Provident Scheme, on account of various factors, like dearness allowance being included in the pay for computing pension, ceiling on pension being removed and liberalisation of family pension, etc. But the respondent was well aware that not having opted for pension scheme and having received the PF amount on retirement, he was not entitled to seek switch over to pension scheme. But in 1996, when the respondent learnt that some others who had retired in and around 1973 to 1976 had been permitted to exercise the option in 1993-1994 on the ground that they had not been notified about the option, he decided to take a chance and gave a representation seeking an option to switch over to pension scheme.

13. Having enjoyed the benefits and income from the provident fund amount for more than 22 years, the respondent could not seek switch over to pension scheme which would result in the respondent getting in addition to the PF amount already received, a large amount as arrears of pension for 22 years (which will be much more than the provident fund amount that will have to be refunded in the event of switch over) and also monthly pension for the rest of his life. If his request for such belated exercise of option is accepted, the effect would be to permit the respondent to secure the double benefit of both provident fund scheme as also pension scheme, which is unjust and impermissible. The validity period of the option to switch over to pension scheme expired on 31-12-1978 and there was no recurring or continuing cause of action. The respondent's representation dated 8-10-1998 seeking an option to shift to pension scheme with effect from 1976 ought to have been straightaway rejected as barred by limitation/delay and laches.

14. The order of the Tribunal allowing the first application of respondent without examining the merits, and directing the appellants to consider his representation has given rise to unnecessary litigation and avoidable complications. The ill-effects of such directions have been considered by this Court in *C. Jacob* v. *Director of Geology and Mining*[1]: (SCC pp. 122-23, para 9)

> "*9.* The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly, they assume that a mere direction to consider and dispose of the representation does not involve any 'decision' on rights and obligations of parties. Little do they realise the consequences of such a direction to 'consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to 'consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."

15. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

16. A court or tribunal, before directing "consideration" of a claim or representation should examine whether the claim or representation is with reference to a "live" issue or whether it is with reference to a "dead" or "stale" issue. If it is with reference to a "dead" or "stale" issue or dispute, the court/tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or tribunal deciding to direct "consideration" without itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect.

1 (2008) 10 SCC 115 : (2008) 2 SCC (L&S) 961

17. Even on merits, the application has to fail. In *Krishena Kumar* v. *Union of India*[2] a Constitution Bench of this Court considering the options given to the railway employees to shift to pension scheme, held that prescription of cut-off dates while giving each option was not arbitrary or lacking in nexus. This Court also held that provident fund retirees who failed to exercise option within the time were not entitled to be included in the pension scheme on any ground of parity. Therefore, the respondent who did not exercise the option available when he retired in 1976, was not entitled to seek an opportunity to exercise option to shift to the pension scheme, after the expiry of the validity period for option scheme, that too in the year 1998 after 22 years.

18. The respondent relied on the decision of a two-Judge Bench of this Court in *Union of India* v. *D.R.R. Sastri*[3] in support of his claim. The said decision is clearly distinguishable on facts. In that case the respondent, a railway employee, had gone on deputation to Heavy Engineering Corporation, and later resigned from railway service with effect from 26-6-1973 and was absorbed in the service of the said Corporation. When the Liberalised Pension Scheme was introduced by the Railway Board by Letter dated 23-7-1974, an opportunity was given to all persons governed by the provident fund scheme who were in service of Railways as on 1-1-1973 to opt for the pension scheme. The Railway Board directed that the availability of such option should be brought to the notice of all retired railway servants who were in service as on 1-1-1973. The respondent therein who had left the railway service on 26-6-1973 was not informed of the availability of the option. He could not therefore exercise the option. In fact, he retired from service of Heavy Engineering Corporation without any pension as that Corporation had also no pension scheme.

19. The respondent in *D.R.R. Sastri case*[3] approached the Central Administrative Tribunal in 1993 alleging that he came to know about the said option only in 1993 and that his representation dated 12-6-1993 for relief was rejected by the Railway Board on 13-7-1993. The Tribunal held that the respondent should be given the opportunity to exercise his option to shift to pension scheme, in terms of the Railway Board's Letter dated 23-7-1974, as he was prevented from exercising his option by the failure of Railways to inform him about the option. The Tribunal also took note of the fact that another railway employee was allowed to exercise the option long after the date for exercising the option had expired, but the respondent was not given a similar benefit. The said decision of the Tribunal was affirmed by this Court.

20. The decision in *D.R.R. Sastri*[3] is of no assistance as it does not lay down any proposition that the last date prescribed for exercising option is not relevant or that option could be exercised at any time, even if a last date had been stipulated for exercise of the option. That case was decided on its peculiar facts as the employee (who was on deputation and who resigned

2 (1990) 4 SCC 207 : 1991 SCC (L&S) 112 : (1990) 14 ATC 846
3 (1997) 1 SCC 514 : 1997 SCC (L&S) 555

from the service of Railways on 26-6-1973 when on deputation) was not made aware of the option to which he was entitled, even though there was a specific instruction that all employees who had retired after 1-1-1973 should be informed about the option. The facts of this case are completely different. Here the employee was in service of the Railways itself before and at the time of retirement. He was working as the Head of the Department and was receiving all communications relating to option for being circulated to all employees in his department. Therefore, the question of respondent not being aware of the option does not arise.

21. The Tribunal in this case has assumed that being "aware" of the scheme was not sufficient notice to a retiree to exercise the option and individual written communication was mandatory. The Tribunal was of the view that as the Railways remained unrepresented and failed to prove by positive evidence, that the respondent was informed of the availability of the option, it should be assumed that there was non-compliance with the requirements relating to notice. The High Court has impliedly accepted and affirmed this view. The assumption is not sound.

22. The Tribunal was examining the issue with reference to a case where there was a delay of 22 years. A person, who is aware of the availability of option, cannot contend that he was not served a written notice of the availability of the option after 22 years. In such a case, even if Railway Administration was represented, it was not reasonable to expect the department to maintain the records of such intimation(s) of individual notice to each employee after 22 years. In fact by the time the matter was considered more than nearly 27 years had elapsed. Further when notice or knowledge of the availability of the option was clearly inferable, the employee cannot after a long time (in this case 22 years) be heard to contend that in the absence of written intimation of the option, he is still entitled to exercise the option.

23. This Court considered the meaning of "notice" in *Nilkantha Sidramappa Ningashetti* v. *Kashinath Somanna Ningashetti*[4]. This Court held: (AIR p. 669, para 10)

> "*10.* We see no ground to construe the expression 'date of service of notice' in Column 3 of Article 158 of the Limitation Act to mean only a notice in writing served in a formal manner. When the legislature used the word 'notice' it must be presumed to have borne in mind that it means not only a formal intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. If its intention were to exclude the latter sense of the words 'notice' and 'service' it would have said so explicitly."

24. Learned counsel for the respondent lastly submitted that one K.V. Kasturi who had retired in 1973, was granted the benefit of exercising the option by an order dated 19-9-1994, and therefore, principles of equality and

4 AIR 1962 SC 666

equal opportunity required that the Railways should give him the option. The Chairman of Railway Board, while rejecting the respondents' representation by order dated 15-5-2004 has clarified that K.V. Kasturi's case was similar to that of *D.R.R. Shastri*[3] as he had also not been informed of the availability of option.

25. There is another angle to the issue. If someone has been wrongly extended a benefit, that cannot be cited as a precedent for claiming similar benefit by others. This Court in a series of decisions has held that guarantee of equality before law under Article 14 is a positive concept and cannot be enforced in a negative manner; and that if any illegality or irregularity is committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction of courts for perpetuating the same irregularity or illegality in their favour also on the reasoning that they have been denied the benefits which have been illegally extended to others. (See *Chandigarh Admn.* v. *Jagjit Singh*[5], *Gursharan Singh* v. *NDMC*[6], *Faridabad CT Scan Centre* v. *D.G. Health Services*[7], *State of Haryana* v. *Ram Kumar Mann*[8], *State of Bihar* v. *Kameshwar Prasad Singh*[9] and *Union of India* v. *International Trading Co.*[10])

26. A claim on the basis of guarantee of equality, by reference to someone similarly placed, is permissible only when the person similarly placed has been lawfully granted a relief and the person claiming relief is also lawfully entitled for the same. On the other hand, where a benefit was illegally or irregularly extended to someone else, a person who is not extended a similar illegal benefit cannot approach a court for extension of a similar illegal benefit. If such a request is accepted, it would amount to perpetuating the irregularity. When a person is refused a benefit to which he is not entitled, he cannot approach the court and claim that benefit on the ground that someone else has been illegally extended such benefit. If he wants, he can challenge the benefit illegally granted to others. The fact that someone who may not be entitled to the relief has been given relief illegally, is not a ground to grant relief to a person who is not entitled to the relief.

27. The appeal is therefore allowed and the orders of the Tribunal and the High Court are set aside and the original application of the respondent before the Tribunal is dismissed.

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5 (1995) 1 SCC 745
6 (1996) 2 SCC 459
7 (1997) 7 SCC 752
8 (1997) 3 SCC 321 : 1997 SCC (L&S) 801
9 (2000) 9 SCC 94 : 2000 SCC (L&S) 845
10 (2003) 5 SCC 437

1968 SCC OnLine Mad 22 : AIR 1969 Mad 172 : (1968) 2 Mad LJ 367

Madras High Court
(BEFORE ISMAIL, J.)

Govindasami Pillai ... Appellant;
Versus
T.M. Srinivasa Chettiar and others ... Respondents.

Second App. No. 345 of 1963 and S.A. 571 of 1964 and S.A. 1357 and 1557 of 1965, against decree of Sub. Court, Kumbakonam in A.S. No. 114 of 1960
Decided on January 24, 1968

Page: 173

JUDGMENT

1. These four appeals raise a common question. S.A. No. 1557 of 1965 is filed by the respondents in S.A. 1357 of 1965 to the extent to which the decisions of the courts below went against them.

2. The short facts, the narration of which is necessary for the purpose of appreciating the rival contentions of the parties, are that the village of Mathi in Tanjore Dt. is an estate to which the Madras Estates Land Act of 1908 and the Madras Estates Land (Reduction of Rent) Act 1947 applied; but not the Madras Estates (Abolition and Conversion into Ryotwari) Act 1948. The respondents to the first three appeals claimed that the lands with reference to which they filed the present suit for recovery of rent were private lands. It is the common case of the parties that a notification under the Madras Estates Land (Reduction of Rent) Act 1947 was made by the Government fixing reduced rates of rent for ryoti lands in the village of Mathi. However, the Madras Estates Land (Reduction of Rent) Act 1947, as originally passed did not contain any provision for deciding the question whether a particular piece of land is a ryoti land or a private land in an estate with reference to which a notification has been made under the said

Page: 174

Act. Subsequently, by an amendment made in 1956, namely, Madras Act 29 of 1956, Section 3-A was introduced prescribing the machinery for the purpose of determining whether any land in a village is or is not ryoti land. Under that section, provision was made for determining that question by the Collector and a right of appeal was provided to the Tribunal having jurisdiction over the village. Section 3-A(4)(b) of the Act states that the decision of the Tribunal on the appeal shall be final and shall not be liable to be questioned in any court of law. In this case, the respondents herein filed an application before the Collector for determining the question whether the lards involved in these appeals are ryoti lands or private lands. The application was transferred to the Revenue Divisional Officer, Kumbakonam, who by an order dated 20 -2-1959 made in M.A. 22 of 1957, decided that the lands are private lands. The

appellants herein took up the matter on appeal to the Tribunal, and the Tribunal by its order dated 12-3-1960, dismissed the appeal thereby confirming the conclusion of the Revenue Divisional Officer that the lands are private lands and not ryoti lands. At that stage, the respondents herein filed suits for recovery of rent from the appellants herein. The appellants resisted the claim on several grounds, the most important of which is that the lands are ryoti lands stuate in an Inam estate and therefore the respondents are not entitled to file the Buit in the Civil Court for recovery of rent. After the Tribunal dismissed the appeal, the respondents preferred a writ petition on the file of this Court for quashing the order of the Tribunal. By an order dated 4-4-1962, Veeraswami, J., dismissed the writ petition in the following terms—

> "The petitioner's proper remedy is to Institute a suit. The petition is dismissed. The rule is discharged. No costs".

3. I must point out at this stage that the suits filed by the respondents herein were decreed by the learned District Munsif of Kumbakonam, and against the said judgments and decrees, the appellant herein had preferred appeals to the learned Subordinate Judge of Kumbakonam, end during the pendency of the said appeals, the order above quoted in the writ petition was passed by this Court. Before file learned Subordinate Judge, the appellants put forward only two contentions, namely, the suit lands are not private lands of the plaintiff and the Civil Court had jurisdiction to go into that question and secondly there was no relationship of landlord and tenant between the parties. Except in the appeal which has given rise to S.A. 1357 of 1965, in all the other appeals, the learned Sub-ordinate Judge held that the relationship of landlord and tenant existed between the parties. With regard to the question as to whether the lands are private or ryoti lands, he came to the conclusion that the order of the Estates Abolition Tribunal holding that the lands are private lands was final and the Civil Court had no jurisdiction to go into that question. Since the order in the writ petition had been passed by that time, an argument seems to have been advanced before the learned Subordinate Judge that in view of the terms of the order in the writ petition, the Civil Court had jurisdiction to go into the question as to whether the lands were private lands or ryoti lands. The learned Subordinate Judge dealt with this contention in his judgment in the following terms—

> "The learned Counsel for the appellants also urged another aspect of the case. His contention is that inasmuch as in the writ petition No. 401 of 1960 filed by him to quash the order of the Estate Abolition Tribunal in this case, the High Court has been pleased to observe that the petitioner's proper remedy is to institute a suit, he is entitled to put forward a defence that the suit lands are not private lands of the plaintiffs and that they are ryoti lands. It is not possible for me to accept such a contention. No such right of defence is given to the appellants in the suit in question. His right to question the character of the land in the suit has been barred as already observed by me under the provisions of the Amending Act referred to above".

With the result, the appeals preferred by the appellants herein were dismissed. The above facts arise in S.A. 345 of 1963 and the facts in the other appeals are similar with some immaterial, differences in dates etc. With regard to the appeal which has given rise to S.A. 1357 of 1965 and 1557 of 1965, there was a further question that was decided by the learned Subordinate Judge. The learned Subordinate Judge applying the provisions contained in the Transfer of Property Act held that the defendants in the suit who were not the original lessees, but the sons of the original lessees, were not tenants and consequently, they were trespassers, and they were liable to pay damages for use and occupation. In S.A. 1357 of 1965, preferred by the tenants, the decision of the learned Subordinate Judge is challenged not only on the ground that the Civil Court had jurisdiction to decide the question whether the suit

land is ryoti land or private land, but also on the ground that the finding of the learned Subordinate Judge that the appellants were only trespassers was illegal. S.A. 1557 of 1965 filed by the landlord against the same judgment, in addition to challenging the finding of

the learned Subordinate Judge that the respondents therein were not tenants, but trespassers also challenges the quantum of the amounts awarded by the Subordinate Judge as damages for use and occupation. Therefore, the common question that arises in all these appeals is whether the Civil Court has jurisdiction to go Into the question whether the suit lands are ryoti lands or private lands. The additional question that arises for consideration in S.A. 1357 of 1965 and 1557 of 1965 is that whether the conclusion of the learned Subordinate Judge that the appellants in S.A. 1357 of 1965 were only trespassers is correct or not. I shall first dispose of the additional ground arising in S.A. 1357 of 1965 and 1557 of 1965.

4. The common case of the parties is that the lands are agricultural lands and the leases were agricultural leases. If that was the case, the provisions of the Transfer of Property Act as such will not apply. If the case of the landlord that the lands are private lands is accepted, then the provisions contained in the Madras Cultivating Tenants Protection Act 1955, will apply. Section 2(a) of the Act defines 'cultivating tenant' in relation to any land as meaning a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied, and includes any such person who continues in possession of the land after the determination of the tenancy agreement and the heirs of such person, but does not include a mere intermediary or his heirs. In view of this definition, the appellants in S.A. 1357 of 1965 as heirs of the original lessee, will be cultivating tenants within the scope of the Act. Consequently, the conclusion of the learned Subordinate Judge that the appellants in S.A. 1357 of 1965 are trespassers cannot be supported. On this question, there was no dispute before me between the two parties.

5. With regard to the amount awarded to the appellant in S.A. No. 1557 of 1965, that being a finding on a pure question of fact, its correctness cannot be canvassed in the second appeal. Therefore, S.A. 1357 of 1965 and 1557 of 1965 will be allowed to the extent of vacating the finding of the learned Subordinate Judge holding that the appellants in S.A. 1357 of 1965 are trespassers and not tenants.

6. Then remains the common question arising in all the appeals as to the jurisdiction of the Civil Court to determine whether the suit lands are private lands or ryoti lands. I have already referred to the provision contained in Section 3-A(4)(b) of the Madras Act (30 of 1947). That provision makes it abundantly dear that the decision of the Tribunal whether a particular land is a ryoti land or not is final and the correctness of that decision cannot be canvassed in any Court of law. If authority is needed in support of such a conclusion, reference can be made to the decision of the Supreme Court in *Desikacharyulu* v. *State of A.P.*, AIR 1964 SC 807 dealing with a similar provision contained in the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. Mr. K. Parasaran, learned Counsel for the appellants in these cases did not contend that notwithstanding the provision already referred to by me, a Civil Court has got jurisdiction to decide whether a particular land in an estate is ryoti land or not. On the other hand, in view of the express provision contained in Sec. 3-A (4)(b) of the Act, no such contention is possible. The contention of Mr. Parasaran is that the order in the writ petition constitutes res judicata as between the parties so as to prevent the respondents from raising the contention that the Civil Court had no

jurisdiction to determine whether the lands in question are private lands or ryoti lands. It is unfortunate that the express provision contained in Section 3-A(4)(b) of the Act was not brought to the notice of the learned Judge who disposed of the writ petition. I must also point out one further fact. Against the order in the writ petition, the appellants preferred a writ appeal to this Court; but they have chosen to withdraw the same. Under these circumstances, the contention of the learned Counsel Mr. K. Parasaran, is that the statement contained in the order in the writ petition, namely, the petitioner's proper remedy is to institute a suit constitutes the determination of the question whether the Civil Court has jurisdiction to decide whether the lands in question are private lands or ryoti lands or not and that determination has been rendered by this Court in the presence of both the parties and hence binding on both the parties, and consequently it is not open to the respondents to raise the plea of want of jurisdiction in the Civil Court on this point in the suits for recovery of rent instituted by them. On the other hand, the contention of Mr. R. Kesava Aiyangar, the learned Counsel for the respondents, is that the dismissal of the writ petition would operate as a res judicata preventing the appellants herein from raising the contention that the suit lands are ryoti lands and not private lands. Mr. R. Kesava Aiyangar in support of his contention relied on the decisions of the Privy Council in *Watson* v. *Collector of Rajashya*, (1869-1870) 13 M.I.A. 160 and in *Fateh Singh* v. *Jagannath Baksh Singh*, 48 Mad LJ 64 : (AIR 1925 PC 55), the decision of the Calcutta High Court in *Abdul Hamid* v. *Bijoychand*, AIR 1932 Cal 108, the decision of the

Patna High Court in *Ganesh* v. *Baidyanath*, AIR 1958 Pat 270 and the decisions of this Court in *Krishnaswami* v. *Manikka*, AIR 1931 Mad 268 and *Veeraragu* v. *Manikkavasagam*, AIR 1934 Mad 68. In reply, the contention of Mr. K. Parasaran is that none of these decisions will prevent him from putting forward the contention that the lands are ryoti lands, because the writ petition filed by the appellants was not dismissed after considering the merits, but summarily, on the ground that the alternative remedy of a suit was available to the appellants.

7. In the view I am taking in relation to the first contention of Mr. K. Parasaran, it is unnecessary for me to decide whether the dismissal of the writ petition would constitute res judicata, so as to prevent the appellants from raising the contention that the suit lands are ryoti lands.

8. So far as the main question argued by Mr. K. Parasaran, I must point out that the learned Counsel was not able to bring to my notice any decision which has taken the view that a Civil Court whose jurisdiction has been expressly taken away by the statutory provision can get jurisdiction by having recourse to the principle of res judicata. Mr. Parasaran relied on the decision of the Supreme Court in *State of West Bengal* v. *Hemant Kumar*, AIR 1966 SC 1061. In my view, that decision does not lay down any such proposition. Really speaking, it is very doubtful whether such a plea of res judicata will be available to the appellants at all. Before a plea of res judicata can be sustained either under the provisions of the Code of Civil Procedure or under the general principles, it must be established that the determination which is said to constitute res judicata was with reference to a matter which was directly and substantially in issue between the parties in the earlier proceedings. Explanation III to Section 11 of the CPC states that the matter referred to in the section must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. As I pointed out earlier, the writ petition was dismissed after the suit was decreed and before the appeal was disposed of by the Subordinate Judge.

With the result, neither the judgment in the writ petition nor the pleading in the writ petition were filed in these proceedings for the purpose of establishing that the question regarding the jurisdiction of the Civil Court was directly and substantially in issue between the parties in the writ petition. Even this will be sufficient to reject the plea of res judicata sought to be raised by the learned Counsel for the appellants. However, I do not want to rest my conclusion on this somewhat narrow and technical ground, in view of the fact that counsel for both the parties before me relied on the same order as constituting res judicata against the opposite party. The question that really falls for determination in these second appeals is whether the statement of this Court while dismissing the writ petition, that the petitioner's proper remedy is to institute a suit can be said to be a determination of the question regarding the jurisdiction of the Civil Court to entertain a plea Whether a land in an estate is a ryoti land or not. For one thing, I am unable to accept the contention of the learned counsel that the statement contained in that order disposing of the writ petition constitutes a determination on the question regarding the jurisdiction of the civil court. No doubt, that statement was the basis on which the writ petition was dismissed. But that will not by itself constitute that statement a determination of the question regarding the jurisdiction of the civil court to go into an issue whether a particular land is a ryoti land or not. Apart from this, the question of jurisdiction is really a matter between a party and a Court and cannot be said to be a matter between the parties before the Court. Whether a particular party raises the question regarding the want of jurisdiction of a Court or not, it is the duty of the Court to take note of the statutory provisions conferring jurisdiction on it or taking away the jurisdiction from it. If, under the law, a Court has no jurisdiction, no amount of consent, acquiescence or assertion on the part of any of the parties can confer jurisdiction on the Court.

9. In *Raleigh Investment Co. Ltd.* v. *Gov-ernor-General-in-Council*, 74 Ind App 50 at p. 61 : (AIR 1947 PC 78 at p. 79), the Privy Council pointed out that “it is pars judicis to take jurisdiction into consideration and the section has to be considered”. Therefore, in the light of this statement of the law, whenever a party comes before the Court and raises the plea that a particular land in an estate is a ryoti land or private land, it is for the Court to consider the provision contained in Section 3-A (4)(b) of the Act and take that into account for determining whether it had jurisdiction to proceed with the matter or not. In *Jwala Debi* v. *Amir Singh*, AIR 1929 All 132, it has been observed thus—

> “There can be no doubt that a decision on a point of law is as much binding on the parties, in a subsequent litigation provided other ingredients for a principle of res judicata to apply are present, as a decision on a point of fact. The question whether the previous decision was right or wrong is entirely irrelevant; but these considerations do not apply where a question of jurisdiction arises. Looked

at closely, a question of jurisdiction although it may be raised by the defendant, is a question that virtually arises between the plaintiff and the Court itself. The plaintiff invokes the jurisdiction of the Court. The defendant may or may not appear. If the Court finds that it has no jurisdiction to entertain the plaint, it will order the return of it for presentation to the proper Court. The defendant, if he appears, and if he so chooses, may point out to the Court that it has no jurisdiction. A decision on the question of jurisdiction does not affect in any way the status of the parties or the right of one party to obtain redress against the other. The fact that a decision as to jurisdiction is not binding on the parties in a subsequent litigation will be apparent from this. Suppose instead of instituting the present suit in the Revenue Court, the

appellant had gone to the Civil Court and asked for redress. She could not rely on the decision of the Revenue Court in order to induce the Civil Court to exercise jurisdiction in the matter of her suit. She could not say that because the decision was given as between herself and the defendant, the presiding officer of the Civil Court was bound to exercise jurisdiction although he had not got it. She would not be heard if she said that the defendant was precluded from saying that the Revenue Court had no jurisdiction to entertain the suit. As I have said, looked at closely, it will be found that a question of jurisdiction is not a question which may be said to have arisen between the parties". The principles underlying this decision were followed by a Bench of the same High Court in *Nathan* v. *Harbans Singh*, AIR 1930 All 254. In *Dt. Board Dharbanga* v. *Suraj Narain*, AIR 1936 Pat 198 it has been held thus—

> "That brings me to the question whether a question of law can be said to be subject to the principle of res judicata ..... Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions, the rights of parties are not the only matter for consideration. The Court and the public have an interest. When a plea of res judicata is raised with reference to such matters, it is at least a question whether special considerations do not apply ..... In the question of jurisdiction, not only parties themselves, but the Court and the public had an interest".

In the light of these principles, to apply the principle of res judicata and to contend that the statement contained in the order of this Court dismissing the writ petition conferred jurisdiction on the Civil Court which has been expressly taken away by the statute will be not only illegal and contrary to law, but also contrary to public policy. Whenever a question of jurisdiction is involved, it will be the duty of the Court to consider the same and decide it. The principle of res judicata cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, and a party cannot by his admission, omission or previous conduct or consent confer jurisdiction on a Court, where none exists. Hence I hold that the order of this Court in the writ petition does not operate as to confer jurisdiction on the Civil Court to decide whether the suit lands are ryoti lands or not, which jurisdiction has been taken away by the express provision contained in Section 3-A(4)(b) of the Madras Act (30 of 1947). No other question arises in these appeals or was argued before me.

10. The result is, I dismiss S.A. 345 of 1963 and S.A. 571 of 1964. S.A. 1357 of 1965 and 1557 of 1965 will stand allowed to the extent indicated already by me, namely, to the extent of vacating the finding of the learned Subordinate Judge that the appellants in S.A. 1357 of 1965 are not tenants, but trespassers, and will stand dismissed in other respects. There will be no order as to costs in any of these appeals. No leave.

11. In view of the above conclusion of mine, C.M.P. 5770 of 1967 and 5771 of 1967 are dismissed.

KSB

12. *Order accordingly*.

is liable to be set aside under Section 34. The Public Policy of India referred to in Sec.34(2)(b) also is wide enough to include the requirement that the Arbitrator who has functioned as such should have functioned as an independent and impartial arbitrator. Failure on his part to do so, can be regarded as resulting in an award which is in conflict with the Public Policy of India, and therefore, liable to be set aside.

11. On the facts of this case, it is clear, that the applicant has failed to utilise the right conferred on the applicant by Section 13(2) of the Act, as it is submitted that after the institution of these proceedings an Arbitrator has been appointed, and the applicant has not so far challenged the Arbitrator in accordance with Section 13(2). The applicant had come to Court, even before the Arbitrator was appointed, and at a time, when the applicant could not have been aware as to the identity of the person, who will be appointed as an Arbitrator, and the existence or otherwise of justifiable doubts, as to the independence or impartiality of the person, who was to be appointed as an Arbitrator.

12. Counsel submitted that as an Engineer Officer is subordinate to the Chief Engineer, he is incapable of being independent or impartial. It is not necessary to decide such a contention at this stage, as the applicant has the right to apply under Section 34, for setting aside the award, and it is open to him at that stage to urge all these contentions in support of the case, if he should have an occasion to seek the setting aside of the award.

13. The present application is, therefore, misconceived, and is dismissed. KA/RR/VCS

1997 - 2 - L.W.845

MADRAS HIGH COURT

20th January 1997/Application No.178 of 1996 and C.S.Nos.159 of 1996 and 26 of 1997

S. Jagadeesan, J.

1997-2-L.W.56

Application No.179 of 1986: Union of India, represented by the Secretary, Ministry of Telecommunications, through the Assistant General, Manager (Buildings), Madras Telephones.

v.

1. Zarin Taj Begum 2. V. Ramabhadran 3. Harindrakumar Dave 4. M/s. Srinivasan Shipping & Property Development Ltd.

C.S.No.159 of 1996: Union of India represented by the Secretary, Ministry of Telecommunications, through the Assistant General Manager (Buildings) Madras Telephones.

v.

1. Zarin Taj Begum 2. V. Ramabhadran 3. O. Harindrakumar Dave 4. The Land Acquisition Officer & Special Deputy Collector (L.A. Works) Madras-5. 5. The Appropriate Authority, Represented by its Member, Income-tax Officer, Madras. 6. M/s. Srinivasan Shipping & Property Development Ltd., represented by its Director, Madras-17.

C.S.No.26 of 1997: 1. Zarin Taj Begum 2. V. Ramabhadran 3. O. Harindrakumar Dave

v.

1. The Land Acquisition Officer & Special Deputy Collector, (Land Acquisition Works), Madras-5. 2. State of Tamil Nadu, represented by its Secretary to Government, Public (Telephones II) Department, Madras-9. 3. Union of India, represented by General Manager, Telephones, Madras-3.

Land Acquisition Act, Ss.4,6,11,etc., and C.P.C., S.9 — Suits in Civil Court filed by owner of land challenging the validity of acquisition proceedings, seeking injunction, etc — Held, not maintainable, and withdrawn, exercising *suo motu* jurisdiction, from City Civil Court and dismissed.

Suit filed by the Union of India/Ministry

of Telecommunications, on the Original side of High Court seeking injunction to restrain defendants from alienating property etc. after issue of Land Acquisition Notifications — Not maintainable/dismissed.

Held: it is clear that the Civil Court has no jurisdiction to take cognizance of a land acquisition case under S.9, C.P.C., since the said provision stands excluded and equally, a Civil Court has no jurisdiction to grant any interim order in respect of the acquisition proceedings. "Hence, the Civil Suit O.S.No.1917 of 1991 filed by the respondents on the file of the City Civil Court is not maintainable and cannot be allowed to stand on file any more. Hence, by *suo motu* inherent powers I directed transfer of the suit, O.S.No.1917 of 1991 from the City Civil Court to this Court and the office is directed to re-number the suit. The said suit, C.S.No.26 of 1997 (O.S.No.1917 of 1991) is dismissed as the same is not maintainable in law. When once it has been held that the Civil Court has no jurisdiction to entertain the Civil Suit, the direction given by this Court cannot be construed as if it confers jurisdiction of the Civil Court to entertain the suit". Paras 2,3

It is clear from AIR 1969 Madras 172 that neither the consent of the parties nor leaving open the position to be decided by the Civil Court, will confer any jurisdiction on the Civil Court, if such jurisdiction is totally prohibited under the Land Acquisition Act. Para 3

C.S.159 of 1996: This suit was filed by the Union of India represented by the Secretary, Ministry of Telecommunications through the Assistant General Manager (Buildings), Madras Telephones, seeking for a bare injunction restraining the defendants 1 to 3 from alienating the suit property either by sale or by other mode of transfer. Pending disposal of the suit, the plaintiff filed this application, Application No.178 of 1996, seeking an interim injunction restraining the respondents 1 to 3 from alienating the suit property pending disposal of the suit. There is absolutely no need for the plaintiff to file the suit seeking for such relief of injunction. Hence, the suit is of no merit and accordingly, it is dismissed. Paras 1, 5

AIR 1995 S.C. 1955; and

AIR 1969 Madras 172 — **Referred to.**

Suits dismissed.

Mr. R. Santhanam, Addl. Central Govt. Standing Counsel for Plaintiffs.

Mr. S. Subramanian, Mr. A.R. Karunakaran, and Mr. Mohan Parasaran for Respondents.

JUDGMENT

The plaintiff/Union of India represented by the Secretary, Ministry of Telecommunications through the Assistant General Manager (Buildings), Madras Telephones, has filed the suit seeking for a bare injunction restraining the defendants 1 to 3 from alienating the suit property either by sale or by other mode of transfer. Pending disposal of the suit, the plaintiff has filed this application, Application No.178 of 1996, seeking an interim injunction restraining the respondents 1 to 3 from alienating the suit property pending disposal of the suit. In the said Application only notice was ordered and no interim order has been granted. When the Application came up for final disposal on 17.1.1997, it was represented that the respondents/defendants herein filed a suit C.S.No.1917 of 1991 before the City Civil Court, Madras, challenging the acquisition proceedings and also obtained an order of interim injunction restraining the applicant herein from interfering with the peaceful possession and enjoyment of the second respondent. When it is admitted that the applicant/plaintiff herein is in possession and enjoyment of the suit property as a tenant, in order to ascertain as to how the respondents/ defendants herein have filed an application for injunction restraining the applicant/plaintiff from interfering with their possession and enjoyment of the suit property, records have been called for from the City Civil Court. After calling for the records, I find that the respondents have filed two applications, one for restraining the applicant herein from interfering

with the peaceful possession and enjoyment of the respondents and another application seeking for an injunction against the applicant from proceeding with the acquisition proceedings.

2. The Supreme Court has held in a decision in *State of Bihar* v. *Dhirendra Kumar* (AIR 1995 S.C., 1955) that the validity of notification under Sec.4 and declaration under Sec.6 of the Land Acquisition Act, cannot be challenged before the Civil Court since the Civil Court has no jurisdiction. The Supreme Court held as follows:-

"The question is whether civil suit is maintainable and whether *ad interim* injunction could be issued where proceedings under the Land Acquisition Act was taken pursuant to the notice issued under S.9 of the Act and delivered to the beneficiary. The provisions of the Act are designed to acquire the land by the State exercising the power of eminent domain to serve the public purpose. The State is enjoined to comply with Statutory requirements contained in S.4 and S.6 of the Act by proper publication of notification and declaration within limitation and procedural steps of publication in papers and the local publications envisaged under the Act as amended by Act 68 of 1984. In publication of the notifications and declaration under S.6, the public purpose gets crystalised and becomes conclusive. Thereafter, the State is entitled to authorise the Land Acquisition Officer to proceed with the acquisition of the land and to make the award. Sec.11-A now prescribes limitation for making the award within 2 years from the last of date of publication envisaged under S.6 of the Act. In an appropriate case, where the Government needs possession of the land urgently, it would exercise the power under S.17(4) of the Act and dispense with the enquiry under S.5-A. Thereon, the State is entitled to issue notice to the parties under S.9 and on expiry of 15 days, the State is entitled to take immediate possession even before the award could be made. Otherwise, it would take possession after the award under S.12. Thus, it could be seen that the Act is a complete code in itself and is meant to serve public purpose. We are, therefore, inclined to think as presently advised, that by necessary implication the power of the Civil Court to take cognizance of the case under S.9 of C.P.C. stands excluded, and a Civil Court has no jurisdiction to go into the question of the validity or legality of the notification under S.4, and declaration under S.6, except by the High Court in a proceeding under Article 226 of the Constitution. So, the Civil suit itself was not maintainable. When such is the situation, the finding of the trial court that there is a *prima facie* triable issue is unsustainable. Moreover, possession was already taken and handed over to Housing Board. So, the order of injunction was without jurisdiction."

From the above passage, it is clear that the Civil Court has no jurisdiction to take cognizance of the case under Sec.9, C.P.C. since the said provision stands excluded and equally, a Civil Court has no jurisdiction to grant any interim order in respect of the acquisition proceedings. Hence, the Civil Suit O.S.No.1917 of 1991 filed by the respondents on the file of the City Civil Court is not maintainable and cannot be allowed to stand on file any more. Hence, by *suo motu* inherent powers I directed transfer of the suit, O.S.No.1917 of 1991 from the City Civil Court to this Court and the office is directed to re-number the suit. The said suit, C.S.No.26 of 1997 (O.S.No.1917 of 1991) is dismissed as the same is not maintainable in law in view of the well established principles laid down by the Supreme Court which is extracted above. Interim Applications filed in the said suit are also dismissed.

3. Counsel for the respondents however, contended that when a Writ Appeal was pending before this Court challenging the acquisition proceedings a Division Bench of this Court has granted permission to the respondents herein to challenge the acquisition proceedings by way of separate suit since evidence was required. Only pursuant to the direction of this Court, the suit has been filed by the respondents before the City Civil Court. When once it has been held that the Civil Court has no jurisdiction to entertain the Civil Suit, the direction given by this Court cannot be construed as if it confers jurisdiction of the Civil Court to entertain the suit. It has been held in a decision of this Court in *Govindasami* v. *Srinivasa Chettiar* (A.I.R. 1969 Madras, 172) as follows:-

"The question that really falls for determination

in these second appeals is whether the statement of this Court while dismissing the Writ Petition, that the petitioner's proper remedy is to institute a suit "can be said to be a determination of the question regarding the jurisdiction of the Civil Court to entertain a plea whether a land in an estate is a ryoti land or not. For one thing, I am unable to accept the contention of the learned counsel that the statement contained in that order disposing of the writ petition, constitutes a determination on the question regarding the jurisdiction of the Civil Court. No doubt, that statement was the basis on which the writ petition was dismissed. But that will not by itself constitute that statement a determination of the question regarding the jurisdiction of the Civil Court to go into an issue whether a particular land is a ryot land or not. Apart from this, the question of jurisdiction is really a matter between a party and a Court and cannot be said to be a matter between the parties before the Court. Whether a particular party raises the question regarding the want of jurisdiction of a Court or not, it is the duty of the Court to take note of the statutory provisions conferring jurisdiction on it or taking away the jurisdiction from it. If under the law, a court has no jurisdiction, no amount of consent, acquiescence or assertion on the part of any of the parties can confer jurisdiction on the Court."

It is clear from the above passage that neither the consent of the parties nor leaving open the position to be decided by the Civil Court, will not confer any jurisdiction on the Civil Court, if such jurisdiction is totally prohibited under the Land Acquisition Act. Hence, the contention of the counsel for the respondents cannot be sustained.

4. Coming to the facts of the present case, C.S.No.159 of 1996, the plaintiff has filed the suit seeking for a decree for injunction restraining the defendants from alienating the suit property on the ground that the suit property has been acquired by the plaintiff and the award has also been passed. In spite of the passing of the award, the defendants in the suit are repeatedly entering into sale agreements with various persons and trying to dispose of the properties, and the conduct of the defendants would complicate the issue as the third parties interest would get involved. Such third parties would challenge the acquisition proceedings by way of separate proceedings independently that of the defendants, and that would delay the proceedings or it will end in multiplicity of proceedings.

5. I am unable to agree with the pleadings raised by the plaintiff because when once the Union or the State Government acquire the lands invoking sovereign powers under the Land Acquisition Act, and notifications have been issued thereon, the land owners can challenge the acquisition proceedings. In case, if the land owners fail in their attempt, the acquisition proceedings would become final. In this case, subsequent to the notification under Sec.4(1) and declaration under Sec.6 of the Land Acquisition Act, the award enquiry has been held and award has also been passed on 18.11.1989. As per Sec.16 of the Land Acquisition Act, the District Collector can take possession of the land immediately after passing of the award under Sec.11 of the Act. On taking possession of the land or property, the same shall vest absolutely with the Government free from all encumbrances. Admittedly, the award has been passed and no question of taking over possession arises in this case as the plaintiff is in possession of the property already as a tenant. Only formal recording of delivery is necessary. Since the award has been passed under Sec.11 of the Act, the plaintiff is deemed to have taken possession of the property under Sec.16 of the Act, the property shall vest with the plaintiff free from any encumbrance. If once the property vests free of any encumbrance, whatever the transaction that may be entered into by the defendants, in the suit, subsequent to the passing of the award and vesting of the land with the plaintiff, is of no use and cannot be enforced so far as the plaintiff is concerned. There is absolutely no need for the plaintiff to file the suit seeking for such relief of injunction. Hence, I am of the opinion that the suit is of no merit and accordingly, it is dismissed. No costs. Consequently, connected Application No.178 of 1996 is also dismissed.

6. It is further represented by the learned counsel for the defendants that the defendants have filed Writ Petition, W.P.No.1625 of 1989 challenging the award passed in this case. Since the Writ Petition is pending before this Court, it is open to the defendants to raise other pleas, in respect of the validity of the acquisition proceedings, also in the same Writ Petition by filing additional affidavit. It is open to the State Government as well as Telecom Authorities to file additional counter. KA/RR/VCS

1997 - 2 - L.W.849

MADRAS HIGH COURT

2nd May 1997/ Writ Appeal Nos.122/87 and 141 of 1997.

Shivaraj Patil and P.D. Dinakaran, JJ.

T.Lakshmikumara Thathachariar

v.

1. The Commissioner, Hindu Religious and Charitable Endowments (Administration) Department, Madras-34. 2. The Deputy Commissioner, Hindu Religious and Charitable Endowments (Administration) Department, Chennai-34. 3. State of Tamil Nadu, rep. by the Secretary, Department of Hindu Religious and Charitable Endowments, Chennai-9. A.K. Srinivasachariar 4. T.E.Vijayaraghavachariar 5. P.B. Ranganathachariar

Tamil Nadu Hindu Religious and Charitable Endowments Act (1959), Ss.5(3), 103 and 118, C.P.C., S.92, and Constitution of India, Arts. 14, 245, 246 and 300A — Writ Petition praying for a direction to the Deputy Commissioner to conduct fresh enquiry and also challenging the validity of Ss.64(5) and 118, dismissed and afirmed on Writ Appeal — Order of Deputy Commissioner modifying or cancelling scheme with regard to Sri Devaraja Swamy Temple, Kancheepuram, settled under Act 2 of 1927, held, did not violate any rights of the petitioner and cannot be said to be in excess of jurisdiction — Jurisdiction of Civil Court after enactment of 1951 Act regarding the scheme and its applicability under Ss.92, C.P.C. — Scope.

Proceedings under S.64(5) are quasi-judicial and not mere administrative order — Contention on behalf of appellant that scheme framed by Court, including the High Court under S.92 cannot be modified by Deputy Commissioner, not accepted.

Plea on behalf of appellant that the scheme framed and settled by Court having not been referred to in S.118(2A) of the 1959 Act, stood outside the scope and that S.64(5) did not apply to the scheme, settled earlier, not accepted.

The Writ Petition out of which this Writ Appeal arose, related to Arulmighu Devarajaswami Temple, Kancheepuram, and the prayer was to direct the second respondent/Deputy Commisioner, H.R. & C.E., to conduct a fresh enquiry on merits with regard to the contentions raised before him in O.A.No.95 of 1978. In Writ Petition No.2082/97 the petitioner challenged the validity of Ss.64(5) and 118 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. The learned single judge noticing the earlier proceedings between the parties held that the Deputy Commissioner, in entertaining a proceeding or modifying or cancelling the scheme which is deemed to have been settled under the Madras Act 2 of 1927, is not acting in a manner, which can be regarded as in excess of his jurisdiction or in violation of any of the rights of the petitioner under the Constitution, in the light of the facts or the background of the litigation which has preceded the Writ Petition. He also held that the question of the legislature modifying a decree of the Court and excluding the jurisdiction of the Court also did not arise. Para 3, 8

Held: The combined effect of Sec.5(3)(e) and Sec.103(d) of the Act 1951 shows that a scheme framed by the Civil Court under Sec.92,

AIR 1962 SC 1621

In the Supreme Court of India
(BEFORE S.K. DAS, J.L. KAPUR, A.K. SARKAR, K. SUBBA RAO, M. HIDAYATULLAH, N. RAJAGOPALA AYYANGAR AND J.R. MUDHOLKAR, JJ.)

Smt. Ujjam Bai
Versus
State of Uttar Pradesh

Writ Petition No. 79 of 1959†
Decided on April 10, 1962

The Judgment of the Court was delivered by

S.K. DAS, J.:— The facts of the case have been stated in the judgment of my learned brother Kapur J., and it is not necessary for me to restate them. I have reached the same conclusion as has been reached by my learned brother. But in view of the importance of the question raised, I would like to state in my own words the reasons for reaching that conclusion.

2. The two questions which have been referred to this larger Bench are:

1. Is an order of assessment made by an authority under a taxing statute which is *Intra vires*, open to challenge as repugnant to Art. 19(1)(g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued there under?
2. Can the validity of such an order be questioned in a petition under Art. 32 of the Constitution?

3. These two questions are inter-connected and substantially relate to one matter: is the validity of an order made with jurisdiction under an Act which is *Intra vires* and good law in all respects, or of a notification properly issued thereunder, liable to be questioned in a petition under Art. 32 of the Constitution on the sole ground that the provisions of the Act, or the terms of the notification issued thereunder, have been misconstrued?

4.It is necessary, perhaps, to start with the very Article, namely, Art. 32, with reference to which, the question has to be answered.

> "32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of the rights conferred by this Part.
>
> (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).
>
> (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

4. The Article occurs in Part III of the Constitution headed 'Fundamental Rights'. It is one of a series of articles which fall under the sub-head, "Right to Constitutional Remedies". There can be no doubt that the right to move the Supreme Court by appropriate proceedings for the enforcement of the right conferred by Part III is itself a guaranteed fundamental right. Indeed, cl. (1) of the Article says so in express

terms. Clause (2) says that this Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas* corpus, *mandamus, prohibition, quo warranto* and *certiorari*, whichever may be appropriate, for the enforcment of any of the rights conferred by Part III. Clause (4) makes it clear that the right guaranteed by the Article shall not be suspended except as otherwise provided for by the Constitution. Article 359 of the Constitution states that where a Proclamation of Emergency is in operation the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended etc. It is clear, therefore, that so long as no order is made by the President to suspend the enforcement of the rights conferred by Part III of the Constitution every person in India, citizen or otherwise, has the guaranteed right to move the Supreme Court for enforcement of the rights conferred on him by Part III of the Constitution and the Supreme Court has the power to issue necessary directions, orders or writs which may be appropriate for the enforcement of such rights. Indeed, this Court has held in more than one decision that under the Constitution it is the privilege and duty of this Court to uphold the fundamental rights, whenever a person seeks the enforcement of such rights. The oath of office which a Judge of the Supreme Court takes on assumption of office contains *inter alia* a solemn affirmation that he will "uphold the Constitution and the laws".

5. The controversy before us centres round the expression "enforcement of the rights conferred by this Part" which occurs in cls. (1) and (2) of the Article. It has not been disputed before us that this Court is not trammelled by technical considerations relating to the issue of writs *habeas corpus mandamus*, Prohibition, *quo warranto* and *certiorari* This Court said in *T.G. Basappa* v. *T. Nagappa*[(1)].

> "In view of the express provisions in our Constitution we need not-now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate case and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law,"

6. Therefore, apart altogether from all technical considerations, the broad question before us is — in what circumstances does the question of enforcement of the rights conferred by Part III of the Constitution arise under Art. 32 of the Constitution, remembering all the time that the constitutional remedy under Art. 32 is itself a fundamental right? On behalf of the petitioner it has been submitted that whenever it is *prima facie* established that there is violation of a fundamental right, the question of its enforcement arises; for example, (a) it may arise when the statute itself is *ultra vires* and some action is taken under such a statute, or (b) it may also arise when some action is taken under an *intra vires* statute, but the action taken is without jurisdiction so that the statute though *intra vires* does not support it; or (o) it may again arise on misconstruction of a statute which is *intra vires*, but the misconstruction is such that the action taken on the misconstrued statute results in the violation of a fundamental right. It has been argued before us that administrative bodies do not cease to come within the definition of the word "State" in Art. 12 of the Constitution when they perform quasi-judicial functions and in view of the true scope of Art. 32, the action of such bodies whenever such action violates or threatens to violate a fundamental right gives rise to the question of enforcement of such right and no distinction can be drawn in respect of the three classes of cases referred to above. As to the case before us the argument is that the taxing authorities misconstrued the terms of the notification which was issued by the State Government on December 14, 1957 under s. 4(1)(b) of the United Provinces Sales Tax Act, U.P. Act No. XV of 1948

and as a result of the misconstruction, they have assessed the petitioner to sales tax on the sum of Rs. 4,71,541.75 nP. which action, it is submitted, has violated the fundamental right guaranteed to the petitioner under Art. 19(1)(f) and (g) and Art. 31 of the Constitution.

7. The misconstruction, it is argued, may lead to a transgression of constitutional limits in different ways; for example, in a case where an inter-State transaction of sale is sought to be taxed despite the constitutional prohibition in Art. 286 of the Constitution as it stood previously, by wrongly holding that the transaction is intra-State, there is a transgression of constitutional limits. Similarly, where a quasi-judicial authority commits an error as to a fact or issue which the authority has complete jurisdiction to decide under the statute, but the error is of such a nature that it affects a fundamental right, there is again a transgression of constitutional limits. The argument is that there is no distinction in principle between these classes of misconstruction of a statute, and the real test, it is submitted, should be the individuality of the error, namely, whether the error impings on a fundamental right. If it does, then the person aggrieved has a right to approach this Court by means of a petition under Art. 32 of the Constitution.

8. On the contrary, the contention of the respondents which is urged as a preliminary objection to the maintainability of the petition in that on the facts stated in the present petition no question of the enforcement of any fundamental right arises and the petition is not maintainable. It is stated that the validity of the Act not being challenged in any manner, every part of it is good law; therefore, the provision in the Act authorising the Sales-tax Officer as a quasi-judicial tribunal to assess the tax is a valid provision and a decision made by the said tribunal strictly acting in exercise of the quasi-judicial power given to it must necessarily be a fully valid and legal act. It is pointed out that there is no question here of the misconstruction leading to a transgression of constitutional limits nor to any error relating to a collateral fact. The error which is complained of, assuming it to be an error, is in respect of a matter which the assessing authority has complete jurisdiction to decide; that decision is legally valid irrespective of whether it is correct or otherwise. It is stated that a legally valid act cannot offend any fundamental right and the proper remedy for correcting an error of the nature complained of in the present case is by means of an appeal or if the error is an error apparent on the face of the record, by means of a petition under Art. 226 of the Constitution.

9. Before I proceed to consider these arguments it is necessary to clear the ground by standing that certain larger questions were also mooted before us, but I consider it unnecessary to examine or decide them. Such questions were: (1) whether taxation laws are subject to the limitations imposed by Part III, particularly Art. 19 therein, (2) whether the expression “the State” in Art. 12 includes “courts” also, and (3) whether there can be any question of the enforcement of fundamental rights against decisions of courts or the action of private persons. These larger questions do not fall for decision in the present case and I do not consider it proper to examine or decide them here. I should make it clear that nothing I have stated in the present judgment should be taken as expressing any opinion on these larger questions. It is perhaps necessary to add also that this writ petition could have been disposed of on the very short ground that there was no misconstruction of the notification dated December 14, 1957 and the resultant action of the assessing authority did not affect any fundamental right of the petitioner. That is the view which we have expressed in the connected appeal of *Chhota-bhai Jethabhai Patel & Co.* v. *The Sales Tax Officer, Agra* (Civil Appeal No. 99 of 1961) in which Judgment is also being delivered to-day.

10. The writ petition, however, has been referred to a larger Bench for the decision of the two important constitutional questions relating to the scope of Art. 32, which I

have stated earlier in this judgment. It is, therefore, necessary and proper that I should decide those two questions which undoubtedly arise as a preliminary objection to the maintainability of the writ petition.

11. I now proceed to a consideration of the main arguments advanced before us. On some of the aspects of the problem which has been debated before us there has been very iittle disagreement. I may first delimit the filed where there has been agreement between the parties and then go on to the controversial area of disagreement. It has not been disputed before us that where the statute or a provision thereof is *ultra vires*, any action taken under such *ultra vires* provision by a quasi-judicial authority which violates or threatens to violate a fundamental right does give rise to a question of enforcement of that right and a petition under Art. 32 of the Constitution will lie. There are several decisions of this Court which have laid this down. It is unnecessary to cite them all and a reference need only be made to one of the earliest decisions on this aspect of the case, namely, *Himmatlal Harilal Mehta* v. *The State of Madhya Pradesh*[(1)]. A similar but not exactly the same position arose in the *Bengal Immunity Company Limited* v. *The State of Bihar*[(2)]. The facts of the case were that the appellant company filed a petition under Art. 226 in the High Court of Patna for a writ of prohibition restraining the Sales Tax Officer from making an assessment of sales tax pursuant to a notice issued by him. The appellant claimed that the sales sought to be assessed were made in the course of inter-State trade, that the provisions of the Bihar Sales Tax Act, 1947 (Bihar Act 19 of 1947) which authorised the imposition of tax on such sales were repugnant to Art. 286(2) and void, and that, therefore, the proceedings taken by the Sales Tax Officer should be quashed. The application was dimissed by the High Court on the ground that if the Sales Tax Officer made an assessment which was erroneous, the assessee could challenge it by way of appeal or revision under ss. 24 and 25 of that Act, and that as the matter was within the jurisdiction of the Sales Tax Offcer, no writ of prohibition or *certiorari* could be issued. There was an appeal against this order to this Court and therein a preliminary objection was taken that a writ under Art. 226 was not the appropriate remedy open to an assessee for challenging the legality of the proceedings before a Sales Tax Officer. In rejecting the contention, this Court observed:

> "It is, however, clear from article 265 that no tax can be levied or collected except by authority of law which must mean a good and valid law. The contention of the appellant company is that the Act which authorises the assessment, levying and collection of Sales tax on inter-State trade contravenes and constitutes an infringement of Article 286 and is, therefore, *ultra vires*, void and unenforceable. If, however, this contention by well founded, the remedy by way of a writ must, on principle and authority, be available to the party aggrieved."

12. And dealing with the contention that the petitioner should proceed by way of appeal or revision under the Act, this Court observed;

> "The answer to this plea is short and simple. The remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself *ultra vires* and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the powers of the legislature which enacted it and as such void and prays for appropriate relief under article 226."

13. It will be seen that the question which arose in that case was with reference to a provision in the taxing statute which was *ultra vires* and the decision was that any action taken under such a provision was without the authority of law and was, therefore, an unconstitutional interference with the right to carry on business under Art. 19(1)(f). In circumstances somewhat similar in nature there have been other

decision of this Court which the violation of a fundamental right was taken to have been established when the assessing authority sought to tax a transaction the taxation of which came within a constitutional prohibition. Such cases were treated as on a par with those cases where the provision itself was *ultra vires.*

14. The decision in *Bidi Supply Co.* v. *The Union of India*[(1)] arose out of a somewhat different set of facts. There the Central Board of Revenue transferred by means of a general order certain cases of the petitioner under s. 5 (7-A) of the Indian Income-tax Officer, District III, Calcutta, to the Income-tax Officer, Special Circle, Ranchi. It was held that an omnibus wholesale order of tranfer as was made in the case was not contemplated by the sub-section and, therefore, the impugned order of transfer which was expressed in general terms without reference to any particular case and without any limitation as to time was beyond the competence of the Central Board of Revenue. It was also held that the impugned order was discriminatory against the petitioner and violated the fundamental right guaranteed by Art. 14 of the Constitution. This decision really proceeded upon the basis that an executive body cannot, without authority of law, take action violative of a fundamental right and if it does, an application under Art. 32 will lie. In that case no question arose of the exercise of a quasi-judicial function in the discharge of undoubted jurisdiction; on the contrary, the ratio of the decision was that the order passed by the Central Board of Revenue was without jurisdiction. The decision was considered again in *Pannalal Binjraj* v. *Union of India*[(1)] after further amendments had been made in s. 5 (7-A) of the India Income-tax Act, 1922 and it was pointed out that s. 5 (7-A) as amended was a measure of administrative convenience and constitutionally valid and an order passed thereunder could not be challenged as unconstitutional.

15. There are other decisions which proceeded on a similar basis, namely that if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right, the question of enforcement of that right arises and a petition under Art. 32 will lie. (See *Tata Iron and Steel Co. Ltd.* v. *S.R. Sarkar*[(2)]; and *Madan Lal Arora* v. *The Excise and Taxation Officer, Amritsar*[(3)]. In *Tata Iron and Steel Go. Ltd.* v. *S.R. Sarkar*[(2)] the question arose under the Central Sales Tax Act, 1956. Under that Act sales in the course of inter-State trade are liable to be taxed at a single point. The petitioner was assessed to tax on certain sales falling within the Act by the Central Sales Tax Officer' Bihar, and the tax was also duly paid. Thereafter the Central Sales Tax Officer in West Bengal made an order assessing to tax the very sales in respect of which tax had been paid. The petitioner then moved this Court under Art. 32 for an order quashing the assessment. A preliminary objection to the maintainability of the petition was taken on behalf of the respondent State on the ground that under the Act the petitioner could file an appeal against the order of assessment and that proceedings under Art. 32 were, therefore, incompetent. In overruling this contention Shah, J., referred to the decisions of this Court in *Himmatlal Harilal Mehta's case*[(1)], *Bengal Immunity's Company's case*[(2)] and *the State of Bombay* v. *United Motors (India) Ltd.*[(3)] and observed:

> "In these cases, in appeals from orders passed by the High Courts in petitions under Art. 226, this Court held that an attempt to levy tax under a statute which was *ultra vires* infringed the fundamental right of the citizens and recourse to the High Court for protection of the fundamental right was not prohibited because of the provisions contained in Art. 265. In the case before us, the *vires* of the Central Sales Tax Act, 1956, are not challenged; but in *Kailash Nath* v. *The State of Uttar Pradesh*[(4)] a petition challenging the levy of a tax was entertained by this Court even though the Act under the authority of which the tax was sought to be recovered was not challenged as *ultra vires*. It is nob necessary for purposes of this case to decide whether the principal of *Kailash Nath's case*[(4)] is inconsistent with

the view expressed by this Court in *Bamjilal* v. *Income-tax Officer, Mohindargarh* [(5)]."

16. The learned Judge then proceeded to hold that as there was under the Act a single liability and that had been discharged, there could be no proceedings for the assessment of the same sales a second time to tax. The ratio of the decision would appear to be that as the law did not authorise the imposition of tax a second time on sales on which tax had been levied and collected, proceedings for assessment a second time were without jurisdiction. In *Madan Lal Arora's case*[(1)] a notice for assessment was issued after the expiry of the period prescribed therefore by the statute. The assessee thereupon applied to this Court under Art. 32 for quashing the proceedings for assessment on the ground that they were without jurisdiction and it was held that as the taxing authority had no power under the statute to issue the notice in question the proceedings were without jurisdiction and must be quashed. This again was a case in which the authority had no jurisdiction under the Act to take proceedings for assessment of tax and it made no difference that such assumption for jurisdiction was based on a misconstruction of statutory provision.

17. It is necessary perhaps to refer here to another class of cases which have sometimes been characterised as cases of procedural *ultra vires*. When a statute prescribes a manner or from in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must, therefore, formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory in which case disobedience will render void or voidable what has been done, or as directory in which case disobedience will be treated as a mere irregularity not affecting the validity of what has been done. A quasi-judicial authority is under an obligation to act judicially. Suppose, it does not so act and passes an order in violation of the principles of natural justice. What is the position then? There are some decisions, particularly with regard to customs authorities, where it has been held that an order of a quasi-judicial authority given in violation of the principles of natural justice is really an order without jurisdiction and if the order threatens or violates a fundamental right, an application under Art. 32 may lie. (See *Sinha Govindji* v. *The Deputy Controller of Imports & Exports, Madras*[(1)]). These decisions stand in a class by themselves and really proceed on the footing that the order passed was procedurally *ultra vires* and therefore without jurisdiction.

18. So far I have dealt with three main classes of cases as to which there is very little disagreement: (1) where action is taken under an *ultra, vires* statute; (2) where the statute is *intra vires*, but the action taken is without jurisdiction; and (3) where the action taken is procedurally *ultra vires*. In all these cases the question of enforcement of a fundamental right may arise and if it does arise, an application under Art. 32 will undoubtedly lie. As to these three classes of cases there has been very little disagreement between the parties before us.

19. Now, I come to the controversial area. What is the position with regard to an order made by a quasi-judicial authority in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is admittedly intra vires? It is necessary first to clarify the concept of jurisdiction. Jurisdiction means authority to decide. Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for *certiorari* but are binding until reversed on appeal. Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or in fact. The question, whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its

findings on these facts, but upon their nature, and it is determinable "'at the commencement, not at the conclusion, of the inquiry'. (*Rex* v. *Bolten*[(1)]) Thus, a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office, and it does not exceed its jurisdiction by determining any of those questions incorrectly but it has no jurisdiction to entertain a claim for reinstatement or damage for wrongful dismissal, and it will exceed its jurisdiction if it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an in-correct determiuation of any question that it is empowered or required (i.e.,) has jurisdiction to determine. The strength of this theory of jurisdiction lies in its logical consistency. But there are other cases where Parliament when it empowers an inferior tribunal to enquire into certain facts intend to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and with in the other area impeachable. "The jurisdiction of an inferior tribunal may depencd upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the tribunal has to try and the determination whether it exists or not is logically prior to the determination of the actual question which the tribunal has to try. The tribunal must itself decide as to the collateral fact when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on winch the further exercise of their jurisdiction depends; but, subject to that an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess." (*Halsbury's. Laws of England*, 3rd Edn. Vol. 11 page 59).' The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts *stricto sensu* but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of *res judicata* has been applied to such decisions. (See *Livingstone* v. *Westminister Corporation*[(1)] *Re Birkenhead Corporation*[(2)] *Re 56 Denton Road Twickenham*[(3)] *Society of Medical Officers of Health* v. *Hope*[(4)]. In *Bum & Co., Calculta* v. *Their Emplogees*[(5)] this Court said that although the rule of *res judicata* as enacted by s. 11 of the Code of Civil Procedure did not in terms apply to an award made by an industrial tribunal its underlying principle which is founded on sound public policy and is of universal application must apply. In *Daryao* v. *The State of U.P.*[(1)] this Court applied the doctrine of *res judicata* in respect of application under Art. 32 of the Constitution. It is perhaps pertinent to observe here that when the Allahabad High Court was moved by the petitioner under Art. 226 of the Constitution against the order of assessment, passed on an alleged misconstruction of the notification of December 14, 1957, the High Court rejected the petition on two grounds. The first ground given was that the petitioner had the alternative remedy of getting the error corrected by appeal the second ground given was expressed by the High Court in the following words:

"We have, however, heard the learned counsel for the petitioner on merits also,

but we are not satisfied that the interpretation put upon this notification by the Sales Tax Officer contains any obvious error in it. The circumstances make the interpretation advanced by the learned counsel for the petitioner unlikely. It is admitted that even handmade biris have been subject to Sales Tax since long before the date of the issue of the above notification. The object of passing the Additional Duties of Excise (Goods of Special Importance) Central Act No. 58 of 1957, was to levy an additional excise duty on certain important articles and with the concurrence of the State Legislature to abolish Sales Tax on those articles. According to the argument of the learned counsel for the petitioner during the period 14th December, 1957, to 30th June, 1958, the petitioner was liable neither to payment of excise duty nor to payment of Sales Tax. We do not know why there should have been such an exemption. The language of the notification might well be read as meaning that the notification is to apply only to those goods on which an additional Central excise duty had been levied and paid."

20. If the observations quoted above mean that the High Court rejected the petition also on merits, apart from the other ground given, then the principle laid down in *Daryao* v. *The State of U.P.*[(1)] will apply and the petition under Art. 32 will not be maintainable on the ground of *res judicata*. It is, however, not necessary to pursue the question of *res judicata* any further, because I am resting my decision on the more fundamental ground that an error of law or fact committed by a judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends.

21. In *Malkarjun Narhari*[(2)] the Privy Council dealt with a case in which a sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate, and the executing court had erroneously decided that he was to be treated as such representative. The Privy Council said:

"In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed".

22. The above view finds support from a number of decisions of this Court.

1. *Aniyoth Kunhamina Umma* v. *Ministry of Rehabilitation*[(1)]. In this case it had been held under the Administration of Evacuee Property Act, 1950, that a certain person was an evacuee and that certain plots of land which belonged to him were, therefore, evacuee property and vested in the Cus todian of Evacuee Property. A transferee of the land from the evacuee then presented a petition under Art. 32 for restoration of the lands to her and complained of an infringement of her fundamental right, under Art. 19(1)(f) and Art. 31 of the Cons titution by the aforesaid orders under the Adminis tration of Evacuee Property Act. The petitioner had been a party to the proceedings resulting in the declaration under that Act earlier mentioned. This Court held that as long as the decision under the Administration of Evacuee Property Act which had become final stood, the petitioner could not comp lain of any infringement of any fundamental right. This Court dismissed the petition observing:

"We are basing our decision on the ground that the competent authorities under the Act had come to a certain decision, which decision has now become final the petitioner not having moved against that decision in an appropriate court by an appropriate proceeding. As long as that decision stands, the petitioner cannot complain of the infringement of a fundamental right, for she has no such right".

2. *Gulabdas & Co.* v. *Assistant Collector of Customs*[2] In this case certain imported goods had been assessed to customs tariff. The assessee contenued in a petition under Art. 32 that the duty should have been charged under a different item of that tariff and that its fundamental right was violated by reason of the assessment order charging it to duty under a wrong item in the tariff. This Court held that there was no violation of fundamental right and observed:

"If the provisions of law under which impugned orders have been passed are with jurisdiction, whether they be right or wrong on fact, there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal".

3. *Bhatnagar & Co. Ltd,* v. *The Union of India*[1] In this case the Government bad held that the petitioner had been trafficking in licences and in that view confiscated the goods imported under a licence. A petition had been filed under Art. 32 challenging this action. It was held:

"If the petitioner's grievance is that the view taken by the appropriate authority in this matter is erroneous, that is not a matter which can be legitimately agitated before us in a petition under Art. 32".

4. *The Parbhani Transport Co-operative Society Ltd.* v. *Regional Transport Authority, Aurangabad*[2]. In this case it was contended that the decision of the Transport Authority in granting a permit for a motor carriage service had offended Art. 14 of the Constitution. This Court held that the decision of a quasi-judicial body, right or wrong, could not offend Art. 14.

23. There are, however, two decisions which stand out and must be mentioned here. A contrary view was taken in *Kailash Nath* v. *The State of U.P.*[3]

24. There a question precisely the same as the one now before us had arisen. A trader assessed to sales tax had claimed exemption under certain notification and this claim had been rejected. Thereupon he had moved this Court under Art. 32. It was contended that the right to be exempted from the payment of tax was not a fundamental right and therefore, the petition under Art. 32 was not competent. This Court rejected that contention basing itself on *Bengal Immunity Company's case*[1] and *Bidi Supply Co's case*[2]. The two cases on which the decision was rested had clearly no application to the question decided. I have shown earliar that in both those cases the very statute under which action had been taken was challenged as *ultra vires*. In *Kailash Nath's case*[3] the question was not considered from the point of view in which it has been placed before us in the present case and in which it was considered in the four cases referred to above. Therefore, I am unable to agree with the view taken in *Kailash Nath's case*[3].

25. In *Ramavatar Budhai Prasad* v. *Assistant Sales Tax Officer*[4] the question raised was whether betel leaves were exempted from sales tax under certain provisions of the C.P. & Berar Sales Tax Act. This Court agreed with the view of the assessing authority that they were not exempted. The question as to the maintainability of the application under Art. 32 was neither raised nor was it decided. This decision cannot, therefore, be taken as an authority for holding that an application under Art. 32 is maintainable even in respect of orders which are made in the undoubted exercise of jurisdiction by a quasi-judicial authority.

26. Certain other decisions were also cited before us, namely, *Thakur Amar Singhji* v. *State of Rajas-than*[5]; *Mohanlal Hargovind Dass* v. *The State of Madhya Pradesh*[1]; *Y. Mahaboob Sheriff* v. *Mysore State Transport Authority*[2] *J.V. Gokal & Go. (Private) Ltd.* v. *The Assistant Collector of Sales-tax (Inspection)*[3]; and *Universal Imports Agency* v. *Chief Controller of Imports and Exports*[4]. These decisions fall under the category in which an executive authority acts without authority of Jaw, or a quasi-judicial authority acts in transgression of a constitutional prohibition and without

jurisdiction. I do not think that these decisions support the contention of the petitioner.

27. In my opinion, the correct answer to the two questions which have been referred to this larger Bench must be in the negative. An order of assessment made by an authority under a taxing statute which is *intra vires* and in the undoubted exercise of its jurisdiction cannot be challenged on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder. Nor can the validity of such an order be questioned in a petition under Art. 32 of the Constitution. The proper remedy for correcting an error in such an order is to proceed by way of appeal, or if the error is an error apparent on the face of the record, then by an application under Art. 226 of the Constitution. It is necessary to observe here that Art. 32 of the Constitution does not give this Court an appellate jurisdiction such as is given by Arts. 132 to 136. Article 32 guarantees the right to a constitutional remedy and relates only to the enforcement of the rights conferred by Part III of the Constitution. Unless a question of the enforcement of a fundamental right arises, Art. 32 does not apply. There can be no question of the enforcement of a fundamental right if the order challenged is a valid and legal order, in spite of the allegation that it is erroneous. I have, therefore, come to the conclusion that no question of the enforcement of a fundamental right arises in this case and the writ petition is not maintainable.

28. It is necessary to refer to one last point. The petitioner's firm had also filed an appeal on a certificate of the Allahabad High Court against the order of that Court dismissing their petition under Art. 226 of the Constitution. The appeal against that order was dismissed by this Court for non-prosecution on February 20, 1961. In respect of that order of dismissal the petitioner's firm has filed an application for restoration on the ground that it had been advised that in view of a rule having been issued under Art. 32 of the Constitution, it was not necessary to prosecute the appeal. The petitioner's firm has prayed for condonation, of delay in filing the application for restoration of appeal. In my opinion no sufficient cause has been made out for allowing the application for restoration. The petitioner's firm had deliberately allowed the appeal to be dismissed for non-prosecution and it cannot now be allowed to get the dismissal set aside on the ground of wrong advice.

29. Furthermore, in the appeal filed on behalf of *Chhotabhai Jethabhai Patel & Co.* v. *The Sales Tax Officer, Agra* (Civil Appeal No. 99 of 1961) we have decided the question on merits and have held that the assessing authorities did not put a wrong construction on the notification in question.

J.L. KAPUR, J.:— In this petition under Art. 32 of the Constitution which is directed against the order passed by the Sales Tax Officer, Allahabad, dated December 20, 1958, the prayer is for a writ of *certiorari* or other order in the nature of *certiorari* quashing the said order, a writ of *mandamus* against the respondents to forbear from realizing the sales tax imposed on the basis of the said order and such other writ or direction as the petitioner may be entitled to.

30. The petitioner is a partner in the firm M/s. Mohanlal Hargovind Das which carried on the business of manufacture and sale of handmade biris, their head office being in Jubbalpore in the State of Madhya Pradesh. They also carry on business in U.P., and in that State their principal place of business is at Allahabad.

31. Under s. 4(1) of the U.P. Sales Tax Act (Act XV of 1948) hereinafter called the 'Act', the State Government is authorised by a notification to exempt unconditionally under cl. (a) and conditionally under cl. (b) any specified goods, On December 14, 1957, the U.P. Government issued a notification under s. 4(1)(b) of the Act exempting cigars, cigarettes, biris and tobacco provided that the additional Central Excise Duties leviable under the Additional Duties of Excise (Goods of Special Importance) Act, 1957

(Act 58 of 1957) had been paid. This notification was subsequently modified and on November 25, 1958, another notification was issued unconditionally exempting from sales tax biris both handmade and machine-made with effect from July 1, 1958. The exemption of biris from sales tax was conditional under the notification dated December 14, 1957, for the period December 14, 1957, to June 30, 1958, but was unconditional as from July 1, 1958.

32. The petitioner's firm submitted its return for the quarter beginning April 1, 1958, to June 30, 1958, showing a gross turnover of Rs. 75,44,633 and net turnover of Rs. 111. The firm claimed that as from December 14, 1957, biris had been exempted from payment of sales tax which had been replaced by the additional central excise duty and therefore no tax was leviable on the sale of biris. The requisite sales tax of Rs. 3.51 nP on the turnover of Rs. III was deposited as required under the law. The petitioner's' firm also submitted its return for the periods December 14, 1957, to December 31, 1957, and from January 1, 1958, to March 31, 1958. For the subsequent periods returns were made but those are not in dispute as they fell within the notification of November 25, 1958. The Sales Tax Officer on November 28, 1958, sent a notice to the petitioner's firm for assessment of tax on sale of biris during the assessment period April 1, 1958, to Jund 30, 1958. On December 10, 1958, the petitioner's firm submitted an application to the Sales Tax Officer stating that no sales tax was exigible under the Act on the sale of biris because of the notification dated December 14, 1957. This place was rejected by the Sales Tax Officer and on December 20, 1958, he assessed the sales of the petitioner's firm to sales tax amounting to Rs. 4,71,541-75 nP. In his order the Sales Tax Officer held:—

> "The exemption envisaged in this notification applies to dealers in respect of sales of biris provided that the additional Central Excise duties leviable thereon from the closing of business on 13-12-1957 have been paid on such goods. The assessees paid no such Excise duties. Sales of biris by the assessees are therefore liable to sales tax".

33. Against this order the firm took an appeal under s. 9 of the Act to the Judge (Appeals) Sales Tax, Allahabad, being Appeal No. 441 of 1959, but it was dismissed on May 1, 1959.

34. The petitioner's firm filed a petition under Art. 226 of the Constitution in the High Court of Allahabad challenging the validity of the order of assessment and demand by the Sales Tax Officer. This was Civil Miscellaneous Writ No. 225 of 1959 which was dismissed on January 27, 1959 on the ground that there was another remedy open to the petitioner under the Act. The High Court also observed:—

> "We have come to the conclusion that the Sales Tax Officer has not committed any apparent or obvious error in the interpretation of the notification of 14th December 1957".

35. Against the order of the High Court an appeal was brought to this Court on a certificate under Art. 133(1)(a). During the pendency of the appeal this petition under Art. 32 was filed and rule was issued on May 20, 1959. Subsequently the appeal which had been numbered C-A. 572/60 was dismissed by a Divisional Bench of this Court for non-prosecution. An application has been filed in this Court for restoration of the appeal and for condonation of delay. That matter will be dealt with separately.

36. In the petition under Art. 32 the validity of the order of assessment dated December 20, 1958, is challenged on the ground that the levy of the tax amounts to "infringement of the fundamental right of the petitioner to carry on trade and business guaranteed by Art. 19(1)(g)" and further that it is an illegal consfiscation of property without payment of compensation and contravenes the provisions of Art. 31 of the Constitution". The prayers have already been set out above.

37. As before the Constitution Bench which heard the petition a preliminary

objection against the competency of the petitioner's right to move this court under Art. 32 of the Constitution, was raised and the correctness of the decision in *Kailash Nath* v. *The State of U.P.*[(1)], was challenged, the Constitution Bench because of that decision and of certain other decisions of this court and because of the importance of the question raised made the following order:

> "The question thus debated is of considerable importance on which there has been no direct pronouncement by this court. It seems desirable that it should be authoritatively settled. We accordingly direct that the papers be placed before the Chief Justice for constituting a larger Bench for deciding the two following questions:
>
> 1. Is an order of assessment made by an authority under a taxing statute which is *intra vires* open to challenge as repugnant to Art. 19(1)(g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder?".
> 2. Can the validity of such an order be questioned in a petition under Art. 32 of the Constitution?"

38. That is how this matter has come up before this bench.

39. Before examining the rival contentions raised and the controversy between the parties it is necessary to state that (i) in the present case we are not called upon to decide whether els. (f) and (g) of Art. 19 are applicable to a taxing statute or to express our preference for the view of this court as expressed in a group of cases beginning with *Ramjilal* v. *Income-tax Officer, Mohindergarh*[(1)] over the later view taken in the *second Kochunni*[(2)] case or *K.T. Moopil Nair* v. *State of Kerala*[(3)], (2) whether the word 'State" in Art. 12 of the Constitution Comprises judicial power exercised by courts and (3) the wider question whether Art. 32 is applicable in the case of infringement of rights by private parties. The controversy in the present case in this; the petitioner contends that an erroneous order, in this case, of assessment resulting from a misconstruction of a notification issued under a statute by a quasi-judicial authority like the Sales Tax Officer even if the statute is *intra tires* is an infringement of the fundamental right to carry on trade under Art. 19(1)(g) on the ground that the essence of the right under that Article is to carry on trade unfettered and that such a right can be infringed as much by an executive act of an administrative tribunal as by a quasi-judicial decision given by such a tribunal. The petitioner mainly relies on the decision of this Court in *Kailash Nath* v. *State of U.P.* (1).

40. The submission of the respondent, which was urged as a preliminary objection to the maintainability of this petition, was that the impugned decision of the Sales tax Officer does not violate any fundamental right. The respondent argued that if the constitutionality of the Act is not challenged then all its provisions must necessarily be constitutional and valid including the provisions for the imposition of the tax and procedure for assessment and appeals against such assessments and revisions therefrom would be equally valid. A decision by the Sales tax Officer exercising quasi-judicial power and acting within his powers under the Act and within his jurisdiction must necessarily be valid and legal irrespective of whether the decision is right or wrong. Therefore an order of the Sales tax Officer even if erroneous because of misconstruction of notification issued thereunder remains a valid and legal order and a tax levied thereunder cannot contravene fundamental rights and cannot be challenged under Art. 32. An aggrieved party must proceed against the decision by way of appeal etc. as provided under the statute or in appropriate cases under Art. 226 of the Constitution and finally by appeal to this Court under Art. 136. For the order to be valid and immune from challenge under Art. 32, it is necessary therefore that (I) the statute is *intra vires* in all respects; (2) the authority acting under it acts quasi-

judicially; (3) it acts within the powers given by the Act and within jurisdiction; and (4) it does not contravene rules of natural justice.

41. In *Mulkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa*[(1)], Lord Hobhouse while dealing with an erroneous order of a court said:

> "The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. It made a sad mistake it is true; but a Court has jurisdiction to decide wrong as well as right. If it decided wrong, the wronged party oan only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed."

42. In an earlier case dealing with the revisional powers of the Court, Sir Barnes Peacock in *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh*[(2)] said:—

> "The question then is, did the judges of the Lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity".

43. This principle has been accepted by this Court in cases to which reference will be made later in this judgment. Although these cases were dealing with the decisions of Courts they are equally applicable to decisions of quasi-judicial tribunals because in both cases where the authority has jurisdiction to decide a matter it must have jurisdiction to decide it rightly or wrongly and if the decision is wrong the aggrieved party can have recourse to the procedure prescribed by the Act for correcting the erroneous decision.

44. Now Art. 32 is a remedial provision and is itself a fundamental right which entitles a citizen to approach this court by an original petition in any ease where his fundamental right has been or may be infringed. The relevant part of the Article provides:—

> Art. 32(1) "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs in the nature of *habeas corpus, mandamus*, prohibition, *que warranto* and *certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by this Part".

45. Under Art. 32(1) a citizen can approach this Court when his fundamental rights guaranteed under Part III of the Constitution are invaded the remedy for which is provided in cl. (2) of Art. 32. Thus the remedy under Art. 32 is not available unless the fundamental rights of a citizen are invaded.

46. In my opinion the contention raised by the respondents is well founded. If the statute and it constitutionality is not challenged then every par of it is constitutionally valid including the provisions authorising the levying of a tax and the mode and procedure for assessment and appeals etc. A determination of a question by a Sales tax Officer acting within his jurisdiction must be equally valid and legal. In such a case an erroneous construction, assuming it is erroneous, is in respect of a matter which the statute has given the authority complete jurisdiction to decide. The decision is therefore a valid act irrespective of its being erroneous.

47. An order of assessment passed by a quasi-judicial tribunal under a statute which is *ultra vires* cannot be equated with an assessment order passed by that tribunal under an *intra vires* statute even though erroneous. The former being with out

authority of law, is wholly unauthorised and has no existence in law and therefore the order is an infringement of fundamental rights under Art. 19(1)(f) & (g) and can be challenged under Art. 32. The latter is not unconstitutional and has the protection of law being under the authority of a valid law and therefore it does not infringe any fundamental right and cannot be impugned under Art. 32. To say that the doing of a legal act violates a fundamental right would be a contradiction in terms. It may be pointed out that by an erroneous decision of the quasi-judicial authority the wronged party is not left without a remedy. In the first place under the Act before an assessment is made the Sales tax Officer is required to give notice and hear objections of a taxpayer and give decision after proceeding in a judicial manner that is after considering the objections, and such evidence as is led. Against the order of assessment an appeal is provided by s. 9 of the Act and against such an appellate order a revision can be taken under s. 10 of the Act under a. 11 a reference to the High Court on a question of law is provided and if the revising authority refuses to make a reference then the High Court can be moved to direct the revising authority to state a case and then an appeal would lie under Art. 136 of the Constitution of India and it may be added that a petition under Art. 226 would lie to the High Court in appropriate eases against which an appeal will lie to this Court under Art. 136. It may here be added that the procedure prescribed by the Act shows that the Sales tax Officer has to determine the turnover after giving the taxpayer a reasonble opportunity of being heard and such an assessment is a quasi-judicial act *Province of Bombay* v. *Kusaldas S. Advani*[(1)]. If a Sales tax Officer acts as a quasi-judicial authority then the decision, whether right or wrong, is a perfectly valid act which has the authority of an *intra vires* statute behind it. Such a decision, in *my* opinion, does not infringe any fundamental right of the petitioner and any challenge to it under Art. 32 is unsustainable.

48. Before giving the reasons for any opinion I think it necessary to refer to the constitutional provisions dealing with the power to tax. This subject is dealt with in Part XII of Constitution and Art. 265 therein which is the governing provision provides:—

> "No tax shall be levied or colleoted except by authority of law."

49. Therefore a taxing law enacted by a legislature, which it is not competent to enact, will have no existence in the eye of law and will be violative of Art. 19(1)(g). The same result will follow if the law is a colourable piece of legislation e.g., a law disguised as a taxing law but really law but confiscatory measure the object of which is not to raise revenue but confiscation. Similarly, if a tax is assessed by an authority which has no jurisdiction to impose it will also be outside the protection of law being without authority of law. The same will be the case where an Executive authority levies an unauthorised tax. Then there are cases like the present one where a quasi-judicial tribunal imposes a tax by interpreting a notification under a taxing provision and the objection taken is that the interpretation is erroneous. The cases relied upon by counsel for the appellant and the respondent fall within one or other of these categories.

50. As I have said above, the submission of the learned Additional Solicitor General is well founded. It has the support of the following decisions of this Court which I shall now deal with. In *Gulabdas* v. *Assistant Collector of Custom*[(1)] it was held that if the order impungned is made under the provisions of a statue which is *intra vires* and the order is within the jurisdiction of the authority making it then whether it is right or wrong, there is no infraction of the fundamental rights and it has to be challenged in the manner provided in the Statute and not by a petition under Art. 32. In that case the petitioner was aggrieved by the order of the Assistant Collector of Customs who assessed the goods imported under a licence under a different entry and consequently

a higher Excise Duty was imposed. The petitioners feeling aggrieved by the order filed a petition under Art. 32 and the objection to its maintainability was that the application could not be sustained because no fundamental right had been violated by the impugned order it having been properly and correctly made by the authorities competent to make it. The petitioner there contended that the goods imported, which were called 'Lyra' brand Crayons were not crayons at all and therefore imposition of a higher duty by holding them to be crayons was an infringement of fundamental right under Art. 19(1)(f) & (g). This contention was repelled. Delivering the judgment of the Court, S.K. Das, J., observed at p. 736:—

> "What, after all, is the grievance of the petitioners? They do not challenge any of the provisions of the India Traiff Act, 1934 (XXXII of 1934) or any of the provisions of the Sea Customs Act, 1878 (VIII of 1878). It is for the Customs authorities to determine under the provisions of the said Acts what duty is payable in respect of certain imported articles. The Customs authorities came to a decision, right or wrong, and the petitioners pursued their remedy by way of an appeal to the Central Board of Revenue.
>
> The Central Board of Revenue dismissed the appeal. Unless the provisions relating to the imposition of duty are challenged as unconstitutional, or the orders in question are challenged as being in excess of the powers given to the Customs authorities and therefore without jurisdiction it is difficult to see how the question of any fundamental right under Art. 19(1) cls. (f) & (g) of the Constitution can at all arise.
>
> If the provisions of law under which the impugned orders have been passed are good provisions and the orders passed are with jurisdiction, whether they be right or wrong on facts, there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal.
>
> All that is really contended is that the orders are erroneous on merits. That surely does not give rise to the violation of any fundamental right under Art. 19 of the Constitution."

51. The second case is *Bhatnagar Co. Ltd.* v. *The Union of India*[(1)]. In that case the Sea Customs authorities ordered the confiscation of goods on the ground that the petitioner had been trafficking in licenses under which the goods had been imported. This order was challenged under Art. 32. It was held that the order of confiscation made as a result of investigation, which the Customs Authorities were competent to make, was not open to challenge in proceedings under Art. 32 of the Constitution on the ground that the conclusions were not properly drawn. It was observed:—

> "If the petitioner's grievance is that the view taken by the appropriate authorities in this matter is erroneous that is not a matter which can be legitimately agitated before us in a petition under Art. 32. It may perhaps be, as the learned Solicitor General suggested, that the petitioner may have remedy by suit for damages but that is a matter with which we are not concerned. If the goods have been seized in accordance with law and they have been seized as a result of the findings recorded by the relevant authorities competent to hold enquiry under the Sea Customs Act, it is not open to the petitioner to contend that we should ask the authorities to exercise discretion in favour of the petitioner and allow his licences a further lease of life. Essentially the petitioner's grievence is against the conclusions of fact reached by the relevant authorities."

52. The third case is *The Parbhani Transport Cooperative Society Ltd.* v. *The Regional Transport Authority, Aurangabad*[(2)] where the decision of a Transport Authority in granting a motor carriage permit was challenged as a contravention of Art. 14. The Court held that the Regional Transport Authority acts in a quasi-judicial

capacity in the matter of granting permits, and if it comes to an erroneous decision the decision is not challengeable under Art. 32 of the Constitution because the decision right or wrong could not infringe Art. 14. Sarkar J. said at p. 188:—

> "The decision of respondent No. 1 (Regional Transport Authority) may have been right or wrong but we are unable to see that the decision offends Art. 14 or any other fundamental right of the petitioner. The respondent No. 1 was acting as a quasi-judicial body and if it has made any mistake in its decision there are appropriate remedies available to the petitioner for obtaining relief. It cannot complain of a breach of Art. 14".

53. Lastly reliance was placed on an unreported judgement of this Court in *Aniyoth Kunhamina Umma* v. *The Ministry of Rehabilitation, Government of India, New Delhi*[(11)] The petitioner in that case was a reprssent-ative-in-interest of her husband who had been declared an evacuee by the Custodian of Evacuee property. Her appeals first to the Deputy Custodian and then to the Custodian General were unsuccessful. She then field a petition under Art. 32 of the Constitution. It was held that the appropriate authorities of competent jurisdiction under the Administration of Evacuee Property Act 1950 having determined that the husband was an evacuee within that Act and the property was evacuee property it was not open to the petitioner to challenge the decision of the Custodian General under Art. 32 of the Constitution. S.K. Das, J., delivering the judgment of the Court observed:—

> "Where, however, on account of the decision of an authority of competent jurisdiction the right alleged by the petitioner has been found not to exist, it is difficult to see how any question of infringement at right can arise as a ground for a petition under Art. 32 of the Constitution unless the decision on the right alleged by the petitioner is held to be a nullity or can be otherwise got rid of. As long as that deoision stands, the petitioner cannot complain of any infringement of a fundamental right. The alleged fundamental right of the petitioner is really dependent on whether Kunhi Moosa Haji was an evacuee property. Is the decision of the appropriate authorities of competent jurisdiction cannot be otherwise got rid of, the petitioner cannot complain of her fundamental right under Arts. 19(1)(f) and 31 of the Constitution".

54. These authorities show (1) that if a statute is *intra vires* than a competent order under it by an authority acting as a quasi-judicial authority is equally *intra vires* (2) that the decision whether right or wrong is not violative of any fundamental right and (3) that if the order is erroneous then it can be questioned only under the provisions of that statute because the order will not amount to an infringement of a fundamental right as long as the statute is consiti-tutional. In appropriate case it may be challenged under Art. 226 and in both cases an appeal lies to this Court.

55. I may now examine decisions of this Court relied upon by the learned Attorney General in which the operation of taxation laws as violating Art. 19(1)(g) was considered and the procedure by which this Court was approached. In support of his case the Attorney General mainly relied on *Kailash Nath* v. *State of U.P.*[(1)] and tried to buttress that decision by certain cases decided before and subsequent to it. He submitted that a misconstruction of a provision of law even by a quasi-judicial tribunal is equally an infringement of fundamental rights under Art. 19(1)(f) & (g) because as a consequence of such misconstruction the tax is an illegal imposition. In *Kailash Nath's* case it was contended before the Sales tax Authorities that cloths, on which Excise duty had already been paid and which was then processed, hand-printed and exported, no sales tax was leviable as it was exempt under the notification under s. 4 of the U.P. Sales Tax Act. The Sales tax Authorities however held the exemption to be applicable only to cloth which had not been processed and hand-printed and was in the original condition. A petition under Art. 32 was filed against that order and it was

contended that the rights of the assessee under Art. 19(1)(g) were infringed by the order misinterpreting the notification. The Court said:—

> "If a tax is levied without due legal authority on any trade or business, then it is open to the citizen aggrieved to approach this court for a writ under Art. 32 since his right to carry on trade is violated or infringed by the imposition and such being the case, Art. 19(1)(g) comes into play".

56. The objection there taken on behalf of the State was in the following terms:—

> "That the imposition of an illegal tax will not entitle the citizen to invoke Art. 32 but he must resort to remedies available under ordinary law or proceed under Art. 226 of the Constitution, in view of the fact that the right to be exempted from the payment of tax cannot be said to be a fundamental right which comes within the purview of Art. 32".

57. This contention was repelled because of the following observations in the *Bengal Immunity Co. Ltd.* v. *State of Bihar*[(1)]:

> "We are unable to agree the above con clusion. In reaching the conclusion the High Court appears to have overlooked the fact that the main contention of the appellant oompany, as set forth in its petition, is that the Act, in so far as it purports to tax a non resident dealer in respect of an inter-State sale or purchase of goods, is *ultra vires* the Constitution and wholly illegal"

58. The other cases referred to in that judgment were *Mohammad Yasin* v. *Town Area Committee, Jalalabad*[(2)]; *State of Bombay* v. *United Motors*[(3)]; *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh*[(4)] and *Bidi Supply Co.* v. *Union of India*[(5)]. Thus the decision in that case was based on decisions none of which supports the proposition that a misconstru-tion by a quasi-judicial tribunal of a notification under the provision of a statute which is *intra vires* is a violation of Art. 19(1)(g). On the other hand they were all cases where the imposition of tax or license fee or executive action was sought to be supported by an *ultra vires* provision of the law and was therefore void and violative of Art. 19(1)(g). As this distinction was not kept in view the remedy by way of petition under Art. 32 was held to be available. The question as now raised was not argued in *Kailash Nath's case*.

59. The distinction between a competence order of assessment made under a provision of law which is *intra vires* even if it is erroneous and an order made under a provision of law which is *ultra vires* in fundamental in the matter of applicability of Art. 32. In the former case the provision of law being valid the order will be protected as being under the authority of a valid law and therefore it will not be violative of Art. 19 (1)(g) and Art. 32 is not available to challenge that order. In the latter case the provisions of law being void the protection of law does not operate and the order is an unauthorised interference with the rights of a citizen under Art. 19(1)(g). It can therefore be challenged under Art. 32. This distinction does not seem to have been kept in view in *Kailash Nath's* case [(1)]. That case is further open to the criticism that it is based on decisions which were not cases of erroneous interpretations of notifications under *intra vires* statutes but were cases where an unconstitutional provision of law was sought to be used to support a tax. For, the reasons I have given *Kailash Nattis case*[(1)]' cannot be accepted as well founded".

60. In yet another case where the remedy under Art. 32 was sought to challenge the decision of a Sales tax Officer is *Ramavtor Budhaiprasad etc.* v. *Assistant Sales tax Officer, Akola*[(2)]. There a Sales tax Officer on a construction of a Schedule of the Sales tax Act had held that betel leaves were subject to sales tax as they were not vegetables which were exempt from that tax and this Court upheld that decision. The question as to the availability of Art. 32 was not raised.

61. Besides *Kailash Nath's* case which I have dealt with above the other case relied upon by the learned Attorney General fall within the following categories in none of

which the question as now argued arose or was considered.

(1). Where the tax imposed or action taken is under a statute which is unconstitutional.

(2) Where the Executive action is without authority of law.

(3) Where the taxing authority imposes a tax or acts without authority of law.

(4) Where the quasi-judicial authority without having jurisdiction determines a fact or gives a decision.

62. I shall now discuss the cases which fall in the first category i.e. where action is taken under a statute which is unconstitutional. The action taken thereunder must necessarily be unconstitutional which is challengeable by an aggreived party under Art. 32.

63. In *Himfnatlal Harilal Mehta* v. *The State of Madhya Pradesh*[(1)] sales tax was neither levied nor demanded but apprehending that an illegal sales tax may be assessed and levied a petition under Art. 226 was filed in the High Court which was dismissed and an appeal was brought to this Court and thus it was not a petition under Art. 32. In that case the sales tax under explanation II to s. 2(g) of the Central Provinces & Berar Sales tax Act (Act 2 of 1947) was held *ultra vires* of the State Legislature because it offended Art. 286(1)(a) and its imposition or threat of imposition was held without authority of law and therefore infringement of the constitutional right guaranteed under Art. 19(1)(g) entitling the petitioner to apply under Art. 226 of the Constitution. This case therefore decided that a tax under an Act which is unconstitutional, *ultra vires* and void is without authority of law under Art. 265 and is an infringement of Art. 19(1)(g). This case and *Ramjilal's case*[(2)] received approval in *The Bengal Immunity Co. case* [(3)]. In the *Bengal Immunity* case also the right infringed was by an Act which was *ultra vires*. and the remedy under the Act wag held to be inadequate, nugatory or useless. The facts of that case were that the appellant company filed a petition under Art. 226 in the High Court of Patna for a writ of prohibition restraining the Sales tax Officer from making an assessment of sales tax pursuant to a notice issued by him. The appellant claimed that sales sought to be assessed were made in the course of inter-State trade, that the provisions of the Bihar Sales Tax Act, 1947 (Bihar Act 19 of 1947) which authorised the imposition of tax on such sales were repugnant to Art. 286(2) and void, and that, therefore, the proceedings taken by the Sales tax Officer should be quashed. The application was dismissed by the High Court on the ground that if the Sales tax Officer made an assessment which was erroneous, the assessee could challenge it by way of appeal or revision under ss. 24 and 25 of the Act and that as the matter was within the jurisdiction of the Sales, tax Officer, no writ of prohibition or *certiorari* could be issued. There was an appeal against this order to this Court and therein a preliminary objection was taken that a writ under Art. 226 was not the appropriate remedy open to an assessee for challenging the legality of the proceedings before a Sales tax Officer. In rejecting this contention, this Court observed:—

> "It is, however, clear from article 265 that no tax can be levied or collected except by authority of law which must mean a good and valid law. The contention of the appellant company is that the Act which authorises the assessment, levying and collection of sales tax on inter-State trade contravenes and constitutes an infringement of Art. 286 and is, therefore, *ultra vires*, void and unenforceable. If, however, this contention be well founded, the remedy by way of a writ must, on principle and authority, be available to the party aggrieved."

64. And dealing with the, contention that the petitioner should proceed by way of appeal or revision under the Act, this Court observed:—

> "The answer to this plea is short and simple. The remedy under the Act cannot be said to be adequate and is, indeed nugatory or useless if the Act which provides

for such remedy is itself *ultra vires* and void and the principle relied upon can, therefore, have no application were a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the powers of the legislature which enacted it and as such void and prays for appropriate relief under article 226." (p. 620).

65. It will be seen that the question which arose in that case was with reference to a provision in a taxing statute which was *ultra vires* and the decision was only that action taken under such a provision was without the authority of law and was, therefore, an unconstitutional interference with the right to carry on business under Art. 19(1)(g).

66. In *Mohmmad Yasin* v. *The Town Area Committee, Jalalabad*[(1)] the imposition of the license fee was without authority of law and was therefore held to be challengeable under Art. 32 because such a license fee on a business not only takes away the property of the licensee but also operates as on unreasonable restriction on the right to carry on business. In *Balaji* v. *The Income Tax. Officer, Special Investigation Circle, Akola*[(2)] the Income tax Officer included, after the registration of a firm, the income of the wife and of the minor children who had been admitted to partnership.

67. The assessee attacked the constitutionality of s. 16(3)(a)(i)(ii) of the Income tax Act. The first question there raised was of the legislative competence of Parliament to enact the law and that Parliament was held competent to enact. Socondly the constitutionality of the provision was questioned on the ground that it violated the doctrine of equality before the law under Art. 14 of the Constitution and that ground was also repelled and it was held that the legislature had selected for the purpose of classification only that group of persons who in fact are used as a cloak to perpetuate fraud on taxation. The third ground of attack was based on Art. 19(1)(f) & (g) of the Constitution. Relying upon the case of *Mohd. Yasin* v. *Town Area Committee*[(1)] which was a case of license fees and *Himmatlal Harilal Mehta's case*[(2)] in which, there was no determination by any tribunal but there was a threat of an illegal imposition, the court held that not only must a law be valid in the sense of there being legislative competence, it must also not infrings the fundamental rights declared by the Constitution. This again was not a case of a determination of a question by a taxing authority acting quasi-judicially but the constitutionality and *vires* of the statute were challenged.

68. The second category of cases is were the Taxing Authority imposes a tax or acts without authority of law and the assessment made by the Taxing Authority is without jurisdiction. *Tata Iron & Steel Co., Ltd.,* v. *S.R. Sarkar*[(3)] was a ease under the Central Sales Tax Act under which sales in the course of inter-State trade are liable to be taxed only once and by one State on behalf of the Central Government. The petitioner company in that case was assessed to tax of certain sales falling within that Act by the Central tales tax Officer, Bihar, and the tax was paid. They were again taxed by the Central Sales tax Officer, West Bengal who held that under the statute that was the "Appropriate State" to levy the tax as the situs of sale was in West Bengal and that was assailed under Art. 32. The objection to the maintainablity of the petition on the ground that an appeal against the order of assessment could be taken and that proceedings under Art. 32 were incompetent was overruled. Shah J., in delivering the judgment of the majority referred to the decision of this Court in *Himmatlal Harilal Mehta's case*, [(1)]; *The Bengal Immunity Go. case*[(2)] and the *State of Bombay* v. *United Motors India Ltd.*[(3)] and observed as follows:—

'In these cases, in appeal from orders passed by the High Courts in petitions under Art. 226, this Court held that an attempt to levy tax under a statute which was *ultra vires* infringed the fundamental right of the citizen and recourse to the High Court for protection of the fundamental right was not prohibited because of

the provisions contained in Art. 265. In the case before us, the vires of the Central Sales Tax Act, 1956, are not challenged; but in *Kailash Nath* v. *The State' of Uttar Pradesh*, A.I.R. 1957 S.C. 790 a petition challenging the levy of a tax was entertained by this Court even though the Act under the authority of which the tax was sought to be recovered was not challenged as *ultra vires*. It is not necessary for purposes of this case to decide whether the principle of *Kailash Nath's case* is inconsistent with the view expressed by this Court in *Ramjilal's case*, [1951] S.C.R. 127".

69. The learned Judges also held that the statute made it impossible to levy two taxes on the same sale and only one tax being payable it could be collected on behalf of the Government of India by one State only and one sale could not be taxed twice. It having been collected once the threat to recover it again was *Prima facie* an infringement of the fundamental right of the petitioner. Sarkar J., who gave the minority judgment observed:—

"In *Kailash Nath* v. *The State of U.P.*, A.I.R. 1947 S.C. 790, this Court held that an illegal levy of sales tax on a trader under an Act the legality of which was not challenged violates his fundamental rights under Art. 19(1)(g) and a petition under Art. 32 with respect to such violation lies. The earlier case of *Ramjilal* v. *Income tax Officer, Mohindergarh*, [1951] S.C.R. 127 does not appear to have been considered. It is contended that the decision in *Kailash Nath's* case requires reconsideration. We do not think however that the present is a fit case to go into the question whether the two cases not reconcilable and to decide the preliminary question raised-The point was taken as a late stage of proceedings after much costs had been incurred. The question arising on this petition is further of general importance a decision of which is desirable in the interest of all concerned. As there is at least one case supporting the competence of the petition, we think it fit to decide this petition on its merits on the footing that it is competent".

70. It cannot be said that this case is an authority which supports the contention of the petitioner. Apart from the fact that *Kailash Nath's case*[(1)] did not receive approval it was decided on the ground of the Central Sates tax being a tax, which could be collected on a sale once and by one State on behalf of the Government of India, and having been imposed and paid once could not be imposed a second time. In other words it was a tax which was without jurisdiction and therefore fell within Art. 12(1)(f).

71. A similar case also relied upon by the petitioner is *J.V. Gokal & Co. (Private) Ltd.* v. *The Assistsant Collector of Sales Tax (Inspection)*(1). The There the petitioner had entered into contracts with the Government of India for the supply of certain quantities of foreign sugar. When the goods were on the high seas the petitioner delivered to the Government shipping documents pertaining to the goods and received the price. On their arrival they were taken possession of by the Government of India after paying the requisite customs duty. For the assessment year 1954-55 the petitioner was assessed to sales tax in calculating which the price of the sales made to the Government of India deducted. The Assistant Collector of Sales tax issued a notice to the petitioner proposing to review the said assessment passed by the Sales tax Officer. Objections were filed but were rejected and it was held by the Assistant Collector that sales tax was payable in respect of the two transactions. Against this order a petition was filed under Art. 32 which was supported by the Union Government. It was contended by the petitioner that the sales in question were not liable to sales tax inasmuch as they took place in the course of import of goods into India. This Court held that the property in the goods passed to the Government of India when the shipping documents were delivered against payment and that the sales of goods by the petitioner to the Government took place when the goods were on the high seas and were therefore exempt from sales tax under Art. 286(1)(b) of the

Constitution. This was also a case of lack of legislative authority and jurisdiction to impose the sales tax,.

72. Then there are oases where the Executive action is without authority of law. One such case is *Bombay Dyeing Manufacturing Go. Ltd.* v. *The State of Bombay*[(1)] which was not a petition under Art. 32 but an appeal against can order under Art. 226. In that case under the Bombay Labour Welfare Fund Act, which authorised the constituting of a fund for financing labour welfare, notices were served upon the appellant company to remit the fines and unpaid accumulations in its custody to the Welfare Commissioner. The appellant company questioned in a petition under Art. 226 the validity of that Act as a contravention of Art. 31(2). The High Court held that Act *intra vires* and dismissed the petition. On appeal against that judgment this Court held that the unpaid accumulations of wages and fines were the property of the Company and any direction for the payment of those sums was a contravention of Art. 31(2) and therefore invalid. It was also held that assuming that the money was not property within the meaning of Art, 31(2)and Art. 19(1)(f) applied that Article would also be of no help to the Welfare Commissioner because it could not be supported under Art. 19(5) of the Constitution. Moreover this was not a case of a determination by a quasi-judicial tribunal but was a case of executive action without authority of law.

73. In *Bidi Supply Co.* v. *The Union of India*[(2)] an order passed by Central Board of Revenue transferring the assessment records and proceedings of the petitioner from Calcutta to Ranchi under s. 5(7A) of the Income tax Act was challenged under Art. 32 as an infringement of the fundamental rights of the petitioner under Arts. 14, 19(1)(a) and 31 of the Constitution. The impugned order by the Central Board of Revenue was made acting in its executive capacity and this Court, without deciding the question whether the order could be supported on the ground of reasonable classification held that the order expressed in general terms without any reference to any particular case and without any limitation as to time was not contemplated or sanctioned by sub-s. 7 (A) of s. 5 and therefore the petitioner was entitled to the benefit of the provisions of sub-ss. 1 and 2 of s. 64 of Indian Income tax Act. The question decided therefore was that the Central Board of Revenue acting under s. 5(7A) was not empowered to pass an "omnibus wholesale order of transfer". It was not a quasi-judicial order of an administrative tribunal acting within its jurisdiction but an unauthorised executive order of an administrative tribunal acting in its administrative capacity. Section 5(7A) was subsequently 'amended and in a somewhat similar oase *Pannalal Binjraj* v. *Union of India*[(1)] it was held that the amended s. 5(7A) was a measure of administrative convenience and was constitutional and an order passed thereunder was equally constitutional.

74. In *Thakur Amar Singhji* v. *State of Rajasthan*[(2)] the State of Rajasthan passed orders assuming certain jagirs under Rajasthan Land Reforms and Resumption of Jagirs Act,. In the case of one of the jagirs it was held by this Court that the notification, by which the resumption was made, was bad as regards properties comprised in that petition because the properties were not within the impugned Act, and being dedicated for religious purposes was exempt under s. 207 of the Act. This again was not a case of any quasi-judicial decision but it was a notification issued by the executive Government in regard to properties not within the Act which was challenged in that case.

75. A case strongly relied upon by the petitioner was *Mohanalal Hargovind Das, Jabalpur* v. *The State of Madhya Pradesh*[(1)]. The petitioners there were called upon to file their returns of the total purchase of tobacco made by them out of Madhya Pradesh with a view to assess and levy purchase tax. The return was filed under protest and the Sales tax Authorities, as it was required under the law, called upon the petitioners to deposit the purchase tax. No quasi-judicial determination was made, no decision

was given after hearing the taxpayer, but deposit was asked to be made as that was a requirement of the statute. In a petition under Art. 32 of the Constitution for a writ of *mandamus* restraining the State of Madhya Pradesh from enforcing Madhya Pradesh Act against the petitioners it was contended that the transactions were in the course of inter-State trade. The nature of the transaction was that finished tobacco which was supplied to the petitioners by the suppliers moved from the State of Bombay to the State of Madhya Pradesh and the transactions which were sought to be taxed were therefore in the course of inter-State trade and were not liable to tax by the State. That was not a case of misconstruction of any statue by any' quasi-judicial authority but that was a case in which the very transaction was outside the taxing powers of the State and any action taken by the taxing authorities was one without authority of law. The statue did not give jurisdiction to the Authority to decide an inter-State transaction was an intra-State sale. If it had so done the statute would have been unconstitutional under Art. 286(1)(a).

76. In *Madanlal Arora* v. *The Excise Taxation Officer Amritsar*[(2)], notices were issued to the asse-see enquiring him to attend with the documents and other evidence in support of his returns. In the last of these notices it was stated that on failure to produce the documents and evidence the ease will be decided "on best judgment assessment basis". The petitioner did not comply with the notices but filed a petition under Art. 32 of the Constitution chellenging the right of the authority to make a "best judgment assessment" on the ground that at the date of the last notice the sales tax authority had no right to proceed to make any "best judgment assessment" as the three years within which alone such assessment could be made had expired. This contention was held to be well founded. Indeed the respondent conceded that he could not contend to the contrary. This therefore was a case in which the taxing authority had no jurisdiction to take proceeding for assessment of tax because of the expiry of three years which had to be counted from the end of the each quarter in respect of which the return had been filed. The question was one of lack of jurisdiction and it made no difference that the Sales tax Officer had misconstrued the provision.

77. *Y. Mahaboob Sheriff* v. *Mysore State Transport Authority*[(1)]. was a case under the Motor Vehicles Act. The petitioners' application for the renewal of the permits were granted by the Regional Transport Authority empowered to grant renewal for the period of one year. A petition under Arts. 226 and 227 of the Constitution was filed against the order of renewal after the usual appeals had been taken and proved unsuccessful and the petition was summarily dismissed. Thereafter a petition under Art. 32 of the Constitution was filed in this Court and the question for determination was whether on a proper construction of the provision of s. 58(1)(a) and (2) of the Motor Vehicles Act the period of renewal like in the case of original permit had to be not less than three and not more than five years. It was held that it had to be for that period as provided in sub-s. (1)(a) of s. 58 read with sub-s. 2 of that section. This, it was submitted, was an authority for the proposition that where a provision is misconstrued by an authority having jurisdiction to construe a section a petition under Art. 32 is competents. In the first place the question as to whether Art. 32 was applicable was not raised and was therefore not decided. Secondly what was held was that if the authority renewed a permit the renewal had to be for a particular period as specified in s. 58 and could not be for a lesser period. The question was therefore of jurisdiction.

78. In *Universal Imports Agency* v. *The Chief Controller of Imports and Exports*[(1)]. the petitioners, in Pondicherry, entered before its merger with India, into firm contracts with foreign sellers and the goods agreed to be imported were shipped before or after the merger. The goods were confiscated by the Controller of Customs on the ground that they' were imported without a licence but as an option in lieu of confiscation the goods were released on payment of a fine. On a petition under Art. 32

it was held by a majority that under paragraph 6 of the French Establishments (Application of Laws) Order 1954, the transactions in question fell within the words "things done" in the saving clause and were not liable to tax. This saving clause was contained in the Order applying Indian laws in place of the French laws. The construction was not of the taxing statute but of certain Orders by which the taxing statute had been applied to Pondicherry. These Orders the Taxing Officer had no power to construe and there was no law to support the order of the Collector. In any case this is an instance of want of jurisdiction to tax transactions which the law excludes from the taxing powers of the authority levying the tax. There again the question of the applicability of Art. 32 to quasi-judicial determination was not raised.

79. There is one other class of cases of which *K.T. Moopil Nair's case*[(1)] is an example. That was a case where the tax was of a confiscatory nature and the procedure was contrary to rules of natural justice. The imposition of land tax at a flat rate of Rs. 2 per acre imposed under the provisions of Travancore Cochin Land Tax Act (Act 15 of 1955) as amended by Travancore Cochin Land Tax Act (Act 10 of 1957) was held to be violative of Arts. 14 and 19(1)(f). A taxing statute it was held by a majority of the Court, was not immune from attack on the ground that it infringes the equality clause under Art. 14, and the tax was also held to be violative of Art. 19(1)(f), because it was silent as to the machinery and procedure to be followed in making the assessment leaving to the executive to evolve the requisite machinery and procedure thus treating the whole thing as purely administrative in character and ignoring that the assessment on a person or property is quasi-judicial in character. It was also held that a tax of Rs. 2 was unreasonable as it was confiscatory in effect. The main ground on which the law was held to be an infringement of Art. 19(1)(f) was the procedure or the want of procedure for imposing taxes and therefore its being opposed to rules of natural justice. Here again the vice was in the Act and not in any misinterpretation of it. No doubt the amount of the tax imposed was also held to be unreasonable because it was in effect confiscatory but this is not a matter which is necessary in the present case to go into as the question whether Art. 19(1) applies to taxing laws or not was not debated by the parties before us. On the main contention as to the applicability of Art. 32 these were the submissions of the learned Attorney-General.

80. A review of these cases shows that (1) the law which is ultra vires either because of the legislative incompetence or its contravention of some constitutional inhibition is a non-existing law and any action taken thereunder, quasi-judicial or otherwise, would be a contravention of Art. 19(1)(f) and (g) and the result will be no different if it is a colourable piece of legislation; (2) where the proceedings are repugnant to the rules of natural justice the right guaranteed under Art. 19(1)(f) and (g) are infringed; (3) the consequence is the same where assessment is made by an authority which has no jurisdiction to impose the tax and (4) if an administrative tribunal acting quasi-judicially misconstrues a provision which it has jurisdiction to construe and therefore imposes a tax infringement of Art, 19(1)(g) would result according to *Kailash Nath's case* (') but there is no such infringement according to cases which the learned Additional Solicitor General relied upon and which have been discussed above. The reason why the decision in the latter cases is correct and the decision in *Kailash Nath's case*[(1)] is not have already been given and it is unnecessary to repeat them.

81. Mr. Palkhivala who intervened in C.M.P. 1496/61 in support of the petition in the main argued the question whether a misconstruction of a taxing statute can involve the violation of a fundamental right under Art. 19(1)(g). His contention was that an erroneous construction which result in transgression of constitutional limits would violate Art. 19(1)(g) and that the difference between jurisdictional and non-jurisdictional error was immaterial and that a misconstruction of a statute can violate the right to trade and he relied upon *Moharilal Hargovind Das* v. *The State of Mad-hya*

Pradesh[(1)] which was a case of inter-State sale and which has already been discussed. He also relied upon the decision in *R.S. Ram Jawaya Kapur* v. *The State of Punjab*[(2)]. In that case it was held that the acts of the Executive even if deemed to be sanctioned by the legislature can be declared void if they infringe any of the fundamental rights but no question of judicial determination by quasi-judicial tribunal arose there. Similarly in *Ram Narain Sons Ltd.* v. *Asstt. Commissioner of Saks tax*[(3)] the question raised was of the meaning and scope of the proviso to Art. 286(2) and therefore the question was one of inter-State sales which no statute could authorise to turn into intra-State sale by a judicial decision.

82. It was argued before us that the decision of a tribunal acting quasi-judicially operates as *res judicata* and further that the judgment of the High Court of Allahabad when it was moved by the petitioner under Art. 226 of the Constitution against the order of assessment passed on the ground of misconstruction of the notification of December 14, 1957 also operates as *res judicata* as the appeal against that order has been withdrawn. The High Court rejected the petition under Art. 227 firstly on the ground that there was an alternative remedy of getting the error corrected by way of appeal and secondly the High Court said:—

> "We have, however, heard the learned counsel for the petitioner on merits also, but we are not satisfied that the interpretation put upon this notification by the Sales Tax Officer contains any obvious error in it. The circumstances make the interpretation advanced by the learned counsel for the petitioner unlikely. It is admitted that even hand-made biris have been subject to Sales tax since long before the date of the issue of the above notification. The object of passing the Additional Duties of Excise (Goods of Special Importance) Central Act, No. 58 of 1957 was to levy an additional excise duty on certain important articles and with the concurrence of the State Legislature to abolish Sales tax on those articles. According to the argument of the learned counsel for the petitioner during the period 14th December, 1957 to June 30, 1958, the petitioner was liable neither to payment of excise duty nor to payment of sales tax. We do not know why there should have been such an exemption. The language of the notification might well be read as meaning that the notification is *to* apply only to those goods on which an additional Central excise duty had been levied and paid."

83. It is unnecessary to decide this question in this case.

84. It was next argued that the Sales tax Authorities are all officers of the State charged with the function of levy and collection of taxes which is essentially administrative and that when they act as quasi-judicial tribunals that function is only incidental to the discharge of their administrative function and therefore the assessment order of December 20, 1958, was an executive order and falls within Art. 19(1)(g). Reference was made to *Bidi Supply Co.,* v. *The Union of India*[(1)] (at pp. 271 and 277), a case under s. 5(7-A) of the Income tax Act. At page 271 the definition of the word "State" is set out and at p. 277 Das, C.J., said that the "State" includes its Income tax Department. There is no dispute that the Sales tax Department is a department of the State and is included within the word "State" but the question is what is the nature and quality of the determination made by a Sales Tax Officer when he is performing judicial or quasi-judicial functions. The argument of the learned Attorney General comes to this that even though in the performance of quasi-judioial functions the Taxing Officer may have many of the trappings of a court still he is not a court and therefore the decision of the taxing authority in the present case was not entitled to the protection which an erroneous decision of a proper court has; *Chaparala Krishna Brahman* v. *Gururu Oovardhaiah*[(1)] where it was held that the Income tax Officer is not a court within s. 195 of the Criminal Procedure Code was cited in support of the contention that the taxing authority in the present case was not a court. So also

Sell Co. of Australia Ltd. v. *The Federal Commissioner of Taxation*[(2)], where it was held that a Board of Revenue created by the Income tax Assessment Act to review the decision of Commissioner of Income tax is not a court exercising the judicial powers of the Commonwealth. At page 298 Lord Sankey. L.C. observed:

> "An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a court of judicial power".

85. It was also observed in that case that there are tribunals with many of the trappings of a court, which nevertheless are not courts in the strict sense exercising judicial power. There is no gainsaying that Sales tax Officer is not a court even though he may have many of the trappings of a court including the power to summon witnesses, receive evidence on oath and making judicial determinations. In the strict sense of the term he is not a court exercising judicial power; but the question for decision in the present case is not whether he is a Court or not but whether the determination made by him in regard to the exemption available to the petitioners on the sale of biris was a decision made by a quasi-judicial authority in the exercise of its statutory powers and within its jurisdiction and therefore not an administrative act.

86. The characteristic of an administrative tribunal is that it has no ascertainable standards. It only follows policy and expediency which being subjective considerations are what a tribunal makes them. An administrative tribunal acting as an administrative tribunal and acting as a judicial tribunal may be distinguished thus:

> "Ordinarily 'administrative' tribunals need not act on legal evidence at all, but only on such considerations as they see fit. A statute requiring such evidence to be received prevents a tribunal's making up its mind until it has given this evidence a chance to weigh with it. But it is a fallacy to assume that the tribunal is thereby limited to acting on that evidence. If it is an 'administrative' tribunal it must still be governed by policy and expendiency until it has heard the evidence, but the evidence need not influence its policy any further than it sees fit. A contrary view would involve the decision's being dictated by the evidence, not by policy and expediency; but if certain evidence with it a right to a particular decision, that decision would be a decision on legal rights; so the tribunal would be administering 'justice' and would be exercising judicial not 'administrative". ((1933) L.Q.R. 424).

87. There are decisions of this court in which certain tribunals have been held judicial bodies; *Bharat Bank Ltd., Delhi* v. *Employees of the Bharat Bank Ltd.*[(1)] *Province of Bombay* v. *Kusaldas S. Advani*[(2)] where Das, J., (as he then was) observed at p. 725:

> "that if a statutory authority has power to do any act which will prejudicially affect the subject then, although there are not two parties apart from the authority and the contest between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially".

88. See also *Nagendra Nath Bora* v. *The Commissioner of Hills Division & Appeals, Assam*[(3)].

89. It is unnecessary again to examine in detail the provisions of the Act to determine the character of the Sales tax Officer when he takes assessment proceedings for they have already been referred to. They are all characteristics of judicial or quasi-judicial process and would clothe the Sales tax Officer making assessment orders with judicial or quasi-judicial character. Indeed, because the order of assessment was judicial or quasi-judicial the petitioner filed in the High Court a petition for *certiorari* and against that order an appeal under Art. 136 as also a petition for *certiorari* under Art. 32. Taking the nature of the determination by the Sales tax

Officer in the instant case it cannot be said that he is purely an administrative authority or the order passed by him is an executive order; on the contrary when he is determining the amount of tax payable by a dealer, he is acting in a quasi-judicial capacity.

90. Mr. Chari, intervening on behalf of the State of Bihar, submitted that in Art. 12 the judicial branch of the State was not included in the definition of the word "State" and the words "other bodies" there did not comprise a tribunal having jurisdiction to decide judicially and its decisions could not be challenged by way of a petition under Art. 32 of the Constitution. In view of my decision that a quasi-judicial order of the Sales tax Officer is not challengeable by proceedings under Art. 32, I do not think it necessary to decide the wider question whether the definition of the word "State" as given in Art. 12 comprises the judicial department of the State or not.

91. In view of the decision as to the correctness of the decision in *Kuilash Nath's case*[(1)]. it is not necessary in this case to go into the correctness or otherwise of the order of the Sales tax Officer. The petition under Article 32 therefore fails and is dismissed. There will be no orders as to costs.

(CM.P. No. 1349 of 1961)

92. J.L. KAPUR, J.:— Messrs. Mohanlal Hargovind Das, the assessee firm had filed an appeal on a certificate of the Allahabad High Court against the order of the Court dismissing their petition under Art. 226 of the Constitution challenging the imposition of the sales tax, on the ground that another remedy was available. The appeal against that order was dismissed by this Court for non-prosecution on February 20, 1961. Against that order of dismissal the assessee firm has filed an application for restoration on the ground that it had been advised that in view of the rule having been issued under Art. 32 of the Constitution wherein the contentions were the same as raised in the appeal against the order under Art. 226 it was unnecessary to prosecute the appeal. It also prayed for condonation of delay in filing the application for restoration.

93. No sufficient cause has been made out for allowing the application for restoration. The assessee firm deliberately allowed the appeal, which was pending in this Court, to be dismissed for non-prosecution and after deliberately taking that step it cannot be allowed to get the dismissal set aside on the ground of wrong advice. The application for restoration is therefore dismissed with costs.

A.K. SARKAR, J.:— I have had the advantage of reading the judgments just delivered by my brothers Das and Kapur and I am in agreement with them.

K. SUBBA RAO, J.:— I have carefully gone through the judgment prepared by my learned brother Kapur, J. I am unable to agree. The facts have been fully stated in his judgment and it is therefore not necessary to cover the ground over again.

94. This larger Bench has been constituted to canvass the correctness of the decision in *Kailush Nath* v. *State of Uttar Pradesh*[(1)]. After hearing the elaborate arguments of learned counsel, I am convinced that no case has been made out to take a different view.

95. Learned Attorney General seeks to sustain the correctness of the said decision. He broadly contends that this Court is the constitutional protector of the fundamental rights enshrined in the Constitution, that every person whose fundamental right is infringed has a guaranteed right to approach this Court for its enforcement, and that it is not permissibe to whittle down that jurisdiction with the aid of doctrines evolved by courts for other purposes. He argues that in the present case an executive authority functioning under the Uttar Pradesh Sales Tax Act, 1948 (Act XV of 1948), hereinafter called the Act, made a clearly erroneous order imposing tax on exempted goods, namely, bidis, and that it is a clear infringement of the fundamental right of the petitioner to carry on business in bidis. Whenever such a right is infringed, the

argument proceeds, by a State action — here we are only concerned with State action — it is the duty of this Court to give the appropriate relief and not to refuse to do so on any extraneous considerations.

96. The Additional Solicitor General appearing for the State does not admit this legal position. He says that the Act is a reasonable restriction on the petitioner's right to carry on business in bidis, that thereunder a Sales-Tax Officer has jurisdiction to decide, rightly or wrongly, whether bidis are exempted from sales-tax, and that, therefore, his order made with jurisdiction cannot possibly infringe the fundamental rights of the petitioner.

97. Mr. Chari, who appears for the intervener, while supporting the argument of learned Solicitor General emphasizes the point that the fundamental rights enshrined in Art. 19(1)(g) of the Constitution is only against State action, that the definition of "State" in Art. 12 thereof excludes all authorities exercising judicial power, that the sales-tax authority, in making the assessment in exercising judicial power, and that, therefore, no writ can be issued by this Court against the said authority.

98. Before attempting to answer the questions raised, it is relevant and convenient to ascertain precisely the position of the fundamental rights under the Constitution and the scope of the jurisdiction of this Court in enforcing those rights.

99. Fundamental rights are enshrined in Part III of the Constitution as the paramount rights of the people. Article 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by the said Part and declares that any law made in contravention of this clause shall, to the extent of the contravention, be void. These rights may be broadly stated to relate to (i) right to equality — Arts. 14 to 18, (ii) right to freedom — Arts. 19 to 22, (iii) right against exploitation — Arts. 23 and 24, (iv) right to freedom of religion — Arts. 25 to 28, (v) cultural and educational rights— Arts. 29 and 30, (vi) right to property — Arts. 31 and 31A, and (vii) right to constitutional remedies— Arts. 32 to 35. These are the inalienable rights of the people of this country — some of them of non-citizens also — believed to be necessary for the development of human personality; they are essential for working out one's way of life. In theory these rights are reserved to the people after the delegation of the other rights by them to the institutions of Government created by the Constitution, which expresses their will: see observations of Patanjali Sastri, J., as he then was, in *A.K. Gopalan* v. *State of Madras*[(1)]. In *State of Madras* v. *Shrimati Champakam Dorairajan*[(2)] the same idea was more forcibly restated thus:

> "The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or Executive Act or order, except to the extent provided in the appropriate article in Part III. The directive principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights."

100. In the context of fundamental rights, an important principle should be borne in mind, namely, that the English idea of legislative supremacy is foreign to our Constitution. As this Court pointed out in *A.K. Gopalan''s case* (') the Constitution has not accepted the English doctrine of absolute supremacy of Parliament in matters of legislation. Therefore, every institution, be it the Executive, the Legislature of the Judiciary, can only function in exercise of the powers conferred on it that is, the Constitution is the paramount law. As the Constitution declares the fundamental rights and also prescribes the restrictions that can be imposed thereon, no institution can overstep the limits, directly or indirectly, by encroaching upon the said rights.

101. But a mere declaration of the fundamental rights would not be enough, and it was necessary to evolve a machinery to enforce them. So our Constitution, entrusted the duty of enforcing them to the Supreme Court, the highest judicial authority in the country. This Court has no more important function than to preserve the inviolable fundamental rights of the people; for, the fathers of the Constitution, in their fullest

confidence, have entrusted them to the care of this Court and given to it all the institutional conditions necessary to exercise its jurisdiction in that regard without fear or favour. The task is delicate and sometimes difficult; but this Court has to discharge it to the best of its ability and not to abdicate it on the fallacious ground of inability or inconvenience. It must be borne in mind that our Constitution in effect promises to usher in a welfare State for our country; and in such a state the Legislature has necessarily to create innumerable administrative tribunals, and entrust them with multifarious functions. They will have powers to interfere with every aspect of human activity. If their existence is necessary for the progress of our country, the abuse of power by them may bring about an authoritarian or totalitarian state. The existence of the aforesaid power in this Court and the exercise of the same effectively when the occasion arises is a necessary safeguard against the abuse of the power by the administrative tribunals.

102. The scope of the power of this Court under Art. 32 of the Constitution has been expounded by this Court on many occasions. The decisions not only laid down the amplitude of the power but also the mode of exeroising that power to meet the different situations that might present themselves to this Court. In *Romesh Thappar* v. *State of-Madras*[(1)] this Court declared that under the Constitution the Supreme Court constituted as the protector guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights, although such applications are made to the Court in the first instance without resort to a High Court having concurrent jurisdiction in the matter. This Court again in *Rashid Ahmad* v. *The Municipal Board, Kairana*[(2)] pointed out that the powers given to this Court under Art. 32 of the Constitution are much wider and are not confined to issuing prerogative writs only. This Court further elucidated the scope of the jurisdiction in *T.C. Basappa* v. *T. Nagappa*[(3)], wherein Mukberjea, J., speaking for the Court defined the scope of the power thus:

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges."

103. This Court again elaborated the scope of its power under that Article in *Kavalappara Kottarathil Koch, unni Moopil Nayar* v. *The State of Madras*[(4)]. Das, C.J., after reviewing the earlier case law on the subject observed:

> "Further, even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Art. 226 of the Constitution, as to which we say nothing now — this Court cannot, on a similar ground, decline to entertain a petition under Art. 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right."

104. In that case it was pressed upon this Court to hold that in exercise of its power under Art. 32 of the Constitution, this Court could not embark upon an enquiry into disputed questions of fact, and various inconveniences were pointed out if it was otherwise. After considering the cases cited in support of that contention, this Court came to the conclusion that it would fail in its duty as the custodian and protector of fundamental rights if it was to decline to entertain a petition under Art. 32 simply because it involved the determination of disputed questions of fact. When it was pointed out that if that *view* was adopted, it might not be possible for this Court to decide questions of fact on affidavits, the learned Chief Justice observed:

> "As we have already said, it is possible very often to decide questions of fact on

affidavits. If the petitions and the affidavites in support thereof are not convincing and the court is not satisfied that the petitioner has established his fundamental right or any breach thereof, the court may dismiss the petition on the ground that the petitioner has not discharged the onus that lay on him. The court may, in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases by filing further affidavits or by issuing a commission or even by setting the application down for trial on evidence, as has often been done on the original sides of the High Courts of Bombay and Calcutta, or by adopting some other appropriate procedure. Suoh occasions will be rare indeed and such rare cases should not, in our opinion, be regarded as a cogent reason for refusing to entertain the petition under Art. 32 on the ground that it involves disputed questions of fact."

105. Finally, this Court also held that in appropriate cases it had the power, in its discretion, to frame writs or orders suitable to the exigencies created by enaotments and that where the occasion so required to make even a declaratory order with consequential relief. In short, this decision recognized the comprehensive jurisdiction of this Court under Art. 32 of the Constitution and gave it full effect without putting any artificial limitations thereon. But in *Daryao* v. *State of U.P.*[(1)]. this Court applied the doctrine of *res judicata* and held that the petitioners in that case had no fundamental right, as their right on merits was denied by the High Court in a petition under Art. 226 of the Constitution and that as no appeal was filed therefrom, it has become final. But the learned Judges carefully circumscribed the limits of the doctrine in its application to a petition under Art. 32. Gajendragadkar, J., speaking for the Court observed:

"If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32. If a writ petition is dismissed *in limine* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed *in limine* without passing a speaking order then such dismissed cannot be treated as creating a bar of *res judicata*. It is true that, *prima facie*, dismissal *in limine* even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata* against a similar petition filed under Art. 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Art. 32, because in such a case there has been no decision on the merits by the Court."

106. Though this decision applies the doctrine of *res judicata*, the aforesaid observations indicate the anxiety of the Court to confine it within the specified limits and to prevent any attempt to overstep the said limits. Shortly stated it is settled law that Art. 32 confers a wide jurisdiction on this Court to enforce the fundamental rights, that the right to enforce a fundamental right is itself a fundamental right, and that it is the duty of this Court to entertain an application and to decide it on merits whenever a party approaches it to decide whether he has a fundamental right or if so whether it has been infringed irrespective of the fact whether the question raised involves a question of law or depends upon questions of fact. The doctrine of *res judicata* applied

by this Court does not detract from the amplitude of the jurisdiction, but only negatives the right of a petitioner on the ground that a competent court has given a final decision against him in respect of the right claimed.

107. In this case a further attempt is made on be-half of the State to restrict the scope of the Court's jurisdiction. Uninfluenced by judicial decisions, let us approach the question on principle. An illustration arising on the facts of the present case will highlight the point to be decided. A citizen of India is doing business in bidis. He has a fundamental right to carry on that business. The State Legislature enacts the Sales Tax Act imposing a tax on the turnover and on the sales of various goods, but gives certain exemptions. It expressly declares that no tax-shall be levied on the exempted goods. The said law is a reasonable restriction on the petitioner's fundamental right to carry on the business in bidis. Now on a true construction of the relevant provisions of the Act, no tax is leviable on bidis. But on a wrong construction of the relevant provisions of the Act, the Sales-tax Officer imposes a tax on the turnover of the petitioner relating to the said bidis. He files successive statutory appeals to the hierarchy of tribunals but without sucess. The result is that he is asked to pay tax in respect of the business of bidies exempted under the Act. The imposition of the said illegal tax on the turnover of *bidis* is certainly an infringement of his fundamental right. He comes to this Court and prays that his fundamental right may be enforced against the Sales-tax Officer. The Officer says, “It may be true that my order is wrong; it may also be that the Supreme Court may hold that my construction of the section as accepted by the highest tribunal is perverse; still, as under the Act I have got the power to decide rightly or wrongly, my order though illegal operates as a reasonable restriction on the petitioner's fundamental right to carry on business.” This argument, in my view, if accepted, would in effect make the wrong order of the Sales-tax Officer binding on the Supreme Court, or to state it differently, a fundamental right can be defeated by a wrong order of an executive officer, and this Court would become a helpless spectator abdicating its functions in favour of the subordinate officer in the Sales-tax Department. The Constitution says in effect that neither the Parliament nor the Executive can infringe the fundamental rights of the citizens, and if they do, the person affected has a guaranteed right to approach this Court, and this Court has a duty to enforce it; but the Executive authority says, “I have a right to decide wrongly and, therefore the Supreme Court cannot enforce the fundamental right”. There is nothing in the Constitution which permits such an extraordinary position. It cannot be a correct interpretation of the provisions of the Constitution if it enables any authority to subvert the paramount power conferred on the Supreme Court.

108. It is conceded that if the law is invalid, or if the officer acts with inherent want of jurisdiction, the petitioner's fundamental right can be enforced. It is said that if a valid law confers jurisdiction on the officer to decide rightly or wrongly, the petitioner has no fundamental right. What is the basis for this principle? None is discernible in the provisions of the Constitution. There is no provision which enables the Legislature to make an order of an executive authority final so as to deprive the Supreme Court of its jurisdiction under Art, 32 of the Constitution.

109. But the finality of the order is sought to be sustained on the principle of *res judicata*. It is argued that the Sales-tax Tribunals are judicial tribunals in the sence they are courts, and, therefore their final decisions would operate as *res judicata* on the principle enunciated by this Court in *Daryao's case*[(1)]. Can it be said that Sales-tax authorities under the Act are judicial tribunals in the sense they are courts? In a Welfare State the Governments is called upon to discharge multifarious duties affecting every aspect of human activity. This extension of the governmental activity necessitated the entrusting of many executive authorities with power to decide rights of parties. They are really instrumentalities of the executive designed to function in the discharge of their duties adopting, as far as possible, the principles of judicial

procedure. Nonetheless, they are only executive bodies. They may have the trappings of a court, but the officers manning the same have neither the training nor the institutional conditions of a judicial officer. Every Act designed to further the social and economic progress of our country or to raise taxes, constituted some tribunal for deciding disputes arising thereunder, such as income-tax authorities, Sale-tax authorities, town planning authorities, regional transport authorities, etc. A scrutiny of the provisions of the U.P. Sales-tax Act with which we are now concerned, shows that the authorities constituted thereunder are only such administrative tribunals as mentioned above. The preamble to the Act shows that it was enacted to provide for the levy of tax on the sale of goods in Uttar-Pradesh. The Act imposes a tax on the turnover of sales of certain commodities and provides a machinery for the levy, assessment and collection of the said tax. Under the Act the State Government is authorized to appoint certain assessing authorities. It provides for an appeal against the order of the assessing authority and for a revision in some cases and a reference to the High Courts in others. The State Government is also authorized to appoint a hierarchy of authorities or tribunals for deciding the appeals or revisions. The assessing authorities are admittedly the officers of the Sales-tax Department and there is nothing in the Act to indicate that either the assessing authority or the appellate authority need possess any legal qualification. It is true that legal qualification is prescribed for the revising authority, but that does not make him a court or make the inferior tribunals courts. The said authorities have to follow certain principles of natural justice, but that does not make them courts. The scheme of the Act clearly shows that the sale-tax authorities appointed uader the Act, following the principles of natural justice, ascertain the turnover of an assessee and impose the tax. The hierarchy of tribunals are intended to safeguard the interest of the assessees as well as the State by correcting wrong orders. The fact that, following the analogy of the Income-tax Act, at the instance of the party aggrieved a reference can be made by the reviewing authority to the High Court on a question of law shows only that the help of the High Court can be requisitioned only to elucidate questions of law, but the High Court has no power to make final orders, but on receipt of the judgments of the High Court, the revising authority shall make an order in conformity with such judgment.

110. Now let us consider the decisions cited at the Bar which would throw some light on the nature of such tribunals. In considering whether the Board of review created by s. 41 of the Federal Income-Tax Assessment Act, 1922-25 was a judicial authority, the Judicial Committee in *Shell Company of Australia Limited* v. *Federal Commission of Taxation*[(1)] observed.

> "The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power."

111. The Judicial Committee further observed:

> "An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by and ad hoc tribunal an exercise by a Court of judicial power."

112. The Allahabad High Court in *Kamlapat Moti Lal* v. *Commissioner of Income Tax, U.P.*[(1)] held that the Income-tax authorities are not courts and, therefore, their decisions cannot operate as *res judicata*. Malik, C.J., observed:

> "The income-tax authorities cannot be treated as Courts deciding a disputed point, except for the purposes mentioned in s. 37. and further there is no other party before them and there are no pleadings. As has been said by Lord Herschell in *Boulter* v. *Kent Justices*[(2)],"

"There is no truth, no lis, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party".

The Income-tax authorities are mainly concer ned with finding out the assessable income for the year and not with deciding any question of title. But to arrive at that income they have at times to decide certain general ques tions which might affect the determination of the assessable income not only in the year in question but also in subsequent years

An assessment is inherently of a passing nature and it cannot provide an estoppel by *res judicata* in later years by reson of a matter being taken in to account or not being taken into account by the Income-tax Officer in an earlier year of assessment."

113. An instructive discussion on the question whether an Income-tax Officer is a court within the meaning of s. 195 of the Code of Criminal Procedure is found in *Krishna Brahman* v. *Goverdhanaiah*[(1)], where Balakrishaa Ayyar, J., after considering the case law on the subject and the provisions of the Income-tax Act, held that an income-tax officer was not a "court". The learned Judge did not think that the adoptation of norms of judicial procedure or the fact that appeals were provided for, was sufficient to make them courts. The learned Judge observed:

"When exercising his powers under Chapter IV of the Act, it seems to me, that the Income-tax Officer is acting in a purely administrative capacity. It is his duty to ascertain what the income of the particular individual is and what amount of tax he should be required to pay. There is therefore no 'lis' whatever before him."

114. The same reasoning would equally apply to sales tax authorities. This Court in *Bidi Supply Go.* v. *The Union of India*[(1)], speaking through Das, C.J., set aside the order of an Income-tax Officer and in doing so observed:

"Here, 'the State' which includes its Income-tax Department has by an illegal order denied to the petitioner, as compared with other Bidi merchants who are similarly situate, equality before the law or the equal protection of the laws and the petitioner can legitimately complain of an infraction of his fundamental right under article 14 of the Constitution."

115. Though this cannot be called a direct decision on the question raised in the present case, it indicates that this Court treated the Income-tax Officer as a department of the executive branch of the Government. This Court again in *Gullapalli Nageswara Rao* v. *State of Andhra Pradesh*[(1)] pointed out the distinction between a quasi-judicial act of an Executive authority and the judicial act of a court thus:

"The concept of a quasi-judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive powers."

116. It is, therefore, clear that administrative tribunal cannot be equated with courts. They are designed to discharge functions in the exercise of the executive power of the State, and the mere fact that the relevant statutes, with a view of safeguard the interest of the people, direct them to dispose of matters coming before them following the principles of natural justice and by adopting the same well-known trappings of judicial procedure, does not make them any the less the executive orgnas of the State. It is not possible to apply the principle of *res judicata* to the orders of such tribunals, for obviously s. 11 of the Code of Civil Procedure does not apply to such orders, and the general principle of *res judicata dehors* that provision has never been applied to such orders. It is true that some statutes expressly or by necessary implication oust the jurisdiction of Civil Courts in respect of certain matters but such exclusion cannot affect the extraordinary powers of superior courts conferred under Arts. 226, 227 and 32 of the Constitution.

117. There is a simpler answer to the plea of *res-judicata*. In the present case the Sales-tax authorities decided the case against the petitioners. The petitioners are seeking the help of this Court under Art. 32 of the Constitution to enforce their fundamental rights on the ground that he said order infringes their rights. To put it differently, the petitioners by this application question the orders of the Sales-tax authority. How is it possible to contend that the order which is now sought to be quashed can operate as *res judicata* precluding this Court from questioning its correctness? The principle underlying the doctrine of *res judicata* is that no one shall be vexed twice on the same matter. This implies that there should be two proceedings, and that in a former proceeding in a court of competent jurisdiction, an issue has been finally decided *inter partes* and therefore the same cannot be reagitated in a subsequent proceeding. On the said principle the impugned order itself cannot obviously be relied upon to sustain the plea of *res-judicata*.

118. The argument *ab-inconvenienti* does not appeal to me. As it is the duty of this Court to enforce a fundamental right of a party if any authority has infringed his right, considerations based upon inconvenience are of no relevance. It is suggested that if the jurisdiction of this Court is not restricted in the manner indicated, this Court will be flooded with innumerable petitions. Apart from the fact that this is not a relevant circumstance, a liberal interpretation of Art. 32 has not had that effect during the ten years of this Court's existence, and I do not see any justification for such an apprehension in the future. It is further said that if a wider interpretation is given namely, that if this Court has to ascertain in each case whether a statutory authority has infringed a fundamental right or not, it will have to decide complicated questions of fact involving oral and documentary evidence, and the machinery provided under Art. 32 of the Constitution is not adequate to discharge that duty satisfactory. This again is an attempt to cloud the issue. If the jurisdiction is there and there are difficulties in the way, this Court will have to evolve by convention or otherwise some procedure to avoid the difficulties. A similar argument of inconvenience was raised in *Kavalappara Kottarathil Kochuani Moopil Nayar* v. *State of Madras*[(1)] and was negatived by this Court. This Court evolved a procedure to meet some of the difficult situations that might arise in particular cases. That apart, this Court also may evolve or mould further rules of practice to suit different contingencies. If a party comes to this Court for enforcement of a fundamental right the existence whereof depends upon proof of facts and the said party has not enhausted the remedies available to him by going through the hierarchy of tribunal created by a particular Act, this Court, if the party agrees, may allow him to withdraw the petition with liberty to file it at a later stage, or, if the party does not agree, may adjourn it *Sine die* till after the remedies are exhausted. If, on the other hand the party comes here after exhausting his remedies and after the tribunals have given their findings of fact, this Court may ordinarily accept the findings of fact as is does in appeals under Art. 136 of the Constitution. If the party complains that the order made against him by a tribunal is based upon a wrong construction of the provisions of a statute, this Court may ascertain whether on a correct interpretation of the statute, the petitioner's fundamental right has been violated. There may be many other situations, but I have no doubt that this Court will deal with them as and when they arise. I would, therefore, unhesitatingly reject the argument based on inconvenience.

119. I shall now proceed to deal with the main argument advanced by learned counsel for the respondent. Briefly stated, the argument is that the Sales-tax Officer has jurisdiction to construe rightly or wrongly the provisions of the Act, which is a valid law, and that even if the said authority wrongly constructed a provision of the Act and imposed the tax, though on a right construction of the said provision it cannot be so imposed, the said order does not infringe the fundamental right of the petitioner. With respect, if I may say so, this argument equates the guaranteed right of a citizen

under Art. 32 of the Constitution with that of the prerogative writs obtaining in England, such as writs of certiorari, prohibition and manadamus, issued against orders of inferior tribunals or authorities. This also confuses the fundamental right enshrined in Art. 32 of the Constitution with one or more of the procedural forms this Court may adopt to suit each occasion. The approach to the two question is different. The jurisdiction of the Supreme Court under Art. 32 is couched in comprehensive phraseology and, as pointed out earlier, is of the widest amplitude: it is not confined to the issue of prerogative writs, for the Supreme Court has power to issue directions or orders to enforce the fundamental right; even in respect of issuing the said writs, this Court is not oppressed by the procedural technicalities of the prerogative writs in England. While under Art. 32 this Court may, for the purpose of enforcing a fundamental right, issue a writ of *certiorari*, prohibition or mandamus, in a suitable case, it may give the relief even in a case not reached by the said writs. The limitations imposed on the prerogative writs cannot limit the power of the Supreme Court under Art. 32 of the Constitution. In order a writ of *certiorari* may lie against a tribunal, the said tribunal must have acted without jurisdiction or in excess of jurisdiction conferred upon it by law or there must be some error of law apparent on the face of the record. There are similar limitations in the case of writs of prohibition and mandamus. In the context of the issue of the said writs, courts were called upon to define what "jurisdiction" means. Jurisdiction may be territorial, pecuniary, or personal. There may be inherent want of jurisdiction or irregular exercise of jurisdiction. A tribunal may have power to decide collateral facts for the purpose of assuming jurisdiction; or it may have exclusive jurisdiction to decide even the said facts. In *Halsbury's Laws of England*, 3rd edn., Vol. III, the scope of the power of *mandamus*, prohibition and *certiorari* is stated thus at p. 59:

> "The primary function of the three orders is to prevent any excess of jurisdiction (prohibition and *certiorari*; or to ensure the exercise of jurisdiction (*mandamus*). The jurisdiction of inferior tribunals may depend upon the fulfilment of some condition precedent (such as notice) or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the inferior tribunal has to try, and the determination whether it exists or not is logically and temporally prior to the determination of the actual question which the inferior tribunal has to try. The inferior tribunal must itself decide as to the collateral fact: when, at the inception of an inquiry by a tribunal of limited jurisdiction a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not."
>
> "There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but, subject to that, an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess or deprive itself of a jurisdiction which it otherwise would possess".

120. It is clear from this passage that a tribunal may have to decide collateral facts to exercise its jurisdiction, but unless the relevant statute confers an exclusive jurisdiction on that tribunal, it cannot wrongly clutch at jurisdiction which it has not or refuse to exercise jurisdiction which it possesses. The doctrine of jurisdiction with its limitations may be relevant in the matter of issue of prerogative writs to quash the orders of tribunals made without or in excess of jurisdiction, but the said restrictions cannot limit the power of the Supreme Court in enforcing the fundamental rights, for under Art. 32 of the Constitution for enforcing the said rights it has power to issue directions or orders uncontrol by any such limitations. That apart, even within the narrow confines of the doctrine of jurisdiction, it is wrong to confine the jurisdiction to inherent want of jurisdiction. A person, who has within the narrow confines of the

doctrine of no authority to function under an Act, if he purports to act under that Act, his order will be no doubt without jurisdiction. If an authority by a wrong construction of a section purports to exercise jurisdiction under an Act which it does not possess at all, it may again be described as inherent want of jurisdiction. But there may be many cases on the border line between inherent want of jurisdiction and exercise of undoubted jurisdiction. The authority may have jurisdiction, to decide certain disputes under an Act, but by a wrong construction of the provisions of the Act, it may make an order affecting a particular subject-matter, which, on a correct interpretation, it cannot reach. By a slight modification of the facts arising in the present case, the point may illustrated thus: A provision of the Sales-tax Act says that the sale of *bidis* is not taxable; the statute prohibits taxation of *bidis*; but the Sales-tax Officer on a wrong construction of the provision holds that hand-made *bidis* are taxable; on a correct interpretation, the Aot does not confer any power on the Sales-tax Officer to tax such *bidis*. In such a case on a wrong interpretation of the provisions of the Act, he has exercised jurisdiction in respect of a subject-matter, which, on their correct interpretation, he does not possess. In a sense he acts without jurisdiction in taxing goods which are not taxable under the Act.

121. The criterion of jurisdiction must also fail in a case where an aggrieved party approaches this Court before the Sales-tax authority makes its order. A Sales-tax authority may issue only a notice threatening to take action under the Act: at that point of time, there is no decision by the tribunal. The person to whom notice is given approaches this Court and complains that the authority under the colour of the Act proposes to infringe his fundamental right; in that case, if this Court is satisfied that his fundamental right is infringed, it has a duty to enforce it. But it is said that when the Sales-tax Act provides a machinery for getting the validity of his claim tested by the tribunals, he must only resort to that machinery. This argument may be relevant to the question whether a civil courts jurisdiction is ousted in view of the special machinery created by a statute, but that circumstance cannot have any bearing on the question of enforcement of fundamental rights, for no law can exclude the jurisdiction of this Court under Art. 32 of the Constitution. Nor is the argument that if a citizen comes to this Court when the proceeding before the Sales-tax authorities is in the midstream, this Court will be permitting a citizen to short-circuit the rest of the procedure laid down by the Act, has any relevance to the question of its jurisdiction under Art. 32. This may be an argument of inconvenience and this Court, as has already been indicated, may adjourn the case till the entire proceedings come to an end before the highest Sales-tax authority. This argument of inconvenience cannot obviously arise when a party approaches this Court after availing himself of all the remedies available to him under the Act.

122. I would, therefore, hold that the principles evolved by the courts in England and accept by the courts in India governing the issue of prerogative writs cannot circumscribe the unlimited power of the Supreme Court to issue orders and directions for the enforcement of the fundamental rights. Even otherwise, in cases similar to those covered by the illustration Supra, a prerogative writ can be issued for quashing the order of an inferior tribunal, and *a fortiori* an order can be issued for enforcing a fundamental right under Art. 32 of the Constitution.

123. Even if the said legal position be wrong, the present case falls within the limited scope of the principle governing the issue of a writ of *certiorari*. In *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*[(1)], the scope of that power vis-a-vis an error of law has been stated thus:

> "It may therefore be taken as settled that a writ of *certiorari* could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the reoord. The real difficultv with reference to this matter. however. is not so mnch in the

statement of the principle as in its application to the facts of a particular case. When does an error case to be mere error, and become an error apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated. Mr. Pathak for the first respondent contended on the Strength of certain observations of Chagla, G.J., in *Batuk K. Vyas* v. *Surat Municipality*[(1)], that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record, cannot be defined precisely or exhaustively there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

124. Whether there is an error of law on the face of the record can be determined only on the facts of each case, and, as this Court pointed out, an error that might pe considered as self-evident by one Judge may not be so considered by another. Except perhaps in a rare case, it is always possible to argue both ways. I would not, therefore, attempt to law down a futher criterion then that which has been accepted by this Court, namely, that the question must be left to be determined judicially on the facts of each case. In the present case, the recitals in the notitication clearly disclose that there is an error *of* law *on* the face of the order of the tribunals. If that error is corrected, as we should do, the position is that the Sales tax tribunals imposed a tax on the sales transactions of biris which they had no power to do. In that event, there is a clear infringement of the fundamental rights of the petitioners to carry on business in biris.

125. Now let us look at the decisions of this Court to ascertain whether all or any of them have applied the criterion of jurisdiction in the matter of enforcement of fundamental right of a citizen.

126. Where under s. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, the Controller was given jurisdiction to determine whether there was non-payment of rent or not, as well as the juridiction, on finding that there was non-payment of rent, to order eviction of a tenant, it was held by this Court in *Rai Brij Raj Krishan* v. *S.K. Shaw and Brothers*[(1)] that even if the Controller had wrongly decided the question whether there had been non-payment of rent, his order for eviction on the ground that there had been non-payment of rent could not be questioned in a civil court. This decision has nothing to do with the scope of this Court's power to enforce a fundamental right, but it deals only with the question of the ouster of the civil court's jurisdiction when a special tribunal is created to finally decide specific matters. In *Mohanlal Hargovind Das Biri Merchants Jabalpur* v. *The State of Madhya Pradesh*[(2)] when the Sale-tax authorities of Madhya Pradesh on a wrong view of the transactions carried on by the petitioners therein, held that the said transactions were intra-State transactions and on that basis required them to file a statement of return of total purchase of tobacco made by them, this court, on a correct view of the transactions came to the conclusion that they related to inter-State trade and, on that view, enforced the fundamental right of the petitioners. Though there was no decision of the Sales-tax authorities that the transactions were intra-State, the notice was on that basis; but yet that did not prevent this Court from coming to a different conclusion and enforcing the fundamental right of the petitioners. In *Bam Narain Sons Ltd.* v. *Asstt. Commissioner of Sale-tax*[(1)] the Sales-tax authorities determined the turnover of the petitioners including therein the proceeds of sales held by them to be intra-State

transactions. This Court held, considering the nature of the transactions once again, that they were not sales inside the State and were only sales in the course of inter-State trade and commerce, and, on that basis, enforced the fundamental right of the petitioners. This Court again enforced the fundamental rights of the petitioners in *J.V. Gokul & Co.* v. *Asstt. Collector of Sale-tax*[(2)] by reversing the finding of the Sales-tax Officer, who had held that the sales in that case were intra-State and holding that they were made in the course of import.

127. Ignoring the first decision wherein there was no order of the Sales-tax Officer on merits, in the other two decisions, the Sale-tax Officer in exercise of his jurisdiction decided on the facts before him that the sales were intra-State sales, whereas this Court on a reconsideration of the facts held that they were outside sales. The criterion of jurisdiction breaks in these cases, for the Sales-tax Officer has inherent jurisdiction to decide the question whether the sales were inside sales or outside sales. But an attempt is made to distinguish these cases on the ground that by a wrong view of the transactions, the sales-tax Officer violated the provisions of Art. 286 of the Constitution, and therefore he had no inherent jurisdiction to impose the tax. There are no merits in this distinction. The Sales tax Officer had jurisdiction to decide under the relevant sales-tax Act whether a transaction was inside or outside sale. He had the jurisdiction to decide rightly or wrongly; on the basis of his finding, though a wrong one, the sales were not exempt from taxation. If, on the facts of the case, the Sales-tax Officer had arrived at the correct conclution, he would not have any power to impose a tax on inter-State sales under the Act; he would also have infringed Art. 286 of the Constitution, if he had imposed a tax on such a sale. The absence of jurisdiction or want of power in one case was traceable to a statutory injunction, and in the other to a constitutional prohibition; but that in itself cannot sustain the distinction in the application of the criterion of jurisdiction, for in either case the said wrong finding of fact was the root of the error.

128. The decision of this Court in *Kailash Nath* v. *State of U.P.*[(1)], which necessitated the reference to this Bench, is another instance where this Court enforced the fundamental right of the petitioner by accepting an interpretation of the provisions of the Sales-tax Act different from that put upon them by the Sales-tax authority. There, as in the present case, the question depended upon the interpretation of the terms of a notification issued under s. 3 of the Sales-tax Act exempting certain goods from taxation. It is said that the view of this Court was based upon the judgments of this Court enforcing fundamental rights on the ground that the impugned provisions whereunder tax was levied were *ultra vires*. But the objection taken before this Court in that case was that the imposition of an illegal tax would not entitle a citizen to invoke Art. 32 of the Constitution, but he must resort to the remedies available under the ordinary law or proceed under Art. 226 of the Constitution. But that argument was negatived on the basis of the decisions cited before them. The test of juris-dection now sought to be applied was not directly raised in that Case. It cannot therefore be said that this Court went wrong by relying upon irrelevant decisions. The discussion shows that this Court held in the manner it did as it came to the conclution that a fundamental right had been clearly infringed by a wrong interpretation of the notification.

129. Let me now consider the decisions of this Court which are alleged to have departed from the view expressed in that case. In *Gulabdas & Co.* v. *Asstt. Collector of Customs*[(1)], the petitioners were established importers holding quota rights for importing stationery articles and having their places of business in Calcutta. They had a licence for a period of 12 months to import goods known as “Artists’ Materials” falling under Serial No. 168(C) of Part IV of the Policy Statement. Item No. 11 of Appendix XX annexed to the Import Trade Control Policy Book was described as “Crayons”. The petitioners, on the basis of the licence, imported “Lyra” brand crayons.

The Assistant Collector of Customs instead of assessing duty on them under item 45 (A), assessed duty under item 45(4) of the Indian Customs Tariff. On appeal the Central Board of Revenue confirmed it. It was argued, *inter alia*, that the Customs authorities imposed a duty heavier than the goods had to bear under the relevant provisions. This Court held that no question of fundamental right arose in that case.

130. In that context, the following observations were made.

> "If the provision of law under which the impugned orders have been passed are good provisions and the orders passed are with jurisdiction, whether they be right or wrong on facts, there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal."
>
> "If the petitioners were aggrieved by the order of the Central Board of Revenue they had a further remedy by way of an application for revision to the Central Government ..... All that is really contended is that the orders are erroneous on merits. That surely does not give rise to the violation of any fundamental right under Art. 19 of the Constitution".

131. In that case, on facts, the Customs authorities held that the petitioners were liable to pay a particular duty on the goods, and this Court accepted that finding and, therefore, no question of fundamental right arose. But, if on the other hand the observations meant that the order of the Customs authorities was binding on this Court, I find it difficult to accept that view. It is one thing to say that this Court ordinarily will accept the findings of administrative tribunals on questions of fact, and it is another to say that the said finding are binding on this Court. I do not think that this Court intended to lay down that the findings of administrative tribunals are binding on this Court, however, erroneous or unjust the said findings may be. This Court again in *Bhatnagars and Co. Ltd.* v. *The Union of India*[(1)] accepted the findings of fact recorded by the relevant Customs authorities, and observed:

> "Essentially the petitioner's grievance is against the conclusions of fact reached by the relevant authorities. If the said conclusion cannot be challenged before us in the present writ petition, the petitioner would obviously not be entitled to any relief of the kind claimed by him."

132. The finding arrived at by the Customs authorities was that, though the licences were obtained by the petitioner in his name, he had been trafficking in those licences, that the consignments had been ordered by another individual, that the said individual held no licence for import of soda ash and as such the consignments received by the said individual were liable to be confiscated. The finding was purely one of fact, and this Court accepted: it as correct: on that basis, no question of fundamental right would arise. The decision in *The Parbhani Transport Co-operative Society Ltd.* v. *The Eegional Transport Authority, Aurangabad*[(1)] related to the fundamental right of the petitioner therein to carry on the business of plying motor buses as stage carriages. The State applied for permits for all these routes under Ch. IV of the Motor Vehicles Act, 1939, as amended by Act 100 of 1956, and the petitioner applied for renewal of its permit. The Regional Transport Authority rejected the petitioner's right and granted the permit to the State. One of the contentions raised was that the provisions of Art. 14 of the Constitution had been infringed. This Court held that the Regional Transport Authority, on the facts, had held that there was no discrimination. Dealing with that contention, this Court observed:

> "This contention is in our view clearly untenable. The decision of respondent No. 1 may have been right or wrong and as to that we say nothing, but we are unable to see that that decision offends Art. 14 or any other fundamental right of the petitioner. The respondent No. 1 was acting as a quasi-judicial body and if it has made any mistake in its decision there are appropriate remedies available to the

petitioner for obtaining relief. It cannot complain of a breach of Art. 14."

133. This decision in effect refused to interfere with the findings of fact arrived at by the tribunal for the reasons mentioned therein. If the findings stand no question of fundamental right would arise. The decision in *A.V. Venkateswaran, Collector of Customs Bombay* v. *Ramchand Sobhraj Wadhwani*[(1)] is of no assistance, as it was a decision under Art. 226 of the Constitution. In *Aniyoth Kunhamina Umma* v. *The Ministry of Rehabilitation, Government of India, New Delhi*[(2)], the petitioner therein filed a writ petition for enforcement of his fundamental right on the ground that the property in question was not evacuee property. The authorities under the relevant Act decided that it was an evacuee property, and the petitioner carried the matter to the appellate tribunals without sucoess. This Court dismissing the petition on the ground that the petitioner had no fundamental right made the following observations:

> "It is, indeed, true that s. 28 of the Act cannot affect the power of the High Court under Arts. 226 and 227 of the Constitution or of this Court under Arts. 136 and 32 of the Constitution. Where, however, on account of the decision of an authority of competent jurisdiction the right alleged by the petitioner has been found not to exist, it is difficult to see how any question of infringement of that right can arise as a ground for a petition under Art. 32 of the Constitution, unless the decision of the authority of competent jurisdiotion on the right alleged by the petitioner is held to be a nullity or can be otherwise got rid of. As long as that decision stands, the petitioner cannot complain of any infringement of a fundamental right. The alleged fundamental right of the petitioner is really dependent on whether Kunhi Moosa Haji was an evacuee and whether his property is evacuee property. If the decision of the appropriate authorities of competent jurisdiction on these questions has become final and cannot be treated as a nullity or cannot be otherwise got rid of, the petitioner cannot complain of any infringement of her fundamental right under Arts. 19(1)(f) and 31 of the Constitution."

Concluding the judgment, it was observed:

> "We are basing our decision on the ground that the competent authorities under the Act had come to a certain decision, which decision has now become final the petitioner not having moved against that decision in an appropriate court by an appropriate proceeding. As long as that decision stands, the petitioner cannot complain of the infringement of a fundamental right, for she has no such right."

134. It would be seen that the tribunals found, on the facts of that case, that the property was evaouee property, and if that finding was accepted, no question of fundamental right arose. It is true that this Court accepted that finding on the ground that it had become final and the petitioner had not questioned the correctness of that decision in a proper court by an appropriate proceeding. As I have said earlier, this Court may ordinarily accept the findings of fact arrived at by tribunals; but, on the other hand, if the judgment meant that under no conceivable circumstances this Court could interfere with the findings of an administrative tribunal even if there was a clear infringement of fundamental right, in my view, it would amount to an abdication of its jurisdiction in favour of administrative tribunals. Nor does the decision of this Court in *Madan Lal Arora* v. *The Excise & Taxation Officer, Amritsar*[(1)] carry the matter further. There, the petitioner was a dealer registered under the Punjab General Sales Tax Act. Notices were served on him by the Sales tax authority, the last of them being that if the relevant documents were not produced within a particular date the case would be decided on the "best judgment assessment basis". It was contended on the basis of s. 11 of the Punjab General Sales Tax Act that at the date of the notice last mentioned the Sales Tax authorities bad no right to proceed to make any "best judgment" assessment as the three years within which only such assessment could be made had expired before then. This Court accepted the construction put forward by the petitioner

and held that no assessment could be made on the petitioner; and, in that view, it enforced his fundamental right. There was no inherent want of jurisdiction in the Sales Tax authorities, for they had jurisdiction to construe the relevant provisions of s. 11 and hold whether the assessment could be made within a particular time or not. Notwithstanding that circumstance, this Court enforced the petitioner's fundamental right. It is not necessary to multiply decisions. On a superficial reading of the aforesaid decisions, though they may appear to be conflicting, there is one golden thread which runs through all of them and, that is, a citizen has a guaranteed procedural right under Art. 32 of the Constitution, and that a duty is cast upon this Court to enforce a fundamental right if it is satisfied that the petitioner has a fundamental right and that it has been infringed by the State. That question was approached by this Court from different perspectives, having regard to the facts of each case. When a fundamental right of a petitioner was infringed by an action of an officer purporting to exercise a power under an Act which is *ultra vires* or unconstitutional, or without jurisdiction, this Court invariably enforced the fundamental right. So too, this Court give relief under Art. 32 of the Constitution whenever a statutory authority infringed a fundamental right of petitioner on a wrong construction of the provisions of a statute where-under he purported to act. This Court, as a rule of practice, accepted the findings of fact arrived at by tribunals and on that basis held that no fundamental right was infringed. But I do not understand any of these decisions as laying down that the amplitude of the jurisdiction conferred on this Court under Art. 32 of the Constitution and the guaranteed right given to a citizen under the said article should be restricted or jlimited by some principle or doctrine not contemplated by the Constitution.

135. Mr. Chari, appearing for one of the interveners, raised a wider question. His argument is that a relief under Act. 32 cannot be given against an authority exercising judicial power and that the Sales-tax authorities are authorities exercising judicial power of the State. This argument is elaborated thus: Under the Constitution, the institutions created thereunder can exercise either legislative, executive or judicial functions and sometimes the same institution may have to exercise one or more of the said powers; institutions exercising legislative powers make laws, those exercising powers, administer the laws, and those exercising judicial powers decide the disputes between citizens and citizens, between citizens and State and State, the said judicial powers can be conferred in the manner prescribed by the Constitution on any institution of individual officer, whether it is a court or not; with that background if Art. 12 of the Constitution is looked at, the argument proceeds, the institutions exercising judicial power are excluded therefrom. Article 32 enables the Supreme Court to enforce a fundamental right only against the State action: no fundamental right can he enforced against an officer exercising judicial power as he does not come under the definition of State in Art. 12 of the Constitution.

136. It is not necessary in this case to decide the two questions, namely, (1) whether a person can approach this Court to enforce his fundamental right on the ground that it was infringed by a decision of a court of law, and (2) whether the right guaranteed by Art. 19 of the Constitution can be enforced under Art. 32 against the action of a private individual. We are concerned only with the narrow question whether such a right can be enforced against the action of an administrative tribunal. It can certainly be enforced against it, if it comes under the definition of a State under Art. 12 of the Constitution. We have already held that an administrative tribunal is not a court but is only an executive authority functioning under a statute adopting the norms of judicial procedure. It is a department of the executive Government exercising statutory functions affecting the rights of parties. Under Art. 12, “the State” has been defined to include the Government and the Parliament of India and the Government and the Legislature of each of the States and all local and other authorities within the territory of India or under the control of the Government of India. A Division Bench of

the Madras High Court in *University of Madras* v. *Shanta Bai*[(1)] construed the words "local or other authorities" under Art. 12 of the Constitution thus:

> "These words must be construed as *ejusdem generis* with Government or Legislature and so construed can only mean authorities exercising governmental functions. They would not include persons natural or juristic who cannot be regarded as instrumentalities of the Government."

137. Applying this definition to Art. 12, it is manifest that authorities constituted under the Sales-tax Act for assessing the tax would be "other authorities" within the meaning of Art. 12; for the said authorities exercise governmental functions and are the instrumentalities of the Government. But it is contended that if the fathers of our Constitution intended to include in the definition authorities exercising judicial functions, having included the Government and the Parliament, they would not have omitted to mention specifically the judicial institutions therein. This argument may have some relevance if the question is whether a court of law is included within the definition of 'State", but none when the question is whether an administrative tribunal is included in the said definition. An administrative tribunal is an executive authority and it is clearly comprehended by the words "other authorities". If the argument of learned counsel be accepted, Government also shall be excluded from the definition where it exercises quasi-judicial functions. So too, Parliament will have to be excluded when it exercises a quasi-judicial function. That would be to introduce words which are not in the Article. It is, therefore, clear to my mind that the definition of the word, whether it takes in a court or not, certainly takes in administrative tribunals. If an administrative tribunal is a "State" and if any order made or action taken by it infringes a fundamental right of a citizen under Art. 19 of the Constitution, it can be enforced under Art. 32 there of.

138. Let me now restate the legal position as I conceive it: (1) A citizen has a fundamental right to carry on business in *bidis* under Art. 19(1) of the Constitution. (2) The State may make a law imposing reasonable restrictions on that right it is conceded that the Uttar Pradesh Sales Tax Act is such a law. (3) The Sales-tax authorities constituted under the Act, purporting to exercise their powers thereunder, may make an illegal order infringing that right. (4) The order may be illegal because the authority concerned has acted without jurisdiction in the sense that the authority is not duly constituted under the Act or that it has inherent want of jurisdiction; the order may be illegal also because the said authority has construed the relevant provisions of the Act wrongly and has decided the facts wrongly or drawn the inferences from the facts wrongly. (5) The Act expressly or by necessary implication cannot give finality to the order of the authority or authorities so as to prevent the Supreme Court from questioning its correctness when the said order in fact affects the fundamental right of a citizen. (6) The aggrieved party may approach this Court before a decision is given by the Sales-tax authority or after the decision is given by the original authority or when an appeal is pending before the appellate tribunal or after all the remedies under the Act are exhausted. (7) Whatever may be the stage at which this Court is approached this Court may in its discretion, if the question involved is one of jurisdiction or a construction of a provision, decide the question and enforce the right without waiting till the procedure prescribed by a law is exhausted; but if it finds that questions of fact or mixed questions of fact and law are involved, it may give an opportunity to the party, if he agrees, to renew the application after he has exhausted his remedies under the Act, or, if he does not agree, to adjourn the petition till after the remedies are exhausted. (8) If the fundamental right of the petitioner depends upon the findings of fact arrived at by the administrative tribunals in exercise of the powers conferred on them under the Act, this Court may in its discretion ordinarily accept the findings and dispose of the application on the basis of those findings.

139. The following of this procedure preserves the jurisdiction of this Court as

envisaged by the Constitution and safeguards the guaranteed rights of the citizens of this country without at the same time affecting the smooth working of the administrative tribunals created under the Act. If the other view is accepted, this Court will be abdicating its jurisdiction and entrusting it to administrative tribunals, who in a welfare State control every conceivable aspect of human activity and are in a dominant position to infringe the fundamental rights guaranteed to the citizens of this country. I would prefer this pragmatic approach to one based on concepts extraneous to the doctrine of fundamental rights.

140. I would, therefore, hold that in the present case if the Sales-tax officer; by a wrong construction of the provisions of the Act, made an illegal order imposing a tax on the petitioner's] fundamental right, it is liable to be quashed.

141. The next question is whether the Sales-tax officer has wrongly construed the notification issued by the Government under s. 4(1)(a) of the Act. Section 4(1) of the Act reads as follows:

> "No tax shall be payable on—
>
> (a) The sale of water, milk, salt, newspapers and motor spirit as defined in the U.P. State Motor Spirit (Taxatior) Act, 1939, and of any other goods which the State Government may by notification in the official Gazette, exempt.
>
> (b) the sale of any goods by the All-India Spinners' Association or Gandhi Ashram, Meerut, and their branches or such other per-sons or class of persons as the State Government may from time to time exempt on such conditions and on payment of such fees, if any, not exceeding eight thousand rupees annually as may be specified by notification in the Official Gazette."

142. The following notification dated December 14, 1957 was issued under the said section:

> "In partial modification of notifications No. ST-905/X, dated March 31, 1956 and ST-418/X 902 (9)-52, dated January 31, 1957, and in exercise of the powers conferred by clause (b) of sub-section (1) of section 4 of the U.P. Sales Tax Act, 1948 (U.P. Act No. XV of 1948) as amended up to date, the Governor of Uttar Pradesh is pleased to order that no tax shall be payable under the aforesaid Act with effect from December 14, 1957 by the dealers in respect of the following classes of goods provided that the Additional Central Excise Duties leviable thereon from the closing of business on December 13, 1957 have been paid on such goods and that the dealers thereof furnish proof of the satisfaction of the assessing authority that such duties have been paid.
>
> (1) .....
>
> (2) .....
>
> (3) Cigars, cigarettes, biris and tobacco, that is to say any form of tobacco, whe ther cured or uncured, and whether manufactured or not includes the leaf, stalks and stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth."

143. The following facts are not disputed: In regard to the sales of certain commodities with an inter-State market certain difficulties cropped up in the matter of imposition of sales-tax by different States. In order to avoid those difficulties, the Central Government and the States concerned came to an arrangement where under the States agreed for the enhancement of the excise duties under the Central Act in respect of certain commodities in substitution for the sales-tax levied upon them, and that the Central Government agreed to collect the enhanced excise duty on the said commodities and distribute the additional income derived amongst the State Governments. To implement that arrangement, Parliament passed Act No. 58 of 1957 called the Additional Duties of Excise (Goods of Special Importance) Act, 1957, on

December 24, 1957. The long title of that Act shows that it was enacted to provide for the levy and collection of additional duties of excise on certain goods and for the distribution of a part of the net proceeds thereof among the States in pursuance of the principles of distribution formulated and the recommendation made by the Finance Commission. Under the Central Act, before the amendment, there was excise duty on tobacco used for various purposes, including machine-made bidis, but there was no excise duty on hand-made bidis. Therefore, under the amended Act, additional duty was payable only on tobacco products already taxable under original Act; with the result, enhanced tax was imposed on tobacco which went in to make hand-made bidis, but no additional tax was imposed on hand made bidis.

144. With this background let us look at the notification issued under s. 4(1) of the Act. There is some controversy whether that notification was issued under s. 4(1)(a) or 4(1)(b) of the Act; but that need not detain us, for I shall assume that the notification was issued under s. 4(1)(b). The goods specified therein were exempted conditionally. The goods exempted under the notification were bidis and tobacco. Bidis might be hand-made or machine-made, and the tobacco included tobaoco out of which bidis were made. Under the first part of the notification the said bidis and tobacco were exempted from the sales-tax from December 14, 1957. The condition imposed for the operation of that exemption was that additional central excise duties leviable thereon from the closing of business on December 13, 1957, should have been paid on such bidis and tobacco. Briefly stated, the *bidis* and tobacco, among others, were exempted from payment of sales-tax, if excise duties leviable thereon were paid during the relevant period. So far as the hand-made *bidis* were conoerened under the amending Act no tax was leviable thereon. The condition was applicable to *bidis* as a unit. Out of *bidis*, no excise duty was leviable on hand-made *bidis*, while excise duty was leviable in respect of machine-made *bidis*. Therefore, the condition imposed has no application to hand-made *bidis*, for under the said condition only tax leviable on the said *bidis* had to be paid, and, as no excise duty was leviable in respect of hand-made *bidis*, they were clearly exempted under the said notification. Assuming that the said notification applied only to goods in respect whereof additional excise duty was leviable, the payment of additional duty in respect of tobacco which went in making hand-made *bidis* was also a condition attached to the exemption of such *bidis* from taxation. It is not disputed that additional excise duty on the said tobacco was paid by the appellant. I, therefore, hold, on a plain reading of the expressed terms of the notification, that hand made *bidis* were exempted from taxation under the Act.

145. There was also every justification for such exemption. It appears from the record that the merchants doing business in hand-made *bidis* were not able to compete with businessmen manufacturing machine-made *bidis*. Indeed, before the amending Act, excise duty was imposed on machine-made *bidis* mainly, though not solely, for protecting the business in the former in competition with the latter. In the circumstances, it was but reasonable to assume that the State Government by the amending Act did not intend to impose, sales-tax on handmade *bidis*, though additional excise duty was imposed on tobacco out of which the said *bidis* were manufactured. The entire scheme of protection of one against unfair competition from the other would break if the Central Government could impose additional excise duty on tobacco and the State could impose sales-tax on *bidis* made out of the said tobacco. That this was the intention of the State Government was made clear by the subsequent notification dated December 14, 1957, exempting handmade *bidis* from taxation without any condition. I am, therefore, clearly of the opinion that, on a fair reading of the said notification, sales of hand-made *bidis* were exempted from taxation under the Act.

146. In the result, there will be an order directing the respondents not to proceed to realize any sales-tax from the petitioner on the basis of the order dated December

20, 1958. The petitioner will have her costs.

147. Now coming to Civil Appeal No. 572 of 1960, the said appeal was dismissed for non-prosecution by order of this Court dated February 20, 1961. The assessee-firm has filed an application for restoration of the said appeal on the ground that it did not rpess the appeal in view of the decision of this Court in *Kailash Nath* v. *State of Uttar Pradesh*[(1)]; but, as I have said that the said decision is still good law, this ground is not open to the said firm. In the result the application for restoration of Civil Appeal No. 572 of 1960 is dismissed with costs.

M. HIDAYATULLAH, J.:— The facts have been set out fully in the order of Venkatarama Aiyar, J., and need not be stated at length. The petitioner is a partner in a firm of *bidi* manufacturers registered under the Uttar Pradesh Sales Tax Act. Under a scheme by which certain additional Central Excise duties are being levied under special Acts for the purpose and are being distributed among the States in respect of certain classes of goods, on which the States have foregone collection of sales tax locally, the Government of Uttar Pradesh issued notification on December 14, 1957, exempting *bidis* from sales tax under the U.P. Sales Tax Act, provided the additional duties of excise were paid. This was followed by another notification on November 25, 1958, by which *bidis*, whether machine-made or hand-made, where exempted without any condition from sales tax from July 1, 1958. The dispute in this petition is about the quarter ending June 30, 1958, in which the firm claimed the exemption. This claim was rejected on the ground that the firm had not paid any additional excise duty on *bidis*. An appeal followed, but was unsuccessful, and though a revision lay under the Sales Tax Act, none was filed. The firm filed instead a petition under Art. 226 of the Constitution in the High Court of Allahabad, but was again unsuccessful mainly because the firm had other remedies under the Sales Tax Act which it had not available of. The firm, however, obtained a certificate from the High Court, and filed an appeal in this Court. Ujjambai filed this petition under Art. 32 of the Constitution for the same reliefs.

148. When she obtained a rule in the petition, the firm did not prosecute the appeal and it was dismissed. In this petition, she claims a writ of *certiorari* against the order of the Sales Tax Officer as also a *mandamus* to the Department not to levy the tax. As a further precautionary measure, lest it be held that the remedy under Art. 32 is misconceived, the firm has also applied for the revival of the appeal. I shall deal with the application later.

149. The question is whether the exemption granted by the notification of December 14, 1957, exempting *bidis* conditionally upon payment of additional duty of excise applied to the petitioner during the quarter ending June 30, 1958. This question depends upon the words of the notification and the schedule of articles on which additional duty of excise was payable and the fact whether such excise duty was, in fact, paid or not. But the question which has been debated in this case is one which arises at the very threshold, and it is this: whether a petition under Art. 32 can lie if the petitioner alleges a breach of fundamental rights, not because the tax is demanded under an invalid or unconstitutional law but because the authority is said to have misconstrued certain provisions of that law. The petitioner contends that she has paid additional excise duty on tobacco used in the manufacture of *bidis* and the word "tobacco" is used comprehensively in the Central Excise Salt Act, 1944, and in Act No. 58 of 1957 and would include *bidis* in the exemption. The Sales Tax Officer rejected this claim, observing:

> "The exemption envisaged in this notification applies to dealers in respect of sales of Biris, provided that the additional Central Excise duties leviable thereon from the closing of business on December 13, 1957, have been paid on such goods. The assessee paid no such Excise duties. Sales of Biris by the assessee are,

therefore, liable to Sales Tax."

150. Whether there has been a misconstruction of any of the provisions is a matter which, of course, could be considered on revision, or in a reference to the High Court on point of law arising out of the order finally passed or even ultimately by appeal to this Court with its special leave under Art. 136. The petitioner, however, contends that she is entitled to file a petition under Art.: 2 of the Constitution, if by a wrong construction of a provision of law, a tax is demanded which is not due because it amounts to a deprivation of property without authority of law and also a restriction upon her right to carry on trade or business. The breach of fundamental rights is thus stated to arise under Arts. 31(1) and 19(1)(g) primarily by the wrong interpretation and secondarily by the result thereof, namely, the de mand of a tax which is not due. The other side contends that no fundamental rights can be said to be breached when the authorities act under a valid law even though by placing their interpretation on some provision of law they may err, provided they have the jurisdiction to deal with the matter and follow the principles of natural justice. Any such error, according to the respondents, must be corrected by the ordinary process of appeals or revisions etc. and not by a direct approach to the Supreme Court under Art. 32 of the Constitution. Both sides cite cases in which petitions under Art. 32 were previously filed and disposed of by this Court, either by granting writs or by dismissing the petitions. In some of them, the question was considered, but in some it was not, because no objection was raised.

151. There, however, appears to be some conflict on this point. In *kailash Nath* v. *State of U.P.*[(1)], where the allegation was that an exemption was wrongly refused on a misconstruction of a notification under s. 4 of the U.P. Sales Tax Act, it was held that the fundamental rights of the taxpayer were in jeopardy, and the remedy under Art. 32 was open. Govinda Menon, J., then observed:

> "If tax is levied without due legal authority on any trade or business, then it is open to the citizen aggrieved to approach this Court for a writ under Article 32 since his right to carry on a trade is violated, or infringed by the imposition and such being the case Article 19(1)(g) comes into play."

152. This proposition was rested upon the case of this Court in the *Bengal Immunity Company*[(1)]; but a close examination of the latter case shows that no such proposition was stated there. In the latter case, exemption was claimed on the ground that the sales sought to be taxed were made in the course of inter-State trade and the Bihar Sales Tax Act, which purported to authorise such levy, offended Art. 286(2) of the Constitution and thus was invalid. On the other hand, doubts were cast on the decision in *Kailash Nath's case*[(2)] on this point, in *Tata Iron ds Steel Co. Ltd.* v. *8. R. Sarkar*[(3)]; but the question was left open. The question has now been raised and argued before this special Bench. In this judgment, I am only concerned with the question of constitutional law raised, since I agree with the interpretation placed on the notification by my brother, Kapur, J.

153. The general principles underlying Part III of the Constitution have been stated so often by this Court that it is hardly necessary to refer to them, except briefly, before considering to what extent and in what circumstances actions or orders of judicial, quasi-judicial and administrative authorities are open to question under Art. 32. The Constitution has accepted a democratic form of Government with the characteristic division of authority of the State between he Legislature, the Judiciary and the Executive. The Constitution being federal in form, there is a further division of powers between the Centre and the States. This division is also made in the jurisdictions of the three Departments of the State. To achieve these purposes, the distribution of legislative powers is indicated in Part XI and of taxes in Part XII, and certain special provisions regarding trade, commerce and intercourse within the territory of India are

placed in Part XIII. In addition to these Parts of the Constitution, to which some reference may be necessary hereafter, the Constitution has also in other Parts indicated what things can only be done by law to be made by Parliament or the State Legislatures. These Articles are too numerous to specify here. But this much, however, is clear that where the Constitution says that a certain thing can be done under authority of law, it intends to convey that no action is justified unless the legality of that action can be supported by a law validly made. The above is, in outline, the general pattern of conferral of power upon the Legislature and the Executive by the people.

154. The people, however, regard certain rights as paramount, because they embrace liberty of action to the individual in matters of private life, social intercourse and share in the government of the country and other spheres. The people who vested the three limps of Government with their power and authority, at the same time kept back these rights of citizens and also sometimes of non-citizens, and made them inviolable except under certain conditions. The rights thus kept back are placed in Part III of the Constitution, which is headed "Fundamental Rights", and the conditions under which these rights can be abridged are also indicated in that Part. Briefly stated, the conditions are that they can be abridged' only by a law in the public interest or to achieve a public purpose. These rights are not like the Directive Principles, which indicate the policy and general pattern for State action to enable India to emerge, after its struggle with poverty, disease, inequalities and prejudices, as a welfare State. These Directive Principles are not justiciable, but any breach of fundamental rights gives a cause of action to the aggrieved person.

155. The sum total of this is that the Constitution insists upon the making of constitutional and otherwise valid laws as the first step towards State action. No arbitrary or capricious action affecting the rights of citizens and others is to be tolerated, if it is unsupported by such law. But even the Legislature cannot go beyond the limits set by the Chapter on Fundamental Rights, because ingress upon those rights is either forbidden absolutely or on condition that the action is either in an emergency or dictated by the overriding public interest. The executive can never affect the fundamental rights unless a valid law enables that to be done. To secure these fundamental rights, the High Courts by Art. 226 as part of their general jurisdiction and the Supreme Court by Art. 32 have been given the power to deal with any breach complained of and to rectify matters by the issue of directions, orders or writs including certain high prerogative writs. Article 32 is included in the Chapter on Fundamental Rights, and provides an expressly guaranteed remedy of approach to the Supreme Court in all cases where fundamental rights are invaded. This right is the most valuable right of the citizen against the State. The Article provides further that the right of moving the Supreme Court is also a fundamental right. Thus, it was that this Court said in *Romesh Thappars case*[(1)] *that this* Court is the protector and guarantor of fundamental rights, in *Rashid Ahmed* v. *Municipal Board, Kairana*[(1)] that the Supreme Court's powers under Art. 32 are wider than the mere right to issue prerogative writs, in *A.K. Gopalan's case*[(2)] that the fundamental rights are the residue from the power surrendered by the people and kept back by them to themselves, and in *Champakam Doraijans case*[(3)] that the fundamental rights are sacrosanct and incapable of being abridged by any legislative or executive action except to the extent provided in the appropriate Articles in Part III. It may, however, be stated that under certain Articles of the Constitution, laws can be made without a challenge in Courts, notwithstanding the Constitution (see, for example Art. 329), and other considerations may arise in respect of those laws. In this judgment, therefore, I shall deal with those laws and situations only, which admittedly are affected by the Chapter on Fundamental Rights.

156. The invasion of fundamental rights may assume many forms. It may proceed

directly from laws which conflict with the guaranteed rights. It may proceed from executive action unsupported by any valid law or laws or in spite of them. Examples of both kinds are to be found in the Reports. In *K.T. Moopil Nair's case*[(4)], a taxing statute was held to be discriminatory and also unreasonable because of the restrictions it created and was struck down under Arts. 14 and 19(1)(f) of the constitution. In *Tata Iran & Steel Co. Ltd. case*[(5)], a threat to recover a tax twice over was said to offend fundamental rights. In both these cases, Art. 32 was invoked successfully. In the first kind of cases the law itself fails, and if the law fails, so does any action under it. In the second kind of cases, the laws are valid but in their application, the executive departments make their own actions vulnerable. A law can give protection to an action only which is within itself, but it cannot avail, if the action it outside. Thus, in *Chintaman Rao's case*[(1)], a law was struck down because it arbitrarily and excessively invaded a fundamental right and in *Lachmandas Kewalram Ahuja* v. *The State of Bombay*[(2)], s. 12 of the Bombay Public Safety Measures Act, 1947 was declared void (after January 26, 1950) as it did not proceed upon any purported classification. Of these two cases, the first was a petition under Art. 32 of the Constitution and the latter, an appeal on a certificate of the High Court under Art. 132 of the Constitution. The method of approach to this court was different, but it made no difference to the application of the provisions of Fart III. There are other such decisions, but these two will suffice.

157. The inference is, therefore, quite clear that this Court will interfere under Art. 32 if a breach of fundamental rights comes before it and indeed, it was so stated in *Romesh Thappar's case*[(3)] that this Court—

> "cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights,"

158. although such applications are made to the Court in the first instance without resort to a High Court, and the American cases about exhausting of other remedies were not followed. In *Himmatlal's case*[(4)] this Court issued a writ prohibiting assessment of a tax under an invalid law, even though there was no assessment begun or even a threat of one. In *K.K. Kochunni Moopil Nayar* v. *State of Madras*[(5)] Das, C.J. after considering all previous oases of this Court laid down.

> "Further, even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Art. 226 of the Constitution, as to which we say nothing now —this Court cannot, on a similar ground decline to entertain a petition under Art. 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right."

159. In that case, the learned Chief Justice said that, if necessary, this Court may even get a fact or facts proved by evidence.

160. The view expressed in the last case finds further support from what Gajendragadkar, J., said very recently in *Daryao* v. *The State of U.P.*[(1)]:

> "If the petition field in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ of because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32."

161. Gajendragadkar, J. then went on to consider the matter from the point of view of *res judicata*, and held that in some cases, that principle would apply if no appeal against the order of the High Court was field, but not in others. This must be so, because if there is a decision of the High Court negating fundamental rights or their

breach, then the decision of the competent Court must be removed by appeal to establish the rights or their breach.

162. From these cases, it follows that what may be said about a direct appeal to this Court without following the intermediate steps may not be said about Art. 32, because resort to other forums for parallel reliefs is strictly not necessary where a party complains of breach of fundamental rights. Of course, when he makes an application under Art. 32, he take the risk of either succeeding or failing on that narrow issue, and a finding of the High Court or some tribunal below on some point, if not get aside in appropriate proceedings, may stand in his way. The right under Art. 32 is not a right of appeal, and cannot be used as such, and this Court may not be in a position to examine the case with the same amplitude as in an appeal. But, if a party takes the risk of coming to this court direct on the narrow issue, he cannot be told that he has other remedies. To take this restricted view of Art. 32 may, in some cases, by delay or expense involved in the other remedies, defeat the fundamental rights before even they can be claimed. But this is not to say that the other remedies are otiose. The issue to be tried under Art. 32 is a narrow one, and once that issue fails, everything else must fail. In jurisdictions like that under Art. 226 and/or in appeals under Art. 132 or Art. 136, not only can the breach of fundamental rights be considered but all other matters which the Court may permit to be raised. It, therefore, follows that if a person chooses to invoke Art. 32, he cannot be told that he must go elsewhere first. The right to move this Court is guaranteed. But this Court in dealing with the petition will deal with it from the narrow standpoint of fundamental rights and not as an appeal.

163. Though the area of action may be thus limited, the power exercisable therein are vast. The power to issue writs in the nature of the five high prerogative writs of *hebeas corpus, mandamus, prohibition, quo warranto* and *certiorari* is, in itself, sufficient to compel obedience by the State (as defined in Art. 12) and observance by it of the Constitution and the laws in all cases where a breach of fundamental right or rights is established. The writ of *mandamus* is a very flexible writ and has always been called in aid to ampliate justice and proves sufficient in most cases of administrative lapses or excesses. Then, there is the writ of *certiorari* to get rid of orders which affect fundamental rights, the writ of prohibition to stop action before it can be completed, the writ of *quo warrnto* to question a wrongful assumption of office, and lastly, the writ of *habeas corpus* to secure liberty. Indeed, an observed by Lord Atkin (then, Atkin, L.J.) in *Rex* v. *Electricity Commissioners*[(1)]:

> "Whenever any body or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs."

164. What was said of judicial action and of the writ of *certiorari* applies equally to other writs and actions of administrative agencies, which are executive or ministerial. The powers of the Supreme Court and the High Courts in our country are no whit less than those of the Kings Bench Division. Indeed, the power conferred on him is made even more ample by enabling these superior Courts to issue in addition to the Prerogative Writs, directions, orders and writs other than the named writs, and the concluding words of Art. 32(2) "whichever may be appropriate, for the enforcement of any of the rights conferred by this Part (Part III)" show the wide ambit of the power. As far back as *Basappa* v. *Nagappa*[(1)], Mukherjea, J. (as he then was) observed:

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any differences or change of opinion expressed in particular cases by English Judges."

165. Speaking then of the writ of *certiorari* the learned Judge added:

> "We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

166. What has been said here has my respectful concurrence, and is applicable to the other writs also. These principles have now become firmly established in the interpretation of Arts. 32 and 226 of the Constitution. The difference in the two Articles is in two respects: firstly, Art, 32 is available only for the enforcement of fundamental rights, but the High Courts can use the powers for other purposes (a power which Parliament can also confer on the Supreme Court by law, vide Art. 139), and secondly, that the right of moving the Supreme Court is itself a guaranteed right (Art. 32(1) and is unaffected by the powers of the High Court (Art. 226(2)).

167. The foregoing is a resume of the interpretations placed upon Art. 32, but there are other provisions of the Constitution relating to the Supreme Court which must be viewed alongside, because the Supreme Court has other roles to perform under the Constitution. Those provisions give an indication of how the Supreme Court is intended to use its powers.

168. The Supreme Court is made, by Arts. 133 and 134, the final Court of appeal over the High Court in all civil and criminal matters, though the right of appeal arises only in certain classes of cases and subject to certain conditions. Under Arts. 132 and 133(2), the Supreme Court is also the final Court of appeal over the High Court in all matters involving an interpretation of the Constitution. By Art. 136, the Supreme Court has been given the power to grant, in its discretion, special leave to appeal to itself from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India. The last power is overriding, because Art. 136 commences with the words "notwithstanding any thing in this Chapter". Only one exemption has been made in favour of a Court or tribunal constituted by or ordered under any law relating to the Armed Forces.

169. There are other jurisdictions of the Supreme Court also, which may be described as advisory and original, arising in special circumstances with which we are not concerned. The appellate jurisdiction of the Supreme Court sets it at the top of the hierarchy of civil and criminal Courts of civil judicature. Articles 132, 133, 134 and 135 make the Supreme Court the final Court of appeal but only in cases which are first carried before the High Court in accordance with the law relating to those cases. Access to the Supreme Court under Arts. 132-135 is not direct but through the High Court. There can be no abridging of that process. But, under Art. 136, the Supreme Court has the jurisdiction to grant special leave, though it has declared in several cases that it would exercise its discretion under Art. 136 only against a final order. *See Chandi Prasad Chokhani* v. *State of Bihar*[(1)], *Indian Alum-inium Co.* v. *Commissioner of Income tax*[(2)], and *Karihaiyalal Lohia* v. *Commissioner of Income-tax*[(3)]. In exercising the discretionary powers to grant special leave, the Supreme Court now insists on the aggrieved party exhausting all its remedies under the law before approaching it.

170. From what has been said above, it is clear that there are three approaches to this Court, and they are: (a) by appeal against the decision of the High Court, (b) by special leave granted by this Court against the decision of any Court or tribunal in India and (c) by a petition under Art. 32. No Court or tribunal in India other than the Supreme Court and the High Courts has been invested with the jurisdiction to deal with breaches of funda- 'mental rights, though the Constitution has reserved the power to Parliament to invest by law this jurisdiction in any other Court [Art 32(3)]. As a result, the enforcement of fundamental rights can only be had in the High Court or the Supreme Court. In most taxation laws, there is a jurisdiction and a right to invoke

the advisory jurisdiction of the High Court and in some there is a right of appeal or revision to the High Court, but the question of a breach of fundamental rights cannot be raised in the proceedings before the tribunals. In its advisory jurisdiction, the High Court can only answer the question referred to it or raise, one which arises out of the order passed and in its appellate and revisional jurisdiction, the High Court can deal with the matter on law or fact or both (as the case may be) but only in so far as the tribunal has the jurisdiction. In these jurisdictions, the plain question of the enforcement of fundamental rights may not arise. There is, however, nothing to prevent a party moving a separate petition under Art. *Si* of the Constitution and raising the issue, as was actually done in this case. The result thus is that no question of a breach of fundamental rights can arise except under Arts. 226 and 32 of the Constitution, and it must be raised before the High Court and the Supreme Court respectively, by a proper petition. But, where the High Court decides, such an issue on a petition under Art. 226, the question can be brought before this Court under Arts. 132 and 136.

171. If this be the true position, and if this Court can only deal with question of breach of fundamental rights in petitions under Art. 32 and in appeals against the orders of the High Court under Art. 226, I am of opinion that a petition under Art. 32 must always lie where a breach is complained of, though, I must say again, if the matter is brought before this Court under Art. 32, the only question that can be considered is the breach of fundamental rights and none other.

172. The right to move this Court being guaranteed, the petition may lie, but there are other thing to consider before it can be said in what cases this Court will interfere. I shall now consider in what kind of cases the powers under Art. 32 will be used by this Court. Since this case arises under a taxing statute, I shall confine myself to taxing laws, because other considerations may arise in other circumstances and the differing facts are sometimes so subtle as to elude one, unless they are before him. The challenge on the ground of a breach of fundamental rights may be against a law or against executive action. I am leaving out of account action by the Courts of civil judicature, and am not pausing to consider whether the word “State” as defined in Art. 12 includes the ordinary Courts of civil judicature. That question does not arise here and mast be left for decision in a case in which it properly does. Whether or not be word “State” covers the ordinary Courts, there is authority to show that tribunals which play the dual role as deciding issues in a quasi-judicial way and acting as the instrumentalities of Governments are within the word “State” as used in Part III of the Constitution. In the *Bidi Supply Co.* v. *Union of India*[(1)], Das, C.J., observed:

> “Here ‘the State’ which includes its Income-tax department has by an illegal order denied to the petitioner, as compared with other Bidi merchants who are similarly situate, equality before the law or the equal protection of laws and the petitioner can legitimately complain of an infraction of hia fundamental rights under article 14 of the Constitution.”

173. Again, in *Guliapalli Nageswara Rao* v. *State of Andhra Pradesh*[(2)] it was observed:

> “The concept of a quasi-judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power.”

174. The taxing departments are instrumentalities of the State. They are not a part of the legislature; nor are they a part of the judiciary. Their functions are the assessment and collection of taxes, and in the process of assessing taxes, they have to follow a pattern of action, which is considered judicial. They are not thereby coverted into Courts of civil judicature. They still remain the instrumentalities of the State and are within the definition of ‘State’ in Art. 12. In this view of the matter, their actions

must be regarded, in the ultimate analysis, as executive in nature, since their determinations result in the demand of tax which neither the legislature nor the judiciary can collect. Thus, the actions of these quasi-judicial bodies may be open to challenge on the ground of breach of fundamental rights.

175. I have already said that the attack on fundamental rights may proceed from laws or from executive action. Confining myself to taxation laws and executive action in furtherance of taxation laws, I shall now indicate how the breaches of fundamental rights can arise and the extent of interference by this Court under Art. 32. Taxing laws have to conform to provisions in Part XII of the Constitution: they are circumscribed further by Part XIII, and they can only be made by an appropriate legislature as indicated in Part XI. These are the provisions dealing with the making of taxing laws. The total effect of these provisions is summed up in Art. 165, which says:

> "No tax shall be levied or collected except by authority of law,"

176. Law is thus a condition precedent to the demand of a tax. A tax cannot be levied by the State, unless a law to that effect exists, and that law must follow and obey all the directions in the Constitution about the making of laws. In other words, the law must be one validly made.

177. Taxation laws may suffer from two defects, and they are: (a) if they are not made within the four corners of the powers conferred by the Constitution on the particular legislature, or (b) if they are opposed to fundamental rights. A law-may fail as *ultra vires*, though it is not opposed to fundamental rights, because it is outside the powers of the legislature that enacted it, or because it is a colourable exercise of power, or if the law was not made in accordance with the special procedure for making it. A simple example is imposition of Profession Tax by Parliament, which it has no power to impose, or the imposition of a tax above Rs. 250 per year on a single person by the State Legislature, which is beyond the powers of the State Legislature. In these cases, the laws fail, because in the first case, Parliament lacks the power completely, and in the second, because the State Legislature transgresses a limit set for it. Such a law is no law at all, and will be struck down under Art. 265 read with the appropriate provisions of the Constitution. A question arising under Art. 265 cannot be brought before the Supreme Court under Art. 32, because that Article is not in the Chapter on Fundamental Rights. But an executive action to enforce the law would expose the executive action to the processes of Arts. 226 and 32, if a fundamental right to carry on a profession or an occupation, trade or business is put in jeopardy. In the order of reference in this case, this position is summed up in the following observation:

> "Where the provision is void, the protection under Art. 265 fails, and what remains is only unauthorised interference with property or trade by a State Officer, and articles 19(1)(f) and (g) are attracted."

178. Where the law fails being opposed to fundamental rights as, for example, when it is void because it involves discrimination or otherwise invades rights protected by Part III, the protection of Art. 265 is again lost. Indeed, the law fails not because of Art. 265 but because of Art. 13, and a cause of action under Art. 35 may arise. This was recognised in *K.T. Moopil Nair* v. *State of Kerala*[(1)] where it was observed:

> "Article 265 imposes a limitation on the taxing power of the State in so far as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection thereof and, secondly, the tax must be subject to the conditions laid down in Art. 13 of the Constitution. One of such conditions envisaged by Art. 13(2) is that the Legislature shall not make any law which takes away or abridges the equality clause in Art. 14, which

enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Art. 14 of the Constitution, it must be struck down as unconstitutional".

179. This arose in a petition under Art. 32 of the Cons titution.

180. It appears that taxation laws were unsuccessfully challenged under Art. 32 of the Constitution as a breach of Art. 31(1) in *Ramjilal's case*[(1)] and *Laxmanappa Hanumantappa* v. *Union of India*[(2)]. In the former, the reason given was:

"Reference has next to be made to article 265 which is in Part XII, Chapter I, dealing with 'Finance'. That article provides that no tax shall be levied or collected except by authority of law. There was no similar provision in the corresponding chapter of the Government of India Act, 1935. If collection of taxes amounts to deprivation of property within the meaning of Art. 31(1), then there was no point in making a separate provision again as has been made in article 265. It, therefore, follows that clause (1) of article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise article 265 becomes wholly redundant ..... In our opinion, the protection against imposition and collection of taxes save by authority of the law directly comes from article 265, and is not secured by clause (1) of article 31. Article 265 not being in Chapter III of the Constitution, its protection is not a fundamental right which can be enforced by an application to this Court under article 32. It is not our purpose to say that the right secured by article 265 may not be enforced. It may certainly be enforced by adopting proper proceedings. All that we wish to state is that this application in so far as it purports to be founded on article 32 read with article 31(1) to this Court is misconceived and must fail."

Similar observations were made in the other case.

181. If by these observations it is meant to convey that the protection under Art. 265 cannot be sought by a petition under Art. 32, I entirely agree. But if it is meant to convey that a taxing law which is opposed to fundamental rights must be tested only under Art. 265, I find it difficult to agree. Articles 31(1) and 265 speak of the same condition. A comparison of these two Articles shows this:

Art. 31(1)— "No person shall be deprived of his property save by authority of law."

Art. 265— "No tax shall be levied or collected except by authority of law."

182. The Chapter on Fundamental Rights hardly stands in need of support from Art. 265. If the law is void under that Chapter, and property is seized to recover a tax which is void, I do not see why Art. 32 cannot be invoked. Where the authority of the law fails a tax, Art. 265 is offended, and the tax cannot be collected. A collection of such a tax will also offend Art. 32. Where the law is opposed to fundamental rights, and in the collection of such a void tax, a person is deprived of his property, Art. 31(1) is offended. It is not possible to circumscribe Art. 32 by making the remedy only upon Art. 265.

183. From this, it is clear that laws which do not offend Part III and are not otherwise *ultra vires* are protected from any challenge whether under Art. 265 or under the Chapter on Fundamental Rights. Where the laws are *ultra vires* but do not *per se* offend fundamental rights (to distinguish the two kinds of defects), they are capable of a challenge under Art. 265, and the executive action, under Art. 32. Where they are *intra vires* otherwise but void being opposed to fundamental rights, they can be challenged under Art. 265 and also Art. 32.

184. This position, however, changes radically when the law is valid but the action under it is challenged. The real difference in such cases arises, because the law is not challenged at all. What is challenged is the interpretation of the law by the taxing

authorities, and a breach of fundamental rights is said to arise from the wrong interpretation. In considering this matter, several kinds of cases must be noticed. Where the action of an officer of the State is wholly without jurisdiction (as, for example, when a sales tax officer imposes income-tax or *vice versa*, though such things are hardly likely to happen), it can have no support from the law he purports to apply. Cases of jurisdiction thus come within Art. 32. Other examples are an attempt to recover a tax twice over, where the first collection is legal (*Tata Iron and Steel Company's case*[(1)]; or acting beyond the period of limitation (*Madanlal Arora* v. *The Excise and Taxation Officer, Amritsar*)[(2)]. In such cases, even if the taxing authority thought on its own understanding of the law that it was acting within its jurisdiction, it would not avail, and the want of jurisdiction, if proved, would attract Art. 32. Speaking of such a situation, the order of reference in this case has said:

> "This again is a case in which the authority had no jurisdiction under the Act to take proceedings for assessment of tax, and it makes no difference that such assumption of jurisdiction was based on a misconstruction of statutory provisions."

The above was said of *Madanlal Arora's case*[(2)].

185. But where the law in made validly and in conformity with the fundamental rights and the officer enforcing it acts with jurisdiction, other considerations arise. If, in the course of his duties, he has to construe provisions of law and miscarries, it gives a right of appeal and revision, where such lie, and in other appropriate cases, resort can be had to the provisions of Arts. 226 and 227 of the Constitution, and the matter brought before this Court by further appeals. This is because every erroneous decision does not give rise to a breach of fundamental rights. Every right of appeal or revision cannot be said to merge in the enforcement of fundamental rights. Such errors can only be corrected by the processes of appeals and revisions. Article 32 does not, as already stated, confer an appellate or revisional jurisdiction on this Court, and if the law is valid and the decision with jurisdiction, the protection of Art. 265 in not destroyed. There is only one exception to this, and it lies within extremely narrow limits. That exception also bears upon jurisdiction, where by a misconstruction the State Officer or a quasi-judicial tribunal embarks upon an action wholly outside the pale of the law he is enforcing. If, in those circumstances, his action constitutes a breach of fundamental rights, than a petition under Art. 32 may lie. The oases of this Court in which interference can be sustained on this ground are many; but as examples may be seen the following: *Amar Singh, case*[(1)] and *Mohanlal Hargovind's case*[(2)]. The first is not a case of a taxing statute, but the second is.

186. The decision in *Kailas Nath's case*[(3)], with respect, appears to have unduly widened the last narrow approach by including cases of interpretation of provisions of law where the error is not apparently one of jurisdiction as within Art. 32. It cited as authority the case of *Bengal Immunity Company*[(4)], which does not bear out the wide proposition, The case involved an interpretation of notification to find out whether an exemption applied to a particular case or not, and no question of want of jurisdiction, as explained by me, arose there. *Kailas Nath's case*[(3)] does not appear to confine the exercise of powers under Art. 32 to cases of errors of jurisdiction. In my opinion — and I say it respectfully — it must be regarded as having stated the proposition a little too widely.'

187. Whether taxing statutes which have the protection of Art. 265 can be questioned under Arts. 19(1)(f) and (g) is a subject, which need not be gone into in this case. I do not, therefore, express any opinion upon it. Here, the several statutes and the notification are not challenged as *ultra vires*. What is claimed is that by a wrong interpretation of the word '*bidis*' and 'tobacco' as used in the notification of December 14, 1957, an exemption is denied to the petitioner, to which she was entitled, and this affects her fundamental rights under Arts. 31(1) and 19(1)(g). This

is not an error of jurisdiction. Whether the Sales Tax Officer's interpretation is right or the contrary interpretation suggested on behalf of the petitioner is right, is a matter for decision on the merits of the case. If there is an error, it can be corrected by resorting to appeals, revisions, references to the High Court and ultimately by appeal to this Court. This Court cans not ignore these remedies and embark upon an examination of the law and the interpretation placed by the authorities, when no question of jurisdiction is involved. To do so would be to convert the powers under Art. 32 into those of an appeal. In my opinion, the petition under Art. 32 is misconceived in the circumstances of this case. I would, therefore, dismiss it with costs.

188. As regards the application of the appeal, I am of opinion that the party was negligent in not prosecuting it. I would therefore, dismiss the application for restoration but without any order about costs.

N. RAJAGOPALA AYYANGAR, J.:— This bench has been constituted for deciding the following two questions set out at the conclusion of what might be termed the order of reference (1): Is an order of assessment made by an authority under a taxing statute which is *intra vires*, open to challenge as repugnant to Art. 19(1)(g) on the sole ground that it is based on a mis-construction of a provision of the Act or of a notification issued thereunder (2) Can the validity of such an order be questioned in a petition under Art. 32 of the Constitution? Though the matter was not discussed with any elaborateness, both these questions were answered in the affirmative by this Court in *Kailashnath* v. *The State of U.P.*[(1)]. In effect therefore the bench has been constituted for considering the correctness of the decision on these points in *Kailashnath's case*.

189. Before proceeding to consider the submissions of learned Counsel on either side it js necessary to point out two matters;

(1) It was agreed before us that in deciding the first question set out above we need not consider the special features applicable to taxing legislation and in particular the point as to whether the constitutional validity of such legislation could be tested with reference to the criteria laid down by Art. 19(1)(f); in other words, the limits to which Art. 19 would be attracted to a law imposing a tax. The discussion in this judgment therefore proceeds on the basis of there being no distinction between a law imposing a tax and other laws.

(2) The second matter which I consider it necessary to state at the outset is that notwithstanding the industry of Counsel which has enabled them top lace before us quite a large number of decisions of this Court which have been referred to in the judgments of Kapur and Subba Rao, JJ., in none of them was the point approached with reference to the matters argued before us. Some of these decisions proceed on the basis that in the circumstances stated in question No. 1 a fundamental right had been invaded and on that basis afforded to the petitioner before them the relief sought. Other decisions state that no fundamental right was involved in the grievance put forward by the petitioners before them and relief has been refused on that basis. In none of them was the question discussed on principle as to when alone a fundamental right would be invaded and in particular as to whether a breach by a quasi-judicial authority of the provisions of a law which is otherwise valid, could involve an invasion of a fundamental right. For this reason I propose to discuss the question on principle and without reference to the decisions which were placed before us at the hearing. I feel further justified in doing so because they have all been referred to in the judgment of Kapur, J., and discussed in detail by Subba Rao, J.

190. I shall now proceed to consider what in my view should be the answer to the first of the questions propounded for our decision and am ignoring the reference therein to a taxing enactment. Pausing here it might be useful to recall briefly the

function of Part III in the Constitution. The rule of British Constitutional Law and in general of the Dominion Constitutions framed by the British Parliament might broadly be stated to be that it asserts the sovereignty of the Legislature in the sense that within the sphere of its activity in the case of a Federal Constitution and in every sphere in the case of a unitary one its will was supreme and was the law of the land which the Courts were bound to administer. As Dicey has pointed out, there are no legal limits to the sovereignty of Parliament. Public opinion, as well as the fear engendered by the possibility of a popular revolt, might impose practical restraints upon the exercise of sovereignty but so would be the limitations or restraints dictated by good sense, justice or a sense of fairplay. But so far as the legal position was concerned, any law made by Parliament was legal and could be enforced. Our Constitution makers did not consider that to the conditions of this country such a vesting of power in the legislatures or in the State would be proper or just or calculated to further the liberty of the individual which they considered was essential for democratic progress. It was in these circumstances and with these ideas that they imposed fetters on State action in Part III entitled "Fundamental Rights". Article 13 laid down that "every law whether made before or after the Constitution which was inconsistent with the rights guaranteed by the succeeding Articles should, save as otherwise expressly provided, be invalid to the extent of the repugnancy". And "law" was defined in a comprehensive manner so as to include not merely laws made by Parliament or the legislatures but every piece of subsidiary legislation including even notifications. The scheme therefore of the Constitution makers was to prescribe a code of conduct to which State action ought to conform if it should pass the test of constitutionality. The rights included in the eighteen Articles, starting from 14 up to 31, comprehend provisions for ensuring guarantees against any State action for protecting the right to life, liberty, and property, to trade and occupation, besides including the right to freedom of thought, belief and worship. The general scheme of Part III may be stated thus: Certain of the freedoms are absolute, i.e., subject to on limitations, e.g., Art. 17, Art. 20(1). In respect of certain others the Articles (vide Art. 19) set out the precise freedom guaranteed as well as its content and the qualifications to which the exercise of that freedom might be subjected by enacted law or action taken under such law. Having thus enumerated these freedoms and laid down the limitations, if any to which they could be subjected Art. 32 vests in the Supreme Court the authority and jurisdiction to ensure that the fundamental rights granted by Part III are not violated, and even the right to move this Court for appropriate relief for infraction of a fundamental right is itself made a fundamental right which ordinary legislation may not affect. The purpose of my drawing attention to these features is two fold: (1) to emphasize the great value which the Constitution-makers attached to the freedoms guaranteed as the *sine qua non* of progress and the need which they considered for marking out a field which was immune from State action, and (2) the function of this Court as a guardian of those rights for the maintenance of individual liberty enshrined in the Constitution. It was with advertance to this aspect of the matter that this Court observed in *Daryao* v. *The State of U.P.*[(1)]:

> "There can be no doubt that the fundamental right guaranteed by Art. 32(1) is a very important safeguard for the protection of the fundamental rights of the citizens, and as a result of the said guarantee this Court has been entrusted with the solemn task of upholding the fundamental rights of the citizens of this country. The fundamental rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them exoept as provided by the Constitution itself. It is because of this aspect of the

matter that in *Romesh Thappar* v. *The State of Madras*, (1950 S.C.R. 594) in the very first year after the Constitution came into force, this Court rejected a preliminary objection raised against the competence of a petition filed under Art. 32 on the ground that as matter of orderly procedure the petitioner should first have resorted to the High Court under Art. 226, and observed that 'this Courtis thus constituted the protector and guarantor of the fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights'. Thus the right given to the citizen to move this Court by a petition under Art. 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right, and in dealing with the objection based on the applications of the rule of *res judicata* this aspect of the matter has no doubt to be borne in mind."

191. Before dealing with the merits of the case it is necessary to mention that the following positions were conceded on the side of the respondent and,' in my opinion, properly: (1) If the levy was imposed or the burden laid on a citizen (as the petition before us is concerned with a legislation imposing a tax I am using phraseology appropriate to such an enactment, but as would be seen, the principle is of wider application and would cover infringement of liberties other than in relation to property and by laws other than in relation to taxation) by a statute beyond the competence of a legislature to enact as not falling within the relevant entry in the legislative list the action by government or governmental officers would involve the violation of the freedom guaranteed by Art. 19(1)(f) — to acquire, bold and dispose of property or by clause (g) to carry on any trade or business, either the one or the other and in some cases both and could therefore furnish a right to invoke the jurisdiction of this Court Art. 32 notwithstanding that the particular action impugned was by a quasi-judicial authority created under such an enactment. The reason for this concession must obviously be that the authority functioning under such a law could have no legal basis for its existence and therefore his or its action would be without authority of law. (2) The legislature may profess to legislate under a specified head of legislative power which it has, but might in reality be seeking to achieve indirectly what it could not do directly. In such a case also it was conceded that the tax imposed would infringe the guarantee embodied in Art. 19(1)(f) and (g). It would, however, be seen that this is in reality merely one manner in which there might be lack of legislative power already dealt with under head (1), (3) The same result would follow and there would be a breach of a fundamental right if though there was legislative competence to enact the legislation in the sense that the subject-matter of the law fell within one of the entries of the Legislative List, appropriate to that legislature, but the legislation was invalid as violating other fundamental rights of a general nature applicable to all legislation, such as the violation of Art. 14, etc. (4) Even in cases where the enactment is valid judged by the tests in 1 to 3 above, if on a proper construction of the enactment, the quasi-judicial authority created to function under the Act and to administer its provisions, acted entirely outside the jurisdiction conferred on him or it by the enactment, such action, if violative of the fundamental rights, could be complained of by a petition under Art. 32 and this Court would be both competent and under a duty to afford relief under that Article. Here again, the ratio on which the concession is based is similar to, though not identical with the basis upon which the concession as regards action under invalid legislation was made. (5) Where even if the officer or authority had jurisdiction, still if he had adopted a procedure contrary to either the m inflatory provisions of the statute or to the principles of natural justice, the resulting order and the imposition of liability effected thereby were conceded to involve a breach of the fundamental right.

192. These exceptions having been conceded by learned Counsel for the respondent, it is sufficient if attention is confined to the question, whether a patently incorrect order passed on a misconstruction of a charging enactment would or would

not result in the violation of a fundamental right and is that the very narrow question which this bench is called upon to answer.

193. The argument of the learned Attorney-General who appeared for the petitioner, was short and simple. His submission rested on the correctness of the following steps:

(1) The Constitution has vested in this Court the power to ensure, when approached by a petition under Art- 32, that fundamental rights were not violated and accordingly there is a constitutional duty cast upon the Court to afford relief when so approached in every case where fundamental rights were violated.

(2) The two matters which a petitioner seeking relief under Art. 32 of the Constitution would have to establish would therefore be: (a) the existence in him of the fundamental right which he complains has been infringed, and (b) its violation by State action. If these two conditions are satisfied the petitioner is entitled as of right to the grant of relief and the Court would be under a duty to afford him that relief by passing appropriate orders or directions which would be necessary to ensure the maintenance of his fundamental right.

(3) There was no dispute that a fundamental right could be invaded by State action which was legislative in character, or where the complaint was as regards the action of executive and administrative authorities created even under valid statutes.

(4) If the above premises which were not in dispute were granted, the next step was whether the decision of a quasi-judicial authority constituted under a valid law could violate a guaranteed freedom. A quasi-judicial authority he urged is as much part of the machinery of the State as executive and administrative authorities, and its decisions and orders are as much State action and if the function of Part III of the Constitution is to protect the citizen against improper State action, the protection should logically extend to the infraction of rights effected by such orders of quasi-judicial authorities.

194. The short question for decision may in the circumstances be formulated thus: Can an action of a quasi-judicial authority functioning under a valid enactment and not overstepping the limits of its jurisdiction imposed by the Act and not violating the procedure required by the principles of natural justice but whose decision is patently erroneous and wholly unjustified on any proper interpretation of the relevant provision, be complained of as violative of the fundamental rights of a party prejudicially affected by such mis-interpretation. Taking the handy illustration of a taxing statute, if by a plain misinterpretation of the charging-provision, an assessing authority levies a tax on transaction A while the statute on its only possible construction imposes no tax on such a transaction, is any fundamental right of the party who is subjected to such an improper levy prejudicially affected by such an imposition?

195. In considering the proper answer to this question it is necessary to exclude one matter which is apt to cloud the issue and it is this. The statute under which the quasi-judicial authority functions or makes the decision or order may contain provisions for enabling the correctness of the decision reached or the order passed being challenged by an appeal or may provide for a gradation of appeals and further revisions. The existence of procedures for redressing grievances or correcting errors of primary or appellate authorities is obviously wholly irrelevant for a consideration of the question as to whether the order of the authority involves an infringement of fundamental rights or not. This Court has laid down in a large number of cases of which it is sufficient to refer to: *Union of India* v. *T.R. Varma*[(1)], *The State of Uttar Pradesh* v. *Mohammad Nooh*[(2)], and *A.V. Venkateswamn, Collector of Customs, Bombay* v. *Ramchand Sobharj Wadhwani*[(3)] that the existence of an alternative remedy is no legal bar to the exercise of the jurisdiction of the High Court under Art. *226* of

the Constitution. If that is so in the case of the jurisdiction under Art. 226 it must *a fortiori* be so in the case of a guaranteed remedy such as is vested in this Court under Art. 32 of the Constitution. Besides it cannot be predicated that there is a violation of a fundamental right if the party aggrieved has no appeal provided by the statute under which the authority acts, but that if other statutory remedies are provided there would be no violation of a fundamental right, for the question whether a fundamental right is violated or not is dependent on the action complained of having an impact on a guaranteed right, and its existence or non-existence or the action constituting a breach of a fundamental right cannot be determined by the absence or presence of procedures prescribed by the statute for correcting erroneous orders. The absence of any provision for redress by way of appeal may have a bearing on the reasonableness of the law, but it has none on the point now under discussion. Besides, it cannot be that if the remedies open under the statute are exhausted and the authority vested with the ultimate authority under the statute has made its decision and there is no longer any possibility of an objection on the score of an alternative remedy being available, there would be a violation of a fundamental right with the consequence that this Court would have jurisdiction, but that if it was approaohed at an earlier stage there was no violation of a fundamental right and that it lacks jurisdiction to afford relief under Art. 32, for it must be admitted that in ultimate analysis there is no distinction between the nature and quality of an order passed by an original as distinct from one by an appellate or revisional authority — in its consequences vis-a-vis the fundamental right of the individual affected. It is common ground and that is a matter which has already been emphasized that if a petitioner made out to the satisfaction of the Court that he has a fundamental right in respect of the subject-matter and that the same has been violated by State action, it is imperative on the Court to afford relief to the petitioner the Court not having any discretion in the matter in those circumstances. On this basis the only ground upon which the jurisdiction could be denied would be that the order or decision of the authority which is impugned does not prejudicially affect the fundamental right of the petitioner, for it cannot be that the order of the ultimate authority under the statute could involve the violation of a fundamental right but that the same orders passed by authorities lower down in the rung under the statute would not involve such a violation.

196. Pausing here, one further matter might also be mentioned for being put aside. This Court has laid down that the principal underlying the rule of *res judicata* is based on principles of law of general application and as such would govern also the right to relief under Art. 32. That principle is not involved in the consideration of the point under discussion, because what is sought to be challenged as violating a fundamental right is the very order of the authority and we are not concerned with a collateral attack on an order that had become final as between the parties thereto.

197. Coming back to the point under consideration it was conceded by the learned Additional Solicitor-General who appeared for the respondent that legislative action might involve an infraction of fundamental rights and that similarly the action of the executive-authorities might involve such an infraction even when the legislation under which they acted or purported to act was within legislative competence and within the constitutional limitations imposed by Part III. His contention, however, was that a very different state of circumstances arose when the action complained of was by a quasi-judicial authority. His submission may be summarised in the following terms:— Where a stat ute was within legislative competence and does not by its provisions violate any of the constitutional guarantees in Part III, it follows as a matter of law that every order of a quasi-judicial authority vested with power under the Act is also valid and constitutional and that the legality and constitutionality of the statute would cover every act or order of such an authority if the same was within his or its jurisdiction and prevent them from the challenge of unconstitutionality. The same argument was

presented in a slightly different form by saying that such a quasi-judicial authority has as much jurisdiction to decide rightly as to decide wrongly and that if there was error in such a decision the only remedy of the citizen affected was by resort to the tribunals set up by the Act for rectifying such errors and that in the last resort, that is after the entire machinery under the Act was exhausted, the affected party had a right to approach the High Courts under Art. 226 in cases where the error was of a type which could be brought within the scope of the remedial-writs provided by that Article.

198. Before examining the correctness of this submission it is necessary to mention that Mr. Chari who appeared for some interveners supporting the Respondent, made a submission which if accepted would have far-reaching consequences. His contention was that the State in Part III against whose action the fundamental rights were guaranteed was confined to the legislative and the executive branches of State activity and that the exercise of the judicial power of the State would never contravene the fundamental rights guaranteed by Part III. It would be seen that this is wholly different from the submission made on behalf of Government by the learned Additional Solicitor-General and it would be convenient to deal with this larger question after disposing of the arguments of Mr. Sanyal.

199. The question for consideration is what exactly is meant when it is said that a statute is valid in the sense of: (a) being legally competent to the legislature to enact, and (b) being constitutional as not violative of the freedoms guaranteed by Part III. It is obvious that it can only mean that the statute properly construed is not legally incompetent or constitutionally invalid. In this connection it is of advantage to refer to a point made by Mr. Palkhivala who appeared for some of the interveners in support of the petition. One of his submissions was this: Suppose there is an Act for the levy of sales-tax which is constitutionally valid. On its proper construction it does not purport to or authorise the imposition of a tax on a sale "in the course of export or import." If it did so expressly authorise, it is obvious that such a provision in the enactment would be *ultra vires* and unconstitutional as violative of the prohibition contained in Art. 286(1)(a). Suppose further that an authority functioning under such an enactment vested with jurisdiction to assess dealers to sales tax proceeds to levy a tax and includes in the computation of the assessable turnover not merely those items which are properly within the legislative competence of the

200. State Legislature to tax under the head 'Taxes on the sale of goods' but also the turnover in respect of transactions which are plainly "sales in the course of export or import" and this it does on a patent misconstruction of the statute, could it be said that the fundamental right of the dealer guaranteed by Art. 19(1)(f) and (g) was not violated by the imposition of the sales tax in such circumstances? The logic behind this argument might be stated thus: If the legislature had in terms authorised the imposition of sales tax on such a transaction it would have been plainly void and illegal and hence *ex-concessis* the fundamental right in respect of property as well as of business under Art. 19(1)(f) and (g) would be violated by the levy of the tax and its collection. How is the position improved if without even the legislature saving so in express terms an officer who purports to act under the statute himself interprets the charging provision so as to bring to tax a transaction which it was constitutionally incompetent for the legislature itself to tax. I find the logic in this reasoning impossible to controvert, nor did the learned Additional Solicitor-General attempt any answer to this argument.

201. It appears to be manifest that the fact that an enactment is legislatively competent and on its proper construction constitutionally valid, i.e., it does not contain provisions obnoxious to Part III of the Constitution, does not *ipso jure* immunise the actions of quasi-judicial authorities set up under the statute from constituting an invasion of a fundamental right. What the legislature could not in express terms enact, could not obviously be achieved by the State vesting power in an authority created by

it to so interpret the enactment as to contravene the Constitution. It might be suggested that such a case would fall within the exception which it is conceded exists that an act of a quasi-judicial authority which is plainly beyond its jurisdiction could give rise to the violation of a fundamental right in regard to which this Court might afford relief if moved under Art. 32. In my opinion, this is not quite a satisfying answer because the suggestion is coupled with the assertion of the well-worn dictum as regards the jurisdiction of the tribunal to decide wrongly as much as rightly. The illustration I have given of unconsitutional action by authorities acting under valid and constitutional enactments cannot be properly answered unless it be held that a plain and patent mis-interpretation of the provisions of the enactment could it self give rise to a plea that it was beyond the jurisdiction of the authority but that would be stretching the concept of jurisdictional errors beyond what is commonly understood by that term.

202. Let me next take a case where the mis-interpretation by the quasi-judicial authority does not involve the levy of a duty beyond the competence of the legislature enacting the statute. In the type of case now under consideration the quasi-judicial authority by a plain misinterpretation of, let us say, the charging provision of a taxing enactment (as that furnishes a handy illustration of the point now under discussion) levies a tax on a transaction which, under the Constitution, it was competent for the legislature to levy if it had been so minded. In other words, there are two related transaction or taxable events — A & B. The taxing-statute has selected the transaction or taxable event A and has imposed a tax upon it, and it alone. The authority vested with jurisdiction under the Act, however, by a patent misconstruction of the enactment considers that not merely the transaction or taxable event A but also the related transaction, or taxable event B is within the charging provision and levies a tax thereon and proceeds to realise it. The problem now under consideration is, could or could it not be said that in such a case the fundamental right of a citizen who has been wrongly assessed to tax in respect of the transaction or taxable event B which *ex-concessis* was not intended to be taxed under the enactment has been violated. With the greatest respect to those who entertain a contrary view I consider that the question can be answered only in one way and that in favour of holding that the fundamental right of the citizen is prejudicially affected. When once it is conceded that a citizen cannot be deprived of his property or be restricted in respect of the enjoyment of his property save by authority of law, it appears to me to be plain that in the illustration above there is no statutory authority behind the tax liability imposed upon him by the assessing authority. The Act which imposed the tax and created the machinery for its assessment, levy and collection is, no doubt, perfectly valid but by reason of this circumstance it does not follow that the deprivation of property occasioned by the collection of a tax which is not imposed by the charging section does not involve the violation of a fundamental right merely because the imposition was by reason of an order of an authority created by the statute, though by a patent mis-interpretation of the terms of the Act and by wrongly reaching the conclusion that such a transaction was taxable.

203. I consider that the four concessions made by the respondent which I have set out earlier, all proceed on the basis that in these cases there is no valid legislative backing for the action of the authority — executive, administrative or quasi-judicial. I consider that the reason of that rule would equally apply to cases where the quasi-judicial authority commits a patent error in construing the enactment — for in such a case also there would obviously be no legislative backing for the action resulting from his erroneous decision.

204. There is however one matter to which it is necessary to advert to avoid misconception, and that concerns the effect of findings reached on questions of fact by quasi-judicial authorities. Provided there is relevant evidence on which the finding

could rest, the finding would preclude any violation of a fundamental right because this Court, though in the absence of a finding of a duly constituted authority would have the power and jurisdiction to investigate even disputed facts in an appropriate case, would however accept findings of fact by duly constituted authorities and proceed to find out whether on that basis a fundamental right exists and is prejudicially affected by the action impugned. The distinction which I would, in this context, draw and emphasise is between a mis-interpretation of a statute by which an authority brings within the scope of an enactment transactions or activities not within it on any possible construction of its terms, and erroneous findings on facts by reason of which the authority considers a transaction as being within the Act even if properly construed.

205. To sum up the position: (1) If a statute is legally enacted in the sense of being within legislative competence of the relevant legislature and is constitutional as not violating any fundamental rights, it does not automatically follow that any action taken by quasi-judicial authorities created under it cannot violate fundamental rights guaranteed by Part III of the Constitution. The legislative competence, the existence of which renders the enactment valid, is confined to action by the authorities created under it, which on its proper construction could be taken. In an authority constituted under such a legal and valid enactment oversteps the constitutional limitations on the legislative power of the State Legislature, the acts of such an authority would be plainly unconstitutional and the consequenoes arising out of unconstitutional State action would necessarily attach to such action. If an “unconstitutional Act” of the btate Legislature would invade fundamental rights the same character and the same consequence must *a fortiori* follow when that act is not even by the Btate Legislature but by an authority constituted under an enactment passed by it. (2) Where State action without legislative sanction behind it would violate the rights guaranteed under Part III, the result cannot be different because the State acts through the mechanism of a quasi-judicial authority which is vested with jurisdiction to interpret the enactment. The absence of legislative sanction for the imposition of an obligation or the creation of a liability cannot be filled in by the misinterpretation by an authority created under the Act.

206. To hold that a patently increased interpretation of a statute by a quasi-judicial authority by which a liability is imposed on a citizen does not violate his fundamental rights under Arts. 19(1)(f) and (g) might not have done consequences but for two circumstances. The first is as regards the difficulty of designating with certainty an authority as quasi-judicial. The fact is that there is no hard and fast formula for determining when an authority which is vested with power to act on behalf of the State falls within category which is termed ‘quasi-judicial’. As Prof. Robson stated; “Lawyers, of course, have often had to decide, in practical cases arising in the courts, whether a particular activity was of a judicial or an administrative (or ‘ministerial’) character; and important consequences have flowed from their decisions. But those decisions disclose no coherent principle, and the reported cases throw no light on the question from the wider point of view..... save to demonstrate, by the very confusion of thought which they present, the difficulty of arriving at a clear basis of distinction”. The significance of this point stems from the fact that it is a matter of concession that where the power of the State is vested in an executive or administrative authority under an enactment which is valid and constitutional and such an authority does an act which on the proper construction of the relevant statute is not justified by it, the act may be of such a character as to violate a fundamental right guaranteed by Part III, i.e., if the impact is in a field which is protected from State interference, and such a violation could be complained of by a petition to this Court under Art. 32. At the same time it is the contention of the respondent that a similar act, order or decision by a quasi-judicial functionary which is not warranted by

the terms of the statute, does not give rise to the violation of fundamental rights.

207. It is therefore necessary to examine somewhat closely the dividing line between an executive authority whose actions may give rise to the violation of a fundamental right and what is termed a "quasi-judicial" authority whose actions do not have that effect. To start with, it is obvious that the nature of the act or of the order might be the same, so that if the same act proceeded from one authority it would have a particular effect but would have quite a different effect or would not have that effect if the same act proceeded from a slightly different type of authority also exercising the power of the State. This Court in *Express Newspapers (Private) Ltd.* v. *The Union of India*[(1)] quoted with approval the following statement of the law as summarised in *Halsbury's Law of England* (3rd Ed., Vol. 2 at pp. 53-56):

> "..... An administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of, and are not in accordance with the practice of a court of law ..... A body may be under a duty, however, to act judicially although there is no form of lis inter partes before it ....."
>
> and in a further passage from the decision in *R.* v. *Manchester Legal Aid Committee*[(1)] which this Court extracted it was observed:
>
> "The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively."

208. The question therefore whether an authoritiy created under a statute is a quasi-judicial authority or, in other words, an authority which is bound to act judicially cannot be laid down by any hard and fast rule but must be gathered from the entire provisions of the Act read with the purpose for which the power is vested in the authority as well as the grounds for the creation of such authority. I must however confess that this is a branch of law in which authorities far from shedding light are in reality unhelpful — for one gets nowhere if these lay down as they do, that an authority would be quasi-judicial, if (not being a court) it is bound to act judicially and that to find out when, apart from clear provisions in the statute, it is bound to act judicially — you are told that it is when it is a quasi-judicial authority. Bearing in mind these circumstances I find it not possible to accept the contention that if the power of the State be exercised by an authority which on a conspectus of the statute is deemed to be quasi-judicial and the exercise of such power prejudicially affects rights of life, liberty or property which are guaranteed by Part III the same cannot amount to a violation of a fundamental right, whereas if on a proper construction of the statute that authority were a mere administrative body but the act remains the same, it would so involve.

209. Let me next see whether there could be any rational or reasonable basis on which such a contention could rest. I take it that the reason why quasi-judicial authorities are suggested as being exceptions to the general rule that State action which involves a prejudicial result on a person's right to property etc. involves a violation of fundamental rights is that a quasi-judicial authority is vested with the jurisdiction to *decide* and that the conferment of such a jurisdiction carries with it by necessary implication a right to decide rightly as well as wrongly; in other words, that it does not out step the limits of the jurisdiction by a decision which is erroneous. I consider that it is the case of the transference of a principal to a branch of law or a situation in which it has no place or relevance. The question for consideration in the context of a petition under Art. 32 is whether there is valid legal sanction behind the action of the authority, for apart from such a sanction it must be and it is conceded that there would be a violation of a fundamental right. Besides, if this proposition is right, then it must rest on the principal that the quasi-judicial authority is vested with

the right to decide. Does it, however, follow that executive action does not in vole a decision or posit a right to decide? If it is clear law, as must be conceded, that there is no necessity to have a *lis* in order to render the body or authority deciding a matter to be treated as a quasi-judicial authority, then it is very difficult to conceive of few actions by the executive which do not involve an element of discretion. No doubt in the case of an administrative or executive body the decision is not preceded by a hearing involved in the maxim *Audi Alteram Partem* but this, in my opinion of the merely the procedure before the decision is reached and is not the essence of the distinction. Besides, as pointed out by Prof. Robson in 'Justice and Administrative Law' (a)

"Sometimes the administrative and judicial functions of an office have been so inextricably blended that it is well-night impossible to say which capacity is the dominant one."

210. In this state of affairs to determine the maintainability of a petition under Art. 32 by proceeding on an investigation as to the nature of the authority which passed that order when, as I have pointed out earlier, there is no essential difference in either the nature or the quantum of the injury suffered by the citizen, cannot be sustained on any proper interpretation either of the Constitution or the principles of law governing the interpetation of statutes. I would, therefore, hold that the freedoms guaranteed by Part III may be violated by the action of a quasi-judicial authority acting within the limits of its jurisdiction under a valid and constitutional statute where it plainly misinterprets the provisions of the statute under which it functions or which it is created to administer.

211. As regards the practical effect of accepting the contention of the learned Additional Solicitor General there is a second matter to which I consider it essential to draw attention. With a very great increase in governmental activity and the diverse fields in which it operates owing to the State being a welfare State as contrasted with a Police-State concerned mainly with the maintenance of law and order, there has necessarily been a great proliferation of governmental departments with the attendant creation of several authorities which have to pass decisions in spheres affecting the citizen at manifold points. It is therefore true to say that in a modern welfare State administrative agencies exercising quasi-judicial authority are vastly more numerous and if I may add, more important and more vital than even the normally constituted Courts. In such a situation to hold that fundamental rights would not be involved by the activities of these various authorities which are increasing in number day by day would, be, in my opinion, to deny to the citizen the guarantee of effective relief which Art. 32 was designed to ensure in the great majority of cases. In such a situation to assert at one breath the prime importance and significance of the function of this Court as a protector and guarantor of fundamental rights, and at the same time to hold that these numerous statutory authorities which are created to administer the law cannot invade those rights would be to render this assertion and this guarantee of relief mostly empty of meaning. Though if the words of the Constitution were explicit, considerations such as there would be of no avail, yet even if the matter were ambiguous I am clearly of the opinion that the rejection of the broad contention raised on behalf of the respondent is justified as needed to give effect to the intentions of the framers of the Constitution. But as I have pointed out already, on no logical basis could it be held that where an act or order of a quasi-judicial authority lacks legislative backing, it cannot still impinge on a person's fundamental right and where an order suffers from patent error, it is no legislative sanction behind it.

212. It now remains to consider the point urged by Mr. Chari that 'State' action which involves the violation of a fundamental right does not include that resulting from what be termed "the judicial authority of the State". The argument put forward in support of this proposition was rested in most part, if not wholly, on the terms of Art.

12 of the Constitution and the definition of the expression "State" contained in it. Article 12 enacts:

"In this part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India."

213. It was pointed out that the "State" whose action might involve the violation of fundamental rights or rather as against whom the citizen had been granted a guarantee of certain rights under this Part was defined to include the "Government" and "Parliament" of the Union and of the States, and the local authorities, did not name the "Judicial power of the State" as within it. If learned Counsel is right in this submission that the State in Part III impliedly excludes judicial and quasi-judicial authorities by reason of the absence of specific mention the further submission that by any of the actions of such anthorities fundamental rights could not be violated would appear to be made out and it has to be added that if this contention is right some of the concessions made by Mr. Sanyal would be unjustified.

214. There are several considerations to which I shall immediately advert which conclusively negative the correctness of the inference to be drawn from judicial and quasi-judicial authorities not being specifically named in Art. 12. (1) In the first place, it has to be pointed out that the definition is only inclusive, which itself is apt to indicate that besides the Government and the Legislature there might be other instrumentalities of State action which might be comprehended within the expression "State". That this expression "includes" is used in this sense and not in that in which it is very occasionally used as meaning "means and includes" could be gathered not merely from other provisions of Part III but also from Art. 12 itself. Article 20(1) would admittedly refer to a limitation imposed upon the judicial power of the State and is obviously addresssed also, if not wholly, to judicial authorities. Mr. Chari however sought to get over the implication arising from Art. 20(1) by suggesting that the definition in Art. 12 which excluded judicial and quasi-judicial authorities from within the purview of the expression "State" should be understood as applying only subject to express provision to the contrary. I feel wholly unable to accept the method suggested of reconciling the presence of Art. 20(1) with the interpretation of Art. 12 as excluding judicial and quasi-judicial authorities. No doubt, the definition in Art. 12 starts with the words "unless the context otherwise requires", that expression however could serve to cut down even further the reach of the definition and cannot serve to expand it beyond the executive and legislative fields of State action if the word "includes" were understood as "means and includes" which is the contention urged by learned Counsel. Again, Art. 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot, obviously be read as *ejusdem generis* with either the Government and the Legislatures or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a statute and functioning within the territory of India. There is, no characterisation of the nature of the "authority" in this residuary clause and consequently it must include every type of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws (2). Among the reliefs which on the terms of Art. 32 this Court might afford to persons approaching it complaining of the violation of the fundamental right is the issue of a writ of *certiorari* specifically enumerated in that Article. It is common ground that that writ is available for issue only against judicial or quasi-judicial authorities and it would normally follow that quasi-judicial authorities could equally with other instruments of State action violate fundamental rights which could be redressed by the issue of this type of writ. (3) The theory propounded by learned Counsel is based on what might be

termed the rigid doctrine of the separation of powers which is not any feature of our Constitution as has bean repeatedly laid down by this Court. (4) Even on the words of Art. 12 as they stand the construction suggested by learned Counsel has to be rejected. The article refers to the government (of Union and of the States) as within the definition of a "State". It is however admitted that both the Government of the Union as well as of the State, function as quasi-judicial authorities under various statutory enactments. The question would at once arise whether when the "government" exercise such powers it is deemed to be a "government" falling within the definition of "State" or should be classified as a judicial authority wielding 'the judicial power of the State' so as to be outside the definition, so that its decisions and orders do not give rise to a violation of a fundamental right. Article 12 on any reasonable construction cannot permit the dissection of "government" for the purpose of discovering the nature or the quality of the powers exercised by it, into the three fields of executive pure and simple, judicial and legislative for the purpose of a fresh reclassification into certain categories. When government exercises any power, be it executive pure and simple, or quasi-judicial under a statute or quasi-legislative in say framing subordinate legislation, it does so as "government" and no further sub-division of it is possible except for the purposes merely of academic study or for determining the nature of the relief which might be had by persons affected by its activities in any particular field. Similarly, Parliament is vested with a quasi-judicial power to punish for contempt which itself is by reason of such power belonging to the Parliament of the United Kingdom and this if anything is an indication that the constitution does not recognise any doctrine of the separation of powers. In other words, the reference to the Government and the Legislature in the definition is a reference to them as institutions known by that name and is not with a view to describe their particular functions in the body politic.

215. (5) That the reference to the Government and the Legislatures is to them as institutions and is not to be understood as a reference to their functions, viz., to bodies performing executive and legislative functions is perhaps forcefully brought out by the inclusion of "Local authorities" in the definition of "State". It is obvious that municipal and local Board authorities going under various descriptions in the several State would be comprehended within that term. Now municipal councils exercise, as is well known, legislative, executive as well as quasi-judicial functions. They frame Rules and bye-laws which are suboidinate legislation and would fall within the description of "laws" as defined by Art. 13. Municipal Councils are vested with administrative functions and they also exercise quasi-judicial functions when assessing taxes, hearing taxation appeals, to mention only a small fraction of the quasi-judicial power which they possess and exercise in the discharge of their functions as the local administration. If the "local authority" as a whole is a "State" within the definition there is no canon of construction by which any part of the action of that authority could be designated as not falling within State action for the purpose of giving rise to violation of a fundamental right. (6) There is only one other matter which need be referred to in this connection. Both this Court, as well as the High Court have vested in them the power to make rules, and it cannot be disputed that such rules would be "laws" within the definition of the expression in Art. 13. If so, it is manifest that such rules might violate the fundamental rights, i.e., their validity would depend *inter alia* on their passing the test of permissible legislation under Fart III. This would directly contradict any argument that Courts and quasi-judicial authorities are outside the definition of State in Art. 12.

216. In the face of these deductions following from the Constitution itself, I find it wholly impossible to accede to the submission that what is termed as judicial power of the State which, it is submitted, would include quasi-judicial authorities created under statutes do not fall within the definition of the "State" and that their actions therefore

are not to be deemed "State" action against which the Constitution has provided the rights guaranteed under Part III.

217. I would therefore answer the question referred to the Bench by saying that the action of quasi-judicial authority could violate a fundamental right if on a plain mis-construction of the statute or a patent misinterpretation of its provisions such an authority affects any rights guaranteed under Part III. This would be in addition to the three broad categories of cases in regard to which it was conceded that there could be a violation of fundamental rights: (1) where the statute under which it functions was itself invalid or unconstittional, (2) where the authority exceeds the jurisdiction conferred on it by the Act, and (3) where the authority though functioning under statute, contravenes mandatory procedure prescribed in the statute or violates the principles of natural justice and passes an order or makes a direction affecting a person's rights of property etc.

218. Before concluding it is necessary to advert to one matter which was just touched on in the course of the agruments as one which might be reserved for consideration when it actually arose, and this related to the question whether the decision or order of a regular ordinary Court of law as distinguished from a tribunal or quasi-judicial authority constituted or created under particular statutes could be complained of as violating a fundamental right. It is a salutary principle that this Court should not pronounce on points which are not involved in the questions raised before it and that is the reason why I am not dealing with it in any fulness and am certainly not expressing any decided opinion on it. Without doing either however, I consider it proper to make these observations. There is not any substantial identity between a Court of law adjudicating on the rights of parties in the *lis* before it and designed as the High Courts and this Court are to investigate *inter alia* whether any fundamental rights are infringed and vested with power to protect them, and quasi-judicial authorities which are created under particular statutes and with a view to implement and administer their provisions. I shall be content to leave the topic at this.

219. This brings me to the question as to whether there has been a patent misinterpretation of the statute, as I have described earlier, and whether as a result the petitioner has established a violation of a fundamental right. Section 4(1) of the U.P. Sales Tax Act enacted:

"No tax shall be payable on:

(a) the sale of water, milk .... and on any other goods which the State Government may, by notification in the official gazette, exempt.

(b) the sale of any goods by the All India Spinner-Association ..... or such other person or class of persons as the State Government may, from time to time, exempt on such conditions ..... as may be specified by notification in the official gazette."

220. Pursuant of the powers conferred by a s. 4(1)(b) the Government of Uttar Pradesh published a notification dated December 14, 1957 and it is the proper interpretation of this notification that forms the central point of the merits of this petition. The notification read:

> "..... In exercise of the powers con ferred by cl. (b) of sub-s. (1) of s. 4 of the U.P. Sales Tax Act 1948 as amended up to date, the Governor of Uttar Pradesh is pleased to order that no tax shall be payable under the aforesaid Act with effect from the 14th of December 1957 by the dealers in respect of the following classes of goods:
>
> Provided that the Additional Central-Excise Duties leviable thereon from the clos ing of business on December 13, 1957 have paid on such goods and that the dealers there of furnish proof to the satisfaction of the assessing authority that such

duties have been paid:

(1) .....

(2) .....

(3) Cigars, cigarettes, biris and tobacco, that is to say any form of tobacco, whether cured or uncured and whether manufactured or not and inoludes the leaf, stalks and stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth."

221. The petitioners are manufacturers of hand-made *biris* and there was no duty of excise payable on them under the relevant entry in the Central Excise Act, nor was there any imposition of any fresh duty on biris so manufactured under Central Act 58 of 1957 whose object was to provide for the levy and collection of "additional duties *inter-alia* on tobacco and tobacco products and for the distribution of a part of the net proceeds thereof among the States in place of the sales tax which was to be forborne by the States on those goods. Briefly stated, the contention urged on behalf of the petitioner was that in the proviso to the notification dated December 14, 1957, the expression have been paid on such goods" applied only to those cases where an additional duty was payable and was framed to deny the benefit of the exemption to parties who being liable to pay such duty failed to pay the same. Where, however, no duty, was payable at all, no question of the levy of duty arose and the proviso was inapplicable. On the other hand, the Sales Tax Officer construed the notification with the aid of the proviso as meaning that the exemption from payment of sales tax was granted only in those cases where an additional duty having become payable the same had been paid i.e. the State was intended to be deprived of the right to levy Sales tax only when it obtained some benefit from the additional excise duty which was distributed to it. The question that arises is not whether the construction contended for by the petitioner is the correct or the preferable one, but whether that adopted by the Sales Tax Officer was not one which it was possible for one reasonably to take of the provision. If not withstanding that the one is preferable to the other or that a Court of construction would more readily accede to the one rather than to the other, the officer had adopted a construction which it was possible to take, could it be said that there was an error apparent on the face of the record justifying the issue of a writ of certiorari. Judged from the point of view I am inclined to hold that where it is possible reasonably to uphold the construction adopted by an inferior tribunal it would be a case of mere error of law and not a patent error, or an error apparent on the face of the record which should justify the issue of a writ of *certiorari*. In this view I would dismiss the writ petition.

222. As regards the application to restore the appeal to the file, I do not consider that the request ought to be allowed and for two reasons: Firstly, the applicant having voluntarily withdrawn the appeal I do not see any justification for acceding to his present request. Secondly, if as I have held, the error in the order of the officer was not such as to justify the issue of a writ of certiorari to quash the same the judgment of the High Court under Art. 226 was correct and the petitioner would not gain any advantage by the revival of the appeal. In the circumstances I would dismiss the petition for restoration of the appeal.

223. MUDHOLKAR, J.— The question which arises for consideration in this petition under Art. 32(1) of the Constitution is whether a right guaranteed by Part III such as a right to carry on trade or business is breached because a taxing authority, though acting under a law which is *inter vires* and following a procedure which is constitutionally as well as legally permissible has erroneously assessed and levied a tax on a trade or business. Unless we hold that an erroneous assessment, be it due to misconstruction of law or misappreciation of facts, constitutes an invasion of a right guaranteed by Part III, the remedy provided by Art. 32(1) will not be available. The

substance of the petitioner's contention is that when the construction placed by a taxing authority upon a provision of law is wrong the levy of tax is one which is not authorised by law and thus the assessee's right under Art. 19(1)(g) of the Constitution is infringed.

224. What had to be construed by the Sales Tax Officer in the case before us was not a statutory provision but a notification issued by the Government of Uttar Pradesh on December 14, 1957 under s. 4(1) of the Uttar Pradesh Sales Tax Act, 1948 (U.P. Act XV of 1948). The aforesaid provision of the Sales Tax Act and the notification have been set out in the judgments of some of my learned brethren and need not be set out over again in this judgment. Upon the construction placed by him on this notification the Sales Tax Officer held the petitioner liable to pay sales tax on the turnover of sales of *bidis* for the period between April 1, 1958 and June 20, 1958. The petitioner's contention before the Sales Tax Officer was that *bidis* were exempted from sales tax by the notification in question. The plea was negatived by the Sales Tax Officer. The petitioner having unsuccessfully challenged the assessment before the sales tax authorities moved the High Court of Allahabad under Art. 226 of the Constitution. The petition was dismissed. Having failed them the petitioner sought and obtained a certificate from the High Court to the effect that the case is fit for appeal before this Court. Thereafter the petitioner moved the present petition before this Court but took no steps to bring the appeal before this Court. That appeal was thereupon dismissed for non-prosecution on February 20, 1961. I may incidentally mention here that the petitioner has now applied for restoration of the appeal. But that has nothing to do with the point which I have referred to earlier.

225. This petition went up before a constitution bench of this Court. At the hearing reliance was placed on behalf of the petitioner on the decision of this Court in *Kailash Nath* v. *State of U.P.*[(1)] in which by accepting an interpretation on a provision of the Sales Tax Act different from that put upon it by the sales tax authorities this Court held that the petitioner before it was being deprived of his property without the authority of law. The correctness of the decision was challenged on behalf of the respondent State on the basis of various decisions, including some of this Court, and in view of the importance of the question involved the case was directed to be placed before the Chief Justice for constituting a large Bench. In the referring Order the following two questions were formulated by the learned Judges who made the reference:

(1) Is an order of assessment made by an authority under a taxing statute which is *intra vires*, open to challenge as repugnant to Art. 19(1)(g) on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder?

(2) Can the validity of such an order be questioned in petition under Art. 32 of the Constitution?

226. I have not discussed the decisions of this Court as they have been considered fully in the judgments of my brethren but have approached the questions with reference to the principles of law applicable to the questions placed before us.

227. The two questions are really one: 'Can an erroneous order of assessment by a taxing authority result in a breach of a right to carry on trade or business so as to entitle the person complaining of the breach to approach this Court under Art. 32? The remedy provided by this Article — which is itself a fundamental right — is restricted to the enforcement of fundamental rights and does not extend to other rights such as a right to have a wrong order quashed. On the one hand it was contended at one stage, on the authority of the-decisions in *Ramjilal* v. *Income-Tax Officer, Mohindargarh*[(1)] and *Laxmanappa Hanumantappa Jamkhandi* v. *The Union of India*[(2)] that a fundamental right will not be breached if the requirements of Art. 265 are satisfied,

that is to say, the tax is assessed under authority of law. On the other hand it is said, in substance, that an erroneous order of a taxing authority is an unreasonable restreiction on a person's right to carry on trade or business and Art. 32 entitles that person to redress from this Court. It has, however, been made clear in sereval decisions of this Court that a law under Art. 265 must not violate a right guaranteed in Part III of the Constitution. [See *Mohommad Yasin* v. *The Town Area Committee, Jalalabad*[(3)]; *State of Bombay* v. *United Motors (India) Ltd.*[(4)]; *Shree Meenakshi Mills Ltd., Madurai* v. *A.V. Viswanatha Sastri*[(5)]; *Ch. Tika Ramji* v. *The State of Uttar Pradesh*[(6)]; *Balaji* v. *Income Tax Officer, Special Investigation Circle*[(7)], J. If it violates any of the guaranteed rights, recourse to the provisions of Art. 32 is available to the aggrieved person.

228. Fundamental rights enumerated in Art. 19(1) are, however, liable to be restricted by laws permissible under cls. 2 to 6 and, therefore, we must first consider the limits within which a person can claim to assert and exercise his fundamental right. We must also bear in mind the nature of a quasi-judicial tribunal and the legal efficacy of its decisions.

229. The right to carry on trade, business etc., with which we are concerned here falls under cl. (1)(g) and can be restricted by a law permissible by cl. 6. This right is further subject to the sovereign power of the State to levy a tax. For, the right to levy a tax is essential-for the support of the State and in exercise thereof the State can impose a tax on a trade or business. Article 265 of the Constitution provides that the imposition must be under the authority of a law. Further our Constitution being, broadly speaking, federal, the right to levy taxes has been divided between the Union and the States and the fields in which the Union and the States can respectively levy taxes have been demarcated in the lists contained in the Seventh Schedule to the Constitution. Despite the demarcation, each is supreme in its own field in the matter of levying taxes. There is yet another limitation on the power of the State to make laws including a law levying a tax and that is placed by cl. (2) of Art. 13 of the Constitution which runs thus:

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

230. A pre-constitution law like the U.P. Sales Tax Act with which we are concerned here must also be consistent with Art. 13(1) which runs thus:

> "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Fart, shall, to the extent of such in consistency, be void."

231. Such a law or any provision thereof to the extent of its inconsistency with the provisions of Part III of the Constitution will be void. The law must further not be violative of any other constitutional provision as for example Art- 276(2), Art. 286, Art. 301 etc. The law must also have been enacted after complying with all the requirements of the Constitution and where it is subordinate legislation, those of other relevent laws.

232. If a law imposing a tax is in contravention of any of the rights conferred by Part III of the Constitution the law would be void and a person aggrieved would be entitled to move this Court under Art. 32 on the ground that one of his fundamental rights has been infringed. Similarly, if a law is beyond the competence of the legislature which enacted it or if it contravenes any provision of the Constitution such as Art. 276 or Art. 286 it would be an invalid law as being *ultra vires* the Constitution and the tax levied thereunder would also be one which is not authorised by law and the assessee can move this Court under Art. 32 on the ground that his right under Art. 19(1)(g) is breached. Similarly, if a tax is levied by an authority not empowered by

law to do so, or by a competent authority in violation of the procedure permitted by law or in violation of the principles of natural justice, the levy would be unauthorised and the decision under which it was made would be a nullity. In such a case also the assessee can move this Court under Art. 32. All this is accepted before us on behalf of the State.

233. But where a tax is levied by a competent legislature, after due compliance with all the requirements relating to the making of laws and when it is subordinate legislation, the requirements of other relevant laws, and is also not in violation of any provision of the Constitution it will operate as a reasonable restriction upon the right of a person to carry on his trade, business etc. Though a person's right to carry on a trade or business is a fundamental right it is thus subject to the aforesaid limitations. The quantum of the right left to an individual to carry on his trade or business will be that which is left after a valid restriction is placed upon it by the State under cl. (6) of Art. 19. His actual right would be to carry on business burdened with the aforesaid restriction. Where, as here, the restriction is placed on a dealer and takes the form of a liability to pay a tax on the turnover of sales on certain commodities by him then he can carry on his trade subject to his liability to pay the tax as assessed from time to time. It is this which is the nett content of his right to carry on trade, ignoring for the moment restrictions laid upon it by other competent laws made by the State. After a valid restriction is placed upon a fundamental right what will be enforceable under Art. 32 would be not the unrestricted right but the restricted right.

234. It was not disputed before us that where a quasi-judicial tribunal constituted under the Act whereunder a tax is levied, by an erroneous construction of the Constitution or of that Act holds the tax to be within the competence of the State legislature or as not contravening a provision of the Constitution, its decision will still be deemed to affect a fundamental right of the person upon whom a tax is levied in pursuance of that decision. This position was rightly not disputed before us because, in the premises, the Act would itself be void and consequently no legal liability can arise by virtue of the quasi-judicial tribunal constituted under it. A restriction imposed by a void law being illegal falls outside cl. (6) of Art. 19.

235. Now when a State wants to impose a tax on a trade or business it must necessarily provide for the machinery for assessing and collecting it. The assessment and collection of a tax cannot be arbitrary and, therefore, the State must confer upon the taxing authority the power and impose upon it the duty to act judicially. Absence of such a provision will make the law bad as being violative of Art. 19(1)(g): *K.T. Moopil Nair* v. *State of Kerala*[(1)].

236. The Sales Tax Act in force in Uttar Pradesh is a law of this kind. It not only imposes a tax-on the sale of certain commodities but also provides for the assessment of the tax as well as for appsals, revisions etc., from the orders of assessment. It is a law as contemplated by Art. 265 and it is not contended that any of its provisions infringe the petitioner under Art. 19(1)(g).

237. Being an instrumentality of the State, like others charged with administrative duties, a taxing authority is not a court of law, as that expression is understood. All the same it has, in the discharge of its functions, to act judicially. Since, however, it is a tribunal of limited jurisdiction and since also it performs other functions which are administrative in character it is not a purely judicial but only a quasi-judicial tribunal.

238. The qualification ‘quasi’, however, would not make its duty to act judicially less imperative. In its role as an assessing authority is if incumbent upon it to ascertain facts and apply the taxing law to those facts. It must apply its mind to the relevant provisions of the law and to the facts of each case and arrive at its findings. It is, therefore, inevitable that the authority should have the power to construe the facts as well as the laws. In other words, it must have jurisdiction to do those things or else

its decisions can never have any value or binding force.

239. A taxing authority which has the power to make a decision on matters falling within the purview of the law under which it is functioning is undoubtedly under an obligation to arrive at a right decision. But the liability of a tribunal to err is an accepted phenomenon. The binding force of a decision which is arrived at by a taxing authority acting within the limits of the jurisdiction conferred upon it by law cannot be made dependent upon the question whether its decision is correct or erroneous. For, that would create an impossible situation. Therefore, though erroneous, its decision must bind the assessee. Further, if the taxing law is a valid restriction the liability to be bound by the decision of the taxing authority is a burden imposed upon a person's right to carry on trade or business. This burden is not lessened or lifted merely because the decision proceeds upon a misconstruction of a provision of the law which the taxing authority has to construe. Therefore, it makes no difference whether the decision is right or wrong so long as the error does not pertain to jurisdiction.

240. The U.P. Act empowers the sales tax officer to make the assessment, to ascertain the necessary facts for holding whether or not a person is liable to pay tax and if he is liable, to determine the turnover of his sales. Since sales tax is imposed only on certain commodities and tax at different rates is since sales chargeable an different commodities the power of the Sales Tax Officer to makes an assessment carries with it the power to determine whether the sales of particular commodities effected by the assessee fall within the ambit of the Act or not and if they do, to determine the rate or rates of tax chargeable in respect of sales of different commodities. In regard to all these matters he has to follow the procedure prescribed by the Act. If he finds upon a construction of the Act and of the rules and notifications issued thereunder that a certain commodity is liable to pay a tax then so long as the transaction is one upon which the State legislature could impose a tax and the commodity is one on which the State legislature could impose a tax it is difficult to see how the decision arrived at by the Sales Tax Officer can be said to be otherwise than within his jurisdiction even though he may have made an error in coming to a particular conclusion. If he comes to a wrong conclusion would he, in demanding the tax on the basis of such concluion, be making an unlawful demand? The conclusion may be obviously or palpably wrong but so long as it is not shown to be dishonest would his decision be void? Of course, if by placing an erroneous construction on the law he holds, say, that a transaction which is bit by Art. 286 of the Constitution is on© which can be taken into consideration for the purposes of assessing the tax or if he holds that a commodity upon which the State legislature could not impose a tax is taxable under the Act he would clearly have acted beyond his jurisdiction and his assessment with respect to such a transaction or a commodity would be void. With respect to such assessment the assessee will of course have the right to move this Court under Art. 32. But where such is not the case and the error of the Sales Tax Officer lay only in holding that a tax is payable on a certain commodity, as in this case bidis, even though *bidis* may have been exempted from such tax by a notification made by the Government, how could he be said to have acted without jurisdiction.

241. It was, however, contended that where the erroneous construction by the Sales Tax Officer results in the levy of a tax for which there is no authority in law the fundamental right to carry on trade or business will necessarily be breached. The answer to this contention is that since he has the power to construe the law and decide whether a particular transaction or commodity is taxable his decision though erroneous must be regarded as one authorised by law and consequently the tax levied thereunder held to be one authorised by law. For, what is authorised by law is that which the appropriate authority upon consideration and construction of the law holds to be within the law.

242. It was said that the answer would take in even erroneous. decisions as to

commodities and transactions with respect to which the State legislature is incompetent to make laws. I have no doubt that it would not, because the power of the Sales Tax Officer to levy a tax cannot extend beyond that of the State legislature.

243. The Sales Tax Officer functioning under the Act in question has, clearly, the power to summon witnesses, call documents, record evidence and so on. The Act imposes a duty on him to give an opportunity to the person sought to be assessed to be heard. His decision upon matters falling within the scope of the laws governing the proceedings before him, unless revised or modified by a tribunal or authority or a court to which he is subordinate must, therefore, be regarded as having as much validity as that of a court of law in the exercise of its judicial power subject, of course, to the limitations stated earlier. The decision may be erroneous. It may proceed upon a blatant or obvious error on the face of the record. Even so, it cannot be regarded as '*non est*' or void or a mere nullity. If that is the correct legal position, what difference would it make if as a result of an erroneous decision arrived at by a Sales Tax Officer resulting from a misconstruction of a notification under the Sales Tax Act, a person is held liable to pay tax upon sales of a commodity which, upon a proper construction, would appear to be exempted from tax by the law like the notification in question? Just as a person cannot complain of a breach of his fundamental right to carry on trade or business because an erroneous decision of a court of law renders him liable to pay a sum of money, so too he cannot complain against an equally erroneous decision of a Sale Tax Officer. But that does not mean that an erroneous decision can never be challenged before this Court. After exhausting the remedies provided by the taxing statute the aggrieved party can challenge it directly under Art. 136 or indirectly by first moving the High Court under Art. 226 or 227 and then coming up in appeal against the decision of the High Court.

244. Though this Court is the guardian of all fundamental rights the Constitution has not taken away the right of the ordinary courts or of quasi-judicial tribunals administering a variety of laws to exercise their existing jurisdiction and to determine matters falling within their purview. If by reason of the decision of a tribunal a person, for instance, loses his right to occupy a house, or has to pay a tax, that decision cannot be thrown to the winds and a complaint made to this Court that a fundamental right has been violated. The decision being one made in exercise of a judicial power and in performance of a duty to make it is a valid adjudication though as a result of it a person may not be able to occupy his house or may have to pay a tax. The decision may be a right one or a wrong one. If it is not a nullity when it is right I fail to see how it can be said to be a nullity because it is erroneous, so long of course, as the law is a good law, the decision is of an authority competent to act under the law, the procedure followed by it is as prescribed by the law and the error does not pertain to jurisdiction. The error may lie in the construction placed upon a statue by the tribunal. If it is that and no more, such erroneous construction cannot render the action taken thereunder arbitrary or unauthorised. The error has to be corrected in the manner permitted by law or the Constitution and until it is so corrected it would not be open to the party to say that its fundamental right is violated.

245. Looking at the matter from the aspect of the nature of the right which is capable of being enforced under Art. 32 the same conclusion is reached. Thus when the provisions of a taxing law entitle a taxing authority to assess and levy a tax and for these purposes to decide certain matters judicially and give binding effect to its decision and none of the provisions of that law are void under Art. 13 or otherwise invalid the right enforceable under Art. 32 would be the right to carry on business subject to the payment of the tax as assessed by the taxing authority and not a right to carry on trade or business free from that liability. It makes no difference even if the assessment of the tax is based upon an erroneous construction of the taxing law

inasmuch as the right to have a correct determination of the tax is not part of the fundamental right to carry on business but flows only from the taxing law. It would follow therefore that in such a case nothing is left for being enforced under Art. 32 when the taxing authority does no more than assess and levy a tax after determining it.

246. One more point needs to be dealt with. It was said that a quasi-judicial tribunal being an instrumentality of the State its action is State action and so it will be under the same disabilities as the State to do a thing which it is incompetent or impermissible for the State to do. It is also said that what a State cannot do directly it cannot do indirectly. In so far as the incompetency of the State arises out of a constitutional prohibition or lack of legal authority due to any reason whatsoever, it will attach itself to the action of the quasi-judicial tribunal purporting to act as the instrumentality of the State. Where, in such a case, any fundamental right of a person is violated by the action of the quasi-judicial tribunal that person is entitled to treat the action as arbitrary or a nullity and come up to this court under Art. 32 because the action would be one which is not authorised by law. But while an erroneous action of the State in exercise of its administrative functions can be challenged directly under Art. 32 if it affects a person's fundamental right on the ground that it is not authorised by law the action of the tribunal pursuant to an erroneous order will not be open to challenge for the reason that its action arises out of the exercise of a judicial power and is thus authorised by law, State action though it be. When, under the provisions of a law, the State exercises judicial power, as for instance, by entertaining an appeal or revision or assessing or levying a tax it acts as a quasi-judicial tribunal and its decision even, though erroneous will not be a nullity and cannot be ignored. It can be corrected only under Art. 226 or Art. 227 by the High Court or under Art. 136 by this Court inasmuch as the State would then be acting as a quasi-judicial tribunal.

247. To summarise, my conclusions are these:

1. The question of enforcement of a fundamental right will arise if a tax is assessed under a law Which is (a) void under Art. 13 or (b) is *ultra vires* the Constitution or (c) where it is subordinate legislation, it is *ultra vires* the law under which it is made or inconsistent with any other law in force.
2. A similar question will also arise if the tax is assessed and/or levied by an authority (a) other than the one empowered to do so under the taxing law or (b) in violation of the procedure prescribed by the law or (c) in colourable exercise of the powers conferred by the law.
3. No fundamental right is breached and consequently no question of enforcing a fundamental right arises where a tax is assessed and levied *bona fide* by a competent authority under a valid law by following the procedure laid, down by that law, even though it be based upon an erroneous construction of the law except when by reason of the construction placed upon the law a tax is assessed and levied which is beyond the competence of the legislature or is violative of the provisions of Part III or of any other provisions of the Constitution.
4. A mere misconstruction of a provision of law does not render the decision of a quasi-judicial tribunal void (as being beyond its jurisdiction). It is a good and valid decision in law until and unless it is corrected in the appropriate manner. So long as that decision stands, despite its being erroneous, it must be regarded as one authorised by law and where, under-such a decision a person is held liable to pay a tax that person cannot treat the decision as a nullity and contend that what is demanded of him is something which is not authorised by law. The position would be the same even though upon a proper construction, the law under which the decision was given did not authorise such a levy.

248. My answer to each of the two questions is in the negative.

249. BY COURT: In accordance with the judgments of the majority, Writ Petition No. 79 of 1959 is dismissed, but the parties will bear their own costs C.M.P. No. 1349 of 1961 for restoration of Civil Appeal No. 572 of 1960 is also dismissed, but the parties will bear their own costs.

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† Under Article 32 of the Constitution of India. Referred to larger bench in *Ujjam Bai* v. *State of U.P.*, (1963) 1 SCR 778 (5-Judges).

(1) [1955] 1 S.C.R. 250-256.

(1) [1954] S.C.R. 1122.

(2) [1955] 2 S.C.R. 603, 619, 620.

(1) [1956] 2 S.C.R. 67.

(1) [1957] S.C.R. 233.

(2) [1961] 1 S.C.R. 379, 383.

(3) [1962] 1 S.C.R. 823.

(1) [1954] S.C.R. 1122.

(2) [1955] 2 S.C.R. 603, 619, 620.

(3) [1953] S.C.R. 1969.

(4) A.I.R. 1957 S.C. 790.

(5) [1951] S.C.R. 127.

(1) (1962) 1 S.C.R. 823.

(1) (1962) 1 S.C.R. 540.

(1) [1841] 1 Q.B. 66, 74.

(1) [1904] 2 K.B. 109.

(2) (1952) Ch. 359.

(3) [1953] Ch. 51.

(4) [1959] 2 W.L.R. 377, 391, 396, 397, 402.

(5) [1956] S.C.R. 781.

(1) [1961] [2] S.C.A. 591.

(1) 1961 2 S.C.A. 591.

(2) [1950] L.R. 279, A, 216, 225.

(1) [1962] 1 S.C.R. 505.

(2) A.I.R. [1957] S.C. 733, 736.

(1) [1957] S.C.R. 701, 702.

(2) [1960] 3 S.C.R. 177.

(3) A.I.R. [1957] S.C. 790.

(1) [1955] 2 S.C.R. 603, 619, 620.

(2) [1956] S.C.R. 267.

(3) A.I.R. [1957] S.C. 790.

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(4) [1962] 1 S.C.R. 279.

(5) [1955] 2 S.C.R. 303.

(1) [1955] 2 S.C.R. 509.

(2) [1960] 2 S.C.R. 146.

(3) [1960] 2 S.C.R. 852.

(4) [1960] 1 S.C.R. 305.

(1) A.I.R. 1957 S.C. 790.

(1) (1951) S.C.R. 127.

(2) (1960) 3 S.C.R. 887.

(3) (1961) 3 S.C.R. 77.

(1) [1900] L.R. 27 I.A. 216.

(2) [1884] L.R. 11 I.A. 237, 239.

(1) [1950] 1 S.C.R. 621, 725.

(1) A.I.R. 1957 S.C. 733, 736.

(1) (1957) S.C.R. 701, 712.

(2) [1960] 3 S.C.R. 177, 188.

(11) [1962] 1 S.C.R. 505.

(1) A.I.R. 1957 S.C. 790.

(1) [1955] 2 S.C.R. 603, 618.

(2) [1952] S.C.R. 572.

(3) [1953] S.C.R. 1069, 1077.

(4) [1954] S.C.R. 1122.

(5) [1956] S.C.R. 257, 271, 277.

(1) A.I.R. 1957 S.C. 790.

(2) [1962] 1 S.C.R. 279.

(1) (1954) S.C.R. 1122.

(2) (1951) S.C.R. 127.

(3) (1953) 2 S.C.R. 603, 618.

(1) (1952) S.C.R. 572.

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(1) (1952) S.C.R. 572.

(2) (1954) S.C.R. 1122.

(3) (1961) 1 S.C.R. 379, 402.

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(1) [1957] S.C.R. 233.

(2) [1955] 2 S.C.R. 303.

(1) [1955] 2 S.C.R. 509.

(2) [1962] 1 S.C.R. 823.

(1) [1960] 2 S.C.R. 146.

(1) [1961] 1 S.C.R. 305.

(1) (1961) 3 S.C.R. 77.

(1) A.I.R. 1957 S.C. 790.

(1) [1955] 2 S.C.R. 509.

(2) [1955] 2 S.C.R. 225.

(3) (1955) 2 S.C.R. 498.

(1) (1956) S.C.R. 257, 271, 277.

(1) A.I.R. 1954 Mad. 822.

(2) (1931) A.C. 275, 298.

(1) (1950) S.C.R. 459, 463.

(2) (1950) S.C.R. 621, 725.

(3) (1958) S.C.R. 1240, 1257, 1258.

(1) A.I.R. (1957) S.C. 790.

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(1) (1950) S.C.R. 88.

(2) (1951) S.C.R. 525, 531.

(1) (1950) S.C.R. 594.

(2) (1950) S.C.R. 566.

(3) (1955) 1 S.C.R. 250, 256.

(4) (1959) Supp. 2 S.C.R. 316, 325. 337.

(1) (1962) 1 S.C.R. 574.

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(1) (1930) A.C. 275, 296, 298.

(1) A.I.R. 1950 All. 249, 251.

(2) (1897) A.C. 556.

(1) A.I.R. 1954 Med. 822, 826.

(1) [1959] Supp. 1 S.C.R. 319, 353-354.

(1) [1959] Supp. (2) S.C.R. 316 325, 337.

(1) [1955] 1 S.C.R. 1104, 1123.

(1) A.I.R. [1953] Bom. 133.

(1) [1951] S.C.R. 145.

(2) [1955] 2 S.C.R. 509.

(1) (1925) 2 S.C.R. 483.

(2) (1960) 2 S.C.R. 852.

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(1) A.I.R. [1957] S.C. 733, 736

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(1) (1960) 3 S.C.R. 177, 183.

(1) (1962) 1 S.C.R. 753.

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(1) A.I.R. 1954 Mad. 67, 68.

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(1) (1955) 2 S.C.R. 603.

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(3) (1961) 1 S.C.R. 379.

(1) [1950] S.C.R. 594, 596, 597.

(1) [1950] S.C.R. 566.

(2) [1950] S.C.R. 88.

(3) [1961] 3 S.C.R. 525, 531.

(4) [1961] 3 S.C.R. 77.

(5) [1961] 1 S.C.R. 379.

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(2) (1952) S.C.R. 710.

(3) (1950) SCR. 593 896, 897.

(4) (1951) S.C.R. 1122.

(5) (1959) Supp. 2 S.C.R. 316, 325.

(1) [1962] 1 S.C.R. 574.

(1) (1924) 1 K.B. 171, 205.

(1) (1955) 1. S.C.R. 250, 256.

(1) (1962) 2 S.C.R. 276.

(2) Civil Appeal No. 176 of 1959 decided on April 24, 1961.

(3) (1962) 2 S.C.R. 839.

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(1) (1956) S.C.R. 267, 277.

(2) (1959) Supp. 1 S.C.R. 319, 353, 354.

(1) (1961) 3 S.C.R. 77.

(1) (1951) S.C.R. 127.

(2) (1951) 1 S.C.R. 769.

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(1) (1955) 2 S.C.R. 303.

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(2) [1958] S.C.R. 595.

(3) [1962] 1 S.C.R. 753.

(1) (1959) S.C.R. 12-113, 114.

(1) [1952] 2 Q.B. 413.

(1) A.I.R. 1957 S.C. 790.

(1) [1951] S.C.R. 12.

(2) [1935] 1 S.C.R. 769.

(3) [1952] S.C.R. 572, 578.

(4) [1953] S.C.R. 1069.

(5) [1955] 1 S.C.R. 787.

(6) [1956] S.C.R. 393.

(7) [1962] 2 S.C.R. 983

(1) (1961) 3 S.C.R. 77.

(2007) 5 Supreme Court Cases 614

(BEFORE B.P. SINGH AND H.S. BEDI, JJ.)

Civil Appeal No. 2517 of 2007†

HARDESH ORES (P) LTD. .. Appellant;

Versus

HEDE AND COMPANY .. Respondent.

With

Civil Appeal No. 2518 of 2007‡

SOCIEDADE DE FOMENTO INDUSTRIAL (P) LTD. .. Appellant;

Versus

HEDE AND COMPANY .. Respondent.

Civil Appeals No. 2517 of 2007 with No. 2518 of 2007, decided on May 15, 2007

A. **Civil Procedure Code, 1908 — Or. 7 Rr. 11(d), 7 & 8 — Omitting to claim foundational relief and claiming the consequential relief only, to get around bar of limitation — Impermissibility — Appellants seeking injunction for enforcement of negative covenants in (purportedly renewed) agreement almost four years after the respondents had categorically denied the said renewal — Trial court and High Court finding that appellants' suit was not merely for injunction as prayed for in plaint, but was in effect for specific performance of renewal of the agreement, and hence dismissing plaint as being time-barred — Sustainability — Denial of renewal of the agreement by respondents in December 2001 had led to accrual of cause of action to appellants to seek a declaration and get their right of renewal enforced — Even assuming that Art. 113, Limitation Act applies to enforcement of covenants in a suit for injunction, held, real foundation for the suit was that the earlier agreement had stood renewed automatically containing the same terms and conditions as in the original agreement, including the negative covenants — However, a subsisting renewed agreement did not exist in fact — In its absence, no relief as prayed for in plaint could be granted by the clever device of filing a suit for injunction, without the appellants' claiming a declaration that their rights were subsisting under a renewed agreement, which was barred by limitation — Hence trial court and High Court rightly rejected the plaint — Limitation — Limitation Act, 1963, Art. 113**

B. **Specific Relief Act, 1963 — Ss. 38, 34, 10 and 12 — Enforcement of contractual obligation — Need for subsistence of contract/contractual obligation — Maintainability of suit for enforcement of negative covenants in agreement purported to have been renewed — Need for agreement to**

† Arising out of SLP (C) No. 106 of 2007. From the Final Judgment and Order dated 20-10-2006 of the High Court of Bombay at Goa in First Appeal No. 138 of 2006 with Application No. 148 of 2006

‡ Arising out of SLP (C) No. 640 of 2007

have been properly renewed or declaration obtained in respect thereof from a court of law — Contract Act, 1872 — S. 37

C. **Contract — Renewal of contract — Requirements for — Nature of renewed agreement — Difference between renewal and extension of existing agreement, explained — Transfer of Property Act, 1882 — Ss. 105 and 106 — Deeds and Documents**

D. **Contract — Renewal of contract — Invocation of renewal clause by party having the right to do so — Denial of renewal by other party — Proper relief to be claimed, held, is to get the right of renewal declared and enforced by a court of law and/or to get a declaration that the agreement stood renewed as contemplated by the renewal clause — Specific Relief Act, 1963 — Ss. 34, 38, 10 and 12 — Applicability**

E. **Civil Procedure Code, 1908 — Or. 7 R. 11(d) — Rejection of plaint on ground of limitation, reiterated, is contemplated under Or. 7 R. 11(d) — "Law" within the meaning of Or. 7 R. 11(d) must include the law of limitation**

Dismissing the appeals, the Supreme Court

Held :

The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. "Law" within the meaning of Order 7 Rule 11(*d*) must include the law of limitation as well.

(Para 25)

In order to give effect to the renewal of an agreement or a lease, a document has to be executed evidencing the renewal of the agreement or lease, as the case may be, in accordance with law evidencing the renewal. The grant of renewal is also a fresh grant. There is no concept of automatic renewal of lease by mere exercise of option by the lessee. This may be distinguished from an extension of an agreement where a new document is not required. Enforcement of the negative covenants presupposes the existence of a subsisting agreement.

(Paras 31 and 39)

State of U.P. v. *Lalji Tandon*, (2004) 1 SCC 1; *Provash Chandra Dalui* v. *Biswanath Banerjee*, 1989 Supp (1) SCC 487; *Ambica Quarry Works* v. *State of Gujarat*, (1987) 1 SCC 213, *followed*

M.C. Mehta v. *Union of India*, (2004) 12 SCC 188, *cited*

In the instant case, the appellant-plaintiffs did exercise their option under the original agreement and claimed renewal. The respondents denied the appellants' right to claim renewal in express terms and also unequivocally stated that the agreement did not stand renewed as contended by the appellants. Thus, a cause of action accrued to the appellant-plaintiffs when their right of renewal was denied by the respondents. This happened in December 2001 and, therefore, within three years from that date they ought to have taken appropriate proceedings to get their right of renewal declared and enforced by a court of law and/or to get a declaration that the agreement stood renewed for a further period of 5 years upon the appellants' exercising their option to claim renewal under the original agreement. The appellant-plaintiffs failed to do so.

(Paras 39 and 27 to 29)

It was only on 4-8-2005 that the present suits came to be filed by the appellants in which a prayer for injunction was made with a view to enforce the

terms of clauses 15 and 20 of the agreement which incorporated negative covenants prohibiting mining operation by anyone else except the appellants, or without their permission. The use of the words "during the subsistence of this agreement" in clause 15, and "during the pendency of this indenture" in clause 20 of the agreement is significant. In the absence of a document renewing the original agreement for a further period of 5 years and in the absence of any declaration from a court of law that the original agreement stood renewed automatically upon the appellants exercising their option for grant of renewal, the appellants cannot be granted relief of injunction, for the simple reason that there is no subsisting agreement evidenced by a written document or declared by a court. If there is no such agreement, there is no question of enforcing clauses 15 and 20 thereof. (Paras 32 and 39)

The appellants ought to have prayed for a declaration that their agreement stood renewed automatically on exercise of option for renewal and only on that basis could they have sought an injunction restraining the respondents from interfering with their possession and operation. Having not done so, they cannot be permitted to camouflage the real issue and claim an order of injunction without establishing the subsistence of a valid agreement. In the instant suit as well they could have sought a declaration that the agreement stood renewed automatically but such a claim would have been barred by limitation since more than 3 years had elapsed after a categoric denial of their right claiming renewal or automatic renewal by the respondent-defendants. (Para 39)

Even assuming that Article 113 of the Limitation Act, 1963 applies where enforcement of a positive or negative covenant is sought in a suit for injunction, in this case it has been found that the real foundation for the suit was that the earlier agreement stood renewed automatically containing the same terms and conditions as in the original agreement including the negative covenants. The basis for claiming the relief of injunction, namely, a subsisting renewed agreement did not exist in fact. In its absence, no relief as prayed for in the suit could be granted by the clever device of filing a suit for injunction, without claiming a declaration as to their subsisting rights under a renewed agreement, which is barred by limitation. (Para 40)

N.V. Srinivasa Murthy v. *Mariyamma*, (2005) 5 SCC 548; *T. Arivandandam* v. *T.V. Satyapal*, (1977) 4 SCC 467; *ITC Ltd.* v. *Debts Recovery Appellate Tribunal*, (1998) 2 SCC 70, *followed*

Ramesh B. Desai v. *Bipin Vadilal Mehta*, (2006) 5 SCC 638; *Union of India* v. *West Coast Paper Mills Ltd.*, (2004) 2 SCC 747, *cited*

Hence the trial court as well as the High Court were justified in holding that the plaint deserved to be rejected under Order 7 Rule 11 CPC since the suit appeared from the statements in the plaint to be barred by the law of limitation. (Para 41)

F. **Civil Procedure Code, 1908 — Or. 7 R. 11(d) — Rejection of plaint under — Interpretation and construction of pleadings in plaint — Principles for, reiterated — Need for reading the plaint as a whole, stressed**

G. **Civil Procedure Code, 1908 — Or. 7 R. 11(d) — Matters to be considered at the stage of rejection of plaint — Covenants in agreement sought to be enforced in suit for perpetual injunction — Question raised by defendants as to whether agreement was registrable in application under Or. 7 R. 11 — Maintainability — Held, such question cannot be gone into at such stage**

Whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether Order 7 Rule 11(*d*) is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. (Para 25)

Liverpool & London S.P. & I Assn. Ltd. v. *M.V. Sea Success I*, (2004) 9 SCC 512; *Popat and Kotecha Property* v. *State Bank of India Staff Assn.*, (2005) 7 SCC 510, *followed*

The question as to whether the agreement required registration is not a question which can be gone into an application under Order 7 Rule 11 CPC. (Paras 24 and 23)

D-M/A/36290/C

Advocates who appeared in this case :

Soli J. Sorabjee, M.S. Usgaoncar and R.F. Nariman, Senior Advocates [Dhruv Mehta, Harshvardhan Jha, Yashraj Deora, A.A. Razak (for K.L. Mehta & Co.), Advocates, with them] for the Appellant;

Mukul Rohatgi, M.N. Krishnamani, K.B. Sinha and Ranjit Kumar, Senior Advocates (Bhavanishankar V. Gadnis, Ms Sunita B. Rao and Nitin Popli, Advocates, with them) for the Respondent.

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3. (2005) 5 SCC 548, *N.V. Srinivasa Murthy* v. *Mariyamma* 622*b*, 622*d*, 623*g-h*, 624*g*, 630*e*
4. (2004) 12 SCC 188, *M.C. Mehta* v. *Union of India* 625*d-e*
5. (2004) 9 SCC 512, *Liverpool & London S.P. & I Assn. Ltd.* v. *M.V. Sea Success I* 626*d*
6. (2004) 2 SCC 747, *Union of India* v. *West Coast Paper Mills Ltd.* 623*g*
7. (2004) 1 SCC 1, *State of U.P.* v. *Lalji Tandon* 625*c-d*, 628*b*
8. (1998) 2 SCC 70, *ITC Ltd.* v. *Debts Recovery Appellate Tribunal* 630*c-d*
9. 1989 Supp (1) SCC 487, *Provash Chandra Dalui* v. *Biswanath Banerjee* 625*d*, 627*g*
10. (1987) 1 SCC 213, *Ambica Quarry Works* v. *State of Gujarat* 627*f-g*
11. (1977) 4 SCC 467, *T. Arivandandam* v. *T.V. Satyapal* 630*a*, 630*c-d*

The Judgment of the Court was delivered by

B.P. SINGH, J.— Special leave granted.

2. These appeals have been filed by the appellants against the common judgment and order of the High Court of Judicature at Bombay dated 20-10-2006 in First Appeals Nos. 138 and 139 of 2006 whereby the High Court has affirmed the order of the trial court dismissing the suits filed by the appellants under Order 7 Rule 11 of the Code of Civil Procedure holding that the suits are barred by limitation.

3. The representative facts giving rise to these appeals are taken from the pleadings in suit filed by Hardesh Ores Pvt. Ltd. The appellants herein, namely, Hardesh Ores Pvt. Ltd. in civil appeal arising out of SLP (C) No. 106

of 2007 (for short "Hardesh") and Sociedade de Fomento Industrial Pvt. Ltd. in civil appeal arising out of SLP (C) No. 640 of 2007 (for short "Fomento") respectively entered into two agreements with the respondent Hede & Co. (for short "Hede") on 23-10-1996. The agreement with Hardesh was for extraction of ore from the mine in question whereas the agreement with Fomento was for purchase of minerals extracted from the mine. Both the agreements contained similar terms and conditions. As per clause 2.1 of the agreement, the agreement though executed on 23-10-1996 was to come into force from 1-1-1997 and was to remain in force for a period of 5 years from such date. Clause 2.2 of the agreement provided that on the expiry of every 5 years the agreement shall stand renewed for further periods of like duration at the sole option of Hardesh on the same terms and conditions as contained in the original agreement. Hardesh was entitled to exercise its option during the entire period of lease in respect of the said mine and renewals thereafter, and until such time as remaining deposits of ore in the said mine could be economically exploited. Clause 2.3 gave the right to Hardesh to terminate the agreement by giving two calendar months' prior notice in writing to the respondent Hede of its intention to do so. Clause 2.5 of the agreement provided inter alia that in case Hardesh was forced to abandon work in the said mine/land on account of any lawful or legal claim made and/or objection raised by any person including the holder of surface right or on account of any injunction being passed by any court of law or on account of any fault of the respondent, the agreement shall not stand terminated but the operation thereof shall stand suspended for such time. In the event such a condition/situation continued to exist for a period exceeding six calendar months, Hardesh shall be entitled to terminate the agreement after giving 30 days' notice in writing. Clause 9.2 of the agreement ensured that the respondent shall not in any manner interfere or obstruct Hardesh from carrying on the work of extraction, raising, loading or delivering the ore and its other functions under and in accordance with the agreement.

4. Clause 15 of the agreement provided that during the subsistence of the agreement, Hardesh shall solely be entitled to extract and deliver the ore from the said mine and the respondent shall not be entitled to authorise or permit any other person for that purpose nor shall the respondent either themselves or through their servants and/or agents, extract, raise, remove, load, transport or deliver the ore from the said mine unless expressly authorised or approved by Hardesh in writing.

5. Under clause 20 of the agreement the respondent covenanted unto the appellant that during the pendency of the indenture they shall not enter into any agreement, understanding or arrangement with any other party for working the said mine/lease for carrying on any other operation whatsoever in the said mine/lease.

6. The agreement with Fomento is more or less in the same terms though with Fomento it is for the purchase of the iron ore extracted and to be extracted from the said mine.

7. Two suits for injunction were filed by the appellants herein on 4-10-2005. The reliefs claimed in the suit of Hardesh were as follows:

(*i*) The defendants, their agents or representatives be restrained from in any manner stopping and/or obstructing the plaintiff from entering upon the said mine and/or carrying on the work of extraction, raising, loading and/or delivering the ore from the said mine to Fomento and/or from doing any activities ancillary thereto which the plaintiff is empowered to do under the 23-10-1996 extraction agreement.

(*ii*) The defendants, their agents or representatives be restrained from entering into the mine and doing any work for extracting, raising, removing, loading, transporting, selling or delivering to any other persons iron ore from the said mine either by themselves or through their servants and/or agents.

(*iii*) The defendants, their agents or representatives be restrained from entering into any contract/agreements and/or understanding with third parties for prospecting and/or extracting and/or raising any iron ore from the said mine or selling the ore from the said mine to any third party.

(*iv*) That the defendant be directed to give effect to the negative covenant contained in clauses 15 and 20 of the extraction agreement dated 23-10-1996.

8. In the plaint reference was made to the agreements that were entered into between the parties. It was also stated that there were privately owned lands comprised within the said mine and no consent had been obtained from the surface right owners by the respondent and the same was to be obtained subsequently, which necessitated the incorporation of clause 2.5 in the agreement. The agreement was to commence from 1-1-1997 but on 12-12-1996 in view of an order of the Supreme Court dated 12-12-1996†† prohibiting mining operations in the authorised area, mining operations could not be commenced. In view of the situation that arose on account of the order of the Supreme Court, which necessitated permission being sought from the Central Government for commencing mining operations, as also in view of the fact that the consent of the surface right owners had not been obtained, on the proposal of the respondent, the appellants exercising their right under clause 15 of the agreement authorised the respondent to carry on extraction operation in the pits already opened. It is the case of the appellant that the appellant had taken possession of the mine immediately after coming into effect of the contract on 1-1-1997. The respondent extracted the ore from the mine already opened pursuant to the authorisation given as per clause 15 of the agreement. This arrangement was of a temporary nature. Some obstruction was raised by the surface right owners in January 1998 which was reported to the respondent. The respondent promised to sort out the problem with the surface right owners by getting their consent in writing. It is admitted in the plaint that although the said agreements were to come into

†† *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267

force on 1-1-1997 no mining operations could be commenced in view of the order of the Supreme Court dated 12-12-1996[††].

9. The case of the appellant in the plaint is that the extraction agreement was initially for a period of five years from 1-1-1997 with a right of renewal at the option of the appellant on the same terms and conditions. In view of the original period of 5 years coming to an end on 31-12-2001, in terms of clause 2.2 of the agreement, appellant Hardesh exercised its option to renew the said agreement for further period of 5 years. This was conveyed to the respondent vide letter dated 4-12-2001 which was received by it on 7-12-2001. According to the appellant with the exercise of option by appellant Hardesh the agreement stood renewed up to 31-12-2006. However, the appellant Hardesh received a letter dated 29-12-2001 from the respondent alleging that the plaintiff-appellant was not entitled to exercise the option for renewal. The letter dated 4-12-2001 annexed to the plaint has been marked as Ext. 41 and its reply dated 29-12-2001 has been marked as Ext. 43.

10. The appellant came to learn that the respondent was conducting the extraction in the private area where the surface rights were held by the Salgaonkar sisters. This led the appellant to believe that the problem may have been sorted out with the surface right owners, namely, Salgaonkar sisters. If that was so, it was incumbent upon the respondent to inform the appellant so that the appellant could undertake the extraction work itself. The appellant had also come to learn that the first stage clearance had been granted in respect of the said mine on 17-10-2003 by the Ministry of Environment and Forests under the Forest (Conservation) Act, 1980 but the second stage clearance was yet to be obtained without which it was not possible to commence work.

11. In this background the appellant issued a notice dated 27-4-2005 to the respondent requesting them to furnish to the appellant within 15 days of the receipt of the notice the documents evidencing the consent obtained from Salgaonkar sisters. The notice also stated as follows:

> "Kindly note that if no documents as aforesaid are furnished to us within a period of 15 days from the receipt of this notice, or if no reply is received from you we shall presume that such consent has been obtained since you are doing the extraction in the area of the captioned mining lease wherein surface rights are held by Salgaonkar sisters, pursuant to the authorisation granted to you, in terms of clause 15 of the extraction agreement dated 23-10-1996."

12. The said letter was annexed as Ext. 48. The respondent failed to furnish the documents, as requested, and, therefore, the appellant issued notice dated 17-5-2005 withdrawing the authorisation granted by the appellant under clause 15 of the extraction agreement and called upon the respondent to resist from doing any extraction or selling ore to any party within 30 days of service of notice failing which the appellant asserted its right to enter into the mine to give effect to the agreement. The respondent replied by its letter dated 24-6-2005 refusing to comply with the demand

contained in the notice. The appellant asserted that in view of clauses 15 and 20 of the agreement the appellant had exclusive right to carry on extraction and not the respondent. It was also stated in the plaint that there were valid, subsisting and binding agreements between the plaintiffs (Hardesh and Fomento) and the defendant-respondent and that Hardesh and Fomento were at all material times and even today ready and willing to perform the terms of the agreement. It was asserted that the plaintiff-appellants had performed their obligations under the agreements. The extraction agreement was specifically enforceable and the appellant had performed its obligations and were willing to fully carry out its obligations as per the said agreement. In the circumstances, it was submitted that the appellant was entitled to an order of preventive injunction and as also temporary injunction in the manner prayed for in the suit.

13. It is the case of the appellant-plaintiff that the cause of action arose to the plaintiff with the expiry of notice period dated 17-5-2005. On such pleas the prayers which have been extracted in earlier part of the judgment were made in the suit.

14. An application was filed on behalf of the respondent under Order 7 Rule 11 of the Code of Civil Procedure submitting that there was absence of cause of action and also the plaint was barred by limitation. Subsequently, the plea of absence of cause of action was given up and only the plea of bar of limitation under the Limitation Act was pressed. It was submitted that Article 54 of the Limitation Act applied and that a suit for specific performance of the contract should have been filed within 3 years from the date the appellant-plaintiff had notice that the renewal of the agreement was refused by the respondent. In the instant case the refusal was communicated on 29-12-2001 and, therefore, the suit should have been filed within 3 years thereafter.

15. The trial court by its order of 23-2-2006 allowed the application and dismissed the suit as barred by limitation. It observed that from a mere perusal of the pleadings contained in paras 47 to 51 of the plaint it appeared that the appellant had asserted that the agreements were specifically enforceable. A reading of the plaint established that the foundation of the appellant's suit was for specific performance of the renewal of the agreement dated 23-10-1996, the cause of action for which arose on 29-12-2001 when they received reply of the respondent denying that the agreement stood renewed. Since the suit was filed much after the expiry of 3 years from that date, it was hopelessly barred by limitation.

16. Aggrieved by the order of the trial court the appellants preferred two appeals before the High Court which have been dismissed by the impugned order. Before the High Court it was urged that in deciding an application under Order 7 Rule 11 CPC the contentions raised in defence or submissions advanced by the respondent-defendant about their case need not be considered and the matter must be decided on the basis of averments in the plaint and the documents annexed with the plaint. The trial court had fallen

into an error when it referred to the defence of the defendant to determine as to whether the plaint was liable to be rejected as barred by limitation. It also noticed the submission urged on behalf of the appellant that the question of limitation was a mixed question of law and fact and, therefore, such a question could be adjudicated only in the trial.

17. On the other hand the appellants (*sic* respondents) contended that the case was squarely covered by the ratio laid down by this Court in *N.V. Srinivasa Murthy* v. *Mariyamma*[1]. By the device of clever drafting of the plaint the question of limitation was sought to be got over by camouflaging the real issue in the suit and making it appear as if it was merely a suit for perpetual injunction.

18. The High Court after appreciating the averments contained in the plaint observed that this was not merely a suit for perpetual injunction insisting upon performance of the negative covenants as contained in clauses 15 and 20 of the agreement. The plaint clearly showed that the plaintiff's suit was in effect a suit for specific performance of the renewal of the agreement dated 23-10-1996. The cause of action for such a suit arose on 29-12-2001 when the respondent by its letter refuted the claim of the appellants for renewal w.e.f. 1-1-2002 for a period of 5 years. After considering the judgment of this Court in *Srinivasa Murthy case*[1] the High Court concluded that the ratio laid down therein was squarely applicable to the instant case. It recorded a finding that the suit for injunction simpliciter was nothing but a camouflage to get over the bar of limitation, which, in fact, showed that specific performance was implicit in the pleadings contained in the plaint itself. The suit though styled as "suit for injunction" was, in fact, a suit for specific performance for the renewal of the agreement dated 23-10-1996 for which the cause of action had arisen on 29-12-2001. It negatived the contention urged on behalf of the appellants relying on the judgment of this Court in *Ramesh B. Desai* v. *Bipin Vadilal Mehta*[2] holding that in the instant case without going into the pleadings and the documents filed on behalf of the defence, the plaint itself and the documents annexed therewith showed that in fact it was a suit for specific performance of the agreement between the parties which appeared to be barred by the law of limitation. Accordingly it dismissed the appeals preferred by the appellants.

19. Mr Soli J. Sorabjee, learned Senior Counsel appearing on behalf of the appellants in civil appeal arising out of SLP (C) No. 106 of 2007 submitted that in dealing with an application under Order 7 Rule 11 the court must go by the averments in the plaint. The plaint must be read as a whole. The mere use of words like "readiness" and "willingness" to perform the agreement by themselves do not make it a case of specific performance of agreement. Those averments in the instant case were necessary for enforcing the negative covenants contained in clauses 15 and 20 of the agreement. He,

1 (2005) 5 SCC 548
2 (2006) 5 SCC 638

therefore, submitted that the trial court was entirely wrong in construing the instant suit as a suit for specific performance of the agreement, whereas it was essentially a suit for perpetual injunction seeking enforcement of the negative covenants contained in the agreement in clauses 15 and 20 thereof. He further submitted that the question of limitation was a mixed question of law and fact and could be decided only in the suit.

20. Mr R.F. Nariman, learned Senior Counsel appearing on behalf of the appellant in civil appeal arising out of SLP (C) No. 640 of 2007 submitted that clause 2.2 of the agreement provided for a renewal every 5 years at the option of the lessee till the mine was exhausted. The use of the words "stand renewed", "further periods" and "sole option of Hardesh" were indicative of the fact that there was automatic renewal of the lease once the option was exercised by Hardesh and such renewals took place as and when options were exercised in future till such time as the mine got exhausted. He submitted that there were inbuilt provisions of pricing in the agreement itself which were dependent on export price. There was an inbuilt mechanism for escalation of price which supported his contention that the lease stood renewed from time to time on option being exercised by Hardesh. He also submitted that the subject-matter of the lease was divided into two parts. So far as the forest land was concerned the cause of action had not even arisen and, therefore, there was no question of dismissing the entire suit. He drew our attention to clause 2.5 of the agreement and contended that the aforesaid clause provided for suspension of the agreement and not its termination in the eventualities enumerated in that clause. According to him Article 54 of the Limitation Act was not at all applicable and, if at all, Article 113 may apply since there was no specific article prescribing a period of limitation for the enforcement of positive or negative covenants. The article was elastic enough to include a case where the party unequivocally threatened the plaintiff's right and the same need not be the first threat. Referring to Article 58, he submitted that the limitation is to be computed from the date when the right to sue first accrued whereas under Article 113 the threat giving rise to the cause of action need not be the first threat. In the instant case the defendant had started mining in the area including the land which were in dispute on account of the fact that the surface right owners had not given them permission to do so. It was in these circumstances that the respondent was called upon to disclose the documents, if any, evidencing grant of permission by the surface right owners. He relied upon a decision of this Court in *Union of India* v. *West Coast Paper Mills Ltd.*[3] highlighting the difference between Article 58 and Article 113 of the Limitation Act. He further submitted that *Srinivasa Murthy case*[1] was misapplied since the fact situation in the instant case was different from that in *Srinivasa Murthy case*[1]. The High Court fell into an error in looking at the defence of the respondent to come to the conclusion that the suit was barred since there was

3 (2004) 2 SCC 747

1 *N.V. Srinivasa Murthy* v. *Mariyamma*, (2005) 5 SCC 548

no valid renewal. Mr Nariman, however, did not dispute that reference to "law" in Order 7 Rule 11 CPC included a law relating to limitation such as the Limitation Act.

21. Mr Mukul Rohatgi, learned Senior Counsel appearing for the respondent in civil appeal arising out of SLP (C) No. 106 of 2007 submitted that the High Court was fully justified in coming to the conclusion that the clever drafting of the plaint purporting to be a suit for injunction was merely to camouflage the real issue. He did not dispute that the plaint must be read as a whole and one must look to the substance rather than the form. He submitted that the appellant's case that there was automatic renewal after the original term expired on mere exercise of option by the appellant was not legally tenable. According to him the renewal of a mining lease must be evidenced by the execution of a deed evidencing renewal, or a fresh mining lease, and such a document must incorporate the negative covenants as were sought to be enforced. According to him if the submission urged on behalf of the appellants is to be accepted, by mere exercise of option and without execution of an actual agreement, a renewed agreement comes into existence with the same negative covenants which gave a right to the appellant to enforce the newly born negative covenants. According to him where an option is to be exercised by the lessee, he must insist upon the execution of an actual physical agreement evidencing renewal of the original term. If the promisor refused to execute such a document, the appellants should have sought the assistance of the court and ought to have moved the court claiming a relief against the promisor for execution of a document evidencing renewal of the lease. That should have been done within a period of 3 years from the date on which the promisor rejected the claim of the appellant that the lease stood renewed by mere exercise of option by it. If no suit is filed and no agreement is executed by the parties, there can be no question of a fresh agreement coming into existence and consequently no question of enforcement of a negative covenant arises in such a non-existent agreement. He further submitted that the 1996 agreement was a lease for a period exceeding 11 months and, therefore, required compulsory registration in view of the provisions of Sections 17 and 49 of the Registration Act. It, therefore, cannot be read as evidence in the suit and consequently no rights under such an agreement can be claimed. He further submitted that even renewal of such a lease required registration. According to him the appellants were trying to sidestep something which was imperative and which had necessarily to be asked for in the suit, which had not been asked for. Therefore, applying the principle laid down in *Srinivasa Murthy case*[1] the suit must fail because the appellants should have asked for a declaration under Order 2 Rule 2 to the effect that the agreement stood renewed and the respondent's denial was unlawful. Rather than doing that, the appellants have sought only the end relief which could not be asked for without first asking for a declaration that the lease deed stood renewed on mere exercise of option without the

1 *N.V. Srinivasa Murthy* v. *Mariyamma*, (2005) 5 SCC 548

execution of an indenture evidencing renewal of the lease. Only in such a renewed lease a negative covenant could have been incorporated which could have been enforced. Since such an agreement never came into existence and a suit for declaration stood barred by time, the appellant cannot get over the limitation and seek the remedy of injunction by way of enforcement of the negative covenants in an agreement which never came into existence. In sum and substance he submitted that without first getting a renewed lease deed executed in physical form or getting a declaration from a court of law that the lease stood renewed as contended by them, the appellant cannot seek a relief by way of injunction by filing a suit for enforcement of negative covenants. He further submitted that the appropriate article which applied in the facts of this case was Article 54. Since the respondent denied the fact that the lease stood automatically renewed, the limitation commenced from that day and, therefore, a suit for declaration and/or specific performance was barred after 3 years from the date of refusal i.e. 29-12-2001. Articles 58 and 113 did not apply to the facts of this case.

22. Mr Ranjit Kumar, learned Senior Counsel appearing on behalf of the respondent in civil appeal arising out of SLP (C) No. 640 of 2007 relied upon judgments in *State of U.P.* v. *Lalji Tandon*[4] and *Provash Chandra Dalui* v. *Biswanath Banerjee*[5] and contended that there was a vital distinction between extension of a lease and renewal of a lease. The law is well settled that in case of renewal a fresh agreement has to be executed. He also relied upon decision of this Court in *M.C. Mehta* v. *Union of India*[6] to contend that even renewal of a lease amounted to a fresh grant of lease. He also contended that the plaint itself disclosed that the appellant-plaintiff had never worked the mine and it was the respondent-defendant who was working the mine.

23. Replying to the submissions urged on behalf of the respondents, Mr Sorabjee, appearing for the appellants submitted that the question as to whether the agreement was really a mining lease or a mere agreement, and whether it required registration, has to be gone into in the suit and this question cannot be urged in an application under Order 7 Rule 11 CPC. At this stage whatever is stated in the plaint must be accepted. The question of registration may arise when the document is produced and objected to by the respondent. In any event, even if the document requires registration, that cannot be a ground for rejecting the plaint on the ground that the suit is barred by limitation. Moreover, since the respondents have given up the plea of absence of cause of action, this matter cannot be investigated at this stage. He reiterated his submission that under clause 2.2 of the agreement read with clause 18, by exercise of option claiming renewal, the agreement ipso facto stands renewed and there is no need to get a fresh agreement executed.

24. We may observe at the threshold that the question as to whether the agreement required registration is not a question which can be gone into at

4 (2004) 1 SCC 1
5 1989 Supp (1) SCC 487
6 (2004) 12 SCC 188

this stage, particularly in view of the fact that the plaint has been rejected on the ground of limitation.

25. The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr Nariman did not dispute that "law" within the meaning of clause (*d*) of Order 7 Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (*d*) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (*d*) is quite clear but if any authority is required, one may usefully refer to the judgments of this Court in *Liverpool & London S.P. & I Assn. Ltd.* v. *M.V. Sea Success I*[7] and *Popat and Kotecha Property* v. *State Bank of India Staff Assn.*[8]

26. We shall therefore proceed on the basis of averments contained in the plaint and the documents annexed to it.

27. In the instant case it cannot be disputed that the agreement was acted upon as stated in the plaint itself. It is averred in the plaint that possession of the mine was taken in terms of the agreement by the appellant-plaintiff. The appellant-plaintiff also exercised its right under the agreement and in terms of clause 15 thereof authorised the respondent-defendant to carry on mining operations in the pits already opened up. Apart from these the mere fact that the appellant sought renewal of the lease, which was denied by the respondent, is sufficient proof of the fact that the agreement had been acted upon by the appellant.

28. The next averment in the plaint which is relevant is para 23 thereof wherein the appellant-plaintiff stated that since the original period of 5 years was to end on 31-12-2001 in terms of clause 2.2 of the agreement, the appellant-plaintiff exercised its option to renew the said agreement for further period of 5 years which was conveyed to the respondent vide its letter dated 4-12-2001 and which was received by the respondent-defendant on 7-12-2001. In the same paragraph it is stated that the extraction agreement entered into between the plaintiff-appellant and the defendant-respondent was operative and stood renewed up to 31-12-2006. A copy of the letter dated 4-12-2001 has been annexed to the plaint and marked as Ext. 41. The

7 (2004) 9 SCC 512
8 (2005) 7 SCC 510

plaintiff-appellant further goes on to say that it received the reply from the defendant-respondent dated 29-12-2001 alleging that the plaintiff-appellant was not entitled to exercise the option of renewal. The said letter has been annexed to the plaint and marked as Ext. 43. A mere perusal of the letter dated 4-12-2001 addressed by the appellant to the respondent is enough to satisfy the court that in terms of clause 2.2 of the agreement the appellant exercised its option to renew the captioned agreement for a further period of 5 years commencing from 1-1-2002 on the same terms and conditions as contained in the original agreement. The letter clearly states that after 31-12-2001 the captioned agreement will stand renewed for the period 1-1-2002 to 31-12-2006. To this the respondent-defendant replied by its letter dated 29-12-2001, the relevant part whereof reads as follows:

> "We do not agree with your contention in your letter dated 4-12-2001 that the agreement in reference stands renewed as alleged from 1-1-2002 to 31-12-2006 or for any other period whatsoever."

29. It is thus apparent that the appellant-plaintiff exercised its right under the agreement to claim a renewal of the term of the lease and the respondent-defendant refuted that claim and denied the assertion that the agreement stood renewed as alleged from 1-1-2002 to 31-12-2006 or for any other period whatsoever. In view of the correspondence exchanged between the parties, clearly a cause of action accrued to the appellant-plaintiff since its right of renewal as a matter of course claimed by it was denied by the respondent-defendant. Whether the denial was justified or not is another matter. In the facts and circumstances of the case, a right accrued to the appellant-plaintiff to sue the respondent-defendant and to get a declaration that the agreement stood automatically renewed for a further period of 5 years. It is the admitted position that the appellant-plaintiff did not pursue the matter further and never sought relief from any court of law of competent jurisdiction for a declaration that the lease stood renewed automatically upon the appellant-plaintiff exercising its option under the agreement. It was contended on behalf of the respondent-defendant that there is no question of automatic renewal of an agreement or lease by mere exercise of the option which the appellant-plaintiff may claim under the agreement. The respondent contends that renewal of an agreement or lease requires execution of another document evidencing such renewal and, in its absence, it cannot be argued that the agreement or lease stood automatically renewed. It was also urged relying upon the decision of this Court in *Ambica Quarry Works* v. *State of Gujarat*[9] that the grant of renewal is a fresh grant and must be consistent with law. The respondents relied on the decision of this Court in *Provash Chandra Dalui* v. *Biswanath Banerjee*[5] wherein this Court considered the difference between "extension" and "renewal" of a lease. This Court observed thus: (SCC p. 496, para 14)

> "*14*. It is pertinent to note that the word used is 'extension' and not 'renewal'. To extend means to enlarge, expand, lengthen, prolong, to

9 (1987) 1 SCC 213
5 1989 Supp (1) SCC 487

carry out further than its original limit. Extension, according to *Black's Law Dictionary*, means enlargement of the main body; addition to something smaller than that to which it is attached; to lengthen or prolong. Thus extension ordinarily implies the continued existence of something to be extended. The distinction between 'extension' and 'renewal' is chiefly that in the case of renewal, a new lease is required, while in the case of extension the same lease continues in force during additional period by the performance of the stipulated act."

30. The same view was reiterated by this Court in *State of U.P.* v. *Lalji Tandon*[4] wherein it was observed as under: (SCC pp. 8-9, para 13)

"There is a difference between an *extension of lease* in accordance with the covenant in that regard contained in the principal lease and *renewal of lease*, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed, as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be."

(emphasis in original)

31. Having regard to these decisions we must hold that in order to give effect to the renewal of a lease, a document has to be executed evidencing the renewal of the agreement or lease, as the case may be, and there is no concept of automatic renewal of lease by mere exercise of option by the lessee. It is, therefore, not possible to accept the submission urged on behalf of the appellant-plaintiffs that by mere exercise of option claiming renewal, the lease stood renewed automatically and there was no need for executing a document evidencing renewal of the lease.

32. We shall now advert to some of the facts stated in the plaint itself. The case of the appellant-plaintiff is that since it was not possible to commence mining operation after taking possession of the mine, in exercise of its right under clause 15 of the agreement, it permitted the respondent to carry on mining operations confined to the pits already opened up. Its case was that under its permission the respondents were carrying on limited mining operation. The appellants were awaiting permission of the Central Government under the Forest (Conservation) Act as also consent of the surface right holders permitting them to carry on mining operations. When the original term of the lease expired, they exercised their option to get the lease renewed for a further period of 5 years but the respondents refuted their

4 (2004) 1 SCC 1

claim and denied the fact that the lease stood renewed automatically. The option was exercised by the appellant and refuted by the respondent in December 2001. Thereafter nothing much appears to have happened and during this period the respondent carried on mining operations. It was only on 15-5-2005 that the appellant Hardesh wrote to the respondent stating that they had been permitted to extract ore from the broken pits in the forest area under clause 15 of the extraction agreement. The appellant also permitted the respondent to sell the ore to others like Dempo or Chowgules since Fomento was not interested in purchasing the low grade ore. The communication also referred to the option exercised by the appellant for renewal for a period of 5 years from 1-1-2002 to which the respondent replied saying that they were not entitled to exercise any option. The letter then goes on to say that the appellants were led to believe that the respondent had obtained the consent from the surface right owners of the privately owned land within the mining area about which no information had been given to the appellants. Therefore, by letter dated 27-4-2005 the respondent were called upon to furnish the documents evidencing consent given by the surface right owners. It was further stated that if no documents, as aforesaid, were furnished within a period of 15 days from the date of receipt of this notice or if no reply was received, the appellants shall presume that such consent had been obtained since the respondents were doing the extraction in the area of the captioned mining lease. Since no documents were furnished pursuant to notice dated 27-4-2005, the appellants assumed that such consent had been obtained. It, therefore, withdrew the permission given to the respondents under clause 15 of the extraction agreement so that the appellants could make preparation to start the extraction work. The last paragraph of this letter reads as under:

> "We, therefore, give you notice to desist from doing any extraction of ore or doing work of any type in the above mine on the expiry of 30 days from the receipt of this notice failing which we would have no other alternative than to approach the court to get appropriate relief, including specific performance against you."

It is not necessary to refer to the correspondence exchanged thereafter. The suits came to be filed on 4-8-2005 in which a prayer for injunction was made with a view to enforce the negative covenants contained in clauses 15 and 20 of the agreement.

33. The respondent sought rejection of the plaint by filing application under Order 7 Rule 11 CPC contending that the suit was barred by limitation on the face of it. It was contended before the High Court as also before us that the plaint has been cleverly drafted to give it the appearance of a simple suit for injunction to enforce the terms of clauses 15 and 20 of the agreement which incorporated negative covenants prohibiting mining operation by anyone else except the appellant Hardesh, or without its permission. It was submitted before us that the law is well settled that the dexterity of the draftsman whereby the real cause of action is camouflaged in a plaint cleverly drafted cannot defeat the right of the defendant to get the suit

dismissed on the ground of limitation if on the facts, as stated in the plaint, the suit is shown to be barred by limitation. In *T. Arivandandam* v. *T.V. Satyapal*[10] this Court observed as under: (SCC p. 470, para 5)

> "*5.* We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful—not formal—reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7 Rule 11 CPC, taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10 CPC. An activist judge is the answer to irresponsible law suits."

34. In *ITC Ltd.* v. *Debts Recovery Appellate Tribunal*[11] this Court noticed the judgment in *Arivandandam*[10] and observed as under: (SCC p. 77, para 16)

> "*16.* The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 CPC. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint."

35. The respondent strongly relied on the decision of this Court in *Srinivasa Murthy case*[1]. That was a case where the plaintiffs alleged in the plaint that their father had incurred some debts and had therefore borrowed a sum of Rs 2000 from the predecessor-in-title of the defendants. Only by way of security for the loan advanced, a registered sale deed had been executed on 5-5-1953 with a contemporaneous oral agreement that on return of the borrowed sum with interest payable thereon @ 6% per annum a registered reconveyance deed shall thereafter be executed in favour of the borrower. The case of the plaintiffs was that despite the registered sale deed, the plaintiffs continued to be in possession of the suit lands. The receipt was obtained on 25-3-1987 from the defendants and the original registered sale deed dated 5-5-1953 was returned to the first plaintiff with an oral promise by the defendants to execute the registered document in favour of the plaintiff borrower. On reading of all the averments of the plaint, it appeared that the cause of action for obtaining a registered reconveyance deed from the defendants in favour of the plaintiffs first arose on 25-3-1987 when the entire loan amount was alleged to have been paid and an oral promise was given by

10 (1977) 4 SCC 467
11 (1998) 2 SCC 70
1 *N.V. Srinivasa Murthy* v. *Mariyamma*, (2005) 5 SCC 548

the defendants to reconvey the suit lands. In the mutation proceedings an order was passed in favour of the defendants and the said order was confirmed in appeal by order of the Assistant Commissioner dated 28-4-1994. The cause of action is said to have arisen when the Appellate Authority confirmed the order of the lower authority directing mutation of the names of the defendants and then again in the first week of July 1995 when the defendants were alleged to have made an attempt to interfere with the plaintiffs' possession and enjoyment of the suit lands. The suit was filed on 26-8-1996 in which the reliefs claimed were, (*a*) declaration that the plaintiffs are absolute owners of the suit lands, and (*b*) permanent injunction restraining the defendants from wrongfully entering the scheduled property and from interfering with the peaceful possession and enjoyment of scheduled lands.

36. This Court after examining the pleadings observed that the foundation of the suit was that the registered sale deed dated 5-5-1953 was in fact only a loan transaction executed to secure the amount borrowed from the plaintiffs' predecessor. The amount borrowed was alleged to have been fully paid back on 25-3-1987 and in acknowledgment thereof a formal receipt was obtained. At the same time there was an alleged oral agreement by the defendants to reconvey the property to the plaintiffs by registered deed. This Court held that on the basis of the averments contained in the plaint, relief of declaring the registered sale deed dated 5-5-1953 to be a loan transaction and second relief of specific performance of oral agreement of reconveyance of property by registered document ought to have been claimed in the suit. A suit merely for declaration that the plaintiffs are absolute owners of the suit lands could not have been claimed without seeking a declaration that the registered sale deed dated 5-5-1953 was a loan transaction and not a real sale. The cause of action for seeking such a declaration and for reconveyance deed according to the plaintiffs' own averments arose on 25-3-1987 when the plaintiffs claimed to have obtained the entire loan amount and obtained a promise from the defendants to reconvey the property. The mutation proceedings did not furnish any independent or fresh cause of action to seek a declaration of the sale deed of 5-5-1953 to be merely a loan transaction. The foundation of the suit was clearly the registered sale deed of 1953 which is alleged to be a loan transaction and the alleged oral agreement of reconveyance of the property on return of borrowed amount. This Court went on to observe: (SCC p. 553, paras 14-15)

> "*14.* After examining the pleadings of the plaint as discussed above, we are clearly of the opinion that by clever drafting of the plaint the civil suit which is hopelessly barred for seeking avoidance of registered sale deed of 5-5-1953, has been instituted by taking recourse to orders passed in mutation proceedings by the Revenue Courts.
>
> *15.* Civil Suit No. 557 of 1990 was pending when the present suit was filed. In the present suit, the relief indirectly claimed is of declaring the sale deed of 5-5-1953 to be not really a sale deed but a loan

transaction. Relief of reconveyance of property under alleged oral agreement on return of loan has been deliberately omitted from the relief clause. In our view, the present plaint is liable to rejection, if not on the ground that it does not disclose 'cause of action', on the ground that from the averments in the plaint, the suit is apparently barred by law within the meaning of clause (*d*) of Order 7 Rule 11 of the Code of Civil Procedure."

37. Relying upon these decisions it was contended before us that though the suit is for grant of injunction, real foundation of the suit is that there exists an agreement containing negative covenants which can be enforced by the appellant-plaintiff. The relief is sought on the assumption that there is an existing agreement containing negative covenants in clauses 15 and 20 thereof, as they were in the original agreement. Counsel submitted that even the negative covenants in clauses 15 and 20 of the agreement presuppose the subsistence of the agreement and, therefore, unless the appellant-plaintiffs satisfy the Court that there is a subsisting agreement, they cannot seek any relief from the Court to enforce the negative covenants contained therein.

38. On the other hand, it is the case of the appellant-plaintiff that on mere exercise of option by the appellant-plaintiff claiming renewal the agreement got renewed automatically.

39. We are of the view that the respondents are right in contending that enforcement of the negative covenants presupposes the existence of a subsisting agreement. As noticed earlier, the law is well settled that the renewal of an agreement or lease requires execution of a document in accordance with law evidencing the renewal. The grant of renewal is also a fresh grant. In the instant case, the appellant-plaintiff did exercise their option and claimed renewal. The respondents denied their right to claim renewal in express terms and also unequivocally stated that the agreement did not stand renewed as contended by the appellants. Having regard to these facts it must be held that a cause of action accrued to the appellant-plaintiff when their right of renewal was denied by the respondents. This happened in December 2001 and, therefore, within three years from that date they ought to have taken appropriate proceedings to get their right of renewal declared and enforced by a court of law and/or to get a declaration that the agreement stood renewed for a further period of 5 years upon the appellants' exercising their option to claim renewal under the original agreement. The appellant-plaintiffs have failed to do so. However, the plaint proceeds on the assumption that the original agreement stood renewed including the negative covenants contained in clauses 15 and 20 of the original agreement which authorised only the appellants to extract ore from the mine with an obligation cast on the respondent-defendants not to interfere with the enjoyment of their rights under the agreement. In the facts of this case, in the suit prayer for injunction based on negative covenants could not be asked for unless it was first established that the agreement continued to subsist. The use of the words "during the subsistence of this agreement" in clause 15, and "during the

pendency of this indenture" in clause 20 of the agreement is significant. In the absence of a document renewing the original agreement for a further period of 5 years and in the absence of any declaration from a court of law that the original agreement stood renewed automatically upon the appellants exercising their option for grant of renewal, as is the case of the appellants, they cannot be granted relief of injunction, as prayed for in the suit, for the simple reason that there is no subsisting agreement evidenced by a written document or declared by a court. If there is no such agreement, there is no question of enforcing clauses 15 and 20 thereof. The appellants ought to have prayed for a declaration that their agreement stood renewed automatically on exercise of option for renewal and only on that basis could they have sought an injunction restraining the respondents from interfering with their possession and operation. Having not done so, they cannot be permitted to camouflage the real issue and claim an order of injunction without establishing the subsistence of a valid agreement. In the instant suit as well they could have sought a declaration that the agreement stood renewed automatically but such a claim would have been barred by limitation since more than 3 years had elapsed after a categoric denial of their right claiming renewal or automatic renewal by the respondent-defendants.

40. Mr Nariman contended that this case was governed not by Article 58 of the Limitation Act but, if at all, by Article 113 thereof because there is no specific article provided for enforcement of positive or negative covenants. We shall assume that he is right in contending that Article 113 may apply where enforcement of a positive or negative covenant is sought in a suit for injunction. However, in this case we have found that the real foundation for the suit was that the earlier agreement stood renewed automatically containing the same terms and conditions as in the original agreement including the negative covenants. There is neither a document to prove that the agreement stood renewed nor is there a declaration by a court that the agreement stood renewed automatically on exercise of option for renewal by the appellants. The basis for claiming the relief of injunction, namely, a subsisting renewed agreement did not exist in fact. In its absence, no relief as prayed for in the suit could be granted by the clever device of filing a suit for injunction, without claiming a declaration as to their subsisting rights under a renewed agreement, which is apparently barred by limitation.

41. We are, therefore, satisfied that the trial court as well as the High Court were justified in holding that the plaint deserved to be rejected under Order 7 Rule 11 CPC since the suit appeared from the statements in the plaint to be barred by the law of limitation. We, therefore, find no merit in these appeals and the same are accordingly dismissed. No order as to costs.