BEFORE THE NATIONAL GREEN TRIBUNAL,
(SOUTHERN ZONE), SITTING AT CHENNAI

I.A. No. 48 of 2020
In
Appeal No. 14 of 2020

IN THE MATTER OF:
Yelahanka Puttenahalli Lake and
Bird Conservation Trust (Regd.) ….APPELLANT

VERSUS

Ministry of Environment, Forests and
Climate Change, Union of India & Ors. …RESPONDENTS

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WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT

A. Preliminary arguments on interpretation of the Orders dated 10.06.2020 & 09.09.2020 passed by the Hon'ble Supreme Court of India:-

1. At the outset it is humbly submitted that the Hon'ble Supreme Court has considered the above mentioned matter in respect of the limitation and thereby has consciously granted 4 weeks time to the Appellant to approach this Hon'ble Tribunal. The Appellant has filed the present appeal on 24.06.2020 before this Hon'ble Tribunal. Thus, the present appeal is filed within the time period of 4 weeks as provided by the Hon'ble Supreme Court in its order dated 10.06.2020 and thereby the present appeal deserves to be heard and decided on merits.

2. That the Appellant herein has filed an application in I.A. No. 48 of 2020 with abundant caution and same needs to be formally

considered and appropriate order be passed in the light of the Orders dated 10.06.2020 and 09.09.2020 passed by the Hon'ble Supreme Court in SLP (C) No. 10555/2019 and thereby to hold that the appeal is in time and be heard on merits regarding the challenge to the grant of the Environment Clearance.

3. For the purpose of proper appreciation, the order dated 10.06.2020 passed by the Hon'ble Supreme Court in SLP(C) No. 10555/2019 [C.A. No. 2552/2020] is reproduced as follows:-

> *"Leave granted.*
>
> *The petitioners filed a writ petition No. 25189 of 2018 before the High Court of Karnataka at Bangalore challenging the Order granting environmental clearance dated 1.9.2015 by State Level Environmental Impact Assessment Authority in favour of respondent No.4. The High Court has rightly held that the said order is appealable to the National Green Tribunal. While holding so, the Division Bench has observed that there is no violation of any law in granting environmental clearance, without considering the rival contentions of the parties.*
>
> *Having heard learned counsel for the parties, we are of the view that it is just and proper for the parties to approach the National Green Tribunal for appropriate relief. The observation of the High Court on merits of the case is hereby set aside.*
>
> *If the proceedings are initiated before the National Green Tribunal within a period of four weeks from today, the National Green Tribunal is requested to dispose of the same on merits.*
>
> *The Appeal is disposed of accordingly."*

Further, the Hon'ble Supreme Court in a Clarification Application in M.A. No. 1527/2020 filed by the Respondent No. 4 herein, was pleased to pass the Order dated 09.09.2020 as follows:-

> *"Heard learned counsel for the parties.*
>
> *In our view, Order passed by this Court on 10.06.2020 requires no clarification. Application for Clarification stands disposed of accordingly.*
>
> *However, all the contentions of the parties are left open to be considered by the National Green Tribunal."*

4. Thus, from the conjoint reading of both the Orders passed by the Hon'ble Supreme Court, it is humbly submitted as follows:-

- That the Hon'ble Supreme Court being conscious of the fact that the Appellant has challenged the grant of Environment Clearance dated 01.09.2015 and the same is appealable before this Hon'ble Tribunal; has set aside the observations of the High Court regarding the merits of the grant of Environment Clearance and thereby ordered that if the appeal is filed by the Appellant within 4 weeks then this Hon'ble Tribunal would dispose of the appeal on merits.
- The Hon'ble Supreme Court by its Order dated 09.09.2020 has reiterated that no clarification of the order dated 10.06.2020 is required. Hence, the direction, the Hon'ble Supreme Court gave in the Order dated 10.06.2020

survives *i.e.,* if the Appellant file the matter within 4 weeks, then the NGT shall dispose of the matter on merits.

- That the latter part of the Order dated 09.09.2020 pertains to the contention raised by the Respondent No. 4/KPCL, regarding the issue of grant of EC dated 01.09.2015 not being raised by the Appellant before the High Court and the Supreme Court and hence, contended that the issue of grant of EC cannot be gone into by the NGT. In this regard the Hon'ble Supreme Court was pleased to state that the contention of the parties are left open to be considered by the NGT.

Thus, in view of the above this Hon'ble Tribunal may be pleased to hold that the appeal is within the time period granted by the Hon'ble Supreme Court and thereby proceed to hear the matter on merits regarding the challenge to the grant of Environment Clearance dated 01.09.2015.

B. The issue regarding limitation was argued before the Hon'ble Supreme Court and Hon'ble High Court of Karnataka:-

5. The Appellant herein had filed a W.P. No. 25189/2018 before the High Court of Karnataka on 11.06.2018. The Respondent No. 2/SEIAA filed his objection to the said writ petition and *inter alia* opposed the same on the grounds of delay. The relevant portion of the objection dated 18.08.2018 filed by the Respondent No. 2/SEIAA before the High Court of Karnataka in W.P. 25189/2018 is as follows:-

"1. It is most respectfully submitted that the Petitioner in this Writ Petition filed in the nature of Public Interest Litigation, has in substance, assailed, the environmental clearance bearing No. SEIAA 20 IND 2014 dated 01.09.2015 issued by this Respondent to establish the "Gas based Combined Cycle Power Plant" by the 4th Respondent Karnataka Power Corporation Limited and the cost of project as submitted in the statutory application is 1571.98 crores. ***The said Writ Petition is liable to be dismissed at the threshold on the ground of delay and laches in approaching this Hon'ble Court. Though the Petitioner had the knowledge of the Project in question at the very inception itself and has not assigned any explanation for approaching this Hon'ble Court at this belated stage. Therefore, on the sole ground of delay and laches, the present Writ Petition is liable to be dismissed.*** " (Emphasis supplied)

(Kindly see ANNEXURE A-14 at page 247 of Appeal paper-book)

6. It may be noted that even before the Hon'ble Supreme Court, in SLP (C) No. 10555/2019, the Respondent No. 4/KPCL filed its Counter-affidavit. Whereby, the Respondent No. 4/KPCL objected to grant of special leave to appeal, *inter alia* on the grounds of delay and laches. The relevant portion of the Counter-affidavit dated 14.11.2019 filed by the Respondent No. 4/KPCL before the Hon'ble Supreme Court, is as follows:-

"A. PRELIMINARY OBJECTIONS:

I. THE PETITION IS BARRED BY DELAY AND LACHES:

1. *It is submitted that main issue in the instant Petition is the grant of Environment Clearance dated 01/09/2015 by Respondent No. 2 to the Respondent No. 4. The Writ Petition before the Hon'ble High Court, the final order of which the Petitioner has now sought to challenge by way of the instant Petition, was filed on 11/06/2018 i.e., after more than 2 years and 9 months from the date on which the alleged cause of action arose. Therefore, there is an enormous delay in filing of the present petition. The petitioner has remained silent till the Respondent No. 4's Combined Cycle Power Plant using Natural Gas ("Power Plant") has been constructed and thereafter filed the petition before the Hon'ble High Court. There was sufficient opportunity to challenge the environmental approval process of the Respondent No. 4. The same had been published on 06/09/2015 and 08/09/2015 in newspapers in Bangalore calling for objections. The Petitioner, being inimical to the answering Respondent's project was very well aware of the fact that the Petitioner's frivolous objections would not stand scrutiny before the SEAC and the 1st Respondent. Hence, the Petitioner has deliberately waited till all approvals were granted and the*

construction has been completed, in order to stall the project."

(Kindly see ANNEXURE A-19 page 303 at page 304 of the Appeal paper-book)

7. Further, the Respondent No. 4/KPCL, after the passing of the Order dated 10.06.2020 by the Hon'ble Supreme Court and after filing of the present IA and Appeal before this Hon'ble Tribunal, in its wisdom moved a Clarification Application in M.A. No. 1527/2020 dated 31.07.2020 before the Hon'ble Supreme Court. Therein, the Respondent No. 4/KPCL, *inter alia,* raised the following points for clarification before the Hon'ble Supreme Court:-

"6. With the utmost respect, it is submitted that the consequence of this Hon'ble Court erroneously noting that the EC has been challenge by the Petitioner has resulted in a situation wherein the Petitioner in the Appeal before the Hon'ble NGT has for the first time challenged the EC issued in favour of the Respondent No. 4.

7. This Hon'ble Court did not intend to grant liberty to the Petitioner to enlarge the scope of his grievance and seek reliefs which were never sought either before the Hon'ble High Court or before this Hon'ble Court. Hence, it is necessary to issue a clarification that the liberty is granted only insofar as the reliefs which were sought before this Hon'ble Court and not for challenge to the EC as sought to be interpreted by the Petitioner in its IA for condonation of delay.

xxxxxx

9. In terms of the Section 14(3) of the Act, the condonation of delay is possible only for sixty days and not for a day more. When a special statute prescribes a bar for the entertainment of an appeal, the same cannot be condoned by any Tribunal which is a creation of the special statute. A delay cannot be condoned by any court in violation of statute. Hence, any challenge to the EC cannot be entertained for this reason also.

10. An order passed by this Hon'ble Court ought to be read along with the applicable legislations, pleadings filed by the person. However, the Petitioner has sought to make it appear that this Hon'ble Court has directed that this Hon'ble Court has directed that the NGT entertain the Appeal filed by the Petitioner and contends that the delay is deemed to be condoned."

(Copy of the Clarification Application filed in M.A. No. 1527/2020 before the Hon'ble Supreme Court is filed before this Hon'ble Tribunal by the Respondent No. 4/KPCL along with a Memo dated 17.08.2020)

8. Thus, from the above it is submitted that the issue regarding the delay and laches is fully argued before the Hon'ble Supreme Court and thereafter, the Hon'ble Supreme Court by its Order dated 10.06.2020 was pleased to grant liberty to the Appellant herein to file the Appeal before this Hon'ble Tribunal within 4 weeks and accordingly, the present appeal is filed within time so granted. Hence, it is humbly submitted that the Respondents herein cannot

re-agitate the issue of delay and laches before this Hon'ble Tribunal and further it is submitted that the contention of the Respondents on delay and laches would go against the letter and spirit of the Orders dated 10.06.2020 and 09.09.2020 passed by the Hon'ble Supreme Court. Thus, the contentions of the Respondents on delay and laches deserves to be rejected and the present Appeal be heard and decided on merits.

9. It is further submitted that the issue of delay and laches is decided by the Order dated 10.06.2020 passed by the Hon'ble Supreme Court and the same being re-enforced by the Order dated 09.09.2020, wherein, the Hon'ble Supreme Court has categorically stated that the *"In our view, Order passed by this Court on 10.06.2020 requires no clarification"*. Thus, it is submitted that the contention of the Respondents regarding the delay and laches before this Hon'ble Tribunal would amount to over-reaching the direction passed *inter-vivos* between the parties and hence the same deserves to be rejected and the present Appeal be heard on merits regarding challenge to the grant of EC dated 01.09.2015.

10. Herein, it is humbly submitted that the there is no ambiguity in the Orders dated 10.06.2020 and 09.09.2020 passed by the Hon'ble Supreme Court and the direction passed therein cannot be whittled down nor liquidated by any amount of interpretation advanced by the Respondents herein.

11. It is further submitted that the Respondents herein has contended that the Delay Application in I.A. No. 48/2020 be heard separately and be disposed of on merits. It is submitted that this was never the intention of the Hon'ble Supreme Court while passing the Orders dated 10.06.2020 and 09.09.2020. The contention of the Respondents is prima facie contrary to the substantive order of the Hon'ble Supreme Court passed on 10.06.2020, whereby 4 week time period was granted to the Appellant herein to approach this Hon'ble Tribunal and thus, the present Appeal be heard and decided on merits. Thus, the contention of the Respondents is contrary to the orders of the Hon'ble Supreme Court and the same deserves to be rejected in toto.

C. Orders dated 10.06.2020 & 09.09.2020 passed by the Hon'ble Supreme Court in SLP(C) No. 10555/2019 [C.A. No. 2552/2020] is passed in exercise of its powers under Article 142 of the Constitution of India, 1950:

12. For the sake of ready reference the Art. 142 of the Constitution of India is reproduced as follows:-

> *"**Art. 142. Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc.-***
>
> *(1) 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 orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made*

by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) xxxxx"

13. The powers of the Hon'ble Supreme Court under Art. 142 are spelt out in the following judgements:-

a. The 5-Judge Constitution Bench of the Hon'ble Supreme Court in ***Union Carbide Corporation and Ors. vs. Union of India (UOI) and Ors.*** [(1991) 4 SCC 584] has laid down the law regarding Art. 142, as follows:-

"43. .....The power under Article 142 is at an entirely different level and of a different quality. ***Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso-facto, act as prohibitions or limitations on the constitutional powers under Article 142.*** *Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers - limited in some appropriate way - is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Sri Sorabjee, learned Attorney-General, referring to Garg's case, said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public-policy and not merely incidental to a particular statutory*

scheme or pattern. ***It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision.*** *Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public-policy and regulate the exercise of its power and discretion accordingly....."*
(emphasis supplied)

The above judgement is followed by the later 5-Judge Constitution Bench of the Hon'ble Supreme Court in ***M. Siddiq (D) thr. L.Rs. vs. Mahant Suresh Das and Ors.*** [(2020) 5 SCC 1]

Further, the later 5-Judge Constitution Bench of the Hon'ble Supreme Court in ***Anita Kushwaha and Ors. vs. Pushap Sudan and Ors.*** [(2016) 8 SCC 509], has followed the *Union Carbide Corporation case* and has laid down the law regarding Art. 142, as follows:-

> *"35. Dealing with the question whether a provision contained in an ordinary statute would affect the exercise of powers under Article 142 of the Constitution, this Court held,* ***that the constitutional power under Article 142 was at a different level altogether and that an ordinary statute could not control the exercise of that power.***"

b. The 2-Judge Bench of the Hon'ble Supreme Court in ***Mohammed Anis v/s. Union of India (UOI) and Ors.*** [[1993] Supp1 SCR 263] has laid down the law in respect of Art. 142 as follows:-

"6. True it is, that a Division Bench of this Court made an order on March 10, 1989 referring the question whether a court can order the CBI, an establishment under the Delhi Special Police Establishment Act, to investigate a cognizable offence committed within a State without the consent of that State Government or without any notification or order having been issued in that behalf. In our view, merely because the issue is referred to a larger Bench everything does not grinded to a halt. The reference to the expression 'court' in that order cannot in the context mean the Apex Court for the reason that the Apex Court has been conferred extraordinary powers by Article 142(1) of the Constitution so that it can do complete justice in any cause or matter pending before it.

The question regarding the width and amplitude of this Court's power under Article 142(1) came up for consideration before this Court in Delhi Judicial Service Assn. Delhi v. State of Gujarat MANU/SC/0473/1991 : AIR1991SC2150 , and again before the Constitution Bench in Union Carbide Corpn. v. Union of India MANU/SC/0058/1992 : AIR1992SC248 . In the first case this Court observed that the power conferred by Article 142(1) coupled with the plenary powers under Articles 32 and 136 empowers the Court to pass such orders as it deem necessary to do complete justice to the cause or matter brought before it. ***This power to do complete justice is entirely of different level and of different quality which cannot be limited or restricted by provisions contained in statutory law. No enactment made by the Central or State Legislature can limit or restrict the Court's power under Article 142(1) though while exercising it the Court may have regard to statutory provisions*** *(See Paragraphs 50 and 51 of the judgment). In the second case this Court clarified that the expression "cause or matter" must be construed in a wide sense to effectuate the purpose of conferment of power.*

c. The 3-Judge Bench of the Hon'ble Supreme Court in ***In re: Vinay Chandra Mishra*** [(1995) 2 SCC 584] has laid down the law in respect of Art. 142 as follows:-

> *"15. xxxxxx*
> *In view of these observations of the latter Constitution Bench on the point,* ***the observations made by the majority in Prem Chand Garg's case [supra] are no longer a good law.*** *This is also pointed out by this Court in the case of Mohammed Anis v. Union of India and Ors. MANU/SC/0901/1994 by referring to the decision of Delhi Judicial Services v. State of Gujarat (supra) and Union Carbide Corporation v. Union of India (supra) by observing* ***that statutory provisions cannot override the constitutional provisions and Article 142[1] being a constitutional power it cannot be limited or conditioned by any statutory provision. The Court has then observed that it is, therefore, clear that the power of the Apex Court under Article 142[1] of the Constitution cannot be diluted by statutory provisions and the said position in law is now well settled by the Constitution Bench decision in Union Carbide's case*** *[supra].* (emphasis supplied)

d. The Hon'ble Supreme Court in ***Indian Bank vs. ABS Marine Products Pvt. Ltd. [(2006) 5 SCC 72]*** has laid down the law in respect of Art. 142 as follows:-

> *"23. One word before parting.* ***Many a time, after declaring the law, this Court in the operative part of the judgment, gives some directions which may either relax the application of law or exempt the case on hand from the rigour of the law in view of the peculiar facts or in view of the uncertainty of law till then, to do complete justice. While doing so, normally it is not stated that such direction/order is in exercise of power***

under Article 142. *It is not uncommon to find that courts have followed not the law declared, but the exemption/relaxation made while moulding the relief in exercise of power under Article 142. When the High Courts repeatedly follow a direction issued under Article 142, by treating it as the law declared by this Court, incongruously the exemption/relaxation granted under Article 142 becomes the law, though at variance with the law declared by this Court. The courts should therefore be careful to ascertain and follow the ratio decidendi, and not the relief given on the special facts, exercising power under Article 142. One solution to avoid such a situation is for this Court to clarify that a particular direction or portion of the order is in exercise of power under Article 142. Be that as it may."*
(emphasis supplied)

e. The Hon'ble Supreme Court in ***Ram Pravesh Singh and Ors. vs. State of Bihar and Ors.*** **[(2006) 8 SCC 381]** has laid down the law in respect of Art. 142 as follows:-

"20. xxxxx
The tenor of the said order, which is not preceded by any reasons or consideration of any principle, demonstrates that it was an order made under Article 142 of the Constitution on the peculiar facts of that case. Law declared by this Court is binding under Article 141. Any direction given on special facts, in exercise of jurisdiction under Article 142, is not a binding precedent...."

f. The Hon'ble Supreme Court in ***State of Punjab vs. Rafiq Masih (White Washer)*** [(2014) 8 SCC 883] has laid down the law in respect of Art. 142 as follows:-

*""11. **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 rigors of the law.** The directions issued by the court can normally be categorized into one, in the nature of mòulding 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 the case of Indian Bank v. ABS Marine Products (P) Ltd. MANU/SC/2046/2006 : 2006 5 SCC 72, Ram Pravesh Singh v. State of Bihar MANU/SC/4176/2006 : (2006) 8 SCC 381 and in State of U.P. v. Neeraj Awasthi MANU/SC/0358/2006 : (2006) 1 SCC 667, 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 direction 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 have compartmentalized 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.**"*
(emphasis supplied)

g. The 3-Judge Bench of the Hon'ble Supreme Court in ***In Nidhi Kaim and Ors. vs. State of Madhya Pradesh and Ors.*** [(2017) 4 SCC 1] has laid down the law in respect of Art. 142 as follows:-

> *"10. It was also submitted, that the power conferred on this Court through Article 142, could not be put in a straightjacket. 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 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....."*

D. The Environment Clearance dated 01.09.2015 was challenged before the Hon'ble High Court and Hon'ble Supreme Court:-

14. At the outset it is submitted that the present EC dated 01.09.2015 is obtained by fraud and misrepresentation committed by the Respondent No. 4/KPCL. Thus, the fraud vitiates everything and the fraud cannot be legitimatised by getting the present Appeal dismissed on the technicalities. That has never been the aim and object of the NGT Act, 2010 nor is the purport and intention of the Orders dated 10.06.2020 and 09.09.2020 passed by the Hon'ble Supreme Court of India. It is submitted that the Yelahanka

Puttenahalli Lake is a declared "Bird Conservation Reserve" and it is a protected area under the Wildlife (Protection) Act, 1972. The present Gas based Power Plant falls at about 500 meters from the Protected Area/ Bird Conservation Reserve, and hence, the general conditions to the EIA Notification, 2006 would apply and the project becomes a 'Category A' project, and over which the MoEF alone has the jurisdiction to appraise and issue environmental clearances. This is mandated so as to ensure that special attention is paid to the unique issues that require to be addressed regarding the impact of an activity on a 'protected area' under the Wildlife Protection Act, 1972 so that floral and faunal diversity is not adversely affected and that the habitat of protected species is not destroyed as a result of the proposed activity. For the said reasons, certain projects including the present "Gas based Combined Cycle Power Plant" are prohibited from being set up within 10 kilometres radius of the 'protected area' and only the MoEF is empowered to deal with the issue regarding grant of environment clearance. Herein, it is submitted that the present project proponent *i.e,* Respondent No. 4/ KPCL has obtained the EC dated 01.09.2015 by suppressing the said vital fact from the Respondent No. 2/SEIAA. Thus, the said EC dated 01.09.2015 is illegal and void ab initio.

15. That the Appellant had filed W.P. No. 25189/2018 before the High Court and in the memorandum of writ petition, it is categorically challenged the EC dated 01.09.2015. The relevant paragraph 19 is as follows:-

"19. However, since the project was illegally cleared by the SEIAA who did not have jurisdiction to even deal with the proposal under the EIA Notification, 2006 these issues have not been disclosed or noticed, much less studied or appraised. It is therefore, submitted that the clearance dated 01.09.2015 is void ab initio and is a nullity, with no validity in law. The project proponent has no right to continue construction under the aegis of this void clearance and the continuance of activity at the site is illegal."

(see page 229 @ 236 of the Appeal paper-book)

Further, the prayers made in the W.P. No. 25189/2018 before the High Court are as follows:-

"1. Direct the 1st Respondent to consider the representation submitted by the Petitioner and initiate necessary action against the 4th Respondent towards the cancellation of the illegal and void environment clearance dated 01.09.2015 issued by the 2nd Respondent herein (placed herewith as Annexure-J)

2. Direct the 3rd Respondent to ensure that all steps are taken and necessary financial allocations are made towards preservation of the Puttenahlli Bird Reserve.

3. pass any other orders in the interest of justice and equity."

(see page 229 @ 245 of the Appeal paper-book)

16. The High Court in its order dated 08.03.2019 had ruled as under:-

"5. On hearing the learned counsels, we do not find any merit in this petition. Primarily as could be seen from the representation made by the petitioner, the same is a relief sought for to set aside the Environmental Clearance granted to respondent No. 4. The said order is appealable to the National Greens Tribunal. Therefore, it is not appropriate to entertain this petition. Even otherwise, on considering the material on record, we do not find that there is any violation of law in granting the environmental clearance. The environmental clearance is granted in a manner known to law, after following the procedure involved therein."

(see page 264 @ 268 of Appeal paper-book)

17. The Appellant herein filed a special leave petition before the Hon'ble Supreme Court of India in SLP(C) No. 10555/2019. The Special leave petition, *inter alia,* questioned the grant of EC dated 01.09.2015. The relevant paragraph is as follows:-

"I. It is submitted that the M/s. Karnataka Power Corporation Ltd. Instead of approaching the Ministry of Environment, Forest and Climate Change (MoEFCC) to seek environmental clearance under the EIA Notification,2006; has erroneously approached the Karnataka State Environmental Impact Assessment Authority (hereinafter referred to as the SEIAA) seeking for

environmental clearance in respect of the said "Gas based Combined Cycle Power Plant". The SEIAA, without taking into consideration that it did not have the jurisdiction to consider the said application, and without any application of mind, issued environmental clearance dated 01.09.2015. This calls for the interference of this Hon'ble Court."
(see page 269 @ 286 of Appeal paper-book)

18. The Hon'ble Supreme Court by its Order dated 08.05.2019 issued notice in the special leave petition (**see page 302**). The Karnataka Power Corporation Ltd., (KPCL), filed its counter-affidavit opposing the special leave petition. Therein, *inter alia,* the KPCL, took a stand that there is alternate remedy available to the Appellant and thereby acknowledging that the EC can be questioned before the Hon'ble NGT. The relevant paragraph is as follows:-

"2. S. 14, 15 and 16(h) of the National Green Tribunal Act, 2010 provides that the Tribunal has the jurisdiction inter *alia, to adjudicate matters relating to disputes regarding environmental clearances granted and matters relating to protection of the environment. Therefore, the Petitioner is required to approach the Tribunal for the adjudication of any claims it has regarding the same."*
(see page 303 @ 306 of Appeal paper-book)

19. The Hon'ble Supreme Court in SLP(C) No. 10555/2019 granted leave to appeal in the matter and thereby passed the Order dated 10.06.2020 and disposed of the petition with the direction.
(see page 388 of Appeal paper-book)

20. The KPCL had sought the clarification of the above order dated 10.06.2020, by filing a miscellaneous application in M.A. No. 1527/2020, wherein the Respondent No. 4 arise the following contention:-

> *"5. The necessity for this application for clarification arises due to the material suppression of facts by the Petitioner from this Court and from the Respondent No.4, which has resulted in the liberty being granted in terms of the order dated 10.06.2020. First aspect for clarification is that the order of this Hon'ble Court records that the Petitioner was challenging the EC before this Hon'ble Court and the Hon'ble High Court. The Petitioner has never questioned the EC at any point in time."*

(M.A. No. 1527/2020 is filed along with the memo by the KPCL)

21. The Hon'ble Supreme Court in M.A. No. 1527/2020 by its Order dated 09.09.2020 was pleased to dispose of the same, and reiterated that the Order dated 10.06.2020 does not require any clarification and it is submitted that the issue regarding arising of the contention against the challenge to the EC dated 01.09.2015, is left open to be considered by the Hon'ble NGT.

22. WHEREFORE, in the light of the facts and circumstances and the exposition of law by the Hon'ble Supreme Court of India, it is humbly prayed that this Hon'ble Court may pleased to allow the IA No. 48/2020 in Appeal No. 14/2020 and thereby to hear the Appeal No. 14/2020 on the merits of the matter, as per the Order s dated 10.06.2020 and 09.09.2020 passed by the Hon'ble Supreme Court in SLP(C) No. 10555/2019 (C.A. No. 2552/2020) and M.A. No. 1527/2020 respectively, in the interest of justice, equity and good conscience.

APPELLANT/AAPLICANT

Drawn and filed by,

Date: 14.06.2021
Place: Chennai

Abdul Azeem Kalebudde
Advocate for the Appellant

see page 51 and 52
for Para 43

MANU/SC/0058/1992

Equivalent Citation: I(1992)ACC332, AIR1992SC248, (1991)3CompLJ213(SC), (1991)3CompLJ213(SC), JT1991(6)SC8, 1991(2)SCALE675, (1991)4SCC584, [1991]Supp1SCR251, 1992(1)UJ505

IN THE SUPREME COURT OF INDIA

Civil Miscellaneous Petition Nos. 29377-A/88, 7942-43/89, 16093/89, 17965/89, Review Petition Nos. 229 and 623-24 of 1989. In Civil Appeal Nos. 3187-88 of 1988. With W.P. Nos. 257, 297, 354, 379, 293, 399, 420/89, 231, 300, 378, 382/89 (In C.A. Nos. 3187-

Decided On: 03.10.1991

Appellants:**Union Carbide Corporation and Ors.**
Vs.
Respondent: **Union of India (UOI) and Ors.**

Hon'ble Judges/Coram:
Ranganath Misra, C.J., K.N. Singh, M.N. Venkatachaliah, A.M. Ahmadi and N.D. Ojha, JJ.

Counsels:
For Appearing Parties: Soli J. Sorabjee, Attorney General, Shanti Bhushan, Indira Jaising, R.K. Garg and Danial Latifi, Advs.

JUDGMENT

Ranganath Misra, C.J.

1. I entirely agree with my noble and learned Brother Venkatachaliah and hope and trust that the judgment he has produced is the epitaph on the litigation. I usually avoid multiple judgments but this seems to be a matter where something more than what is said in the main judgment perhaps should be said.

2. Early in the morning of December 3, 1984, one of the greatest industrial tragedies that history has recorded got clamped down on the otherwise quiet township of Bhopal, the capital of Madhya Pradesh. The incident was large in magnitude - 2,600 people died instantaneously and quite a good number of the inhabitants of the town suffered from several ailments. In some cases the reaction manifested contemporaneously and in others the effect was to manifest itself much later.

3. Union Carbide Corporation ('UCC for short), a multi-national one, has diverse and extensive international operations in countries like India, Canada, West Asia, the Far East, African countries, Latin America and Europe. It has a sister concern known as Union Carbide India Limited ('UCIL' for short). In the early hours of the 3rd of December, 1984, there was a massive escape of lethal gas from the MIC Storage Tank of the plant into the atmosphere which led to the calamity.

4. Several suits were filed in the United States of America for damages by the local representatives of the deceased and by many of the affected persons. The Union of India under the Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985 took upon itself the right to sue for compensation on behalf of the affected parties and filed a suit for realisation of compensation. The suits were consolidated and Judge Keenan by his order dated 12th May, 1988, dismissed them on the ground of forum

non conveniens, subject, inter alia, to the following conditions:

> **1.** Union Carbide shall consent to submit to the jurisdiction of the Courts of India and shall continue to waive defences based on the statute of limitations, and
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> **2.** Union Carbide shall agree to satisfy any judgment rendered against it in an Indian Court, and if appealable, upheld by any appellate court in that country, whether such judgment and affirmance comport with the minimal requirements of due process.

5. The United States Court of Appeals for the Second Circuit by its decision of January 14, 1987, upheld the first condition and in respect of the second one stated:

> In requiring that UCC consent to enforceability of an Indian judgment against it, the district court proceeded at least in part on the erroneous assumption that, absent such a requirement, the plaintiff's, if they should succeed in obtaining an Indian judgment against UCC, might not be able to enforce it against UCC in the United States. The law, however, is to the contrary. Under New York law, which governs actions brought in New York to enforce foreign judgments...foreign-country judgment that is final, conclusive and enforceable where rendered must be recognised and will be enforced as "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" except that it is not deemed to be conclusive if:
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> > **1.** The judgment was rendered under a system which does not provide impartial tribunals or procedures, compatible with the requirements of due process of law;
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> > **2.** The foreign court did not have personal jurisdiction over the defendant.
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> Article 53. Recognition of Foreign Country Money Judgments. Although 5304 further provides that under certain specified conditions a foreign country judgment need not be recognized, none of these conditions would apply to the present cases except for the possibility of failure to provide UCC with sufficient notice of proceedings or the existence of fraud in obtaining the judgment, which do not presently exist but conceivably could occur in the future.

The Court rejected the plea advanced by UCC of breach of due process by non-observance of proper standards and ultimately stated:

> Any denial by the Indian Courts of due process can be raised by UCC as a defence to the plaintiffs' later attempt to enforce a resulting judgment against UCC in this country.

6. After Judge Keenan made the order of 12th of May, 1986, in September of that year Union of India in exercise of its power under the Act filed a suit in the District Court at Bhopal. In the plaint it was stated that death toll upto then was 2,660 and serious injuries had been suffered by several thousand persons and in all more than 5 lakh persons had sought damages upto then. But the extent and nature of the injuries or the aftereffect thereof suffered by victims of the disaster had not yet been fully ascertained though survey and scientific and medical studies had already been

undertaken. The suit asked for a decree for damages for such amount as may be appropriate under the facts and the law and as may be determined by the Court so as to fully, fairly and finally compensate all persons and authorities who had suffered as a result of the disaster and were having claims against the UCC. It also asked for a decree for effective damages in an amount sufficient to deter the defendant and other multi-national corporations involved in business activities from committing wilful and malicious and wanton disregard of the rights and safety of the citizens of India. While the litigations were pending in the US Courts an offer of 350 million dollars had been made for settlement of the claim. When the dispute arising out of interim compensation ordered by the District Court of Bhopal came before the High Court, efforts for settlement were continued. When the High Court reduced the quantum of interim compensation from Rs. 350 crores to a sum of Rs. 250 crores, both UCC and Union of India challenged the decision of the High Court by filing special leave petitions. It is in these cases that the matter was settled by two orders dated 14th and 15th of February, 1989. On May 4, 1989, the Constitution Bench which had recorded the settlement proceeded to set out brief reasons on three aspects:

> (a) How did this Court arrive at the sum of 470 million US dollars for an over-all settlement?
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> (b) Why did the Court consider this sum of 470 million US dollars as 'just, equitable and reasonable?
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> (c) Why did the Court not pronounce on certain important legal questions of far-reaching importance said to arise in the appeals as to the principles of liability of monolithics, economically entrenched multi-national companies operating with inherently dangerous technologies in the developing countries of the third world - questions said to be of great contemporary relevance to the democracies of the third-world?

7 . The Court indicated that considerations of excellence and niceties of legal principles were greatly overshadowed by the pressing problems of very survival of a large number of victims. The Court also took into account the law's proverbial delays. In paragraph 31 of its order the Constitution Bench said:

> As to the remaining question, it has been said that many vital juristic principles of great contemporary relevance to the Third World generally, and to India in particular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multi-nationals arose in this case. It is said that this is an instance of lost opportunity to this apex Court to give the law the new direction of new vital issues emerging from the increasing dimensions of the economic exploitation of developing countries by economic forces of the rich ones. This case also, it is said, concerns the legal limits to be envisaged in the vital interests of the protection of the constitutional rights of the citizenry, and of the environment, on the permissibility of such ultra-hazardous technologies and to prescribe absolute and deterrent standards of liability if harm is caused by such enterprises. The prospects of exploitation of cheap labour and of captive-markets, it is said, induces multi-nationals to enter into the developing countries for such economic-exploitation and that this was eminently an appropriate case for a careful assessment of the legal and Constitutional safeguards stemming from these vital issues of great contemporary relevance.

8. The Bhopal gas leak matter has been heard in this Court by four different Constitution Benches. The first Bench consisted of Pathak, CJ, Venkataramiah, Misra, Venkatachaliah and Ojha, JJ. The hearing continued for 24 days. The challenge to the validity of the Act was heard by a different Bench consisting of Mukharji, CJ, Singh, Ranganathan, Ahmadi and Saikia, JJ. where the hearing continued for 27 days. The review proceedings wherein challenge was to the settlement were then taken up for hearing by a Constitution Bench presided over by Mukharji, CJ with Misra, Singh, Venkatachaliah and Ojha, JJ. as the other members. This continued for 18 days. It is unfortunate that Mukharji, CJ. passed away soon after the judgment had been reserved and that necessitated a rehearing. The matters were re-heard at the earliest opportunity and this further hearing took 19 days. Perhaps this litigation is unique from several angles and this feature is an added one to be particularly noted. The validity of the Act has been upheld and three separate but concurring judgments have been delivered. At the final hearing of these matters long arguments founded upon certain varying observations of the learned Judges constituting the vires Bench in their respective decisions were advanced and some of them have been noticed in the judgment of my learned brother.

9. In the main judgment now being delivered special attention has been devoted to the conduct of Union of India in sponsoring the settlement in February, 1989, and then asking for a review of the decision based upon certain developments. Union of India as rightly indicated is a legal entity and has been given by the Constitution the right to sue and the liability of being sued. Under our jurisprudence a litigating party is not entitled to withdraw from a settlement by choice. Union of India has not filed a petition for review but has supported the stand of others who have asked for review. The technical limitations of review have not been invoked in this case by the Court and all aspects have been permitted to be placed before the Court for its consideration.

10. It is interesting to note that there has been no final adjudication in a mass tort action anywhere. The several instances which counsel for the parties placed before us were cases where compensation had been paid by consent or where settlement was reached either directly or through a circuitous process. Such an alternate procedure has been adopted over the years on account of the fact that trial in a case of this type would be protracted and may not yield any social benefit. Assessment of compensation in cases of this type has generally been by a rough and ready process. In fact, every assessment of compensation to some extent is by such process and the concept of just compensation is an attempt to approximate compensation to the loss suffered. We have pointed out in our order of May 4, 1989, that 'the estimate in the very nature of things cannot share the accuracy of an adjudication'. I would humbly add that even an adjudication would only be an attempt at approximation.

11. This Court did take into account while accepting the settlement the fact that though a substantial period of time had elapsed the victims were without relief. For quite some time the number of claims in courts or before the authorities under the Act was not very appreciable. Perhaps an inference was drawn from the figures that the subsequent additions were to be viewed differently. I do not intend to indicate that the claims filed later are frivolous particularly on account of the fact that there are contentions and some prima fade materials to show that the ill-effects of exposure to MIC could manifest late. The nature of injuries suffered or the effect of exposure are not the same or similar; therefore, from the mere number no final opinion could be reached about the sufficiency of the quantum. The Act provides for a Fund into which the decretal sum has to be credited. The statute contemplates of a

procedure for quantification of individual entitlement of compensation and as and when compensation becomes payable it is to be met out of the Fund. The fact that the Union of India has taken over the right to sue on behalf of all the victims indicates that if there is a shortfall in the Fund perhaps it would be the liability of Union of India to meet the same. Some of the observations of the vires Beach support this view. The genuine claimants thus have no legitimate relevance to make as long as compensation statutorily quantified is available to them because the source from which the compensation comes into the Fund is not of significant relevance to the claimant.

12. When the settlement was reached a group of social activists, the Press and even others claiming to be trustees of society came forward to question it. For some time what appeared to be a tirade was carried on by the media against the Court. Some people claiming to speak on behalf of the social Think Tank in meetings disparaged the Court. Some of the innocent victims were even brought into the Court premises to shout slogans at the apex institution. Some responsible citizens oblivious of their own role in the matter carried on mud-slinging.

13. The main foundation of the challenge was two-fold:

> (i) The criminal cases could not have been compounded or quashed and immunity against criminal action could not be granted; and
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> (ii) the quantum of compensation settled was grossly low.

So far as the first aspect is concerned, the main judgment squarely deals with it and nothing more need be said. As far as the second aspect goes, the argument has been that the principle enunciated by this Court in M.C. Mehta v. Union of India, MANU/SC/0092/1986 : [1987]1SCR819 should have been adopted. The rule in Rylands v. Fletcher [1868] 3 HL 330 has been the universally accepted authority in the matter of determining compensation in tort cases of this type. American jurisprudence writers have approved the ratio of that decision and American Courts too have followed the decision as a precedent. This Court in paragraph 31 of the Mehta judgment said:

> Rule of Rylands v. Fletcher was evolved in the year 1866 and it provides that a person who for his own purposes brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keep there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non- natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide Halsbury's Laws of England, vol. 45, para 1305. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be

displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry as part of the developmental programme, this rule evolved in the 19th century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in the context of a totally different kind of rule which was evolved in the context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence and we cannot countenance an argument that merely because the law in England does not recognise the rule of strict and absolute liability in cases of hazardous or inherently dangerous activities or the rule laid down in Rylands v. Fletcher as developed in England recognises certain limitations and exceptions, we in India must hold back our hands and not venture to evolve a new principle of liability since English courts have not done so. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently

dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule of Rylands v. Fletcher.

14. In M.C. Mehta's case no compensation was awarded as this Court could not reach the conclusion that Shriram (the delinquent company) came within the meaning of "State" in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution. Thus what was said essentially obiter.

15. The extracted part of the conservation from M.C. Mehta's case perhaps is a good guideline for working out compensation in the cases to which the ratio is intended to apply. The statement of the law ex-fade makes a departure from the accepted legal position in Rylands v. Fletcher. We have not been shown any binding precedent from the American Supreme Court where the ratio of M.C. Mehta's decision has in terms been applied. In fact Bhagwati, CJ clearly indicates in the judgment that his view is a departure from the law applicable to the western countries.

16. We are not concerned in the present case as to whether the ratio of M.C. Mehta should be applied to cases of the type referred to in it in India. We have to remain cognizant of the fact that the Indian assets of UCC through UCIL are around Rs. 100 crores or so. For any decree in excess of that amount, execution has to be taken in the United States and one has to remember the observation of the U.S. Court of Appeals that the defence of due process would be available to be raised in the execution proceedings. The decree to be obtained in the Bhopal suit would have been a money decree and it would have been subject to the law referred to in the judgment of the U.S. Court of Appeals. If the compensation is determined on the basis of strict liability-a foundation different from the accepted basis in the United States-the decree would be open to attack and may not be executable.

17. If the litigation was to go on merits in the Bhopal Court it would have perhaps taken at least 8 to 10 years; an appeal to the High Court and a further appeal to this Court would have taken in all around another spell of 10 years with steps for expedition taken. We can, therefore, fairly assume that litigation in India would have taken around 20 years to reach finality. From 1986, the year when the suit was instituted, that would have taken us to the beginning of the next century and then steps would have been made for its execution in the United States. On the basis that it was a foreign judgment, the law applicable to the New York Court should have been applicable and the 'due process' clause would have become relevant. That litigation in the minimum would have taken some 8-10 years to be finalised. Thus,

relief would have been available to the victims at the earliest around 2010. In the event the U.S. Courts would have been of the view that strict liability was foreign to the American jurisprudence and contrary to U.S. public policy, the decree would not have been executed in the United States and apart from the Indian assets of UCIL, there would have been no scope for satisfaction of the decree. What was said by this Court in Municipal Council, Ratlam v. Vardichand and Ors. MANU/SC/0171/1980 : 1980CriLJ1075 may be usefully recalled:

> Admirable though it may be, it is at once slow and costly. It is a finished product of great beauty, but entails an immense sacrifice of time, money and talent.
>
> This "beautiful" system is frequently a luxury; it tends to give a high quality of justice only when, for one reason or another, parties can surmount the substantial barriers which it erects to most people and to many types of claims.

We had then thought that the Bhopal dispute came within the last category and now we endorse it.

18. When dealing with this case this Court has always taken a pragmatic approach. The oft-quoted saying of the great American Judge that 'life is not logic but experience' has been remembered. Judges of this Court are men and their hearts also bleed when calamities like the Bhopal gas leak incident occur. Under the constitutional discipline determination of disputes has been left to the hierarchical system of Courts and this Court at its apex has the highest concern to ensure that Rule of Law works effectively and the cause of justice in no way suffers. To have a decree after struggling for a quarter of a century with the apprehension that the decree may be ultimately found not to be executable would certainly not have been a situation which this Court could countenance.

19. In the order of May 4, 1989, this Court had clearly indicated that it is our obligation to uphold the rights of the citizens and to bring to them a judicial fitment as available in accordance with the laws. There have been several instances where this Court has gone out of its way to evolve principles and make directions which would meet the demands of justice in a given situation. This, however, is not an occasion when such an experiment could have been undertaken to formulate the Mehta principle of strict liability at the eventual risk of ultimately losing the legal battle.

20. Those who have clamoured for a judgment on merit were perhaps not alive to this aspect of the matter. If they were and yet so clamoured, they are not true representatives of the cause of the victims, and if they are not, they were certainly misleading the poor victims. It may be right that some people challenging the settlement who have come before the Court are the real victims. I assume that they are innocent and unaware of the rigmarole of the legal process. They have been led into a situation without appreciating their own interest. This would not be the first instance where people with nothing as stake have traded in the misery of others.

21. This Court is entitled under the constitutional scheme to certain freedom of operation. It would be wrong to assume that there is an element of judicial arrogance in the act of the Court when it proceeds to act in a pragmatic way to protect the victims. It must be conceded that the citizens are equally entitled to speak in support of their rights. I am prepared to assume, nay, concede, that public activists should

also be permitted to espouse the cause of the poor citizens but there must be a limit set to such activity and nothing perhaps should be done which would affect the dignity of the Court and bring down the serviceability of the institution to the people at large. Those who are acquainted with jurisprudence and enjoy social privilege as men educated in law owe an obligation to the community of educating it properly and allowing the judicial process to continue unsoiled. Lord Simonds in Shaw v. Director of Public Prosecutions (1981) 2 All E.R. 447 said:

> I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State.

22. Let us remember what had once been said in a different context:

> It depends upon the present age whether this great national institution shall descend to our children in its masculine majesty to protect the people and fulfil their great expectations.

23. Let us also remember what Prof. Harry Jones in the Efficacy of Law has said:

> There are many mansions in the house of Jurisprudence, and I would not be little any one's perspective on law in society, provided only that he does not insist that his is the only perspective that gives a true and meaningful view of ultimate legal reality.

24. In the facts and circumstances indicated and for the reasons adopted by my noble brother in the judgment. I am of the view that the decree obtained on consent terms for compensation does not call for review.

25. I agree with the majority view.

M.N. Venkatachaliah, J.

26. These Review Petitions under Article 137 and Writ Petitions under Article 32 of the Constitution of India raise certain fundamental issues as to the constitutionality, legal-validity, propriety and fairness and conceivability of the settlement of the claims of the victims in a mass-tort-action relating to what is known as the "Bhopal Gas Leak Disaster"-considered world's industrial disaster, unprecedented as to its nature and magnitude. The tragedy, in human terms, was a terrible one. It has taken a toll of 4000 innocent human lives and has left tens of thousands of citizens of Bhopal physically affected in various degrees. The action was brought up by the Union of India as parens patriae before the District Court Bhopal in Original Suit No. 1113 of 1986 pursuant to the statutory ennoblement in that behalf under the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 ('Act for short') claiming 3.3 Billion- Dollars as compensation. When an inter-locator matter pertaining to the interim-compensation came up for hearing there was a Court assisted settlement of the main suit claim itself at 470 Million U.S. Dollars recorded by the orders of this Court dated 14th and 15th of February 1989. The petitions also raise questions as to the jurisdiction and powers of the Court to sanction and record such settlement when appeals brought up against an inter-locator order, were alone before this Court.

The Union Carbide (India) Limited (for short the UCIL) owned and operated, in the northern sector of Bhopal, a chemical plant manufacturing pesticides commercially marketed under the trade-names "Sevin" and "Temik". Methyl Isocyanate (MIC) is an

ingredient in the composition of these pesticides. The leak and escape of the poisonous fumes from the tanks in which they were stored occurred late in the night on the 2nd of December 1984 as a result of what has been stated to be a 'run-away' reaction owing to water entering into the storage tanks. Owing to the then prevailing wind conditions the fumes blew into the hutments abutting the premises of the plant and the residents of that area had to bear the burnt of the fury of the vitriolic fumes. Besides large areas of the city were also exposed to the gas.

27. Referring to this industrial accident this Court in the course of its order dated 4th May, 1989 had occasion to say:

> The Bhopal Gas Leak tragedy that occurred at midnight on 2nd December, 1984, by the escape of deadly chemical fumes form the appellant's pesticide-factory was a horrendous industrial mass disaster, unparalleled in its magnitude and devastation and remaining a ghastly monument to the de-humanising influence of inherently dangerous technologies. The tragedy took an immediate toll of 2,660 innocent human lives and left tens of thousands of innocent citizens of Bhopal physically impaired or affected in various degrees. What added grim poignancy to the tragedy was that the industrial-enterprise was using Methyl Iso-cyanate, a lethal toxic poison, whose potentiality for destruction of life and biotic-communities was, apparently, matched only by the lack of a prepackage of relief procedures for management of any accident based on adequate scientific knowledge as to the ameliorative medical procedures for immediate neutralisation of its effects.

The toll of life has since gone up to around four thousand and the health of tens of thousands of citizens of Bhopal City has come to be affected and impaired in various degrees of seriousness. The effect of the exposure of the victims to Methyl Isocyanate (MIC) which was stored in considerably large quantities in tanks in the chemical plant of the UCIL which escaped on the night of the 2nd of December 1984 both in terms of acute and chronic episodes has been much discussed. There has been growing body of medical literature evaluating the magnitude and intensity of the health hazards which the exposed population of Bhopal suffered as immediate effects and to which it was potentially put at risk.

It is stated that the MIC is the most toxic chemical in industrial use. The petitioners relied upon certain studies on the subject carried out by the Toxicology Laboratory, Department of Industrial Environmental Health Sciences, Graduate School of Public Health, University of Pittsburg, [reported in Environmental Health Perspective Volume 72, pages 159 to 167], Though it was initially assumed that MIC caused merely simple and short-term injuries by scalding the surface tissues owing to its highly exothermic reaction with water it has now been found by medical research that injury caused by MIC is not to the mere surface tissues of the eyes and the lungs but is to the entire system including nephrology lymph, immune, circulatory system, etc. It is even urged that exposure to MIC has mutagenic effects and that the injury caused by exposure to MIC is progressive. The hazards of exposure to this lethal poison are yet an unknown quanta.

Certain studies undertaken by the Central Water and Air Pollution Control Board, speak of the high toxicity of the chemical.

The estimates of the concentration of MIC at Bhopal that fateful night by the Board

inculcate a concentration of 26-70 parts per million as against the 'OSHA' standard for work environment of 0.02 P.P.M. which is said to represent the threshold of tolerance. This has led to what can only be described as a grim and grisly tragedy. Indeed the effects of exposure of the human system to this toxic chemical have not been fully grasped. Research studies seem to suggest that exposure to this chemical fumes renders the human physiology susceptible to long term pathology and the toxin is suspected to lodge itself in the tissues and cause long term damage to the vital systems, apart from damaging the exposed parts such as the eyes, lung membrane etc. It is also alleged that the 'latency-period' for the symptomatic manifestation of the effects of the exposure is such that a vast section of the exposed population is put at risk and the potential risk of long term effects is presently unpredictable. It is said that even in cases of victims presently manifesting symptoms, the prospects of aggravation of the condition and manifestation of other effects of exposure are statable possibilities.

Immediately symptomatic cases showed ocular inflammation affecting visual acuity and respiratory distress owing to pulmonary edema and a marked tending towards general morbidity. It is argued that analysis of the case histories of persons manifesting general morbidity trends at various intervals from 3rd December, 1989 upto April, 1990 indicate that in all the severely affected, moderately affected and mildly affected areas the morbidity trend initially showed a decline compared with the acute phase. But the analysis for the later periods, it is alleged, showed a significant trend towards increase of respiratory, ophthalmic and general morbidity in all the three areas. It is also sought to be pointed out that the fatal miscarriages in the exposed group was disturbingly higher than in the control group as indicated by the studies carried out by medical researchers. One of the points urged is that the likely long term effects of exposure have not been taken into account in approving the settlement and that the only way the victims' interests could have been protected against future aggravation of their gas related health hazards was by the incorporation of an appropriate "re-opener" clause.

28. On 29th of March, 1985 the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (Act) was passed authorising the Government of India, as parens patriae exclusively to represent the victims so that interests of the victims of the disaster are fully protected, and that claims for compensation were pursued speedily, effectively, equitably and to the best advantage of the claimants. On 8th of April, 1985 Union of India, in exercise of the powers conferred on it under the Act, instituted before the U.S. District Court, Southern District of New York, an action on behalf of the victims against the Union Carbide Corporation (UCC) for award of compensation for the damage caused by the disaster.

A large number of fatal-accidents and personal-injury actions had earlier also come to be filed in Courts in the United States of America by and on behalf of about 1,86,000 victims. All these earlier claims instituted in the various Courts in United States of America had come to be consolidated by the "Judicial Panel on Multi District Litigation" by its direction dated 6th February 1985 and assigned to United States District Court, Southern District of the New York, presided over by a Judge Keenan. The claim brought by the Union of India was also consolidated with them.

The UCC held 50.9% of the shares in the UCIL. The latter was its subsidiary. UCC's liability was asserted on the averments that UCC, apart from being the holding company, had retained and exercised powers of effective control over its Indian subsidiary in terms of its Corporate Policy and the establishment of the Bhopal

Chemical Plant-with defective and inadequate safety standards which, compared with designs of UCC's American plants, manifested an indifference and disregard for human-safety-was the result of a conscious and deliberate action of the UCC. It was averred that UCC had, on considerations of economic advantages, consciously settled and opted for standards of safety for its plant in a developing country much lower than what it did for its own American counter-parts. The claim was partly based on 'Design liability' on the part of UCC. The liability was also said to arise out of the use of ultra-hazardous chemical poisons said to engender not merely strict liability on Rylands v. Fletcher principal but an absolute liability on the principals of M.C. Mehta's case.

The defences of the UCC, inter-alia, were that UCC was a legal entity distinct in law from the UCIL; that factually it never exercised any direct and effective control over UCIL and that its corporate policy itself recognised, and was subject to, the over-riding effect of the municipal laws of the country and therefore subject to the statutes in India which prohibit any such control by a foreign company over its Indian subsidiary, except the exercise of rights as share-holder permitted by-law.

The UCC also resisted the choice of the American Forum on the plea of Forum Non-Convenience. Union of India sought to demonstrate that the suggested alternative forum before the judiciary in India was not an 'adequate' forum pointing out the essential distinction between the American and Indian systems of Tort Law both substantive and procedural available under and a comparison of the rights, remedies and procedure the competing alternative forums. The nature and scope of a defendant's plea of Forum Non-Convenience and the scope of an enquiry on such plea have received judicial considerations before the Supreme Court of United States of America in Gulf Oil Corporation v. Gilbert 330 U.S. 501, koster v. Lumbermens Mutual Casualty Co. 330 U.S. 518 and Piper Aircraft Co. v. Reyno 454 U.S. 235.

The comparison of rights, remedies and procedures available in the two proposed forums though not a "major-factor", nevertheless, were relevant tests to examine the adequacy of the suggested alternative forum. System of American Tort Law has many features which make it a distinctive system. Judge Keenan adopting the suggested approach in Piper's decision that doctrine of forum non conveniens was designed in part to help courts in avoiding complex exercises in comparative laws and that the decision should not hinge on an unfavourable change in law which was not a major factor in the analysis was persuaded to the view that differences in the system did not establish inadequacy of the alternative forum in India. Accordingly on 12th of May, 1986, Judge Keenan allowed UCCs plea and held that the Indian judiciary must have the "opportunity to stand tall before the world and to pass judgment on behalf of its own people".

29. Thereafter the Union of India was constrained to alter its choice of the forum and to pursue the remedy against the UCC in the District Court at Bhopal. That is how Original Suit No. 1113 of 1986 seeking a compensation of 33 Billion Dollars against the UCC and UCIL came to be filed at Bhopal.

Efforts were made by the District Court at Bhopal to explore the possibilities of a settlement. But they were not fruitful. Zahreeli Gas Kand Sangharsh Morcha one of the victim-organisations appears to have moved the Court for award of interim-compensation. On 13th December 1987, the District Court made an order directing payment of Rupees 350 crores as interim compensation. UCC challenged this award before the High Court of Madhya Pradesh. The High Court by its order dated 4th of

April, 1988 reduced the quantum of interim compensation to Rs. 250 crores. Both Union of India and UCC brought up appeals by Special Leave before this Court against the order of the High Court-Government of India assailing the reduction made by the High Court in the quantum of interim compensation from Rs. 350 crores to Rs. 250 crores and the UCC assailing the very jurisdiction and permissibility to grant interim compensation in a tort-action where the very basis of liability itself had been disputed. The contention of the UCC was that in a suit for damages where the basis of the liability was disputed the Court had no power to make an award of interim-compensation. It was urged that in common law-and that the law in India too-in a suit for damages no court could award interim-compensation.

Prior to 1980 when the Rules of Supreme Court in England were amended (Amendment No. 2/1980) Courts in United Kingdom refused interim-payments in actions for damages. In Moore v. Assignment Courier 1977 (2) All ER 842 (CA), it was recognised that there was no such power in common law. It was thereafter that the rules of the Supreme Court were amended by inserting Rules 10 and 11 of Order 29 Rules of Supreme Court specifically empowering the High Court to grant interim relief in tort injury actions. The amended provision stipulated certain preconditions for the inviolability of its enabling provision. But in England Lord Denning in the Court of Appeal thought that even under the common law the court could make an interim award for damages [(See Lim Poll Choo v. Camden Islington Area Health Authority 1979 1 AER 332. But his view was disapproved by the House of Lords (See 1979 (2)AER 910. Lord Scarman said:

> Lord Denning MR in the Court of Appeals declared that a radical reappraisal of the law is needed. I agree. But I part company with him on ways and means. Lord Denning MR believes it can be done by the Judges, whereas I would suggest to your Lordships that such a reappraisal calls for social, financial, economic and administrative decisions which only the legislature can take. The perplexities of the present case, following on the publication of the report of Royal Commission of Civil Liability and Compensation for Personal Injury (the Pearson report), emphasise the need for reform of the law.
>
> Lord Denning MR appeared, however, to think, or at least to hope, that there exists machinery in the rules of the Supreme Court which may be adopted to enable an award of damages in a case such as this to be 'regarded as an interim award'.
>
> It is an attractive, ingenious suggestion, but, in my judgment, unsound. For so radical a reform can be made neither by judges nor by modification of rules of court. It raises issues of social economic and financial policy not amenable to judicial reform, which will almost certainly prove to be controversial and can be resolved by the legislature only after full consideration of factors which cannot be brought into clear focus, or be weighed and assessed, in the course of the forensic process. The Judge, however, wise, creative, and imaginative he may be, is cabinet, cribbed, confined, bound in not as was Macbeth, to his 'saucy doubts and fears' but the evidence and arguments of the litigants. It is this limitation, inherent in the forensic process, which sets bounds to the scope of judicial law reform.

But in cases governed by common law and not affected by the statutory changes in the Rules of Supreme Court in U.K., the Privy Council said:

> Their Lordships cannot leave this case without commenting On two unsatisfactory features. First, there is the inordinate length of time which has elapsed between service of the writ in February 1977 and final disposal of the case in the early months of 1984. The second is that, as their Lordships, understand the position, no power exists in a case where liability is admitted for an interim payment to be ordered pending a final decision on quantum of damages. These are matters to which consideration should be given. They are, of course, linked; though the remedy for delay may be a matter of judicial administration, it would be seen legislation may be needed to enable an interim award to be made.

[See: Jamil Bin Harun v. Young Kamsiali: 1984 (1)AC 529

The District Court sought to sustain the interim award on the inherent powers of the court preserved in Section 151 CPC. But the High Court of Madhya Pradesh thought that appeal to and reliance on Section 151 was not appropriate. It invoked Section 9 CPC read with the principle underlying the English Amendment, without its strict pre-conditions. The correctness of this view was assailed by the UCC before this Court in the appeal.

On 14th February, 1989 this Court recorded an over-all settlement of the claims in the suit for 470 million U.S. Dollars and the consequential termination of all civil and criminal proceedings. The relevant portions of the order of this Court dated 14th February, 1989 provide:

> (1) The Union Carbide Corporation shall pay a sum of U.S. Dollars 470 millions (Four hundred and seventy Millions) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster.
>
> (2) The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31st March, 1989.
>
> (3) To enable the effectuation of the settlement, all civil proceedings related to and arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.
>
> A memorandum of settlement shall be filed before us tomorrow setting forth all the details of the settlement to enable consequential directions, if any, to issue.

On 15th February, 1989 the terms of settlement signed by learned Attorney General for the Union of India and the Counsel for the UCC was filed. That memorandum provides:

> **1.** "The parties acknowledge that the order dated February 14, 1989 as supplemented by the order dated February 15, 1989 disposes of in its entirety all proceedings in Suit No. 1113 of 1986. This settlement shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever wherever pending) by all Indian citizens and all public and private entitles with respect to all past, present and future deaths, personal injuries, health effects compensation,

losses, damages and civil and criminal complaints of any nature whatsoever against UCC, Union Carbide India Limited, Union Carbide Eastern, and all of their subsidiaries and affiliates as well as each of their present and former directors, officers, employees, agents representatives, attorneys, advocates and solicitors arising out of, relating to or concerned with the Bhopal gas leak disaster, including past, present and future claims, causes of action and proceedings against each other. All such claims and causes of action whether within or outside India of Indian citizens, public or private entitles are hereby extinguished, including without limitation each of the claims filed or to be filed under the Bhopal Gas Leak Disaster (Registration and Processing Claims) Scheme 1985, and all such civil proceedings in India are hereby transferred to this Court and are dismissed with prejudice, and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.

2 . Upon full payment in accordance with the Court's directions the undertaking given by UCC pursuant to the order dated November 30, 1986 in the District Court, Bhopal stands discharged, and all orders passed in Suit No. 1113 of 1986 and or in any Revision therefrom, also stand discharged.

A further order was made by this Court on 15th February, 1989 which, apart from issuing directions in paragraphs 1 and 2 thereof as to the mode of payment of the said sum of 470 million U.S. Dollars pursuant to and in terms of the settlement, also provided the following:

3. Upon full payment of the sum referred to in paragraph 2 above:

(a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future become necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settlement are defended by them and disposed of in terms of this order.

(b) Any such suits, claims or civil or criminal proceedings filed or to be filed before any court or authority are hereby enjoined and shall not be proceeded with before such court or authority except for dismissal of quashing in terms of this order.

4. Upon full payment in accordance with the Court's directions:

(a) The undertaking given by Union Carbide Corporation pursuant to the order dated 30 November, 1986 in the District Court Bhopal shall stand discharged, and all orders passed in Suit No. 1113 of 1986 and/or in revision therefrom shall also stand discharged.

(b) Any action for contempt initiated against counsel or parties relating to this case and arising out of proceedings in the courts below shall be treated as dropped.

30. The settlement is assailed in these Review Petitions and Writ Petitions on various grounds. The arguments of the petitioners in the case have covered a wide range and have invoked every persuasion-jurisdictional, legal, humanitarian and those based on

considerations of public-policy. It is urged that the Union of India had surrendered the interests of the victims before the might of multinational cartels and that what are in issue in the case are matters of great moment to developing countries in general. Some of these exhortations were noticed by this Court in the course of its order of 4th May, 1989 in the following words:

> **31.** As to the remaining question, it has been said that many vital juristic principles of great contemporary relevance to the Third World generally, and to India in particular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multi-nationals arose in this case. It is said that this is an instance of lost opportunity to this apex Court to give the law the new direction on vital issues emerging from the increasing dimensions of the economic exploitation of developing countries by economic forces of the rich ones. This case also, it is said, concerns the legal limits to be envisaged in the vital interests of the protection of the constitutional rights of the citizenry, and of the environment, on the permissibility of such ultra-hazardous technologies and to prescribe absolute and deterrent standards of liability if harm is caused by such enterprises. The prospect of exploitation of cheap labour and of captive-markets, it is said, induces multinationals to enter into the developing countries for such economic-exploitation and that this was eminently an appropriate case for a careful assessment of the legal and Constitutional safeguards stemming from these vital issues of great contemporary relevance.

On the importance and relevance of these considerations, this Court said:

> **32.** These issues and certain cognate areas of even wider significance and the limits of the adjudicative disposition of some of their aspects are indeed questions of seminal importance. The culture of modern industrial technologies, which is sustained on processes of such pernicious potentialities, in the ultimate analysis, has thrown open vital and fundamental issues of technology options. Associated problems of the adequacy of legal protection against such exploitative and hazardous industrial adventurism, and whether the citizens of the country are assured the protection of a legal system which could be said to be adequate in a comprehensive sense in such contexts arise. These, indeed are issues of vital importance and this tragedy, and the conditions that enabled it happen, are of particular concern.
>
> **33.** The chemical pesticide industry is a concomitant, and indeed, an integral part, of the Technology of Chemical Farming. Some experts think, that it is time to return from the high-risk, resource-intensive, high input, anti-ecological, monopolistic 'hard' technology which feeds, and is fed on, its self-assertive attribute, to a more human and humane flexible, eco-conform-able, "soft" technology with its systemic-wisdom and opportunities for human creativity and initiative. "Wisdom demands" says Schumacher "a new orientation of science and technology towards the organic, the gentle the non-violent, the elegant and beautiful". The other view stressing the spectacular success of agricultural production in the new era of chemical farming with high-yielding strains, points to the break-through achieved by the Green Revolution with its effective response to, and successful management of the great challenges of feeding the millions. This technology in agriculture has given a big impetus to enterprises of chemical fertilizers

and pesticides. This, say its critics, has brought in its trail its own serious problems. The technology-options before scientists and planners have been difficult.

31. Before we examine the grounds of challenge to the settlement we might, perhaps, refer to three events. The first is that the Central Bureau of Investigation, Government of India, brought criminal charges under Sections 304, 324, 326, 429 read with Section 35 of the Indian Penal Code against Mr. Warren Anderson, the then Chairman of the UCC and several other persons including some of the officers in-charge of the affairs of the UCIL. On 7th December, 1984 Mr. Warren Anderson came to India to see for himself the situation at Bhopal. He was arrested and later released on bail. One of the points seriously urged in these petitions is the validity of the effect of the order of this Court which terminated those criminal proceedings.

The second event is that on 17th of November, 1986 the District Court at Bhopal, on the motion of the plaintiff- Union of India, made an order restraining the UCC by an interlocutory injunction, from selling its assets, paying dividends, buying back debts, etc. during the pendency of the suit. On 30th of November, 1986 the District Court vacated that injunction on the written assurance and undertaking dated 27th November 1986 filed by the UCC to maintain unencumbered assets of three billion U.S. Dollars. One of the points argued in the course of the hearing of these petitions is whether, in the event the order recording the settlement is reviewed and the settlement set aside, the UCC and UCIL would become entitled to the restitution of the funds that they deposited in Court pursuant to and in performance of their obligations under the settlement. The UCC deposited 420 million U.S. Dollars and the UCIL the rupee equivalent of 45 million U.S. Dollars. 5 million U.S. Dollars directed by Judge Keenan to be paid to the International Red Cross was given credit to. The petitioners urge that even after setting aside of the settlement, there is no compulsion or obligation to restore to the UCC the amounts brought into Court by it as such a step would prejudicially affect the interests of the victims. The other cognate question is whether, if UCC is held entitled to such restitution, should it not, as a pre-condition, be held to be under a corresponding obligation to restore and effectuate its prior undertaking dated 27th November 1987 to maintain unencumbered assets of three billion U.S. Dollars, accepting which the order dated 30th November, 1987 of the District Court Bhopal came to be made.

The third event is that subsequent to the recording of the settlement a Constitution Bench of this Court dealt with and disposed of writ-petitions challenging the constitutionality of the 'Act' on various grounds in what is known as Charanlal Sahu's case and connected matters. The Constitution Bench upheld its constitutionality and in the course of the Court's opinion Chief Justice Mukharji made certain observations as to the validity of the settlement and the effect of the denial of a right of being heard to the victims before the settlement, a right held to be implicit in Section 4 of the Act. Both sides have heavily relied on certain observations in that pronouncement in support of the rival submissions.

32. We have heard learned Attorney General for the Union of India; Sri Shanti Bhushan, Sri R.K. Garg, Smt. Indira Jaising, Sri Danial Latif, Sri Trehan learned senior counsel and Shri Prashant Bhushan, learned Counsel for petitioners and Sri F.S. Nariman, learned senior counsel for the UCC, Sri Rajinder Singh, learned senior counsel for the UCIL and Dr. N.M. Ghatate and Sri Ashwini Kumar, learned senior counsel for the State of Madhya Pradesh and its authorities.

At the outset, it requires to be noticed that Union of India which was a party to the settlement has not bestirred itself to assail the settlement on any motion of its own. However, Union of India while not assailing the factum of settlement has sought to support the petitioners' challenge to the validity of the settlement. Learned Attorney General submitted that the factum of compromise or settlement recorded in the orders dated 14th & 15th of February, 1989 is not disputed by the Union of India. Learned Attorney-General also made it clear that the Union of India does not dispute the authority of the then Attorney General and the Advocate on record for the Union of India in the case to enter into a settlement. But, he submitted that this should not preclude the Union of India from pointing out circumstances in the case which, if accepted, would detract from the legal validity of the settlement.

33. The contentions urged at the hearing in support of these petitions admit of the following formulations:

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 139A 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 of the Court dated 14th and 15th of February 1989, in so far as they pertain to the quashing of criminal proceedings are without jurisdiction.

Contention (C):

> The 'Court-assisted-settlement' was as between, and confined to, the Union of India on the one hand and UCC & UCIL on the other. The Original Suit No. 1113 of 1986 was really and in substance a representative suit for purposes and within the meaning of Order XXIII Rule 3B C.P.C. inasmuch as any order made therein would affect persons not economic parties to the suit. Any settlement reached without notice to the persons so affected without complying with the procedural drill of Order XXIII Rule 3B is a nullity.
>
> That the present suit is such a representative suit; that the order under review did affect the interests of third parties and that the legal effects and consequences of non-compliance with Rule 3B are attracted to case are concluded by the pronouncement of the

Constitution Bench in Charanlal Sahu's case.

Contention (D):

The termination of the pending criminal proceedings brought about by the orders dated 14th and 15th of February, 1989 is bad in law and would require to be reviewed and set aside on grounds that (i) if the orders are construed as permitting a compounding of offences, they run in the teeth of the statutory prohibition contained in Section 320(9) of the CrPC; (ii) if the orders are construed as permitting a withdrawal of the prosecution under Section 321 Cr. P.C. they would, again, be bad as violative of settled principles guiding withdrawal of prosecutions; and (Hi) if the orders amounted to a quashing of the proceedings under Section 482 of the CrPC, grounds for such quashing did not obtain in the case.

Contention (E):

The effect of the orders under review interdicting and prohibiting future criminal proceedings against any person or persons whatsoever in relation to or arising out of the Bhopal Gas Leak Disaster, in effect and substance, amounts to conferment of an immunity from criminal proceedings. Grant of immunity is essentially a legislative function and cannot be made by a judicial act.

At all events, grant of such immunity is opposed to public policy and prevents the investigation of serious offences in relation to this horrendous industrial disaster where UCC had inter-alia alleged sabotage as cause of the disaster. Criminal investigation was necessary in public interest not only to punish the guilty but to prevent any recurrence of such calamitous events in future.

Contention (F):

The memorandum of settlement and the orders of the Court thereon, properly construed, make the inference inescapable that a part of the consideration for the payment of 470 million U.S. Dollars was the stifling of the criminal prosecutions which is opposed to public-policy. This vitiates the agreement on which the settlement is based for unlawfulness of the consideration. The consent order has no higher sanctity than the legality and validity of the agreement on which it rests.

Contention (G):

The process of settlement of a mass tort action has its own complexities and that a "Fairness-Hearing" must precede the approval of any settlement by the court as fair, reasonable and adequate. In concluding that the settlement was just and reasonable the Court omitted to take into account and provide for certain important heads of compensation such as the need for and the costs of medical surveillance of a large section of population, which though symptomatic for the present was likely to become symptomatic later having regard to the character and the potentiality

of the risks of exposure and the likely future damages resulting from long-term effects and to build-in a 're-opener' clause.

The settlement is bad for not affording a fairness-hearing and for not incorporating a "re-opener" clause. The settlement is bad for not indicating appropriate break-down of the amount amongst the various classes of victim-groups. There were no criteria to go by at all to decide the fairness and adequacy of the settlement.

Contention (H):

Even if the settlement is reviewed and set aside there is no compulsion or obligation to refund and restore to the UCC the funds brought in by it, as such restitution is discretionary and in exercising this discretion the interests of the victims be kept in mind and restitution denied.

At all events, if restitution is to be allowed, whether UCC would not be required to act upon and effectuate its undertaking dated 27th November, 1986 on the basis of which order dated 30th November, 1986 of the Bhopal District Court Vacating the injunction against it was made.

Contention (I):

Notice to the affected-person implicit in Section 4 of the Act was imperative before reaching a settlement and that as admittedly no such opportunity was given to the affected-person either by the Union of India before entering into the settlement or by the Court before approving it, the settlement is void as violative of natural justice. Sufficiency of natural justice at any later stage cannot cure the effects of earlier insufficiency and does not bring life back to a purported settlement which was in its inception void.

The observations of the Constitution Bench in Charanlal Sahu's case suggesting that a hearing was available at the review stage and should be sufficient compliance with natural justice, are mere obiter-dicta and do not alter the true legal position.

Point (j):

Does the settlement require to be set aside and the Original Suit No. 1113 of 1986 directed to be proceeded with on the merits? If not, what other reliefs require to be granted and what other directions require to be issued?

Re: Contentions (A) and (B)

34. The contention articulated with strong emphasis is that the court had no jurisdiction to withdraw and dispose of the main suits and the criminal proceedings in the course of hearing of appeals arising out of an interlocutory order in the suits. The disposal of the suits would require and imply their transfer and withdrawal to this Court for which, it is contended, the Court had no power under law. It is urged that there is no power to withdraw the suits or proceedings dehors. Article 139A and the

conditions enabling the application of Article 139A do not, admittedly, exist. It is, therefore, contended that the withdrawal of the suits, implicit in the order of their final disposal pursuant to the settlement, is a nullity. It is urged that Article 139A is exhaustive of the powers of the Court to withdraw suits or other proceedings to itself.

It is not disputed that Article 139A in terms does not apply in the facts of the case. The appeals were by special leave under Article 136 of the Constitution against an interlocutory order. If Article 139A exhausts the power of transfer or withdrawal of proceedings, then the contention has substance. But is that so?

This Court had occasion to point out that Article 136 is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing of appeals by granting special leave against any kind of judgment or order made by a Court or Tribunal in any cause of matter and the powers can be exercised in spite of the limitations under the specific provisions for appeal contained in the Constitution or other laws. The powers given by Article 136 are, however, in the nature of special or residuary powers which are exercisable outside the purview of the ordinary laws in cases where the needs of justice demand interference by the Supreme Court. (See Durga Shankar Mehta v. Thakur Raghuraj Singh and Ors. MANU/SC/0099/1954 : [1955]1SCR267 .

Article 142(1) of the Constitution provides:

> 142 (1) The Supreme Court in 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 shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.
>
> [Emphasis added]

The expression "cause or matter" in Article 142(1) is very wide covering almost every kind of proceedings in Court. In Halsbury's Laws of England-Fourth Edition [vol. 37] para 22 referring to the plenitude of that expression it is stated:

> *Cause or matter*-The words "cause and "matter" are often used in juxtaposition, but they have different meanings. "Cause" means any action or any criminal proceedings and "matter" means any proceedings in court not in a cause. When used together, the words "cause or matter" *cover almost every kind of proceeding in court,* whether civil or criminal, whether interlocutory or final, and whether before or after judgment.
>
> [emphasis added]

Any limited interpretation of the expression "cause or matter" having regard to the wide and sweeping powers under Article 136 which Article 142(1) seeks to effectuate, limiting it only 10 the short compass of the actual dispute before the Court and not to what might necessarily and reasonably be connected with or related to such matter in such a way that their withdrawal to the Apex Court would enable the court to do "complete justice", would stultify the very wide constitutional powers. Take, for instance, a case where an interlocutory order in a matrimonial cause pending in the trial court comes up before the apex court. The parties agree to have the main matter itself either decided on the merits or disposed of by a compromise. If the argument is

correct this Court would be powerless to withdraw the main matter and dispose it of finally even if it be on consent of both sides. Take also a similar situation where some criminal proceedings are also pending between the litigating spouses. If all disputes are settled, can the court not call up to itself the connected criminal litigation for a final disposal? If matters are disposed of by consent of the parties, can any one of them later turn around and say that the apex court's order was a nullity as one without jurisdiction and that the consent does not confer jurisdiction? This is not the way in which jurisdiction with such wide constitutional powers is to be construed. While it is neither possible nor advisable to enumerate exhaustively the multitudinous ways in which such situations may present themselves before the court where the court with the aid of the powers under Article 142(1) could bring about a finality to the matters, it is common experience that day-in-and-day-out such matters are taken up and decided in this Court. It is true that mere practice, however long, will not legitimize issues of jurisdiction. But the argument, pushed to its logical conclusions, would mean that when an interlocutory appeal comes up before this Court by special leave, even with the consent of the parties, the main matter cannot be finally disposed of by this Court as such a step would imply an impermissible transfer of the main matter. Such technicalities do not belong to the content and interpretation of constitutional powers.

To the extent power of withdrawal and transfer of cases to the apex court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Articles 136 and 142(1), the power under Article 139A, must be held not to exhaust the power of withdrawal and transfer.

Article 139A it is relevant to mention here, was introduced as part of the scheme of the 42nd Constitutional Amendment. That amendment proposed to invest the Supreme Court with exclusive jurisdiction to determine the constitutional validity of central laws by inserting Articles 131A, 139A arid 144A. But Articles 131A, and 144A were omitted by the 43rd Amendment Act 1977, leaving Article 139A intact. That article enables the litigants to approach the Apex-Court for transfer of proceedings if the conditions envisaged in that Article are satisfied. Article 139A was not intended, nor does it operate, to whittle down the existing wide powers under Article 136 and 142 of the Constitution.

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. U.P. State MANU/SC/0072/1982 : 1982CriLJ795 the Court said:

> 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 Arts. 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 extra-ordinary 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 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.

We find absolutely no merit in this hypertechnical submission of the petitioners'

learned Counsel. We reject the argument as unsound.

A similar ground is urged in support of contention [B] in relation to such withdrawal implicit in the quashing of the criminal proceedings. On the merits of the contention whether such quashing of the proceedings was, in the circumstances of the case, justified or not we have reached a decision on Contentions [D] and [E]. But on the power of the court to withdraw the proceedings, the contention must fail.

We, accordingly, reject both Contentions [A] and [B].

Re: Contention (C)

35. Shri Shanti Bhushan contends that the settlement recorded on the 14th and 15th of February, 1989, is void under Order XXIII Rule 3B, CPC, as the orders affect the interests of persons not economies parties to the proceedings, and, therefore, the proceedings become representative-proceedings for the purpose and within the meaning of Order XXIII Rule 3-B C.P.C. The order recording the settlement, not having been preceded by notice to such persons who may appear to the Court to be interested in the suit, would, it is contended, be void.

Order XXIII Rule 3-B CPC provides:

> Order XXIII Rule 3B.
>
> No agreement or compromise to be entered in a representative suit without leave of Court.
>
> (1) No agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the proceedings; and any such agreement or compromise entered into without the leave of the Court so recorded shall be void.
>
> (2) Before granting such leave, the Court shall give notice in such manner as it may think fit to such persons as may appear to it to be interested in the suit.
>
> Explanation-In this rule, "representative suit" means,-
>
> (a) a suit under Section 91 or Section 92.
>
> (b) a suit under rule 8 of Order 1,
>
> (c) a suit in which the manager of an undivided Hindu family sues or is sued as representing the other members of the family,
>
> (d) any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for time being in force bind any person who is not named as party to the suit.

Shri Shanti Bhushan says that the present proceedings by virtue of Clause (d) of the Explanation should be deemed to be a representative suit and that the pronouncement of the Constitution Bench in Sahu case which has held that Order XXIII Rule 3-B CPC is attracted to the present proceedings should conclude the controversy. The observations in Sahu's case relied in this behalf are these:

However, Order XXIII Rule 3B of the Code is an important and significant pointer and the principles behind the said provision would apply to this case. The said rule 3B provides that no agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the proceedings; and Sub-rule (2) of rule 3B enjoins that before granting such leave the Court shall give notice in such manner as it may think fit in a representative action. Representative suit, again, has been defined under Explanation to the said rule vide Clause (d) as any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as party to the suit. *In this case, indubitably the Victims would be bound by the settlement though not named in the suit. This is a position conceded by all. If that is so, it would be a representative suit in terms of and for the purpose of Rule 3B of Order XXIII of the Code. If the principles of this rule are the principles of natural justice then we are of the opinion that the principles behind it would be applicable, and also that* section be applicable, and also that *section 4 should be so construed* in spite of the difficulties of the process of notice and other difficulties of making "informed decision making process cumbersome", as canvassed by the learned Attorney General.

The Learned Attorney General, however, sought to canvas the view that the victims had notice and some of them had participated in the proceedings. We are, however, unable to accept the position that the victims had notice of the nature contemplated under the Act upon the underlying principle of Order XXIII Rule 3B of the Code. It is not enough to say that the victims must keep vigil and watch the proceeding... In the aforesaid view of the matter, in our opinion, notice was necessary. The victims at large did not have the notice.

[Emphasis added]

36. We have given our careful consideration to this submission. The question is whether Rule 3-B of Order XXIll, proprio-vigore, is attracted to the proceedings in the suit or whether the general principles of natural justice underlying the provision apply. If it is the latter, as indeed, the Sahu case has held, the contention in substance is not different from the one based on non-compliance with the right of being heard which has been read into Section 4. The Sahu case did not lay down that provisions of Order XXIII Rule 3-B CPC, proprio-vigore, apply. It held that the principles of natural justice underlying the said provisions were not excluded. It is implicit in that reasoning that Order XXIII Rule 3B in terms did not apply. The Court thereafter considered the further sequential question whether the obligation to hear had been complied with or not and what were the consequences of failure to comply. The Court in the Sahu case after noticing that the principle underlying Rule 3-B had not been satisfied, yet, did not say that the settlement was, for that reason, void. If as Shri Shanti Bhushan says the Sahu case had concluded the matter, it would have as a logical consequence declared the settlement void. On the contrary, the discussion of the effect of failure of compliance would indicate that the court declined to recognise any such fatal consequences. The Court said:

Though entering into a settlement without the required notice is wrong. In the facts and circumstances of this case, therefore, we are of the opinion, to direct that notice should be given now, would not result in doing justice in the situation. In the premises, no further consequential order is necessary by the Court. Had it been necessary for this Bench to have passed such a

consequential order, we would not have passed any such consequential order in respect of the same.

37. The finding on this contention cannot be different from the one urged under Contention (I) infra. If the principle of natural justice underlying Order XXIII Rule 3-B CPC is held to apply, the consequences of non-compliance should not be different from the consequences of the breach of rules of natural justice implicit in Section 4. Dealing with that, the Sahu case, having regard to the circumstances of the case, declined to push the effect of non-complain to its logical conclusion and declare the settlement void. On the contrary, the Court in Sahu's case considered it appropriate to suggest the remedy and curative of an opportunity of being heard in the proceedings for review. In sahu decision the obligation under Section 4 to give notice is primarily on the Union of India. Incidentally there are certain observations implying an opportunity of being heard also before the Court. Even assuming that the right of the affected persons of being heard is also available at a stage where a settlement is placed before the Court for its acceptance, such a right is not referable to, and does not stem from, Rule 3-B of Order XXIII CPC. The pronouncement in Sahu case as to what the consequences of non-compliance are in conclusive as the law of the case. It is not open to us to say whether such a conclusion is right or wrong. These findings cannot be put aside as mere obiter.

Section 112 CPC, inter-alia, says that nothing contained in that Code shall be deemed to affect the powers of the Supreme Court under Article 136 or any other provision of the Constitution or to interfere with any rules made by the Supreme Court. The Supreme Court Rules are framed and promulgated under Article 145 of the Constitution. Under Order 32 of the Supreme Court Rules, Order XXIII Rule 3-B CPC is not one of the rules expressly invoked and made applicable.

In relation to the proceedings and decisions of superior Courts of unlimited jurisdiction, imputation of nullity is not quite appropriate. They decide all questions of their own jurisdiction. In Isaacs v. Robertson l984 (3) AER 140 the Privy Council said:

> The...legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court; if it is regular it can only be set aside by an appellate court on appeal if there is one to which appeal lies.

With reference to the "void" cases the Privy Council observed:

> **...** The cases that are referred to in these dicta do not support the proposition that there is any category or orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex

> debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

This should conclude the present Contention under C also against the petitioners.

Re: Contention (D)

38. This concerns the validity of that part of the orders of the 14th and 15th of February, 1989 quashing and terminating the criminal proceedings. In the order dated 14th February 1989 Clause (3) of the order provides:

> **...**and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.

Para 3 of the order dated 15th February, 1989 reads:

> Upon full payment of the sum referred to in paragraph 2 above:
>
> > (a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future become necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settlement are defended by them and disposed of in terms of this order.
> >
> > (b) Any such suits, claims or civil or criminal proceedings filed or to be filed before any court or authority are hereby enjoined and shall not be proceeded with before such court or authority except for dismissal or quashing in terms of this order.

The signed memorandum filed by the Union of India and the UCC includes the following statements:

> This settlement shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever wherever pending) by all Indian citizens and all public and private entitles with respect to all past, present and future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever against UCC, Union Carbide India Limited, Union Carbide Eastern, and all of their subsidiaries and affiliates as well as each of their present and former directors, officers, employees, agents representatives, attorneys, advocates and solicitors arising out of, relating or concerned with the Bhopal gas leak disaster, including past, present and future claims, causes of action and proceedings against each other... and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.

The order of 15th February, 1989 refers to the written memorandum filed by the learned Counsel on both sides.

39. The two contentions of the petitioners, first, in regard to the legality and validity of the termination of the criminal proceedings and secondly, the validity of the protection or immunity from future proceedings, are distinct. They are dealt with also separately. The first - which is considered here - is in relation to the termination of

pending criminal proceedings.

40. Petitioners' learned Counsel strenuously contend that the orders of 14th and 15th of February, 1989, quashing the pending criminal proceedings which were serious non-compoundable offences under Sections 304, 324, 326 etc. of the Indian Penal Code are not supportable either as amounting to withdrawal of the prosecution under Section 321 CrPC, the legal tests of permissibility of which are well settled or as amounting to a compounding of the offences under Section 320 Criminal Procedure Code as, indeed, Sub-section (9) of Section 320 Cr. P.C. imposes a prohibition on such compounding. It is also urged that the inherent powers of the Court preserved under Section 482 Cr. P.C. could not be pressed into service as the principles guiding the administration of the inherent power could, by no stretch of imagination, be said to accommodate the present case. So far as Article 142(1) of the Constitution is concerned, it is urged, that the power to do "complete justice" does not enable any order "inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any constitutional provisions" as observed by this Court in Prem Chand Garg v. Excise Commissioner, U.P., Allahabad MANU/SC/0082/1962 : [1963] 1 SCR 885.

41. Shri Nariman, however, sought to point out that in Prem Chand Garg's case the words of limitation of the power under Article 142(1) with reference to the "express statutory provisions of substantive law" were a mere obiter and were not necessary for the decision of that case. Shri Nariman contended that neither in Garg's case nor in the subsequent decision in A.R. Antulay v. R.S. Nayak and Anr. MANU/SC/0002/1988 : 1988CriLJ1661 where the above observations in Garg's case were approved, any question of inconsistency with the express statutory provisions of substantive law arose and in both the cases the challenge had been on the ground of violation of fundamental rights. Shri Nariman said that the powers under Articles 136 and 142(1) are overriding constitutional powers and that while it is quite understandable that the exercise of these powers, however wide, should not violate any other constitutional provision, it would, however, be denying the wide sweep of these constitutional powers if their legitimate plenitude is whittled down by statutory provisions. Shri Nariman said that the very constitutional purpose of Article 142 is to empower the Apex Court to do complete justice and that if in that process the compelling needs of justice in a particular case and provisions of some law are not on speaking terms, it was the constitutional intendment that the needs of justice should prevail over a provision of law. Shri Nariman submitted that if the statement in Garg's case to the contrary passes into law it would wrongly alter the constitutional scheme. Shri Nariman referred to a number of decisions of this Court to indicate that in all of them the operative result would not strictly square with the provisions of some law or the other. Shri Nariman referred to the decisions of this Court where even non-compoundable offences were permitted to be compounded in the interests of complete justice; where even after conviction under Section 302 sentence was reduced to one which was less than that statutorily prescribed; where even after declaring certain taxation laws unconstitutional for lack of legislative competence this Court directed that the tax already collected under the void law need not be refunded etc. Shri Nariman also referred to the Sanchaita case. where this Court, having regard to the large issues of public interest involved in the matter, conferred the power of adjudication of claims exclusively on one forum irrespective of jurisdictional prescriptions.

42. Learned Attorney General submitted that the matter had been placed beyond doubt in Antulay's case where the court had invoked and applied the dictum in Garg's

case to a situation where the invalidity of a judicial-direction which, "was contrary to the statutory provision, namely Section 7(2) of the Criminal Law (Amendment) Act, 1952 and as such violative of Article 21 of the Constitution" was raised and the court held that such a direction was invalid. Learned Attorney General said that the power under Article 142(1) could not be exercised if it was against an express substantive statutory provision containing a prohibition against such exercise. This, he said, is as it should be because justice dispensed by the Apex Court also should be according to law.

The order terminating the pending criminal proceedings is not supportable on the strict terms of Sections 320 or 321 or 482 Cr. P.C. Conscious of this, Shri Nariman submitted that if the Union of India as the Dominus litis through its Attorney-General invited the court to quash the criminal proceedings and the court accepting the request quashed them, the power to do so was clearly referable to Article 142(1) read with the principle of Section 321 Cr. P.C. which enables the Government through its public-prosecutor to withdraw a prosecution. Shri Nariman suggested that what this Court did on the invitation of the Union of India as Dominus Litis was a mere procedural departure adopting the expedient of "quashing" as an alternative to or substitute for "withdrawal". There were only procedural and terminological departures and the Union of India as a party inviting the order could not, according to Shri Nariman, challenge the jurisdiction to make it, Shri Nariman submitted that the State as the Dominus Litis may seek leave to withdraw as long as such a course was not an attempt to interfere with the normal course of justice for illegal reasons.

43. It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Article 142(1) is unsound and erroneous. In both Garg's as well as Antulay's case the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 in so far as quashing of criminal proceedings are concerned is not exhausted by Sections 320 or 321 or 482 Cr. P.C. or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso-facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers - limited in some appropriate way - is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Sri Sorabjee, learned Attorney-General, referring to Garg's case, said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public-policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea

that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public-policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise.

Learned Attorney General said that Section 320 Criminal Procedure Code is "exhaustive of the circumstances and conditions under which composition can be effected." [See Sankar Rangayya v. Sankar Ramayya MANU/TN/0508/1915 : AIR 1916 Mad. 463 at 485 and that "the courts cannot go beyond a test laid down by the Legislature for determining the class of offences that are compoundable and substitute one of their own." Learned Attorney General also referred to the following passage in Biswabahan v. Gopen Chandra MANU/SC/0096/1966 : 1967CriLJ828 :

> If a person is charged with an offence, then unless there is some provision for composition of it the law must take its course and the charge enquired into resulting either in conviction or acquittal.

He said that "if a criminal case is declared to be non-compoundable, then it is against public policy to compound it, and any agreement to that end is wholly void in law." (See ILR 40 Cal. 113; and submitted that court "cannot make that legal which the law condemns". Learned Attorney-General stressed that the criminal case was an independent matter and of great public concern and could not be the subject matter of any compromise or settlement. There is some justification to say that statutory prohibition against compounding of certain class of serious offences, in which larger social interests and social security are involved, is based on broader and fundamental considerations of public policy. But all statutory prohibitions need not necessarily partake of this quality. The attack on the power of the apex court to quash the crucial proceedings under Article 142(1) is ill-conceived. But the justification for its exercise is another matter.

44. The proposition that State is the dominus Litis in criminal cases, is not an absolute one. The society for its orderly and peaceful development is interested in the punishment of the offender. [See A.R. Antulay v. R.S. Nayak and Anr. MANU/SC/0082/1984 : 1984CriLJ647 , 509 and "If the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member of the society must have locus to initiate a prosecution as also to resist withdrawal of such prosecution, if initiated." [See Sheonandan Paswan v. State of Bihar and Ors. [1987] 1 SCC 289.

But Shri Nariman put it effectively when he said that if the position in relation to the criminal cases was that the court was invited by the Union of India to permit the termination of the prosecution and the court consented to it and quashed the criminal cases, it could not be said that there was some prohibition in some law for such powers being exercised under Article 142. The mere fact that the word 'quashing' was used did not matter. Essentially, it was a matter of mere form and procedure and not of substance. The power under Article 142 is exercised with the aid of the principles of Section 321 Cr. P.C. which enables withdrawal of prosecutions. We cannot accept the position urged by the learned Attorney-General and learned Counsel for the

petitioners that court had no power or jurisdiction to make that order. We do not appreciate Union of India which filed the memorandum of 15th February, 1989 raising the plea of want of jurisdiction.

But whether on the merits there were justifiable grounds to quash is a different matter. There must be grounds to permit a withdrawal of the Prosecution. It is really not so much a question of the existence of the power as one of justification for its exercise. A prosecution is not quashed for no other reason than that the Court has the power to do so. The withdrawal must be justified on grounds and principles recognised as proper and relevant. There is no indication as to the grounds and criteria justifying the withdrawal of the prosecution. The considerations that guide the exercise of power of withdrawal by Government could be and are many and varied. Government must indicate what those considerations are. This Court in State of Punjab v. Union of India MANU/SC/0218/1986 : 1987CriLJ151 said that in the matter of power to withdraw prosecution the "broad ends of public justice may well include appropriate social, economic and political purposes". In the present case, no such endeavour was made. Indeed, the stand of the UCC in these review petitions is not specific as to the court to permit a withdrawal. Even the stand of the Union of India has not been consistent. On the question whether Union of India itself invited the order quashing the criminal cases, its subsequent stand in the course of the arguments in Sahu case as noticed by the court appears to have been this:

> ... The Government as such had nothing to do with the quashing of the criminal proceedings and it was not representing the victims in respect of the criminal liability of the UCC or UCIL to the victims. He further submitted that quashing of criminal proceedings was done by the Court in exercise of plenary powers under Articles 136 and 142 of the Constitution...

The guiding principle in according permission for withdrawal of a prosecution were stated by this Court in M.N. Sankarayanan Nair v. P.V. Balakrishnan and Ors. [1972] 2 SCC 599:

> ...Nevertheless it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law, directs the public prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at the behest.

Learned Counsel for the petitioners submitted that the case involved the allegation of commission of serious offences in the investigation of which the society was vitally interested and that considerations of public interest, instead of supporting a withdrawal, indicate the very opposite.

The offences relate to and arise out of a terrible and ghastly tragedy. Nearly 4,000 lives were lost and tens of thousands of citizens have suffered injuries in various degrees of severity. Indeed at one point of time UCC itself recognized the possibility of the accident having been the result of acts of sabotage. It is a matter of importance that offences alleged in the context of a disaster of such gravity and magnitude should not remain uninvestigated. The shifting stand of the Union of India on the point should not by itself lead to any miscarriage of justice.

We hold that no specific ground or grounds for withdrawal of the prosecutions having

been set out at that stage the quashing of the prosecutions requires to be set aside.

45. There is, however, one aspect on which we should pronounce. Learned Attorney-General showed us some correspondence pertaining to a letter Rogatory in the criminal investigation for discovery and inspection of the UCC's plant in the United States for purposes of comparison of the safety standards. The inspection was to be conducted during the middle of February, 1989. The settlement, which took place on the 14th of February, 1989, it is alleged, was intended to circumvent that inspection we have gone through the correspondence on the point. The documents relied upon do not support such an allegation. That apart, we must confess our inability to appreciate this suggestion coming as it does from the Government of India which was a party to the settlement.

46. However, on Contention (D) we hold that the quashing and termination of the criminal proceedings brought about by the orders dated 14th and 15th February, 1989 require to be, and are, hereby reviewed and set aside.

Re: Contention (E)

47. The written memorandum setting out the terms of the settlement filed by the Union of India and the U.C.C. contains certain terms which are susceptible of being construed as conferring a general future immunity from prosecution. The order dated 15th February, 1989 provides in Clause 3[a] and 3[b]:

> **...**that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settlement are defended by them and disposed of in terms of this order".
>
> Any such suits, claims or civil or criminal proceedings filed or to be filed before any court or authority or hereby enjoined and shall not be proceeded with before such court or Authority except for dismissed or quashing in terms of this order.

These provisions, learned Attorney General contends, amount to conferment of immunity from the operation of the criminal law in the future respecting matters not already the subject matter of pending cases and therefore, partake of the character of a blanket criminal immunity which is essentially a legislative function. There is no power or jurisdiction in the courts, says learned Attorney-General, to confer immunity for criminal prosecution and punishment. Learned Attorney General also contends that grant of immunity to a particular person or persons may amount to a preferential treatment violative of the equality clause.

This position seems to be correct. In Apodaca v. Viramontes 13 ALR 1427, it was observed:

> **...** The grant of an immunity is in very truth the assumption of a legislative power... (P.1433)
>
> **...** The decisive question, then, is whether the district attorney and the district court in New Mexico, absent constitutional provision or enabling statute conferring the power, are authorized to grant immunity from prosecution for an offense to which incriminating answers provoked by questions asked will expose the witness.

> We are compelled to give a negative answer to this inquiry. Indeed, sound reason and logic, as well as the great weight of authority, to be found both in text books and in the decided cases, affirm that no such power exists in the district attorney and the district court, either or both, except as placed there by constitutional or statutory language. It is unnecessary to do more in this opinion in proof of the statement made than to give a few references to texts and to cite some of the leading cases...

After the above observation, the court referred to the words of Chief Justice Cardozo [as he then was in the New York Court of Appeals] in Doyle v. Hafstader 257 NY 244:

> ... The grant of an immunity is in very truth the assumption of a legislative power, and that is why the Legislature, acting alone, is incompetent to declare it. It is the assumption of a power to annul as to individuals or classes the statutory law of crimes, to stem the course of justice, to absolve the grand jurors of the county from the performance of their duties, and the prosecuting officer from his. All these changes may be wrought through the enactment of a statute. They may be wrought in no other way while the legislative structure of our government continues what it is.

In the same case the opinion of Associate Judge Pound who dissented in part on another point, but who entirely shared the view expressed by Chief Justice Cardozo may also be cited:

> The grant of Immunity is a legislative function. The Governor may pardon after conviction [NY Const. Article 4 & 5], but he may not grant immunity from criminal prosecution or may the courts. Amnesty is the determination of the legislative power that the public welfare requires the witness to speak.

Learned Attorney General referred us to the following passage in "Jurisprudence" by Wortley:

> Again, if we say that X has an immunity from arrest when a sitting member of the House of Commons, then during its subsistence he has an immunity that is denied to the generality of citizens; there is an inequality of rights and duties of citizens when the immunity is made out.....

This inequality must be justified by intelligible differentia for classification which are both reasonable and have a rational nexus with the object.

Article 361(2) of the Constitution confers on the President and the Governors immunity even in respect of their personal acts and enjoins that no criminal proceedings shall be instituted against them during their term of office. As to the theoretical basis for the need for such immunity, the Supreme Court of the United States in a case concerning immunity from civil liability [Richard Nixon v. Ernest Fitzgerald, said:

> ... This court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government...

> ... In the case of the President the inquiries into history and policy, though mandated independently by our case, tend to converge. Because the Presidency did not exist through most of the development of common law,

> any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.
>
> ... In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognise absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.
>
> Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable "functions" encompassed a particular action...

Following observations of Justice Storey in his "Commentaries in the Constitution of United States" were referred to:

> There are...incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.

48. Indeed, the submissions of learned Attorney General on the theoretical foundations as to the source of immunity as being essentially legislative may be sound. But the question does not strictly arise in that sense in the present case. The direction that future criminal proceedings shall not be instituted or proceeded with must be understood as a concomitant and a logical consequence of the decision to withdraw the pending prosecutions. In that context, the stipulation that no future prosecutions shall be entertained may not amount to conferment of any immunity but only to a reiteration of the consequences of such termination of pending prosecutions. Thus understood any appeal to the principle as to the power to confer criminal immunity becomes inapposite in this case.

49. However, in view of our finding on contention (D) that the quashing of criminal proceedings was not justified and that the orders dated 14th and 15th of February, 1989 in that behalf require to be reviewed and set-aside, the present contention does not survive because as a logical corollary and consequence of such further directions as to future prosecutions earlier require to be deleted. We, therefore, direct that all portions in the orders of this Court which relate to the incompetence of any future prosecutions be deleted.

50. The effect of our order on Contentions [D] and [E] is that all portions of orders dated 14th and 15th February, 1989, touching the quashing of the pending prosecution as well as impermissibility of future criminal liability are set-aside. However, in so far as the dropping of the proceedings in contempt envisaged by Clause (b) of para 4 of the order dated 15th February, 1989 is concerned, the same is left undisturbed.

Contention (E) is answered accordingly.

Re: Contention (F)

51. As we have seen earlier the memorandum of settlement as well as the orders of the Court contemplate that with a view to effectuating the settlement there be a termination of pending criminal prosecution with a further stipulation for abstention from future criminal proceedings. Petitioners have raised the plea -and learned Attorney General supports them - that the language of the memorandum of settlement as well as the orders of the court leave no manner of doubt that a part of the consideration for the payment of 470 million US dollars was the stifling of the prosecution and, therefore, unlawful and opposed to public policy. Relying upon Sections 23 and 24 of the Indian Contract Act it was urged that if any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful, the agreement becomes "void".

52. At the outset, learned Attorney General sought to clear any possible objections based on estoppel to the Union of India, which was a consenting party to the settlement raising this plea. Learned Attorney-General urged that where the plea is one of invalidity the conduct of parties becomes irrelevant and that the plea of illegality is a good answer to the objection of consent. The invalidity urged is one based on public-policy. We think that having regard to the nature of plea - one of nullity - no preclusive effect of the earlier consent should come in the way of the Union of India from raising the plea. Illegalities, it is said, are incurable. This position is fairly well established. In re A Bankruptcy Notice (1924 2 Ch. D. 76 at 97) Atkin L.J. said:

> It is well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid.

In Maritime Electric Co. Ltd.. v. General Dairies Ltd. MANU/PR/0041/1937 a similar view finds expression:

> ...an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law.
>
> ... The court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.
>
> ... there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character.

The case of this Court in point is of the State of Kerala and Anr. v. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc. MANU/SC/0068/1973 : [1974]1SCR671 where this Court repelled the contention that an agreement on the part of the Government not to acquire, for a period of 60 years the lands of the company did not prevent the State from enacting or giving effect to a legislation for acquisition and

that the surrender by the Government of its legislative powers which are intended to be used for public good cannot avail the company or operate against the Government as equitable estoppel. It is unnecessary to expand the discussion and enlarge authorities.

We do not think that the Union of India should be precluded from urging the contention as to invalidity in the present case.

53. The main arguments on invalidity proceed on the premise that the terms of the settlement and the orders of the court passed pursuant thereto contemplate, amount to and permit a compounding of non-compoundable offences which is opposed to public-policy and, therefore, unlawful. The orders of the court based on an agreement whose or part of whose consideration is unlawful have, it is Urged, no higher sanctity than the agreement on which it is based. The orders of the court based on consent of parties do not, so goes the argument, reflect an adjudicative imposition of the court, but merely set the seal of the court on what is essentially an agreement between the parties. It is urged that the validity and durability of a consent order are wholly dependent on the legal validity of the agreement, on which it rests. Such an order is amenable to be set-aside on any ground which would justify a setting aside of the agreement itself.

These principles are unexceptionable. Indeed, in Huddersfield Banking Company Ltd. v. Henry Lister & Son Ltd [1895] 2 Ch. 273 Vaughan Williams J. said:

> **...**it seems to me that the clear result of the authorities is that, *notwithstanding the consent order has been drawn up and completed, and acted upon* to the extent that the property has been sold and the money has been paid into the hands of the receiver, *I may now set aside the order and arrangement upon any ground which would justify me in setting aside an agreement entered into between the parties.*
>
> *The real truth of the matter is that the order is a mere creature of the agreement, and to say that the Court can set aside the agreement - and it was not disputed that this could be done if a common mistake were proved* - but that it cannot set aside an order which was the creature of that agreement, seems to me to be giving the branch an existence which is independent of the tree.
>
> [emphasis added]

This was affirmed in appeal by Lindley L.J. in the following words:

> the appellants, contend that there is no jurisdiction to set aside the consent order upon such materials as we have to deal with; and they go so far as to say that a consent order can only be set aside on the ground of fraud. I dissent from that proposition entirely. A consent order, I agree, is an order; and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses b a more formal way than usual.

In Great North-West Central Railway Co. and Ors. v. Charlebois and Ors[1899 AC 114, the Privy Council stated the proportion thus:

> It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done... Such a judgment cannot be of more validity than the invalid contract on which it was founded".
>
> [emphasis added]

It is, indeed, trite proposition that a contract whose object is opposed to public policy is invalid and it is not any the less so by reason alone of the fact that the unlawful terms are embodied in a consensual decree. In State of Punjab v. Amar Singh MANU/SC/0351/1974 : [1974]3SCR152 , this Court said:

> After all, by consent or agreement, parties cannot achieve what is contrary to law and a decree merely based on such agreement cannot furnish a judicial amulet against statutory violation... The true rule is that the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge.

54. We do not think that the plea of "Accord and Satisfaction" raised by the UCC is also of any avail to it. UCC contends that the funds constituting the subject-matter of the settlement had been accepted and appropriated by Union of India and that, therefore, there was full accord and satisfaction. We find factually that there is no appropriation of the funds by the Union of India. The funds remain to the credit of the Registrar- General of this Court in the Reserve Bank of India. That apart as observed in Corpus Juris Secundum, Vol.1:

> an illegal contract or agreement, such as one involving illegality of the subject matter, one involving the unlawful sale or exchange of intoxicating liquors, or a subletting, subleasing, or hiring out of convicts, held under lease from the state, in violation of statute, or stifling a prosecution for a public policy, *cannot constitute or effect an accord and satisfaction.*
>
> [emphasis added]

55. The main thrust of petitioner's argument of unlawfulness of consideration is that the dropping of criminal charges and undertaking to abstain from bringing criminal charges in future were part of the consideration for the offer of 470 million US dollars by the UCC and as the offences involved in the charges were of public nature and non-compoundable, the consideration for the agreement was stifling of prosecution and, therefore, unlawful. It is a settled proposition and of general application that where the criminal charges are matters of public concern there can be no diversion of the course of public justice and cannot be the subject matters of private bargain and compromise.

56. Shri Nariman urged that there were certain fundamental misconceptions about the scope of this doctrine of stifling of prosecution in the arguments of the petitioners. He submitted that the true principle was that while non-compoundable offences which are matter of public concern cannot be subject-matter of private bargains and that administration of criminal justice should not be allowed to pass from the hands of Judges to private individuals, the doctrine is not attracted where side by side with criminal - liability there was a pre-existing civil liability that was also settled and satisfied. The doctrine, he said, contemplates invalidity based on the possibility of the element of coercion by private individuals for private gains taking advantages of the threat of criminal prosecution. The whole idea o." applicability of

this doctrine in this case becomes irrelevant having regard to the fact that the Union of India as dominus litis moved in the matter and that administration of criminal justice was not sought to be exploited by any private individual for private gains. Shri Nariman submitted that distinction between "motive" and "consideration" has been well recognised in distinguishing whether the doctrine is or is not attracted.

57. The questions that arise in the present case are, first, whether putting an end to the criminal proceedings was a part of the consideration and bargain for the payment of 470 million US dollars or whether it was merely one of the motives for entering into the settlement and, secondly, whether the memorandum of settlement and orders of this Court, properly construed, amount to a compounding of the offences. If, on the contrary, what was done was that Union of India invited the court to exercise its powers under Article 142 to permit a withdrawal of the prosecution and the expedient of quashing was a mere procedure of recognising the effect of withdrawal, could the settlement be declared void ?

We think that the main settlement does not suffer from this vice. The pain of nullity does not attach to it flowing from any alleged unlawfulness of consideration. We shall set out our reasons presently.

Stating the law on the matter, Fry L.J. in Windhill Local Board of Health v. Vint. [1890] 45 Ch.D. 351 said:

> We have therefore a case in which a contract is entered into for the purpose of diverting - I may say perverting - the course of justice; and, although I agree that in this case it was entered into with perfect good faith and with all the security which could possibly be given to such an agreement, I nevertheless think that the general principle applies, and that we cannot give effect to the agreement, the consideration of which is the diverting the course of public justice.

In Keir v. Leeman 6 QB 308, Lord Denrnan, C.J. said:

> The principle of law is laid down by Wilmot C.J. in Collins v. Blantem (a) that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused, is founded on an unlawful consideration and void.
>
> On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty the law was eluded by a corrupt compromise, screening the criminal for a bribe.
>
> **...** But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.
>
> In the present instance, the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise.
>
> The approbation of the Judge (whether necessary or not) may properly be asked on all occasions where an indictment is compromised on the trial; plainly it cannot make that legal which the law condemns.

This was affirmed in appeal by Tindal C J. who said:

> It seems clear, from the various authorities brought before us on the argument, that some misdemeanours are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration. Such was the case of Collins v. Blantem, 2 Wils. 341 which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury.

58. V. Narasimha Raju v. V. Gurumurthy Raju and Ors. MANU/SC/0005/1962 : [1963]3SCR687 of this Court is a case in point. The first respondent who had filed a criminal complaint in the Magistrate's Court against the appellant and his other partners alleging of commission of offences under Sections 420, 465, 468 and 477 read with Sections 107, 120B of the Indian Penal Code entered into an agreement with the accused persons under which the dispute between the appellant and the first respondent and Ors. was to be referred to arbitration on the first respondent agreeing to withdraw his criminal complaint. Pursuant to that agreement the complaint was got dismissed, on the first-respondent abstaining from adducing evidence. The arbitration proceedings, the consideration for which was the withdrawal of the complaint, culminated in an award and the first respondent applied to have the award made a rule of the court. The appellant turned around and challenged the award on the ground that the consideration for the arbitration-agreement was itself unlawful as it was one not to prosecute a non-compoundable offence. This court held that the arbitration agreement was void under Section 23 of the Indian Contract Act as its consideration was opposed to public policy. The award was held void.

59. Even assuming that the Union of India agreed to compound non-compoundable offences, would this constitute a stifling of prosecution in the sense in which the doctrine is understood. The essence of the doctrine of stifling of prosecution is that no private person should be allowed to take the administration of criminal justice out of the hands of the Judges and place it in his own hands. In Rameshwar v. Upendranath MANU/WB/0706/1925 : AIR1926Cal451 the High Court said:

> Now in order to show that the object of the Agreement was to stifle criminal prosecution, it is necessary to prove that there was an agreement between the parties express or implied, the consideration for which was *to take the administration of law out of the hands of the Judges and put it into the hands of a private individual to determine what is to be done in particular case and that the contracting parties should enter into a bargain to that effect.*
>
> [emphasis added]

V. Narasimha Raju (supra) this Court said:

The principle underlying this provision is obvious. Once the machinery of the Criminal Law is set into motion on the allegation that a non-compoundable offence has been committed, it is for the criminal courts and criminal courts alone to deal with that allegation and to decide whether the offence alleged has in fact been committed or not. *The decision of this question cannot either directly or indirectly be taken out of the hands of criminal courts and dealt with by private individuals.*

[Emphasis added]

This was what was reiterated in Ouseph Poulo and Ors. v. Catholic Union Bank Ltd. and Ors. MANU/SC/0054/1964 : [1964]7SCR745 :

> With regard to non-compoundable offence, however, the position is clear that *no court to law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not for itself.*
>
> [Emphasis added]

In this sense, a private party is not taking administration of law in its own hands in this case. It is the Union of India, as the dominus litis, that consented to the quashing of the proceedings. We have said earlier that what was purported to be done was not a compounding of the offences. Though, upon review, we have set aside that part of the order, the consequences of the alleged unlawfulness of consideration must be decided as at the time of the transaction. It is here that we see the significance of the concurring observations of Chapan J. in Majibar Rahman v. Muktashed Hossein, ILR Cal 113, who said.

> I agree, but desire to carefully confine my reason for holding that the bond was void to the ground that the consideration for the bond was found by the lower Court to be a promise to withdraw from the prosecution in a case the compromise of which is expressly forbidden by the CrPC.

As stated earlier, the arrangement which purported to terminate the criminal cases was one of a purported withdrawal not forbidden by any law but one which was clearly enabled. Whether valid grounds to permit such withdrawal existed or not is another matter.

60. Besides as pointed out by this Court in Narasimha Raju's case (supra) the consequence of doctrine of stifling of prosecution is attracted, and its consequences follow where a "person sets the machinery of criminal law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy". (See page 692 of the report). In that case this Court further held that the doctrine applies "when as a consideration for not proceeding with a criminal complaint, an agreement is made, in substance it really means that the complainant has taken upon himself to deal *with his complaint and on the bargaining counter he has used his non-prosecution of the complaint as a consideration for the agreement which his opponent has been induced or coerced to enter into.* (emphasis added). These are not the features of the present case.

61. More importantly, the distinction between the "motive" for entering into agreement and the "consideration" for the agreement must be kept clearly distinguished. Where dropping of the criminal proceedings is a motive for entering into the agreement- and not its consideration-the doctrine of stifling of prosecution is not attracted. Where there is also a pre-existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability. In Hamaraih Sahu and Ors. v. Jogi Sahu and Ors. MANU/BH/0042/1921 : AIR 1922 Pat 502, this distinction is pointed out:

> The distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and

> this care must be particularly exercised in a case where there is a civil liability already existing, which is discharged or remitted by the Agreement.

In Deb Kumar Ray Choudhury v. Anath Bandhu Sen and Ors. MANU/WB/0256/1930 : AIR1931Cal421 . it was mentioned:

> A contract for payment of money in respect of which a criminal prosecution was permissible under the law, was not by itself opposed to public policy.
>
> ... the withdrawal of the prosecution in the case before us might have been the motive but not certainly the object or the consideration of the contract as evidenced by the bond in suit so as to render the agreement illegal.
>
> These decisions are based upon the facts of the cases showing clearly that the agreements or the contracts sought to be enforced were the foundation for the withdrawal of non-com-poundable criminal cases and were declared to be unlawful on the ground of public policy wholly void in law and, therefore, unenforceable. This class of cases has no application, where, as in the present case, there was a pre-existing civil liability based upon adjustment of accounts between the parties concerned.
>
> [emphasis added]

Again in Babu Hamaraih Kapur v. Babu Ram Swarup Nigam and Anr. MANU/OU/0309/1941 : AIR 1941 Oudh 593 this distinction has been pointed out:

> Though the motive of the execution of the document may be the withdrawal of a non-compoundable criminal case, the consideration is quite legal, provided there is an enforceable preexisting liability. In the Patna case it was observed that the distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particularly exercised in a case where there is a civil liability already existing which is discharged or remitted by the agreement.

Finally, this Court in Ouseph Poulo (supra) at page 749 held that:

> In dealing with such agreements, it is, however, *necessary to bear in mind the distinction between the motive which may operate in the mind of the complainant and the accused and which may indirectly be responsible for the agreement and the consideration for such an agreement.* It is only where the agreement is supported by the prohibited consideration that it falls within the mischief of the principle, that agreements which intend to stifle criminal prosecutions are invalid.
>
> [Emphasis added]

62. On a consideration of the matter, we hold that the doctrine of stifling of prosecution is not attracted in the present case. In reaching this conclusion we do not put out of consideration that it is inconceivable that Union of India would, under the threat of a prosecution, coerce UCC to pay 470 million US dollars or any part thereof as consideration for stifling of the prosecution. In the context of the Union of India the plea lacks as much in reality as in a sense of proportion.

63. Accordingly on Contention (F) we hold that the settlement is not hit by Section 23 or 24 of the Indian Contract Act and that no part of the consideration for payment

of 470 million US dollars was unlawful.

Re: Contention (G)

64. This concerns the ground that a "Fairness-Hearing", as understood in the American procedure is mandatory before a mass- tort action is settled and the settlement in the present case is bad as no such procedure had preceded it. It is also urged that the quantum settled for is hopelessly inadequate as the settlement has not envisaged and provided for many heads of compensation such as the future medical surveillance costs of a large section of the exposed population which is put at risk; and that the toxic tort actions where the latency-period for the manifestation of the effects of the exposure is unpredictable it is necessary to have a "re-opener" clause as in the very nature of toxic injuries the latency period for the manifestation of effects is unpredictable and any structured settlement should contemplate and provide for the possible baneful contingencies of the future. It is pointed out for the petitioners that the order recording the settlement and the order dated 4th May, 1989 indicate that no provision was made for such imminent contingencies for the future which even include the effect of the toxic gas on pregnant mothers resulting in congenital abnormalities of the children. These aspects, it is urged, would have been appropriately discussed before the Court, had the victims and victim-groups had a "Fairness-Hearing". It is urged that there has been no application of the Court's mind to matters particularly relevant to toxic injuries. The contention is two fold. First is that the settlement did not envisage the possibilities of delayed manifestation or aggravation of toxic morbidity, in the exposed population. This aspect, it is urged, is required to be taken care of in two ways: One by making adequate financial provision for medical surveillance costs for the exposed but still latent victims and secondly, by providing in the case of symptomatic victims a "re-opener clause" for meeting contingencies of aggravation of damages in the case of the presently symptomatic victims. The second contention is as to the infirmity of the settlement by an omission to follow the 'Fairness-Hearing' procedures.

65. On the first aspect, Sri Nariman, however, contends that the possibility that the exposed population might develop hitherto unsuspected complications in the future was known to and was in the mind of the Union of India and it must be presumed to have taken all the possibilities into account in arriving at the settlement. Sri Nariman said we now have the benefit of hindsight of six years which is a sufficiently long period over which the worst possibilities would have blow-over. Indeed, in the plain; in the Bhopal Court, Shri Nariman points out, Union of India has specifically averred that there were possibilities of such future damage. Sri Nariman referred to the preface to the Report of April, 1986 of the Indian Council of Medical Research (ICMR) on "Health Effects of the Bhopal Gas Tragedy" where these contingencies are posited to point out that these aspects were in the mind of Union of India and that there was nothing unforeseen which could be said to have missed its attention. In the said preface ICMR said:

> ... How long will they (i.e. the respiratory, ocular and other morbidities) last ? What permanent disabilities can be caused? What is the outlook for these victims ? What of their off-spring?

Shri Nariman referred to the following passage in the introduction to the Working Manual I on "Health Problems of Bhopal Gas Victims" April, 1986, ICMR;

> Based on clinical experience gained so far, it is believed that many of them

(i.e. victims) would require specialised medicate for several years since MIC is an extremely reactive substance, the possibility of the exposed population developing hitherto unsuspected complications in the future cannot be overlooked.

What is, however, implicit in this stand of the UCC is the admission that exposure to MIC has such grim implications for the future; but UCC urges that the Union of India must be deemed to have put all these into the scales at the time it settled the claim for 470 million US dollars. UCC also suggests that with the passage of time all such problems of the future must have already unfolded themselves and that going by the statistics of medical evaluation of the affected persons done by the Directorate of Claims, even the amount of 470 million US dollars is very likely to be an over-payment. UCC ventures to suggest that on the estimates of compensation based on the medical categorisation of the affected population, a sum of Rs. 440 crores could be estimated to be an over-payment and that for all the latent-problems not manifested yet, this surplus of Rs. 440 crores should be a protect" e and adequate financial cushion.

66. We may at this stage have a brief look at the work of the medical evaluation and categorisation of the Health Status of the affected persons carried out by the Directorate of Claims. It would appear that as on 31st October, 1990, 6,39,793 claims had been filed. It was stated that a considerably large number of the claimants who were asked to appear for medical evaluation did not turn up and only 3,61,166 of them responded to the notices. Their medical folders were prepared. The total number of deaths had risen to 3,828. The results of medical evaluation and categorisation of the affected persons on the basis of the data entered in their Medical Folders as on 31st October, 1990 are as follows:

No. of medical folders prepared	3,61,966
No of folders evaluated	3,58,712
No. of folders categorised	3,58,712
No injury	1,55,203
Temporary injuries	1,73,382
Permanent injuries	18,922
Temporary disablement caused by a temporary injury	7,172
Temporary disablement caused by a permanent injury	1,313
Permanent Partial disablement	2,680
Permanent total disablement	50
Deaths	3,828

67. On the medical research literature placed before us it can reasonably be posited that the exposure to such concentrations of MIC might involve delayed manifestations of toxic morbidity. The exposed population may not have manifested any immediate symptomatic medical status.

But the long latency-period of toxic injuries renders the medical surveillance costs a permissible claim even ultimately the exposed persons may not actually develop the apprehended complications. In Ayers v. Jackson TP, 525 A 2d.287 N.J.1987, referring to the admissibility of claims of medical surveillance expenses, it was stated:

The claim for medical surveillance expenses stands on a different footing

from the claim based on enhanced risk. It seeks to recover the cost of periodic medical examinations intended to monitor plaintiffs' health and facilitate early diagnosis and treatment of disease caused by plaintiffs' exposure to toxic chemicals...

... The future expense of medical monitoring, could be a recoverable consequential damage provided that plaintiff's can establish with a reasonable degree of medical certainty that such expenditures are "reasonably anticipated" to be incurred by reason of their exposure. There is no doubt that such a remedy would permit the early detection and treatment of maladies and that as a matter of public policy the tort-feasor should bear its cost.

Compensation for reasonable and necessary medical expenses is consistent with well-accepted legal principles. It is also consistent with the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease. The value of early diagnosis and treatment for cancer patients is well-documented.

Although some individuals exposed to hazardous chemicals may seek regular medical surveillance whether or not the cost is reimbursed, the lack of reimbursement will undoubtedly deter others from doing so. An application of tort law that allows post-injury, pre-symptom recovery in toxic tort litigation for reasonable medical surveillance costs is manifestly consistent with the public interest in early detection and treatment of disease.

Recognition of pre-symptom claims for medical surveillance serves other important public interests. The difficulty of proving causation, where the disease is manifested years after exposure, has caused many commentators to suggest that tort law has no capacity to deter polluters, because the costs of proper disposal are often viewed by pollutors as exceeding the risk of tort liability...

Other considerations compel recognition of a pre-symptom medical surveillance claim. It is inequitable for an individual,, wrongfully exposed to dangerous toxic chemicals but unable to prove that disease is likely to have to pay his own expenses when medical intervention is clearly reasonable and necessary...

Accordingly, we hold that the cost of medical surveillance is a compensable item of damages where the proves demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary...

In the "Law of Toxic Torts" by Michael Dore, the same idea is expressed:

In Myers v. Johns-Manville Corporation, the court permitted plaintiff prove emotional harm where they were suffering from "serious fear or emotional distress or a clinically diagnosed phobia of cancer." The court distinguished,

> however, between a claim for fear of cancer and a claim for cancerphobia. The former could be based on plaintiff's fear, preoccupation and distress resulting from the enhanced risk of cancer but the latter would require expert opinion testimony...
>
> The reasonable value of future medical services required by a defendant's conduct is recoverable element of damage in tradition and toxic tort litigation. Such damages have been awarded even in circumstances where no present injury exists but medical testimony establishes that such future medical surveillance is reasonably required on the basis of the conduct of a particular defendant...

It is not the reasonable probability that the persons put at risk will actually suffer toxic injury in future that determines whether the medical surveillance is necessary. But what determines it is whether, on the basis of medical opinion, a person who has been exposed to a toxic substance known to cause long time serious injury should undergo periodical medical tests in order to look for timely warning signs of the on-set of the feared consequences. These costs constitute a relevant and admissible head of compensation and may have to be borne in mind in forming an opinion whether a proposed settlement - even as a settlement - is just, fair and adequate.

68. Sri Nariman, however, urged that the only form of compensation known to the common law is a lumpsum award - a once and for all determination of compensation for all plaintiffs' losses, past, present and future-and that split-trials for quantification of compensation taking into account future aggravation of injuries, except statutorily enabled, are unknown to common law.

Indeed, that this is the position in common law cannot be disputed. In an action for negligence, damages must be and are assessed once and for all at the trial of such an issue. Even if it is found later that the damage suffered was much greater than was originally supposed, no further action could be brought. It is well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once and for all. Two actions, therefore, will not lie against the same defendant for personal injury sustained in the same accident. (See Charlsworth and Percy on Negligence [1990] 8th Edn. Para 43.

Indeed, even under the Common Law, as administered in U.K. prior to the introduction of Section 32A of the Supreme Court Act 1981, Lord Denning thought that such special awards were not impermissible. But as pointed out earlier the House of Lords in Lim Poh Choo v. Camden Islington, did not approve that view.

Later Section 32A of the Supreme Court Act, 1981 expressly enabled award of provisional damages and Order 37 Rules 7 to 10 (Part II) Rules of Supreme Court provided for the assessment of such further damages. The contention of the UCC is that the common law rule of once and for all damages is unuttered in India unlike in England where split awards are now statutorily enabled and that, therefore, references to future medical surveillance costs and "re-opener" Clauses are inapposite to a once for all payment. The concept of re-opener clause in settlement, it is contended, is the result of special legal requirements in certain American jurisdictions and a settlement is not vitiated for not incorporating a "re-opener" clause or for not providing for future medical surveillance costs inasmuch as all these must be presumed to have engaged the minds of the settling parties at the time of a once for all settlement. Shri Nariman pointed out that the American case of Acushnet River v.

New Bedford Harbour, 712 F 2d Supp. 1019 referred to by the learned Attorney-General was a case where the "re-opener" clause was a statutory incident under the Comprehensive Environmental Response, Compensation and Liability Act, 1980.

But petitioners say that in the process of evolving what is a fair, reasonable and adequate settlement some of the elements essential and relevant to fairness and adequacy such as provision for future medical surveillance and the likely future, but yet unforeseen, manifestation of toxic injury, having regard to the nature of the hazard, have not been kept in mind and, therefore, the approval accorded to the settlement is on an incomplete criteria. But UCC would say that Union of India was aware of the possibility of such future manifestations of the effects of the exposure and must be deemed to have kept all those in mind at the time of settlement.

69. But the point to emphasise is that those who were not parties to the process of settlement are assailing the settlement on these grounds. In personal injury actions the possibility of the future aggravation of the condition and of consequent aggravation of damages are taken into account in the assessment of damages. The estimate of damages in that sense is a very delicate exercise requiring evaluation of many criteria some of which may border on the imponderable. Generally speaking actions for damages are limited by the general doctrine of remoteness and mitigation of damages. But the hazards of assessment of once and for all damages in personal injury actions lie in many yet inchoate factors requiring to be assessed. It is in this context we must look at the 'very proper refusal of the courts to sacrifice physically injured plaintiff's on the alter of the certainty principle'. The likelihood of future complications-though they may mean mere assessment or evaluation of mere chances-are also put into the scales in qualifying damages. This principle may, as rightly pointed out by Sri Nariman, take care of the victims who have manifest symptoms. But what about those who are presently wholly a symptomatic and have no material to support a present claim ? Who will provide them medical surveillance costs and if at some day in the future they develop any of the dreaded symptoms, who will provide them with compensation ? Even if the award is an "once and for all" determination, these aspects must be taken into account.

70. The second aspect is the imperative of the exercise of a "Fairness-Hearing" as a condition for the validity of the settlement. Smt. Indira Jaising strongly urged that in the absence of a "Fairness-Hearing" no settlement could at all be meaningful. But the question is whether such a procedure is relevant to and apposite in the context of the scheme under the Act. The "Fairness-Hearing" in a certified class of action is a concept in the United States for which a provision is available under rule 23 of US Federal Rules of Procedure. Smt. Indira Jaising referred to certain passages in the report of Chief Judge Weinstein in what is known as the Agent Orange Litigation (597 Federal Supplement 740 (1984), to indicate what according to her, are the criteria a Court has to keep in mind in approving a settlement. The learned judge observed (at page 760 para 9):

> In deciding whether to approve the settlement the Court must have a sufficient grasp of the facts and the law involved in the case in order to make a sensible evaluation of the ligation's prospects. (See Malchman v. Davis, 706 F.2d, 426 2d Cir.1983. An appreciation of the probabilities of plaintiffs' recovery after a trial and the possible range of damages is essential. The cases caution, however, that the court" should not...turn the settlement hearing 'into a trial or rehearsal of the trial.' "Flin v. FMC Corporation 528 F.2d, 11694th Cir. 1975, Cert, denied, 424 U.S. 967, 96 S.Ct. 1462, 47

> L.Ed.2d 734, quoting Teachers Ins. & annuity Assn of America v. Beame, 67 F.R.D. 30(S.D.N.Y.1975). See also Malchman v. Davis, 706 F.2d 426 2D Cir. 1983.
>
> A democratic vote by informed members of the class would be virtually impossible in any large class suit. The costs of ensuring that each member of the class in this case fully understood the issue bearing on settlement and then voted on it would be prohibitive and the enterprise quixotic. *Even though hundreds of members of the class were heard from, there was an overwhelmingly large silent majority. In the final analysis there was and can be no "consent" in any meaningful sense.*
>
> [Emphasis added]

Learned Judge also referred to the nine relevant factors: (1) The complexity expense and likely duration of the litigation, (2) The reaction of the class of the settlement, (3) The stage of the proceedings and the amount of discovery completed, (4) The risks of establishing liability, (5) The risks of establishing damages (6) The risks of maintaining the class action through the trial, (7) The ability of the defendants to withstand a greater judgement, (8) The range of reasonableness of the settlement fund in the light of the best possible recovery and, (9) the range of reasonableness of the settlement fund to a possible recovery in the light of all the attendant risks of litigation. But the limits were also indicated by learned Judge:

> Thus the trial court has a limited scope of review for determining fairness. The very purpose of settlement is to avoid trial of sharply disputed issue and the costs of protracted litigation.
>
> The Court may limit its fairness proceeding to whatever is necessary to aid it in reaching a just and informed decision. 'Flin v. FMC Corporation 528 F.2d 1173. An evidentiary hearing is not required.

The settlement must, of course, be an informed one. But it will be an error to require its quantum to be co-extensive with the suit claim or what, if the plaintiff's fully succeeded, they would be entitled to expect.

The Bhopal Gas Disaster (Processing of Claims) Act, 1985, has its own distinctive features. It is a legislation to meet a one time situation. It provides for exclusivity of the right of representation of all claimants by Union of India and for divesting the individual claimants of any right to pursue any remedy for any cause of action against UCC and UCIL. The constitutionality of this scheme has been upheld in the Sahu's case. Sri Nariman contended that the analogy of "Fairness-Hearing" envisaged in certified class action in the United States is inapposite in the context of the present statutory right of the Union of India. Shri Nariman referred to the following statement of the Court in Saint case:

> **...**Our attention was drawn to the provisions of Order 1 Rule 8(4) of the Code. *Strictly speaking, Order 1, Rule 8 will not apply to a suit or a proceeding under the Act. It is not a case of one having common interest with others. Here the plaintiff, the Central Government has replaced and divested the victims.*
>
> Emphasis added]

Consistent with the limitations of the scope of the review, says Shri Nariman, the

Court cannot go behind the settlement so as to take it back to a stage of proposal and order a "Fairness Hearing". He urged that a settlement was after all a settlement and an approval of a settlement did not depend on the legal certainty as to the claim or counter claim being worthless or valuable. Learned Counsel commended the following passage from the judgment in the Court of Appeal for the Fifth Circuit stated in Florida Trailer and Equipment Co. v. Deal,284 F.2d 567 (1960):

> ... The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and (thus) no basis for a compromise.

Sri Nariman also pointed out that In Agent Orange settlement only a small fraction of one percent of the class came forward at the fairness hearings; that there was no medical evidence nor a mini-trial about the factual aspects of the case and that in the end: "the silent majority remains inscrutable". It is pointed out that in United Kingdom a different variant or substitute of fairness hearing obtains. Order 15 Rule 13, Rules of Supreme Court makes provision for orders made in representative actions binding on persons, class or members of a class who cannot be ascertained or cannot be readily ascertained.

71. In our opinion, the right of the victims read into Section 4 of the Act to express their views on a proposed settlement does not contribute to a position analogous to that in United States in which fairness hearings are imperative. Section 4 of the Act to which the right is traceable merely enjoins Government of India to have 'due-regard' to the views expressed by victims. The power of the Union of India under the Act to enter into a compromise is not necessarily confined to a situation where suit has come to be instituted by it on behalf of the victims. Statute enables the Union of India to enter into a compromise even without such a suit. Right of being heard read into Section 4 and subject to which its constitutionality has been upheld in Sahu's case-subjects the Union of India to a corresponding obligation. But that obligation does not envisage or compel a procedure like a "Fairness-Hearing" as a condition precedent to a compromise that Union of India may reach, as the situations in which it may do so are not necessarily confined to a suit.

Accordingly, contention (G) is answered against petitioners. We hold that the settlement is not vitiated by reason alone of want of a "Fairness-Hearing" procedure preceding it. Likewise, the settlement is not vitiated by reason of the absence of a "re-opener" clause built into it. But there is one aspect as to medical surveillance costs and as to a provision for possible cases which are now a-symptomatic and which may become symptomatic after a drawn-out of latency period. We will discuss that aspect under Point (J) infra.

Re: Contention (H)

72. The question is if the settlement is reviewed and set aside what should happen to

the funds brought in by the UCC pursuant to the order. This question was raised by the petitioners and argued before us by the parties inviting a decision. We propose to decide it though the stage for giving effect to it has not yet arrived.

The stand of the Union of India and other petitioners is that even upon a setting aside of the settlement, the funds should not be allowed to be repatriated to the United States as that would embroil the victims in endless litigations to realise the fruits of the decree that may be made in the suit and to realise the order for interim-payment. The stand of the Union of India as recorded in the proceedings dated 10.4.1990 is as follows:

> **1.** It is submitted that the Union of India consistent with its duty as parens patriae to the victims cannot consent to the taking away by Carbide of the moneys which are in India outside the jurisdiction of Indian Courts.
>
> **2.** At this stage, the Union of India is not claiming unilaterally to appropriate the moneys, nor to disburse or distribute the same. The moneys can continue to be deposited in the Bank as at present and earn interest subject to such orders that may be passed in appropriate proceedings by courts.
>
> **3.** It is submitted that in view of the facts and circumstances of the case, the previous history of the litigation, the orders passed by the district court Bhopal, Madhya Pradesh High Court and this Hon'ble Court, and the undertakings given by UCIL and Carbide to Courts in respect of their assets, this Hon'ble Court may, in order to do complete justice under Article 142 of the constitution, require retention of the moneys for such period as it may deem fit, in order to satisfy any decree that may be passed in the suit including the enforceable order of the M.P. High Court dated 4th April 1988.

73. It is urged by the learned Attorney General that restitution being in the nature of a proceedings in execution , the party claiming that benefit must be relegated to the court of first instance to work out its remedies. It is also urged that the UCC did not bring in the funds on the faith of the court's order, but did so deliberately and on its own initiative and choice and deposited the funds to serve its own interest even after it was aware of the institution of the proceedings challenging the settlement in an attempt to effectuate a fait-accompli. It is further said that the order of the High Court directing payment of interim compensation of Rs. 250 crores is operative and since the UCC has not sought or obtained any stay of operation of that order, the sums to the extent of Rs. 250 crores should not, at all events, be permitted to be repatriated.

Learned Attorney General also sought to point out that the UCC had, subsequent to the settlement, effected certain corporate and administrative changes and without a full disclosure by the UCC of these changes and their effect on the interests of the claimants, the funds should not be permitted to be taken out of the court's jurisdiction, though, however, Government of India should not also be free to appropriate or use the funds.

74. We are not impressed by any of these contentions. It is not shown that the UCC brought-in the monies with any undue haste with a view to confronting Union of India with a fait accompli. The records indicate a different complexion of the matter. The payment appears to have been expedited at instance by the Union of India itself.

75. Strictly speaking no restitution in the sense that any funds obtained and

appropriated by the Union of India requiring to be paid back arises. The funds brought in by the UCC are deposited in the Reserve Bank of India and remain under this Court's control and jurisdiction. Restitution is an equitable principle and is subject to the discretion of the Court. Section 144, CPC, embodying the doctrine of restitution does not confer any new substantive right to the party not already obtaining under the general law. The section merely regulates the power of the court in that behalf.

76. But, in the present case, Section 144 CPC does not in terms apply. There is always an inherent jurisdiction to order restitution a fortiori where a party has acted on the faith of an order of the court. A litigant should not go back with the impression that the judicial-process so operated as to weaken his position and whatever it did on the faith of the court's order operated to its disadvantage. It is the duty of the court to ensure that no litigant goes back with a feeling that he was prejudiced by an act which he did on the faith of the court's order. Both on principle and authority it becomes the duty of the court to - as much moral as it is legal - to order refund and restitution of the amount to the UCC - if the settlement is set aside.

In Binayak v. Ramesh MANU/SC/0024/1965 : [1966]3SCR24 this Court dealing with scope of Section 144 CPC observed:

> **...** The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from....

In Jai Berham and Ors. v. Kedar Nath Marwari and Ors.[1922] P.C. 269 the Judicial Committee noticed that:

> The auction-purchasers have parted with their purchase-money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to...
>
> and said:
>
> > ...and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction-purchaser the moneys which have been applied for his benefit.
>
> In L. Guran Ditta v. T.R. Ditta [1935] PC 12 Lord Atkin said:
>
> > **...** The duty of the Court when awarding restitution under Section 144 of the Code is imperative. It shall place the applicant in the position in which he would have been if the order had not made: and for this purpose the Court is armed with powers [the 'may' is empowering, not discretionary] as to mesne profits, interest and so forth. As long ago as 1871 the Judicial Committee in 3 P.C. 465 (1) made it clear that interest was part of the normal relief given in

> restitution: and this decision seems right to have grounded the practice in India in such cases...

In Jagendra Nath Singh v. Hira Sahu and Ors. MANU/UP/0091/1947 : AIR1948All252 Motham J. observed:

> Every Court has a paramount duty to ensure that it does no injury to any litigant and the provisions of Section 144 lay down a procedure where effect can be given to that general provision of the law. The Court should be slow so to construe this section as to impose a restriction upon its obligation to act right and fairly according to the circumstances towards all parties involved.

77. We are satisfied in this case that the UCC transported the funds to India and deposited the foreign currency in the Reserve Bank of India on the faith of the Court's order. If the settlement is set aside they shall be entitled to have their funds remitted to them back in the United States together with such interest as has accrued thereon. So far as the point raised by the learned Attorney-General as to the corporate changes of the UCC is concerned, we think, a direction to the UCC to prove and establish compliance with the District Court's order dated 30th November, 1986, should be sufficient safeguard and should meet the ends of justice.

78. Accordingly, in the event of the settlement being set aside the UCC shall be entitled to have 420 million US Dollars brought in by it remitted to it by the Union of India at the United States along with such interest as has accrued on it in the account.

But this right to have the restitution shall be strictly subject to the condition that the UCC shall restore its undertaking dated 27.11.1986 which was recorded on 30.11.1986 by District Court at Bhopal and on the strength of which the court vacated the order of injunction earlier granted against the UCC. Pursuant to the order recording the Settlement, the said order dated 30.11.1986 of the District Court was set-aside by this Court. If the settlement goes, the order dated 30.11.1986 of the District Court will automatically stand restored and the UCC would be required to comply with that order to keep and maintain unencumbered assets of the value of US 3 billion dollars during the pendency of the suit. The right of the UCC to obtain the refund of and repatriate the funds shall be subject to the performance and effectuation of its obligations under the said order of 30.11.1986 of the District Court at Bhopal. Till then the funds shall remain within the jurisdiction of this Court and shall not be amenable to any other legal process. The Contention (H) is disposed of accordingly.

Re: Contention (I)

79. The contention is that notices to and opportunities for hearing of the victims, whom the Union of India claims to represent, were imperative before the proposed settlement was recorded and this, admittedly, not having been done the orders dated 14th and 15th February, 1989 are nullities as these were made in violation of the rules of natural justice. Shri Shanti Bhushan urged that the invalidity of the settlement is squarely covered and concluded, as a logical corollary, by the pronouncement of the Constitution Bench in Sahu case. He referred to and relied upon the following observations of Chief Justice Sabyasachi Mukharji in Sahu's case:

> It has been canvassed on behalf of the victims that the CPC is an instant

example of what is a just, fair and reasonable procedure, at least the principles embodied therein and the Act would be unreasonable if there is exclusion of the victims to vindicate properly their views and rights. This exclusion may amount to denial of justice. In any case, it has been suggested and in our opinion there is a good deal of force in this contention, that if a part of the claim, for good reasons or bad, is sought to be compromised or adjusted without at least considering the views of the victims that would be unreasonable deprivation of the rights of the victims...

...Right to a hearing or representation before entering into a compromise seems to be embodied in the due process of law understood in the sense the term has been used in the constitutional jargon of this country though perhaps not originally intended...

In view of the principles settled by this Court and accepted all over the world, *we are of the opinion that in a case of this magnitude and nature, when the victims have been given some say by Section 4 of the Act, in order to make that opportunity contemplated by Section 4 of the Act meaningful and effective, it should be so read that the victims have to be given an opportunity of the making their representation before the court comes to any conclusion in respect of any settlement.*

x x x

In our opinion, the constitutional requirements, the language of the section, the purpose of the Act and the principles of natural justice lead us to this interpretation of Section 4 of the Act that in case of a proposed or contemplated settlement, notice should be given to the victims who are affected or whose rights are to be affected to ascertain their views. Section 4 is significant. It enjoins the Central Government only to have "due regard" to any matters which such person may require to be urged. So the obligation is on the Central Govt. in the situation contemplated by Section 4 to have due regard to the views of the victims and that obligation cannot be discharged by the Central Government unless the victims are told that a settlement is proposed, intended or contemplated. It is not necessary that such views would require consent of all the victims. The Central Govt. as the Representative of the victims must have the views of the victims and place such views before the court in such manner it considers necessary before a settlement is entered into. If the victims want to advert to certain aspects of the matter during the proceedings under the Act and settlement indeed is an important stage in the proceedings, opportunities must be given to the victims. Individual notices may not be necessary. The court can, and in our opinion should, in such situation formulate modalities of giving notice and public notice can also be given inviting views of the victims by the help of mass media.

... The Act would be bad if it is not construed in the light that notice before any settlement under Section 4 of the Act was required to be given...

[Emphasis Supplied]

Shri Shanti Bhushan urged that with these findings and conclusions the only logical resultant is that the settlement must be declared a nullity as one reached in violation of the rules of natural justice. For Shri Shanti Bhushan, the matter is as simple as

that.

But after making the observation excerpted above, the Constitution Bench, having regard to the nature of this litigation, proceeded to spell out its views and conclusions on the effect of non-compliance of natural justice and whether there were other remedial and curative exercise. Chief Justice Mukharji noticed the problem arising out of non-compliance thus:

> ... It further appears that that type of notice which is required to be given had not been given. *The question therefore, is what is to be done and what is the consequence ? The Act would be bad if it is not construed in the light that notice before any settlement under Section 4 of the Act was required to be given. Then arises the question of consequences of not giving the notice...*
>
> [Emphasis supplied]

Learned Chief Justice proceeded to say:

> ... In this adjudication, we are not strictly concerned with the validity or otherwise of the settlement, as we have indicated hereinbefore. But constitutional adjudication cannot be divorced from the reality of a situation, or the impact of an adjudication. Constitutional deductions are never made in the vacuum. These deal with life's problems in the reality of a given situation. And no constitutional adjudication is also possible unless one is aware of the consequences of such an adjudication. One hesitates in matters of this type where large consequences follow one way or the other to put as under what others have put together. It is well to remember, as old Justice Holmes, that time has upset many fighting faiths and one must always wager one's salvation upon some prophecy based upon imperfect knowledge. Our knowledge changes; our perception of truth also changes...
>
> ... No man or no man's right should be affected without an opportunity to ventilate his views. We are also conscious that justice is a psychological yearning, in which men seek acceptance of their view point by having an opportunity of vindication of their view point before the forum or the authority enjoined or obliged to take a decision affecting their right. *Yet, in the particular situations, one has to bear in mind how an infraction of that should be sought to be removed in accordance with justice. In the facts and the circumstances of this case where sufficient opportunity is available when review application is heard on notice, as directed by Court, no further opportunity is necessary and it cannot be said that injustice has been done.* "To do a great right" after all, it is permissible sometimes "to do a little wrong". In the facts and circumstances of the case, this is one of those rate occasions...
>
> [Emphasis supplied]

Chief Justice Mukharji also observed;

> ... But having regard to the urgency of the situation and having regard to the need for the victims for relief and help and having regard to the fact that so much effort has gone in finding a basis for the settlement, we, at one point of time, thought that a post-decisional hearing in the facts and circumstances of this case might be considered to be sufficient compliance with the requirements of principles of natural justice as embodied under Section 4 of

the Act...

> ... In the facts and the circumstances of this, therefore, we are of the opinion, to direct that notice should be given now, would not result in doing justice in the situation. In the premises, no further consequential order is necessary by this Court...

While Shri Nariman understandably strongly relies on these observations as the law of the case, Shri Shanti Bhushan seeks to deny them any binding force on the ground that they were mere passing observations inasmuch as the question of validity of the settlement was not before the court in Sahu case Shri Shanti Bhushan relied upon several pronouncements of this Court: viz. National Textile Workers Union v. P.R. Ramakrishnan MANU/SC/0025/1982 : (1983)ILLJ45SC Institute of Chartered Accountants v. L.K. Ratna MANU/SC/0083/1986 : [1987]164ITR1(SC) , K.I. Shephard v. Union of India MANU/SC/0643/1987 : (1988)ILLJ162SC , R.B. Shreeram Durga Prasad v. Settlement Commission MANU/SC/0429/1989 : [1989]176ITR169(SC) and H.L. Trehan v. Union of India MANU/SC/0179/1988 : AIR1989SC568 to emphasise the imperatives of observance of natural justice and the inevitability of the consequences the flow from a non-compliance of the requirements of a pre-decisional hearing.

These are all accepted principles. Their wisdom, verity and universality in the discipline of law are well established. Omission to comply with the requirements of the rule of Audi Alteram Partetn, as a general rule, vitiates a decision. Where there is violation of natural justice no resultant or independent prejudice need be shown, as the denial of natural justice is, in itself, sufficient prejudice and it is no answer to say that even with observance of natural justice the same conclusion would have been reached. The citizen "is entitled to be under the Rule of law and not the Rule of Discretion" and "to remit the maintenance of constitutional right to judicial discretion is to shift the foundation of freedom from the rock to the sand".

But the effects and consequences of non-compliance may alter with situational variations and particularities, illustrating a "flexible use of discretionary remedies to meet novel legal situations". "One motive" says Prof. Wade "for holding administrative acts to be voidable where according to principle they are void may be a desire to extend the discretionary powers of the Court". As observed by Lord Reid in Wiseman v. Bomeman 1971 AC 297 natural justice should not degenerate into a set of hard and fast rules. There should be a circumstantial flexibility.

In Sahu case this Court held that there was no compliance with the principles of natural justice but also held that the result of the non-compliance should not be a mechanical invalidation. The Court suggested curatives. The Court was not only sitting in judicial review of legislation; but was a court of construction also, for, it is upon proper construction of the provisions, questions of constitutionality come to be decided. The Court was considering the scope and content of the obligations to afford a hearing implicit in Section 4 of the Act. It cannot be said to have gone beyond the pale of the enquiry when it considered the further question as to the different ways in which that obligation could be complied with or satisfied. This is, in substance, what the Court has done and that is the law of the case. It cannot be said that these observations were made by the way and had no binding force.

Sri Garg submitted that when the Union of India did not, even prima-facie, probabilise that the quantification reflected in the settlement was arrived on the basis

of rational criteria relevant to the matter, the determination fails as the statutory authority had acted ultra-vires its powers and trusts under the statutory scheme. Sri Garg said that it would be a perversion of the process to call upon the victims to demonstrate how the settlement is inadequate. There was, according to Sri Garg, no material to shift the risk of non-persuasion. Sri Garg urged that unless the elements of reasonableness and adequacy - even to the extent a settlement goes-are not established and the quantification shown to be justified on some tenable basis the settlement would incur the criticism of being the result of an arbitrary action of Government.

Shri Shanti Bhushan, however, strongly commended the following observations of Megarry J in Leary v. National Union of Vehicle Builders [1971] Ch. 34 which were referred to with approval by the court in Institute of Chartered Accountants v. L.K. Ratna MANU/SC/0083/1986 : [1987]164ITR1(SC) as to the effect of non-observance of natural justice:

> If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will never-the-less have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.

Prof. Wade in his treatise on Administrative Law observes:

> If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial.

We might recall here that the Privy Council in Calvin v. Can [1980] AC 576 had expressed its reservations about Megarry J's 'General Rule' in Leary's case. However, the reservations were in the area of domestic jurisdiction, where contractual or conventional Rules operate. The case did not involve a public law situation. But the House of Lords in Llyod v. Memahan [1987] AC 625 applied the principle to a clearly public law situation. The principle in Leary's might, perhaps, be too broad a generalisation.

But the question here is not so much as to the consequences of the omission on the part of the Union of India to have "due regard" to the views of the victims on the settlement or the omission on the part of the Court to afford an opportunity to the victims of being heard before recording a settlement as it is one of the effects and

implications of the pronouncement in Sahu case which is the law of the case. In Sahu case the Court expressly held that the non-compliance with the obligation to issue notices did not, by such reason alone, in the circumstances of the case, vitiate the settlement, and that the affected persons may avail themselves of an opportunity of being heard in the course of the review petitions. It is not proper to isolate and render apart the two implications and hold the suggested curative as a mere obiter.

80. While reaching this conclusion, we are not unmindful of the force of the petitioner's case. The sahu's case laid down that Section 4 of the Act contemplated and conferred a right on the victims of being heard. It also held that they were not so heard before the Government agreed to the terms of the settlement. According to the Sahu's case, the victims should have an opportunity of being heard in the Review Proceedings. The petitioners who were litigating the matter did not represent all the victims and victim-groups.

81. In the ultimate analysis, the crucial question is whether the opportunity to the affected persons predicated in the Sahu case can reasonably be said to have been afforded. Indeed, at the very commencement of the hearing of the review petitions, Smt. Indira Jaising made a pertinent submission that the court should determine and clarify the nature and scope of the review hearing: whether they partake of the nature of a "Fairness Hearing" or of the nature of a "post-decisional hearing" or whether the court would device some way in which the victims at large would have an effective sense of participation as envisaged in the Sahu decision, Smt. Indira Jaising submitted that opportunity of being heard in the review suggested and indicated by the Sahu decision cannot be understood to confer the opportunity only to those who were eonomine parties to the review petitions.

82. In the present hearings Shri Nariman placed before us a number of press-clippings to show that, from time to time, largely circulated newspapers in the country carried detailed news reports of the settlement and of the subsequent legal proceedings questioning them. Shri Nariman's contention is that in view of this wide publicity the majority of the affected persons must be presumed to have had notice, though not in a formal way and to have accepted the settlement as they had not bestirred themselves to move the Court.

83. Shri Nariman also raised what he urged were basic objection as to the scope of the review jurisdiction and to the enlargement of the scope of the review hearings to anything resembling a "Fairness Hearing" by treating the concluded settlement as a mere proposal to settle. Shri Nariman said that the Court could either review the orders dated 14th and 15th February, 1989 if legal grounds for such review under law were strictly made out or dismiss the review petitions if petitioners fail to make out a case in accordance with the accepted principles regulating the review jurisdiction; but the court could not adopt an intermediate course by treating the settlement as a proposed or provisional settlement and seek now to do what the Union of India was expected to do before the settlement was reached.

84. The whole issue, shorn of legal subtleties, is a moral and humanitarian one. What was transacted with the court's assistance between the Union of India on one side and the UCC on the other is now sought to be made binding on the tens of thousands of innocent victims who, as the law has now declared, had a right to be heard before the settlement could be reached or approved. The implications of the settlement and its effect on the lakhs of citizens of this country are, indeed, crucial in their grim struggle to reshape and give meaning to their torn lives. Any paternalistic

condescension that what has been done is after all for their own good is out of place. Either they should have been heard before a settlement was approved in accordance with the law declared by this Court or it, at least, must become demonstrable in a process in which they have a reasonable sense of participation that the settlement has been to their evident advantage or, at least, the adverse consequences are effectively neutralised. The ultimate directions on Point J that we propose to issue will, we think, serve to achieve the last mentioned expectation. Legal and procedural technicalities should yield to the paramount considerations of justice and humanity. It is of utmost importance that in an endeavour of such great magnitude where the court is trusted with the moral responsibility of ensuring justice to these tens of thousand innocent victims, the issues of human suffering do not become obscure in procedural thickets. We find it difficult to accept Shri Nariman's stand on the scope of the review. We think that in a situation of this nature and magnitude, the Review-proceeding should not be strict, orthodox and conventional but one whose scope would accommodate the great needs of justice. That apart, quite obviously, the individual petitioners and the petitioner-organisations which have sought review cannot, be held to represent and exhaust the interest of all the victims.

Those represented by the petitioner-organisations even if their claims of membership are accepted on face value- constitute only a small percentage of the total number of persons medically evaluated. The rest of the victims constitute the great silent majority.

When an order affects a person not a party to the proceedings, the remedy of an affected person and the powers of the Court to grant it are well-settled. For instance, in Shivdeo Singh and Ors. v. State of Punjab and Ors. MANU/SC/0395/1961 : AIR 1963 SC 1909 on a writ petition filed under Article 226 of the Constitution by A for cancellation of the order of allotment passed by the Director of Rehabilitation in favour of B, the High Court made an order cancelling the allotment though 'B' was not a party. Later, B filed a writ petition under Article 226 for impleading him as a party and for re-hearing the whole matter. The High Court granted it. Before this Court, the objection was this:

> learned Counsel contends that Article 226 of the Constitution does not confer any power on the High Court to review its own order and, therefore, the second order of Khosla, J., was without jurisdiction.

This Court rejected the contention observing that:

> It is sufficient to say that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. Here the previous order of Khosla, J., affected the interests of persons who are not made parties to the proceedings before him. It was at their instance and for giving them a hearing that Khosla, J., entertained the second petition. In doing so, he merely did what the principles of natural justice required him to do. It is said that the respondents before us had no right to apply for review because they were not parties to the previous proceedings. As we have already pointed out, it is precisely because they were not made parties to the previous proceedings, though their interests were sought to be affected by the decision of the High Court, that the second application was entertained by Khosla, J.

85. The nature of the present review proceedings is indeed sui-generis. Its scope is pre-set by the terms of the order dated 4th May 1989 as well as what are further necessarily implicit in Sahu decision. In the course of the order dated 4th May 1989, it was observed.

> ... If, owing to the pre-settlement procedures being limited to the main contestants in the appeal, the benefit of some contrary or supplemental information or material, having a crucial bearing on the fundamental assumptions basic to the settlement, have been denied to the Court and that as a result, serious miscarriage of justice, violating the constitutional and legal rights of the persons affected, has been occasioned, it will be the endeavour of this Court to undo any such injustice. But that, we reiterate, must be by procedures recognised by law. Those who trust this Court will not have cause for despair.

The scope of the review in the present case is to ensure that no miscarriage of justice occurs in a matter of such great moment. This is, perhaps, the last opportunity to verify our doubts and to undo injustice, if any, which may have occurred. The fate and fortunes of tens of thousands of persons depend on the effectiveness and fairness of these proceedings. The legal and procedural technicalities should yield to the paramount considerations of justice and fairness. The considerations go beyond legalism and are largely humanitarian. It is of utmost importance that great issues of human suffering are not subordinated to legal technicalities.

But in view of our conclusion on point J that on the material on record, the settlement-fund should be sufficient to meet the needs of a just compensation and the order we propose to pass with regard to point J, the grievance of the petitioners on the present contention would not, in our opinion really survive. Contention (I) is answered accordingly.

Re: Point (J)

86. Before we go into the question whether the settlement should be set aside on grounds of inadequacy of the settlement fund, certain subsidiary contentions and arguments may be noticed. They deal with (i) that there has been an exclusion of a large number of claims on the ground that despite service of notices they did not respond and appear for medical documentation and (ii) that the whole exercise of medical documentation is faulty and is designed and tends to exclude genuine victims. These contentions are really not directly germane to the question of the validity of the settlement. However, they were put forward to discredit the statistics emerging from the medical documentation done by the Directorate of Claims on which the UCC sought to rely. We may as well deal with these two contentions.

87. The first contention is that the claims of a large number of persons who had filed their claims are not registered on the ground that they did not respond to the notices calling upon them to undergo the requisite medical tests for medical documentation. It was urged that no effective service of notice had taken place and that the claims of a large number of claimants-according to them almost over 30% of the total number-have virtually gone for default. While the victim-groups allege that there was a systematic attempt to suppress the claims, the Directorate of Claims would say that the lack of response indicated that the claims were speculative and spurious and, therefore, the claimants did not offer themselves to medical examination.

In order to appreciate this grievance of the victim-groups it is, perhaps, necessary to

advert to the provisions of the Act and the Scheme attracted to this stage of processing of the claims. Section 9 of the Act enjoins upon the Central Government to frame a Scheme providing for any or all of the matters enumerated in clauses (a) to (i) of Sub-section (2) of Section 9. The Scheme, known as the "Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985," was promulgated by notification dated 24th September, 1985, published in the Gazette of India. Para 4 of the Scheme deals with the manner of filing of claims and specifies the forms in which they should be filed. Para 5(1) requires the Deputy Commissioner of Claims to place the claims in the appropriate category amongst those enumerated in sub-para (2) of para 5. Sub-para (2) requires the registration of the claim under various heads such as "death"; "total disablement resulting in permanent disability to earn livelihood"; "permanent partial disablement affecting the overall capacity of a person to earn his livelihood"; "temporary partial disablement resulting in reduced capacity to earn livelihood" and so on. Sub-paras (3), (4) and (5) of para 5 of the Scheme provide:

> (3) On the consideration of a claim made under paragraph 4 of the Scheme, if the Deputy Commissioner is of the opinion that the claim falls in a category different from the category mentioned by the claimant, he may decide the appropriate category after giving an opportunity to the claimant to be heard and also after taking into consideration any facts made available to him in this behalf by the Government or the authorities authorised by the Government in this behalf.
>
> (4) Where the Deputy Commissioner is of the opinion that a claim made under paragraph 4 does not fall in any of the categories specified in sub-paragraph (2) he may refuse to register the claim:
>
> > Provided that before so refusing he shall give a reasonable opportunity for a personal hearing to the claimant.
>
> (5) If the claimant is not satisfied With the order of the Deputy Commissioner under sub-paragraph (3) or sub-paragraph (4) he may prefer an appeal against such order to the Commissioner, who shall decide the same.

The stage at which medical examination was required related presumably to the exercise under sub-paragraph (3) of Para 5 of the Scheme. Failure of a claimant to respond to the notice and offer himself for medical examination would entail a refusal to register the claim. It is manifest that such a refusal is appealable under the scheme. But this grievance does not survive in view of the stand taken by the Government in these proceedings. In the affidavit of Sri Ramesh Yashwant Durve, dated 5th December, 1989 in W.P. No. 843/88, it is stated:-

> That all claimants who did not respond to the first notice were given a second and then a third notice to appear at one of the medical documentation centers for their medical examination. Wide publicity was also done by way of beating of drums in mohallas, radio announcements and newspaper advertisements. In addition to all these, ward committee members were also involved in motivating the claimants to get themselves medically examined. All those claimants who approach the Director of Claims even now are given a fresh date on which to appear for medical examination and are informed accordingly.
>
> Although the medical documentation exercise is completed, even then if a

claimant fails to appear for medical examination after service of all three notices and he makes an application for medical examination, his medical examination is arranged at one of the two medical documentation centers-TB Center and JP Hospital-specially kept functioning for such claimants. It is relevant to point out that this arrangement has been approved by Supreme Court vide order dated 29 September, 1989...

For the reasons given above, a fresh public notice and fixing of dates for medical documentation is also not needed. It may be pointed out here that these people will still have an opportunity to file claims when the Commissioner for Welfare of the gas victims issues a notification in terms of para 4(i) of Bhopal Gas Leak Disaster (Registration & Processing of Claims) Scheme, 1985 inviting claims.

This assurance coupled with the right of appeal should sufficiently safeguard the interests of genuine claimants.

88. It was urged by the petitioners that the very concept of injury' as an element in the eligibility for medical documentation was erroneous as it tended to exclude victims who did not have or retain some medical documentation of their initial treatment immediately after the exposure. The stand of the Director of Claims on the point is this: -

That it is unlikely that a person who was injured and suffered during the post-exposure period is not in possession of any form of medical record. The line of treatment was widely publicised. Therefore, the patient must have received treatment from one of the private practitioners, if not from one of the many temporary and permanent govt./semi-govt. institutions or institutions run by voluntary organisations, and he must be in possession of some form of record.

Every claimant is advised to bring relevant medical record at the time of medical examination. Documents of post-exposure medical record are accepted even after the medical documentation of the claimant is over.

It is incorrect to say that the documents for post-exposure period are just not available. Had it been so, 55% of the claimants who fall in category 'B' to 'CF' would also have been categorised as 'A'. In this connection it may be clarified that even in post-exposure period prescriptions were issued. Besides this, private practitioners were also issuing prescriptions in printed form. It is therefore incorrect to say that there is dearth of documentation. However, bearing this point in mind, a very liberal approach in admitting documents was adopted as will be clear from the guidelines for evaluation. It will also be relevant here to state that the claimants are being helped to get the benefit of any medical records available in any hospital or dispensary. Institutions like ICMR, COM (Gas Relief), Jawahar Lal Nehru Hospital, Bhopal Eye Hospital, Indian Red Cross Society, BHEL Hospital and the Railway Hospital have treated numerous gas victims during the post-exposure period. The relevant medical records from them have been retrieved and are being linked with the respective claim folders so that the benefit of such post-exposure record is extended to these claimants.

It will be irrational and unscientific to admit all claims without reference to any documentary evidence as suggested by the petitioner...

(See the affidavit dated 5th December, 1989 of Sri Ramesh Yeshwant Durve filed in W.P. No. 843/88.)

89. As to the charge that after the purported settlement, Government is playing down the seriousness of the effects of the disaster, and that the medical documentation did not help proper evaluation it is, perhaps, necessary to read the affidavit dated 5th December, 1989 of the Additional Director of Claims, in W.P. No. 843 of 1988. The Additional Director says:

> The Medical Documentation Exercise has been an unique effort. It was possibly for the first time that such a comprehensive medical examination (with documentation evaluation and categorisation) of such a large population was undertaken anywhere in the world. There was no earlier experience or expertise to fall back upon. The whole exercise had, therefore, to be conceived, conceptualised and concretised locally. But care was taken to ensure that the guidelines were approved by legal and medical experts not only at the State level but also at the National level. The guidelines were also approved by GOI's Committee of Experts on Medical Documentation. In other words, a systematic arrangement was organised to make the most objective assessment of the medical health status of the claimants in a scientific manner.
>
> It has to be recognised in this context that the guidelines for categorisation can only be a broad indicator as it is not possible for anyone to envisage all types of situations and prescribe for them. Likewise, the examples cited are only 'illustrative examples' and not 'exhaustive instructions'.
>
> Hundreds of graduate and post-graduate doctors assisted by qualified para-medical staff have examined the claimants with the help of sophisticated equipments. It cannot be reasonably contended that all of them have colluded with the Government to distort the whole exercise.
>
> The exercise of categorisation is not just an arithmetical exercise directly flowing from the evaluation sheet. Had it been so, the same Assistant Surgeon, who does the evaluation can himself do the categorisation also. Post graduate specialists have been engaged for this work because the total medical folder has to be assessed keeping the evaluation sheet as a basic indicator. In doing the categorisation, the postgraduate specialist takes into account symptoms reported, clinical findings, specialist's opinions and investigation reports.

The Additional Director accordingly assets:

> ...it will be meaningless to suggest that the Govt. is jeopardising the interests of the claimants by deliberately distorting the Medical Documentation Exercise. Similarly, it will be absurd to suggest that the Govt. is trying to help UCC in any way.

The Additional Director also refers to the attempts by unscrupulous persons to exploit the situation in pursuit of unjust gains and how the authorities had to encounter attempts of impersonation and "attempts by claimants to pass of other's urine as their own." It was said that there were urine-donors. The affidavit also discloses certain malpractices involving medical prescriptions and certificates by some members of the medical profession and ante-dated urine-thiocyanate estimations. The Additional

Director says that despite all this Government endeavoured to give the benefit to the claimants wherever possible. It is stated:

> The State Govt. had to preserve the scientific character and ensure the credibility of the exercise of evaluation. Bearing this limitation in mind, wherever possible, the government has attempted to give the benefit to the claimants. The various guidelines relating to documentation of the immediate post-disaster phase are proof of this intention. At the same time, government have had to adhere to certain quality standards so that the exercise could stand up to scrutiny in any Court of law or in any scientific form.

The stand of the Directorate cannot be brushed aside as arbitrary. However, provisions of appeal ensure that in genuine cases there will be no miscarriage of justice.

90. Shall we set aside the settlement on the mere possibility that medical documentation and categorisation are faulty? And that the figures of the various kinds of injuries and disablement indicated are undependable? As of now, medical documentation discloses that "there is no conclusive evidence to establish a casual link between cancer-incidence and MIC exposure". It is true that this inference is tentative as it would appear studies are continuing and conclusions of scientific value in this behalf can only be drawn after the studies are over. While the medical literature relied upon by the petitioners suggests possibilities of the exposure being carcinogenic, the ICMR studies show that as of now the annual incidence of cancer registration is more among the unexposed population as compared to the exposed population." (See Sri Ramesh Yeshwant Durve's affidavit dated 5th December, 1989, para 9). Similarly, "there is no definite evidence that derangement in immune system of the gas exposes have taken place". But the literature relied upon by petitioners does indicate that such prognosis cannot be ruled out. These matters are said to be under close study of the ICMR and other research agencies using, as indicated, the "multi-test CMI technique to screen the status of the immune system".

91. But the whole controversy about the adequacy of the settlement-fund arises on account of the possibility that the totality of the awards made on all the claims may exceed the settlement-fund in which event the settlement-fund will be insufficient to satisfy all the Awards. This is the main concern of the victims and victim-groups. There is, as it now stands, a fund of one thousand two hundred crores of rupees for the benefit of the victims. The main attack on its adequacy rests solely on the possibility that the medical documentation and categorisation based thereon, of the victims' medical status done by the Directorate of Claims is faulty. The charge that medical documentation was faulty and was calculated to play down the ill-effects of the exposure to MIC is, in our opinion, not substantiated. This attack itself implies that if the categorisation of the claimants on the basis of the severity of the injuries is correct then the settlement-fund may not, as a settlement, be unreasonable.

92. At the same time, it is necessary to remind ourselves that in bestowing a second thought whether the settlement is just, fair and adequate. We should not proceed on the premise that the liability of the UCC has been firmly established. It is yet to be decided if the matter goes to trial. Indeed, UCC has seriously contested the basis of its alleged liability. But it is true that even to the extent a settlement goes, the idea of its fairness and adequacy must necessarily be related to the magnitude of the problem and the question of its reasonableness must be assessed putting many considerations into the scales. It may be hazardous to belittle the advantages of the

settlement in a matter of such complexity. Every effort should be made to protect the victims from the prospects of a protracted, exhausting and uncertain litigation. While we do not intend to comment on the merits of the claims and of the defences, factual and legal, arising in the suit, it is fair to recognise that the suit involves complex questions as to the basis of UCC's liability and assessment of the quantum of compensation in a mass tort action. One of the areas of controversy is as to the admissibility of scientific and statistical data in the quantification of damages without resort to the evidence as to injuries in individual cases.

93. Sri Nariman contended that scientific and statistical evidence for estimates of damages in toxic tort actions is permissible only in fairness hearings and such evidence would not be so admissible in the proceedings of adjudication, where personal injury must be proved by each individual plaintiff. That would, indeed, be a struggle with infinity as it would involve individual adjudication of tens of thousands of claims for purposes of quantification of damages.

In an article on 'Scientific and Legal Standards of Statistical Evidence in Toxic Tort and Discrimination Suits' by Carl Cranor and Kurt Nutting (See: Law and Philosophy Vol. 9 No. 2 May, 1990) there is an interesting discussion as to what would be the appropriate standard of evidence in presenting and evaluating scientific and statistical information for use in legal proceedings. The learned authors say:

> These are two of the main sides in the controversy concerning the kind and amount of scientific evidence necessary to support legally a verdict for the plaintiff. Black seems to urge that courts should only accept evidence that is scientifically valid, and adhere to the standards of evidence implicit in the discipline, while the Ferebee court urges that plaintiff's in presenting scientific evidence and expert scientific testimony should be held to legal standards of evidence. Powerful forces are arrayed on both sides of this issue. On the side of requiring scientific testimony only to measure up to legal standards of evidence, the social forces include plaintiff's or potential plaintiff's, plaintiffs' attorneys, public interest groups, consumer advocacy groups, all individuals who are 'concerned to make it somewhat easier to recover damages under personal injury law for alleged injuries suffered as a consequence of activities of others. On the other side of the same issue are defendants, potential defendants (typically corporations, manufacturing firms) and, interestingly, the scientific community." [Page 118]

In Sterling v. Velsicol Chemical Corporation 855 F 2d 1188 the US Court of Appeals tended to the view that generalised proof of damages is not sufficient to prove individual damages and that damages in mass tort personal injury cases must be proved individually by each individual plaintiff. The Court held:

> We cannot emphasise this point strongly enough because generalised proof will not suffice to prove individual damages. The main problem on review stems from a failure to differentiate between the general and the particular. This is an understandably easy trap to fall into in mass tort litigation. Although many common issues of fact and law will be capable of resolution on a group basis, individual particularised damages still must be proved on an individual basis.

94. While Shri Nariman contends that admissibility of scientific and statistical evidence is confined to Fairness Hearings alone and not in adjudication where

personal injury by each individual plaintiff must be proved, the learned Attorney-General, however, urges that such evidence and estimates of damages are permissible in toxic-tort actions and says that the fundamental principle is and should be that countless injured persons must not suffer because of the difficulty of proving damages with certainty or because of the delay involved in pursuing each individual claim. He referred to the following passage in Florance B. Bigelow v. RKO Radio Pictures Inc., 327 US 251 (1946):

> the most elementary conceptions of justice and public policy require that the wrong doer shall bear the risk of the uncertainty which his own wrong has created.

Learned Attorney General also urged that in tort actions of this kind the true rule is the one stated in Story Parchment Company v. Paterson Parchment Paper Co. 282 US 555:

> The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. Taylor v. Bradley, 4 Abb. App. DEc. 363 Am. Dec. 415:
>
> It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of.
>
> The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The later description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount.
>
> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making were otherwise.

And in Frederick Thomas Kingsley v. The Secretary of State for India MANU/WB/0258/1922 : AIR 1923 Cal 49, it was observed:

> Shall the injured party be allowed to recover no damages (or merely nominal) because he cannot show the exact amount of the certainty, though he is ready to show, to the satisfaction of the Jury, that he has suffered large damages by the injury ? Certainty, it is true, would be thus attained, but it would be the certainty of injustice. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the

> nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the Jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.

The risk of the uncertainty, says learned Attorney-General, should, in such cases, be thrown upon the wrongdoer instead of upon the injured party. Learned Attorney General also urged that, on first principle, in cases where thousands have been injured, it is far simpler to prove the amount of damages to the members of the class by establishing their total damages than by collecting and aggregating individual claims as a sum to be assessed against the defendants. He said statistical methods are commonly accepted and used as admissible evidence in a variety of contexts including quantification of damages in such mass tort actions. He said that these principles are essential principles of justice and the Bhopal disaster is an ideal setting for an innovative application of these salutary principles.

95. The foregoing serves to highlight the complexities of the area. Indeed, in many tort actions the world-over speedy adjudications and expeditious relief's are not easily accomplished and many of them have ended in settlements. In the context of the problems presented by the issues of liability in cases of certain corporate torts beyond the corporate veil there is an impressive body of academic opinion amongst the school men that the very theories of limited corporate liability which initially served as incentives for commercial risk-taking needs re-thinking in certain areas of tortious liability of Corporations. Some scholars have advocated abolition of limited liability for "knowable tort risks". (See "An Economic Analysis of Limited Liability in Corporation Law" (30 U.Toronto LJ.117 (1980); 'The Place of Enterprise Liability in the Control of Corporate Conduct" (90Yale Law Journal 1 (1980); "Should Shareholders be personally liable for the torts of their Corporations?" (76 Yale Law Journal 1190 (1967). This, of course, has the limitation of one more shade of an academician's point of view for radical changes in law.

96. With the passage of time there are more tangible details available by way of the proceedings of the Directorate of Claims which has medically evaluated and categorised nearly 3,60,000 affected persons. We have looked into the formats and folders prepared by the Directorate of Claims for the medical evaluation of the conditions of the victims. Some sample medical dossiers pertaining to some individual claimants containing an evaluation of the data pertaining to the medical status of the persons have also been shown to us. It is on the basis of such medical dossiers that evaluation and categorisation are stated to have been done. The guidelines for carrying out these medical evaluations, it is stated, have been formulated and issued by the Government of India.

97. Petitioners seriously assail the correctness of the guidelines for medical evaluation as also the result of the actual operational processes of evaluation based thereon. Petitioners described the results indicated by the medical categorisation done by the Directorate of Claims which showed only 40 cases of total permanent disablement as shocking and wholly unrelated to the realities. Indeed, some learned Counsel for the petitioners, of course in a lighter vein, remarked that if these were the final figures of injuries and incapacitations caused by the Bhopal Gas Leak Disaster, then UCC should be entitled to a refund out of the sum settled and wondered why, in the circumstances, UCC was taking shelter under the settlement

and fighting shy of a trial.

It appears to us that particulars care has gone into the prescription of the medical documentation tests and the formulation of the results for purposes of evaluation and categorisation.

98. After a careful thought, it appears to us that while it may not be wise or proper to deprive the victims of the benefit of the settlement, it is, however, necessary to ensure that in the-perhaps unlikely-event of the settlement-fund being found inadequate to meet the compensation determined in respect of all the present claimants, those persons who may have their claims determined after the fund is exhausted are not left to fend themselves. But, such a contingency may not arise having regard to the size of the settlement-fund. If it should arise, the reasonable way to protect the interests of the victims is to hold that the Union of India, as a welfare State and in the circumstances in which the settlement was made, should not be found wanting in making good the deficiency, if any. We hold and declare accordingly.

99. It is relevant here that the Union of India while, quite fairly, acknowledging that there was in fact such a settlement, however, sought to assail its validity on certain legal issues. But the factum of the settlement was not disputed. Indeed, Union of India did not initiate any substantive proceedings of its own to assail the agreement or the consensual element constituting the substratum of the order of the Court. The legal contentions as to the validity of the settlement were permitted to be raised in as much as that an order made on consent would be at no higher footing and could be assailed on the grounds on which an agreement could be. But, as stated earlier, the factum of the consensual nature of the transaction and its existence as a fact was not disputed. Those legal contentions as to the validity have now failed. The result is that the agreement subsists.

For all these reasons we leave the settlement and the orders dated 14/15th February, 1989-except to the extent set aside or modified pursuant to the other findings-undisturbed.

100. We may here refer to and set at rest one other contention which had loomed in the hearings. The petitioners had urged that the principles of the liability and the standards of assessment of damages in a toxic mass tort arising out of a hazardous enterprise should be not only on the basis of absolute liability-not merely on Rylands v. Fletcher principle of strict liability-not admitting of any exceptions but also that the size of the award be proportional to the economic superiority of the offender, containing a deterrent and punitive element. Sustenance was sought from M.C. Mehta v. Union of India MANU/SC/0092/1986 : [1987]1SCR819 . This argument in relation to a proceeding assailing a settlement is to be understood as imputing an infirmity to the settlement process as not being informed by the correct principle of assessment of damages. Respondents, however, raised several contentions as to the soundness of the Mehta principle and its applicability. It was also urged that Mehta principle, even to the extent it goes, does not solve the issues of liability of the UCC as distinct from that of UCIL as Mehta case only spoke of the liability of the offending enterprise and did not deal with principles guiding the determination of a holding-company for the torts of its subsidiaries.

It is not necessary to go into this controversy. The settlement was arrived at and is left undisturbed on an over-all view. The settlement cannot be assailed as violative of

Mehta principle which might have arisen for consideration in a strict adjudication. In the matter of determination of compensation also under the Bhopal Gas Leak Disaster (P.C) Act, 1985, and the Scheme framed thereunder, there is no scope for applying the Mehta principle inasmuch as the tort-feasor, in terms of the settlement - for all practical purposes-stands notionally substituted by the settlement-fund which now represents and exhausts the liability of the alleged hazardous entrepreneurs viz., UCC and UCIL. We must also add that the Mehta principle can have no application against Union of India inasmuch as requiring it to make good the deficiency, if any, we do not impute to it the position of a joint tort-feasor but only of a welfare State. There is, therefore, no substance in the point that Mehta principle should guide the quantification of compensation to the victim-claimants.

101. This necessarily takes us to the question of the medical surveillance costs; and the operational expenses of the Hospital. We are of the view that for at least a period of eight years from now the population of Bhopal exposed to the hazards of MIC toxicity should have provision for medical surveillance by periodic medical check-up for gas related afflictions. This shall have to be ensured by setting up long-term medical facilities in the form of a permanent specialised medical and research establishment with the best of expertise. An appropriate action-plan should be drawn up. It will be proper that expert medical facility in the form of the establishment of a full-fledged hospital of at least 500 bed strength with the best of equipment for treatment of MIC related affliction should be provided for medical surveillance and for expert medical treatment. The State of Madhya Pradesh shall provide suitable land free of cost. The allocation of the land shall be made within two months and the hospital shall be constructed, equipped and made functional within 18 months. It shall be equipped as a Specialist Hospital for treatment and research of MIC related afflictions and for medical surveillance of the exposed population.

102. We hold that the capital outlays on the hospital and its operation expenses for providing free treatment and services to the victims should, both on humanitarian considerations and in fulfilment of the offer made before the Bhopal court, be borne by the UCC and UCIL. We are conscious that it is not part of the function of this Court to re-shape the settlement or restructure its terms. This aspect of the further liability is also not a master on which the UCC and the UCIL had an opportunity to express their views. However, from the tenor of the written submissions made before the District Court at Bhopal in response to the proposal of the Court for "reconciliatory substantial interim relief' to the gas victims, both the UCC and UCIL had offered to fund and provide a hospital for the gas victims. The UCC had re-called that in January, 1986, it had offered "to fund the construction of hospital for the treatment of gas victims the amount being contributed by the UCC and the UCIL in equal proportions". Shri Nariman had also referred to this offer during the submissions in the context of the bona fides of the UCC in that behalf. It is, no doubt, true that the offer was made in a different context and before an overall settlement. But that should not detract the UCC and the UCIL from fulfilling these obligations, as indeed, the moral sensibilities to the immense need for relief in all forms and ways should make both the UCC and UCIL forthcoming in this behalf. Such a hospital should be a fully equipped hospital with provision for maintenance for a period of eight years which in our estimate might together involve the financial outlay of around Rs. SO crores. We hope and trust that UCC and UCIL will not be found wanting in this behalf.

103. Then comes the question which we posed at the end of paragraph 44. This concerns the exposed members of the populace of Bhopal who were put at risk and who though presently a symptomatic and filed no claim for compensation might

become symptomatic in future. How should cases of yet unborn children of mothers exposed to MIC toxicity where the children are found to have or develop congenital defects be taken care of?

The question is as to who would provide compensation for such cases?

We are of the view that such contingencies shall be taken care of by obtaining an appropriate medical group insurance cover from the General Insurance Corporation of India or the Life Insurance Corporation of India for compensation to this contingent class of possible prospective victims. There shall be no individual upper monetary limit for the insurance liability. The period of insurance cover should be a period of eight years in the future. The number of persons to be covered by this Group Insurance scheme should be about and not less than one lakh of persons. Having regard to the population of the seriously affected wards of Bhopal city at the time of the disaster and having regard to the addition to the population by the subsequent births extrapolated on the basis of national average of birth rates over the past years and the future period of surveillance, this figure broadly accords with the percentage of population of the affected wards bears to the number of persons found to be affected by medical categorisation. This insurance cover will virtually serve to render the set dement an open ended one so far as the contingent class of future victims both existing and after-born are concerned. The possible claimants fall into two categories: those who were in existence at the time of exposure; and those who were yet unborn and whose congenital defects are traceable to MIC toxicity inherited or derived congenitally.

In so far as the second class of cases is concerned, some aspects have been dealt with in the report of the Law Commission in United Kingdom on "Injuries to Unborn Children". The Commission, referring to the then-existing Law, said:

> **7.** Claims for damages for pre-natal injuries have been made in many other jurisdictions but there is no English or Scottish authority as to whether a claim would lie and, if it did, what rules and limitations should govern it. In our working paper we did not attempt to forecast how such a claim would be decided if it came before a court in this country, although we did add, as an appendix to the paper, a brief account of some of the decisions of courts in other jurisdictions...
>
> **8.** It is, however, important from our point of view to express our opinion (reinforced by our general consultation and supported by the report of the Scottish Law Commission) that it is highly probable that the common law would, in appropriate circumstances, provide a remedy for a plaintiff suffering from a pre-natal injury caused by another's fault. It is important to make our opinion on this point clear because, on consultation, it has become apparent that many people think that we were, in our working paper, proposing the creation of new liabilities, whereas it is probable that liability under the common law already exists...

Thereafter in United Kingdom, the Congenital Disabilities (Civil Liability) Act, 1976, was brought forth. Section 1(1) of that Act says:

> 1 (1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in Sub-section (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage

resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

It is not necessary for the present purpose to go into other features of that legislation and the state of corresponding law in India. Our present question is as to how and who would provide compensation to the two class of cases referred to us earlier. We hold that these two classes of cases are compensable if the claimants are able to prove injury in the course of the next eight years from now.

The premia for the insurance shall be paid by the Union of India out of the settlement fund. The eligible claimants shall be entitled to be paid by the insurer compensation on such principles and upon establishment of the nature of the gas related toxic morbidity by such medical standards as are applicable to the other claimants under the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, and the scheme framed thereunder. The individual claimants shall be entitled to have their claims adjudicated under the statutory scheme.

104. We must, however, observe that there is need for expeditious adjudication and disposal of the claims. Even the available funds would not admit of utilisation unless the claims are adjudicated upon and the quantum of compensation determined. We direct both the Union of India and the State Government to take expeditious steps and set-up adequate machinery for adjudication of claims and determination of the compensation. The appointment of the Claim Commissioners shall be completed expeditiously and the adjudicative process must commence within four months from today. In the first instance, there shall at least be 40 Claim Commissioners with necessary secretarial assistance to start the adjudication of the claims under the Scheme.

105. In the matter of disbursement of the amounts so adjudicated and determined it will be proper for the authorities administering the funds to ensure that the compensation-amounts, wherever the beneficiaries are illiterate and are susceptible to exploitation, are properly invested for the benefit of the beneficiaries so that while they receive the income therefrom they do not, owing to their illiteracy and ignorance, deprive themselves of what may turn out to be the sole source of their living and sustenance for the future. We may usefully refer to the guide-lines laid down in the case of Muljibhai Ajarambhai Harijan and Anr. v. United India Insurance Co. Ltd. and Ors. MANU/GJ/0141/1982 : (1982)1GLR756 . We approve and endorse the guidelines formulated by the Gujarat High Court. Those guidelines, with appropriate modifications, could usefully be adopted. We may briefly recapitulate those guidelines:

(i) The Claims Commissioner should, in the case of minors, invariably order the amount of compensation awarded to the minor to be invested in long term fixed deposits at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may, however, be allowed to be withdrawn;

(ii) In the case of illiterate claimants also the Claims commissioner should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property such as, agricultural implements, assets utilisable to earn a living, the Commissioner may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a ruse to

withdraw money;

(iii) In the case of semi-literate persons the Commissioner should ordinarily resort to the procedure set out in (ii) above unless he is satisfied that the whole or part of the amount is required for expanding any existing business or for purchasing some property for earning a livelihood.

(iv) In the case of widows the Claims Commissioner should invariably follow the procedure set out in (i) above;

(v) In personal injury cases if further treatment is necessary withdrawal of such amount as may be necessary for incurring the expenses for such treatment may be permitted;

(vi) In all cases in which investment in long term fixed deposits is made it should be on condition that the Bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be.

It should be stipulated that the FDR shall carry a note on the face of the document that no loan or advance will be allowed on the security of the said document without express permission.

(vii) In all cases liberty to apply for withdrawal in case of an emergency should be available to the claimants.

Government might also consider such investments being handled by promulgating an appropriate scheme under the Unit Trust of India Act so as to afford to the beneficiaries not only adequate returns but also appropriate capital appreciation to neutralise the effect of denudation by inflation,

106. Point (J) is disposed of in terms of the foregoing directions.

107. We might now sum up the conclusions reached, the findings recorded and directions issued on the various contentions:

(i) The contention that the Apex Court had no jurisdiction to withdraw to itself the original suits pending in the District Court at Bhopal and dispose of the same in terms of the settlement and the further contention that, similarly, the Court had no jurisdiction to withdraw the criminal proceedings are rejected.

It is held that under Article 142(1) of the Constitution, the Court had the necessary jurisdiction and power to do so.

Accordingly, contentions (A) and (B) are held and answered against the petitioners.

(ii) The contention that the settlement is void for non-compliance with the requirements of Order XXIII Rule 3B, CPC is rejected. Contention (C) is held and answered against the petitioners.

(iii) The contention that the Court had no jurisdiction to quash the criminal proceedings in exercise of power under Article 142(1) is rejected. But, in the particular facts and circumstances, it is held that the quashing of the criminal

proceedings was not justified.

The criminal proceedings are, accordingly, directed to be proceeded with. Contention (D) is answered accordingly.

(iv) The orders dated 14th /15th of February, 1989 in so far as they seek to prohibit future criminal proceedings are held not to amount to a conferment of criminal immunity; but are held to be merely consequential to the quashing of the criminal proceedings.

Now that the quashing is reviewed, this part of the order is also set aside. Contention (E) is answered accordingly.

(v) The contention (F) that the settlement, and the orders of the Court thereon, are void as opposed to public policy and as amounting to a stifling of criminal proceedings is rejected.

(vi) Having regard to the scheme of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, the incidents and imperatives of the American Procedure of 'Fairness Hearing' is not strictly attracted to the Court's sanctioning of a settlement. Likewise, the absence of a "Re-opener" clause does not, ipso facto, vitiate the settlement. Contention (G) is rejected.

(vii) It is held, per invitium, that if the settlement is set aside the UCC shall be entitled to the restitution of the US 420 million dollars brought in by it pursuant to the orders of this Court.

But, such restitution shall be subject to the compliance with and proof of satisfaction of the terms of the order dated 30th November 1986, made by the Bhopal District Court. Contention (H) is rejected subject to the condition aforesaid.

(viii) The settlement is not vitiated for not affording the victims and victim-groups an opportunity of being heard. However, if the settlement-fund is found to be insufficient, the deficiency is to be made good by the Union of India as indicated in paragraph 72. Contention (I) is disposed of accordingly.

(ix) On point (J), the following findings are recorded and directions issued:

> (a) For an expeditious disposal of the claims a time-bound consideration and determination of the claims are necessary. Directions are issued as indicated in paragraph 77.
>
> (b) In the matter of administration and disbursement of the compensation amounts determined, the guide-lines contained in the judgment of the Gujarat High Court in Muljibhai v. United India Insurance Co, are required to be taken into account and, wherever apposite, applied. Union of India is also directed to examine whether an appropriate scheme under the Unit Trust of India Act could be evolved for the benefit of the Bhopal victims.
>
> (c) For a period of 8 years facilities for medical surveillance of the population of the Bhopal exposed to MIC should be provided by periodical medical check-up. For this purpose a hospital with at least 500 beds strength, with the best of equipment and facilities should

be established. The facilities shall be provided free of cost to the victims at least for a period of 8 years from now. The state Government shall provide suitable land free of cost.

(d) In respect of the population of the affected wards, [excluding those who have filed claims], Government of India shall take out an appropriate medical group insurance cover from the Life Insurance Corporation of India or the General Insurance Corporation of India for compensation to those who, though presently symptomatic and filed no claims for compensation, might become symptomatic in future and to those later-born children who might manifest congenital or prenatal MIC related afflictions. There shall be no upper individual monetary limit for the insurance liability. The period of insurance shall be for a period of eight years in future. The number of persons to be covered by this group shall be about one lakh persons. The premia shall be paid out of the settlement fund.

(e) On humanitarian consideration and in fulfilment of the offer made earlier, the UCC and UCIL should agree to bear the financial burden for the establishment and equipment of a hospital, and its operational expenses for a period of eight years.

108. In the result, the Review Petitions are allowed in part and all the contentions raised in the Review-Petitions and the I.As in the civil appeals are disposed of in terms of the findings recorded against the respective contentions. In the light of the disposal of the Review-petitions, the question raised in the writ-petitions do not survive. The writ-Petitions are dismissed accordingly without any order as to costs.

A.M. Ahmadi, J.

109. I have carefully gone through the elaborate judgment prepared by my learned Brother Venkatachaliah, J. and I am by and large in agreement with his conclusions except on a couple of aspects which I will presently indicate.

110. The points which arise for determination on the pleadings, documents and submissions made at the Bar in the course of the hearing of these petitions have been formulated at points (A) to (J) in paragraph 8 of my learned Brother's judgment and the conclusions reached by him have been summarised and set out in the penultimate paragraph of his judgment at (i) to (ix), with their sub-paragraphs. I am in agreement with the conclusions at (i) to (vii) which answer contentions (A) to (H). So far as conclusion (viii) pertaining contention (I) is concerned. I agree that the settlement is not vitiated for not affording the victims or victim-groups an opportunity of being heard but I find it difficult to persuade myself to the view that if the settlement. Fund is found to be insufficient the shortfall must be made good by the Union of India. For reasons which I will presently state I am unable to comprehend how the Union of India can be directed to suffer the burden of the shortfall, if any, without finding the Union of India liable in damages on any count. As regards conclusion (ix) referable to contention(J). I am in agreement with sub-paragraphs (a), (b) and (d) thereof but so far as sub-paragraphs (c) and (e) are concerned I agree with the directions therein as I understand them to be only recommendatory in nature and not linked with the settlement.

111. In Charan Lal Sahu's case MANU/SC/0285/1990 : AIR1990SC1480 this Cour upheld the constitutional validity of the Bhopal Gas Leak Disaster (Processing of

Claims) Act,. 1985 (herein after called 'the Act'). In that case although the question referred to the Bench was in regard to the constitutional validity of the said enactment, submissions were made on the question whether the impugned settlement was liable to be set aside on the ground that it was in flagrant violation of the principles of natural justice, in that, the victims as well as the victim-groups had no opportunity to examine the terms of the settlement and express their views thereon. Mukharji, CJ. who spoke for the majority (Ranganathan, J. and myself expressing separately) observed that on the materials available "the victims have not been able to show at all any other point or material which would go to impeach the validity of the settlement". It was felt that though the settlement without notice to the victims was not quite proper, justice had in fact been done to the victims but did not appear to have been done. Taking the view that in entering upon the settlement regard should have been had to the views of the victims and for that purpose notices should have been issued before arriving at the settlement, the majority held that "post-decisional notice might be sufficient but in the facts and circumstances of this case, no useful purpose would be served by giving a post-decisional hearing having regard to the circumstances mentioned in the order of this Court dated May 4, 1989, and having regard to the fact that there are no further additional data and facts available with the victims which can profitably and meaningfully be presented to controvert the basis of the settlement and further having regard to the fact that the victims had their say or on their behalf their views have been agitated in the proceedings and will have further opportunity in the pending review proceedings". It would, therefore, appear that the majority had applied its mind fully to the terms of the settlement in the light of the data as well as the facts and circumstances placed before it and was satisfied that the settlement was a fair and reasonable one and a post-decisional hearing would not be of much avail. Referring to the order of May 4, 1989 carrying the Court's assurance that it will be only too glad to consider any aspect which may have been overlooked in considering the terms of the settlement, Mukharji, CJ., opined that the further hearing which the victims will receive at the time of the hearing of the review petitions will satisfy the requirement of the principles of natural justice . K.N. Singh, J. while agreeing with the view expressed by Mukharji, CJ. did not express any opinion on the question of inadequacy of the settlement. In the circumstances it was held that there was no failure of justice necessitating the setting aside of the settlement as violative of fundamental rights. After stating this the learned Chief Justice observed that while justice had in fact been done, a feeling persisted in the minds of the victims that they did not have a full opportunity to ventilate their grievances in regard to the settlement. In his view this deficiency would be adequately met in the hearing on the Review Petitions (the present petitions). After taking notice of the aforesaid view expressed by the learned Chief Justice, Ranganathan, J. (myself concurring) observed as under:

> Though we are prima facie inclined to agree with him that there are good reasons why the settlement should not be set aside on the ground that the principles of natural justice have been violated quite apart from the practical complications that may arise as a result of such an order, we would not express any final opinion on the validity of the settlement but would leave it open to be agitated to the extent permissible in law in the review petition pending before this Court.

It is, therefore, manifest from the above that the Sahu Bench was 'prima facie' of the view that the settlement was not liable to be set aside on the ground that the principles of natural justice had been violated. Mukharji, CJ. went on to say that no useful purpose would be served by a post-decisional hearing and that the settlement

was quite reasonable and fair. Of course K.N. Singh, J. did not express any opinion on the inadequacy of the settlement amount but he was otherwise in agreement with the view expressed by Mukharji, CJ. on all the other points. The view of Ranganathan, J. and myself is evident from the passage extracted above.

112. This case has gone through several twists and turns. One of the world's worst disaster occurred on the night between 2nd and 3rd December, 1984 choking several to death and injuring thousands of residents living near about the industrial plant of UCIL. Litigation was initiated on behalf of some of the victims in the U.S. District Court, Southern District of New-York presided over by Judge Keenan. After the enactment of the Act on 29th March, 1985, the Union of India also approached Judge Keenan with a complaint. Judge Keenan ultimately terminated the proceedings before him on the ground of 'forum-non-convenience'. Thereafter the Union of India representing the victims file a suit for damages in the Bhopal District Court against the UCIL as well as the UCC in which an order for interim compensation was made against which an appeal was filed in the High Court. The matter was brought to this Court against the High Court order. It was during the hearing of the said matter that a court assisted settlement was struck and orders were passed recording the same on 14th/15th February, 1989. On 4th May, 1989 this Court gave its reasons for the settlement. Soon a hue and cry was raised against the settlement by certain victims and victim groups. In the meantime petitions were filed in this Court challenging the constitutional validity of the Act on diverse grounds. In the course of the hearing of the cases raising the question of validity of the Act submissions were also made regarding the validity of the settlement. The hearing continued from 8th March, 1989 to 3rd May, 1989 and the same received wide publication in the media. The judgment in the said case was pronounced on 22nd December, 1989 upholding the validity of the Act. In the meantime petitions were filed under Article 137 of the Constitution to review the settlement. Several Writ Petitions under Article 32 also came to be filed. These came up for hearing before a Constitution Bench presided over by Mukharji, CJ. The hearing continued for more than two weeks and the media carried reports of the day to day court proceedings throughout the country. Unfortunately, before the judgment could be pronounced a tragic event took place. Mukharji, CJ. passed away necessitating a rehearing by a Constitution Bench presided over by Misra, CJ. This hearing lasted for about 18 to 19 days and received the same wide coverage in the press, etc. In fact considerable heat was generated throughout the court hearings and the press also was none too kind on the court. It is, therefore, difficult to imagine that all those who were interested in the review of the settlement were unaware of the proceedings. Mr. Nariman has placed on record a number of press-clippings to make good his point that newspapers having large circulation throughout the country carried news regarding the settlement and subsequent attempts to challenge the same. Can it then be said that the victims were unaware of the proceedings before this Court ? To say so would be to ignore the obvious.

113. In view of the observations in Sahu's case, the scope of the inquiry in the present petitions can be said to be a narrow one. One way of approaching the problem is to ask what the Court could have done if a pre-decisional hearing was afforded to the victims. The option obviously would have been either to approve the terms of the compromise, or to refuse to super add the Court's seal to the settlement and leave the parties to go to trial. The Court could not have altered, varied or modified the terms of the settlement without the express consent of the contracting parties. If it were to find the compensation amount payable under the settlement inadequate, the only option left to it would have been to refuse to approve the settlement and turn it into a decree of the Court. It could not have unilaterally

imposed any additional liability on any of the contracting parties. If it found the settlement acceptable it could turn it into a Court's decree. According to the interpretation put by the majority in Sahu's case on the scope of Sections 3 and 4 of the Act, a pre-decisional hearing ought to have been given but failure to do so cannot vitiate the settlement as according to the majority the lapse could be cured by a post-decisional hearing. The scope of the review petitions cannot be any different at the post decisional stage also. Even at that stage the Court can either approve of the settlement or disapprove of it but it cannot, without the consent of the concerned party, impose any new or additional financial obligations on it. At the post decisional stage it must be satisfied that the victims are informed of or alive to the process of hearing, individually or through press reports, and if it is so satisfied it can apply its mind to the fairness and reasonableness of the settlement and either endorse it or refuse to do so. In the present case the majority speaking through Brother Venkatachaliah, J. has not come to the conclusion that the settlement does not deserve to be approved nor has it held that the settlement-fund is inadequate. Merely on the apprehended possibility that the settlement-fund may prove to be inadequate, the majority has sought to saddle the Union of India with the liability to make good the deficit, if any. The Union of India has not agreed to bear this liability. And why should it burden the Indian tax-payer with this liability when it is neither held liable in tort nor is it shown to have acted negligently in entering upon the settlement? The Court has to reach a definite conclusion on the question whether the compensation fixed under the agreement is adequate or otherwise and based thereon decide whether or not to convert it into a decree. But on a mere possibility of there being a shortfall, a possibility not supported by any realistic appraisal of the material on record but on a mere apprehension, quia timet, it would not be proper to saddle the Union of India with the liability to make good the shortfall by imposing an additional term in the settlement without its consent, in exercise of power under Article 142 of the Constitution or any statute or on the premises of its duty as a welfare State. To my mind, therefore, it is impermissible in law to impose the burden of making good the shortfall on the Union of India and thereby saddle the Indian tax-payer with the tortfeasor's liability, if at all. If I had come to the conclusion that the settlement-fund was inadequate, I would have done the only logical thing of reviewing the settlement and would have left the parties to work out a fresh settlement or go to trial in the pending suit. In Sahu's case as pointed out by Mukharji, CJ. the victims had not been able to show any material which would vitiate the settlement. The voluminous documentary evidence placed on the record of the present proceedings also does not make out a case of inadequacy of the amount, necessitating a review of the settlement. In the circumstances I do not think that the Union of India can be saddled with the liability to make good the deficit, if any, particularly when it is not found to be a tortfeasor. It's liability as a tortfeasor, if at all, would have to be gone into in a separate proceeding and not in the present petitions. These, in brief, are my reasons for my inability to agree with the latter part of conclusion (viii) imposing, a liability on the Union of India to make good the deficit, if any.

114. One word about the shifting stand of the Union of India. It entered into a Court assisted settlement but when the review applications came up for hearing it supported the review petitioners without seeking the Court's leave to withdraw from the settlement on permissible grounds or itself filing a review petition. To say the least this conduct is indeed surprising.

115. I would have liked to reason out my view in greater detail but the constraint of time does not permit me to do so. The draft of the main judgment was finalised only yesterday by noon time and since the matter was already listed for judgment today, I

had only a few hours to state my views. I had, therefore, no time to write a detailed judgment but just a little time to indicate in brief the crux of some of the reasons for my inability to agree with the view expressed in the judgment of Brother Venkatachaliah, J. on the question of Union of India's liability to make good the deficiency, if any.

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IN THE SUPREME COURT OF INDIA

Transfer Petition (C) No. 1343 of 2008, 562 of 2011, 1161, 1294, 1497 and 1573 of 2012, 426, 1773, 1821 and 1845 of 2013, 14 of 2014 and Transfer Petition (Crl.) No. 116 of 2011 and 99 of 2014

Decided On: 19.07.2016

Appellants: **Anita Kushwaha and Ors.**
Vs.
Respondent: **Pushap Sudan and Ors.**

Hon'ble Judges/Coram:
T.S. Thakur, C.J.I., F.M. Ibrahim Kalifulla, A.K. Sikri, S.A. Bobde and R. Banumathi, JJ.

Counsels:
For Appearing Parties: Ranjit Kumar, P.S. Patwalia, ASGs, Vivek K. Tankha, Babu H. Marlapalle, Sr. Advs., Rashmi Malhotra, Sushma Suri, Pradeep Kumar Mittal, Anurag Kashyap, Arunav Tiwari, Shikha Srivastva, Mona K. Rajvanshi, Arvind Kumar, Pradeep Kumar Mathur, Poonam Prasad, Laxmi Arvind, Ashwin Vaish, Vinod Pandey, Nitin Kumar Thakur, Vibhakar Mishra, Shariq Ahmed, Tariq Ahmad, Vipin Gogia, Jaspreet Gogia, Kaveeta Wadia, Shashank Tripathi, Sudhir Walia, Sachin Pujari, Parth Tiwari, Abhishek Atrey, Niharika Ahluwalia, Pragya Wazir, S. Janani, Sunando Raha, Anupam Raina, Madhu Moolchandani, Abhay Prakash Sahay, Jamnesh Kumar, Himanshu Shekhar, Ujjal Singh, J.P. Singh, R.C. Kaushik, Kunal Cheema, Ajit Wagh, Apoorv Shukla, Aditya Gaggar, Vilas Giri, Yogesh K. Ahirrao, Yash Pal Dhingra, Sunil Kumar Verma, Rajinder Mathur, Shailendra Bhardwaj, Debasis Misra, C.D. Singh, Sakshi Kakkar, Venkita Subramoniam T.R., Rahat Bansal, Anup Kumar, Venkatakrishna Kunduru, Nitin Sangra, Pragya Baghel, Amol Chitale, Asem Sawhney, Dharmendra Kumar Sinha, Ranjana Narayan, Binu Tamta, Gaurav Sharma, Sunil Fernandes, Astha Sharma, Puneeth K.G., Bimal Roy Jad, Naresh Kumar, Manjit Singh, Vivekta Singh, Rajesh Srivastava, Raghvendra Pratap Singh, Suresh Kumar, Shreekant N. Terdal, Ashok Mathur, Rabin Majumder and Ramesh Babu M.R., Advs.

JUDGMENT

T.S. Thakur, C.J.I.

1. A three-judge bench of this Court has, by an order dated 21st April, 2015, referred these Transfer Petitions to a Constitution Bench to examine whether this Court has the power to transfer a civil or criminal case pending in any Court in the State of Jammu and Kashmir to a Court outside that State and *vice versa*. Out of thirteen Transfer Petitions placed before us, pursuant to the reference order, eleven seek transfer of civil cases from or to the State of Jammu and Kashmir while the remaining two seek transfer of criminal cases from the State to Courts outside that State.

2. The transfer petitions are opposed by the Respondents, *inter alia*, on the ground that the provisions of Section 25 of the Code of Civil Procedure and Section 406 of

the Code of Criminal Procedure, which empower this Court to direct transfer of civil and criminal cases respectively from one State to the other, do not extend to the State of Jammu and Kashmir and cannot, therefore, be invoked to direct any such transfer. The Transfer Petitions are also opposed on the ground that the Jammu and Kashmir Code of Civil Procedure, 1977 and the Jammu and Kashmir Code of Criminal Procedure, 1989 do not contain any provision empowering the Supreme Court to direct transfer of any case from that State to a Court outside the State or *vice versa*. It is also contended on behalf of the Respondents that, in the absence of any provision empowering this Court to direct transfer of civil or criminal cases from or to the State of Jammu and Kashmir, no such power can be invoked or exercised by this Court. It is further urged that the provisions of Article 139A of the Constitution which empowers this Court to transfer a case pending before one High Court to itself or to another High Court also has no application to the cases at hand as the Constitution 42nd Amendment Act, 1977 which inserted the said provision itself has no application to the State of Jammu and Kashmir. It is argued that in the absence of any enabling provision in the Code of Civil and Criminal Procedure or in the Constitution of India or the State Constitution for that matter, a litigant has no right to seek transfer of a civil or a criminal case pending in the State of Jammu and Kashmir to a Court outside the State or *vice versa*.

3. On behalf of the Petitioners, it was, on the other hand, submitted that while Sections 25 of the Code of Civil Procedure and 406 of Code of Criminal Procedure as applicable to the rest of the country have no application to the State of Jammu and Kashmir, there was no specific or implied prohibition in the said two codes against the exercise of power of transfer by the Supreme Court under the Constitution or under any other provision of the law whatsoever. It was urged that inapplicability of the Central Civil and/or Code of Criminal Procedure to the State of Jammu and Kashmir or the absence of an enabling provision in the State Code of Civil and/or Criminal Procedure does not necessarily imply that this Court cannot exercise the power of transfer, if the same is otherwise available under the provisions of the Constitution. So also, the inapplicability of Article 139A to the State of Jammu and Kashmir by reason of non-extension of the Constitution 42nd Amendment Act to that State does not constitute a disability, leave alone, a prohibition against the exercise of the power of transfer if such power could otherwise be traced to any other source within constitutional framework.

4. The Code of Civil Procedure, 1908 and so also the Code of Criminal Procedure, 1973 (hereinafter referred to as "*Central Codes*") as applicable to the rest of the country specifically exclude the application thereof to the State of Jammu and Kashmir. This is evident from Section 1 of Code of Civil Procedure, 1908 which deals with short title, commencement and extent reads:

> *1. Short title, commencement and extent- (1) This Act may be cited as the Code of Civil Procedure, 1908. (2) It shall come into force on the first day of January, 1909. [2][(3) It extends to the whole of India except- (a) the State of Jammu and Kashmir: (b) the State of Nagaland and the tribal areas: Provided that the State Government concerned may, by notification in the Official Gazette, extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications as may be specified in the notification. Explanation-In this clause, "tribal areas" means the territories which, immediately before the 21st day of January, 1972*

were included in the tribal areas of Assam as referred to in paragraph 20 of the Sixth Schedule to the Constitution. (4) In relation to the Amindivi Islands, and the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh and the Union territory of Lakshadweep, the application of this Code shall be without prejudice to the application of any Rule or Regulation for the time being in force in such Islands, Agencies or such Union territory, as the case may be, relating to the application of this Code.

(Emphasis supplied)

5. To the same effect is Section 1 of the Code of Criminal Procedure, 1973 which reads as under:

Short title extent and commencement.

1. Short title extent and commencement.

(1) This Act may be called the Code of Criminal Procedure, 1973.

(2) It extends to the whole of India except the State of Jammu and Kashmir: Provided that the provisions of this Code, other than those relating to Chapters VIII, X and XI thereof, shall not apply- (a) to the State of Nagaland, (b) to the tribal areas, but the concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications, as may be specified in the notification. Explanation.-In this section, "tribal areas" means the territories which immediately before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to in paragraph 20 of the Sixth Schedule to the Constitution, other than those within the local limits of the municipality of Shillong.

(Emphasis supplied)

6. Learned Counsel for the Respondents, in the light of the above, are perfectly justified in contending that the provisions of Section 25 of the Code of Civil Procedure, 1908 and that of Section 406 of the Criminal Procedure, 1973 as applicable to the rest of India, cannot be invoked by any litigant seeking transfer of any case to or from the State of Jammu and Kashmir. It is equally true that Jammu and Kashmir Code of Civil Procedure, SVT. 1977 and Jammu and Kashmir Code of Criminal Procedure SVT. 1989 also do not have any provision empowering this Court to direct transfer of any case civil or criminal from any Court in the State to a Court outside that State or *vice versa*. Resort to the Central or State Codes of Civil and Criminal Procedures for directing transfer of cases to or from the State is, therefore, ruled out. To that extent, therefore, the contentions urged on behalf of the Respondents are well-founded and legally unexceptionable.

7. The question, however, is whether independent of the provisions contained in the Codes of Civil and Criminal Procedure is there a source of power which this Court can invoke for directing transfer of a case from the State of Jammu and Kashmir or *vice versa*. On behalf of the Petitioners, it was contended that even when the Central Codes of Civil and Criminal Procedure have no applicability to the State of Jammu

and Kashmir and even when the State Codes of Civil and Criminal procedure do not contain any provision empowering this Court to direct transfer it does not mean that this Court is helpless in making an order of transfer in appropriate case where such transfer is otherwise called for in the facts and circumstances of a given case. It was argued with considerable forensic tenacity that access to justice being a fundamental right guaranteed Under Article 21 of the Constitution of India, any litigant whose fundamental right to access to justice is denied or jeopardised can approach this Court for redress Under Article 32 of the Constitution of India for protection and enforcement of his/her right. This Court can in any such case issue appropriate directions to protect such right which protection may in appropriate cases include a direction for transfer of the case from that State to the Court outside the State or *vice versa*. It was strenuously argued that Article 142 of the Constitution of India read with Article 32 amply empower this Court to intervene and issue suitable directions wherever such directions were considered necessary to do complete justice to the parties including justice in the matter of ensuring that litigants engaged in legal proceedings in any Court within or outside the State of Jammu and Kashmir get a fair and reasonable opportunity to access justice by transfer of their cases to or from that State, if necessary.

8. Two distinct questions fall for consideration in the context of what is argued at the Bar. The first involves examination of whether access to justice is indeed a fundamental right and if so, what is the sweep and content of that right, while the second is whether Articles 32 and 142 of the Constitution of India empower this Court to issue suitable directions for transfer of cases to and from the State of Jammu & Kashmir in appropriate situations. Both these aspects, in our view, are well-traversed by judicial pronouncements of this Court as well as those of Courts in England in which the Courts have had an opportunity to examine the jurisprudential aspect of the Right of Access to Justice and its correlation with the right to life. Availability of Article 142 of the Constitution of India for directing transfer of cases in situations where such power is not *stricto sensu* available under an ordinary statute or the Constitution has also been judicially explored by this Court on several earlier occasions. We may deal with the said two aspects *ad seriatim*.

9. The concept of '*access to justice*' as an invaluable human right, also recognized in most constitutional democracies as a fundamental right, has its origin in common law as much as in the Magna Carta. The Magna Carta lays the foundation for the basic right of access to courts in the following words:

> *No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.*
>
> *To no man will we sell, to no one will we deny or delay right to justice.*
>
> *Moreover, all those aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all our kingdom, as well clergy as laymen, as far as pertains to them towards their men.*
>
> *Wherefore, it is our will, and we firmly enjoin, that the English Church be free, and the men in our kingdom have an hold all the aforesaid liberties, rights and concessions, well as peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all aspects and in all*

places for ever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intention-Given under our hand-the above named and many others being witnesses-in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign.

10. The Universal Declaration of Rights drafted in the year 1948 gave recognition to two rights pertaining to 'access to justice' in the following words:

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him.

11. To the same effect is Clause 3 of Article 2 of International Covenant on Civil and Political Rights, 1966 which provides that each State party to the Covenant shall undertake that every person whose rights or freedom as recognised is violated, shall have an effective remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, and the State should also ensure to develop the possibilities of judicial remedies.

12. De Smith's book on Judicial Review of Administrative Action (5th Ed., 1995) stated the principle thus:

It is a common law presumption of legislative intent that access of Queen's Court in respect of justiciable issues is not to be denied save by clear words in a statute.

13. ***Prof. M. Cappelletti Rabel*** a noted jurist in his book *'Access to Justice'* (Volume I) explained the importance of access to justice in the following words:

The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement-the most 'basic human right' - of a system which purports to guarantee legal right.

14. Courts in England have over the centuries post *Magna Carta* developed fundamental principles of common law which are enshrined as the basic rights of all humans. These principles were over a period of time recognised in the form of Bill of Rights and Constitutions of various countries which acknowledged the Roman maxim '*Ubi Jus Ibi Remedium*' i.e. every right when it is breached must be provided with a right to a remedy. Judicial pronouncements have delved and elaborated on the concept of access to justice to include among other aspects the State's obligation to make available to all its citizens the means for a just and peaceful settlement of disputes between them as to their respective legal rights. In ***R. v. Secretary of***

State for Home Dept., ex p Leech (MANU/UKWA/0073/1993 : 1993 [4] All ER 539) Steyn LJ was dealing with a prisoner who complained that correspondence with his solicitor concerning litigation in which he was involved or which he intended to launch, was being censored by the prison authorities under the Prisons Rules, 1964. He challenged the authority of the Secretary of State to create an impediment in the free flow of communication between him and his solicitor about contemplated legal proceedings. The court held that access to justice was a basic right which could not be denied or diluted by any kind of interference or hindrance. The court said:

> *It is a principle of our law that every citizen has a right of unimpeded access to a court. In* ***Raymond v. Honey*** *MANU/UKHL/0003/1982 : 1983 AC 1 : 1982 [1] Alt ER 756. Lord Wilberforce described it as a 'basic right'. Even in our unwritten Constitution, it ranks as a constitutional right. In Raymond v. Honey, Lord Wilberforce said that there was nothing in the Prisons Act, 1952 that confers power to 'interfere' with this right or to 'hinder' its exercise. Lord Wilberforce said that Rules which did not comply with this principle would be ultra vires. Lord Elwyn Jonesand Lord Russell of Killowan agreed... It is true that Lord Wilberforce held that the rules, properly construed, were not ultra vires. But that does not affect the importance of the observations. Lord Bridge held that Rules in question in that case were ultra vires... He went further than Lord Wilberforce and said that a citizen's right to unimpeded access can only be taken away by express enactment... It seems (to) us that Lord Wilberforce's observation ranks as the ratio decidendi of the case, and we accept that such rights can as a matter of legal principle be taken away by necessary implication.*

15. The legal position is no different in India. Access to justice has been recognised as a valuable right by courts in this country long before the commencement of the Constitution. Reference in this regard may be made to ***Re: Llewelyn Evans*** MANU/MH/0065/1926 : AIR 1926 Bom 551 in which Evans was arrested in Aden and brought to Bombay on the charge of criminal breach of trust. Evan's legal adviser was denied access to meet the prisoner. The Magistrate who ordered the remand held that he had no jurisdiction to grant access, notwithstanding Section 40 the Prisons Act, 1894. The question that therefore fell for consideration was whether the right extended to the stage where the prisoner was in police custody. The High Court of Bombay, while referring to Section 340 of the Code of Criminal Procedure, 1898, held that the right under that provision implied that the prisoner should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purposes of preparing his defence. Madgavkar, J., comprising the Bench added that:

> *....if the ends of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely and fairly before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice-advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very state which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance.*

16. Reference may also be made to ***P.K. Tare v. Emperor*** MANU/NA/0067/1942 : AIR 1943 Nagpur 26. That was a case where the Petitioner had participated in the Quit India Movement of 1942. The detention was challenged on the ground of being vitiated on account of refusal of permission by the authorities to allow them to meet

their counsel to seek legal advice or approach the court in person. The State opposed that plea based on Defence of India Act, 1939, which, according to it, took away right of the detenu to move a habeas corpus petition Under Section 491 of the Code of Criminal Procedure, 1898. Rejecting the contention and relying upon the observation of Lord Hailsham in ***Eshugbayi v. Officer Administering the Govt. of Nigeria***, the court held that such fundamental rights, safeguarded under the Constitution with elaborate and anxious care and upheld time and again by the highest tribunals of the realm in language of utmost vigour, cannot be swept away by implication or removed by some sweeping generality. Justice Vivian Bose, giving the leading opinion of the court explained that the right to move the High Court remained intact notwithstanding the Defence of India Act, 1939. He further held that although courts allow a great deal of latitude to the executive and presumptions in favour of the liberty of the subject are weakened, those rights do not disappear altogether. The Court ruled that the attempt to keep the applicants away from the Court under the guise of these Rules was an abuse of the power and warranted intervention. Justice Bose emphasized the importance of the right of any person to apply to the court and demand that he be dealt with according to law. He said:

> *...the right is prized in India no less highly than in England, or indeed any other part of the Empire, perhaps even more highly here than elsewhere; and it is zealously guarded by the courts.*

17. Decisions of this Court too have unequivocally recognised the right of a citizen to move the court as a valuable constitutional right recognised by Article 32 of the Constitution as fundamental right by itself. [See ***In re Under Article 143, Constitution of India [Keshav Singh case]*** (AIR 1965 SC 745) and ***L. Chandra Kumar v. Union of India*** MANU/SC/0261/1997 : (1997) 3 SCC 261].

18. In ***Hussainara Khatoon v. State of Bihar*** MANU/SC/0119/1979 : (1980) 1 SCC 81 this Court declared speedy trial as an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. It also pointed out that Article 39A made free legal service an inalienable element of reasonable, fair and just procedure and that the right to such services was implicit in the guarantee of Article 21.

19. In ***Imtiyaz Ahmad v. State of Uttar Pradesh and Ors.*** MANU/SC/0073/2012 : (2012) 2 SCC 688, a two-Judge Bench of this Court to which one of us *(Thakur J.)* was also a party, this Court examined the correctness of an interlocutory order passed by a learned Single Judge of the High Court of Allahabad, whereby, the Single Judge had stayed the order passed by the Additional Chief Judicial Magistrate, directing registration of a case against the Respondents. Since the matter had remained pending before the High Court, and was not heard for a long time of over six years or so and since several other cases in different High Courts in India were similarly pending in which the proceedings before the Trial Court had been stayed, no matter the cases involved commission of heinous offences like murder, rape, kidnapping and dacoity etc., this Court enlarged the scope of the proceedings and directed the Registrar Generals of the High Courts to furnish a report containing statistics of cases pending in the respective Courts in which the proceedings had been stayed at the stage of registration of FIR, and framing of charges in exercise of powers Under Article 226 of the Constitution or Section 482 or 397 of the Code of Criminal Procedure. On the basis of the statistics so furnished by the High Courts, this Court held that administration of justice was facing problems of serious dimensions. This Court also noticed, on the basis of the material made available by

the High Courts, that unduly long delay was being caused in the disposal of the cases resulting in a blatant violation of the Rule of law and the right of common man to seek access to justice. Emphasizing the importance of access to justice and recognizing the right as a fundamental right relatable to Article 21 of the Constitution of India, this Court observed:

> .....
>
> *25. Unduly long delay has the effect of bringing about blatant violation of the Rule of law and adverse impact on the common man's access to justice. A person's access to justice is a guaranteed fundamental right under the Constitution and particularly Article 21. Denial of the right undermines public confidence in the justice delivery system and incentivises people to look for shot cuts and other fora where they feel that injustice will be done quicker. In the long run, this also weakens the justice delivery system and poses a threat to the Rule of law.*
>
> *26. It may not be out of place to highlight that access to justice in an egalitarian democracy must be understood to mean qualitative access to justice as well. Access to justice is, therefore, much more than improving an individual's access to courts, or guaranteeing representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and inequitable [see United Nations Development Programme, Access to Justice-Practice Note (2004)]*
>
> *27. The present case discloses the need to reiterate that "access to justice" is vital for the Rule of law, which by implication includes the right of access to an independent judiciary. It is submitted that the stay of investigation or trial for significant periods of time runs counter to the principle of Rule of law, wherein the rights and aspirations of citizens are intertwined with expeditious conclusion of matters. It is further submitted that delay in conclusion of criminal matters signifies a restriction on the right of access to justice itself, thus amounting to a violation of citizen's rights under the Constitution, in particular Under Article 21.*

20. The Court held that Rule of law, independence of judiciary and access to justice are conceptually interwoven. The Court also referred to the International Covenant on Civil and Political Rights and the statute of the International Criminal Court. It also referred to Article 47 of the Charter of Fundamental Rights of European Union, 2007 and European Convention on Human Rights and Fundamental Freedom, 1950. Reliance was placed upon the European Court of Human Rights decision in ***Delcourt v. Belgium*** 1970 ECHR 1 to hold that access to justice was a valuable human and fundamental right relatable to Article 21 of the Constitution of India. Having said that, this Court issued directions for better maintenance of the Rule of Law and better administration of Justice by the High Courts. It also directed the Law Commission of India to undertake a study and submit its recommendations in relation to measures that need to be taken by creation of additional courts and other allied matters including rational and scientific methods for elimination of arrears to help reduce delay and speedy clearance of the backlog of cases.

21. In ***Brij Mohan Lal v. Union of India and Ors.*** MANU/SC/0316/2012 : (2012) 6 SCC 502 this Court declared that Article 21 guarantees to the citizens the rights to expeditious and fair trial. The Court observed:

137. Article 21 of the Constitution of India takes in its sweep the right to expeditious and fair trial. Even Article 39A of the Constitution recognises the right of citizens to equal justice and free legal aid. To put it simply, it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive and fair trial. The plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of the constitutional duty of the Government, more particularly, when such rights are accepted as basic and fundamental to the human rights of citizens.

22. In ***Tamilnad Mercantile Bank Shareholders Welfare Association v. S.C. Sekar and Ors.*** MANU/SC/8375/2008 : (2009) 2 SCC 784, this Court declared that an aggrieved person cannot be left without the remedy and that access to justice is a human right and in certain situations even a fundamental right.

23. In order that the juristic content and basis of access to justice as a fundamental right is not provided only by judicial pronouncements, the Commission for Review of the Constitution has recommended that access to justice be incorporated as an express fundamental rights as in the South African Constitution, 1996. Article 34 of the South African Constitution reads:

Article 34: Access to Courts and Tribunals and speedy justice.

(1) Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or tribunal or forum or where appropriate, another independent and impartial Court, tribunal or forum.

(2) The right to access to Courts shall be deemed to include right to reasonably speedy and effective justice in all matters before the Courts, tribunals or other forum and the State shall take all reasonable steps to achieve that object.

24. Insertion of Article 30A in the Constitution in the following terms was accordingly proposed by the Commission:

30A: Access to Courts and Tribunals and speedy justice.

(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent court or, where appropriate, another independent and impartial tribunal or forum.

(2) The right to access to Courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunals or other fora and the State shall take all reasonable steps to achieve the said object.

25. The recommendation has not yet led to the incorporation of the proposed Article 30A, but, that does not in the least matter, for what the proposed Article may have added to the constitutional guarantees already stands acknowledged as a part of the right to life Under Article 21 of the Constitution by judicial pronouncements of this Court. The proposed incorporation of Article 30A, would have simply formalised what

already stands recognised by Judges and Jurists alike. V. Krishna Iyer J. has in his inimitable style explained the importance of access to justice in the following words:

> *Access to justice is basic to human rights and directive principles of State Policy become ropes of sand, teasing illusion and promise of unreality, unless there is effective means for the common people to reach the Court, seek remedy and enjoy the fruits of law and justice.*

26. ***To sum UP:*** Access to justice is and has been recognised as a part and parcel of right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. The Magna Carta, the Universal Declaration of Rights, the International Covenant on Civil and Political Rights, 1966, the ancient Roman Jurisprudential maxim of "*Ubi Jus Ibi Remedium*", the development of fundamental principles of common law by judicial pronouncements of the Courts over centuries past have all contributed to the acceptance of access to justice as a basic and inalienable human right which all civilized societies and systems recognise and enforce.

27. This Court has by a long line of decisions given an expansive meaning and interpretation to the word 'life' appearing in Article 21 of the Constitution. In ***Maneka Gandhi v. Union of India*** MANU/SC/0133/1978 : (1978) 1 SCC 248, this Court declared that the right to life does not mean mere animal existence alone but includes every aspect that makes life meaningful and liveable, (to be checked). In ***Sunil Batra v. Delhi Administration*** MANU/SC/0184/1978 : (1978) 4 SCC 494 the right against solitary confinement and prison torture and custodial death was declared to be a part of right to life. In ***Charles Sobhraj v. Suptd. Central Jail*** MANU/SC/0070/1978 : (1978) 4 SCC 104 the right against bar fetters was declared to be a right protected Under Article 21 of the Constitution. In ***Khatri II v. State of Bihar*** MANU/SC/0518/1981 : (1981) 1 SCC 627, the right to free legal aid was held to be a right covered Under Article 21 of the Constitution. In ***Prem Shankar Shukla v. Delhi Administration*** MANU/SC/0084/1980 : (1980) 3 SCC 526 the right against handcuffing was declared to be a right Under Article 21. So also in ***Rudal Shah v. State of Bihar*** MANU/SC/0380/1983 : (1983) 4 SCC 141 the right to compensation for illegal and unlawful detention was considered to be a right to life Under Article 21 and also Under Article 14. In ***Sheela Barse v. Union of India*** MANU/SC/0437/1988 : (1988) 4 SCC 226, this Court declared speedy trial to be an essential right Under Article 21. In ***Parmanand Katara v. Union of India*** MANU/SC/0423/1989 : (1989) 4 SCC 248, right to emergency, medical aid was declared to be protected Under Article 21 of the Constitution. In ***Chameli Singh v. State of U.P.*** MANU/SC/0286/1996 : (1996) 2 SCC 549 and ***Shantistar Builders v. Narayan Khimalal Totame*** MANU/SC/0115/1990 : (1990) 1 SCC 520, right to shelter, clothing, decent environment and a decent accommodation was also held to be a part of life. In ***M.C. Mehta v. Union of India*** MANU/SC/1007/1997 : (1997) 1 SCC 388, right to clean environment was held to be a right to life Under Article 21. In ***Lata Singh v. State of U.P.*** MANU/SC/2960/2006 : (2006) 5 SCC 475, right to marriage was held to be a part of right to life Under Article 21 of the Constitution. In ***Suchita Srivastava v. Chandigarh Administration*** MANU/SC/1580/2009 : (2009) 9 SCC 1, right to make reproductive choices was declared as right to life. While in ***Sukhwant Singh v. State of Punjab*** MANU/SC/0866/2009 : (2009) 7 SCC 559 right to reputation was declared to be a facet of right to life guaranteed Under Article 21. In the recent Constitution Bench judgment decision of this Court in ***Subramanian Swamy v. Union of India*** [W.P. (Crl.) No. 184 of 2014], this Court held reputation

to be an inherent and inseparable component of Article 21.

28. Given the fact that pronouncements mentioned above have interpreted and understood the word "life" appearing in Article 21 of the Constitution on a broad spectrum of rights considered incidental and/or integral to the right to life, there is no real reason why access to justice should be considered to be falling outside the class and category of the said rights, which already stands recognised as being a part and parcel of the Article 21 of the Constitution of India.

If *"life"* implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of *"access to justice"* will not affect the quality of human life so as to take access to justice out of the purview of right to life guaranteed Under Article 21. We have, therefore, no hesitation in holding that access to justice is indeed a facet of right to life guaranteed Under Article 21 of the Constitution. We need only add that access to justice may as well be the facet of the right guaranteed Under Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. We say so because equality before law and equal protection of laws is not limited in its application to the realm of executive action that enforces the law. It is as much available in relation to proceedings before Courts and tribunal and adjudicatory fora where law is applied and justice administered. The Citizen's inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equal protection of laws and reduce it to a mere teasing illusion. Article 21 of the Constitution apart, access to justice can be said to be part of the guarantee contained in Article 14 as well.

29. What then is the sweep and content of that right is the next question that must be answered for a fuller understanding of the principle and its significance in real life situations.

30. Four main facets that, in our opinion, constitute the essence of access to justice are:

i) The State must provide an effective adjudicatory mechanism;

ii) The mechanism so provided must be reasonably accessible in terms of distance;

iii) The process of adjudication must be speedy; and

iv) The litigant's access to the adjudicatory process must be affordable.

(i) The need for adjudicatory mechanism: One of the most fundamental requirements for providing to the citizens access to justice is to set-up an adjudicatory mechanism whether described as a Court, Tribunal, Commission or Authority or called by any other name whatsoever, where a citizen can agitate his grievance and seek adjudication of what he may perceive as a breach of his right by another citizen or by the State or any one of its

instrumentalities. In order that the right of a citizen to access justice is protected, the mechanism so provided must not only be effective but must also be just, fair and objective in its approach. So also the procedure which the court, Tribunal or Authority may adopt for adjudication, must, in itself be just and fair and in keeping with the well recognized principles of natural justice.

(ii) The mechanism must be conveniently accessible in terms of distance:

The forum/mechanism so provided must, having regard to the hierarchy of courts/tribunals, be reasonably accessible in terms of distance for access to justice since so much depends upon the ability of the litigant to place his/her grievance effectively before the court/tribunal/court/competent authority to grant such a relief. (See ***D.K. Basu v. State of West Bengal*** MANU/SC/0799/2015 : (2015) 8 SCC 744.

(iii) The process of adjudication must be speedy.

"Access to justice" as a constitutional value will be a mere illusion if justice is not speedy. Justice delayed, it is famously said, is justice denied. If the process of administration of justice is so time consuming, laborious, indolent and frustrating for those who seek justice that it dissuades or deters them from even considering resort to that process as an option, it would tantamount to denial of not only access to justice but justice itself. In *Sheela Barse's* case (supra) this Court declared speedy trial as a facet of right to life, for if the trial of a citizen goes on endlessly his right to life itself is violated. There is jurisprudentially no qualitative difference between denial of speedy trial in a criminal case, on the one hand, and civil suit, appeal or other proceedings, on the other, for ought we know that civil disputes can at times have an equally, if not, more severe impact on a citizen's life or the quality of it. Access to Justice would, therefore, be a constitutional value of any significance and utility only if the delivery of justice to the citizen is speedy, for otherwise, the right to access to justice is no more than a hollow slogan of no use or inspiration for the citizen. It is heartening to note that over the past six decades or so the number of courts established in the country has increased manifold in comparison to the number that existed on the day the country earned its freedom. There is today almost invariably a court of Civil Judge junior or senior division in every taluka and a District and Sessions Judge in every district. In terms of accessibility from the point of view of distance which a citizen ought to travel, we have come a long way since the time the British left the country. However, the increase in literacy, awareness, prosperity and proliferation of laws has made the process of adjudication slow and time consuming primarily on account of the over worked and under staffed judicial system, which is crying for creation of additional courts with requisite human resources and infrastructure to effectively deal with an ever increasing number of cases being filed in the courts and mounting backlog of over thirty million cases in the subordinate courts. While the States have done their bit in terms of providing the basic adjudicatory mechanisms for disposal of resolution of civil or criminal conflicts, access to justice remains a big question mark on account of delays in the completion of the process of adjudication on account of poor judge population and judge case ratio in comparison to other countries.

(iv) The process of adjudication must be affordable to the disputants:

Access to justice will again be no more than an illusion if the adjudicatory mechanism provided is so expensive as to deter a disputant from taking resort to the same. Article 39A of the Constitution promotes a laudable objective of providing legal aid to needy litigants and obliges the State to make access to justice affordable for the less fortunate Sections of the society. Legal aid to the needy has been recognized as one of the facets of access to justice in ***Madhav Hayawadanrao Hoskot v. State of Maharashtra*** MANU/SC/0119/1978 : (1978) 3 SCC 544 where this Court observed:

> *If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court Under Article 142, read with Articles 21, and 39A of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice. This is a necessary incident of the right of appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State's duty and not government's charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. Surely, the profession has a public commitment to the people but mere philanthropy of its members yields short mileage in the long run. Their services, especially when they are on behalf of the State, must be paid for. Naturally, the State concerned must pay a reasonable sum that the court may fix when assigning counsel to the prisoner. Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the court.*

31. Affordability of access to justice has been, to an extent, taken care of by the State sponsored legal aid programmes under the Legal Service Authorities Act, 1987. Legal aid programmes have been providing the much needed support to the poorer Sections of the society in the accessing justice in Courts.

32. That brings us to the second facet of the question referred to us namely whether Article 32 of the Constitution of India read with Article 142 empowers the Supreme Court to direct transfer in a situation where neither the Central Code of Civil Procedure or the Central Code of Criminal Procedure empowers such transfer to/from the State of Jammu and Kashmir. The need for transfer of cases from one court to the other often arises in several situations which are suitably addressed by the courts competent to direct transfers in exercise of powers available to them under the Code of Civil Procedure (CPC) or the Code of Criminal Procedure (Cr.P.C.). Convenience of parties and witnesses often figures as the main reason for the courts to direct such transfers. What is significant is that while in the rest of the country the courts deal with applications for transfer of civil/criminal cases under the provisions of the Code of Civil Procedure and the Code of Criminal Procedure the fact that there is no such enabling provision for transfer from or to the State of Jammu and Kashmir does not

detract from the power of a superior court to direct such transfer, if it is of the opinion that such a direction is essential to subserve the interest of justice. In other words, even if the provision empowering courts to direct transfer from one court to other were to stand deleted from the statute, the superior courts would still be competent to direct such transfer in appropriate cases so long as such courts are satisfied that denial of such a transfer would result in violation of the right to access to justice to a litigant in a given fact situation.

33. Now if access to justice is a facet of the right to life guaranteed Under Article 21 of the Constitution, a violation actual or threatened of that right would justify the invocation of this Court's powers Under Article 32 of the Constitution. Exercise of the power vested in the court under that Article could take the form of a direction for transfer of a case from one court to the other to meet situations where the statutory provisions do not provide for such transfers. Any such exercise would be legitimate, as it would prevent the violation of the fundamental right of the citizens guaranteed Under Article 21 of the Constitution.

34. That apart from Article 32 even Article 142 of the Constitution can be invoked to direct transfer of a case from one court to the other, is also settled by a Constitution Bench decision of this Court in ***Union Carbide Corporation v. Union of India*** MANU/SC/0058/1992 : (1991) 4 SCC 584. One of the questions that fell for consideration in that case was whether this Court could in exercise of its powers under Articles 136 and 142 withdraw a case pending in the lower court and dispose of the same finally even when Article 139A does not empower the court to do so. Answering the question in the affirmative, this Court held that the power to transfer cases is not exhausted Under Article 139A of the Constitution. This Court observed that Article 139A enables the litigant to seek transfer of proceedings, if the conditions in the Article are satisfied. The said Article was not intended to nor does it operate to affect the wide powers available to this Court under Articles 136 and 142 of the Constitution. The following two passages from the judgments are apposite in this regard:

> ***61.*** *To the extent power of withdrawal and transfer of cases to the apex Court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Articles 136 and 142(1), the power Under Article 139A must be held not to exhaust the power of withdrawal and transfer. Article 139A, it is relevant to mention here, was introduced as part of the scheme of the Constitution Forty-second Amendment. That amendment proposed to invest the Supreme Court with exclusive jurisdiction to determine the constitutional validity of central laws by inserting Articles 131A, 139A and 144A. But Articles 131A and 144A were omitted by the Forty-third Amendment Act, 1977, leaving Article 139A intact. That Article enables the litigants to approach the apex Court for transfer of proceedings if the conditions envisaged in that Article are satisfied. Article 139A was not intended, nor does it operate, to whittle down the existing wide powers under Articles 136 and 142 of the Constitution.*

35. Dealing with the question whether a provision contained in an ordinary statute would affect the exercise of powers Under Article 142 of the Constitution, this Court held, that the constitutional power Under Article 142 was at a different level altogether and that an ordinary statute could not control the exercise of that power. Speaking for the majority, Venkatachaliah J., as His Lordship then was, observed:

The power Under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers Under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment or power-limited in some appropriate way-is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy.....

But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers Under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers Under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex Court will take note of the express prohibitions in any substantive provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court Under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise.

36. In the cases at hand, there is no prohibition against use of power Under Article 142 to direct transfer of cases from a Court in the State of Jammu and Kashmir to a Court outside the State or *vice versa*. All that can be said is that there is no enabling provision because of the reasons which we have indicated earlier. The absence of an enabling provision, however, cannot be construed as a prohibition against transfer of cases to or from the State of Jammu and Kashmir. At any rate, a prohibition simplicitor is not enough. What is equally important is to see whether there is any fundamental principle of public policy underlying any such prohibition. No such prohibition nor any public policy can be seen in the cases at hand much less a public policy based on any fundamental principle. The extraordinary power available to this Court Under Article 142 of the Constitution can, therefore, be usefully invoked in a situation where the Court is satisfied that denial of an order of transfer from or to the Court in the State of Jammu and Kashmir will deny the citizen his/her right of access to justice. The provisions of Articles 32, 136 and 142 are, therefore, wide enough to empower this Court to direct such transfer in appropriate situations, no matter Central Code of Civil and Criminal Procedures do not extend to the State nor do the State Codes of Civil and Criminal Procedure contain any provision that empowers this Court to transfer cases. We accordingly answer the question referred to us in the affirmative.

37. The transfer petitions shall now be listed before the regular bench for hearing and disposal on merits keeping in view what has been observed above.

See page 116
for Para 6

Equivalent Citation: 1994(2)BLJR1075, 1994Supp(1)SCC145, [1993]Supp1SCR263

IN THE SUPREME COURT OF INDIA

Writ Petition (Crl.) No. 214 of 1993

Decided On: 16.07.1993

Appellants: **Mohammed Anis**
Vs.
Respondent: **Union of India (UOI) and Ors.**

Hon'ble Judges/Coram:
A.M. Ahmadi and N.G. Venkatachala, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: U.R. Lalit, Senior Adv., Aftab Ali Khan and R.C. Kaushik, Advs

JUDGMENT

A.M. Ahmadi, J.

1. This writ petition filed by an Inspector of Police (U. P. State Service) is yet another attempt at thwarting the implementation of this Court's order dated may 15, 1992 passed in Writ Petition (Criminal) No. 1118 of 1991. An abridged version of the events which led to the passing of that order may first be stated.

2. On July 12/13,1991, an incident occurred in Pilibhit area of the State of U. P. in which 10 persons were killed on the spot in what came to be officially stated as 'encounters' between the Punjab Militants and the Local Police. The Times of India, highlighted the incident on the basis whereof Shri R.S. Sodhi, an advocate practising in this Court, filed a writ petition under Article 32 the Constitution alleging infringement of Article 21 and related provisions. The issue figured in the Parliament and two teams of MPs belonging to the Congress (I) and the BJP rushed to the spot for an on-the-spot assessment. Their reports were placed on the record of the proceedings along with the report of the Additional Chief Judicial Magistrate, Pilibhit. Certain local police officers suspected to be involved in the incidents, were immediately transferred and the investigation was handed over to an officer of the level of an Inspector-General. The State Government also appointed a one-member Commission headed by a Judge of the Allahabad High Court to inquire into the incident but the work of the Commission did not commence on account of stay obtained in a writ petition. The allegations were mainly directed against the local police by the kith and kin of those were killed in the alleged encounters. Doubts were expressed regarding the fairness of the investigation as it was feared that as the local police was alleged to be involved in the encounters, the investigation by an officer of the U. P. Cadre may not be impartial. This Court refrained from expressing any opinion on the allegation made by either side but thought it wise to have the incidents investigated by so independent agency, the Central Bureau of Investigation, so that it may bear credibility. The Court felt that no matter how faithfully and honestly the local police may carry out the investigation the same will lack credibility

as the allegations were directed against them. This Court, therefore, though it both desirable and advisable and in the interest of justice to entrust the investigation to the CBI so that it may complete the investigation at an early date. It was clearly stated that in so ordering no reflection on either the local police or the State Government was intended. This Court merely acted in public interest.

3. After this order when the CBI authorities approached to local police as well as officers in the Home Department of the State Government, they did not receive the desired co-operation and the case paper were not handed over to them. This was communicated to this Court. After inquiring into the matter another order was passed on January 11, 1993, directing the Home Secretary, U. P., to take immediate steps to ensure compliance with the order dated May 15, 1992. Direction was also issued to the then DGP, U. P., Shri Prakash Singh, IPS and Secretary, Home, U. P., Shri Prabhat Kumar, IAS to show cause why action for their failure to comply with the Court's order of May 15 1992, should not be initiated against them. In response to the notices so issued both the officers filed affidavits dated April 7 and 13, 1993, expressing unconditional and unqualified apology for their failure to promptly comply with this Court's order. This Court taking a lenient view acted on the statement that necessary action had already been taken to comply with the order of May 15, 1992 and accepting the apology tendered by the said two officers discharged the notices by the order of April 16, 1993. As nothing further survived the petition was disposed of. It will thus be seen that unfortunately the U. P. Police did not take the order of this Court dated May 15, 1992 in the right spirit and tried to create hurdles in its implementation, notwithstanding the fact that a Review Petition No. 549 of 1992 was also rejected earlier.

4. The present petition was filed during the vacation on May 21, 1993. The petitioner is a Police Inspector and claims to have filed this petition in public interest for the enforcement of fundamental rights guaranteed by Articles 14 and 21. In the opening paragraph of the writ petition it is stated that the petition is being filed in a representative capacity on behalf of the U.P. Police as the interest of the entries police force of U. P. is involved because this Court's order directing of the C.B.I. to investigate into the Pilibhit incident is destructive of the exclusive powers of the State of U. P. and is in flagrant disregard of the mandatory provisions of the CrPC. The basis of the writ petition is an order dated March 10, 1989 of this Court in Writ Petition Nos. 531-36 of 1988, Haryana Mahila Sanghathan v. Union of India, wherein the Division Bench of this Court referred the question whether the Court can order the CBI to investigate an alleged offence without the consent and orders of the concerned State Government to a larger Bench, preferably a Bench comprising of five Judges of this Court. The petitioner, therefore, contends that since this issue was awaiting decision by a larger Bench this Court could not have passed the order dated May 15, 1992.

5. In the first place it is difficult to appreciate what public interest the petition seeks to serve and it is even more difficult to appreciate how the petitioner's fundamental rights under Articles 14 and/or 21 of the Constitution can be said to be violated. Fair and impartial investigation by an independent agency not involved in the controversy, is the demand of public interest. If the investigation is by an agency which is allegedly privy to the dispute, the credibility of the investigation will be doubted and that will be contrary to public interest as well as the interest of justice. This Court was careful enough to state that its order should not be read as a reflection on either the local policy or the State Government but that it was actuated by the sole object of ensuring that the outcome of the investigation, whatever it be, is not suspect in the

eyes of the people including the family members of those killed in the incident.... Therefore, it is difficult to understand how the petition can be said to be in public interest. What public interest it seeks to subserve ? In fact the averment in Paragraph 1 betrays that the petition is filed on behalf of U. P. Police to protect "the interest of the entire police of U. P." The petitioner now where alleges that he was serving in that area at the time when the incident occurred. It is, therefore, difficult to understand how his constitutional right under Article 14 and/or Article 21 can be said to have been violated. It is obvious that the petition is misconceived and is merely yet another attempt to frustrate the implementation of the order dated May 15, 1992. In fact such successive attempts on the part of the U. P. Police only strengthens the suspicion calling for an independent investigation. Thus the writ petition is untenable on this preliminary ground.

6. True it is, that a Division Bench of this Court made an order on March 10, 1989 referring the question whether a court can order the CBI, an establishment under the Delhi Special Police Establishment Act, to investigate a cognizable offence committed within a State without the consent of that State Government or without any notification or order having been issued in that behalf. In our view, merely because the issue is referred to a larger Bench everything does not grinded to a halt. The reference to the expression 'court' in that order cannot in the context mean the Apex Court for the reason that the Apex Court has been conferred extraordinary powers by Article 142(1) of the Constitution so that it can do complete justice in any cause or matter pending before it.

The question regarding the width and amplitude of this Court's power under Article 142(1) came up for consideration before this Court in Delhi Judicial Service Assn. Delhi v. State of Gujarat MANU/SC/0473/1991 : AIR1991SC2150 , and again before the Constitution Bench in Union Carbide Corpn. v. Union of India MANU/SC/0058/1992 : AIR1992SC248 . In the first case this Court observed that the power conferred by Article 142(1) coupled with the plenary powers under Articles 32 and 136 empowers the Court to pass such orders as it deem necessary to do complete justice to the cause or matter brought before it. This power to do complete justice is entirely of different level and of different quality which cannot be limited or restricted by provisions contained in statutory law. No enactment made by the Central or State Legislature can limit or restrict the Court's power under Article 142(1) though while exercising it the Court may have regard to statutory provisions (See Paragraphs 50 and 51 of the judgment). In the second case this Court clarified that the expression "cause or matter" must be construed in a wide sense to effectuate the purpose of conferment of power. This power, has been conferred on the Apex Court only and the exercise of that power is not dependent or conditioned by any statutory provision. The constitutional plenitude of the powers of the Apex Court is to ensure due and proper administration of justice and is intended to be coextensive in each case with the needs of justice of a given case and to meeting any exigency. Very wide powers have been conferred on this Court for due and proper administration of justice and whenever the Court sees that the demand of justice warrants exercise of such powers, it will reach out to ensure that justice is done by resorting this extraordinary power conferred to meet precisely such a situation.
True it is, that the power must be exercised sparingly for furthering the ends of justice but it cannot be said that its exercise is conditioned by any statutory provision. Any such view would defeat the very purpose and object of conferment of this extraordinary power. In the Union Carbide case, MANU/SC/0058/1992 : AIR1992SC248 MANU/SC/0058/1992 : 1991 Supp (1) SCR 251 this Court observed as under:

> It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Article 142(1) is unsound and erroneous.

Proceeding further, the Court observed:

> The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations on provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142.

That is so for the obvious reason that statutory provisions cannot override constitutional provisions and Article 142(1) being a constitutional power cannot be limited or conditioned by any statutory provisions. It, therefore, seems clear to us that the power of the Apex Court under Article 142(1) of the Constitution cannot be diluted merely because the statute, namely, the Delhi Special Police Establishment Act, stipulates that the State Government's permission will be necessary if the CBI is to investigate any offence committed within the territorial jurisdiction of a State Government. That may be a statutory obligation governing the relations between the Central Government and the State Government but it cannot control this Court's power under Article 142(1). In both the aforesaid cases reference was made to the decision in A. R. Antulay v. R.S. Nayak MANU/SC/0002/1988 : 1988CriLJ1661 , and it was distinguished by pointing out that the violation of constitutional provisions and constitutional rights was in issue. Here as pointed out earlier no such right is infringed. Besides the decision in that case turned on its peculiar facts. The statute does not prohibit investigation by CBI but only requires certain formalities to be completed which have no relevance when the Apex Court makes an order in exercise of its power under Article 142(1). Therefore we do not think that merely because a question is referred to a larger Bench this Court is prohibited from exercising the powers conferred on it by Article 142(1) of the Constitution. In any case so far as the powers of the Apex Court under Article 142(1) are concerned, the position in law is now well settled by the aforementioned Constitution Bench rulings and hence if the reference includes the Apex Court it must be taken as impliedly answered.

7. We do hope that the U. P. Police will reconcile to the fact that the factual situation arising from the incident in Pilibhit had persuaded this Court to pass the order of May 15, 1992 not only in the interest of fair and impartial investigation but also in the interest of the U. P. Police so that there may not remain any lingering doubt regarding the credibility of the investigation. The U. P. Police, we hope, will give up its obstructionist attitude and co-operate with the investigation entrusted to the CBI in its larger interest.

8. It is also unfortunate that the petitioner who was nowhere in the picture has permitted himself to be used for preferring this petition, and that too after two of the high ranking officers had assured this Court that they would ensure compliance with this Court's order of May 15, 1992. It was on that assurance that this Court had accepted their apology and dropped the proceedings by discharging the notices. We do hope that a situation will not be created which may compel us to initiate similar proceedings once again. The petitioner will also be more circumspect and careful in future and not become a tool in the hands of others.

9. For the above reasons, we see no merit in this petition and dismiss the same.

See page 145
for Para 15

MANU/SC/0471/1995

Equivalent Citation: AIR1995SC2348, 1995(1)ALT(Cri)674, II(1995)CCR101(SC), 1995CriLJ3994, 1995(2)Crimes381(SC), 1995GLH(1)690, (1995)2GLR992, JT1995(2)SC587, 1995(1)KLJ504, 1995(3)RCR(Criminal)655, 1995(2)SCALE200, (1995)2SCC584, [1995]2SCR638, 1995(2)UJ93

IN THE SUPREME COURT OF INDIA

Contempt Petn. (Criminal) No. 3 of 1994

Decided On: 10.03.1995

Appellants:**In re: Vinay Chandra Mishra**

Hon'ble Judges/Coram:
Kuldip Singh, J.S. Verma and P.B. Sawant, JJ.

ORDER

P.B. Sawant, J.

1. On 10th March, 1994; Justice S.K. Keshote of the Allahabad High Court addressed a letter to the Acting Chief Justice of that Court as follows :

> No. SKK/ALL/8/94 10.3.94
>
> Dear brother Actg. Chief Justice,
>
> Though on 9.3.94 itself I orally narrated about the misbehavior of Sh. B.C. Misra with me in the Court but I thought it advisable to give you same in writing also.
>
> On 9.3.94 I was sitting with Justice Anshuman Singh in Court No. 38. In the list of fresh cases of 9.3.94 at Sr. No. 5 FAFO Record No. 22793 M/s. Bansal Forgings Ltd. v. U.P.F. Corp. filed by Smt. S.V. Misra was listed. Sh. B.C. Misra appeared in this case when the case was called.
>
> Brief facts of that case
>
> M/s. Bansal Forgings Ltd. took loan from U.P. Financial Corporation and it made default in payment of installment of the same. Corporation proceeded against the Company Under Section 29 of the U.P. Financial Corporation Act. The company filed a Civil Suit against the Corporation and it has also field an application for grant of temporary injunction. Counsel for the Corporation suo moto put appearance in the matter before Trial Court and prayed for time for filing of reply. The learned trial court passed an order on the said date that the Corporation will not seize the factory of the Company. The company shall pay the amount of installment and it will furnish also security for the disputed amount. The court directed to furnish security on 31.1.94 and case was fixed on 15.3.94.
>
> Against said order of the trial court this appeal has been filed and arguments have been advanced that Court has no jurisdiction to pass the order for payment of installment of loan and further no security could have been ordered.

I put a question to Shri Misra under which provision this order has been passed. On putting of question he started to shout and said that no question could have been put to him. He will get me transferred or see that impeachment motion is brought against me in Parliament. He further said that he has turned up many Judges. He created a good scene in the court. He asked me to follow the practice of this Court. In sum and substance it is a matter where except to abuse me of mother and sister he insulted me like anything. What he wanted to convey to me was that admission is as a course and no arguments are heard, at this stage.

It is not the question of insulting of a Judge of this institution but it is a matter of institution as a whole. In case dignity of Judiciary is not being maintained then where this institution will stand. In case a senior Advocate, President of Bar and chairman of Bar Council of India behaves in Court in such manner what will happen to other advocates.

Since the day I have come here I am deciding the cases on merits. In case a case has merits it is admitted but not as a matter of course. In this Court probably advocates do not like the consideration of cases on their merits at the stage of admission. In case dignity of Judiciary is not restored then it is very difficult for the Judges to discharge their Judicial function without fear and favour.

I am submitting this matter to you in writing to bring this misshaping in the Court with the hope that you will do something for restoration of dignity of Judiciary.

Thanking you,

Yours sincerely,

Sd/-

(Jus. S.K. Keshote).

The Acting Chief justice Shri V.K. Khanna forwarded the said letter to the then Chief Justice of India by his letter of 5th April, 1994. The learned Chief Justice of India constituted this Bench to hear the matter on 15th April, 1994.

On 15th April, 1994, this Court took the view that there was a prima fade case of criminal contempt of court committed by Shri Vinay Chandra Mishra [hereinafter referred to as the "contemner"] and issued a notice against him to show cause why contempt proceedings be not initiated against him. By the same order, Shri D.P. Gupta, the learned Solicitor General of India was requested to assist the Court in the matter. Pursuant to the notice, the contemner filed his reply by affidavit dated 10th May, 1994 and also an application seeking discharge of show cause notice, and in the alternative for an inquiry to be held into the incident referred to by Justice Keshote in his letter which had given rise to the contempt proceedings. It is necessary at this stage to refer to the material portions of both the affidavit and the application filed by the contemner. After referring to his status a Senior Advocate of the Allahabad High Court and his connections with the various law organisations in different capacities to impress upon the Court that he had a deep involvement in the purity, integrity and solemnity of judicial process, he has submitted in the affidavit that but for his deep commitments to the norms of judicial processes as evidenced by his said status and

connections, he would have adopted the usual expedient of submitting his unconditional regrets. But the facts and circumstances of this case were such which induced him to "state the facts and seek the verdict of the Court" whether he had committed the alleged contempt or whether it could be "a judge committing contempt of his own court". He has then stated the facts which according to him form the "genesis" of the present controversy. They are as follows :-

A. A Private Ltd. Co. had taken an installment loan from U.P. Financial Corporation, which provides under its constituent Act (Sec. 29) for some sort of self help in case of default of installments.

B. A controversy arose between the said Financial Corporation and the borrower as a result of which, the borrower had to file a civil suit seeking an injunction against the Corporation for not opting for the non-judicial sale of their assets.

C. The Civil Court granted the injunction against putting the assets to sale, but at the same time directed furnishing security for the amount due.

D. Being aggrieved by the condition of furnishing security, which in law would be tantamount to directing a mortgager to furnish security for payment of mortgage loan, even when he satisfies the Court that a stay is called for - the property mortgaged being a pre-existing security for its payment.

E. The Company filed an FAFO being No. 229793/94 against the portion of the order directing furnishing of security.

F. The said FAFO came for preliminary hearing before Hon'ble Justice Anshuman Sing and the Applicant of this petition on 9th March, 1994. In which I argued for the debtor Company.

G. When the matter was called on Board, the Applicant took charge of the court proceedings and virtually foreclosed attempts made by the senior Judge to intervene. The Applicant Judge inquired from me as to under what law the impugned order was passed to which I replied that it was under various rules of Order 39, CPC. That Applicant therefore conveyed to me that he was going to set aside the entire order, against a portion of which I had come in appeal, because in his view the Lower Court was not competent to pass such an order as Order 39 did not apply to the facts.

H. I politely brought to the notice of the Applicant Judge that being the appellant I had the dominion over the case and it could not be made worse, just because I had come to High Court.

I. The Applicant Judge apparently lost his temper and told me in no unconcealed term that he would set aside the order in toto, disregarding what I had said.

J. Being upset over, what I felt was an arbitrary approach to judicial process I got emotionally perturbed and my professional and institutional sensitivity got deeply wounded and I told the Applicant Judge that it was not the practice in this Court to dismiss cases without hearing or to upset judgments or portions of judgments, which have not been appealed against. Unfortunately the Applicant judge took it unsparingly and apparently lost his

temper and directed the stenographer to take down the order for setting aside of the whole order.

K. At this juncture, the Hon'ble Senior Judge intervened, whispered something to the Applicant Judge and directed the case to be listed before some other Bench. It was duly done and by an order of the other Court dated 18th March, 1994 Hon'ble Justices B.M. Lal and S.K. Verma, the points raised by me before the Applicant Judge were accepted. A copy of the said order is reproduced as Annexure I to this affidavit.

L. I find it necessary to mention that the exchange that took place between me and the Applicant Judge got a little heated up. In the moment of heat the Applicant Judge made the following observations :-

> I am from the Bar and if need be I can take to goondaism.

Adding in English -

> I never opted for Allahabad. I had opted for Gujarat and Himachal Pradesh. I do not know why the Chief Justice of India disregarded my options and transferred me to this place, which I never liked.

Provoked by this I asked him whether he was creating a scene to create conditions for getting himself transferred as also talked earlier.

After narrating the above incident, contemner has gone on to deny that he had referred to any impeachment, though according to him he did mention that "a judge got himself transferred earlier on account of his inability to command the goodwill of the Bar due to lack of mutual reverence".

The contemner has further denied the allegations made by Justice Keshote that as soon as the case was called out, he [i.e., Justice Keshote] asked him the provision under which the impugned order was passed and that he had replied that the Court had no jurisdiction to ask the same and should admit and grant the stay order. According to him, such a reply could only be attributed to one who is "mad" and that considering his practice of thirty five years at the Bar and his responsible status as a member of the Bar, it is unbelievable that he would reply in such a "foolish manner". The contemner has further denied that he had abused the learned judge since according to him he had never indulged in abusing anybody. With regard to the said allegations against him, the contemner has stated that the same are vague and, therefore, "nothing definite is warranted to reply".

He has further contended in his affidavit that if the learned Judge was to be believed that he had committed the contempt, the senior Judge who was to direct the court proceedings would have initiated proceedings under "Article 129 of the Constitution" for committing contempt in facie curiae. He has also stated that the learned Judge himself did not direct such proceeding against him which he could have. He has found fault that instead of doing so, the learned Judge had "deferred the matter for the next day and adopted a devious way of writing to the Acting Chief Justice for doing something about it". He has then expressed his "uncomprehension" with the learned Judge should have come to the Supreme Court when he had ample and sufficient legal and constitutional powers to arraign him at the Bar for what was attributed to him.

The contemner has then gone on to complain that the "language used" by the learned Judge "in the Court extending a threat to resort to goondaism is acting in a way which is professionally perverse and approximating to creating an unfavourable public opinion about the awesomeness of judicial process, lowering or tending to lower the authority of any Court" which amounted to contempt by a Judge punishable under Section 16 of the Contempt of Courts Act, 1971. He has then gone on to submit "under compulsion of his "institutional and professional conscience" and for upholding professional standards expected of both the Bench and the Bar of this Court" that this Court may order a thorough investigation into the incident in question to find out whether a contempt has been committed by him punishable under "Article 215" of the Constitution Or by the Judge under Section 16 of the Contempt of Courts Act.

He has further stated that the entire Bar at Allahabad knows that he has unjustly "roughed" by the Judge and was being punished for taking a "fearless and non-servile stand" and that he is being prosecuted for asserting the right of audience and using "the liberty to express his views" when a Judge takes a course "which in the opinion of the bar is irregular". He has also contended that any punishment meted out to the "outspoken lawyer" will completely emasculate the freedom of the profession and make the Bar "a subservient tail wagging appendage to the judicial branch, which is an anathema to a healthy democratic judicial system".

He has made a complaint that he was feeling handicapped in not being provided with the copy of the letter/report of the Acting Chief Justice of the Allahabad High Court and he has also been unable to gauge the "rationale of the applicant in not having initiated proceedings" against him either immediately or a day following, when he chose to address a letter to the Acting Chief Justice. He has then contended that he wanted to make it clear that he was seeking a formal inquiry not for any vindication of any personal hurt but to make things safe for profession which in a small way by a quirk of destiny come to his keeping also. He has also stated that he would be untrue and faithless to his office if he subordinated the larger interests of the profession and dignity of the judicial process for a small thing of seeking his little safety. The contemner goes on to state that he did not opt for filing a contempt against the learned judge as in normal course of arguments, sometimes, altercations take place between a Judge and the arguing advocate, which may technically be contempt on either side but there being no intention, provisions of contempt are not attracted. In support of his said case, he has reproduced an extract form Oswald's Contempt of Court, III Edition, By Robertson. The said extract is as follows :

> An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the advocate thinks irregular or detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the Advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case. It is said that a Scotch advocate was arguing before a Court in Scotland, when one of the Judges, not liking his manner, said to him, "It seems to me, Mr. Blank, that you are endeavoring in every way to show your contempt for the Court." "No," was the quick rejoinder, "I am endeavouring in every way to conceal it.

In the end, he has stated that he had utmost respect and regard for the courts and he never intended nor intends not to pay due respect to the courts which under the law they are entitled to and it is for this reason that instead of defending himself through an advocate, he had left to the mercy of this Court to judge and decide the right and wrong. He has also stated that it is for this reason that he had not relied upon the provisions of the Constitution under Articles 129 and 215 and Section 16 of the Contempt of Court Act and to save himself on the technicality and jurisdictional competence.

Lastly, he has reiterated that he had always paid due regard to the Courts and he was paying the same and will continue to pay the same and he "neither intended not intends to commit contempt of any Court".

2. Along with the aforesaid affidavit was forwarded by the contemner, a petition stating therein that he had not gone beyond the legitimate limits of fearless, honest and independent obligations of an advocate and it was Justice Keshote himself who had lost him temper and extended threats to him which was such as would be punishable under Section 16 of the Contempt of Courts Act, 1971[hereinafter referred to as the "Act"]. He has prayed that the notice issued to him be discharged and if in any case, this Court does not feel inclined to discharge the notice, he "seeks his right to inquiry and production of evidence directly or by affidavits" as this Court may direct. He has further stated in that petition that he is moving an independent application for contempt proceedings to be drawn against the learned judge and it would be in the interest of justice and fairplay if the two are heard together. It has to be noted that the contemner has throughout this affidavit as well as the petition referred to Justice Keshote as "applicant", although he knew very well that contempt proceedings had been initiated suo moto by this Court on the basis of the letter written by Justice Keshote to the Acting Chief Justice of the High Court. His manner of reference to the learned Judge also reveals the respect in which he holds the learned Judge.

The contemner has also filed another petition on the same day as stated in the aforesaid petition wherein he has prayed that on the facts staled in the reply affidavit to the show cause notice for contempt proceedings against him. this Court be pleased to draw proceedings under Section 16 of the Act against the learned judge for committing contempt of his own court and hold an inquiry. In this petition, he has stated that in his reply to the contempt notice, he has brought the whole truth before this Court which according to him was witnessed by the senior judge of the Bench, Justice Anshuman Singh and a large number advocates. Once again referring to Justice Keshote as the applicant, he has stated that the learned Judge in open court conveyed to him [i.e., the contemner] that he can take to goondaism if need arises, that he also talked disparagingly against the Chief justice of India for not transferring him to the place for which he had opted and in a manner unworthy of a Judge and also attempted to gag the contemner from discharging his duties as an advocate. The contemner has further contended that as a common law principle relating to contempt of courts, a Judge is liable for contempt of his own Court as much as any other person associated with judicial proceedings and outside, and that the aforesaid principle has been given statutory recognition under Section 16 of the Act. He has further contended that the behavior of the learned judge was so unworthy that the senior colleague on the Bench apart from "disregarding with the desire of the applicant to dismiss the entire order" against a part of which an appeal had been filed, released the case from the board and did not think of taking recourse to the obvious and well-known procedure of initiating contempt proceedings against him for

the alleged contempt committed in the face of the Court. He has further contended that the adoption of devious way of reaching the Acting Chief Justice by letter and reportedly coming to Delhi for meeting meaningful people" is "itself seeking about the infirmity of the case" of the Judge. He has in the end reiterated his prayer for an inquiry into the behavior of the learned Judge if the notice of contempt was not discharged against him in view of the denial by him of the conduct alleged against him.

3. This Court gave four weeks' time as desired by the contemner to file an additional affidavit giving more facts and details. The Court also made clear that the cause title of the proceedings was misleading since Justice Keshote had not initiated the proceedings. The proceedings were initiated suo moto by this Court. A direction was given to the Registry to correct the cause title.

On 30th June, 1994, the contemner filed his supplementary/additional counter affidavit. In this affidavit, he raised objections to the maintainability "of initiating contempt proceedings" against him. His first objection was to the assumption of jurisdiction by the Court to punish for an act of contempt committed in respect of another Court of record which is invested with identical and independent power for punishing for contempt of itself. According to him, this Court can take cognisance only of contempt committed in respect of itself. He has also demanded that in view of the point of law raised by him, the matter be placed before the Constitution Bench and that notice be issued to the Attorney General of India and all the Advocate General of the States. He has then gone on to deny the statements made by the learned Judge in the letter written to the Acting Chief Justice of the High Court and in view of the said denial by him, he has asked for the presence of the learned Judge in the Court for being cross-examined by him, i.e., the contemner. He has further stated that if the contempt proceedings are taken against him, the statement of Justice Anshuman Singh who was the senior Judge on the Bench before which the incident took place, would also be necessary. He has also taken exception to Justice Keshote's speaking in the Court except through the senior Judge on the Bench which, according to him had been the practice in the Allahabad High Court, and has alleged that the learned Judge did not follow the said convention. In the end, he has reiterated that he has utmost respect and regard for the courts and he has never intended nor intends not to pay due regard to the Courts.

On 15th July, 1994, this Court passed an order wherein it is recorded that on 15th April, 1994, the court had issued a notice to the contemner to show cause as to why criminal contempt proceedings be not initiated against him and notice was issued on its own motion. The Court heard the contemner in person as well as his learned Counsel. The Court perused the counter affidavit and the additional affidavit of the contemner and was of the view that it was a fit case where criminal contempt proceedings be initiated against the contemner. Accordingly, the Court directed that the proceedings be initiated against him. The contemner was given an opportunity to file any material in reply or in defence within another eight weeks. He was also allowed to file the affidavit of any other person apart from himself in support of his defence. Shri Gupta, learned Solicitor General was appointed as the prosecutor to conduct the proceedings. The affidavits filed by the contemner were directed to be sent to Justice Keshote making it clear that he might offer his comments regarding the factual averments in the said affidavits.

4. In view of the said order, the Court dismissed the contemner's application No. 2560/94 praying for discharge of the notice. The contemner thereafter desired to

withdraw his application No. 2561/94 seeking initiation of proceedings against the learned judge for contempt of his own Court, by stating that he was doing so "at this stage reserving his right to file a similar application at a later stage". The Court without any comment on the statement made by the Contemner, dismissed the said application as withdrawn.

5. Justice Keshote by a letter of 20th August, 1994 forwarded his comments on the counter affidavit and the supplementary/additional counter affidavit filed by the contemner. The learned Judge denied that he took charge of the court proceedings and virtually foreclosed the attempts made by the senior Judge to intervene, as was alleged by the contemner. He stated that being a member of the Bench, he put a question to the contemner as to under which provision, the order under appeal had been passed by the trial court, and upon that the contemner started shouting and said that he would get him transferred or see to it that impeachment motion was brought against him in Parliament. According to the learned Judge, the contemner said many more things as already mentioned by him in his letter dated 10th March, 1994. He further stated that the contemner created a scene which made it difficult to continue the court proceedings and ultimately when it became difficult to hear all the slogans, insulting words and threats, he requested his learned brother on the Bench to list that case before another Bench and to retire to the chamber. Accordingly, the order was made by the other learned member of the Bench and both of them retired to their chambers.

The learned Judge also stated that the Contemner has made wrong statement when he states "that applicant, therefore, conveyed to me that he was going to set aside the entire order, against portion of which I had come in appeal because in his view, the lower court was not competent to pass such order as Order 39 did not apply to the facts". The learned Judge stated that he neither made any such statement nor conveyed to the contemner as suggested by him. He reiterates that except one sentence, viz., "that under which provision this order had been made by the trial court" nothing was said by him. According to the learned Judge, it was a case where the contemner did not permit the court proceedings to be proceeded and both the Judges ultimately had to retire to the chambers. The learned Judge alleges that the counter affidavit manufactures a defence. He has denied the contents of paragraph 6[H] and [I] of the counter affidavit by stating that nothing of the kind as alleged therein had happened. According to the learned Judge, it was a case where the contemner lost his temper on the question being put to him by him, i.e., the learned Judge. He has stated that instead of losing his temper and creating a scene and threatening and terrorising him, the contemner should have argued the matter and encouraged the new junior Judge. The learned Judge has further denied the following averment, viz., "unfortunately, the applicant Judge took it unsparingly and apparently lost his temper and directed the stenographer to take down the order for setting aside of the whole order" made in paragraph 6[J] of the counter affidavit, as wrong. He has pointed out that in the Division Bench, it is the senior member who dictates order/judgments. He has also denied the statements attributed to him in other paragraphs of the affidavit and in particular, has stated that he did not make the following observations: "I am from the Bar and if need be I can take to goondaism" and has alleged that the said allegations are absolutely wrong. He has also denied that he ever made the statements as follows : "I never opted for Allahabad. I had opted for Gujarat and Himachal Pradesh. I do not know why the Chief justice of India disregarded my options and transferred me to this place which I never liked". According to him, the said allegations are manufactured with a view to create a defence. He has denied the allegations made against him in the

additional/supplementary affidavits as wrong and has stated that what actually happened in the Court was stated in his letter of 10th March, 1994.

On 7th October, 1994, the contemner filed his unconditional written apology in the following words:

> **1.** In deep and regretful realization of the fact that a situation like the one which has given rise to the present proceedings, and which in an ideal condition should never have arisen, subjects me to deep anguish and remorse and a feeling of moral guilt. The feeling has been compounded by the fact of my modest association with the profession as the senior advocate for some time and also being the President of the High Court Bar Association for multiple terms (from which I have resigned a week or ten days back), and also being the Chairman of the Bar Council of India for the third five - year term. The latter two being elective posts convey with its holding an element of trust by my professional fraternity which expectations of setting up an example of an ideal advocate, which includes generating an intra-professional culture between the Bar and the Bench, under which the first looks upon the second with respect and resignation, the second upon the first with courtesy and consideration. It also calls for cultivation of a professional attitude amongst the lawyers to learn to be good and sporting losers.
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> **2.** Guilty realizing my failure at approximating these standards resulting in the present proceedings, nolo contender I submit my humble and unconditional apologies for the happenings in the Court of Justice S.K. Keshote at Allahabad High Court on March 9, 1994, and submit myself at the Hon. Courts sweet will.
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> **3.** I hereby withdraw from record all my applications, petitions, counter affidavits, and prayers made to the court earlier to the presented [sic] of this statement. I, also, withdraw all submissions made at the bar earlier and rest my matter with the present statement alone, and any submissions that may be made in support of or in connection with statement.

On that day, the matter was adjourned to 24th November, 1994 to enable the learned Counsel for the parties to make further submissions on the apology and to argue the case on all points, since the Court stated that it may not be inclined to accept the apology as tendered. The learned Counsel for all the parties including the contemner, Bar Council of India and the State Bar Council of U.P. [who were allowed to intervene] were heard and the matter was reserved for judgment.

6. Thereafter, the State Bar Council of U.P., also submitted its written submissions on 26th November, 1994 alongwith an application for intervention. We have perused the said submissions.

7. We may first deal with the preliminary objection raised by the Contemner and the State Bar Council, viz., that the Court cannot take cognisance of the contempt of the High Courts. The contention is based on two grounds. The first is that Article 129 vests this Court with the power to punish only for the contempt of itself and not of the High Courts. Secondly, the High Court is also another court of record vested with identical and independent power of punishing for contempt of itself.

The contention ignores that the Supreme Court is not only the highest Court of

record, but under various provision of the Constitution, is also charged with the duties and responsibilities of correcting the lower courts and tribunals and of protecting them from those whose misconduct tends to prevent the due performance of their duties. The latter functions and powers of this Court are independent of Article 129 of the Constitution. When, therefore, Article 129 vest this Court with the powers of the court of record including the power to punish for contempt of itself, it vests such powers in this Court in its capacity as the highest court of record and also as a court charged with the appellate and superintending powers over the lower courts and tribunals as detailed in the Constitution. To discharge its obligations as the custodian of the administrations of justice in the country and as the highest court imbued with supervisory and appellate jurisdiction over all the lower courts and tribunals, it is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour and for that purpose all the courts and tribunals are protected while discharging their legitimate duties. To discharge this obligation, this Court has to take cognisance of the deviation from the path of justice in the tribunals of the land, and also of attempts to cause such deviations and obstruct the course of justice. To hold otherwise would mean that although this Court is charged with the duties and responsibilities enumerated in the Constitution, it is not equipped with the power to discharge them.

This subject has been dealt with elaborately by this Court in All India Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and Ors. MANU/SC/0473/1991 : AIR1991SC2150 . We may do no better than quote from the said decision the relevant extracts :

> **18.** There is therefore no room for any doubt that this Court has wide power to interfere and correct the judgment and orders passed by any court or tribunal in the country. In addition to the appellate power, the Court has special residuary power to entertain appeal against any order of any court in the country. The plenary jurisdiction of this Court to grant leave and hear appeals against any order of a court or tribunal, confers power of judicial superintendence over all the courts and tribunals in the territory of India including subordinate courts of Magistrate and District Judge. This Court has, therefore, supervisory jurisdiction over all courts in India.
>
> **19.** Article 129 provides that the Supreme Court shall be a court of record and shall have all the power of such a court including the power to punish for contempt of itself. Article 215 contains similar provision in respect of High Court. Both the Supreme court as well as High Courts are courts of record having powers to punish for contempt including the power to punish for contempt of itself. The Constitution does not define "Court of Record'. This expression is well recognised in juridical world. In Jowitt's Dictionary of English Law, "Court of record" is defined as :
>
> > A court whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, and which has power to fine an imprison for contempt of its authority.
>
> In Wharton's Law Lexicon, Court of record is defined as :
>
> > Courts are either of record where their acts and judicial proceedings are enrolled for a perpetual memorial and testimony and they have

> power to fine and imprison, or not of record being courts of inferior dignity, and in a less proper sense the King's Courts-and these art not entrusted by law with any power to fine or imprison the subject of the realm, unless by the express provision of some Act of Parliament. These proceedings are not enrolled or recorded

In words and Phrases (Permanent Edition Vol.10 page 429) "Court of Record" is defined as under :

> Court of Record is a court where acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the 'record' of the court, and are of such high and supereminent authority that their truth is not to be questioned.

Halsbury's Law of England, 4th Edn., Vol.10, para 709, page 319, states :

> Another manner of division is into courts of record and courts not of record. Certain courts are expressly declared by statute to be courts of record. In the case of courts not expressly declared to be courts of record, the answer to the question whether a court is a court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences; if it has such power, it seems that it is a court of record.... The proceedings of a court of record preserved in its achieves are called records, and are conclusive evidence of that which is recorded therein.

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23. The question whether in the absence of any express provision a Court of Record has inherent power in respect of contempt of subordinate or inferior courts, has been considered by English and Indian courts.

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... These authorities show that in England the power of the High Court to deal with the contempt of inferior court was based not so much on its historical foundation but on the High Court's inherent jurisdiction being a court of record having jurisdiction to correct the orders of those courts.

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24. In India prior to the enactment of the Contempt of Courts Act, 1926, High Court's jurisdiction in respect of contempt of subordinate and inferior courts was regulated by the principles of Common Law of England. The High Courts in the absence of statutory provision exercised power of provision exercised power of contempt to protect the subordinate courts on the premise of inherent power of a Court of record."

26. The English and the Indian authorities are based on the basic foundation of inherent power of a Court of Record, having jurisdiction to correct the judicial order of subordinate courts. The King's Bench in England and High Courts in India being superior Courts of Record and having judicial power to correct orders of subordinate courts enjoyed the inherent power of contempt

to protect the subordinate courts. The Supreme Court being a Court of Record under Article 129 and having wide power of judicial supervision over all the courts in the country, must possess and exercise similar jurisdiction and power as the High Courts and prior to contempt Legislation in 1926. Inherent powers of a superior Court of Record have remained unaffected even after codification of Contempt Law."

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28. ...The Parliament's power to legislate in relation to law of contempt relating to Supreme Court is limited, therefore the Act does not impinge upon this Court's power with regard to the contempt of subordinate courts under Article 129 of the Constitution.

29. Article 129 declares the Supreme Court a court of record and it further provides that the Supreme Court shall have all the powers of such a court including the power to punish for contempt of itself. The expression used in Article 129 is not restrictive instead it is extensive in nature. If the Framers of the Constitution intended that the Supreme Court shall have power to punish for contempt of itself only, there was no necessity of inserting the expression "including the power to punish for contempt of itself". The Article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power relating to contempt as would appear from the expression "including". The expression "including" has been interpreted by courts, to extend and widen the scope of power. The plain language of Article 129 clearly indicates that this Court as a court of record has power to punish for contempt of itself and also something else also which could fall within the inherent jurisdiction of a court of record. In interpreting the constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The courts ought not to accept any such construction. While construing Article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since the Supreme Court is designed by the Constitution as a court of record and as the Founding Fathers were aware that a superior court of record has inherent power to indict a person for the contempt of itself as, well as of courts inferior to it, the expression "including" was deliberately inserted in the article. Article 129 recognised the existing inherent power of a court of record in its full plenitude including the power to punish for the contempt of inferior courts. If Article 129 is susceptible to two interpretations, we would prefer to accept the interpretation which would preserve the inherent jurisdiction of this Court being the superior court of record, to safeguard and protect the subordinate judiciary, which forms the very backbone of administration of justice. The subordinate courts administer justice at the grassroot level, their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice at its base level.

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31. We have already discussed a number of decisions holding that the High Court being a court of record has inherent power in respect of contempt of itself as well as of its subordinate courts even in the absence of any express provision in any Act. A fortiori the Supreme Court being the Apex Court of

the country and superior court of record should possess the same inherent jurisdiction and power for taking action for contempt of itself as well as for the contempt of subordinate and inferior courts. It was contended that since High Court has power of superintendence over the subordinate courts under Article 227 of the Constitution, therefore, High Court has power to punish for the contempt of subordinate courts. Since the Supreme Court has no supervisory jurisdiction over the High Court or other subordinate courts, it does not possess powers which High Courts have under Article 215. This submission is misconceived. Article 227 confers supervisory jurisdiction on the High Court and in exercise of that power High Court may correct judicial orders of subordinate courts, in addition to that, the High Court has administrative control over the subordinate courts. Supreme Court's power to correct judicial orders of the subordinate courts under Article 136 is much wider and more effective than that contained under Article 227. Absence of administrative power of superintendence over the High Court and subordinate court does not affect this Court's wide power of judicial superintendence of all courts in India. Once there is power of judicial superintendence, all the courts whose orders are amenable to corrections by this Court would be subordinate courts and therefore this Court also possesses similar inherent power a the High Court has under Article 215 with regard to the contempt of subordinate courts. The jurisdiction and power of a superior Court of Record to punish contempt of subordinate courts was not founded on the Court's administrative power of superintendence, instead the inherent jurisdiction was conceded to superior Court of Record on the premise of its judicial power to correct the errors of subordinate courts.

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36. Advent of freedom, and promulgation of Constitution have made drastic changes in the administration of justice necessitating new judicial approach. The Constitution has assigned a new role to the Constitutional Courts to ensure rule of law in the country. These changes have brought new perceptions. In interpreting the Constitution, we must have regard to the social , economic and political changes, need of the community and the independence of judiciary. The court cannot be a helpless spectator, bound by precedents of colonial days which have lost relevance. Time has come to have a fresh look at the old precedents and to lay down law with the changed perceptions keeping in view the provisions of the Constitution. "Law", to use the words of Lord Coleridge, "grows; and though the principles of law remain unchanged yet their application is to be changed with the changing circumstances of the time". The considerations which weighed with the Federal Court in rendering its decision in Gauba and Jaitly case are no more relevant in the context of the constitutional provisions.

37. Since this Court has power of judicial superintendence and control over all the courts and tribunals functioning in the entire territory of the country, it has a corresponding duty to protect and safeguard the interest of inferior courts to ensure the flow of the stream of justice in the courts without any interference or attack from any quarter. The subordinate and inferior courts do not have adequate power under the law to protect themselves, therefore, it is necessary that this Court should protect them. Under the constitutional scheme this Court has a special role, in the administration of justice and the powers conferred on it under Articles 32, 136, 141 and 142 form part of

basic structure of the Constitution. The amplitude of the power of this Court under these articles of the Constitution cannot be curtailed by law made by Central or State legislature. If the contention raised on behalf of the contemners is accepted, the courts all over India will have no protection from this Court. No doubt High Courts have power to persist for the contempt of subordinate courts but that does not affect or abridge the inherent power of this Court under Article 129. The Supreme Court and the High Court both exercise concurrent jurisdiction under the constitutional scheme in matters relating to fundamental rights under Articles 32 and 226 of the Constitution, therefore this Court's jurisdiction and power to take action for contempt of subordinate courts would not be inconsistent to any constitutional scheme. There may be occasions when attack on Judges and Magistrates of subordinate courts may have wide repercussions throughout the country, in that situation it may not be possible for a High Court to contain the same, as a result of which the administration of justice in the country may be paralysed, in that situation the Apex Court must intervene to ensure smooth functioning of courts. The Apex Court is duty bound to take effective steps within the constitutional provisions to ensure a free and fair administration of justice throughout the country, for that purpose it must wield the requisite power to take action for contempt of subordinate courts. Ordinarily, the High Court would protect the subordinate court from any onslaught on their independence, but in exceptional cases, extraordinary situation may prevail affecting the administration of public justice or where the entire judiciary is affected, this Court may directly take cognisance of contempt of subordinate courts. We would like to strike a note of caution that this Court will sparingly exercise its inherent power in taking cognisance of the contempt of subordinate courts, as ordinarily matters relating to contempt of subordinate courts must be dealt with by the High Courts. The instant case is of exceptional nature, as the incident created a situation where functioning of the subordinate courts all over the country was adversely affected, and the administration of justice was paralysed, therefore, this Court took cognisance of the matter.

38. ...It is true that courts constituted under a law enacted by the Parliament or the State legislature have limited legislature and they cannot assure jurisdiction in a matter, not expressly assigned to them, but that is not so in the case of a superior court of record constituted by the Constitution. Such a court does not have a limited jurisdiction instead it has power to determine its own jurisdiction. No matter is beyond the jurisdiction of a superior court of record unless it is expressly shown to the so, under the provisions of the Constitution. In the absence of any express provision in the Constitution the Apex Court being a court of record has jurisdiction in every matter and if there be any doubt, the Court has power to determine its jurisdiction. If such determination is made by High Court, the same would be subject to appeal to this Court, but if the jurisdiction is determined by this Court is would be final.

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... We therefore hold that this Court being the Apex Court and a superior court of record has power to determine its jurisdiction under Article 129 of the Constitution and as discussed earlier it has jurisdiction to initiate or entertain proceedings for contempt of subordinate courts. This view does not run

counter to any provision of the Constitution.

The propositions of law laid down and the observations made in this decision conclusively negate the contention that this Court cannot take cognisance of the contempt committed of the High Court.

8. The contemner has also contended that notwithstanding the decision in Delhi Judicial Service Association Case [supra], the matter should be referred to a larger Bench because according to him, the decision does not lay down the correct proposition of law when it gives this Court the jurisdiction under Article 129 of the Constitution to take cognisance of the contempt of the High Court. Neither the contemner nor the learned Counsel appearing on his behalf has pointed out to us any specific infirmity in the said decision. We are not only in complete agreement with the law laid down on the point in the said decision but are also unable to see how the legal position to the contrary will be consistent with this Court's wide ranging jurisdiction and its duties and responsibilities as the highest Court of the land as pointed out above. Hence, we reject the said request.

9. The contemner has further contended that it will be necessary to hold an inquiry into the allegations made by the learned Judge by summoning the learned judge for examination to verify the version of the incident given by him as against that given by the contemner. According to him, in view of the conflicting versions of the incident given by him and the learned Judge, it would be necessary for him to cross-examine the learned Judge. As the facts reveal, the contempt alleged is in the face of the Court. The learned judge or the Bench could have itself taken action for the offence on the spot. Instead, the learned Judge probably thought that it would not be proper to be a prosecutor, a witness and the judge himself in the matter and decided to report the incident to the learned Acting Chief Justice of his Court. There is nothing unusual in the course the learned Judge adopted, although the procedure adopted by the learned judge has resulted in some delay in taking action for the contempt. (See Balogh v. Crown Court at St. Albans [1975] QB 73 [1974] 3 All ER 283. The criminal contempt of court undoubtedly amounts to an offence but it is an offence sui generis and hence for such offence, the procedure adopted both under the common law and the statute law even in this country has always been summary. However, the fact that the process is summary does not mean that the procedural requirement, viz., that an opportunity of meeting the charge, is denied to the contemner. The degree of precision with which the change may be stated depends upon the circumstances. So long as the gist of the specific allegations is made clear or otherwise the contemner is aware of the specific allegation, it is not always necessary to formulate the charge in a specific allegation. The consensus of opinion among the judiciary and the jurists alike is that despite the objection that the judge deals with the contempt himself and the Contemner has little opportunity to defend himself, there is a residue of cases where not only it is justifiable to punish on the spot but it is the only realistic way of dealing with certain offenders. This procedure does not offend against the principle of natural justice, viz., Nemo judex in sua causa since the prosecution is not aimed at protecting the Judge personally but protecting the administration of justice. The threat of immediate punishment is the most effective deterrent against misconduct. The judge has to remain in full control of the hearing of the case and he must be able to take steps to restore order as early and quickly as possible. The time factor is crucial. Dragging out the contempt proceedings means a lengthy interruption to the main proceedings which paralyses the court for a time and indirectly impedes the speed and efficiency with which justice is administered. Instant justice can never be complete satisfactory yet it does provide the simplest, most effective and least

unsatisfactory method of dealing with disruptive conduct in Court. So long as the contemner's interest are adequately safeguarded by giving him an opportunity of being heard in his defence, even summary procedure in the case of contempt in the face of the Court is commended and not faulted.

10. In the present case, although the contempt is in the face of the court, the procedure adopted is not only not summary but has adequately safeguarded the contemner's interest. The contemner was issued a notice intimating him the specific allegation against him. He was given an opportunity to counter the allegations by filing his counter affidavit and additional counter/supplementary affidavit as per his request, and he has filed the same. He was also given an opportunity to file an affidavit of any other person that he chose or to produce any other material in his defence, which he has not done. However, in the affidavit which he has filed, he has requested for an examination of the learned Judge. We have at length dealt with the nature of in facie curiae contempt and the justification for adopting summary procedure and punishing the offender on the spot. In such procedure, there is no scope for examining the Judge or Judges of the court before whom the contempt is committed. To give such a right to the contemner is to destroy not only the raison d'etre for taking action for contempt committed in the face of the court but also to destroy the very jurisdiction of the Court to adopt proceedings for such conduct. It is for these reasons that neither the common law nor the statute law countenances the claim of the offender for examination of the Judge or Judges before whom the contempt is committed. Section 14 of our Act, i.e., the Contempt of Courts Act, 1971 deals with the procedure when the action is taken for the contempt in the face of the Supreme Court and the High Court. Sub-section [3] of the said Section deals with a situation where in facie curiae contempt is tried by a Judge other than the Judge or judges in whose presence or hearing the offence is alleged to have been committed. The provision in specific terms and for obvious reasons, states that in such cases it shall not be necessary for the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, to appear as a witness and the statement placed before the Chief Justice shall be treated as the evidence in the case. The statement of the learned Judge has already been furnished to the contemner and he has replied to the same. We have, therefore, to proceed by treating the statement of the learned Judge and the affidavits filed by the contemner and the reply given by the learned Judge to the said affidavits, as evidence in the case.

11. We may now refer to the matter in dispute to examine whether the contemner is guilty of the contempt of court under the common law definition, "contempt of court" is defined as an act or omission calculated to interfere with the due administration of justice. This covers criminal contempt [that is, acts which so threaten the administration of justice that they require punishment] and civil contempt [disobedience of an order made in a civil cause]. Section 2[a][b] and [c] of the Act defines the contempt of court as follows :

> **2.** Definitions. - In this Act, unless the context otherwise requires, -
>
> [a] "contempt of court" means civil contempt or criminal contempt;
>
> [b] "civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;
>
> [c] "criminal contempt" means the publication [whether by words,

spoken or written, or by signs, or by visible representations, or otherwise] of any matter or the doing of any other act whatsoever which -

[i] scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or

[ii] prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

[iii] interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

From the facts which have been narrated above it is clear that the allegations against the contemner, if true, would amount to criminal contempt as defined under Section 2[c] of the Act. It is in the light of this definition of the "criminal contempt" that we have to examine the facts on record.

The essence of the contents of Justice Keshote's letter is that when he put a question to the contemner as to under which provision the order was passed by the lower court, the contemner "started to shout and said that no question could have been put to him". The contemner further said that he would get the learned judge transferred or see that impeachment motion was brought against him in Parliament. He also said that he had "turned up many judges". He also created a scene in the Court. The learned Judge has further stated in his letter that in sum and substance it was a matter where "except to abuse him of mother and sister", he insulted him "like anything". The contemner, according to the learned Judge, wanted to convey to him that admission was a matter of course and no argument were to be heard at that stage. The learned Judge has given his reaction to the entire episode by pointing out that this is not a question of insulting a Judge but the institution as a whole. In case the dignity of the judiciary was not maintained then he "did not know where the institution would stand, particularly when contemner who is a senior advocate, President of the Bar and Chairman of the Bar Council of India behaved in the court in such manner which will have its effect on other advocates as well". He has further stated that in case the dignity of the judiciary is not restored, it would be very difficult for the judges to discharge the judicial function without fear or favour. At the end of this letter, he has appealed to the learned Acting Chief Justice for "restoration of dignity of the judiciary".

The contemner, as pointed out above, by filing an affidavit has denied the version of the episode given by the learned Judge and has stated that when the matter was called on, the learned Judge [he has referred to him as the 'applicant'] took charge of the court proceedings and virtually foreclosed the attempts made by the senior Judge to intervene. The learned judge inquired from the contemner as to under which law the impugned order was passed to which the latter replied that it was under various rules of Order 39, CPC. The learned Judge then conveyed to the contemner that he was going to set aside the entire order although against a portion of it only he had come in appeal. According to the contemner, he then politely brought to the notice of the learned Judge that being the appellant, he had the dominion over the case and it could not be made worse just because he had come to High Court. According to the contemner, the learned Judge then apparently lost his temper and told him that he would set aside the order in toto disregarding what he had said. The contemner has

then proceeded to state that "being upset over what" he felt was an arbitrary approach to judicial process he "got emotionally perturbed" and "his professional and institutional sensitivity got deeply wounded" and he told the applicant-Judge that "it was not the practice" of that Court to dismiss case without hearing or to upset judgments or portions of judgments which have not been appealed against. According to the contemner, "unfortunately the applicant - Judge took it unsparingly and apparently lost his temper and directed the Stenographer to take down the order for setting aside the whole order. The contemner has then stated that he "found it necessary to mention that the exchange that took place between him and the applicant-Judge got a little heated up". In the moment of heat the applicant-Judge made the following observations : "I am from the bar and if need be I can take to goondaism. I never opted for Allahabad. I had opted for Gujarat and Himachal Pradesh. I do not know why the Chief Justice of India disregarded my options and transferred me to this place, which I never liked". According to the Contemner, he was "provoked by this" and asked the learned Judge "whether he was creating a scene to create conditions for getting himself transferred as also talked earlier". The contemner has denied that he had referred to any impeachment although according to him, he did say that "a Judge got himself transferred earlier on account of his inability to command the goodwill of the Bar due to lack of mutual reverence". He has also denied that when the learned judge asked him as to under which provision the order was passed, he had replied that the Court had no jurisdiction to ask the same and should admit and grant the stay order. He has added that such a reply could only be attributed to one who is made and it is unbelievable that "he would reply in such a foolish manner". He has also denied that he had abused the learned Judge and the allegation made against him in that behalf were vague. According to the contemner, if he had committed the contempt, the senior member of the Bench would have initiated proceedings under "Article 129" of the Constitution for committing contempt in facie curiae. He has also stated that even the learned Judge himself could have done so but he did not do so and deferred the matter for the next day and "adopted a devious way of writing to the acting Chief Justice for doing something about it" which shows that the version of the episode was not correct. The contemner has also then expressed his "uncomprehension" why the learned Judge should have come to this Court when he had ample and sufficient legal and constitutional powers to arraign the contemner at the "Bar for what was attributed" to him.

12. Before we refer to the other contentions raised by the contemner, the question is which of the two versions has to be accepted as correct. The contemner has no doubt asked for an inquiry and an opportunity to produce evidence. For reasons stated earlier, we declined his request for such inquiry, but gave him ample opportunity to produce whatever material he desired to, including the affidavits of whomsoever he desired. Our order dated 15th July, 1994 is clear on the subject. Pursuant to the said order, the contemner has not filed his further affidavit or material or the affidavit of any other person. Instead he tendered a written apology dated 7th October, 1994 which will be considered at the proper place. In his earlier counter additional counter, he has stated that it is not he who had committed contempt but it is the learned Judge who had committed contempt of his own court. According to him, the learned Judge had gagged him from discharging his duties as an advocate and the statement of senior member of the bench concerned was necessary. He has taken exception to the learned Judge speaking in the Court except through the senior Judge of the Bench which according to him, had been the practice in the said High Court and has also alleged that the learned judge did not follow the said convention.

13. Normally, no Judge takes action for in facie curiae contempt against the lawyer

unless he is impelled to do so. It is not the heat generated in the arguments but the language used, the tone and the manner in which it is expressed and the intention behind using it which determine whether it was calculated to insult, show disrespect, to overbear and overawe the court and to threaten and obstruct the course of justice. After going through the report of the learned Judge and the affidavits and the additional affidavits filed by the contemner and after hearing the learned Counsel appearing for the contemner, we have come to the conclusion that there is every reason to believe that notwithstanding his denials, and disclaimers, the contemner had undoubtedly tried to browbeat, threaten, insult and show disrespect personally to the learned Judge. This is evident from the manner in which even in the affidavits filed in this Court, the contemner has tried to justify his conduct. He has started narration of his version of the incident by taking exception the learned Judge's taking charge of the court proceedings. We are unable to understand what exactly he means thereby. Every member of the Bench is on par with the other member or members of the Bench and has a right to ask whatever questions he want to, to appreciate the merits or demerits of the case. It is obvious that the contemner was incensed by the fact that the learned Judge was asking the questions to him. This is clear from his contention that the learned Judge being a junior member of the Bench, was not supposed to ask him any question and if any questions were to be asked, he had to ask them through the senior member of the Bench because that was the convention of the Court. We are not aware of any such convention in any court at least in this country. Assuming that there is such a convention, it is for the learned Judges forming the Bench to observe it inter se. No lawyer or a third party can have any right or say in the matter and can make either an issue of it or refuse to answer the questions on that ground. The lawyer or the litigant concerned has to answer the questions put to him by any member of the Bench. The contemner has sought to rely on the so-called convention and to spell out his right from it not to have been questioned by the learned Judge This contention coupled with his grievance that the learned Judge had taken charge of the proceedings, shows that the contemner was in all probability perturbed by the fact that the learned Judge was asking him questions. The learned Judge's version, therefore, appear to be correct when he states that the contemner lost his temper when he started asking him questions. The contemner has further admitted that he got "emotionally perturbed" and his "professional and institutional sensitivity got deeply wounded" because the learned Judge, according to him, apparently lost his temper and told him in no unconcealed terms that he would set aside the order in toto disregarding what he had said. The learned Judge's statement that the contemner threatened him with transfer and impeachment proceedings also gets corroboration from the contemner's own statement in the additional affidavit that he did tell the learned Judge that a Judge got himself transferred earlier on account of his inability to command the goodwill of the Bar due to lack of mutual reverence. No one expects a lawyer to be subservient to the Court while presenting his case and not to put forward his arguments merely because the Court is against him. In fact, that is the moment when he is expected to put forth his best effort to persuade the Court. However, if, in spite of it, the lawyer finds that the court is against him, he is not expected to be discourteous to the court or to fling hot words or epithets or use disrespectful, derogatory or threatening language or exhibit temper which has the effect of overbearing the court. Cases are won and lost in the court daily. One or the other side is bound to lose. The remedy of the losing lawyer or the litigant is to prefer an appeal against the decision and not to indulge in a running battle of words with the court. That is the least that is expected of a lawyer. Silence on some occasions is also an argument. The lawyer is not entitled to indulge in unbecoming conduct either by showing his temper or using unbecoming language.

The incident had undoubtedly created a scene in the court since even according to the contemner, the exchange between the learned Judge and him was "a little heated up" and the contemner asked the learned Judge "whether he was creating scene to create conditions for getting himself transferred as also talked earlier". He had also to remind the learned Judge that "a Judge got himself transferred earlier on account of his inability to command the goodwill of the Bar due to lack of mutual reverence". He has further stated in his affidavit that "the entire Bar at Allahabad" knew that he was unjustly "roughed" by the Judge and was being punished for taking "a fearless and non-servile stand" and that he was being prosecuted for "asserting" a right of audience and "using the liberty to express his views when a Judge takes a course which in the opinion of the Bar is irregular". He has also stated that any punishment meted out to the "outspoken" lawyer will completely emasculate the freedom of the profession and make the Bar a subservient tail wagging appendage to the judicial branch which is an anathema to a healthy democratic judicial system. He has further stated in his petition for taking contempt action against the learned Judge that the incident was "witnessed by a large number of advocates".

We have reproduced the contents of the letter written by the learned judge and his reply to the affidavits filed by the contemner The learned Judge's version is that when he put the question to the contemner as to under which provision, the lower court had passed the order in question, the contemner started shouting and said that no question could have been put to him. The contemner also stated that he would get him transferred or see that impeachment motion was brought against him in Parliament. He further said that he had "turned up" many judges and created a good scene in the Court. The contemner further asked him to follow the practice of the Court. The learned Judge has stated that in sum and substance, it was a matter where except "to abuse of his mother and sister", he had insulted him "like anything". The learned Judge has further stated that the contemner wanted to convey to him that admission of every matter was as a matter of course and no arguments were heard at the admission stage. He has reiterated the said version in his reply to the affidavits and in particular, has denied the allegations made against him by the contemner. He has defended his asking the question to the contemner since he was a member of the Bench. The learned judge has stated that the contemner I took exception to his asking the said question as if he had committed some wrong and started shouting. He has further stated that he had asked only the question referred to above and the contemner had created the scene on account of his putting the said question to him, and made it difficult to continue the court's proceedings. Ultimately when it became impossible he hear all the slogans and insulting words and threats, he requested the senior learned member of the Bench to list the case before another Bench and to retire to the chamber. Accordingly, an order was made by the senior member of the Bench and both of them retired to the chamber. The learned Judge has denied that he had conveyed to the contemner that he was going to set aside the entire order against a portion of which the contemner had come in appeal. He has stated that it was a case where the contemner did not permit the court proceedings to be proceeded and both the members of the Bench had ultimately to retire to the chambers. The learned Judge has stated that the defence of the conduct of the contemner in the counter affidavit "was a manufactured" one. He has then dealt with each paragraph of the contemner's counter affidavit. He has also stated that there was no question of his having directed the stenographer to take down the order for setting aside of the whole order since that function was performed by the senior member of the Bench. He has also stated that the contemner has made absolutely wrong allegations when he states that he had made the following remarks : "I am from the bar and if need be I can take to goondaism". He has also denied that he had

said : "I never opted for Allahabad. I had opted for Gujarat and Himachal Pradesh. I do not know why the Chief Justice of India disregarded my options and transferred me to this place, which I never liked". He has stated that the contemner has made false allegations against him.

We have, by referring to the relevant portions of the affidavit and the counter affidavit filed by the contemner, pointed out the various statements made in the said affidavits which clearly point to the veracity of the version given by the learned Judge and the attempted rationalisation of his conduct by the contemner. The said averments also lend force and truthfulness to the content of the learned Judge's letters. We are, taking into consideration all the circumstances on record, of the view that the version of the incident given by the learned Judge has to be accepted as against that of the contemner.

To resent the questions asked by a Judge, to be disrespectful to him, to question his authority to ask the questions, to shout at him, to threaten him with transfer and impeachment, to use insulting language and abuse him, to dictate the order that he should pass, to create scenes in the Court, to address him by losing temper, are all acts calculated to interfere with and obstruct the course of justice. Such act tend to overawe the court and to prevent it form performing its duty to administer justice. Such conduct brings the authority of the court and the administration of justice into disrespect and disrepute and undermines and erodes the very foundation of the judiciary by shaking the confidence of the people in the ability of the court to deliver free and fair justice.

The stance taken by the contemner is that he was performing his duty as an outspoken and fearless member of the Bar. He seems to be labouring under a grave misunderstanding. Brazenness is not outspokenness and arrogance is not fearlessness. Use of intemperate language is not assertion of right nor is a threat an argument. Humility is not servility and courtesy and politeness are not lack of dignity. Self-restraint and respectful attitude towards the Court, presentation of correct facts and law with a balanced mind and without overstatement, suppression, distortion or embellishment are requisites of good advocacy. A lawyer has to be a gentlemen first. His most valuable asset is the respect and goodwill he enjoys among his colleagues and in the Court.

The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. Hence judiciary is not only the third pillar, but the central pillar of the democratic State. In a democracy like ours, where there is a written Constitution which is above all individuals and institutions and where the power of judicial review is vested in the superior courts, the judiciary has a special and additional duty to perform, viz., to oversee that all individuals and institutions including the executive and the legislature act within the framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. It is for this purpose that the courts are entrusted with the extra-ordinary power of punishing those who indulge in acts whether inside or outside the courts, which tend to undermine their authority and bring them in disrepute and disrespect by scandalising

them and obstructing them from discharging their duties without fear or favour. When the court exercises this power, it does not do so to vindicate the dignity and honour of the individual judge who is personally attacked or scandalised, but to uphold the majesty of the law and of the administration of justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded.

It cannot be disputed and was not disputed before us that the acts indulged into by the contemner in the present case as stated by the learned Judge per se amount to criminal contempt of court. What was disputed, was their occurrence. We have held above that we are satisfied that the contemner did indulge in the said acts.

As held by this Court in the matter of Mr. 'G', a Senior Advocate of the Supreme Court MANU/SC/0027/1954 : [1955] 1 SCR 490;

> ...the Court, in dealing with cases of professional misconduct is not concerned with ordinary legal rights, but with the special and rigid rules of professional conduct expected of and applied to a specially privileged class of persons who, because of their privileged status, are subject to certain disabilities which do not attach to other men and which do not attach even to them in a non-professional character....

He (a legal practitioner) is bound to conduct himself in a manner befitting the high and honourable profession to whose privileges he has so long been admitted; and if he departs from the high standards which that profession has set for itself and demands of him in professional matters, he is liable to disciplinary action.

In L.M. Das v. Advocate General, Orissa MANU/SC/0019/1956 : [1957]1SCR167 , this Court observed :-

> A member of the Bar undoubtedly owes a duty to his client and must place before the Court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may ask for a review of that order. At the same time, a member of the Bar is an officer of the Court and owes a duty to the court in which he is appearing. He must uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute. The appellant before us grossly overstepped the limits of propriety when he made imputations of partiality and unfairness against the Munsif in open Court. In suggesting that the Munsif followed no principle in his orders, the appellant was adding insult to injury, because the Munsif had merely upheld an order of his predecessor on the preliminary point of jurisdiction and Court fees, which order had been upheld by the High Court in revision. Scandalising the Court in such manner is really polluting the very fount of justice; such conduct as the appellant indulged in was not a matter between an individual member of the Bar and a member of the judicial service; it brought into disrepute the whole administration of justice. From that point of view, the conduct of the appellant was highly reprehensible.

The contemner has obviously misunderstood his function both as a lawyer representing the interests of his client and as an officer of the court. Indeed, he has not tried to defend the said acts in either of his capacities. On the other hand, he has

tried to deny them. Hence, much need not be said on this subject to remind him of his duties in both the capacities. It is, however, necessary to observe that by indulging in the said acts, he has positively abused his position both as a lawyer and as an officer of the Court, and has done distinct disservice to the litigants in general and to the profession of law and the administration of justice in particular. It pains us to note that the contemner is not only a senior member of the legal profession, but holds the high offices of the Chairman of the Bar Council of India, Member of the Bar Council of U.P., Chairman and Member, Executive Council and Academic Council of the National Law School University of India at Bangalore and President of the High Court Bar Association, Allahabad. Both as a senior member of the profession and as holder of the said high offices, special and additional duties were cast upon him to conduct himself as a model lawyer and officer of the court and to help strengthen the administration of justice by upholding the dignity and the majesty of the court. It was in fact expected of him to be zealous in maintaining the rule of law and in strengthening the people's confidence in the judicial institutions. To our dismay, we find that he has acted exactly contrary to his obligations and has in reality set a bad example to others while at the same time contributing to weakening of the confidence of the people in the courts.

The contemner has no doubt tendered an unconditional apology on 7th October, 1994 by withdrawing from record all his applications, petitions, counter affidavits, prayers and submissions made at the Bar and to the court earlier. We have reproduced that apology verbatim earlier. In the apology he has pleaded that he has deeply and regretfully realised that the situation, meaning thereby the incident, should never have arisen and the fact that it arose has subjected him to anguish and remorse and a feeling of moral guilty. That feeling has been compounded with the fact that he was a senior advocate and was holding the elective posts of the President of the High Court Bar Association and the Chairman of the Bar Council of India which by their nature show that he was entrusted by this professional fraternity to set up an example of an ideal advocate. He has guiltily realised his failure to approximate to this standard resulting in the present proceedings and he was, therefore, submitting his unconditional apology for the incident in question, we have not accepted this apology, firstly because we find that the apology is not a free and frank admission of the misdemeanor he indulged in the incident in question. Is there a sincere regret for the disrespect he showed to the learned Judge and the Court, and for the harm that he has done to the judiciary. On the other hand, the apology is couched in a sophisticated and garbed language exhibiting more an attempt to justify his conduct by reference to the circumstances in which he had indulged in it and to exonerate himself from the offence by pleading that the condition in which the "situation" had developed was not an ideal one and were it ideal, the 'situation' should not have arisen. It is a clever and disguised attempt to refurbish his image and get out of a tight situation by not only not exhibiting the least sincere remorse for his conduct but by trying to blame the so-called circumstances which led to it. At the same time, he has attempted to varnish and re-establish himself as a valiant defender of his "alleged duties" as a lawyer. Secondly, from the very inception his attitude has been defiant and belligerent. In his affidavits and application, not only he has not shown any respect for the learned Judge, but has made counter-allegations against him and has asked for initiation of contempt proceedings against him. He has even chosen to insinuate that the learned Judge by not taking contempt action on the spot and instead writing the letter to the Acting Chief Justice of the High Court, had adopted a devious way and that he had also come to Delhi to meet "meaningful" people. These allegations may themselves amount to contempt of court. Lastly, to accept any apology for a conduct of this kind and to condone it, would tantamount to a failure

on the part of this Court to uphold the majesty of the law, the dignity of the court and to maintain the confidence of the people in the judiciary. The Court will be failing in its duty to protect the administration of justice from attempts to denigrate and lower the authority of the judicial officers entrusted with the sacred task of delivering justice. A failure on the part of this Court to punish the offender on an occasion such as this would thus be a failure to perform one of its essential duties solemnly entrusted to it by the Constitution and the people. For all these reasons, we unhesitatingly reject the said so called apology tendered by the contemner.

14. The question now is what punishment should be meted out to the contemner. We have already discussed the contempt jurisdiction of this Court under Article 129 of the Constitution. That jurisdiction is independent of the statutory law of contempt enacted by the Parliament under Entry 77 of List I of VII Schedule of the Constitution. The jurisdiction of this Court under Article 129 is sui generis. The jurisdiction to take cognisance of the contempt as well as to award punishment for it being constitutional, it cannot be controlled by any statute. Neither, therefore, the Contempt of Courts Act, 1971 nor the Advocates Act, 1961 can be pressed into service to restrict the said jurisdiction. We have during the course of the proceedings indicated that if we convict the contemner of the offence, we may also suspend his licence to practise as a lawyer. The learned Counsel for the contemner and the interveners and also the learned Solicitor General appointed amicus curiae to assist the Court were requested to advance their arguments also on the said point. Pursuant to it, it was sought to be contended on behalf of the contemner and the U.P. Bar Association and the U.P. Bar Council that the Court cannot suspend the licence which is a power entrusted by the Advocates Act, 1961 specially made for the purpose, to the disciplinary committees of the State Bar Councils and of the Bar Council of India. The argument was that even the constitutional power under Articles 129 and 142 was circumscribed by the said statutory provisions and hence in the exercise of our power under the said provisions, the licence of an advocate was not liable either to be cancelled or suspended. A reference was made in this connection to the provisions of Sections 35 and 36 of the Advocates Act, which show that the power to punish the advocate is vested in the disciplinary committees of the State Bar Council and the Bar Council of India. Under Section 37 of the Advocates Act, an appeal lies to the Bar Council of India, when the order is passed by the disciplinary committee of the State Bar Council. Under Section 38, the appeal lies to the Court when the order is made by the disciplinary committee of the Bar Council of India, either under Section 36 or in appeal under Section 37. The power to punish includes the power to suspend the Advocate from practice for such period as the disciplinary committee concerned may deem fit under Section 35[3](c) and also to remove the name of the advocate from the State roll of the Advocates under Section 35[3](d). Relying on these provisions, it was contended that since the Act has vested the powers of suspending and removing the advocate from practice inclusively in the disciplinary committees of the State Bar Council and the Bar Council of India, as the case may be, the Supreme Court is denuded of its power to impose such punishment both under Articles 129 and 142 of the Constitution. In support of this contention, reliance was placed on the observations of the majority of this Court in Prem Chand Garg v. Excise Commission, U.P., Allahabad MANU/SC/0082/1962 : [1963] Supp. 1 S.C.R. 885 relating to the powers of this Court under Article 142 which are as follows :

> In this connection, it may be pertinent to point out that the wide powers which are given to this Court for doing complete justice between the parties, can be used by this Court for instance, in adding parties to the proceedings pending before it, or in admitting additional evidence, or in remanding the

case, or in allowing an new point to be taken for the first time. It is plain that in exercising these and similar other powers, this Court would not be bound by the relevant provisions of procedure if it is satisfied that a departure from the said procedure is necessary to do complete justice between the parties.

That takes us to the second argument urged by the Solicitor-General that Article 142 and Article 32 should be reconciled by the adoption of the rule of harmonious construction. In this connection, we ought to bear in mind that though the powers conferred on this Court by Article 142(1) are very wide, and the same can be exercised for doing complete justice in any case, as we have already observed, this Court cannot even under Article 142(1) make an order plainly inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any Constitutional provisions. There can, therefore, be no conflict between Article 142(1) and Article 32. In the case of KM. Nanavati v. The State of Bombay MANU/SC/0063/1960 : 1961CriLJ173 on which the Solicitor-General relies, it was conceded, and rightly, that under Article 142(1) this Court had the power to grant bail in cases brought before it, and so, there was obviously a conflict between the power vested in this Court under the said Article and that vested in the Governor of the State under Article 161. The possibility of a conflict between these powers necessitated the application of the rule of harmonious construction. The said rule can have no application to the present case, because on a fair construction of Article 142(1), this Court has no power to circumscribe the fundamental right guaranteed under Article 32. The existence of the said power is itself in dispute, and so, the present case is clearly distinguishable from the case of KM. Nanavati.

15. Apart form the fact that these observations are made with reference to the powers of this Court under Article 142 which are in the nature of supplementary powers and not with reference to this Court's power under Article 129, the said observations have been explained by this Court in its latter decisions in Delhi Judicial Services Association v. State of Gujarat [supra] and Union Carbide Corporation v. Union of India [1991] SCC 584. In paragraph 51 of the former decision, it has been, with respect, rightly pointed out that the said observations were made with regard to the extent of this Court's power under Article 142[1] in the context of fundamental rights. Those observations have no bearing on the present issue. No doubt, it was further observed there that those observations have no bearing on the question in issue in that case as there was no provision in any substantive law restricting this Court's power to quash proceedings pending before subordinate courts. But it was also added there that this Court's power under Article 142[1] to do complete justice was entirely of different level and of a different quality. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court. Once this Court is in seisin of a matter before it, it has power to issue any order or direction to do complete justice in the matter. A reference was made in that connection to the concurring opinion of Justice A.N. Sen in Harbans Singh v. State of U.P. MANU/SC/0072/1982 : 1982CriLJ795 , where the learned Judge observed as follows :

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 extra-ordinary 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.

The Court has then gone on to observe there that no enactment made by Central or State legislature can limit or restrict the power of this Court under Article 142 of the Constitution, though the Court under Article 142 of the Constitution, though the Court must take into consideration the statutory provisions regulating the matter in dispute. What would be the need of complete justice in a cause or matter, would depend upon the facts and circumstances of each case.

In the latter case, i.e., the Union Carbide's case [supra], the Constitution Bench in paragraph 83 stated as follows:

> It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution, These issues are matter of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the apex Court under Article 142(1) is unsound and erroneous. In both Garg as well as Antulay cases the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really un-necessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar" as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 Cr.P.C. or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into a Count the nature and status of the authority or the court on which conferment of powers - limited in some appropriate way - is contemplates. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Shri Sorabjee, learned Attorney General, referring to Garg Case, said that limitation on the powers under Article 142 arising form "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under

> Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise.

In view of these observations of the latter Constitution Bench on the point, the observations made by the majority in Prem Chand Garg's case [supra] are no longer a good law. This is also pointed out by this Court in the case of Mohammed Anis v. Union of India and Ors. MANU/SC/0901/1994by referring to the decision of Delhi Judicial Services v. State of Gujarat (supra) and Union Carbide Corporation v. Union of India (supra) by observing that statutory provisions cannot override the constitutional provisions and Article 142[1] being a constitutional power it cannot be limited or conditioned by any statutory provision. The Court has then observed that it is, therefore, clear that the power of the Apex Court under Article 142[1] of the Constitution cannot be diluted by statutory provisions and the said position in law is now well settled by the Constitution Bench decision in Union Carbide's case [supra].

16. The consequence of accepting the said contention advanced on behalf of the contemner and the other parties, will be two-fold. This Court while exercising its power under Article 142(1) would not even be entitled to reprimand the Advocate for his professional misconduct which includes exhibition of disrespect to the Court as per Rule 2 of Section 1 of Chapter II of Part VI of the Bar Council of India Rules made under the Advocates Act, which is also a contempt of court, since the reprimand of the advocate is a punishment which the disciplinary committees of the State Bar Council and of the Bar Council of India are authorised to administer under Section 35 of the Advocates Act. Secondly, it would also mean that for any act of contempt of court, if it also happens to be an act of professional misconduct under the Bar Council of India Rules, the courts including this Court, will have no power to take action since the Advocates Act confers exclusive power for taking action for such conduct on the disciplinary committees of the State Bar Council and the Bar Council of India, as the case may be. Such a proposition of law on the face of it deserves rejection for the simple reason that the disciplinary jurisdiction of the State Bar Council and the Bar Council of India to take action for professional misconduct is different from the jurisdiction of the courts to take action against the advocates for the contempt of court. The said jurisdiction co-exist independently of each other. The action taken under one jurisdiction does not bar an action under the other jurisdiction.

17. The contention is also misplaced for yet another and equally, if not more, important reason. In the matter of disciplinary jurisdiction under the Advocates Act, this Court is constituted as the final Appellate authority under Section 38 of the Act as pointed out earlier. In that capacity this Court can impose any of the punishments mentioned in Section 35(3) of the Act including that of removal of the name of the Advocate from the State roll and of suspending him from practice. If that be so, there is no reason why this Court while exercising its contempt jurisdiction under Article 129 read with Article 142 cannot impose any of the said punishments. The punishment so imposed will not only be not against the provisions of any statute, but in conformity with the substantive provisions of the Advocates Act and for conduct which is both a professional misconduct as well as the contempt of court. The argument has, therefore, to be rejected.

18. What is further, the jurisdiction and powers of this Court under Article 142 which are supplementary in nature and are provided to do complete justice in any matter, are independent of the jurisdiction and powers of this Court under Article 129 which

cannot be trammeled in any way by any statutory provision including the provisions of the Advocates Act or the Contempt of Courts Act. As pointed out earlier, the Advocates Act has nothing to do with the contempt jurisdiction of the court including of this Court and the Contempt of Courts Act, 1971 being a statute cannot denude, restrict or limit the powers of this Court to take action for contempt under Article 129. It is not disputed that suspension of the advocate from practice and his removal from the State roll of advocates are both punishments. There is no restriction or limitation on the nature of punishment that this Court may award while exercising its contempt jurisdiction and the said punishments can be the punishments the Court may impose while exercising the said jurisdiction.

Shri P.P. Rao, learned Counsel appearing for the High Court Bar Association of Allahabad contended that Article 19[1](a) and 19(2), and 19[1](g) and 19[6] have to be read together and thus read the power to suspend a member of the legal profession from practice or to remove him from the roll of the State Bar Council is not available to this Court under Article 129. We have been unable to appreciate this contention. Article 19[1](a) guarantees freedom of speech and expression which is subject to the provisions of Article 19[2] and, therefore, to the law in relation to the contempt of court as well, Article 19[1](g) guarantees the right to practise any profession or to carry on any occupation, trade or business and is subject to the provisions of Article 19[6] which empowers the State to make a law imposing reasonable restrictions, in the interests of general public, on the exercise of the said right and, in particular, is subject to a law prescribing technical or professional qualifications necessary for practising the profession or carrying on the occupation, trade or business. On our part we are unable to see how these provisions of Article 19 can be pressed into service to limit the power of this Court to take cognisance of and punish for the contempt of court under Article 129. The contention that the power of this Court under Article 129 is subject to the provisions of Articles 19[1](a) and 19[1](g), is unexceptional. However, it is not pointed out to us as to how the action taken under Article 129 would be violative of the said provisions, since the said provisions are subject to the law of contempt and the law laying down technical and professional qualifications necessary for practising any profession, which includes the legal profession. The freedom of speech and expression cannot be used of committing contempt of court nor can the legal profession be practised by committing the contempt of court. The right to continue to practise, is subject to the law of contempt. The law does not mean merely the statute law but also the constitutional provisions. The right, therefore, is subject to the restrictions placed by the law of contempt as contained in the statute - in the present case, the Contempt of Courts Act, 1971 as well as to the jurisdiction of this Court and of the High Court to take action under Articles 129 and 215 of the Constitution respectively. We, therefore, do not see any conflict between the provisions of Articles 129 and 215, and Article 19[1](a) and Article 19(1)(g) read with Articles 19[2] and 19[6] respectively.

19. When the Constitution vests this Court with a special and specific power to take action for contempt not only of itself but of the lower courts and tribunals, for discharging its constitutional obligations as the highest custodian of justice in the land, that power is obviously coupled with a duty to protect all the limbs of the administration of justice from those whose actions create interference with or obstruction to the course of justice. Failure to exercise the power on such occasions, when it is invested specifically for the purpose, is a failure to discharge the duty. In this connection, we may refer to the following extract from the decision of this Court in Chief Controlling Revenue Authority and Superintendent of Stamps v. Maharashtra Sugar Mills Ltd. MANU/SC/0001/1950 .

> ...But when a capacity or power is given to a public authority there may be circumstances which couple with the power a duty to exercise it. To use the language of Lord Cairns in the case of Julius v. Bishop of Oxford: There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so'.

20. For the reason discussed above, we find the contemner, Shri Vinay Chandra Mishra, guilty of the offence of the criminal contempt of the Court for having interfered with and obstructed the course of justice by trying to threaten, overawe and overbear the court by using insulting, disrespectful and threatening language, and convict him of the said offence. Since the contemner is a senior member of the Bar and also adorns the high offices such as those of the Chairman of the Bar Council of India, the President of the U.P. High Court Bar Association, Allahabad and others, his conduct is bound to infect the members of the Bar all over the country. We are, therefore, of the view that an exemplary punishment has to be meted out to him.

21. The facts and circumstances of the present case justify our invoking the power under Article 129 read with Article 142 of the Constitution to award to the contemner a suspended sentence of imprisonment together with suspension of his practice as an advocate in the manner directed herein. We accordingly sentence the contemner for his conviction for the offence of criminal contempt as under :

> (11.1) The contemner is sentenced to undergo simple imprisonment for a period of six weeks. However, in the circumstances of the case, the sentence will remain suspended for a period of four years and may be activated in case the contemner is convicted for any other offence of contempt of court within the said period,
>
> (11.2) The contemner shall stand suspended from practising as an advocate for a period of three years from today with the consequence that all elective and nominated offices/posts at presents held by him in his capacity as an advocate, shall stand vacated by him forthwith.

The contempt petition is disposed of in the above terms.

MANU/SC/2046/2006

Equivalent Citation: 2006(41)AIC1, AIR2006SC1899, 2006 (63) ALR 822, 2006(6)ALT2(SC), 2006 (3) AWC 2276 (SC), I(2007)BC112(SC), I(2007)BC112(SC), (2007)1CALLT1(SC), (SCSuppl)2006(3)CHN49, 2006(1)CLJ(SC)356, [2006]131CompCas339(SC), (2006)7CompLJ24(SC), [2006(3)JCR295(SC)], JT2006(5)SC281, 2006(2)KLT538, 2006(2)KLT538(SC), 2006-4-LW924, (2006)4MLJ870(SC), 2006(2)RCR(Civil)624, 2006(4)SCALE423, (2006)5SCC72, [2006]Supp(1)SCR52

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 10074-10075 of 2003

Decided On: 18.04.2006

Appellants:**Indian Bank**
Vs.
Respondent:**ABS Marine Products Pvt. Ltd.**

Hon'ble Judges/Coram:
A.R. Lakshmanan and R.V. Raveendran, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: L.N. Rao, Sr. Adv., Himanshu Munshi and Rajesh Kumar Chaurasia, Advs

For Respondents/Defendant: Jaideep Gupta, Sr. Adv., Rana Mukherjee, Siddharth Gautam and Goodwill Indeevar, Advs.

Case Category:
MERCANTILE LAWS, COMMERCIAL TRANSACTIONS INCLUDING BANKING - MATT
RELATING TO RECOVERY OF DEBTS/ BANK LOANS DUE UNDER THE BANKS A
FINANCIAL INSTITUTIONS

JUDGMENT

R.V. Raveendran, J.

1. These appeals by special leave are filed against the judgment dated 10.5.2002 of the Calcutta High Court, dismissing A.P.O. Nos. 57-58 of 2001 filed by the appellant-Bank against orders dated 24.1.2001 and 13.3.2001 passed by a learned Single Judge of that court, rejecting an oral application and a written application respectively, filed by the appellant- Bank for transfer of Civil Suit No. 7/1995 (filed by first respondent herein against the appellant and others and pending on the file of the Calcutta High Court) to the Debt Recovery Tribunal, Calcutta, for being tried with O.A. No. 170/1995 (filed by the appellant against the first respondent and its guarantors).

2. The first respondent (also referred to as the 'borrower' or 'company') approached the appellant-Bank (for short 'the Bank') for certain credit facilities. By Sanction Advices dated 12.7.1991 and 6.12.1991, the Bank sanctioned ad hoc packing credit facilities to a limit of Rs. 20 lakhs and Rs. 5 lakhs respectively. According to the Bank, the company utilized the said credit facilities, but committed default in repaying the amounts advanced. Therefore, the Bank filed O.A. No. 170/1995 on 21.8.1995 before the Debt Recovery Tribunal (for short 'the Tribunal') under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'Debt Recovery Act') seeking a certificate to recover Rs. 30,67,820/04 with

interest from the company and its four guarantors (Directors), jointly and severally. The said application is pending and trial therein is yet to commence.

3. On 19.12.1991, the Bank sanctioned a Middle Term Loan of Rs. 90 lakhs and certain other credit facilities to the company. The sanctioned loans were not released. The company filed C.S. No. 7/1995 against the Bank in the Calcutta High Court in January, 1995, for recovery of Rs. 25,38,58,000/- as damages (for non-disbursal of the loans) with interest. By the end of 2000, recording of evidence in the suit was completed and the suit was ripe for arguments.

4. On 24.1.2001, the Bank made an oral submission that the suit could not be tried by the High Court and it should be transferred to the Tribunal. A learned Single Judge rejected the said request by the following order :-

> Though not pleaded in the written statement specifically, the learned Counsel for the defendant contends that in view of the amendment of Section 19 of the Recovery of debts due to Banks and Financial Institutions Act, 1993, this suit cannot be tried by this Court. I have gone through Section 19 of the said act as amended up to date. It appears from the said amendment that the debtor/respondent will be entitled to make counter claims in the same proceeding initiated by the bank. Before amendment there was no such specific provision. But in this case, the plaintiff/debtor had filed the suit before the bank could file appropriate proceeding. It is a separate suit. It is neither a cross suit nor can be termed as counter-claim. So the suit is perfectly entertainable by this Court. Therefore, the preliminary objection raised by the Bank is hereby overruled.

5. Thereafter, the Bank filed an application in writing, praying for transfer of C.S. No. 7/1995 filed by the borrower to the Tribunal on the ground that the said suit was broadly in the nature of a counter-claim to Bank's O.A. No. 170/1995 and was integrally connected with its application. The learned Single Judge rejected the said application by order dated 13.3.2001, as barred by *res judicata*, in view of the fact the same prayer made orally earlier had been rejected on 24.1.2001. The said two orders dated 24.1.2001 and 13.3.2001 were challenged by the Bank in two appeals (APO Nos. 57-58/2001) before a Division Bench of the High Court. In support of its contention that C.S. No. 7/1995 should be transferred from the High Court to the Tribunal for being tried with OA No. 170/1995, the Bank relied on Sections 19(6) to (11) of the Debts Recovery Act and the following observations of this Court in *United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd.MANU/SC/0551/2000 :* AIR2000SC2957 :-

> If a set-off or a counter-claim is to be equated to a cross-suit under Section 19, a fortiori there can be no difficulty in treating the cross-suit as one by way of set-off and counter-claim, and as proceedings which ought to be dealt with simultaneously with the main suit by the Bank. "In our view, in the context, the word "counter-claim" in Sections 19(8) to (11) which is equated to a cross-suit, includes a claim even if it is made in an independent suit filed earlier.

6. A Division Bench of the Calcutta High Court dismissed the Bank's appeals by an order dated 10.5.2002. The High Court held that:

> (i) In the absence of a provision in the Debt Recovery Act enabling a borrower to file a suit (application) against the bank or a financial institution,

in the Debt Recovery Tribunal, the jurisdiction of the civil court to entertain a suit filed by the borrower against the bank is not excluded under Section 18 of the said Act.

(ii) Section 31 of the Debts Recovery Act providing for transfer of the pending suits/cases, from courts to tribunals, applies only to those suits or proceedings which were pending before any court immediately before the establishment of a Tribunal under the said Act and will not apply to any suit or proceeding validly initiated in a civil court after the establishment of the Tribunal.

(iii) Sub-section (8) of Section 19 of the Act is merely a provision enabling a defendant (in a Recovery Application filed by the Bank before the Tribunal) to raise a counter-claim in his written statement against the bank, and empowering the Tribunal to try such a counter-claim. Such an enabling provision cannot be construed as ousting or excluding the jurisdiction of the civil court to entertain a suit for damages filed by the borrower against the bank, or enabling the bank to seek transfer of such a suit, to the Tribunal. The observation in Abhijit (supra) that the borrower's suit should be transferred to the Tribunal by treating the independent suit of the borrower as a counter-claim in the application of the Bank, was in exercise of the extraordinary power under Article 142 of the Constitution of India, on the special and peculiar facts of that case. As the High Court in its jurisdiction as a civil court, did not possess the power available to the Supreme Court under Article 142, it could not pass any order for transfer of a suit validly instituted before it, to the Tribunal.

(iv) Even assuming that the High Court could transfer the suit, the basic requirement for transfer laid down in Abhijit (supra), that is, the subject-matter of the borrower's suit pending before the Court, and the Bank's application pending before the Tribunal should be inextricably connected, was not present in this case. Therefore, there could be no transfer.

(v) Where a borrower's suit is deemed to be a counter-claim in respect of the Bank's application, and is transferred to the Tribunal, it would be open for the Bank, to contend, as enabled by Section 19(11) of the Debts Recovery Act, that such suit should be tried independently. If such a contention is accepted by the Tribunal, the suit transferred from the civil court to the Tribunal will have to be re-transferred from the Tribunal to the civil court, as the Tribunal has no jurisdiction to entertain or try an independent suit of the borrower against the bank. That will lead to an anomalous situation.

(vi) The civil court has jurisdiction to try all suits of civil nature, except those excluded by reason of an express or implied bar in a statute. The jurisdiction of a civil court can never be contingent upon an order passed by the Tribunal, and that too on an application by one of the parties to the proceeding before the Tribunal. Nor will the jurisdiction vested in a civil court to proceed with a suit, cease on the Bank or financial institution filing an application for recovery before the Tribunal.

7. The said decision of the Division Bench of the Calcutta High Court is challenged by the Bank in these appeals by special leave, on the ground that the subject matter of the Bank's application and the first respondent's suit were **inextricably connected**,

and though the suit of the borrower was prior to the Bank's application before the Tribunal, in view of the law laid down in *Abhijit* (supra), the borrower's suit should be considered as a counter-claim in the Bank's application before the Tribunal and consequently, transferred to the Tribunal. On the contentions raised, the following questions arise for our consideration:

(a) Whether the subject-matter of the borrower's suit before the High Court and Bank's application before the Tribunal were **inextricably connected**?

(b) Whether the provisions of Debts Recovery Act mandate or require the transfer of an independent suit filed by a borrower against a Bank before a civil court to the Tribunal, in the event of the Bank filing a recovery application against the borrower before the Tribunal, to be tried as a counter-claim in the Bank's application?

(c) Whether the observation in *Abhijit* (supra) that the suit filed by the borrower against the Bank has to be transferred to the Tribunal for being tried as a counter- claim in the applications of the Bank, is to be construed as a principle laid down by this Court, or as an observation in exercise of power under Article 142 in order to do complete justice between the parties?

Re : Question No. (i) :

8. The Bank sanctioned an ad hoc packing credit limit of Rs. 20 lacs on 12.7.1991 and an additional ad hoc packing credit limit of Rs. 5 lacs on 6.12.1991, subject to the terms contained in the Sanction Advice dated 12.7.1991. In regard to the initial limit of Rs. 20 lacs, the company executed an agreement dated 15.7.1991 and its 4 Directors executed a guarantee dated 15.7.1991. In regard to the additional amount of Rs. 5 lacs, a promissory note and an agreement were executed on 20.11.1991. Claiming that the company failed to pay the amounts advanced, the Bank filed an application before the Tribunal for recovery of Rs. 30,67,820.04. The cause of action for the Bank's application is the alleged non-payment of the amounts advanced to the borrower, in pursuance of ad-hoc limits sanctioned on 12.7.1991 and 6.12.1991. On the other hand, the subject matter of the suit filed by the borrower against the Bank and the cause of action therefor, are totally unconnected with and different from the subject matter of and cause of action for the Bank's application. On the request of the borrower, the Bank by letter dated 19.12.1991 sanctioned several credit facilities to the borrower, namely, (i) a Medium Term Loan of Rs. 90 lacs; (ii) packing credit loan facilities to a limit of Rs. 50 lacs; (iii) bridge loan of Rs. 15 lacs; and (iv) guarantee facility to an extent of Rs. 85.42 lacs. The Bank also agreed to absorb the ad hoc packing credit facilities of Rs. 25 lacs already sanctioned within the fresh limits sanctioned. The borrower alleged that it proceeded to a arrange its affairs and activities on the assumption that the Bank will be releasing the loans; and that the Bank failed to release the credit facilities, thereby putting it (the borrower) to huge losses, apart from denying the profits from the business. Consequently, it filed C.S. No. 7/1995 for recovery of Rs. 25,38,58,000/- made up of Rs. 11,33,22,000/- towards loss of profits, Rs. 10 crores as compensation for loss of goodwill and reputation, Rs. 3.50 crores as damages on account of the impact of inflation and difference in foreign exchange rates, Rs. 31,36,000/- towards expenditure which became infructuous on account of the Bank's failure to release the loans, and Rs. 24 lacs towards interest up to the date of the suit. The cause of action for the borrower's suit is the alleged breach by the Bank, in not releasing the sanctioned loans.

9. The issues that arose in the Bank's application was whether the borrower failed to repay the sums borrowed and whether the Bank was entitled to the amounts claimed. On the other hand, the issues that arose in the borrower's suit were whether the Bank had promised/agreed to advance certain monies; whether the Bank committed breach in refusing to release such loans in terms of the sanction letter; whether the borrower failed to fulfil the terms and conditions of sanction and therefore the Bank's refusal to advance, was justified; and even if there was breach, whether the borrower suffered any loss on account of such non-disbursement and if so whether the borrower was entitled to the amounts claimed. While the claim of the Bank was for an ascertained sum due from the borrower, the claim of the borrower was for damages which required firstly a determination by the court as to whether the Bank was liable to pay damages and thereafter assessment of quantum of such damages. Thus there is absolutely no connection between the subject matter of the two suits and they are no way connected. A decision in one does not depend on the other. Nor could there be any apprehension of different and inconsistent results if the suit and the application are tried and decided separately by different forums. In the circumstances, it cannot be said that the borrower's suit

and the Bank's application were inextricably connected.

Re : Question No. 2 :

10. Section 17 of the Debts Recovery Act deals with jurisdiction, powers and authority of the Tribunals. Sub-section (1) thereof provides that a tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide **applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.** "Debt" is defined under Section 2(g) as follows:

> (g) "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application;

Section 18 provides that on and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Article 226 and 227 of the Constitution) **in relation to the matters specified in Section** 17.

11. Section 19 **related** to the procedure of Tribunal, in regard to filing of applications. Section 19, as it originally stood, was substituted in entirety by Act 1 of 2000. Sub-section (1) of Section 19 provides that a Bank or financial institution can make an application to jurisdictional Debt Recovery Tribunal. Sub-sections (6) to (11) of new Section 19, relevant for our purpose, are extracted below:

> (6) Where the defendant claims to set-off against the applicant's demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set-off.

(7) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

(8) A defendant in an application may, in addition to his right of pleading a set off under Sub-section (6), set up, by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

(9) A counter-claim under Sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

(10) The applicant shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Tribunal.

(11) Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be excluded, and the Tribunal may, on the hearing of such application make such order as it thinks fit.

12. Section 31 of the Debts Recovery Act provides that every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under the said Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal.

13. Section 9 of the Code of Civil Procedure provides that the courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred.

14. It is evident from Sections 17 and 18 of the Debts Recovery Act that civil court's jurisdiction is barred only in regard to applications by a bank or a financial institution for recovery of its debts. The jurisdiction of civil courts is not barred in regard to any suit filed by a borrower or any other person against a bank for any relief. It is not disputed that the Calcutta High Court had jurisdiction to entertain and dispose of C.S. No. 7/1995 filed by the borrower when it was filed and continues to have jurisdiction to entertain and dispose of the said suit. There is no provision in the Act for transfer of suits and proceedings, except Section 31 which relates to suit/proceeding by a Bank or financial institution for recovery of a debt. It is evident from Section 31 that only those cases and proceedings (for recovery of debts due to banks and financial institutions) which were pending before any court immediately before the date of establishment of a tribunal under the Debts Recovery Act stood transferred, to the Tribunal. In this case, there is no dispute that the Debt Recovery Tribunal, Calcutta, was established long prior to the company filing C.S. No. 7/1995 against the bank. The said suit having been filed long after the date when the tribunal was established and not being a suit or proceeding instituted by a bank or financial institution for recovery of a debt, did not attract Section 31.

15. As far as Sub-sections (6) to (11) of Section 19 are concerned, they are merely enabling provisions. The Debts Recovery Act, as it originally stood, did not contain any provision enabling a defendant in an application filed by the bank/financial institution to claim any set off or make any counter claim against the bank/financial institution. On that among other grounds, the Act was held to be unconstitutional (see *Delhi High Court Bar Association v. Union of IndiaMANU/DE/0066/1995 :* AIR1995Delhi323). During the pendency of appeal against the said decision, before this Court, the Act was amended by Act 1 of 2000 to remove the lacuna by providing for set off and counter-claims by defendants in the applications filed by Banks/financial institution before the Tribunal. The provisions of the Act as amended were upheld by this Court in *Union of India v. Delhi High Court Bar AssociationMANU/SC/0194/2002 :*[2002]2SCR450 . The effect of Sub-sections (6) to (11) of Section 19 of the amended Act is that any defendant in a suit or proceeding initiated by a bank or financial institution can : (a) claim set off against the demand of a Bank/financial institution, any ascertained sum of money legally recoverable by him from such bank/financial institution; and (b) set-up by way of counter-claim against the claim of a Bank/financial institution, any right or claim in respect of a cause of action accruing to such defendant against the bank/financial institution, either before or after filing of the application, but before the defendant has delivered his defence or before the time for delivering the defence has expired, whether such a counter claim is in the nature of a claim for damages or not. What is significant is that Sections 17 and 18 have not been amended. Jurisdiction has not been conferred on the Tribunal, even after amendment, to try independent suits or proceedings initiated by borrowers or others against banks/financial institutions, nor the jurisdiction of civil courts barred in regard to such suits or proceedings. The only change that has been made is to enable defendants to claim set off or make a counter-claim as provided in Sub-sections (6) to (8) of Section 19 in applications already filed by the bank or financial institutions for recovery of the amounts due to them. In other words, what is provided and permitted is a cross-action by a defendant in a pending application by the bank/financial institution, the intention being to have the claim of the bank/financial institution made in its application and the counter-claim or claim for set off of the defendant, as a single unified proceeding, to be disposed of by a common order.

16. Making a counter claim in the Bank's application before the Tribunal is not the only remedy, but an option available to the borrower/defendant. He can also file a separate suit or proceeding before a civil court or other appropriate forum in respect of his claim against the Bank and pursue the same. Even the Bank, in whose application the counter-claim is made, has the option to apply to the tribunal to exclude the counter-claim of the defendant while considering its application. When such application is made by the Bank, the Tribunal may either refuse to exclude the counter-claim and proceed to consider the Bank's application and the counter-claim together; or exclude the counter-claim as prayed, and proceed only with the Bank's application, in which event the counter-claim becomes an independent claim against a bank/financial institution. The defendant will then have to approach the civil court in respect of such excluded counter claim as the Tribunal does not have jurisdiction to try any independent claim against a bank/financial institution. A defendant in an application, having an independent claim against the Bank, cannot be compelled to make his claim against the Bank only by way of a counter-claim. Nor can his claim by way of independent suit in a court having jurisdiction, be transferred to a Tribunal against his wishes.

17. In this case, the first respondent does not wish his case to be transferred to the

Tribunal. It is, therefore, clear that the suit filed by the first respondent against the Bank in the High Court for recovery of damages, being an independent suit, and not a counter-claim made in the application filed by the bank, the Bank's application for transfer of the said suit to the Tribunal was misconceived and not maintainable. The High Court, where the suit for damages was filed by the company against the bank, long prior to the bank filing an application before the tribunal against the company, continues to have jurisdiction in regard to the suit and its jurisdiction is not excluded or barred under Section 18 or any other provision of Debts Recovery Act.

Re : Question No. (iii) :

18. Let us examine what happened in Abhijit (supra). A suit (No.410/1985) filed by the Bank in the Calcutta High Court, was disposed of in terms of an alleged compromise on 29.3.1984. The Tribunal was established on 27.4.1994. Subsequently, the compromise decree was set aside by a Division Bench on 11.8.1998 and the said suit stood restored to file. The debtor company filed an application praying that the Bank's suit should be retained on the original side of the Calcutta High Court and should not be transferred to the tribunal, as the said suit was "not pending" on 27.4.1994 and therefore Section 31 of the Debts Recovery Act was not attracted. A learned Single Judge of the Calcutta High Court accepted the said contention and directed that the Bank's suit should be retained and proceeded with before the High Court. That order was challenged by the Bank before this Court. Before this Court, the debtor company urged an additional ground for seeking retention of the Bank's suit in the High Court by contending that the Bank's suit was inextricably connected with a suit filed by it against the Bank (Suit No. 272/1985) and therefore, the Bank's suit should not be transferred to the Tribunal. This Court formulated the following four questions as arising for its consideration:

> (1) Whether Suit No. 410 of 1985 by the Bank which was disposed of by judgment dated 29.3.1994 and which judgment was set aside by the Bench on 11.8.1998 and remanded to the Single Judge, could not be treated as pending immediately before the commencement of the Act on 27.4.1994 (in West Bengal) and whether it could not be transferred to the Recovery Tribunal ?
>
> (2) What is the combined effect of Sections 18 and 31 and of the Act on pending proceedings ?
>
> (3) Whether the pendency of Suit No. 272 of 1985 filed by the debtor Company against the Bank for specific performance and for perpetual and mandatory injunctions raising common issues between parties in both these suits was a sufficient reason for retention of the Bank's suit No. 410 of 1985 on the original side of the High Court to be tried along with Suit No. 272 of 1985 filed by the debtor Company ?
>
> (4) Whether Suit No. 272 of 1985 filed by the debtor Company was, in substance, one in the nature of a "counter-claim" against the Bank and was one which also fell within the special Act by reason of Sections 19(8) to (11) of the Act (as introduced by amending Act 1 of 2000) and if that be so, whether it could still be successfully pleaded by the respondent Company that the pendency of the Company's Suit No. 272 of 1985 was a ground for retention of the Bank's Suit No. 410 of 1985 on the original side of the High Court ?

Though the questions raised were four, the issues were only two. The first was whether suit disposed of on 29.3.1994 and restored on 11.8.1998 could be deemed to be pending on 27.4.1994, when the Tribunal was established, for purpose of Section 31. The second was, whether the Bank's suit, even though liable to be transferred to the Tribunal under Section 31, could be retained in the High Court on the ground that it was inextricably connected with an earlier suit filed by the borrower against the Bank. The question whether a suit filed by the borrower against a Bank in a civil court, could be transferred to the Tribunal against his wishes, neither arose for decision nor was considered or decided.

19. With reference to the first issue, this Court held that when the appeal against the compromise decree dated 29.3.1984 was allowed and the compromise decree was set aside, the suit stood restored and it should be deemed to be pending from 29.3.1984 itself, and consequently, must be deemed in the eye of law to be pending on 27.4.1994 when the Tribunal was constituted at Calcutta, and Sections 18 and 31 of the Debts Recovery Act would apply to the said suit. There is no dispute that the decision of this Court on the first issue is the law declared by this Court.

20. The second issue, as noticed above, was whether the suit of the Bank against the borrower should be retained in the High Court, merely because the borrower's suit was pending in the High Court. There was no application or prayer for transfer of the borrower's suit [OS No. 272/1985] to the Debts Recovery Tribunal. Neither the Bank nor the borrower had sought transfer of the said suit from the High Court. In fact, before the High Court, the borrower had not even contended that the Bank's suit should be retained in the High Court on the ground that it was inextricably connected with its suit pending in the High Court. However, the borrower raised an additional ground in support of its request for retention of the Bank's suit in the High Court, for the first time, in this Court by contending that the subject matter of the Bank's suit was inextricably connected with the subject matter of its suit, and therefore, both should be tried together by the High Court itself. The borrower submitted that as the borrower's suit could not be transferred to the Tribunal, having regard to Sections 17, 18 and 31 of the Debts Recovery Act, the Bank's suit should also not be transferred to the tribunal. This Court held that having regard to the mandate contained in Section 31, it was not possible to retain the Bank's suit before the civil (High) Court on the ground that it was connected with another suit filed against the Bank. This answered the second issue. But this Court thereafter proceeded to consider as an incidental issue whether the borrower's suit could be transferred to the Tribunal as the borrower was insisting that his suit and Bank's suit should be tried together. It found a solution by holding that the principle underlying Sub-section (8) of Section 19 which enabled the defendant making a counter-claim in an application filed by the Bank, can broadly be extended and applied to an independent prior suit of the borrower by considering such suit as a counter-claim, so that both could be transferred to the Tribunal, instead of transferring only the Bank's suit. This Court, however, held so only because of the following circumstances :-

(i) The borrower contended that its suit and the Bank's suit cannot be tried independently, as the subject-matter of its suit and the Bank's suit were inextricably connected;

(ii) the Bank also agreed that the borrower's suit can be tried along with its suit; and

(iii) the court on examination found that the two suits were in fact

inextricably connected.

But the confusion is in regard to this 'incidental' decision/observations made while deciding the second issue. While the Appellant contends that the said incidental observations, made on an issue not arising for decision, are also in the nature of law declared by this Court, the first Respondent contends that they are merely observations made on the peculiar facts and circumstances of that case, in exercise of the power under Article 142 to do complete justice.

21. The first Respondent drew our attention to the following circumstances in support of its contention that the observations relating to treating a borrower's independent suit as a counter claim, was in exercise of power under Article 142:

(a) Though there was no prayer for transfer of the borrower's suit to Tribunal at any stage, this Court held that borrower's suit should be transferred to the Tribunal.

(b) The four questions that were formulated for consideration (extracted above) clearly showed that the question as to whether borrower's suit should be transferred never arose for consideration. In fact, no arguments were addressed by either party on the question whether the borrower's suit can be or should be transferred to the Tribunal.

(c) Sub-section (8) of Section 19 refers only to a counter-claim in the Bank application, and does not contemplate a separate suit filed against a Bank, being treated as a counter-claim.

The first respondent also pointed out that this Court, in the operative portion, only directly transfer of Bank's suit, but not the borrower's suit, to the Tribunal. The first respondent also relied on the following observations/ directions in paras 42, 43, 44 and 45 of the judgment to demonstrate that the decision was by exercising power under Article 142:

Our decision in regard to the real nature of Suit No. 272 of 1985 has become necessary in the context of a plea by the debtor Company that the Company's Suit No. 272 of 1985 is liable to be retained in the civil court and on account of the plea that the connected suit by the Bank Suit No. 410 of 1985 is also to be retained.

We, therefore, direct the Bank's Suit No. 410 of 1985 to be transferred by the Registrar, Calcutta High Court to the appropriate Tribunal under the Act. So far as the debtor Company's Suit No. 272 of 1985 is concerned, **action has to be taken likewise by the Registrar in the light of our finding, which finding has become necessary in view of the contention on behalf of the debtor Company before us, as explained above.**

The pendency of the Company's Suit No. 272 of 1985 in the High Court is no reason for keeping the Bank's suit No. 410 of 1985 in the High Court. Suit No. 410 of 1985 is liable to be transferred to the Tribunal. **Incidentally, we also hold that even Suit No. 272 of 1985 is to be tried only by the Tribunal.**

The appeal is allowed. The order of the learned Single Judge is set aside and Suit No. 410 of 1985 is directed to be transferred by the Registrar, High

> Court to the Tribunal. **In the light of our finding as to the real nature of the Company's Suit No. 272 of 1985, it will be for the Registrar of the High Court to pass appropriate orders.** We hope that appropriate orders will be passed in relation to suit No. 272 of 1985 expeditiously, at any rate, within one month from today.
>
> (Emphasis supplied)

It is further submitted that any direction issued in exercise of power under Article 142 to do proper justice and the reasons, if any, given for exercising such power, cannot be considered as law laid down by this Court under Article 141. It is pointed out that other courts do not have the power similar to that conferred on this Court under Article 142 and any attempt to follow the exercise of such power will lead to incongruous and disastrous results.

22. Though there appears to be some merit in the first Respondent's submission, we do not propose to examine that aspect. Suffice it to clarify that the observations in *Abhijit* that an independent suit of a defendant (in Bank's application) can be deemed to be a counter claim and can be transferred to the Tribunal, will apply only if the following conditions were satisfied :-

> (i) The subject matter of Bank's suit, and the suit of the defendant against the Bank, should be inextricably connected in the sense that decision in one would affect the decision in the other.
>
> (ii) Both parties (the plaintiff in the suit against the Bank and the Bank) should agree for the independent suit being considered as a counter-claim in Bank's application before the Tribunal, so that both can be heard and disposed of by the Tribunal.

In short the decision in *Abhijit* is distinguishable both on facts and law.

23. One word before parting. Many a time, after declaring the law, this Court in the operative part of the judgment, gives some directions which may either relax the application of law or exempt the case on hand from the rigour of the law in view of the peculiar facts or in view of the uncertainty of law till then, to do complete justice. While doing so, normally it is not stated that such direction/order is in exercise of power under Article 142. It is not uncommon to find that courts have followed not the law declared, but the exemption/relaxation made while moulding the relief in exercise of power under Article 142. When the High Courts repeatedly follow a direction issued under Article 142, by treating it as the law declared by this Court, incongruously the exemption/relaxation granted under Article 142 becomes the law, though at variance with the law declared by this Court. The courts should therefore be careful to ascertain and follow the ratio decidendi, and not the relief given on the special facts, exercising power under Article 142. One solution to avoid such a situation is for this Court to clarify that a particular direction or portion of the order is in exercise of power under Article 142. Be that as it may.

Conclusion

24. In view of the above, we find that the order of the High Court does not call for any interference. These appeals are accordingly dismissed. Parties to bear their respective costs.

Equivalent Citation: 2006(5)ESC164(SC), [2007(113)FLR639], [2007(1)JCR62(SC)], JT2006(12)SC209, (2007)ILLJ202SC, 2006(4)PLJR222, 2006(9)SCALE468, (2006)8SCC381, (2006)SCC(LS)1986, [2006]Supp(6)SCR512, 2006(6)SLR33(SC)

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 4191 of 2004

Decided On: 22.09.2006

Appellants:**Ram Pravesh Singh and Ors.**
Vs.
Respondent:**State of Bihar and Ors.**

Hon'ble Judges/Coram:
B.P. Singh and R.V. Raveendran, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: P.S. Mishra, Sr. Adv., Gaurav Agrawal, Upendra Mishra, Dhruv Kumar Jha and Prashant Kumar, Advs.

For Respondents/Defendant: Kailash Yadav, Sr. Adv., Navin Prakash, Nishakant Pandey, Gopal Singh and Chander Shekhar Ashri, Advs.

Case Category:
SERVICE MATTERS - CONDITION OF SERVICE

JUDGMENT

R.V. Raveendran, J.

1. Appellants who were the employees of Futwah Phulwarishariff Gramya Vidyut Sahakari Samiti Ltd., a co-operative society under liquidation, have challenged the order dated 30.9.2002 passed by the Patna High Court, dismissing their appeal (L.P.A. No. 1030/2002) against the order dated 24.2.2002 passed by a Single Judge rejecting their writ petitions.

2. Prior to 1976, Bihar State Electricity Board (for short, 'the Board') was supplying electricity to the rural areas surrounding Patna. In the year 1976, the Bihar Government, the Board and Rural Electrification Corporation brought into existence a society registered under the Bihar Co-operative Societies Act, known as the 'Futwah - Phulwarishariff Gramya Vidyut Sahakari Samiti Ltd. (for short 'the Society') to implement a REC Scheme for better distribution of electricity to rural areas. The state government granted a licence dated 24.8.1976 to the society, under Section 3 of the Indian Electricity Act, 1910 ('Act' for short) to supply electricity to the Futwah and Phulwari Sharif Blocks, for a period of 20 years, with options to the licencee to extend the period of licence.

3. By letter dated 23.4.1993, the Board recommended to the State Government, to revoke the licence granted to the Society and merge the Society with the Board, assigning three reasons : (i) The purpose for which the Society was created no longer existed. (ii) The Society was drawing electricity from multiple points in the Board's distribution network, making it difficult to ascertain the actual quantity of electricity drawn by the Society. (iii) The financial position and management of the

Society was in a very bad shape and huge arrears were due from the Society to the Board, in spite of Board supplying it to the Society at 7 paise per unit (as against the Board's cost price of 90 to 115 paise per unit).

4. The State Government, after considering the matter, issued a notification dated 25.4.1995, in exercise of its power under Sections 4 and 5 of the Act revoking the licence dated 24.8.1976 granted to the Society. The State Government also constituted a Committee to evaluate the assets of the society which had to be transferred to the Board. The Committee was also required to consider whether it would be useful for the Board to absorb some of the employees of the Society. At a Meeting held on 18.9.1995 (as per Minutes drawn up on 10.11.1995), the said Committee made the following suggestions:

(a) The Society should be liquidated in view of the cancellation of the licence;

(b) The Liquidator of the Society should realize the amounts due to the Society and also invite claims from creditors of the Society for settlement of claims;

(c) The amounts due in regard to the electricity supplied up to the date of cancellation (25.4.1995) should be credited to the Society, and the amounts due for electricity supplied thereafter should be received by the Board;

(d) The accounts relating to the income and expenditure of the Society and the Board be maintained separately, from the date of cancellation of licence, so that they could settle the accounts between them; and

(e) The Board should consider taking work from the employees of the society and pay salary to them. The Board may also consider absorbing the eligible employees of the Society after examining whether they were qualified for the posts and were duly appointed and whether their pay-fixation has been properly done.

5. The State Government by letter dated 2.1.1996 requested the Board to implement the suggestion of the Committee relating to the employees of the society that the Board should take work from the employees of the society and pay their salaries, and also consider the absorption of eligible employees. Some assurance was also held out in 1996 on the floor of the Legislature that the Board will be persuaded to take over the undertaking of the society with its employees. However, thereafter, the State Government took a decision that the assets and liabilities of the society should be transferred to the Board, but not the services of the employees of the Society. The said decision was communicated by the Secretary, Energy Department to the Secretary, Cooperative Department and the Board, by letter dated 24.2.1997.

6. In view of the rejection of the proposal for absorption of services of employees of the Society by the Board, several representations were sent by the Administrator of the Society to the State government to absorb the services of the employees of the society. The Administrator of the Society also furnished a list of employees of the Society with particulars of designations and educational and technical qualifications to the State Government. The number of employees is 225 ranging from Engineers to Class IV employees. The said list was forwarded by the State Government to the Board on 14.7.1999 with a request to ascertain the existing vacancies in the Board. There were some more correspondence relating to the suggestions from various

quarters, for absorption of the suitable and fit employees of the Society by the Board.

7 . But the Board did not absorb the services of the employees of the Society. Therefore, the employees of the society (appellants) filed CWJC Nos. 1503 of 2000 and 14394 of 2001 seeking a direction to the Board to absorb them in equivalent posts with continuity of service and also pay their arrears of salaries, allowances and other dues. They contended that they had a right, both in law and in equity, as also a 'legitimate expectation' to be absorbed into the services of the Board, for the following reasons:

a) The Committee constituted by the State Government had recommended that the Board should take work from the employees of the society and ultimately absorb them;

b) The employees of the society have a 'legitimate expectation' that they should be absorbed by the Board for the following reasons:

(i) Initially several private companies were generating and distributing electricity in the State. When the Board was constituted, the undertakings of all those private companies were taken over and their employees were all absorbed in the services of the Board.

(ii) Whenever the undertaking of any company or institution was taken over by any statutory body or corporation, the services of employees of such undertaking are also normally taken over.

(iii) When an 'undertaking' is purchased, in the absence of an intention to the contrary, all the assets and liabilities, as also the services of all employees are transferred to the purchaser and therefore the Board cannot refuse to absorb them.

(iv) When certain departments were abolished by the State of Bihar, this Court and the High Court had passed several orders directing absorption of the retrenched employees in other departments of the state government.

(v) The society was constituted by the Board and the state government to discharge the functions which were earlier being carried on by the Board. The licence granted to the society to distribute electricity was subsequently revoked on the recommendation of the Board. The Board has expressed its readiness to take over the undertaking of the Society. The Board has in fact taken over the assets of the Society and discharging the functions of the society without any interruption, on revocation of the Society's licence on 25.4.1995.

(vi) The Board had extracted some work from the employees of the society from 25.4.1995 till May, 1996.

c) There are large number of vacancies in the Board in various categories of posts and there would be no difficulty for absorption of their services by the Board.

d) All the employees of the society have crossed the maximum age limit for

seeking fresh employment and if they were not absorbed by the Board, they will be deprived of their livelihood.

e) The society was an instrumentality of the State Government and the Board, and answered the definition of 'State' within the meaning of that expression in Article 12 of the Constitution of India. When the undertakings of such instrumentality of the state was taken over by another instrumentality of the State, 'fairness in action' which is one of the hallmarks of a 'State' require that the rights of the employees are protected by providing for their absorption in an appropriate manner.

The State Government, in its counter, while denying the claim of the writ petitioners, however, admitted that in August, 2001, it had taken a decision that when the prohibition against recruitment in the Board is lifted and appointments are made in future, preference should be given to the eligible employees of the society if necessary by granting relaxation of the age limit.

8 . A learned single Judge of the High Court rejected the said contentions and consequently, dismissed the writ petitions by order dated 24.2.2002. He held:

(i) The state government had not given any specific direction to the Board to absorb the services of the employees of the society. Any decision taken by the state government that as and when prohibition against recruitment was lifted and appointments were to be made, the Board should give preference to the eligible employees of the society, was not by itself a direction to the Board. At all events, having regard to Section 78A of the Electricity (Supply) Act, 1948 the State Government can issue direction only in regard to matters of policy, but could not issue a direction to appoint or absorb any employee of the society in its service as that would amount to encroachment of Board's power under Section 15 of the Act -- vide Rakesh Ranjan Verma v. State of Bihar MANU/SC/0817/1999 : 1999CriLJ3484 .

(ii) Even if the society was to be considered as an instrumentality of the State, that would not assist the appellants to contend that the society was an extension of the Board, nor cast any obligation on the Board to absorb the employees of the society. When the licence granted under Section 3 of the Act was revoked and the undertaking of the Society (licencee) was agreed to be purchased by Board, the provisions of the Act governed the matter and those provisions did not enable the appellants to claim any right of being absorbed in the services of the Board.

(iii) The fact that the Board took over the undertakings of the private companies which were generating and distributing electrical power till then, along with the services of the employees of such private undertakings, did not have any relevance to the appellants' claim for absorption. The undertakings and services of employees of the erstwhile licencees were taken over several decades ago when the Board was constituted and when the Board was financially and administratively in a completely different position. As the financial position of the Board was presently precarious due to various circumstances, in particular, setting up of Jharkhand State Electricity Board following the reorganization of the state of Bihar and as the Board itself was considering retrenchment of large number of its existing employees, it cannot be compelled to take over the services of the employees of the society in the

absence of any legal right in the appellants.

(iv) It could not direct absorption on equitable grounds. Any equitable consideration of the claim of the appellants cannot ignore the financial position of the Board, howsoever sympathetically the court may view the plight of the appellants. The state government, being interested in the welfare of the employees of the society had considered several alternatives to rehabilitate the employees of the Society. In the course of exploring the various alternatives, information was sought by the Government, views were expressed and assurances were made on the floor of the House, to explore the possibility of the Board absorbing the services of the employees of the society. But that did not create any right in the employees of the society to seek employment from the Board. In the absence of any specific decision by the Board or assurance by the Board to absorb the services of the appellants, the principle of 'legitimate expectation' was not attracted.

(v) Having regard to Section 7 and 7A of the Act, when the undertaking of a licensee was purchased by the Board, there was no obligation on the part of the Board to absorb the employees of the erstwhile licensee.

9. The Letters Patent Appeal filed by the appellants against the said decision of the learned single Judge was dismissed by a Division Bench by a brief order dated 30.9.2002, both on the ground of limitation and on merits, thereby affirming the decision of the learned single judge. The said order is challenged in this appeal. On the contentions urged, the following question arises for our consideration:

Whether there is any obligation on the part of the Board - either contractual or statutory, or on equitable considerations-to absorb the services of the appellants?

Contractual Obligation:

10. The licence granted to the society under Section 3 of the Indian Electricity Act, 1910 was revoked by the State Government on 25.4.1995. It is no doubt true that on such revocation, the Board took over the entire activities of the society relating to distribution of power to the licensed areas. The Board also gave its concurrence to purchase the undertaking of the society. But the Board neither entered into any contract with the society, nor gave any assurance to the Society or its employees to absorb the employees of the society into its service. Therefore, obviously, there is no contractual obligation on the part of the Board to absorb the services of the appellants.

Statutory Obligation:

11. Section 3 of the Act dealt with grant of licence by the State Government to any person to supply energy in any specified area. Section 4 dealt with revocation of such licences. The provisions that would have effect when a licence was revoked, were listed in Section 5. Section 6 gave the option to the Electricity Board and the State Government to purchase the undertaking of a licensee, in the circumstances mentioned therein. Section 7 provided for vesting of the undertaking of the licensee sold to a purchaser under Section 5 or 6. Section 7A provided for determination of the purchase price. None of these provisions of the Act required the purchaser of the undertaking to take over the services of the employees of the Society. The appellants have not been able to show any other statutory provision which entitles them to seek

absorption by the Board. Hence, there is no statutory obligation to absorb them into Board's service.

Equitable considerations:

12. Realising that the appellants had no contractual or statutory right, learned Counsel for the appellants sought to derive support for the claim on equitable considerations, by placing reliance on an amalgam of the principles relating to legitimate expectation, fairness in action and natural justice, reiterating the contentions urged before the High Court.

13. It may be true that when the Board took over the undertakings of the erstwhile private licencees several decades ago, it also took over the services of the employees of such private licensees. It is also possible that this Court in exercise of its jurisdiction under Article 142, on the facts of a given case, might have directed that the persons, whose services had been terminated on account of closure of an instrumentality of the State, be continued in the service of Government Departments or other Government Corporations. It may also be true that certain enactments providing for transfer of undertakings in pursuance of nationalization or otherwise, had also provided for continuation/transfer of the services of the employees of the undertakings to the transferee. But these do not attract the principle of 'legitimate expectation'.

14. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above 'fairness in action' but far below 'promissory estoppel'. It may only entitle an expectant : (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, courts may grant a direction requiring the Authority to follow the promised procedure or established practice.

A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'.

The doctrine of legitimate expectation based on established practice (as contrasted from legitimate expectation based on a promise), can be invoked only by someone who has dealings or transactions or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognized legal

relationship with the authority.

A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered into any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly.

15. In *Union of India v. Hindustan Development Corporation MANU/SC/0219/1994 :* AIR1994SC988 , this Court explained the nature and scope of the doctrine of 'legitimate expectation' thus:

> For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. **The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.**
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> (Emphasis Supplied)

This Court also explained the remedies flowing by applying the principle of legitimate expectation:

> ...it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular decision then decision-maker should justify the denial of such expectation by showing some overriding public interest. Therefore even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or restricted. **A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil.** The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public

> interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so then what should be the relief is again a matter which depends on several factors.

16. In *Punjab Communication Ltd. v. Union of India MANU/SC/0326/1999 :* [1999]2SCR1033 , this Court observed:

> The principle of legitimate expectation is still at a stage of evolution. The principle is at the root of the rule of law and requires regularity, predictability and certainty in the Governments dealings with the public. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made.
>
> However, the more important aspect is whether the decision maker can sustain the change in policy by resort to *Wednesbury* principles of rationality or whether the court can go into the question whether the decision-maker has properly balanced the legitimate expectation as against the need for a change.... In sum, this means that the judgment whether public interest overrides the substantive legitimate expectation of individuals will be for the decision-maker who has made the change in the policy. The choice of the policy is for the decision-maker and not for the court. The legitimate substantive expectation merely permits the court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made.

17. Recently, a Constitution Bench of this Court in *Secretary, State of Karnataka v. Umadevi MANU/SC/1918/2006 :*(2006)IILLJ722SC referred to the circumstances in which the doctrine of legitimate expectation can be invoked thus:

> The doctrine can be invoked if the decisions of the administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

Another Constitution Bench, referring to the doctrine, observed thus in *Confederation of Ex-servicemen Associations v. Union of India MANU/SC/8441/2006 :* AIR2006SC2945 :

> No doubt, the doctrine has an important place in the development of Administrative Law and particularly law relating to 'judicial review'. Under the said doctrine, a person may have reasonable or legitimate expectation of being treated in a certain way by an administrative authority even though he

has no right in law to receive the benefit. In such situation, if a decision is taken by an administrative authority adversely affecting his interests, he may have justifiable grievance in the light of the fact of continuous receipt of the benefit, legitimate expectation to receive the benefit or privilege which he has enjoyed all throughout. Such expectation may arise either from the express promise or from consistent practice which the applicant may reasonably expect to continue.

In such cases, therefore, the Court may not insist an administrative authority to act *judicially* but may still insist it to act *fairly*. The doctrine is based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time even in absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised.

18. Let us now examine whether the principles of legitimate expectation can have any application in this case. What transpired several decades ago when the Board commenced its operations and when its finances were sound, cannot have any bearing on its action in the year 1995. The position of the Board vis-Ã -vis the Society in 1995 was completely different from the position of the Board vis-Ã -vis the several ex-licensees when the Board took over their undertakings several decades back. Further, the assumption that whenever an undertaking is taken over, transferred or purchased, the transferee or purchaser should continue the services of the employees of the erstwhile owner of the undertaking, is not sound. In fact, statutory provisions seem to indicate otherwise. Section 25FF of the Industrial Disputes Act, 1947 provides that where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched, except in the cases mentioned in the proviso thereto. Therefore, the natural consequence of a transfer of an undertaking, unless there is a specific provision for continuation of the service of the workmen, is termination of employment of its employees, and the employer's liability to pay compensation in accordance with Section 25F. In *Anakapalle Co-operative Agricultural and Industrial Society Ltd. v.Workmen MANU/SC/0281/1962 :*(1962)IILLJ621SC , a Constitution Bench of this Court rejected the contention of the employees that, on transfer of the undertaking, the employees of the undertaking should be absorbed by the purchaser/transferee of the undertaking. This Court held:

This double benefit in the form of payment of compensation and immediate re-employment cannot be said to be based on any considerations of fair play or justice. Fair play and justice obviously mean fair play and social justice to both the parties. It would, we think, not be fair that the vendor should pay compensation to his employees on the ground that the transfer brings about the termination of their services, and the vendee should be asked to take them back on the ground that the principles of social justice require him to do so and in that sense, the said compensation is distinguishable from gratuity. Therefore, if the transferor is by statute required to pay retrenchment compensation to his workmen, it would be anomalous to suggest that the workmen who received compensation are entitled to claim immediate reemployment in the concern at the hands of the transferee.

19. The Board had never agreed nor decided to take services of any of the employees of the Society. In fact, it is not even the case of the appellants that the Board had at any point of time held out any promise or assurance to absorb their services. When the licence of the Society was revoked, the State Government appointed a Committee to examine the question whether the Board can take over the services of the employees of the Society. The Committee no doubt recommended that the services of eligible and qualified employees should be taken over. But thereafter the State Government considered the recommendation and rejected the same, apparently due to the precarious condition of the Board which itself was in dire financial straits, and was contemplating retrenchment of its own employees. At all events, any decision by the State Government either to recommend or direct the absorption of the Society's employees was not binding on the Board, as it was a matter where it could independently take a decision. It is also not in dispute that for more than two decades or more, before 1995, the Board had not taken over the employees of any private licencee. There was no occasion for consideration of such a course. Hence, it cannot be said that there was any regularity or predictability or certainty in action which can lead to a legitimate expectation.

20. The appellant next submitted that this Court, in some cases, has directed absorption in similar circumstances. Reliance is placed on the decision in *G. Govinda Rajulu v. Andhra Pradesh State Construction Corporation Ltd. MANU/SC/0325/1986 :* (1988)ILLJ328SC . We extract below the entire judgment:

> We have carefully considered the matter and after hearing learned Counsel for the parties, we direct that the employees of the Andhra Pradesh State Construction Corporation Limited whose services were sought to be terminated on account of the closure of the Corporation shall be continued in service on the same terms and conditions either in the government departments or in the government corporations. The writ petition is disposed of accordingly. There is no order as to costs.

The tenor of the said order, which is not preceded by any reasons or consideration of any principle, demonstrates that it was an order made under Article 142 of the Constitution on the peculiar facts of that case. Law declared by this Court is binding under Article 141. Any direction given on special facts, in exercise of jurisdiction under Article 142, is not a binding precedent. Therefore, the decision in Govindarajulu cannot be the basis for claiming relief similar to what was granted in that case. A similar contention was negatived by the Constitution Bench in Umadevi (supra):

> The fact that in certain cases, the Court directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation.

21. We will now consider the contention that the appellants are entitled to relief based on the principle of fairness in action, on equitable considerations. Learned Counsel for the appellants relied on two decisions of this Court in support of his contention *Gurmail Singh v. State of PunjabMANU/SC/0640/1990 :*(1991)IILLJ76SC and Kapila Hingorani v. State of Bihar MANU/SC/0403/2003 : (2003)IIILLJ31SC .

22. The observations in *Gurmail Singh* (supra) on which reliance is placed are extracted below:

> This is where, as here, the transferor and/or transferee is a State or a State

instrumentality, which is required to act fairly and not arbitrarily (see the recent pronouncement in *Mahabir Auto Stores v. Indian Oil Corporation MANU/SC/0191/1990 :*[1990]1SCR818) and the court has a say as to whether the terms and conditions on which it proposes to hand over or take over an industrial undertaking embody the requisite of "fairness in action" and could be upheld. We think that, certainly, in such circumstances it will be open to this Court to review the arrangement between the State Government and the Corporation and issue appropriate directions. Indeed, such directions could be issued even if the elements of the transfer in the present case fall short of a complete succession to the business or undertaking of the State by the Corporation, as the principle sought to be applied is a constitutional principle flowing from the contours of Article 14 of the Constitution which the State and Corporation are obliged to adhere to.

It was very fair on the part of the State Government to decide that, as the tubewells would be operated by the Corporation, it would be prudent to run them with the help of the appellants rather than recruit new staff therefore and that the government should bear the burden of any losses which the Corporation might incur as a result of running the tubewells. But having gone thus far, we are unable to see why the government stopped short of giving the appellants the benefit of their past services with the government when thus absorbed by the Corporation. Such a step would have preserved to the appellants their rightful dues and retirement benefits. The conduct of the government in depriving the appellants of substantial benefits which have accrued to them as a result of their long service with the government, although the tubewells continue to be run at its cost by a Corporation wholly owned by it, is something which is grossly unfair and inequitable. This type of attitude designed to achieve nothing more than to deprive the employees of some benefits which they had earned, can be understood in the case of a private employer but comes ill from a State Government and smacks of arbitrariness. Acting as a model employer, which the State ought to be, and having regard to the long length of service of most of the appellants, the State, in our opinion, should have agreed to bear the burden of giving the appellants credit for their past service with the government. That would not have affected the Corporation or its employees in any way - except to a limited extent indicated below - and, at the same time, it would have done justice to the appellants. We think, therefore, that this is something which the State ought to be directed to do.

But in a case where one or both of the parties is a State instrumentality, having obligations under the Constitution, the court has a right of judicial review over all aspects of transfer of the undertaking. It is open to a court, in such a situation, to give appropriate directions to ensure that no injustice results from the changeover.

These observations have to be understood in the background of the facts of that case. The appellants therein were tubewell operators in the Public Works Department (PWD) of the State Government. The State took a decision to transfer all tubewells to a Corporation wholly owned and managed by the State and as a consequence all the permanent posts with reference to the Tubewell Circle in the PWD were abolished. Notices were served in terms of Section 25F of the Industrial Disputes Act. When those notices were challenged, they were set aside on the ground that they were not in consonance with Clause [c] of Section 25F. The State Government issued fresh

notices of termination and they were also set aside by the High Court on the ground that they did not conform to Clause [b] of Section 25F. Thereafter, the State Government served fresh notices terminating the services in accordance with Section 25F for the third time. The third round notices were also challenged. But the High Court upheld the notices of retrenchment. The order of the High Court was challenged before this Court. During the pendency of the long drawn litigation, the newly formed Corporation decided to take over their services by extending them the same scale of Pay, which they were getting when they were in the employ of the State Government. Therefore, the only grievance that survived for consideration before this Court related to appellants therein being treated as fresh appointees on the dates of their respective appointment by the corporation, thereby denying them the benefit of their past service and seniority. It is in the context of examining the said grievance, this Court made the aforesaid observations. As noticed above, retrenchment under Section 25FF was found to be valid. The Corporation had voluntarily taken over the services of the retrenched employees. The question whether the transferee or the purchaser of the undertaking should absorb the services of the employees of the previous employer was not in issue and therefore, the said decision is of no assistance. On the other hand, what may be relevant are the following observations of the Constitution Bench in *Uma Devi* (supra):

> Obviously, the State is also controlled by economic considerations and financial implications of any public employment. The viability of the department or the instrumentality of the project is also of equal concern for the State. The State works out the scheme taking into consideration the financial implications and the economic aspects. Can the court impose on the State a financial burden of this nature by insisting on regularization or permanence in employment, when those employed temporarily are not needed permanently or regularly? As an example, we can envisage a direction to give permanent employment to all those who are being temporarily or casually employed in a public sector undertaking. The burden may become so heavy by such a direction that the undertaking itself may collapse under its own weight. It is not as if this had not happened. So, the court ought not to impose a financial burden on the State by such directions, as such directions may turn counterproductive.

23. The decision in *Kapila Hingorani* (supra) is an interim order in a public interest litigation. In the State of Bihar, various Government companies and public sector undertakings had not paid salaries to their workmen and other employees for a long time, resulting in deaths and suicides of several employees. The petitioner therein wanted the State to bear the responsibility for payment of salaries. The State resisted the petition on the footing/contending that the liabilities of the company cannot be passed on to the State by taking recourse to the doctrine of lifting the veil or otherwise. This Court issued certain interim directions for disposal of all liquidation proceedings in regard to the Government companies in question and appointment of a Committee to scrutinize (ascertain) the assets and liabilities of the company. This Court also directed the State Government to deposit a sum of Rs. 50 crores before the High Court for disbursement of salaries to the employees. During the course of the said interim order, this Court observed as follows:

> The government companies/public sector undertakings being "States" would be constitutionally liable to respect life and liberty of all persons in terms of Article 21 of the Constitution of India. They, therefore, must do so in cases of their own employees. The Government of the State of Bihar for all intent

and purport is the sole shareholder. Although in law, its liability towards the debtors of the company may be confined to the shares held by it but having regard to the deep and pervasive control it exercises over the government companies; in the matter of enforcement of human rights and/or rights of the citizen to life and liberty, the State has also an additional duty to see that the rights of employees of such corporations are not infringed.

The right to exercise deep and pervasive control would in its turn make the Government of Bihar liable to see that the life and liberty clause in respect of the employees is fully safeguarded. The Government of the State of Bihar, thus, had a constitutional obligation to protect the life and liberty of the employees of the government-owned companies/ corporations who are the citizens of India. It had an additional liability having regard to its right of extensive supervision over the affairs of the company.

The said observations made in an interim order with reference to the State's obligations will not be of any avail to seek employment under the Board. We are not concerned in these appeals about the rights of the employees of the Society vis-Ã -vis the Society or the State Government. We are concerned with a specific question as to whether they can seek absorption under the Board. We may in this behalf refer to the decision of this Court in Bhola Nath Mukherjee v. Government of West Bengal MANU/SC/1020/1997 : (1997)IILLJ59SC relating to transfer of a licensee's undertaking to a State Electricity Board, as a consequence of revocation of the licence. In that case the Board initially allowed the employees of the erstwhile licensee to continue in its service but subsequently introduced terms which rendered them fresh appointees from the date of take over of the undertaking. The question that arose for consideration was whether the employees were entitled to compensation under Section 25FF of the Act; and whether the liability for payment of such compensation under Section 25FF of the Act was on the transferor or the Board. This Court held that employees had no right to claim any retrenchment compensation from the Board, nor did they have any right to claim to be in continuous employment on the same terms and conditions, after the purchase of the undertaking by the Board. The said decision clearly recognises that the Board has no obligation towards the employees of the previous owner of the undertaking.

We therefore find no reason to interfere with the order of the High Court. The appeal is dismissed.

See pages 176-177
for Para 11

MANU/SC/0621/2014

Equivalent Citation: 2015II AD (S.C.) 397, AIR2015SC1267, 2014 (5) AWC 4818 (SC), 2015(1)ESC33(SC), [2014(142)FLR638], 2014(3)J.L.J.R.461, JT2014(8)SC448, 2014(4)PLJR36, 2014(8)SCALE613, (2014)8SCC883, 2014(4)SCT138(SC), 2014(3)SLJ136(SC), 2014(5)SLR485(SC), (2015)1WBLR(SC)795

IN THE SUPREME COURT OF INDIA

Special Leave Petition No. 11684 of 2012, CC Nos. 14663 and 20144 of 2010, CC Nos. 9303, 15876, 16190, 16326, 16327, 16350, 16309, 16325, 16303, 16548, 16723, 16594, 16580, 16582, 16850, 16904, 17204, 17193, 17201, 17192, 17388, 17534, 17507, 17508, 17709, 17711, 17735, 17798, 17888, 17846, 17835, 18261, 18286, 18227, 18312, 18337, 18310, 18423, 18536, 18527, 18526, 18525, 18524, 18535, 18628, 18630, 18767, 18784, 18805, 18802, 18796, 18769, 18857, 18834, 18960, 19116, 19236, 19527, 19590, 19552, 19556, 19580, 19594, 19597, 19599, 19601, 19663, 19727, 19864, 19837, 20024, 20022, 20048, 20291, 20454, 20794, 20891, 21915, 22256, 22255 and 22257 of 2011, CC Nos. 133, 178, 434, 887, 1147, 1166, 1168, 1188, 1200, 1291, 1303, 1306, 1391, 1596, 1637, 1644, 1657, 1653, 1739, 1869, 1864, 1928, 1935, 2209, 2818, 2798, 2821, 2832, 6093, 6483, 6604, 6659, 6800, 6829, 10109, 12769, 13044, 13114, 13300 of 2012, CC Nos. 2335 and 6861 of 2013, CC No. 3626 of 2014, S.L.P. Nos. 30473, 33651 and 35876 of 2011, S.L.P. No. 30751, 6692, 4822, 11690, 11702, 11693, 11694, 11697, 11699, 11703, 11704, 11705, 11706, 11709, 11707, 11710, 11712, 26386, 26388, 26389, 26391, 26306, 26307, 26308, 28655, 28812, 28813, 28814, 28816, 28815, 28818, 28817, 28823, 28819, 28824, 28825, 28827, 28828, 28829, 33343, 33345, 30246, 33347, 33350, 33348, 33352, 33353, 33354, 33356, 35328, 37149, 37151, 37152, 37153, 37154, 39202, of 2012 S.L.P. No. 21554, 15307, 519, 523, 524, 13023, 11072, 11068, 11069, 15852, 5765, 5821, 5753, 5810, 5838, 5751, 9907, 9909, 9912, 9911, 9914, 9915, 9913, 9916, 9918, 10927, 10928, 10929, 10930, 10931, 10936, 10933, 10934, 10935, 10938, 10939, 10941, 10940, 10942, 10943, 13021, 14780, 14782, 15299, 15300, 20830, 15301, 15302, 15303, 15305, 19469, 17618, 20529, 16788 and 18880, 21492 of 2013 and S.L.P. Nos. 8086 and 8103 of 2014

Decided On: 08.07.2014

Appellants: **State of Punjab**
Vs.
Respondent: **Rafiq Masih (White Washer)**

Hon'ble Judges/Coram:
H.L. Dattu, R.K. Agrawal and Arun Mishra, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: L.N. Rao, ASG., Nikhil Nayyar, AAG., Jagdish Singh Chhabra, Joginder Sukhija, Anis Ahmed Khan, Ajay Pal, Kuldeep Singh, Naresh Bakshi, Rachana Joshi Issar, Vineet Bhagat, Vipin Gupta, Ansar Ahmad Chaudhary, Dinesh Verma, Subhasish Bhowmick, Satyendra Kumar, Kanhaiya Priyadarshi, Mukesh Kumar Verma, Ashwani Bhardwaj, Balbir Singh Gupta, Namita Choudhary, Anil Kumar Tandale, Kanchan Kaur Dhodi, S.K. Sabharwal, Sudhir Walia, Abhishek Atrey, Rahul Gupta, Sarad Kumar Singhania and S.L. Aneja, Advs.

ORDER

1. These batch of matters are placed before us for authoritative pronouncement on

the apparent difference of opinion expressed on one hand in the cases of *Shyam Babu Verma and Ors.* v. *Union of India and Ors.* MANU/SC/0654/1994 : (1994) 2 SCC 521 *and Sahib Ram Verma v. State of Haryana* MANU/SC/0848/1995 : (1995) Supp. 1 SCC 18 and on the other hand, in *Chandi Prasad Uniyal and Ors. v. State of Uttarakhand and Ors.* MANU/SC/0656/2012 : (2012) 8 SCC 417. The order of reference made by this Court reads as under:

> In View of an apparent difference of views expressed on the one hand in Shyam Babu Verma and Ors. v. Union of India and Ors. MANU/SC/0654/1994 : (1994) 2 SCC 521 and Sahib Ram Verma v. State of Haryana MANU/SC/0848/1995 : (1995) Supp. 1 SCC 18; and on the other hand in Chandi Prasad Uniyal and Ors. v. State of Uttarakhand and Ors. MANU/SC/0656/2012 : (2012) 8 SCC 417, we are of the view that the remaining special leave petitions should be placed before a Bench of Three Judges. The Registry is accordingly directed to place the file of the remaining special leave petitions before the Hon'ble the Chief Justice of India for taking instructions for the constitution of a Bench of Three Judges, to adjudicate upon the present controversy.

2 . The issue in this matter pertains to the recovery of excess money from the pensionary benefit of the Respondent-white washer, on account of a wrong fixation of pay by the Petitioner No. 4-The Executive Engineer. The Respondent approached the High Court by filing a writ petition. The question of law for consideration before the High Court was: whether the Government is entitled to recover from an employee any payment made in excess of what the employee is otherwise entitled to, in the absence of any fraud or misrepresentation on the part of the employee. The High Court relies on a Full Bench decision, and directed not to recover the excess amount from the Respondent.

3. We have heard Shri L.N. Rao, learned Additional Solicitor General and the learned Counsel for the Respondents.

4. To answer the reference, the decisions need to be considered.

5 . I n *Shyam Babu Vienna's case (Supra)*, this Court while observing that the Petitioners-therein were not entitled to the higher pay scales, had come to the conclusion that since the amount has already been paid to the Petitioner, for no fault of theirs, the said amount shall not be recovered by the Respondent-Union of India. The observations made by this Court in the said case are as under:

> Although we have held that the Petitioners were entitled only to the pay scale of Rs. 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs. 330-560 but as they have received the scale of Rs. 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them.
>
> (Emphasis supplied)

6. In *Sahib Ram Verma's case (Supra)*, this Court once again held that although the Appellant-therein did not possess the required educational qualification, yet the Principal granting him the relaxation, had paid his salary on the revised pay scale.

This Court further observed that this was not on account of misrepresentation made by the Appellant but by a mistake committed by the Principal. In a fact situation of that nature, the Court was pleased to observe that the amount already paid to the Appellant need not be recovered. In the words of the Court:

> Admittedly the Appellant does not possess the required educational qualifications. Under the circumstances the Appellant would not be entitled to the relaxation. The principal erred in granting him the relaxation. Since the date of relaxation the Appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the Appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which Appellant cannot be held to be fault. Under the circumstances the amount paid till date may not be recovered from the Appellant.

7. In our considered view, the observations made by the Court not to recover the excess amount paid to the Appellant-therein were in exercise of its extra-ordinary powers Under Article 142 of the Constitution of India which vest the power in this Court to pass equitable orders in the ends of justice.

8. In *Chandi Prasad Uniyal's case (Supra)*, a specific issue was raised and canvassed. The issue was whether the Appellant-therein can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on his part. The Court after taking into consideration the various decisions of this Court had come to the conclusion that even if by mistake of the employer the amount is paid to the employee and on a later date if the employer after proper determination of the same discovers that the excess payment is made by mistake or negligence, the excess payment so made could be recovered. While holding so this Court observed at paragraphs 14 and 16 as under:

> **14.** We are concerned with the excess payment of public money which is often described as "taxpayers' money" which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see whey the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reason like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.
>
> **16.** The Appellant in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the Appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However we

order that excess payment made be recovered from the Appellants salary in 12 equal monthly instalments.

9. In our view, the law laid down in *Chandi Prasad Uniyal's case*, 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 Article 136 and 142 of the Constitution of India. Distinctively, although the words employed under the two aforesaid provision speak of the powers of this Court, the former vest a plenary jurisdiction in 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.

The word 'complete justice' was fraught with uncertainty until Article 142 of the Constitution received its first interpretation in *Prem Chand Garg v. Excise Commissioner, U.P.* MANU/SC/0082/1962 : AIR (1963) SC 996 which added a rider to the exercise of wide extraordinary powers by laying down that though the powers are wide, the same is an ancillary power and can be used when not expressly in conflict with the substantive provisions of law. This view was endorsed by a Nine-Judges Bench in *Naresh Shridhar Mirajkar v. State of Maharashtra* MANU/SC/0044/1966 : (1966) 3 SCR 744 reiterated by a Seven Judge Bench in*A.R. Antulay v. R.S. Nayak* MANU/SC/0002/1988 : (1988) 2 SCC 602 and finally settled in the*Supreme Court Bar Association v. Union of India* MANU/SC/0291/1998 : (1998) 4 SCC 409.

10. Article 136 of the Constitution of India, confers a wide discretionary power on the Supreme Court to interfere in suitable cases. Article 136 is a special jurisdiction and can be best described in the words of this Court in *Ramakant Rai v. Madab Rai* MANU/SC/0780/2003 : (2003) 12 SCC 395, "It is a residuary power, it is extraordinary in its amplitude, its limits when it chases injustice, is the sky itself". Article 136 of the Constitution of India was legislatively intended to be exercised by the Highest Court of the Land, with scrupulous adherence to the settled judicial principle well established by precedents in our jurisprudence. Article 136 of the Constitution is a corrective jurisdiction that vest a discretion in the Supreme Court to settle the law clear and as forthrightly forwarded in the case of *Union of India v. Karnail Singh* MANU/SC/0636/1995 : (1995) 2 SCC 728, it makes the law operational to make it a binding precedent for the future instead of keeping it vague. In short, it declares the law, as Under Article 141 of the Constitution.

11. 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 rigors of the law. The directions issued by the court can normally be categorized 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 the case of*Indian Bank v. ABS Marine*

Products (P) Ltd. MANU/SC/2046/2006 : 2006 5 SCC 72,*Ram Pravesh Singh v. State of Bihar* MANU/SC/4176/2006 : (2006) 8 SCC 381 and in*State of U.P. v. Neeraj Awasthi* MANU/SC/0358/2006 : (2006) 1 SCC 667, 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 direction 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 have compartmentalized 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.

12. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments and the latter judgment.

13. In that view of the above, we are of the considered opinion that reference was unnecessary. Therefore, without answering the reference, we send back the matters to the Division Bench for its appropriate disposal.

Ordered accordingly.

MANU/SC/0150/2017

Equivalent Citation: AIR2017SC986, 2017 2 AWC1554SC, 2017(2)ESC242(SC), 2017(5)MhLj1, (2017)2MLJ412, 2017(2)SCALE626, (2017)4SCC1, 2017 (2) SCJ 225, 2017(2)SCT150(SC), 2017(3)SLR135(SC)

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 1727, 1720-1724, 1726, 1728, 1729, 1733, 1734-1741, 1742-1749, 1750-1751, 1752, 1753-1758, 1759-1764, 1765, 1766, 1767-1768, 1769-1774, 1776-1787, 1788, 1789-1791, 1792-1794, 1795-1798, 1799-1805, 1806-1808, 1809, 1810-1811, 1812, 1813-1814, 1815, 1816-1817, 1818-1819, 1820, 1822-1824, 1825, 1826, 1827, 1828, 1830, 1831-1832, 1833, 1834, 1835, 1836-1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847-1852 of 2016, Civil Appeal Nos. 2503-2504 of 2017 (Arising out of SLP (C) Nos. 101-102 of 2015) and Civil Appeal No. 2505 of 2017 (Arising out of SLP (C) No. 182 of 2015)

Decided On: 13.02.2017

Appellants: **Nidhi Kaim and Ors.**
Vs.
Respondent: **State of Madhya Pradesh and Ors.**

Hon'ble Judges/Coram:
J.S. Khehar, C.J.I., Kurian Joseph and Arun Mishra, JJ.

Counsels:
For Appearing Parties: R. Venkataramani, Indu Malhotra, Raju Ramachandran, Sr. Advs., Purushaindra Kaurav, AAG, Vijay Kumar, V. Vijay Laxmi, Yashraj Singh Bundela, Neelam Singh, Rajeev Kumar, Thomas Oommen, Bharti Tyagi, Vikram Mehta, Varun Singh, Tanvir Nayar, Prashant Singh, Varun Kumar Tikmani, Raka Chatterjee, Vikas Mehta, Nar Hari Singh, Pragati Neekhra, Sunny Choudhary, Rupali Bandhopadhaya, Nikhil Jain, Aniruddha P. Mayee, Varinder Kumar Sharma, Mohd. Shahid Hussain, Bharat Singh, A.K. Upadhiya, Amit Pawan, Rameshwar Prasad Goyal, Rajender Prasad, Abha R. Sharma, Navin Prakash, Purushottam Sharma Tripathi, Mukesh Kumar Singh, K.S. Srinivasan, Ravi Chandra Prakash, Luv Kumar, L. Nidhiram Sharma, T. Mahipal, Mithilesh Kumar Singh, M. Singh, E.C. Agrawala, Divyakant Lahoti, Parikshit Ahuja, Shashank Garg, Gaurav Jain, Rajul Shrivastava, K. Krishna Kumar, Abhinav Shrivastava, R. Balasubramanian, R.K. Rathore, Vibhu Shankar Mishra, Prabhas Bajaj, Santosh Kumar, Akshay Amritanshu, M.K. Maroria, Mishra Saurabh, Ankit Kumar Lal, Rajeev Kumar Bansal, Brahma Prakash, Sanjeev Bansal, Akshay K. Ghai, C.D. Singh, Dharmendra Kumar Sinha, Arjun Garg, Manish Yadav, Ishan Nagar, Shashank Shekher, Mritunjay Kumar Singh, Gaurav Sharma, Prateek Bhatia, Vara Gaur, Pramod Kr. Sharma, Abhinav Gupta, Advs. for Pratibha Jain, Adv., Hemant Sharma and Ashwani Bhardwaj, Advs.

JUDGMENT

J.S. Khehar, C.J.I.

1. Leave granted in the special leave petitions.

2 . 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. Resultantly, the Appellants approached this Court. The orders of the High Court were affirmed by a Division Bench (hereinafter referred to as, the 'former Division Bench'), on 12.05.2016. 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. 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) referred to above, Hon'ble the Chief Justice of India, constituted this larger Division Bench, to deal with the matter. 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. 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 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, when the two Hon'ble Judges constituting the 'former Division Bench', passed separate orders. According to 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 learned Counsel, emerges from the legal position expressed by this Court in Gaurav Jain v. Union of India MANU/SC/0248/1998 : (1998) 4 SCC 270. 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 12.05.2016), there existed no judgment in the eyes of 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:

After hearing had gone on for sometime, 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 12th May, 2016:

> 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 Hon'ble the Chief Justice of India for appropriate further orders.

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 12th May, 2016, whether the reference required re-hearing of the entire matter, and if not, the limited issue referred for consideration.

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 Hon'ble the Chief Justice of India, for seeking clarification of the Division Bench which passed the order dated 12th May, 2016.

Post the matters for hearing, after clarification.

4. On 30.8.2016, the 'former Division Bench' passed another order, in furtherance of the order extracted above. Relevant extract of the same is reproduced below:

> Pursuant to the Order dated 28th July, 2016 of the larger Bench, the matter was placed before this Bench.
>
> Heard the learned Counsel.
>
> It appears from the above-mentioned order that, it was argued before the larger Bench that by the Order of this Bench dated 12th May, 2016, a Reference was made to a larger Bench. The submission is factually incorrect. It is clear from the Order dated 12th May, 2016 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.
>
> 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.
>
> While one of us (Justice Abhay Manohar Sapre) 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 (Justice J. Chelameswar) 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.

We completely fail to understand the reference made to Article 145(5) of the Constitution in the Order dated 28th July, 2016. 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 re-hearing 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.

Ordered accordingly.

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.

5 . According to Mr. R. Venkataramani, learned senior Counsel appearing for the Appellants in Civil Appeal Nos. 1727, 1720-1724, 1726, 1728, 1776-1787 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, 'the Code of Civil Procedure') and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as, 'the Code of Criminal Procedure') provide for situations, wherein a Court can exercise inherent powers. It was submitted, that inherent powers as contemplated Under Section 151 of the Code of Civil Procedure, and Section 482 of the Code of Criminal Procedure, 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. In order to substantiate his contention, learned Counsel placed reliance on a treatise by Roscoe Pound - An Introduction to the Philosophy of Law, (Sixth Indian Reprint - 2012, published by the Universal Law Publishing Co. Pvt. Ltd.). Learned Counsel invited the Court's attention to the following opinion expressed by the author:

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 Application of Law

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 stature 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?

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 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 had 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 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.

6. It was submitted, that in exercise of judicial intuition and judicial discretion, J. Chelameswar, J. had categorized 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 legitimize 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 its 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.

7. It was also the contention of 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.

8. As a special emphasis, 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.

9. 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. 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 been a better case, than the one in hand, to invoke such power.

10. It was also submitted, that the power conferred on this Court through Article 142, could not be put in a straightjacket. 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 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 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 learned Counsel, was an apt balancing factor, which would also act as a deterrent to others in future.

11. 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.

12. 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 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.

13. It was also the submission of 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 flow. 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 jeopardized. Rather, according to 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 learned Counsel, while benefiting the Appellants, would also benefit the citizens of this country, and would not result in any consequential loss.

14. 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 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 utilization of the "knowledge" acquired by them.

15. On the issue in hand, learned Counsel placed reliance on Union Carbide Corporation v. Union of India MANU/SC/0058/1992 : (1991) 4 SCC 584, and referred to contentions (A) and (B) delineated in paragraph 55 thereof, which are being extracted hereinbelow:

> 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 of the Court dated February 14 and 15, 1989, in so far as they pertain to the quashing of criminal proceedings are without jurisdiction.

In order to invite our attention to the conclusions recorded by this Court, with reference to the above two contentions, learned Counsel pointed out to the following paragraphs of the above judgment:

> **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. MANU/SC/0072/1982 : (1982) 2 SCC 101, the Court said: (SCC pp. 107-08, para 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 Arts. 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 extra-ordinary 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 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.

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.

16. 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 Pvt. 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 vaccum 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 emphasize 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 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 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 behavior in Court of an advocate (always an officer of the Court), the advocate was not only punished (by a Bench of three Justices of the Supreme Court) for contempt of court, but he was also suspended from practice 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 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.

17. Learned Counsel, then drew our attention to the decision in State v. Sanjeev Nanda MANU/SC/0621/2012 : (2012) 8 SCC 450, and pointed out to the following observations recorded therein:

> **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 him, 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 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 utilizing it for the welfare of the nation. According to 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.

18. Learned Counsel also placed reliance on Sushil Ansal v. State MANU/SC/1065/2015 : (2015) 10 SCC 359, and highlighted the position expressed in paragraph 11, which is extracted below:

> **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.

19. Last of all, reliance was placed on Priya Gupta v. State of Chhattisgarh MANU/SC/0437/2012 : (2012) 7 SCC 433, wherein also, illegal admissions were dealt with. In the above judgment, this Court held as under:

> **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. 4,000/- per year. So, they have taken a double advantage. As per their merit, they obviously would not have got admission into the 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 sum of Rs. 5 lakhs to Jagdalpur College, which amount shall be utilized for developing the infrastructure in Jagdalpur College.

20. In order to further illustrate the scope of the exercise of jurisdiction, vested in this Court Under Article 142, learned Counsel placed reliance on Academy of Nutrition Improvement v. Union of India MANU/SC/0805/2011 : (2011) 8 SCC 274. It was submitted, that in the above case, the controversy related to a ban on non-iodized 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:

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 be contrary to any express provision of law.

70. In Supreme Court Bar Assn. v. Union of India MANU/SC/0291/1998 : (1998) 4 SCC 409, 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 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 law maker and its role travels beyond merely dispute settling. It is a 'problem solver in the nebulous areas' (see. K. Veeraswami v. Union of India MANU/SC/0610/1991 : (1991) 3 SCC 655) 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 MANU/SC/0106/2005 : (2005) 3 SCC 284, 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. (supra))".

> **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 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.

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 legitimize 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.

21. Having adverted to the situations wherein this Court has positively exercised power Under Article 142, to provide relief to the concerned parties, 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 Private Limited v. State of Assam, MANU/SC/1860/2009 : (2010) 2 SCC 27, wherein this Court held as under:

> **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 wrong-doer 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 Appellant 1, M/s. Priyanka Estates International (P) Ltd. was 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.

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.

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). Additionally, reference was made to Uttar Pradesh Avas Evam Vikas Parishad v. Uttar Pradesh Power Corporation Limited, MANU/SC/1261/2011 : (2011) 10 SCC 643, wherein our attention was invited to the following observations:

29. Mr. Pallav Shishodia, learned Senior Counsel also urged that the Appellants are migrants from Gujarat. They have settled in Chidambaram about thirty years back and the livelihood of the entire family of the Appellants which comprised of about 40 members is dependant on the saw mill 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 saw mill. 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 upto 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, 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.

It was submitted, 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.

22. Our attention was also drawn to the judgment rendered in State of Punjab v. Rafiq Masih (Whitewasher) MANU/SC/0621/2014 : (2014) 8 SCC 883, 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:

8. In our view, the law laid down in Chandi Prasad Uniyal case, 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 vest 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.

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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 categorized 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 the case of Indian Bank v. ABS Marine Products (P) Ltd. MANU/SC/2046/2006 : (2006) 5 SCC 72, Ram Pravesh Singh v. State of Bihar MANU/SC/4176/2006 : (2006) 8 SCC 381 and in State of U.P. v. Neeraj Awasthi MANU/SC/0358/2006 : (2006) 1 SCC 667, 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 direction 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 compartmentalized 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.

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 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').

23. Mr. Shyam Divan, learned senior Counsel, entered appearance on behalf of an Appellant (in C.A. No. 1752 of 2016). Some of the submissions advanced by 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 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 (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 were discovered to have been tampered, 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 learned Counsel, is a vital factor which needs to be taken into consideration. In addition, learned Counsel invited the Court's attention to certain observations made by the Hon'ble Presiding Judge, which are extracted hereunder:

> **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 others 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. .....

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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).

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36. 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 7 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 (iii) to (vi) of Footnote 7 supra) are demonstrated to be not true (with reference to some of the Appellants).

Footnote 7, referred to in paragraph 36 extracted above, is reproduced below:

7. 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.

Based on the aforesaid observations, 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.

24. In continuation of the above submission, 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 learned Counsel for the rival parties, which are extracted hereunder:

> **34.** From an analysis of the above decisions, the following principles emerge:
>
> **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.
>
> **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.
>
> **3.** The fact that unfair means were adopted by students at an examination could be established by circumstantial evidence.
>
> **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.

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's case provided there is some justifiable material to support the conclusion that the examination process had been tampered with.

In the light of the principles of law emerging from scrutiny of the abovementioned judgments, we are of the opinion that 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?

Based on the principles culled out, the Hon'ble Presiding Judge, recorded the following conclusion in paragraph 38:

38. 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. 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 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's case.

> 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 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.
>
> 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.

A perusal of the aforesaid consideration, according to 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 learned Counsel, that the conclusions recorded by the Hon'ble Presiding Judge (in paragraph 38, 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.

25. Likewise, for the same purpose, learned Counsel placed reliance on the observations recorded by the Hon'ble Presiding Judge (of the 'former Division Bench'):

> 39. 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 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.

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.

26. For the same purpose, as has been recorded hereinabove, learned Counsel for the Appellants, placed reliance on paragraph 46 of the judgment dated 12.5.2016. The same is reproduced below:

> **46.** Coming to the case in hand, the number of students involved is relatively huge. (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). 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.

27. Last of all, it was the submission of learned Counsel for the Appellants, that the Hon'ble Presiding Judge, in his order dated 12.5.2016, 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 paragraph 55 of the judgment dated 12.5.2016, wherein the Hon'ble Presiding Judge observed as under:

> 55. 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 Act. 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.

Taking note of the observations extracted above, according to 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.

28. 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 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.

29. All put together, 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. 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.

30. Mr. Sidharth Luthra, Senior Advocate, represented the Appellants in Civil Appeal Nos. 1729, 1761-1768, 1813-1814 and 1838 of 2016. At the outset, it was submitted, that the Appellants in the above mentioned 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. Learned Counsel, adverted to the divergent views expressed by the members of the 'former Division Bench' (through their respective orders, dated 12.5.2016) 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:

> 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 years. The abovementioned exercise would require the ascertainment of the views of 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.

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:

> **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 (supra). Beyond this, in my view, the Appellants are not entitled to claim any indulgence.

31. 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 Appeal Nos. 1767-1768 of 2016, 1813-1814 and 1838 of 2016 had cleared the second/third professional examinations, under orders of the High Court and/or this Court. Their academic record in school (class 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 Vypam, 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, was based on a general analysis, and not, on any individual determination of guilt.

32. 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 doctors) in India, specially 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. Replying on statistics of March 31, 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 pediatricians 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 December

12, 2015).

33. 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 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.

34. 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. 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 undertakings given by these Appellants is extracted below:

> The Appellants would serve in Government Hospitals/Government Health Centers 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 centers 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 centers 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 MANU/SC/0621/2012 : (2012) 8 SCC 450].

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.

In this behalf, reliance was placed on the Rafiq Masih case (supra), 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:

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. ABS Marine Products (P) Ltd. MANU/SC/2046/2006 : (2006) 5 SCC 72, Ram Pravesh Singh v. State of Bihar MANU/SC/4176/2006 : (2006) 8 SCC 381 and in State of U.P. v. Neeraj Awasthi MANU/SC/0358/2006 : (2006) 1 SCC 667,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 direction 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 case.

35. 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 v. Idu Beg MANU/UP/0001/1881 : ILR (1881) 3 All 776, 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:

> ... 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 it is to be observed that Section 304A, 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 willfully caused, is excluded. Section 304A 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.

36. Mr. Raju Ramachandran, learned senior Counsel, appearing for the Appellants in Civil Appeal Nos. 1795-1798 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.

37. It was asserted by learned Counsel, that admissions to academic institutions of higher learning, involved a cut-throat competition. The admission-competition, according to 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 pressurized 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.

38. 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).

39. It was emphasized, by 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) were juvenile, when they had appeared for the Pre-Medical Test, and even for this reason, they could not be held responsible for any wrong doing, whether it emanated from a misrepresentation-simpliciter, or misrepresentation - having the trappings of fraud.

40. 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 short-listing 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 learned Counsel, was founded on a regime of penance, to be served by the Appellants.

41. Learned Counsel repeatedly emphasized, 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 the Sanjeev Nanda case, (supra), and our attention was drawn to the following:

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.

Learned Counsel whilst placing reliance on the observations in the Sanjiv Nanda case (supra) 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.

42. Ms. Indu Malhotra, learned senior Counsel, representing some of the Appellants, adopted the submissions advanced by her learned colleagues. In addition, 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 concerned students, could not conclusively justify the guilt of some of the Appellants.

43. 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 highlighted, that the conclusion drawn by Vyapam, against the Appellants, was based on a generalized 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 learned Counsel was at pains to highlight, some illustrative instances, with reference to some of those whose admissions were

cancelled by Vyapam.

44. 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, and their subsequent order dated 30.8.2016, 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 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 re-appreciation of a finding concurrently recorded by the 'former Division Bench', despite the submissions, emphatically advanced. We have placed on record (in paragraph 4 hereinabove), the observations recorded by the 'former Division Bench' in its order dated 30.8.2016. We record our concurrence, with the said observations. Needless to mention, that by passing our order dated 28.7.2016, 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 utilized, 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), for which the clarification was sought.

45. 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 Ors. 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. 539/2013 was accordingly registered on 7.7.2013, at Rajendra Nagar Police Station, Indore.

46. Arrests of the Accused in Crime No. 539/2013 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.

47. It was submitted, that the investigation of Crime Case No. 539/2013 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).

48. 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. 20342/2013 (Pratibha Singh v. State of Madhya Pradesh), and other connected matters. All the writ petitions were dismissed by the High Court, on 11.4.2014. 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, was assailed before this Court, through SLP(C) Nos. 13629-13630 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, and the latter on 8.8.2014. It was therefore contended, that on a controversy identical to the one in hand, this Court has already concluded the matter, against the Appellants.

49. 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 (Nitu 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. It is therefore apparent, according to 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, for exactly the same reasons, as were recorded by the High Court, for upholding the cancellation orders pertaining to admissions made during 2013.

50. The above order dated 24.9.2014 was assailed by the Appellants herein, wherein the members of the 'former Division Bench', passed separate orders on 12.5.2016, details whereof have already been recorded hereinabove.

51. For the reason, that the Appellants had not gained admission to the MBBS course, on their own merit, it was contended by 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.

52. 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 middle-men. 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.

53. 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 19.5.2015 and 8.8.2014). It was submitted, that it was not open to the Appellants, to seek a relief, which was not granted to others, similarly situated.

54. It was also pointed out, by 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 learned Counsel, would amount to giving premium to the Appellants, for their wrongful actions.

55. It was also submitted by 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.

56. 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 Ors. 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.

57. 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 realized, 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 20012. 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.

58(i). Learned Counsel representing Vyapam placed reliance on Vinod Bhandari v. State of Madhya Pradesh,MANU/SC/0098/2015 : (2015) 11 SCC 502. The instant judgment pertained to an application filed by an Accused in the Vyapam scam, seeking bail. Bail having been declined 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.

(ii). Reliance was also placed on Mridul Dhar v. Union of India MANU/SC/0029/2005 : (2005) 2 SCC 65. The instant case also related to admission to the MBBS course. The seriousness of the process of admission was noticed by this Court in paragraph 7 of the above judgment, which is extracted below:

> **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.

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 regularization of a tainted admission process, on those who had been

deprived of admission, despite their merit.

(iii) Reliance was also placed on Gurdeep Singh v. State of J & K MANU/SC/0415/1993 : 1995 Supp (1) SCC 188. The instant case, also pertained to admission to MBBS course, wherein this Court observed, as under:

> **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. Appellant should now be given the seat. By an earlier interlocutory order, a seat had been directed to be kept vacant for Appellant's benefit in the event of his success. We direct the authorities to admit Appellant to the course within two weeks from today. We therefore, allow this appeal, set aside the order dated August 10, 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.

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

(iv) Reliance was also placed on Tanvi Sarwal v. Central Board of Secondary Education MANU/SC/0681/2015 : (2015) 6 SCC 573. 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. 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, learned Counsel, placed reliance on the following observations:

> **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 the prolonged anguish and anxiety if involved in the ordeal of court cases. Acting on this option, would in our estimate, amount to driving knowingly 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.

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.

(v) Reliance was then placed on Abhyudya Sanstha v. Union of India MANU/SC/0612/2011 : (2011) 6 SCC 145. 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. Learned Counsel, drew the Court's attention, to the following observations:

> **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.
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> **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 Services Authority shall be entitled to recover the amount of cost as arrears of land revenue.
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> **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.

Based on the aforesaid observations, it was submitted, that this Court in the above judgment consciously refused to regularize the admission of 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.

(vi) Learned Counsel briefly invited our attention to Director (Studies), Dr. Ambedkar Institute of Hotel Management, Nutrition and Catering Technology, Chandigarh v.

Vaibhav Singh Chauhan MANU/SC/4557/2008 : (2009) 1 SCC 59, and highlighted the following observations recorded therein:

> **12.** The learned Single Judge in the interim order has then emphasised on the fact that the Respondent had apologized 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.

Learned Counsel having referred to the above observations, emphasized, that there could be no leniency for manipulations in dealing with the matter of admissions.

(vii) Last of all, learned Counsel placed reliance on Kerala Solvent Extractions Ltd. v. A. Unnikrishnan MANU/SC/0885/1993 : (2006) 13 SCC 619, so as to emphasise on the words of caution, expressed by a three-Judge Division Bench of this Court, wherein it observed as under:

> **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. 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.
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> **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.

Relying on the above observations, it was contended, that legitimizing "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.

59. 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.

60. During the course of hearing, 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 homogenous. It was submitted, that public perception had inevitably to be heterogeneous, as the society itself was heterogeneous. According to 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 learned Counsel, was sought to be substantiated, by placing reliance on E.M. Sankaran Namboodripad v. T. Narayanan Nambiar MANU/SC/0071/1970 : (1970) 2 SCC 325, and People's Union for Civil Liberties v. Union of India MANU/SC/0336/2005 : (2005) 5 SCC 363.

61. 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 learned Counsel, taking into consideration public perception, would render effectuating justice, extremely difficult. It was pointed out, that by sheer experience gained by 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.

62. It was also the contention of 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.

63. 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 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.

64. During the course of hearing, it could not be seriously disputed at the hands of 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 learned Counsel, that the cause and effect of fraud, was determined by the Court of Appeal, in Lazarus Estates, Ltd. v. Beasley, (1956) 1 All E.R. 341. 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:

> 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 Â£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. 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 (2) (1767) (2 Wils. K.B. 342), as to judgments, Duchess of Kingston's Case (3) (1776) (1 Leach 146), and, as to contracts, Master v. Miller (4) (1791) (4 Term Rep. 320). 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.

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.

65(i). 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 concerned helper, 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 we can safely conclude, as based on established fraud.

(ii). 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 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. On a reference by us, the 'former Division Bench', passed a common order on 30.8.2016, affirming, "... 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.

(iii). 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). (iv). This Court, while dealing with admissions during the years 2008 to 2012, followed the earlier judgment, 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 gained admission to the MBBS course, by established fraud, does not (as it indeed, cannot) require any further consideration.

(v). 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.

(vi). 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.

66. 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, and by their common order dated 30.8.2016, 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 paragraph 65, hereinabove.

67. 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 the Union Carbide case (supra), 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 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 Vypam 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 learned Counsel, would persuade this Court, to override the straitjacket examination of the matter, dealt with in the manner, recorded hereinabove.

68. We shall now consider the submission, founded on the interpretation placed by Mr. Fali S. Nariman (see paragraph 16, and onwards), on Article 142 of the Constitution. If the instant contention is acceptable, then surely, according to learned Counsel, it would be possible to overlook the consequences of fraud (refer to, paragraph 64, 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 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 Association v. Union of India MANU/SC/0291/1998 : (1998) 4 SCC 409. 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. In terms of the above judgment, 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-aggrandizement. 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 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 visualize 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 concerned Court, 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.

69. One of the contentions advanced by 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 health care. To demonstrate authenticity, findings recorded by the World Health Organisation, were also brought to our notice (see paragraph 32 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 of, 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.

70. 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. Specially 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, 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.

71. Having given our thoughtful consideration to the issues canvassed on behalf of the Appellants, as has been narrated in the foregoing paragraph, 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 trivialize the declared legal position. Reference in this behalf, may be made to the judgments relied upon by learned Counsel representing Vyapam.

72. It is also not possible for us to accept the contention under consideration, and vehemently canvassed on behalf of the Appellants (recorded in paragraph 70 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 strategize 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.

73. 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 legalized (or legitimized), in the name of justice.

74. 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, legitimize the admissions of the Appellants to the MBBS course, since the same clearly fall in the imprudent category.

75. It was the repeated submission of learned Counsel representing the Appellants, that there would be significant societal benefit, if the academic pursuit of the Appellants is legitimized. During the course of hearing, 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 wrong doing, 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 legitimize acts of fraudulent character. Fraud, cannot be allowed to trounce, on the stratagem of public good.

76. 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 derive 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.

77(i). 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 the Priya Gupta case (supra). It is necessary to emphasise, that 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 the Priya Gupta case would disclose, that admission in the above case, had also not been obtained by rightful means. In the Priya Gupta case, admissions were gained by the Appellants, through acts of conscious manipulation. And yet, this Court had sustained the same, and had legitimized the admission of the Appellants. The Appellants herein, seek a similar treatment.

(ii) 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 learned Counsel, that even in the Priya Gupta case, 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.

(iii) The facts of the cited case (as canvassed, on behalf of the Appellants) reveal, that the Appellants in the Priya Gupta case, 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 legitimize 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 subsidized fee at the 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.

(iv) 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 the Priya Gupta case. It was pleaded, that the course of studies, successfully completed by the Appellants, should be legitimized.

78(i). 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 the Priya Gupta case (supra). 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.

(ii) It is important to highlight, that in the adjudication of the Priya Gupta case (supra), 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.

(iii) To do complete justice between the parties, within the ambit of Article 142, this Court in the Priya Gupta case, permitted the Appellants, to complete their professional courses, in the institutions where they had gained admission "... subject to the condition each one of them pay a sum of Rs. 5 lakhs to the Jagdalpur College, which amount shall be utilized for developing the infrastructure in the Jagdalpur College ...". 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.

(iv) 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 the Priya Gupta case (supra), can be extended to the Appellants herein. In the Priya Gupta case, 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 the Priya Gupta case, 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 the Priya Gupta case.

79. For the reasons recorded hereinabove, we respectfully concur with the judgment dated 12.5.2016, 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 legitimize 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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PROOF OF SERVICE

NGT Chennai- IA No. 48/2020 in Appeal No. 14/2020

1 message

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To: krishnan-mrgk@krslegal.in, darpan.advocate@gmail.com, tvsekar12@rediffmail.com, vasanthhk72@gmail.com, sns2358@yahoo.co.in, Tanya John <tanya@pragatilaw.in>, ajay@pragatilaw.in

Respected Sir/Madam,

Sub: **Yehanka Puttenahalli Lake and Bird Conservation Trust (R) v/s. Ministry of Environment and Forest and Climate Change and Ors.**
I.A. No. 48/2020 in Appeal No. 14/2020
Before the Hon'ble National Green Tribunal, (SZ) Chennai

As per the Order dated 07.06.2021 passed by the Hon'ble NGT, Chennai in the above mentioned matter, kindly find attached herewith the complete set of Written Submissions on behalf of the Appellant/Applicant.

Kindly acknowledge the receipt of the same.

Thanking you,
Yours faithfully,

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