REPORTABLE

IN THE SUPREME COURT OF INDIA
INHERENT JURISDICTION

REVIEW PETITION (CRL.) NO.228 OF 2018
IN
CRIMINAL APPEAL NO.416 OF 2018

UNION OF INDIA .....PETITIONER

VERSUS

STATE OF MAHARASHTRA AND ORS. ....RESPONDENTS

WITH

REVIEW PETITION (CRIMINAL) NO.275 OF 2018
IN
CRIMINAL APPEAL NO.416 OF 2018

J U D G M E N T

ARUN MISHRA, J.

1. The Union of India has filed the instant petition for review of the judgment and order dated 20.3.2018 passed by this Court in Criminal Appeal No.416 of 2018. This Court while dealing with the provisions of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act of 1989') has issued guidelines in paragraph 83 of the judgment, which are extracted hereunder:-

> "83. Our conclusions are as follows:
>
> i) Proceedings in the present case are clear abuse of process of court and are quashed.
>
> ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no *prima facie* case is made out

or where on judicial scrutiny the complaint is found to be *prima facie mala fide*. We approve the view taken and approach of the Gujarat High Court in ***Pankaj D Suthar*** (supra) and ***Dr. N.T. Desai*** (supra) and clarify the judgments of this Court in ***Balothia*** (supra) and ***Manju Devi*** (supra);

iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

The above directions are prospective."

2. This Court, while passing the judgment under review, has observed in paragraph 32 thus:

"32. This Court is not expected to adopt a passive or negative role and remain bystander or a spectator if violation of rights is observed. It is necessary to fashion new tools and strategies so as to check injustice and violation of fundamental rights. No procedural technicality can stand in the way of enforcement of fundamental rights[1]. There are enumerable decisions of this Court where this approach has been adopted and directions issued with a view to enforce fundamental rights which may sometimes be perceived as legislative in nature. Such directions can certainly be issued and continued till an appropriate legislation is enacted[2]. Role of this Court travels beyond merely dispute settling and directions can certainly be issued which are not directly in conflict with a valid statute[3]. Power to declare law carries with it, within the limits of duty, to make law when none exists[4] .

1 Bandhua Mukti Morcha vs. UOI (1984) 3 SCC 161, para 13
2 Vishakha versus State of Rajasthan (1997) 6 SCC 241, para 16; Lakshmi Kant Pandey v. UOI (1983) 2 SCC 244; Common Cause v. UOI (1996) 1 SCC 753; M.C. Mehta v. State of T.N. (1996) 6 SCC 756
3 Supreme Court Bar Assn. v. UOI (1998) 4 SCC 409, para 48
4 Dayaram v. Sudhir Batham (2012) 1 SCC 333, para 18

[Note: For convenience, the cases/citations in the extracts have been renumbered.]

3. Question has been raised by the Union of India that when the Court does not accept the legislative and specific provisions of law passed by the legislature and only the legislature has the power to amend those provisions if the Court finds provisions are not acceptable to it, it has to be struck them down being violative of fundamental rights or in case of deficiency to point out to the legislature to correct the same.

4. The Union of India has submitted that judgment and order dated 20.3.2018 entails wide ramification and it deserves to be reviewed by this Court. It is also submitted that this Court has failed to take note of aspects which would have a significant bearing on the present case.

5. It is submitted that the Act of 1989 had been enacted to remove the disparity of the Scheduled Castes and Scheduled Tribes who remain vulnerable and denied their civil rights. The Statement of Objects and Reasons of the Act of 1989, for which it had been enacted is as under:

> "Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations, and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social, and economic reasons.
>
> 2. ..... When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them.

> When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes and Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of the commission of certain atrocities like making the Scheduled Caste persons ear inedible substances, like human excreta and attacks on and mass killings of helpless Scheduled Castes and the Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes. Under the circumstances, the existing laws like the Protection of Civil Rights Act, 1955 and the normal provisions of the Indian Penal Code have been found to be inadequate to check these crimes. A special legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary."

The preamble to the Act of 1989 states as under:

> "An Act to prevent the Commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto."

Section 18 of the Act of 1989 has been enacted to take care of an inherent deterrence and to instil a sense of protection amongst members of Scheduled Castes and Scheduled Tribes. It is submitted that any dilution of the same would shake the very objective of the mechanism to prevent the offences of atrocities. The directions issued would cause a miscarriage of justice even in deserving cases. With a view to object apprehended misuse of the law, no such direction can be issued. In case there is no prima facie case made out under the Act of 1989, anticipatory bail can be granted. The same was granted in the case in question also.

6. It is submitted that because of the continuing atrocities against the members of the Scheduled Castes and Scheduled Tribes, a commission of offences against them indicated an increase, even the existing provisions were not considered sufficient to achieve the objective to deliver equal justice to the members of the Scheduled Castes and the Scheduled Tribes. Hence, the Act of 1989 had been amended in April 2015, enforced with effect from 26.01.2016.

7. It is further submitted that the amendments broadly related to addition of several new offences/atrocities like tonsuring of head/moustache, or similar acts which are derogatory to the dignity of the members of Scheduled Castes and Scheduled Tribes, garlanding with footwear, denying access to irrigation facilities or forest rights, dispose or carry human or animal carcasses, or to dig graves, using or permitting manual scavenging, dedicating a Scheduled Caste or a Scheduled Tribe woman as devadasi, abusing in caste name, perpetrating witchcraft atrocities, imposing social or economic boycott, preventing Scheduled Caste and Scheduled Tribe candidates from filing nomination to contest elections, insulting a Scheduled Castes/ Scheduled Tribes woman by removing her garments, forcing a member of Scheduled Caste/ Scheduled Tribe to leave house, village or residence, defiling objects sacred to members of Scheduled Castes and Scheduled Tribes, touching or using acts or gestures of a sexual

nature against members of Scheduled Castes and Scheduled Tribes and addition of certain IPC offences like hurt, grievous hurt, intimidation, kidnapping etc., attracting less than ten years of imprisonment committed against members of Scheduled Castes and Scheduled Tribes as offences punishable under the Act of 1989, beside rephrasing and expansion of some of the earlier offences.

8. It is submitted that the provisions have also been made for the establishment of exclusive Special Courts and specification of Exclusive Special Public Prosecutors to exclusively try the offences under the Act of 1989 to enable expeditious disposal of cases, Special Courts and Exclusive Special Courts to take direct cognisance of offences and completion of trial as far as possible within two months from the date of filing of the charge sheet and addition of chapter on the "Rights of Victims and Witnesses".

9. It is also submitted on behalf of Union of India that as per the amendment Rules, 2016 the provisions have also been made with regard to relief amount of 47 offences of atrocities to victims, rationalisation of the phasing of payment of relief amount, enhancement of relief amount between Rs.85,000/- to Rs.8,25,000/- depending upon the nature of the offence, payment of admissible relief within seven days, on completion of investigation and filing of charge sheet within sixty days to enable timely commencement of prosecution

and periodic review of the scheme for the rights and entitlements of victims and witnesses in accessing justice by the State, District and Sub-Division Level Vigilance and Monitoring Committees in their respective meetings.

10. It is submitted that this Court has failed to appreciate that low rate of conviction and high rate of acquittal under the Act of 1989, related cases is attributable to several factors like delay in lodging the FIR, witnesses, and complainants becoming hostile, absence of proper scrutiny of the cases by the prosecution before filing the charge sheet in the Court, lack of proper presentation of the case by the prosecution and appreciation of evidence by the Court. There is long pendency of the trial, which makes the witness to lose their interest and lack of corroborative evidence. There are procedural delays in investigation and filing of the charge sheet.

11. It is submitted that Rule 7(2) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 provides that investigating officer to complete the investigation within 30 days. Without immediate registration of FIR and arrest and by providing anticipatory bail to the accused, Rule 7 is bound to be frustrated.

12. It is further submitted that the directions issued are legislative. It would devoid the object of the Act to remove the caste-based sub-

judication and discrimination. Such directions are impermissible to be issued under Article 142 of the Constitution of India.

13. It is also submitted that offences of atrocities against the members of Scheduled Castes and Scheduled Tribes have been disturbingly continuing and as per the data of National Crime Records Bureau (NCRB), Ministry of Home Affairs, 47,338 number of cases were registered in the country under the Act of 1989 in conjunction with the Indian Penal Code during the year 2016. Further, only 24.5 % of the said cases ended in conviction and 89.3% were pending in the courts at the end of the year 2016. In the circumstances, it is not proper to dilute the provisions and make it easier for the accused to get away from arrest by directing a preliminary enquiry, approval for an arrest.

14. Per contra, it is submitted that directions are proper because of misuse of the legislative provisions of the Atrocities Act, and no case for interference is made out in the review jurisdiction.

15. Before dealing with submission, we refer to the decisions. In *National Campaign on Dalit Human Rights & Ors v. Union of India & Ors.* (2017) 2 SCC 432, this Court has considered the report of Justice K. Punnaiah Commission and the 6th Report of the National Commission for Scheduled Castes/ Scheduled Tribes. The NHRC

report also highlighted the non-registration of cases and various other machinations resorted to by the police to discourage Dalits from registering cases under the Act of 1989. In the said case this Court had directed the strict implementation of the provisions of the Act of 1989. The relevant portion of the decision mentioned above is extracted hereunder:

> "18. We have carefully examined the material on record, and we are of the opinion that there has been a failure on the part of the authorities concerned in complying with the provisions of the Act and the Rules. The laudable object with which the Act had been made is defeated by the indifferent attitude of the authorities. It is true that the State Governments are responsible for carrying out the provisions of the Act as contended by the counsel for the Union of India. At the same time, the Central Government has an important role to play in ensuring the compliance with the provisions of the Act. Section 21(4) of the Act provides for a report on the measures taken by the Central Government and State Governments for the effective implementation of the Act to be placed before Parliament every year. The constitutional goal of equality for all the citizens of this country can be achieved only when the rights of the Scheduled Castes and Scheduled Tribes are protected. The abundant material on record proves that the authorities concerned are guilty of not enforcing the provisions of the Act. The travails of the members of the Scheduled Castes and the Scheduled Tribes continue unabated. We are satisfied that the Central Government and the State Governments should be directed to strictly enforce the provisions of the Act and we do so. The National Commissions are also directed to discharge their duties to protect the Scheduled Castes and Scheduled Tribes. …."

16. Reliance has been placed on *Lalita Kumari v. Government of U.P.*, (2014) 2 SCC 1, wherein a Constitution Bench of this Court has observed as under:

> "35. However, on the other hand, there are a number of cases which exhibit that there are instances where the power of the police to register an FIR and initiate an investigation thereto are misused where a cognizable offence is not made out from the contents of the complaint. A significant case in this context is the case of *Preeti Gupta* v. *State of Jharkhand* (2010) 7 SCC 667 wherein this Court has expressed its anxiety over misuse of Section 498-A of the Penal

> Code, 1860 (in short "IPC") with respect to which a large number of frivolous reports were lodged. This Court expressed its desire that the legislature must take into consideration the informed public opinion and the pragmatic realities to make necessary changes in law.
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> 36. The abovesaid judgment resulted in the 243rd Report of the Law Commission of India submitted on 30-8-2012. The Law Commission, in its report, concluded that though the offence under Section 498-A could be made compoundable, however, the extent of misuse was not established by empirical data, and, thus, could not be a ground to denude the provision of its efficacy. The Law Commission also observed that the law on the question whether the registration of FIR could be postponed for a reasonable time is in a state of uncertainty and can be crystallised only upon this Court putting at rest the present controversy."
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> 99. In *CBI v. Tapan Kumar Singh* (2003) 6 SCC 175, it was held as under: (SCC pp. 183-84, para 20)
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> > "*20.* ……If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage, it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. …..The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation….."

It is apparent from the decision in *Lalita Kumari* (supra) that FIR has to be registered forthwith in case it relates to the commission of the cognizable offence. There is no discretion on the Officer In-charge of the Police Station for embarking upon a preliminary inquiry before registration of FIR. Preliminary inquiry can only be held in a case where it has to be ascertained whether a cognizable offence has been committed or not. If the information discloses the commission of a cognizable offence, it is mandatory to register the FIR under Section

154 of Cr.PC, and no preliminary inquiry is permissible in such a situation. This Court in *Lalita Kumar* (supra) observed as under:

> "54. Therefore, the context in which the word "shall" appears in Section 154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement of the direction to register FIRs, all these factors clearly show that the word "shall" used in Section 154(1) needs to be given its ordinary meaning of being of "mandatory" character. The provisions of Section 154(1) of the Code, read in the light of the statutory scheme, do not admit of conferring any discretion on the officer in charge of the police station for embarking upon a preliminary inquiry prior to the registration of an FIR. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction."

Concerning the question of arrest, in *Lalita Kumari* (supra) this Court has considered the safeguard in respect of arrest of an accused person. This Court affirmed the principle that arrest cannot be made routinely on the mere allegation of commission of an offence. The question arises as to justification to create a special dispensation applicable only to complaints under the Atrocities Act because of safeguards applicable generally.

17. In *State of Haryana & Ors. v. Bhajan Lal & Ors.,* 1992 Supp (1) SCC 335, which has been relied upon in *Lalita Kumari* (supra), this Court has observed as under:

> "31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under

Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "*information*" without qualifying the same as in Section 41(1)(*a*) or (*g*) of the Code wherein the expressions, "*reasonable complaint*" and *"credible information*" are used. Evidently, the non-qualification of the word "information" in Section 154(1) unlike in Section 41(1)(*a*) and (*g*) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that '*every complaint or information*' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(*c*) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the

> substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

The Court observed the conduct of an investigation into an offence after the registration of FIR is a procedure established by law and conforms with Article 21 of the Constitution. This Court has also considered possible misuse of the provisions of the law in *Lalita Kumari* (supra).

18. On behalf of Union of India, the decision in *State of M.P. v. Ram Krishna Balothia* (1995) 3 SCC 221 has been relied on, in which this Court has upheld the validity of Section 18 of the Act of 1989 and observed in background relating to the practice of untouchability and the social attitude which lead to the commission of such offences against the Scheduled Castes/ Scheduled Tribes, there is justification of apprehension that if benefit of anticipatory bail is made available to persons who are alleged to have committed such offences, there is every possibility of their misusing that liberty while on anticipatory bail to terrorise their victims and to prevent a proper investigation. This Court in *Ram Krishna Balothia's* (supra) has observed:

> "6. It is undoubtedly true that Section 438 of the Code of Criminal Procedure, which is available to an accused in respect of offences under the Penal Code, is not available in respect of offences under the said Act. But can this be considered as violative of Article 14? The offences enumerated under the said Act fall into a separate and special class. Article 17 of the Constitution expressly deals with the abolition of 'untouchability' and forbids its practice in any form. It also provides that enforcement of any disability arising out of 'untouchability' shall be an offence punishable under the law. The offences, therefore, which are enumerated under Section 3(1) arise

out of the practice of 'untouchability.' It is in this context that certain special provisions have been made in the said Act, including the impugned provision under Section 18 which is before us. The exclusion of Section 438 of the Code of Criminal Procedure in connection with offences under the Act has to be viewed in the context of the prevailing social conditions which give rise to such offences, and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail. In this connection we may refer to the Statement of Objects and Reasons accompanying the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Bill, 1989, when it was introduced in Parliament. It sets out the circumstances surrounding the enactment of the said Act and points to the evil which the statute sought to remedy. In the Statement of Objects and Reasons, it is stated:

> "Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations, and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons
>
> 2. ... When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes, and Scheduled Tribes is resented, and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Caste persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes.... A special legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary."

The above statement graphically describes the social conditions which motivated the said legislation. It is pointed out in the above Statement of Objects and Reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and cannot be compared with other offences.

> 9. Of course, the offences enumerated under the present case are very different from those under the Terrorist and Disruptive Activities (Prevention) Act, 1987. However, looking to the historical background relating to the practice of "Untouchability" and the social attitudes which lead to the commission of such offences against Scheduled Castes and Scheduled Tribes, there is justification of an apprehension that if the benefit of the anticipatory bail is made available to the persons who are alleged to have committed such offences, there is every likelihood of their misusing their liberty while on anticipatory bail to terrorise their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the said Act. It cannot be considered as in any manner violative of Article 21.
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> 10. It was submitted before us that while Section 438 is available for graver offences under the Penal Code, it is not available for even "minor offences" under the said Act. This grievance also cannot be justified. The offences which are enumerated under Section 3 are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society, and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code."

19. In *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569, this Court has observed that denial of the right of anticipatory bail under section 438 would not amount to a violation of Article 21 of the Constitution of India. Thus, the provision of section 18 cannot be said to be violative of Article 21. Article 17 of the Constitution abolishes untouchability.

20. In *Subramanian Swamy & Ors. v. Raju* (2014) 8 SCC 390, it is observed that where statutory provisions are clear and unambiguous, it cannot be read down and has observed that the statistics are to be considered by a legislature. The Court must take care not to express any opinions on sufficiency or adequacy of such figures and should

confine their scrutiny to legality not a necessity of law. This Court observed:

> "67. Before parting, we would like to observe that elaborate statistics have been laid before us to show the extent of serious crimes committed by juveniles and the increase in the rate of such crimes, of late. We refuse to be tempted to enter into the said arena, which is primarily for the legislature to consider. Courts must take care not to express opinions on the sufficiency or adequacy of such figures and should confine its scrutiny to the legality and not the necessity of the law to be made or continued. We would be justified to recall the observations of Justice Krishna Iyer in Murthy Match Works (1974) 4 SCC 428, as the present issues seem to be adequately taken care of by the same: (SCC p. 437, paras 13-15)
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> > "13. Right at the threshold, we must warn ourselves of the limitations of judicial power in this jurisdiction. Mr. Justice Stone of the Supreme Court of the United States has delineated these limitations in *United States v. Butler*: 80L Ed 477: 297 US 1 (1936) thus: (L.Ed p. 495)
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> > > "The power of Courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that Courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the Courts but to the ballot and to the processes of democratic Government."
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> > 14. In short, unconstitutionality and not unwisdom of a legislation is the narrow area of judicial review. In the present case, unconstitutionality is alleged as springing from lugging together two dissimilar categories of match manufacturers into one compartment for like treatment.
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> > 15. Certain principles which bear upon classification may be mentioned here. It is true that a State may classify persons and objects for the purpose of legislation and pass laws for the purpose of obtaining revenue or other objects. Every differentiation is not a discrimination. But classification can be sustained only if it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. *The constitutional standard by which the sufficiency of the differentia which form a valid basis for classification may be measured has been repeatedly stated by the courts. If it rests on a difference which bears a fair and just relation to the object for which it is proposed, it is constitutional.* To put it differently,

> the means must have nexus with the ends. Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context, we have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification. Of course, in the last analysis courts possess the power to pronounce on the constitutionality of the acts of the other branches whether a classification is based upon substantial differences or is arbitrary, fanciful and consequently illegal. At the same time, the question of classification is primarily for legislative judgment, and ordinarily does not become a judicial question. *A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation."*
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> (emphasis supplied)

It was observed in *Subramanian Swamy* (supra) that where statutory provisions are clear and unambiguous, it cannot be read down. It would not be possible to carry out directions of this Court as number of Dy. S.P. Level Officers is not sufficient to make compliance of the directions.

21. Concerning the exercise of powers under Article 142 of Constitution of India, learned Attorney General has submitted that such power could not have been exercised against the spirit of statutory provisions and to nullify them and field reserved for the legislature as there was no vacuum. He has referred to the following decisions:

(a) In *Supreme Court Bar Association v. Union of India,* (1998) 4 SCC 409, this Court has observed as under:

> "47. .....It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to *ignore* the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. .....
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> 48. .....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 a statute dealing expressly with the subject."

(b) In *Prem Chand Garg v. Excise Commr., AIR 1963 SC 996*, the Court observed that it has no power to circumscribe fundamental rights guaranteed under Article 32 of Constitution of India.

(c) In *E.S.P. Rajaram v. Union of India*, (2001) 2 SCC 186, the Court observed that the Supreme Court under Article 142 of the Constitution could not altogether disregard the substantive provisions of a statute and pass orders concerning an issue, which can be settled only through a mechanism prescribed in another statute.

(d) In *A.R. Antulay v. R.S. Nayak,* (1988) 2 SCC 602, it has been observed that though the language of article 142 is comprehensive and plenary, the directions given by the court should not be inconsistent with, repugnant to or in violation of the specific provisions of any statute.

(e) In *Bonkya v. State of Maharashtra,* (1995) 6 SCC 447, the Court has held that the Court exercises jurisdiction under Article 142 of the Constitution intending to do justice between the parties, but not in disregard of the relevant statutory provisions.

(f) In *M.C. Mehta v. Kamal Nath,* (2000) 6 SCC 213, this Court has observed that Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.

(g) In *State of Punjab v. Rajesh Syal*, (2002) 8 SCC 158, the Court held that even in exercising power under Article 142(1), it is more than doubtful that an order can be passed contrary to law.

(h) In *Textile Labour Association v. Official Liquidator,* (2004) 9 SCC 741, observation has been made that power under Article 142 is only a residuary power, supplementary and complementary to the powers expressly conferred on this Court by statutes, exercisable to do complete justice between the parties wherever it is just and equitable to do so. It is intended to prevent any obstruction to the stream of justice.

(i) In *Laxmidas Morarji v. Behrose Darab Madan,* (2009) 10 SCC 425, it was observed that the Supreme Court would not pass any

order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions.

(j) In *Manish Goel v. Rohini Goel,* (2010) 4 SCC 393, it was observed that the courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. The power under Article 142 not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure.

(k) In *A.B. Bhaskara Rao v. CBI,* (2011) 10 SCC 259, it was held that the power under Article 142 is not restricted by statutory provisions. It cannot be exercised based on sympathy and in conflict with the statute.

(l) In *State of Punjab v. Rafiq Masih,* (2014) 8 SCC 883, this Court held that Article 142 is supplementary and it cannot supplant the substantive provisions. It is a power which gives preference to equity over the law. The relevant portion is extracted hereunder:

> "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 on the qui vive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case."
>
> (emphasis supplied)

22. It is submitted that there was no legislative vacuum calling for the exercise of power under Article 142 of the Constitution of India and hence the reliance on *Vishakha v. State of Rajasthan,* (1997) 6 SCC 241 is misplaced. On the contrary, the matter was covered by the statute; namely, Section 18 of the said Atrocities Act read with Section 41 of Cr.PC.

23. We now propose to examine the law concerning field reserved for the legislature and extant of judicial interference in the field reserved for the legislature. The difference between the common law and statute law has been brought out in the following passage in the book, Salmond on Jurisprudence, 12th Edition; Sweet & Maxwell:

> "In the strict sense, however, legislation is the laying down of legal rules by a sovereign or subordinate legislator. Here we must distinguish law-making by legislators from law-making by the courts. Legislators can lay down rules purely for the future and without reference to any actual dispute; the courts, in so far as they create law, can do so only in application to the cases before them and only in so far as is necessary for their solution. Judicial law-making is incidental to the solving of legal disputes; legislative law-making is the central function of the legislator."

24. In various decisions, this Court has dealt with the scope of judicial review and issuance of guidelines. The directions mentioned

above touch the realm of policy. In *Bachan Singh v. the State of Punjab,* (1980) 2 SCC 684, the Court has laid down and recognised the judicial review thus:

> "67. Behind the view that there is a presumption of constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other. The primary function of the courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making. "The job of a Judge is judging and not law-making." In Lord Devlin's words: "Judges are the keepers of the law, and the keepers of these boundaries cannot, also, be among outriders."
>
> (emphasis supplied)

It has been observed that the Court should not transgress into the legislative domain of policymaking.

25. In *Asif Hameed & Ors. v. State of Jammu and Kashmir & Ors.,* 1989 Supp. (2) SCC 364, this Court has observed that it is not for the Court to pronounce policy. It cannot lay down what is wise or politic. Self-restraint is the essence of the judicial oath. The Court observed:

> "17. Before adverting to the controversy directly involved in these appeals, we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers, including that of finance. Judiciary has no power over sword or the purse; nonetheless, it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the

sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

18. Frankfurter, J. of the U.S. Supreme Court dissenting in the controversial expatriation case of *Trop* v. *Dulles*, 356 US 96 observed as under:

> "All power is, in Madison's phrase, "of an encroaching nature." Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint...
>
> Rigorous observance of the difference between limits of power and wise exercise of power — between questions of authority and questions of prudence — requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do."
>
> (emphasis supplied)

The Court held that it could not affect its notions of what is wise or politic. It is for the legislature to consider data and decide such aspects. The law laid down in *Asif Hameed v. State of Jammu and Kashmir* (supra) has been reiterated by this Court in *S.C. Chandra v. State of Jharkhand*, (2007) 8 SCC 279.

26. In *Indian Drugs & Pharmaceuticals Ltd. v. Workmen, Indian Drugs & Pharmaceuticals Ltd.*, (2007) 1 SCC 408, the Court observed thus:

> "40. The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularisation, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case-law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail in *Rama Muthuramalingam* v. *Dy. Supdt. of Police,* AIR 2005 Mad 1 and we fully agree with the views expressed therein."

27. In *Divisional Manager, Aravali Golf Club v. Chander Hass,* (2008) 1 SCC 683, this Court held as under:

> "18. Judges must` exercise judicial restraint and must not encroach into the executive or legislative domain, vide *Indian Drugs & Pharmaceuticals Ltd.* v. *Workmen* (2007) 1 SCC 408 and *S.C. Chandra* v. *State of Jharkhand* (2007) 8 SCC 279 (see concurring judgment of M. Katju, J.).
>
> 19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily, it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction."

28. In *Kuchchh Jal Sankat Nivaran Samili & Ors. v. State of Gujarat & Anr.,* (2013) 12 SCC 226, it has been observed that Court should not encroach upon the legislative domain. It cannot term a particular policy as fairer than the other. The Court observed:

> "12. We have given our most anxious consideration to the rival submissions, and we find substance in the submission of Mr. Divan. We are conscious of the fact that there is wide separation of powers between the different limbs of the State and, therefore, it is expected of this Court to exercise judicial restraint and not encroach upon the executive or legislative domain. What the

> appellants in substance are asking this Court to do is to conduct a comparative study and hold that the policy of distribution of water is bad. We are afraid; we do not have the expertise or wisdom to analyse the same. It entails intricate economic choices and though this Court tends to believe that it is expert of experts, but this principle has inherent limitation. True it is that the Court is entitled to analyse the legal validity of the different means of distribution but it cannot and will not term a particular policy as fairer than the other. We are of the opinion that the matters affecting the policy and requiring technical expertise be better left to the decision of those who are entrusted and qualified to address the same. This Court shall step in only when it finds that the policy is inconsistent with the constitutional laws or is arbitrary or irrational."
>
> (emphasis supplied)

29. In *Dr. Subhash Kashinath Mahajan v. State of Maharashtra,* (2018) 6 SCC 454, this Court held that no directions could be issued which are directly in conflict with the statute.

30. In *Kesavananda Bharati v. State of Kerala,* (1973) 4 SCC 225, this Court has observed as under:

> 292. The learned Attorney-General said that every provision of the Constitution is essential; otherwise, it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:
>
> *(1) Supremacy of the Constitution;*
>
> *(2) Republican and Democratic form of Government;*
>
> *(3) Secular character of the Constitution;*
>
> *(4) Separation of powers between the legislature, the executive and the judiciary;*
>
> *(5) Federal character of the Constitution.*

31. In *I.R. Coelho v. State of T.N.,* (2007) 2 SCC 1, the following observations have been made:

> "129. Further, the Court in *Kesavananda case* not only held that Article 31-B is not controlled by Article 31-A but also specifically upheld the Twenty-ninth Constitution Amendment whereby certain Kerala Land Reform Acts were included in the Ninth Schedule after

those Acts had been struck down by the Supreme Court in *Kunjukutty Sahib v. State of Kerala,* (1972) 2 SCC 364. The only logical basis for upholding the Twenty-ninth Amendment is that the Court was of the opinion that the mechanism of Article 31-B, by itself, is valid, though each time Parliament in exercise of its constituent power added a law in the Ninth Schedule, such exercise would have to be tested on the touchstone of the basic structure test. [See Shelat & Grover, JJ., paras 607 & 608(7); Hegde & Mukherjea, JJ., paras 738-43, 744(8); Ray, J., paras 1055-60, 1064; Jaganmohan Reddy, J., para 1212(4); Palekar, J., para 1333(3); Khanna, J., paras 1522, 1536, 1537(*xv*); Mathew, J., para 1782; Beg, J., paras 1857(6); Dwivedi, J., para 1994, 1995(4) and Chandrachud, J., paras 2136-41 and 2142(10).]

130. As pointed out, it is a fallacy to regard that Article 31-B read with the Ninth Schedule excludes judicial review in the matter of violation of fundamental rights. The effect of Article 31-B is to remove a fetter on the power of Parliament to pass a law in violation of fundamental rights. On account of Article 31-B, cause of action for violation of fundamental right is not available because the fetter placed by Part III on legislative power is removed and is non-existent. Non-availability of cause of action based on breach of fundamental right cannot be regarded as exclusion or ouster of judicial review. As a result of the operation of Article 31-B read with the Ninth Schedule, occasion for exercise of judicial review does not arise. But there is no question of exclusion or ouster of judicial review. The two concepts are different."

32. In *Bhim Singh v. Union of India,* (2010) 5 SCC 538, it was held as under:

"77. Another contention raised by the petitioners is that the Scheme violates the principle of separation of powers under the Constitution. The concept of separation of powers, even though not found in any particular constitutional provision, is inherent in the polity the Constitution has adopted. The aim of separation of powers is to achieve the maximum extent of accountability of each branch of the Government.

78. While understanding this concept, two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two that in modern governance, a strict separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact, provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability.

***

85. Again, in the Constitution Bench judgment in *A.K. Roy* v. *Union of India* Chandrachud, C.J. speaking for the majority held at p. 295, para 23 that: "our Constitution does not follow the American pattern of a strict separation of powers."

86. This Court has previously held that the taking away of the judicial function through legislation would be violative of separation of powers. As Chandrachud, J. noted in *Indira Nehru Gandhi v. Raj Narain,* 1975 Supp SCC 1: (SCC p. 261, para 689)

> "*689.* … the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our cooperative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances."

This is because such legislation upsets the balance between the various organs of the State thus harming the system of accountability in the Constitution.

87. Thus, the test for the violation of separation of powers must be precisely this. A law would be violative of separation of powers not if it results in some overlap of functions of different branches of the State, but if it takes over an essential function of the other branch leading to lapse in constitutional accountability. It is through this test that we must analyse the present Scheme."

33. In *State of T.N. v. State of Kerala,* (2014) 12 SCC 696, it was observed as under:

> "126. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between the legislature, executive and judiciary may, in brief, be summarised thus:
>
> 126.1. Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation, and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs—legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of powers, the separation of powers between the legislature, executive and judiciary is not different from the Constitutions of the countries which contain express provision for separation of powers.

126.2. Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.

126.3. Separation of powers between three organs—the legislature, executive and judiciary—is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution.

126.4. The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State Legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

126.5. The doctrine of separation of powers applies to the final judgments of the courts. The legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

126.6. If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law.

126.7. The law enacted by the legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. In such situation, the legal effect of the law on a judgment or a judicial proceeding must be examined closely, having regard to legislative prescription or direction. The questions to be asked are:

(*i*) Does the legislative prescription or legislative direction interfere with the judicial functions?

(*ii*) Is the legislation targeted at the decided case or whether impugned law requires its application to a case already finally decided?

(*iii*) What are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality?

> If the answer to Questions (*i*) and (*ii*) is in the affirmative and the consideration of aspects noted in Question (*iii*) sufficiently establishes that the impugned law interferes with the judicial functions, the Court may declare the law unconstitutional."

34. The House of Lords in *Stock v. Frank Jones (Tipton),* 1978 (1) WLR 231 with respect to interpretation of the legislative provisions has observed thus:

> "It is idle to debate whether, in so acting, the court is making law. As has been cogently observed, it depends on what you mean by "make" and "law" in this context. What is incontestible is that the court is a mediating influence between the executive and the legislature, on the one hand, and the citizen on the other.
>
> Nevertheless, it is essential to the proper judicial function in the constitution to bear in mind:
>
> (1) modern legislation is a difficult and complicated process, in which, even before a bill is introduced in a House of Parliament, successive drafts are considered and their possible repercussions on all envisageable situations are weighed by people bringing to bear a very wide range of experience: the judge cannot match such experience or envisage all such repercussions, either by training or by specific forensic aid;
>
> (2) the bill is liable to be modified in a Parliament dominated by a House of Commons whose members are answerable to the citizens who will be affected by the legislation: an English judge is not so answerable;
>
> (3) in a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say or by what it would have otherwise said if a newly considered situation had been envisaged;
>
> (4) a stark contradistinction between the letter and the spirit of the law may be very well in the sphere of ethics, but in the forensic process St. John is a safer guide than St. Paul, the logos being the informing spirit; and it should be left to peoples' courts in totalitarian regimes to stretch the law to meet the forensic situation in response to a gut reaction;
>
> (5) Parliament may well be prepared to tolerate some anomaly in the interest of an overriding objective;
>
> (6) what strikes the lawyer as an injustice may well have seemed to the legislature as no more than the correction of a now unjustifiable privilege or a particular misfortune necessarily or acceptably

involved in the vindication of some supervening general social benefit;

(7) the parliamentary draftsmen knows what objective the legislative promoter wishes to attain, and he will normally and desirably try to achieve that objective by using language of the appropriate register in its natural, ordinary and primary sense to reject such an approach on the grounds that it gives rise to an anomaly is liable to encourage complication and anfractuosity in drafting;

(8) Parliament is nowadays in continuous session so that an unlooked-for and unsupportable injustice or anomaly can be readily rectified by legislation: this is far preferable to judicial contortion of the law to meet apparently hard cases with the result that ordinary citizens and their advisers hardly know where they stand.

All this is not to advocate judicial supineness: it is merely respectfully to commend a self-knowledge of judicial limitations, both personal and constitution....."

35. A lecture delivered by Mr. Justice M.N. Venkatachaliah, former Chief Justice of India, at the Constitution Day on 26.2.2016 in this Court, has been relied upon in the context of judicial determination of policy. Following observations have been relied upon:

"The proposition that "when there is no law the executive must step-in and when the executive also does not act the judiciary should do so" is an attractive invitations: but it is more attractive than constitutionally sound. Executive power is of course coextensive with legislative power. A field un-occupied by law is open to the executive. But there is no warrant that by virtue of those provisions the courts can come in and legislate. The argument that the larger power of the court to decide and pronounce upon the validity of law includes the power to frame schemes and issue directions in the nature of legislation may equally be open to question.

This is typically the converse case of Bills of attainder; Legislative determination of disputes/rights has been held to be illegal and impressible. Ameerunnisa, Ram Prasad Narayan Sahi and Indira Gandhi are some of the telling cases. By the same logic and converse reasoning, judicial legislation which is judicial determination of policy and law is difficult to be justified jurisprudentially. It is one of the basic constitutional principles that just as courts are not constitutionally competent to legislate under the guise of interpretation so also neither Parliament nor State Legislatures can perform an essentially judicial function.

> None of the three constitutionally assigned spheres or orbits of authority can encroach upon the other. This is the logical meaning of the supremacy of the Constitution.
>
> Lord Devlin's comment comes to mind; 'The British have no more wish to be governed by the judges than they wish to be judged by their admirations'.
>
> This is not to deny the need and the desirability of such measures. The question is one of legitimacy and propriety, Robert Bork's profound statement comes to mind:
>
> ".. the desire to do justice whose nature seems obvious is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem, and a faint crack develops in the American foundation. A judge has begun to rule where a legislator should". (THE TEMPTING OF AMERICA)
>
> Any support or justification for judicial legislation will have to be premised on sound legal reasoning. It cannot be justified for the reason that it produces welcome and desirable results. If that is done, law will cease to be what justice Holmes named it, "the calling of thinkers and becomes the province of emotions and sensitivities". It then becomes a process of personal choice followed by rationalisation. The major and minor premises do not lead to a result; but the result produces major and minor premises. This is a reversal of the process - virtually making concept of constitutional adjudication stand on its head. It is to law what Robert Frost called 'free verse,' "Tennis with the net down." Then naturally there are no rules, only passions. Legal reasoning rooted in a concern for legitimate process rather than desired results restricts judges to their proper role in a constitutional democracy. That marks off the line between judicial power and legislative power. Legislation, contrary to some popular notions, is a very elaborate democratic process. It takes much to distil the raw amorphous public opinion into scalable legislative values through the multi-tiered filter of parliamentary processes & procedures....."

36. In the light of the discussion mentioned above of legal principles, we advert to directions issued in paragraph 83. Direction Nos. (iii) and (iv) and consequential direction No. (v) are sought to be reviewed/recalled. Directions contain the following aspects: -

1. That arrest of a public servant can only be after approval of the appointing authority.

2. The arrest of a non-public servant after approval by the Senior Superintendent of Police (SSP).

3. The arrest may be in an appropriate case if considered necessary for reasons to be recorded;

4. Reasons for arrest must be scrutinised by the Magistrate for permitting further detention;

5. Preliminary enquiry to be conducted by the Dy. S.P. level officers to find out whether the allegations make out a case and that the allegations are not frivolous or motivated.

6. Any violation of the directions mentioned above will be actionable by way of disciplinary action as well as contempt.

37. Before we dilate upon the aforesaid directions, it is necessary to take note of certain aspects. It cannot be disputed that as the members of the Scheduled Castes and Scheduled Tribes have suffered for long; the protective discrimination has been envisaged under Article 15 of the Constitution of India and the provisions of the Act of 1989 to make them equals.

38. All the offences under the Atrocities Act are cognizable. The impugned directions put the riders on the right to arrest. An accused cannot be arrested in atrocities cases without the concurrence of the higher Authorities or appointing authority as the case may be. As per the existing provisions, the appointing authority has no power to grant or withhold sanction to arrest concerning a public servant.

39. The National Commission for Scheduled Castes Annual Report 2015-16, has recommended for prompt registration of FIRs thus:

> "The Commission has noted with concern that instances of procedural lapses are frequent while dealing atrocity cases by both police and civil administration. There are delays in the judicial process of the cases. The Commission, therefore, identified lacunae commonly noticed during police investigation, as also preventive/curable actions the civil administration can take. NCSC recommends the correct and timely application of SC/ST (PoA) Amendment Act, 2015 and Amendment Rules of 2016 as well as the following for improvement:
>
> 8.6.1 Registration of FIRs - The Commission has observed that the police often resort to preliminary investigation upon receiving a complaint in writing before lodging the actual FIRs. As a result, the SC victims have to resort to seeking directions from courts for registration of FIRs u/s 156(3) of Cr.P.C. Hon'ble Supreme Court has also on more than one occasion emphasized about registration of FIR first. This Commission again reemphasizes that the State / UT Governments should enforce prompt registration of FIRs."
>
> (emphasis supplied)

40. The learned Attorney General pointed out that the statistics considered by the Court in the judgment under review indicate that 9 to 10 percent cases under the Act were found to be false. The percentage of false cases concerning other general crimes such as forgery is comparable, namely 11.51 percent and for kidnapping and

abduction, it is 8.85 percent as per NCRB data for the year 2016. The same can be taken care of by the Courts under Section 482, and in case no *prima facie* case is made out, the Court can always consider grant of anticipatory bail and power of quashing in appropriate cases. For the low conviction rate, he submitted that same is the reflection of the failure of the criminal justice system and not an abuse of law. The witnesses seldom come to support down-trodden class, biased mindset continues, and they are pressurised in several manners, and the complainant also hardly muster the courage.

41. As to prevailing conditions in various areas of the country, we are compelled to observe that SCs/STs are still making the struggle for equality and for exercising civil rights in various areas of the country. The members of the Scheduled Castes and Scheduled Tribes are still discriminated against in various parts of the country. In spite of reservation, the fruits of development have not reached to them, by and large, they remain unequal and vulnerable section of the society. The classes of Scheduled Castes and Scheduled Tribes have been suffering ignominy and abuse, and they have been outcast socially for the centuries. The efforts for their upliftment should have been percolated down to eradicate their sufferings.

42. Though, Article 17 of the Constitution prohibits untouchability, whether untouchability has vanished? We have to find the answer to

all these pertinent questions in the present prevailing social scenario in different parts of the country. The clear answer is that untouchability though intended to be abolished, has not vanished in the last 70 years. We are still experimenting with 'tryst with destiny.' The plight of untouchables is that they are still denied various civil rights; the condition is worse in the villages, remote areas where fruits of development have not percolated down. They cannot enjoy equal civil rights. So far, we have not been able to provide the modern methods of scavenging to *Harijans* due to lack of resources and proper planning and apathy. Whether he can shake hand with a person of higher class on equal footing? Whether we have been able to reach that level of psyche and human dignity and able to remove discrimination based upon caste? Whether false guise of cleanliness can rescue the situation, how such condition prevails and have not vanished, are we not responsible? The answer can only be found by soul searching. However, one thing is sure that we have not been able to eradicate untouchability in a real sense as envisaged and we have not been able to provide down-trodden class the fundamental civil rights and amenities, frugal comforts of life which make life worth living. More so, for Tribals who are at some places still kept in isolation as we have not been able to provide them even basic amenities, education and frugal comforts of life in spite of spending a considerable amount for the protection, how long this would continue.

Whether they have to remain in the status quo and to entertain civilized society? Whether under the guise of protection of the culture, they are deprived of fruits of development, and they face a violation of traditional rights?

43. In *Khadak Singh vs. State of Himachal Pradesh,* AIR 1963 SC 1295, this Court has observed that the right to life is not merely an animal's existence. Under Article 21, the right to life includes the right to live with dignity. Basic human dignity implies that all the persons are treated as equal human in all respects and not treated as an untouchable, downtrodden, and object for exploitation. It also implies that they are not meant to be born for serving the elite class based upon the caste. The caste discrimination had been deep-rooted, so the consistent effort is on to remove it, but still, we have to achieve the real goal. No doubt we have succeeded partially due to individual and collective efforts.

44. The enjoyment of quality life by the people is the essence of guaranteed right under Article 21 of the Constitution, as observed in *Hinch Lal Tiwari v. Kamla Devi*, (2001) 6 SCC 496. Right to live with human dignity is included in the right to life as observed in *Francis Coralie Mullin v. Union Territory Delhi, Administrator*, AIR 1981 SC 746, *Olga Tellis v. Bombay Corporation*, AIR 1986 SC 180. Gender injustice, pollution, environmental degradation, malnutrition, social ostracism of

Dalits are instances of human rights violations as observed by this Court in *People's Union for Civil Liberties v. Union of India*, (2005) 2 SCC 436:

> "34. The question can also be examined from another angle. The knowledge or experience of a police officer of human rights violation represents only one facet of human rights violation and its protection, namely, arising out of crime. Human rights violations are of various forms which besides police brutality are — gender injustice, pollution, environmental degradation, malnutrition, social ostracism of Dalits, etc. A police officer can claim to have experience of only one facet. That is not the requirement of the section." (emphasis supplied)

45. There is right to live with dignity and also right to die with dignity. For violation of human rights under Article 21 grant of compensation is one of the concomitants which has found statutory expression in the provisions of compensation, to be paid in case an offence is committed under the provisions of the Act of 1989. A good reputation is an element of personal security and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property. Therefore, it has been held to be an essential element of the right to life of a citizen under Article 21 as observed by this Court in *Umesh Kumar v. State of Andhra Pradesh*, (2013) 10 SCC 591, *Kishore Samrite v. State of Uttar Pradesh*, (2013) 2 SCC 398 and *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221. The provisions of the Act of 1989 are, in essence, concomitants covering various facets of Article 21 of the Constitution of India.

46. They do labour, bonded or forced, in agricultural fields, which is not abrogated in spite of efforts. In certain areas, women are not treated with dignity and honour and are sexually abused in various forms. We see sewer workers dying in due to poisonous gases in chambers. They are like death traps. We have not been able to provide the masks and oxygen cylinders for entering in sewer chambers, we cannot leave them to die like this and avoid tortious liability concerned with officials/machinery, and they are still discriminated within the society in the matter of enjoying their civil rights and cannot live with human dignity.

47. The Constitution of India provides equality before the law under the provisions contained in Article 14. Article 15(4) of the Constitution carves out an exception for making any special provision for the advancement of any socially and educationally backward classes of citizens or SCs. and STs. Further protection is conferred under Article 15(5) concerning their admission to educational institutions, including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions. Historically disadvantageous groups must be given special protection and help so that they can be uplifted from their poverty and low social status as observed in *Kailas & Ors. v. State of Maharashtra*, 2011 (1) SCC 793. The legislature has to attempt such incumbents be protected under

Article 15(4), to deal with them with more rigorous provisions as compared to provisions of general law available to the others would create inequality which is not permissible/envisaged constitutionally. It would be an action to negate mandatory constitutional provisions not supported by the constitutional scheme; rather, it would be against the mandated constitutional protection. It is not open to the legislature to put members of the Scheduled Castes and Scheduled Tribes in a disadvantageous position *vis-à-vis* others and in particular to so-called upper castes/general category. Thus, they cannot be discriminated against more so when we have a peep into the background perspective. What legislature cannot do legitimately, cannot be done by the interpretative process by the courts.

48. The particular law, i.e., Act of 1989, has been enacted and has also been amended in 2016 to make its provisions more effective. Special prosecutors are to be provided for speedy trial of cases. The incentives are also provided for rehabilitation of victims, protection of witnesses and matters connected therewith.

49. There is no presumption that the members of the Scheduled Castes and Scheduled Tribes may misuse the provisions of law as a class and it is not resorted to by the members of the upper Castes or the members of the elite class. For lodging a false report, it cannot be said that the caste of a person is the cause. It is due to the human

failing and not due to the caste factor. Caste is not attributable to such an act. On the other hand, members of the Scheduled Castes and Scheduled Tribes due to backwardness hardly muster the courage to lodge even a first information report, much less, a false one. In case it is found to be false/unsubstantiated, it may be due to the faulty investigation or for other various reasons including human failings irrespective of caste factor. There may be certain cases which may be false that can be a ground for interference by the Court, but the law cannot be changed due to such misuse. In such a situation, it can be taken care in proceeding under section 482 of the Cr.PC.

50. The data of National Crime Records Bureau, Ministry of Home Affairs, has been pointed out on behalf of Union of India which indicates that more than 47,000 cases were registered in the year 2016 under the Act of 1989. The number is alarming, and it cannot be said that it is due to the outcome of the misuse of the provisions of the Act.

51. As a matter of fact, members of the Scheduled Castes and Scheduled Tribes have suffered for long, hence, if we cannot provide them protective discrimination beneficial to them, we cannot place them at all at a disadvantageous position that may be causing injury to them by widening inequality and against the very spirit of our

Constitution. It would be against the basic human dignity to treat all of them as a liar or as a crook person and cannot look at every complaint by such complainant with a doubt. Eyewitnesses do not come up to speak in their favour. They hardly muster the courage to speak against upper caste, that is why provisions have been made by way of amendment for the protection of witnesses and rehabilitation of victims. All humans are equal including in their frailings. To treat SCs. and STs. as persons who are prone to lodge false reports under the provisions of the Scheduled Castes and Scheduled Tribes Act for taking revenge or otherwise as monetary benefits made available to them in the case of their being subjected to such offence, would be against fundamental human equality. It cannot be presumed that a person of such class would inflict injury upon himself and would lodge a false report only to secure monetary benefits or to take revenge. If presumed so, it would mean adding insult to injury, merely by the fact that person may misuse provisions cannot be a ground to treat class with doubt. It is due to human failings, not due to the caste factor. The monetary benefits are provided in the cases of an acid attack, sexual harassment of SC/ST women, rape, murder, etc. In such cases, FIR is required to be registered promptly.

52. It is an unfortunate state of affairs that the caste system still prevails in the country and people remain in slums, more particularly, under skyscrapers, and they serve the inhabitants of such buildings.

53. To treat such incumbents with a rider that a report lodged by an SCs/STs category, would be registered only after a preliminary investigation by Dy. S.P., whereas under Cr.PC a complaint lodged relating to cognizable offence has to be registered forthwith. It would mean a report by upper-caste has to be registered immediately and arrest can be made forthwith, whereas, in case of an offence under the Act of 1989, it would be conditioned one. It would be opposed to the protective discrimination meted out to the members of the Scheduled Castes and Scheduled Tribes as envisaged under the Constitution in Articles 15, 17 and 21 and would tantamount to treating them as unequal, somewhat supportive action as per the mandate of Constitution is required to make them equals. It does not *prima facie* appear permissible to look them down in any manner. It would also be contrary to the procedure prescribed under the Cr.PC and contrary to the law laid down by this Court in *Lalita Kumari* (supra).

54. The guidelines in (iii) and (iv) appear to have been issued in view of the provisions contained in Section 18 of the Act of 1989; whereas adequate safeguards have been provided by a purposive interpretation by this Court in the case of *State of M.P. v. R.K. Balothia*, (1995) 3 SCC

221. The consistent view of this Court that if *prima facie* case has not been made out attracting the provisions of SC/ST Act of 1989, in that case, the bar created under section 18 on the grant of anticipatory bail is not attracted. Thus, misuse of the provisions of the Act is intended to be taken care of by the decision above. In *Kartar Singh* (supra), a Constitution Bench of this Court has laid down that taking away the said right of anticipatory bail would not amount to a violation of Article 21 of the Constitution of India. Thus, *prima facie* it appears that in the case of misuse of provisions, adequate safeguards are provided in the decision mentioned above.

55. That apart directions (iii) and (iv) issued may delay the investigation of cases. As per the amendment made in the Rules in the year 2016, a charge sheet has to be filed to enable timely commencement of the prosecution. The directions issued are likely to delay the timely scheme framed under the Act/Rules.

In re: sanction of the appointing authority :

56. Concerning public servants, the provisions contained in Section 197, Cr.PC provide protection by prohibiting cognizance of the offence without the sanction of the appointing authority and the provision cannot be applied at the stage of the arrest. That would run against the spirit of Section 197, Cr.PC. Section 41, Cr.PC authorises every police officer to carry out an arrest in case of a cognizable offence and

the very definition of a cognizable offence in terms of Section 2(c) of Cr.PC is one for which police officer may arrest without warrant.

57. In case any person apprehends that he may be arrested, harassed and implicated falsely, he can approach the High Court for quashing the FIR under Section 482 as observed in *State of Orissa v. Debendra Nath Padhi,* (2005) 1 SCC 568.

58. While issuing guidelines mentioned above approval of appointing authority has been made imperative for the arrest of a public servant under the provisions of the Act in case, he is an accused of having committed an offence under the Act of 1989. Permission of the appointing authority to arrest a public servant is not at all statutorily envisaged; it is encroaching on a field which is reserved for the legislature. The direction amounts to a mandate having legislative colour which is a field not earmarked for the Courts.

59. The direction is discriminatory and would cause several legal complications. On what basis the appointing authority would grant permission to arrest a public servant? When the investigation is not complete, how it can determine whether public servant is to be arrested or not? Whether it would be appropriate for appointing authority to look into case diary in a case where its sanction for prosecution may not be required in an offence which has not

happened in the discharge of official duty. Approaching appointing authority for approval of arrest of a public servant in every case under the Act of 1989 is likely to consume sufficient time. The appointing authority is not supposed to know the ground realities of the offence that has been committed, and arrest sometimes becomes necessary forthwith to ensure further progress of the investigation itself. Often the investigation cannot be completed without the arrest. There may not be any material before the appointing authority for deciding the question of approval. To decide whether a public servant should be arrested or not is not a function of appointing authority, it is wholly extra-statutory. In case appointing authority holds that a public servant is not to be arrested and declines approval, what would happen, as there is no provision for grant of anticipatory bail. It would tantamount to take away functions of Court. To decide whether an accused is entitled to bail under Section 438 in case no *prima facie* case is made out or under Section 439 is the function of the Court. The direction of appointing authority not to arrest may create conflict with the provisions of Act of 1989 and is without statutory basis.

60. By the guidelines issued, the anomalous situation may crop up in several cases. In case the appointing authority forms a view that as there is no *prima facie* case the incumbent is not to be arrested, several complications may arise. For the arrest of an offender, maybe a

public servant, it is not the provision of the general law of Cr.PC that permission of the appointing authority is necessary. No such statutory protection provided to a public servant in the matter of arrest under the IPC and the Cr.PC as such it would be discriminatory to impose such rider in the cases under the Act of 1989. Only in the case of discharge of official duties, some offence appears to have been committed, in that case, sanction to prosecute may be required and not otherwise. In case the act is outside the purview of the official discharge of duty, no such sanction is required.

61. The appointing authority cannot sit over an FIR in case of cognizable, non-bailable offense and investigation made by the Police Officer; this function cannot be conferred upon the appointing authority as it is not envisaged either in the Cr.P.C. or the Act of 1989. Thus, this rider cannot be imposed in respect of the cases under the Act of 1989, may be that provisions of the Act are sometimes misused, exercise of power of approval of arrest by appointing authority is wholly impermissible, impractical besides it encroaches upon the field reserved for the legislature and is repugnant to the provisions of general law as no such rider is envisaged under the general law.

62. Assuming it is permissible to obtain the permission of appointing authority to arrest accused, would be further worsening the position of

the members of the Scheduled Castes and Scheduled Tribes. If they are not to be given special protection, they are not to be further put in a disadvantageous position. The implementation of the condition may discourage and desist them even to approach the Police and would cast a shadow of doubt on all members of the Scheduled Castes and Scheduled Tribes which cannot be said to be constitutionally envisaged. Other castes can misuse the provisions of law; also, it cannot be said that misuse of law takes place by the provisions of Act of 1989. In case the direction is permitted to prevail, days are not far away when writ petition may have to be filed to direct the appointing authority to consider whether accused can be arrested or not and as to the reasons recorded by the appointing authority to permit or deny the arrest. It is not the function of the appointing authority to intermeddle with a criminal investigation. If at the threshold, approval of appointing authority is made necessary for arrest, the very purpose of the Act is likely to be frustrated. Various complications may arise. Investigation cannot be completed within the specified time, nor trial can be completed as envisaged. Act of 1989 delay would be adding to the further plight of the downtrodden class.

In ref: approval of arrest by the SSP in the case of a non-public servant:

63. *Inter alia* for the reasons as mentioned earlier, we are of the considered opinion that requiring the approval of SSP before an arrest

is not warranted in such a case as that would be discriminatory and against the protective discrimination envisaged under the Act. Apart from that, no such guidelines can prevail, which are legislative. When there is no provision for anticipatory bail, obviously arrest has to be made. Without doubting bona fides of any officer, it cannot be left at the sweet discretion of the incumbent howsoever high. The approval would mean that it can also be ordered that the person is not to be arrested then how the investigation can be completed when the arrest of an incumbent, is necessary, is not understandable. For an arrest of accused such a condition of approval of SSP could not have been made a sine qua non, it may delay the matter in the cases under the Act of 1989.

Requiring the Magistrate to scrutinise the reasons for permitting further detention:

64. As per guidelines issued by this Court, the public servant can be arrested after approval by appointing authority and that of a non-public servant after the approval of SSP. The reasons so recorded have to be considered by the Magistrate for permitting further detention. In case of approval has not been granted, this exercise has not been undertaken. When the offence is registered under the Act of 1989, the law should take its course no additional fetter sare called for on arrest whether in case of a public servant or non-public servant. Even otherwise, as we have not approved the approval of arrest by

appointing authority/S.S.P., the direction to record reasons and scrutiny by Magistrate consequently stands nullified.

65. The direction has also been issued that the Dy. S.P. should conduct a preliminary inquiry to find out whether allegations make out a case under the Atrocities Act, and that the allegations are not frivolous or motivated. In case a cognisable offence is made out, the FIR has to be outrightly registered, and no preliminary inquiry has to be made as held in *Lalita Kumari* (supra) by a Constitution Bench. There is no such provision in the Code of Criminal Procedure for preliminary inquiry or under the SC/ST Act, as such direction is impermissible. Moreover, it is ordered to be conducted by the person of the rank of Dy. S.P. The number of Dy. S.P. as per stand of Union of India required for such an exercise of preliminary inquiry is not available. The direction would mean that even if a complaint made out a cognizable offence, an FIR would not be registered until the preliminary inquiry is held. In case a preliminary inquiry concludes that allegations are false or motivated, FIR is not to be registered in such a case how a final report has to be filed in the Court. The direction (iv) cannot survive for the other reasons as it puts the members of the Scheduled Castes and Scheduled Tribes in a disadvantageous position in the matter of procedure vis-a-vis to the complaints lodged by members of upper caste, for later no such

preliminary investigation is necessary, in that view of matter it should not be necessary to hold preliminary inquiry for registering an offence under the Atrocities Act of 1989.

66. The creation of a casteless society is the ultimate aim. We conclude with a pious hope that a day would come, as expected by the framers of the Constitution, when we do not require any such legislation like Act of 1989, and there is no need to provide for any reservation to SCs/STs/OBCs, and only one class of human exist equal in all respects and no caste system or class of SCs/STs or OBCs exist, all citizens are emancipated and become equal as per Constitutional goal.

67. We do not doubt that directions encroach upon the field reserved for the legislature and against the concept of protective discrimination in favour of down-trodden classes under Article 15(4) of the Constitution and also impermissible within the parameters laid down by this Court for exercise of powers under Article 142 of Constitution of India. Resultantly, we are of the considered opinion that direction Nos.(iii) and (iv) issued by this Court deserve to be and are hereby recalled and consequently we hold that direction No. (v), also vanishes. The review petition is allowed to the extent mentioned above.

68. All the pending applications regarding intervention etc. stand disposed of.

.....J.
(Arun Mishra)

.....J.
(M.R. Shah)

.....J.
(B.R. Gavai)

October 01, 2019.
New Delhi;